STATE OF NEW JERSEY

In the Matter of Rashon Tyson-Butler, Hudson County, Department of Corrections CSC DKT. NO. 2021-1441 OAL DKT. NO. CSR 03574-21	**DECISION OF THE CIVIL SERVICE COMMISSION**

ISSUED: AUGUST 23, 2023

The appeal of Rashon Tyson-Butler, County Correctional Police Officer, Hudson County, Department of Corrections, removal, effective January 19, 2021, on charges was heard by Administrative Law Judge Ernest M. Bongiovanni (ALJ), who rendered his initial decision on July 18, 2023. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 23, 2023, adopted the ALJ's recommendation to modify the removal to a 30 working day suspension.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive and not warranting extensive comment. However, in his initial decision, the ALJ relied, in part, on the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA). In this regard, the ALJ stated:

> [T]he Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act (CREMMA) [sic], signed into law February 22, 2021, casts serious doubt on the enforceability of <u>any disciplinary action,</u> and certainly not termination, for cannabis use while not on duty.
>
> * * *

> While it is true that the CREAMMA was enacted two months after the consumption of cannabis indicated by the positive test, its prohibitions against enforcements of all disciplinary action by any State agency by the mere consumption of such cannabis appears to be prospective in nature.
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> * * *
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> Recently, as well expressed by ALJ Guerrero in her Initial Decision granting summary decision to petitioner in overturning the employee's termination for testing positive for marijuana "It is also worth noting that there is nothing in the CREAMM Act that limits the application of this provision [prohibiting adverse actions] only to employees who ingested cannabis/marijuana after the CRC's opening of New Jersey's regulated recreational cannabis market in April 2022." *IMO Richie Lopez, City of Jersey City*, OAL Docket No. 08567-22, Initial Decision (January 19, 2023), {http://njlaw.rutgers.edu/collections/oal/search.phpl}.

The Commission does not agree with the above analysis. Initially, the ALJ's reliance on *Lopez, supra*, is misplaced. In that regard, the Commission did not adopt that initial decision, but rather, rejected that ALJ's finding that CREAMMA applied to positive cannabis results that occurred prior to its effective date. As such, the Commission remanded that matter to the Office of Administrative Law where it remains pending. *See In the Matter of Richie Lopez* (CSC, decided February 22, 2023). In doing so, the Commission found:

> In the present matter, because the regulated market had not yet begun, it would be impossible for Lopez to have used regulated recreational cannabis. As such, based on the present record, the ALJ incorrectly held that the appointing authority categorically could not take an adverse employment action against Lopez based on his positive testing result. Accordingly, the Commission rejects that determination.
>
> Given the above, the Commission finds it necessary to remand this matter to the OAL for further proceedings. Specifically, there needs to be a hearing to develop a factual record as to how the marijuana/cannabis was obtained and ingested. Because the regulated recreational market had not yet opened, Lopez could have only ingested unregulated marijuana (which he could be terminated for), or regulated medical cannabis (for which he would have protections). There are no facts in the record establishing either scenario. Thus, on remand, a factual finding should be made as to whether Lopez's use was unregulated or not. Moreover, on remand, additional mitigating facts could plausibly be developed, such as accidental exposure, *see e.g., In the Matter of Alberto Aponte*, Docket No. A-1782-19 (App. Div. July 20,

2021), or prescribed use of a derivative product like CBD, s*ee, e.g., In the Matter of William Shorter*, Docket No. A-3150-18T3 (App. Div. May 4, 2020).

However, different from *Lopez*, in this matter the ALJ's misapplication of CREAMMA is not fatal. In this regard, assuming that the appellant's ingestion was of unregulated marijuana, the fact that the ALJ found such ingestion wholly "unintentional," supports that he was properly only found guilty of the charges of neglect of duty for not submitting a negative sample. *See e.g., Aponte, supra.* The Commission notes that the ALJ's findings in this regard were based predominantly on his assessment of the appellant's testimony, which he found credible.

In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the ALJ found that the appellant testified credibly about the incident. In its review of the exceptions filed by the appointing authority, the Commission is not persuaded that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, aside from those regarding the application of CREAMMA, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from 30 working days after the first date of separation until the date of actual reinstatement. However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at

N.J.A.C. 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies that action to a 30 working day suspension.

