STATE OF NEW JERSEY

In the Matter of Corey Corbo, Union City	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2015-2471 OAL Docket Nos. CSR 3512-15 and CSV 9891-19 (on remand)	

ISSUED: JANUARY 30, 2020 (DASV)

The appeal of Corey Corbo, a Police Officer with Union City, of his removal, effective July 16, 2014, on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on December 11, 2019. Exceptions were filed on behalf of the appellant.

Having considered the record and the attached initial decisions, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on January 15, 2020, accepted the Findings of Fact set forth in the December 11, 2019 initial decision and the Conclusions therein and the recommendation of the ALJ to uphold the appellant's removal.

PROCEDURAL HISTORY

The appellant was removed, effective July 16, 2014, on charges of insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty, other sufficient cause, and violations of various departmental rules and regulations. Specifically, the appointing authority asserted that the appellant tested positive for cocaine. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing.

It is noted that the ALJ originally rendered an initial decision on April 14, 2016, upholding the appellant's removal on charges that he ingested cocaine. Exceptions were filed on behalf of the appellant and a reply to the exceptions was filed on behalf of the appointing authority. However, due to the lack of a quorum and consent from all parties to extend the time, the Commission was unable to act

on the matter within the allotted time for determination. Therefore, the ALJ's original initial decision was deemed adopted as the Commission's final decision on July 25, 2016. *See In the Matter of Corey Corbo* (CSC, Deemed Adopted July 25, 2016). Thereafter, the appellant pursued an appeal with the Superior Court of New Jersey, Appellate Division (Appellate Division). On appeal, he argued that the ALJ erred by admitting unreliable hearsay to prove the charges against him in violation of the residuum rule. In that regard, the ALJ admitted a statement made to police by the appellant's girlfriend, who claimed that the appellant had ingested cocaine, as well as the hospital report indicating his positive drug test result. The Appellate Division determined that the girlfriend's statement was hearsay and not admissible as it was not an excited utterance, not made by the patient for medical treatment, or a statement against interest. The court indicated that the source of the girlfriend's knowledge was also never determined. Additionally, it held that the hospital records and the laboratory results embedded in the hospital reports were inadmissible hearsay because they were not properly admitted as business records. Accordingly, the Appellate Division concluded that no competent evidence was introduced to prove the appellant's ingestion of cocaine and reversed his removal. *See In the Matter of Corey Corbo,* Docket No. A-561015T3-16T4 (App. Div., decided March 1, 2018). Subsequently, Union City petitioned for reconsideration seeking a remand, but the Appellate Division denied the request. The appointing authority then petitioned the New Jersey Supreme Court (Supreme Court) for certification, which was granted. Upon review, the Supreme Court modified the Appellate Division's decision and remanded the matter to the Office of Administrative Law (OAL) to allow Union City the opportunity to demonstrate that the hospital records were admissible as business records or present other theories of admissibility. *See In the Matter of Corey Corbo, Union City Police Department,* 238 *N.J.* 246 (2019). The matter was then transmitted to the OAL for further proceedings.

DISCUSSION

As noted in the procedural history of this case, the Supreme Court remanded the matter to the OAL for further proceedings. On remand from the Supreme Court, additional proceedings took place at the OAL. The appointing authority presented three witnesses. Based on the testimonial evidence and a review of the factual background presented previously, the ALJ found that on June 11, 2014, the appellant's girlfriend discovered the appellant "unconscious, gurgling at the mouth with purple lips." She called emergency services, and an ambulance and the police arrived at the scene. It appeared that the appellant had overdosed. Medications had been found in his room. In addition, the appellant's girlfriend had informed a Police Officer that the appellant had taken a "bump" of cocaine five days earlier. Hospital records had been sought to assist in the internal investigation as to whether there was a reasonable suspicion that the appellant had ingested an illegal narcotic. The hospital records had confirmed that a cocaine metabolite was present in the appellant's urine. Moreover, the testimony on remand revealed that the hospital records previously marked into evidence at the OAL matched exactly the

electronic record maintained by the hospital where the appellant had been taken. In that regard, a Medical Records Manager and an Administrative Director of Laboratories had testified at OAL. Moreover, a Lab Technician, who had worked in June 2014, testified as to the laboratory process in testing the appellant's urine, which resulted in a positive drug test. The Lab Technician testified that she had never had a case where the transfer of test results to the hospital electronic information system did not match.

Turning to the issue on remand, the ALJ indicated that the limited question to be answered was "whether the hospital tests run for medical lifesaving purposes on appellant and recorded as medical records . . . satisfy the business records exception to otherwise inadmissible hearsay under the Rules of Evidence." In that regard, *N.J.R.E.* 803(c)(6) provides that the following statement, known as the business records exception, is not excluded by the hearsay rule:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make such writing or other record. This exception does not apply if the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

In applying the business records exception to documents relating to drug tests, the ALJ set forth a four-prong test of admissibility, namely that the documents "were made by an employee in performing her regular duties; they are prepared near the time of the observations; the source and method of information would justify admittance as evidence because it is the employee's observations; and it is within the regular practice of the employee to document [his or her] activities in the submitted reports." The ALJ found no evidence that the appellant's test results were unreliable when they were recorded in 2014. The records were created contemporaneously when the appellant was admitted to the hospital due to the emergency situation and had been historically maintained in the hospital's information system. Moreover, the ALJ indicated that the process by which the appellant's urine was tested was reliable. Testimony had been offered in that regard. The ALJ also stated that the appellant's own expert witness during the initial hearings testified that, for administrative purposes, the results "were presumptively reliable." Therefore, the ALJ concluded that the appointing authority established a reliable foundation that the medical records were created contemporaneously by employees of the hospital lab who had actual knowledge of and made those records in the regular course of business. Pursuant to the business records exception, the medical records were then considered non-hearsay evidence and could be admitted. Accordingly, in conjunction with the findings previously

noted in the April 14, 2016 initial decision and the testimony presented on remand, the ALJ concluded that the charges against the appellant were sustained and recommended his removal.