The Commission orders that the appellant be granted back pay, benefits, and seniority from 30 working days after the first date of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF AUGUST, 2023

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. CSR 03574-21

AGENCY REF. NO. N/A

2021-1441

IN THE MATTER OF RASHON TYSON-BUTLER, HUDSON COUNTY DEPARTMENT OF CORRECTIONS.

Timothy J. Prol, Esq., (Alterman & Associates LLC) attorney for appellant

John Collins, Assistant County Counsel, (Office of Hudson County Counsel) for respondent

Record Closed: May 5, 2023, Decided: July 18, 2023

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Appellant, Rashon Taylor-Butler,(appellant/Butler) appeals the termination of his position with respondent, the Hudson County Department of Corrections (respondent or Department), for conduct unbecoming a public employee, neglect of duty, and other sufficient cause, owing to a failed drug test taken on November 18, 2020, for allegedly testing positive for "11-Carboxy -THC (Cannabinoid-THC)" (marijuana/cannabis) in violation of Hudson County Dept. of Corrections and Rehabilitation Drug Free Workplace Policy.

PROCEDURAL HISTORY

On March 24, 2021, appellant was served with a Final Notice of Disciplinary Action (FNDA) dated March 24, 2021, calling for appellant's termination, effective January 19, 2021.

An appeal was filed by appellant on March 30, 2021, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 19, 2021, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. (OAL Dkt. No. CSR 03574-21).

A hearing was held via Zoom on February 7, 2023. Briefs were received by May 5, 2023 and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

Stipulated Facts and Exhibits.

The parties stipulated to the following facts:

1. Officer Rashon Tyler-Butler has been a Correctional Police Officer with the Department for nearly one (1) year.
2. On November 18, 2020, Officer Tyler-Butler was randomly selected to provide a urine sample pursuant to the County's random testing policy.
3. On January 19, 2021, the Department received notification from the NJ State toxicology Lab that appellant tested positive for 11-Carboxy THC (Cannabinoid-THC)
4. The Department found appellant to be in violation of its Drug Free Workplace Policy and suspended him without pay.
5. On January 19, 2021, Hudson County served Petitioner with a Preliminary Notice of Disciplinary Action seeking his removal solely as a result of the positive test result.

6. A local hearing was held March 10, 2021. On March 17, 2021 the County's Hearing Officer issued his decision upholding petitioner's removal.
7. The appeal follows on the question of penalty.
8. Petitioner does not contest the results of the test.
9. Petitioner however contests the charges insomuch as the penalty sought is removal.
10. Respondent maintains that removal is the appropriate penalty.

The parties further stipulated as to the significance of all the exhibits entered as evidence. They also stipulated that 11-Carboxy-THC (marijuana) was at the time of the random testing a banned substance.

Upon review and consideration of all documents, testimony and stipulated facts I **FIND** the following:

Tyson-Butler was approximately 29 years old when he tested positive for marijuana while employed as a Corrections Officer for Hudson County. He is a high school graduate with some college credits. There was no evidence presented that Tyson-Butler had a history of substance abuse at any time. Further, while working for Hudson County in this capacity, he never once was sent home for being under the influence of drugs or alcohol. He never was drug tested upon a reasonable suspicion of drug use while working for the Department.

Tyson-Butler testified openly and candidly about what he believed the circumstances were that resulted in the positive test for marijuana. His testimony was uncontradicted, credible, and completely believable. On November 14, 2020, he was invited to a luncheon/party at friend's house. It was, he said a "small intimate gathering" a "random party with 10-15 people who like him learned of it by a phone call or word of mouth. Some of the food served was home cooked, he was told, by his friend's aunt, and some prepared food was purchased, he believed at a local supermarket. At the luncheon, he consumed various foods such as chicken, rice and cookies, and later in the afternoon played cards until he began to teel ill, resulting in sweating, having

stomachache, and headache. He left the party because of this ill feeling at approximately 3:00 p.m. Still feeling ill, he showered and went to sleep. It was his belief that owing to his reaction to the food that, some of it, possibly the dessert, had been laced with marijuana. He had no other explanation for the positive drug test as he testified he had never ingested cannabis prior to that date and had no reason, other than his illness, to suspect anything concerning marijuana until he learned of the positive drug test result from a test taken three days after the luncheon. Tyson-Butler admits that the positive test alone deserves discipline. If permitted to be reemployed he testified he would have no problem undergoing a fitness for duty evaluation, and random drug testing beyond what is allowed by collective bargaining and by the NJ Attorney General Guidelines.

During direct and cross examination, Tyson-Butler was never asked for the street address or the name of his friend or the names of any of the people at the party. Although the respondent now claims that it was incredible that Tyson-Butler did not provide those details, I do not. Respondent never asked for those details, and it is likely that as many, probably most witnesses are counselled, he was told not to volunteer information.[1] Nor did I find it incredible that two months later when he received the news, he tested positive, he did not think to confront his friend. For one thing, prior to the positive test, he thought he might have suffered food poisoning. For another, there were 10-15 people at the party which didn't mean that his friend was responsible if some of the food was laced. Lastly, Tyson-Butler was a corrections officer not a member of the local police or County drug enforcement unit, both curious and knowledgeable about such matters, or anxious to make an arrest. His reaction was normal too-he apparently did not know how much trouble he was in. As he put it, "At the moment I didn't know what was going on. So I just thought that everything would blow over,."[2] Further, "I just didn't think to call him to ask who made [the marijuana laced product]" In fact he candidly admitted it may have been a case of food poisoning,

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[1] In final questioning by the court Tyson-Butler said, "Nobody ever asked me [to describe the physical apartment, its addressor the names of his friend or the others he knew at the party]...but I do have all that recollection yes." In fact, Tyson Butler started to identify the street address of the party by saying "It was as at 168 Orient..." when regretfully, I cut off the answer. Still, after Tyson-Butler testified he had all that relevant identifying information, respondent never asked him to testify to give the details.

[2] He had been random tested he believed three times before,

but he had no other explanation for the positive test. This made his explanation more, not less credible. Nor do I think it incredible that a 32-year-old man from, as he called it a "ghetto," never smoked or ingested marijuana before.[3] I **FIND** as a **FACT** that Tyson-Butler's explanation of the positive test and his behavior before and after learning of it was credible and reasonable. I further **FIND** as a **FACT** that the sole reason for Tyson-Butler's termination was the positive test, from the random sample taken November 18, 2020, for marijuana. I also **FIND** as **FACT** that there was no proffered evidence that there was ever reasonable suspicion of cannabis use by Tyson-Butler, nor were there any purported signs of intoxication, suspected drug use, or impairment during work hours.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super 583 (App. Div. 1972) Mastrobattista v. Essex County Park Comm'n., 46 N.J. 138, 147 (1965).

Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A-1 2(b).

[3] I thought it moving and appropriate that Tyson-Butler said he wanted to become a corrections officer not only because of a family member being one, but because he didn't want to become "stereotypical kid from a ghetto" (while acknowledging the perhaps politically incorrect use of that word) but rather wanted to make his "family proud and community proud."

To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the Borough of Elmwood Park bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Here the Department argues first that because the random test was authorized and Tyson-Butler agreed as a condition of employment that he could be terminated if he was found after such a test to have ingested a banned substance anytime, on or off duty while a Hudson County Corrections Officer that the positive test alone warrants his termination. Further, a lessor penalty, respondent argues is not appropriate because, it claims, Tyson-Butler essentially invented his explanation that he must have

unknowingly ingested marijuana in laced food while at a party. Critically, they argue his lack of detailed knowledge of who was at the party and exactly where it took place, and the fact he only complained of possible unintentional ingestion after seeking and obtaining counsel is proof he concocted the explanation. As stated above, I disagree and find his explanation credible. Further while, Tyson-Buter's tenure was not lengthy when he tested positive, disciplinary action short of termination is consistent with the string of cases the Department cites as justifying such punishment when the ingestion was accidental or unknowing.

Petitioner argues and admits that the ingestion of marijuana knowingly or unknowingly while employed justifies some disciplinary action, and therefore I am constrained to agree that some disciplinary action is in order.