In his exceptions, the appellant objects to the ALJ's incorporation of the Findings of Fact of the April 14, 2016 initial decision as he contends that it is beyond the scope of the Supreme Court's remand. He argues that the initial decision also includes "gross mischaracterizations of the record" and relies on evidence that had been explicitly ruled as inadmissible by the Appellate Division. Regarding the former, the appellant asserts that the ALJ's summary of the testimony of his expert witness is inaccurate. Rather, the expert's opinion was that the presumptive finding of a positive result for cocaine from the immunoassay testing did not support that the appellant ingested cocaine and such testing is scientifically unreliable. Moreover, the appellant underscores that the Appellate Division found that the statement of the appellant's girlfriend was inadmissible. Thus, the appellant asserts that the Commission is prohibited from considering the statement. Therefore, the appellant maintains that the ALJ's recommendation should be rejected.

Upon its *de novo* review, the Commission agrees with the ALJ's determinations. With regard to credibility, 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 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 v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon review, the Commission finds that the ALJ's determinations in this respect were proper and that this strict standard has not been met. Clearly, the ALJ found that the three witnesses who testified on remand were credible. There was no evidence or rebuttal witnesses that the hospital records were not made contemporaneously or that there was an issue on the transfer of information to the hospital's electronic information system. Significantly, a Lab Technician testified on the testing process, and there was no cross-examination revealing evidence that would have impeached her testimony. Thus, based on the credible testimony on remand, the appointing authority has established that the hospital records, which reveal that the appellant's urine contained a cocaine metabolite, may be admitted into evidence pursuant to the

business records exception. Accordingly, the Commission finds that the hospital records have properly been admitted into the record as competent evidence.

Therefore, since the hospital records support the appellant's positive drug test, he is properly found guilty of the charges against him. Furthermore, while the appellant is correct that the Supreme Court did not overturn the Appellate Division's finding that the statement of the appellant's girlfriend was not admissible as an excited utterance, not made by the patient for medical treatment, or a statement against interest and was thus unsupported hearsay, the Commission finds that her statement is now admissible as hearsay supported by a residuum of competent evidence, namely the hospital records which revealed that a cocaine metabolite was present in the appellant's urine. In that regard, the residuum rule allows the admission of hearsay evidence before the OAL as long as some legally competent evidence exists to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. *See N.J.A.C.* 1:1-15.5(b); *See also e.g., Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). Therefore, in the instant matter, the Commission finds that the ALJ relied upon sufficient legally competent evidence presented at the OAL on remand, namely the hospital records, in conjunction with the statement of the appellant's girlfriend that the appellant ingested cocaine, to make her determinations to uphold the charges and the appellant's removal. While the appellant argues that the ALJ's findings were "gross mischaracterizations of the record" as they pertained to the testimony of the appellant's expert witness, the Commission emphasizes that in administrative proceedings guilt is found by a preponderance of the evidence and the burden of proving major disciplinary charges against an employee rests with the appointing authority. *See N.J.S.A.* 11A:2-21 and *N.J.A.C.* 4A:2-1.4(a). Even accepting the appellant's description of his expert's testimony, the Commission is unpersuaded that the appellant's test results were not accurate. As noted, the appellant's girlfriend stated that the appellant had taken a "bump" of cocaine and credible witnesses testified as to the reliability of the test as well as the recording of the results. Accordingly, upon a review of the totality of the record, the Commission finds that the appointing authority has met its burden of proof by a preponderance of the evidence that the appellant is guilty as charged.

As to the penalty, the Commission's review is also *de novo*. In imposing a penalty, the Commission, in addition to considering the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). In this case, a review of the appellant's past disciplinary history is unnecessary since it is clear that removal is the proper penalty based on the egregious nature of the offense and the fact that the appellant is a Police Officer.

In that regard, the Commission is ever mindful of the high standards that are placed upon law enforcement personnel. Municipal Police Officers hold highly visible and sensitive positions within the community and the standard for the position includes good character and an image of utmost confidence and trust. It must be recognized that a municipal Police Officer is a special kind of public employee:

> His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public . . . *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560, 566 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990).

Furthermore, the Commission notes that a positive test result for drug use has been held by the Commission to warrant removal from employment for law enforcement employees. *See e.g., In the Matter of Bruce Norman*, Docket No. A-5633-03T1 (App. Div. January 26, 2006), *cert. denied*, 186 *N.J.* 603 (2006) and *In the Matter of Christopher Angelini, City of Trenton*, Docket No. A-0874-12T (December 23, 2013). Accordingly, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appeal of Corey Corbo.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JANUARY, 2020

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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Attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09891-19
(ON REMAND)
OAL DKT. NO. CSR 03512-15
AGENCY REF. NO. 2015-2471

IN THE MATTER OF COREY CORBO,
UNION CITY POLICE DEPARTMENT.

Wolodymyr P. Tyshchenko, Esq. for appellant Corey Corbo (Caruso Smith Picini, attorney)

Nicole DeMuro, Esq., for respondent Union City Police Department (O'Toole Scrivo, attorney)

Record Closed: November 22, 2019 Decided: December 11, 2019

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was filed originally as an appeal on February 25, 2015, by appellant Corey Corbo (appellant) from the Final Notice of Disciplinary Action (FNDA) dated February 10, 2015, issued by the Union City Police Department (City) to terminate him from his position as a police officer. The appeal was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

After several hearing days and post-hearing submissions, the Initial Decision was issued on April 14, 2016. That Initial Decision was deemed adopted by the Civil Service Commission as its Final Decision on July 25, 2016, due to a lack of quorum of commissioners on that agency at the time. The Final Decision was appealed by appellant. The Superior Court Appellate Division reversed the lower determination on the grounds that the undersigned had erred by admitting hospital records (R-6; R-7) into evidence without first requiring the City to lay foundational testimony to satisfy the requirements of the business records hearsay exception and the reliability of the lab results. Accordingly, the Appellate Division held that there was no competent evidence on which to support the disciplinary action against appellant. By Opinion dated June 17, 2019, the Supreme Court of New Jersey reversed the Appellate Division and remanded the matter to the OAL in order to allow the City the opportunity to "demonstrate that the hospital records are admissible as business records, and the opportunity to present any other theories of admissibility." [Slip Op. at 13.]

A telephonic case management conference was convened on August 16, 2019, at which time hearing dates and other prehearing discovery matters were discussed. A supplemental evidentiary hearing was conducted on October 31, 2019. The City produced three witnesses; appellant opted to produce no witnesses. Post-hearing briefs were submitted simultaneously on November 22, 2019, on which date the record closed.

On March 17, 2015, the matter was assigned to the undersigned. On March 30, 2015, a telephonic case management conference was convened, at which time hearing dates were discussed. Interim conferences have also taken place and two interim Orders have been entered, fully incorporated herein. The hearing commenced on August 18, 2015, and was continued on August 19, 2015, September 3, 2015, and January 13, 2016. At the close of the plenary hearings, I permitted counsel to present concise written closing statements. After requests for adjournments for those written submissions, the record closed on April 4, 2016, with their receipt.

FACTUAL EVIDENCE ON REMAND QUESTIONS

Based upon due consideration of the testimonial evidence presented at the remand hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

I will not restate the entirety of the Factual Discussion from the Initial Decision but incorporate the same as if set forth herein at length, except to set some limited factual background.

Background from Prior Record

On June 11, 2014, appellant was at his home in [redacted] with his girlfriend, Jessica Garcia, both of whom were Union City Police Officers. The day before, they had had friends over for a barbeque party. Apparently, they were up until about 4:00 a.m. on June 11 when they went to bed. Later that day, she awoke to find appellant unconscious, gurgling at the mouth with purple lips. She placed a call to emergency services which arrived quickly and immediately began CPR on appellant. Monroe Township Police Officer Jamey DiGrazio was also dispatched to the scene.

DiGrazio described the scene at appellant's residence when he arrived there on June 11, 2014. He found the ambulance already on site and assisted in moving some furniture out of the way for the transport of appellant into the ambulance. The EMT personnel stated to DiGrazio that it appeared to be an overdose and that they had gathered some prescription bottles from his room, specifically, Oxycodone, Xanax, and Ambien. Paramedics also arrived, indicative of the seriousness of the medical condition, according to DiGrazio.

As the scene was crowded with medical personnel, DiGrazio went downstairs and spoke with Garcia in the kitchen. She explained that appellant had been in a recent motorcycle accident and had been prescribed some painkiller medications while recovering from his injuries. DiGrazio had observed earlier that there were bandages

on appellant's leg. DiGrazio obtained personal information on both parties and she stated that he had consumed some alcohol before bed. Then he explained to Garcia that appellant's condition was very serious and that they needed to know if there was anything else he consumed so he could be treated properly. Garcia said that appellant had done a "bump" of cocaine about five days earlier. She then asked that he not say anything, but he could not promise that as the paramedics and EMTs needed to know. Appellant was then transported to Raritan Bay (Raritan Bay).

Lieutenant Ramon Vasquez was presented by respondent as the supervisor of the Internal Affairs processing of this incident. Vasquez explained that they had not sought permission to drug test appellant from the Assistant Prosecutor because he was in the hospital and there would be toxicology reports. Also, the window on drug testing for substances still in his system was closing. Accordingly, those hospital records (R-6; R-7) were sought and obtained in order to assist with the IA investigation on the basis of reasonable suspicion to believe appellant had taken an illegal narcotic. Appellant was never brought up on any criminal charges; this matter was restricted to fitness for duty and other disciplinary charges.

Appellant presented the expert testimony of Richard Saferstein, Ph.D. Dr. Saferstein is a forensic toxicologist, consultant and author. Dr. Saferstein reviewed the Raritan Bay laboratory analysis of urine taken from appellant at the time of his emergency admission on June 11, 2014, which he stated should be accepted as presumptively accurate. Dr. Saferstein explained that under NJSP protocols, a confirmation test would have been run on the urine sample using a gas chromography mass spectrometry (GC/MS), which he referred to as the "gold standard," in order to achieve the level of specificity in results of which opiate and in what quantity required for State Medical Examiner, Department of Defense and other such agencies. Dr. Saferstein stated that the hospital would have been testing broadly for the major metabolite of cocaine for medical or treatment purposes only, and not for criminal evidential purposes.

On cross-examination, Dr. Saferstein acknowledged that he does not have a question about the reliability of the immunoassay test but only its limitations with respect

to specificity. Dr. Saferstein again stated that he had no issue with the immunoassay test being used for non-law enforcement purposes. He also explained that cocaine or its metabolite will remain detectable in the person's urine for two to three days. When presented with the list of other medications that appellant was or might have been taking that day, Dr. Saferstein stated that none of them would create a false positive for cocaine.

Testimony on Remand

Rachel Clarke is the Medical Records Manager at Raritan Bay Medical Center and has served there for two years. Clarke described her management responsibilities as including oversight of the accuracy and security of medical records, and assuring completeness of physician's reports. While she was not at Raritan Bay during the relevant period of this matter, she explained that Raritan Bay is one of several hospitals within the Hackensack Meridian Health system. Prior to her post at Raritan Bay, Clarke served in a similar capacity at Ocean Medical Center within the same system.

Clarke testified that all medical facilities within Hackensack Meridian Health operate the same electronic medical records software, with universal IT set-up and staff training. Clarke also explained that the software changed in July 2018 from the prior (Cerner) system to the current (EPIC) one. Nevertheless, all records are electronically maintained for twenty-three years into whichever system they were originally interfaced. Clarke explicated that electronic patient records are not electronically integrated or interfaced except periodically in batches and at discharge, when all the various departmental records on a patient are transferred to a single repository. She also explained how requests for medical records are verified and fulfilled.

Next, Clarke specifically verified that the portion of the emergency medical records of appellant previously marked into evidence as R-6, and concerning which this matter was remanded, matches exactly the electronic record for that patient and date which is still in the electronic medical records system maintained in the ordinary course of the business of all Hackensack Meridian Health hospitals.

On cross-examination[1], Clarke was asked how she knew to be at this hearing and when she checked R-6 against the records. She responded that she learned of the hearing about three weeks prior, and checked the record the next week, as well as the day before her testimony. Clarke reconfirmed that every page of R-6 matches the corresponding electronic record maintained currently in the hospital's system. The records for appellant in that system obviously include more than just R-6, for example, nursing notes. In response to further questioning, Clarke also confirmed that Raritan Bay was using the Cerner software when she arrived there two years ago and that she was informed that Cerner had been in place since 2012, a fact it held in common with several other hospitals.