However, another more far-reaching reason exists for not terminating Tyson-Butler for obtaining a positive test for marijuana during the course of his employment as a result of a random drug test for marijuana during the course of his employment. As stipulated by the parties, this violated the Drug Free Workplace Policy of the Department of Corrections. The issue is how that Policy has been affected by the 2021 Act authorizing regulated marijuana and subsequent opening of the regulated marijuana market.

As noted in closing written closing argument by petitioner, a memorandum was issued by the New Jersey Attorney General, dated April 13, 2022. Based on my review of that memorandum, the Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act (CREMMA), signed into law February 22, 2021, casts serious doubt on the enforceability of <u>any disciplinary action,</u> and certainly not termination, for cannabis use while not on duty. As stated in the memorandum:

> The CREAMMA does not require law enforcement agencies to permit or accommodate the possession, use or consumption of cannabis items or intoxication by employees 'during work hours." NJSA 24:61-52 (b)(1)(a).
>
> The CREMMA further provides that law enforcement

> agencies may not take any adverse against officers that do or do not use cannabis off duty. But should there be reasonable suspicion of an officer's use of cannabis while engaged in the performance of their duties, or upon finding of intoxication related to cannabis use...that officer may be required to undergo a drug test. N.J.S.A> 24:61-52 (a)(1)...as set forth in the CREAMMA in order to determine the officer's state of impairment. N.J.S.A. 24:61-52(a)(1)-(a)(2)(b).
> [Further]
>
> While marijuana is a Schedule 1 controlled dangerous substance under federal law, 21 USC section 12, the CREAMMA makes clear that no agency in this State may refuse to perform any duty under CREAMMA 'on the basis that manufacturing, transporting, distributing, dispensing, delivering, possessing or using any cannabis item or marijuana is prohibited by federal law.' Such a duty under the law would include the agency's obligation to refrain from 'tak[ing]any adverse action against any employee,,,because that person does or does not ...use cannabis items and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under the [CREAMMA]....
>
> (Emphasis supplied)

Although the Attorney General's memorandum goes on to say there "should be zero tolerance for cannabis use possession or intoxication while performing the duties of a law enforcement officer " as well as zero tolerance "for unregulated marijuana consumption by officers ay any time while on or off duty..." CREAMMA and the Attorney General's memorandum, which also promised a "revised Law Enforcement Drug Testing Policy" to reflect the CREAMMA is forthcoming, the enforceability of any disciplinary action by any agency within the state for conduct without proof that an officer such as Tyson-Butler consumed any marijuana while on duty which impaired the performance of his duties or alternatively, used any "*unregulated* cannabis" (emphasis added) on or off duty, is dubious.

Therefore, as there was no evidence ever set forth that, Tyson-Butler's conduct, while petitioner essentially stipulated as constituting Neglect of Duty, was subject to

termination because of consumption of marijuana while on duty, and there was no evidence from the positive finding of 11-Carboxy-THC (marijuana) in his system was the result of unregulated cannabis use, as there is no evidence of the type of cannabis, being of a type that is now unregulated, and there is no other justification for the penalty other than the positive test, I cannot sustain the ultimate penalty of termination. While it is true that the CREAMMA was enacted two months after the consumption of cannabis indicated by the positive test, its prohibitions against enforcements of all disciplinary action by any State agency by the mere consumption of such cannabis appears to be prospective in nature. Here, the FNDA took place on March 24, 2021, after the enactment of CREAMMA on February 22, 2021. As noted, under CREAMMA, agencies are, in the words of the NJ Attorney General's office to "refrain from" (quoting CREAMMA) "tak[ing]any adverse action against any employee, because that person does or does not ...use cannabis items and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under" CREAMMA.

There can be no doubt here that terminating Tyson-Butler was "adverse action" prohibited under the CREAMMA against the employee "solely due to the presence of cannabinoid metabolites in [his] bodily fluids." As the test provided no proof that the type of cannabis was from a source unregulated under the act, termination certainly cannot be enforced under the Act.

Recently, as well expressed by ALJ Guerrero in her Initial Decision granting summary decision to petitioner in overturning the employee's termination for testing positive for marijuana "It is also worth noting that there is nothing in the CREAMM Act that limits the application of this provision [prohibiting adverse actions] only to employees who ingested cannabis/marijuana after the CRC's opening of New Jersey's regulated recreational cannabis market in April 2022." IMO Richie Lopez, City of Jersey City, OAL Docket No. 08567-22, Initial Decision (January 19, 2023),{http://njlaw.rutgers.edu/collections/oal/search.phpl}.