Clarke verified the Cerner system is maintained for historic records and she was able to access it within the prior weeks, as noted. In response to further examination, Clarke also confirmed that she attends weekly medical records management meetings and has personal knowledge of the processes by which the hospitals maintain those records. She noted that she was employed at Ocean Medical Center as its Medical Records Manager for eighteen years.

Respondent also produced the testimony of June Mahoney, the Administrative Director of Laboratories at Raritan Bay. Prior to becoming a Hackensack Meridien employee in February 2015, Mahoney worked in that same capacity but under a management services agreement between the hospital and LabCorp. Before assuming that position, she had been the Administrative Director of Laboratories for New York Presbyterian Hospital at Columbia for twenty-one years. Mahoney is responsible for the hospital laboratories' budget, personnel, and quality assurance.

Mahoney described how hospital laboratories undergo blind (pseudo-patient) tests and surveys through the College of American Pathologists (CAP) in order to maintain their accreditation. She commented that Raritan Bay has also produced

[1] Appellant moved to strike the testimony of Clarke on the basis that he had not been timely informed of the identity of respondent's witness and the scope of her testimony even though respondent had communicated with Clarke weeks earlier. I denied the application to strike because respondent's well-prepared cross-examination demonstrated that there was no prejudice. If there had been prejudice, this forum was prepared to schedule a future hearing date as a cure.

excellent proficiency testing results for each analyte test administered as required by the State Department of Health.

Mahoney testified on the specifics of the laboratory's electronic system, which operates separately from other departments within the hospital, but as explained by both Clarke and she, eventually interface with all of the other medical records. For ten years prior to the recent change to EPIC, Raritan Bay laboratories were using Sunquest (Sunquest) Laboratory Information System (LIS). In 2014, if a lab test is negative for the particular analyte, the results automatically interface with the medical records; if a lab result is positive, the results must be affirmatively released by the technician. Mahoney stated that the Roche Cobas testing instrument relevant here electronically delivers results to the LIS.

Mahoney confirmed that R-7 is a Sunquest LIS printout. She also confirmed prior to this hearing that the document existed in identical form in the electronic Sunquest LIS historical database under the original date for patient appellant. Mahoney noted the positive opiate result and verified that the technician code revealed that appellant's test was run by Achala Parikh.

On cross-examination, Mahoney acknowledged that she participated in two pre-hearing meetings with Raritan Bay Risk Management and counsel, one with Clarke and the other with Parikh. She modified her testimony to reflect that she personally only verified page one of R-7 and the technician code. When Mahoney learned that Parikh had been the technician for appellant's 2014 screen and that Parikh still worked in the lab, she did not continue to verify the other pages of the exhibit but did confirm the correctness of the page showing the opiate results.

Achala Parikh was the last witness called by Union City in this remand proceeding. Parikh has been a Lab Technician at Raritan Bay since January 1990. She described her own training and how the CAP proficiency testing is accomplished. Parikh also confirmed that the protocols in effect in June 2014 were the same as those still utilized.

For appellant's urine screen, the instrument used was Cobas. Parikh described that the urine sample is sent through pneumatic tube directly to the lab from the Emergency Room. The tube is opened and scanned for entry into the time log by a data processor before it is given to the specific lab department responsible for the particular test; in this case, chemistry. In June 2014, Parikh was working the night shift in the chemistry lab department. Quality control calibration of the various lab testing equipment is undertaken every day but only during the day shift, so she did not have to be concerned with checking the Cobas calibration. She then described how the specimen undergoes centrifuge to ensure purity before the physical placement of the urine specimen in the machine. She then pushed the "start" button and observed the machine processing. The results were available in approximately fifteen minutes. The Cobas results were sent to the LIS which Parikh had to confirm for accuracy of transfer and patient name. At no time did she have to manually input information into either the testing machine or the LIS. The results were auto-generated and auto-transferred to the LIS. Parikh has never had a case where the results of that transfer did not match.

Appellant did not conduct any cross-examination of Parikh and did not present any witnesses.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. 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 DOC 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).

"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, Union City 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).

This present matter is limited to the Supreme Court's remand on the question whether the hospital tests run for medical lifesaving purposes on appellant and recorded as medical records R-6 and R-7 satisfy the business records exception to otherwise inadmissible hearsay under the Rules of Evidence 803(c)(6). Specifically, the Court ordered a "remand [of] this matter to the OAL for further proceedings to allow the City the opportunity to demonstrate that the hospital records are admissible as business records, and the opportunity to present any other theories of admissibility." [Slip. At 13.]

In determining whether evidence is hearsay, an ALJ may consider the business records exception, which excludes as hearsay:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to [N.J.R.E.] Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.
>
> [N.J.R.E. 803(c)(6).]

"The reliability of ... hearsay statements [contained in business records] is based on the regularity with which business is done, the routine quality of each transaction, the lack of motive to single out any transaction for the purpose of making an untrustworthy statement and the responsibility of each employee to make accurate and reliable statements." State v. Moore, 158 N.J. Super. 68, 77-78 n.1 (quoting 1963 Report of New Jersey Supreme Court Committee on Evidence). See also N.J. Div. of Youth & Family Servs. v. B.M., 413 N.J. Super. 118, 130 (App. Div. 2010).

The business records exception relieves the offering party from producing the witnesses who participated in the routine activity involved. State v. Martorelli, 136 N.J. Super. 449, 455 (App. Div. 1975), certif. denied, 69 N.J. 445 (1976); Webber v. McCormick, 63 N.J. Super. 409, 416 (App. Div. 1960). The proponent of the evidence must simply demonstrate that the elements of the business records rule have been satisfied. New Jersey Div. of Youth & Family Serv. v. E.D., 233 N.J. Super. 401, 413-14 (App. Div.) (home evaluation report prepared by South Carolina Department of Social Services was improperly admitted because "no information was available concerning the preparation of the report" and, therefore, there was an insufficient foundation for its admission as a business record), certif. denied, 118 N.J. 232 (1989); Monarch Fed. Sav. & Loan Ass'n v. Genser, 156 N.J. Super. 107, 128 (Ch. Div. 1977). ("No specific person must be called to supply the foundation.... However, whoever testifies must be in a position to supply the foundation specified in [N.J.R.E. 803(c)(6)], i.e., the regular course of business, the time of the making of the record and the event recorded, the sources of information recorded, and finally, the methods and circumstances of the ... record's preparation.").

The requirement that a foundation be laid establishing the criteria for admissibility may be met by the kind of proof that would satisfy a trial judge in a hearing under Rule 104(a), including proof presented in affidavit form."). The foundation can also be established by additional documentary evidence. U.S. v. Pelullo, 964 F.2d 193, 201 (3d Cir. 1992). However, hearsay is not admissible under the business records exception "simply because there are some indicia of the trustworthiness of the statements." Id. at 201. The foundation "must still demonstrate that the records were made contemporaneously with the act the documents purport to record by someone with

knowledge of the subject matter, that they were made in the regular course of business, and that such records were regularly kept by the business." Ibid.

Applied to the situation of documents related to drug test results, they are admissible when they clearly meet the four-part test: they were made by an employee in performing her regular duties; they are prepared near the time of the observations; the source and method of information would justify admittance as evidence because it is the employee's observations; and it is within the regular practice of the employee to document their activities in the submitted reports. Furthermore, if the employee does not challenge the procedures or the results, the appointing authority is not required to have a custodian testify if the results were produced in the regular course of the testing laboratory's business by a relatively simple, well-established test. See, Ward v. City of Newark, CSV 7770-97, Initial Decision, (March 18, 1999), adopted, Comm'r. (June 21, 1999) (Because the record of the automated test performed on appellant's urine was produced in the regular course of the laboratory's business, reporting the results of a relatively simple, well-established test, it was properly admitted into evidence, especially in the absence of an expert witness who would testify on behalf of appellant as to deviations from accepted procedures or standards of testing.).

There is no evidence in the record to support appellant's bald assertion that the hospital did anything incorrect or unreliable when recording the test result of appellant for toxic substances potentially responsible for his condition. It is important to note that R-6 and R-7 are not 2019 records produced just now to establish a 2014 test result. They were medical records created contemporaneous with appellant's medical emergency admittance; they were verified at this hearing to have been immediately and automatically logged into the then-current LIS systems; they were automatically interfaced with the hospital electronic medical record system; and they were verified as still existing as historically maintained medical records in those systems.

Furthermore, the process by which the appellant's urine was tested was shown by a preponderance of the credible evidence to have been reliable. There was adequate testimony on this very standard analytic test on urine and the hospital's exemplary compliance with State and CAP test verification standards. Moreover, as

established by appellant's own expert, while the result might not be specific enough to support criminal liability beyond a reasonable doubt, the results were presumptively reliable for these administrative purposes, notwithstanding appellant's attempt to limit that testimony. Appellant has not identified any evidence or witnesses to otherwise account for or rebut the presence of a metabolite of cocaine in his drug test. Accordingly, there is insufficient credible evidence to dispute the respondent's case that appellant tested positive for a controlled dangerous substance. While the suggestion of Dr. Saferstein that the presumption of reliability might raise a "reasonable doubt" were this a criminal trial because the test can sometimes result in a false positive, a sliver of doubt has no weight in this administrative disciplinary process.

Thus, I **CONCLUDE** that Union City has established a reliable foundation that the subject documents R-6 and R-7 were made at or near the time of the emergency admittance of appellant to Raritan Bay by employees with actual knowledge, and that the documents were made in the regular course of business of the lab, and it was the regular practice of the lab to make these documents. Therefore, respondent has established a foundation for admission of R-6 and R-7 as non-hearsay evidence pursuant to the business records exception as defined by N.J.R.E. 803(c)(6).

I **CONCLUDE** that the Union City Police Department has supported, by the preponderance of the credible evidence, the admissibility and reliability of R-6 and R-7 as medical records maintained in the ordinary course of the hospital's business.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Union City Police Department against appellant Corey Corbo is hereby **AFFIRMED** as supported by the prior Initial Decision and as supplemented herein.

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. 52:14B-10.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

December 11, 2019
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: 12/11/19

Mailed to Parties: 12/12/19

id

APPENDIX

LIST OF WITNESSES

For Appellant:

None.

For Respondent:

Rachel Clarke

June Mahoney

Achala Parikh

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Letters of Counsel Re Objections to Witnesses, various dates

For Respondent:

[From Original Record]

R-6 Raritan Bay, Emergency Record for June 11, 2014

R-7 Raritan Bay, Lab Report for June 11, 2014

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair Chief Executive Officer

July 25, 2016

Paul W. Tyshchenko, Esq.
Caruso, Smith & Picini
[redacted]

Kenneth B. Goodman, Esq.
O'Toole, Fernandez, Weiner & Van Lieu
[redacted]

Re: *In the Matter of Corey Corbo, Union City, Police Department* (CSC Docket No. 2015-2471; OAL Docket No. CSR 3512-15)

Dear Mr. Tyshchenko and Mr. Goodman:

The appeal of Corey Corbo, a Police Officer with the Union City Police Department, of his removal, on charges, was before Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on April 14, 2016, recommending upholding the removal. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The time frame for the Commission to make its final decision was to initially expire on May 29, 2016. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that time the Commission secured a 15-day extension of time, and since the Commission does not currently have a quorum, an additional 15-day extension, with the consent of the parties, to render its final decision no later than July 13, 2016. *See N.J.A.C.* 1:1-18.8. However, the appointing authority failed to provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 40A:14-204.

Sincerely,

Henry Maurer
Director

Attachment

c: The Honorable Gail M. Cookson, ALJ
Kelly Glenn
Joseph Gambino

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 03512-15
AGENCY REF. NO. N/A

IN THE MATTER OF COREY CORBO,
UNION CITY POLICE DEPARTMENT.

Wolodymyr P. Tyshchenko, Esq., for appellant Corey Corbo (Caruso Smith & Pacini, attorney)

Kenneth B. Goodman, Esq., for respondent Union City Police Department (O'Toole, Fernandez, Weiner & Van Lieu, attorney)

Record Closed: April 4, 2016 Decided: April 14, 2016

BEFORE **GAIL M. COOKSON**, ALJ:

This matter was initiated by a Major Discipline Appeal Form filed by appellant Corey Corbo simultaneously with the Civil Service Commission (CSC) and the Office of Administrative Law (OAL) pursuant to N.J.S.A. 40A:14-200 et seq. under cover of February 25, 2015, from the Final Notice of Disciplinary Action (FNDA) dated February 10, 2015, issued by the Union City Police Department to terminate him from his position as a police officer.