I agree with this well-reasoned decision and **CONCLUDE** that terminations of public employees, such as Corrections Officer Tyson-Butler, based solely on a positive test for ingesting recreational cannabis/marijuana after the opening of the regulated cannabis market since April 2022 is prohibited by CREAMMA. Therefore, Tyson-Butler must be reinstated. However, as Tyson-Butler stipulated his conduct was subject to disciplinary action under the terms of the Final Notice of Disciplinary Action, I find that Tyson-Butler is guilty of Neglect of Duty by not providing a negative sample after agreeing to be subject to random testing. Therefore, some penalty is appropriate. I dismiss the charge of Conduct Unbecoming because I believe the ingestion of the marijuana was unintentional and, because no "Other sufficient cause" was ever proffered, I dismiss that charge as well.

PENALTY

On appeals, the concept of progressive discipline guides the determination of a penalty. In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an

employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Here there was no disciplinary history against Tyson-Butler. Although his tenure was brief, he was sworn in a Corrections Police Officer on November 4, 2019, and there was no disciplinary history until the positive drug test a year later. Further, I have already concluded his ingestion of marijuana was unknowing and unintentional and that he had previously passed at least two if not three random tests without incident. As previously stated, there is no evidence to indicate that Tyson-Butler uses marijuana and certainly none to infer, even if he had, that it was used while on duty of has affected his performance as a Corrections Officer. No evidence was set forth to infer anything other than he is of generally good character and a dedicated employee, which was consistent with his demeanor, character, and explanation for his conduct as proven at the hearing. Accordingly, I deem that a thirty (30) day suspension is an appropriate penalty for the offense constituting Neglect of Duty.

ORDER

Accordingly, and for the reasons set forth herein, it is hereby **ORDERED** that the appeal filed on behalf of Rashon Tyson-Butler is **GRANTED**, and that the termination of the appellant Rashon Tyson-Butler's employment be **REVERSED**, and that a penalty of thirty days suspension without pay be imposed.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 18, 2023

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 07/18/23

Date Mailed to Parties: 07/18/23

id

APPENDIX

LIST OF WITNESSES

For Appellant

Corrections Officer Rashon Tyson-Butler

For Respondent

None

LIST OF EXHIBITS IN EVIDENCE[4]

For Appellant

P-1 Oath of Office by Rashon Tyson-Butler dated November 4, 2019

For Respondent

R-1 PNDA, dated 01/19/21. The PNDA outlines the charges and the fact pattern leading to the charges. A Notice of Immediate Suspension similarly details said facts and charges.

R-2 Lists of pool of employees selected for drug testing by the County's randomizer selection program. Appellant is #25 on page 1 of the lists.

R-3 Memo from County Administrator Erika Patterson to Internal Affairs detailing the employees selected for random drug testing.

R-4 Random Drug Screening Advisory Officer Notice and Acknowledgment dated November 17, 2020. This evidences Officer Tyson-Butler's acknowledgement of random drug testing.

[4] The Exhibits were submitted as representing the facts contained within the identified exhibits, as expressed hereinabove,

R-5 Department Urine Specimen Acquisition Check list dated November 17, 2020, which details and acknowledges procedures undertaken by the testing agent for Hudson County.

R-6 Hudson County Internal Chain of Custody log.

R-7 New Jersey Toxicology Laboratory (NJTL) custody and submission form, evidencing receipt of urine sample.

R-8 Toxicology report from NJTL of Tyson-Butler sample, showing positive result for 11-Carboxy-THC, "commonly known as marijuana."

R-9 Memorandum of Administrator Erika Patterson to Director Edwards, dated January 19, 2021, documenting positive test result.

R-10 Memorandum from Administrator Patterson to Internal Affairs file, dated January 22, 2021, documenting procedure for random testing and positive result.

R-11 NJ State Toxicology Laboratory test results of sample of Tyson-Butler, documenting procedure and positive test result for marijuana

R-12 Hudson County Department of Corrections and Rehabilitation Drug-Free workplace: Alcohol and Drug testing policy, which "was in place at the time" of Tyson-Butler's positive test result.