On March 17, 2015, the matter was assigned to the undersigned. On March 30, 2015, a telephonic case management conference was convened, at which time hearing

dates were discussed. Interim conferences have also taken place and two interim Orders have been entered, fully incorporated herein. The hearing commenced on August 18, 2015, and was continued on August 19, 2015, September 3, 2015, and January 13, 2016. At the close of the plenary hearings, I permitted counsel to present concise written closing statements. After requests for adjournments for those written submissions, the record closed on April 4, 2016, with their receipt.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

On June 11, 2014[1], appellant was at his home in [redacted] with his girlfriend, Jessica Garcia, both of whom are or were Union City Police Officers. The day before, they had had friends over for a barbeque party. Apparently, they were up until about 4:00 a.m. on June 11 when they went to bed. Later that day, she awoke to find appellant unconscious, gurgling at the mouth with purple lips. She placed a call to emergency services at 6:32 p.m. which reported to the house and immediately began CPR on appellant. Monroe Township Police Officer Jamey DiGrazio was also dispatched to the scene.

DiGrazio testified at the hearing that he had been a patrolman with the Monroe Township Police Department since November 2010. Prior to obtaining that position, he served in the Marines for six years and was discharged as an E4 Corporal. He described the scene at appellant's residence when he arrived there on June 11, 2014. He found the ambulance already on site and assisted in moving some furniture out of the way for the transport of appellant into the ambulance. The EMT personnel stated to DiGrazio that it appeared to be an overdose and that they had gathered some prescription bottles from his room, specifically, Oxycodone, Xanax, and Ambien.

[1] I summarize the testimony slightly out of order of the witnesses presented in order to set forth the background to the incident as it lays the foundation for the remaining testimony.

Paramedics also arrived, indicative of the seriousness of the medical condition, according to DiGrazio.

As the scene was crowded with medical personnel, DiGrazio went downstairs and spoke with Garcia in the kitchen. She explained that appellant had been in a recent motorcycle accident and had been prescribed some painkiller medications while recovering from his injuries. DiGrazio had observed earlier that there were bandages on appellant's leg. DiGrazio obtained personal information on both parties and she stated that he had consumed some alcohol before bed. Then he explained to Garcia that appellant's condition was very serious and that they needed to know if there was anything else he consumed so he could be treated properly. Garcia said that appellant had done a "bump" of cocaine about five days earlier. She then asked that he not say anything but he could not promise that as the paramedics and EMTs needed to know. Appellant was then transported to Raritan Bay (Raritan Bay). DiGrazio cleared the scene and submitted his incident report (R-3) the next day.

On cross-examination, DiGrazio described his experience with a dozen overdose incidents in his police career and stated that appellant fit the profile because of age, the presence of prescriptions, and his nonresponsive condition. He reiterated that Garcia told him that appellant had done a bump, with no equivocation. While he would not have ordinarily written up an Incident Report if he had provided no medical assistance to the victim, his superior officers advised that it was needed under the circumstances. He was later interviewed by Internal Affairs for Union City Police Department.

Richard Molinari is the Chief of the Union City Police Department. He was made Chief in November 2014 after serving for twenty-two months as Acting Chief. He has been with the department since 1988. Prior to his promotion, Molinari was Captain of Professional Standards with oversight over Internal Affairs.

Molinari was advised of appellant's medical emergency and transport to Raritan Bay on June 13, 2014, after the IA investigation and hospital blood work were provided. Appellant was immediately suspended. His termination was effectuated at the departmental hearing held on various dates in August, October and December 2014,

with the FNDA issued on February 10, 2015. He directed that Officer Garcia be ordered to come in for an interview and drug tests but she never showed up, as testified to in greater detail by Captain Luster. Garcia had failed some drug tests in the past. The Chief also directed that appellant be required to turn over his medical records to the department. Molinari also detailed the several policies that were implicated by this incident referencing the "Consequences of a Positive Drug Result" from the Union City Police Department Manual. He relied on those strong anti-drug policies and mandates to suspend and then terminate appellant from his law enforcement position.

On cross-examination, Molinari was questioned on his familiarity with IA procedures and the Attorney General guidelines on drug testing which are also referenced in the Union City Police Manual. He acknowledged that under those Guidelines, there is a two-step process for a urinalysis to be consistent with drug toxicology protocols. Yet, appellant had not been drug-tested pursuant to those protocols because his urinalysis was not undertaken at the order of the Chief but for independent medical reasons. Hence, the department was not under an obligation to send the urine collected by Raritan Bay to the State Police Lab. Under the circumstances of the hospital emergency drug test and the other aspects of the IA investigation, the Chief was of the opinion that his reliance on the finding of the hospital's lab results was reasonable and authorized. During further direct examination, Molinari remarked that he was relying upon a hospital determination that appellant had tested positive for a cocaine metabolite. Because the department had not directed or controlled the drug test, the Attorney General's Guidelines did not apply.

Lieutenant Ramon Vasquez was presented by respondent as the supervisor of the IA processing of this incident involving appellant. Vasquez has been on the force since 1998 and as a Lieutenant, is assigned to the Chief's office. He detailed the various positions that he has held with Union City Police Department over his career.

Vasquez became familiar with the current incident as a result of a telephone call that came into IA from the Monroe Township Police Department on June 13, 2014. Carlos Maitin, a detective who reports to Vasquez, advised him that Monroe Township's responding officer had been told by Garcia of appellant's cocaine use five days prior to

his collapse. It was requested that Monroe Township fax over the officer's incident report. Based on that information, Vasquez and Maitin met with Chief Molinari. After a further conversation with the Chief and Assistant Prosecutor Peter Stoma, it was determined that Garcia should be brought in for a drug test on grounds of reasonable suspicion. Vasquez reached out to Garcia by telephone at approximately 3:05 p.m. and told her she was being ordered to report by 5:00 p.m. She advised Vasquez that she was at the hospital waiting for appellant's family members but she acknowledged the Chief's order and said she would respond. A follow-up phone call was made to Garcia at 4:33 p.m. when she stated that she was twenty minutes out. Vasquez and other superior officers as well as the Chief waited until 6:45 p.m. but Garcia never arrived. Thereafter, Vasquez and Maitin tried to find Garcia at both her Union City residence and appellant's Monroe Township residence. Captain Luster tried to find her at the hospital but she was not there.

On cross-examination, Vasquez explained that they had only sought permission to drug test Garcia from the Assistant Prosecutor. They took a different approach with appellant because he was in the hospital and there would be toxicology reports. Also, the window on drug testing for substances still in his system was closing. Vasquez admitted that it was his decision to obtain those hospital records in order to assist with the IA investigation on the basis of reasonable suspicion to believe appellant had taken an illegal narcotic.

On June 24, appellant was interviewed by Vasquez and Maitin in the presence of his attorney. He was advised that no criminal charges would be filed but that his fitness for duty was being questioned. Appellant was asked to sign a medical release for his hospital records. After the hospital required additional signatures and initials on HIPAA release forms and some discussion with appellant's attorney ensued over potential charges of insubordination, the records were produced to the department.

Anthony Facchini is also a Lieutenant with the Union City Police Department who has been on the force since 1998, assigned to various patrols, shifts and then the Detective Bureau before his promotion to Sergeant in 2008. In 2014, he was assigned to various responsibilities within the Chief's Office. Vasquez had been off duty on some

personal leave time when the incident occurred and the investigation began. With respect to this incident, he took over the investigation on or about June 16 after being brought up to date by Vasquez and others. At that point, appellant was still gravely ill in the hospital and could not report to duty or to be interviewed. Facchini reviewed the Monroe Township Police Incident Report and then obtained the ambulance report which also mentioned suspected drug overdose and suspected cocaine use. He and Detective Maitin went to Monroe Township to interview DiGrazio near the end of June but there was nothing more to add to his Incident Report.

Facchini was present during the June 24 interview of appellant with his counsel present. Appellant was assured that there were not going to be any criminal charges pressed but the department was looking at his fitness for duty and needed to find out if he had been using illicit drugs. With his attorney providing advice, appellant signed the medical release forms during this interview. Facchini drove them to the hospital but the hospital rejected the specific forms that had been used and it took several attempts to obtain proper forms, new signatures witnessed and initialed before Raritan Bay would release appellant's records. There was also an order from Facchini to appellant to obtain his own records and turn them over, or he would face insubordination charges. Once the records are received and reviewed, Facchini prepared the disciplinary recommendation and documents for the Chief's review.

Facchini confirmed on cross-examination that he had no communications with the nurses, doctors or lab technicians at Raritan Bay with respect to appellant's urine analysis but he also felt he had no need to as his purpose was not a criminal investigation but administrative fitness for duty. He found the hospital toxicology report to be reliable under administrative standards. Especially when combined with Garcia's statement that appellant had done a bump of cocaine. The Attorney General Guidelines were not relevant here because this specimen was overseen by the hospital and not the State Toxicology Lab. Nor was a "false positive" an outcome which occurred to Facchini. The question in the Lieutenant's mind was simply whether appellant had used cocaine.

Captain Nichelle D. Luster was also called to testify by Union City. She has been with the department since 1994 and received her most recent promotion in August 2013. She has served in multiple ranks and capacities within the department. At the time of this incident, Luster was the Patrol Division Commander. Her involvement in the IA investigation was tangential only. Garcia had called Luster on June 12 at approximately 1:00 a.m. from Raritan Bay. She explained the barbeque party, timing of their sleep, finding appellant in medical emergency, calling 9-1-1, and the CPR and intubation that appellant underwent. She also mentioned the prescription medications they found in his room. She sounded very distraught to Luster. Luster knew both of them and knew that they were dating and living together.

Luster relayed what she had just heard to Chief Molinari and then went to Raritan Bay to see Garcia and check in on appellant. Appellant was on a ventilator in the ICU and seemed in very serious condition. Luster tried to be reassuring to his mother. She could not recall if she saw Garcia during that visit. For the next twenty-four hours, Garcia and Luster stayed in touch with respect to her need for time off and appellant's condition. Then on June 13, 2014, Chief Molinari advised Luster of the Monroe Township police incident report and its contents. The Captain returned to the hospital at about 9:00 p.m. trying to locate Garcia but she only saw appellant's other family members. There was limited cross-examination of Luster with respect to some hearsay that I rule has not been collaterally supported.

Appellant did not testify in his own defense but did present the expert testimony of Richard Saferstein, Ph.D. Dr. Saferstein is a forensic toxicologist, consultant and author. He was the Chief Forensic Scientist for the New Jersey State Police for twenty-one years from 1970 until 1991. In that capacity, Dr. Saferstein supervised over ninety scientists in four locations in New Jersey, and established the quality assurance standards for the NJSP labs. He has provided expert testimony in a wide variety of cases and was qualified as an expert herein without objection.

Dr. Saferstein reviewed the Raritan Bay laboratory analysis of urine taken from appellant at the time of his emergency admission on June 11, 2014. He elaborated on the immunoassay type of screening undertaken by the hospital and opined that such

should be considered presumptive at best. Those tests can lead to false positives although he acknowledged that they are an acceptable first step. Dr. Saferstein explained that under NJSP protocols, a confirmation test would have been run on the urine sample using a Gas Chromography Mass Spectrometry (GC/MS), which he referred to as the "gold standard," in order to achieve the level of specificity in results of which opiate and in what quantity required for State Medical Examiner, Department of Defense and other such agencies. Dr. Saferstein's experience was entirely criminal during his years at the NJSP and is now approximately sixty (60%) percent civil as a consultant. Dr. Saferstein stated that the hospital would have been testing broadly for the major metabolite of cocaine for medical or treatment purposes only, and not for criminal evidential purposes.

On cross-examination, Dr. Saferstein acknowledged that he does not have a question about the reliability of the immunoassay test but only its limitations with respect to specificity. He admitted that he has no emergency room or hospital lab experience. In response to further questioning, Dr. Saferstein again stated that he had no issue with the immunoassay test being used for non-law enforcement purposes. He also explained that cocaine or its metabolite will remain detectable in the person's urine for two to three days. When presented with the list of other medications that appellant was or might have been taking that day, Dr. Saferstein stated that none of them would create a false positive for cocaine.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. 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 DOC 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).

"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, Union City 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 a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

As a threshold matter, appellant objects to the admissibility of his girlfriend's statement to the EMTs and officers responding to the scene on June 11, 2014, that appellant had done a "bump" of cocaine about five days before. Hearsay is admissible in administrative hearings, but there must be a residuum of legally competent evidence to support the judge's and the agency's factual findings. N.J.A.C. 1:1-15.5(a), (b). See

In re Okafor, 2011 N.J. Super. Unpub. LEXIS 1693 (App. Div. June 28, 2011), aff'g OAL Docket CSV 1154-09, Initial Decision (August 26, 2009) and Final Decision (October 27, 2009). The residuum rule requires that for hearsay evidence to be admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact of appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). In Weston v. State, 60 N.J. 36, 51 (1972), the New Jersey Supreme Court stated that "[h]earsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony." Here, I **CONCLUDE** that Officer Garcia's statement constitutes admissible evidence as an exception to the general rule against hearsay, such that Weston does not even come into play in this matter.

It is not contested that this statement constitutes hearsay. N.J.R.E. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, hearsay is not admissible unless it is not offered for the truth of the matter asserted therein, or it falls within one of the hearsay exceptions under the rules. Here, I **CONCLUDE** that the out-of-court statement of Officer Garcia, not called to testify by either party, is admissible as an excited utterance. Under N.J.R.E. 803(c)(2), the hearsay rule's general rule on inadmissibility is excepted for an admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate."

> We have explained that hearsay exception in these words: The excited utterance exception to the hearsay rule allows a trial court to admit certain out-of-court statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate. Such statements are admissible under the rationale that excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self-interest and therefore rendered unreliable. [A] statement constitutes an excited utterance when the circumstances reasonably warrant the inference that the statement was made as an uncontrolled

> response to the shock of the event before reasoned reflection could have stimulated a self-serving response.
>
> Consistent with the rationale for the excited utterance exception, . . . when deciding whether there was an opportunity to fabricate or deliberate, a court should consider the element of time, the circumstances of the incident, the mental and physical condition of the declarant, and the nature of the utterance. Although each of these factors is important, the crucial element is the presence of a continuing state of excitement that contraindicates fabrication and provides trust-worthiness. Thus, in this fact-sensitive analysis, a court must determine whether the facts and circumstances reasonably warrant the inference that declarant was still under the stress of excitement caused by the event.
>
> [State v. Cotto, 182 N.J. 316, 327-28 (2005) (citations omitted)]

See generally State v. Branch, 182 N.J. 338, 357-65 (2005) (historical analysis of the excited utterance exception); see also State v. Buda, 195 N.J. 278, 292-93 (2008).

I **CONCLUDE** that Garcia's statement that appellant had taken a bump of cocaine prior to his convulsions and losing consciousness made while he was being intubated and removed by EMTs from his home was an excited utterance. I do not discount it for the additional statement she made that it occurred five days earlier because her instinct to guard for self-defense could occur during the same excited utterance. Thus, the statement of Officer Garcia will be admissible as evidence of such behavior on his part. It supports and is supported by the hospital's objective and independent verification of a cocaine metabolite in appellant's system. In other words, the independent hospital test run for medical lifesaving purposes confirmed the separate and voluntary statement of Garcia.[2]

Furthermore, while Dr. Saferstein opined that the gold standard in specificity of cocaine urinalysis results is the GC/MS, and while respondent did not present a rebuttal expert witness on that point, I **CONCLUDE** that his testimony did not undermine the

[2] As set forth in respondent's brief, I concur that the statement of Garcia and the medical record evidence would also qualify under N.J. Evid. R. 803(c)(4) and (c)(25).

hospital's medical results for the purposes of these administrative fitness for duty proceedings. The same might not be true if these were criminal proceedings -- but they are not.

Furthermore, I **CONCLUDE** that the respondent did not violate the Attorney General's Guidelines pertaining to drug testing because they are inapplicable to the emergency medical circumstances upon which this disciplinary termination was premised. Union City did not undertake to draw and test appellant's blood. Raritan Bay is not bound by those guidelines and there is no evidence in the record to support appellant's bald assertion that the hospital did anything medically incorrect when testing appellant for toxic substances potentially responsible for his condition. As established by appellant's own expert, while the result might not be specific enough to support criminal liability beyond a reasonable doubt, the results were reliable for these administrative purposes.

Insofar as Union City has supported its case of establishing only some grounds for the disciplinary action against appellant, the next question is the appropriate level of that discipline. 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, supra, 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 this concept 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 suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. Nevertheless, the law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive discipline policies. See In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

On balance and based upon the entirety of the factual record, I **CONCLUDE** that removal is the appropriate discipline for a law enforcement officer who used illegal drugs "recreationally" even on his own off-duty time, in such combination with alcohol and prescription drugs as to be life-threatening. For purposes of this administrative disciplinary proceeding alleging fitness for duty, insubordination, and other related charges, I **CONCLUDE** that the Union City Police Department has supported by the preponderance of the credible evidence its determination to remove appellant, including its departmental policies that mandate termination for cocaine use.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Union City Police Department against appellant Corey Corbo is hereby **AFFIRMED**.

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. 52:14B-10.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

April 14, 2016
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

Mailed to Parties: APR 18 2016

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DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Richard Saferstein

For Respondent:

Richard Molinari

Jamey DiGrazio

Ramon Vasquez

Anthony Facchini

Nichelle Luster

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Richard Saferstein CV

For Respondent:

R-1 Police Manual, City of Union City

R-2 Attorney General's Law Enforcement Drug Testing Policy

R-3 Monroe Township Police Incident Report, dated June 12, 2014

R-4 Internal Investigation Report, Lt. Anthony Facchini, dated August 20, 2014

R-5 Investigation Report, Captain Nichelle D. Luster, dated June 16, 2014

R-6 Raritan Bay, Emergency Record for June 11, 2014

R-7 Raritan Bay, Lab Report for June 11, 2014

R-8 Immediate Suspension of Corey Corbo, Chief Richard Molinari, dated June 30, 2014

R-9 Internal Investigation Report, Lt. Ramon Vasquez, dated June 13, 2014

R-10 Monroe Township Municipal Ambulance Service, Patient Record for June 11, 2014

R-11 Medical Release Forms