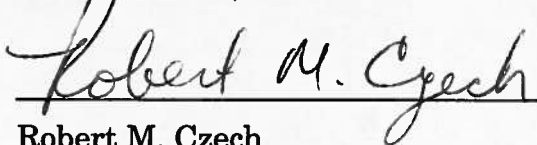


Re: Keith O'Brien

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
FEBRUARY 4, 2015**



**Robert M. Czech
Chairperson
Civil Service Commission**

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312**

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 18701-13

2014-1581

**IN THE MATTER OF KEITH O'BRIEN,
CITY OF JERSEY CITY.**

Alfred V. Gellene, Esq., for appellant (Fusco Macaluso, attorneys)

Vincent Signorile, Corporation Counsel, for respondent

Record Closed: November 18, 2014

Decided: December 1, 2014

BEFORE BARRY E. MOSCOWITZ, ALJ:

STATEMENT OF THE CASE

On September 24, 2013, O'Brien submitted a urine specimen, which tested positive for cocaine. Must O'Brien be removed from his position as a police officer? Yes. New Jersey has long recognized that a police officer is a special kind of public employee who represents law and order and must represent an image of integrity and dependability. See Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

PROCEDURAL HISTORY

I.

On October 30, 2013, Jersey City issued a Preliminary Notice of Disciplinary Action, charging O'Brien with violation of Department Rule 3:164, which prohibits the use of narcotics; violation of Department Rule 3:108, which prohibits conduct unbecoming a police officer; and violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6), which prohibits conduct unbecoming a public employee. Jersey City specified that O'Brien submitted a urine sample on September 24, 2013, which tested positive for cocaine on October 30, 2013. As a result, Jersey City suspended O'Brien without pay, effective October 30, 2013, and sought his removal.

On November 1, 2013, Jersey City served O'Brien with the Preliminary Notice of Disciplinary Action.

O'Brien then waived a departmental hearing.

On December 5, 2013, Jersey City issued and served the Final Notice of Disciplinary Action, sustaining the charges and specifications in the Preliminary Notice of Disciplinary Notice and removing O'Brien from his position as a police officer, effective that day.

II.

On December 16, 2013, O'Brien filed an appeal with the Civil Service Commission and the Office of Administrative Law. On December 23, 2013, O'Brien perfected his appeal, and on January 8, 2014, the case was assigned to me for hearing. On that date, I reviewed the file and scheduled an initial telephone conference for January 13, 2014.

On January 13, 2014, I held the initial telephone conference. During that conference, the parties requested another telephone conference because the parties

wanted to review discovery to determine if they could settle the case. Given this joint request, I scheduled another telephone conference for February 10, 2014.

The telephone conference scheduled for February 10, 2014, was then adjourned because O'Brien's representative had a family emergency, but Jersey City's representative was unavailable for another telephone conference until May, so I did not schedule another telephone conference until May 5, 2014.

On May 5, 2014, I held the telephone conference. During that conference, the parties reported they could not settle the case and requested additional time to review the lab reports and the chain of custody. Given this joint request, I scheduled another telephone conference for June 5, 2014.

On June 5, 2014, I held the telephone conference. The parties reported that the chain of custody was not in dispute but that they were unavailable for trial until October 14, 2014. As a result, I scheduled the hearing for October 14, 2014, through October 16, 2014.

On October 14, 2014, I held the hearing and closed the record.

DISCUSSION AND FINDINGS OF FACT

I.

On September 24, 2013, O'Brien submitted a urine specimen to the Jersey City Police Department as part of a random drug test.

O'Brien was one of ten police officers who were randomly selected to submit a urine specimen on September 24, 2013, and September 25, 2013.

All of the urine specimens were then transported to the State toxicology lab in Newark, New Jersey, for testing.

The chain of custody is not in dispute.

A.

Before O'Brien submitted his urine specimen, he filled out a medication sheet listing all of the prescription and non-prescription medications he had taken in the past fourteen days and the dates on which he had last taken them. Regarding the prescription medications, O'Brien wrote that he had taken Percocet on September 22, 2013, and Amoxicillin on September 22, 2013. Regarding the non-prescription medications, O'Brien wrote that he had taken Creatine on September 21, 2014, Tylenol on September 22, 2013, and Ibuprofen on September 22, 2013. O'Brien listed no other medications.

On October 30, 2014, O'Brien's urine sample tested positive for cocaine. More specifically, his sample tested positive for Benzoyllecgonine, which is a primary metabolite for cocaine. Benzoyllecgonine was not represented by any medication he listed on his medication sheet. As a result, O'Brien was immediately suspended without pay.

B.

O'Brien had a second sample tested in an independent lab but the results were the same.

II.

To provide a specimen, O'Brien had voided into two bottles at Internal Affairs. He had filled the two bottles with at least 45 ml of urine each, labeled the bottles, sealed the bottles, and then placed the two bottles in a dedicated freezer at Internal Affairs for storage. One bottle went to the State lab for testing and the other bottle remained at Internal Affairs for future testing at the independent lab.

Significantly, the bottles were not labeled on the outside. The protocol is for the police officer, who is the subject of the random drug test, to fill out the label and place the label inside the bottle, floating in the urine. This is the protocol O'Brien followed in this case. Once again, the label was not affixed to the outside.

A.

Detective William Jackson is the law enforcement officer who monitored O'Brien when he provided the specimen. Jackson testified that O'Brien did not exhibit any signs of having been under the influence of cocaine. Indeed, Jackson assured that he had enough training as a law enforcement officer to know the signs of someone who was under the influence of cocaine.

Jackson, however, acknowledged that he was not an expert in drug recognition. Jackson explained that he had taken some courses on recognizing the signs of someone under the influence of drugs, including cocaine, but was not in fact a drug recognition officer and had no special certification on the subject. Moreover, Jackson agreed that someone could be under the influence of cocaine yet exhibit no signs that he or she was in fact under the influence of cocaine.

Regardless, Jackson testified that he saw O'Brien fill the bottles, label the bottles, seal the bottles, and then place the bottles in the freezer at Internal Affairs where they remained until they were transported to the two labs.

B.

Sergeant Nelson Alamo, who is now retired from Internal Affairs, is the one who transported the urine specimens to the State lab. Alamo testified that he took the bottles out of the freezer at Internal Affairs, checked the labels against his list, and then handed the bottles to a recipient at the State lab. Alamo also provided documentation of their receipt.

III.

Balkrishena Kaul, Ph.D. is a clinical toxicology consultant who testified on behalf of O'Brien as an expert in toxicology. Kaul had impressive credentials, including the fact that he used to be the head of the largest toxicology lab in the world, testing 2,000 urine specimens a day, and the fact that he is the one who devised the screening test for cocaine. In short, Kaul was accepted as an expert in toxicology without objection.

A.

Kaul stated that the sample tested at the State lab, and the sample tested at the independent lab, were identical.

Kaul then explained that the State lab was a reputable lab, that he had full confidence in its ability to test the urine sample accurately, but that the samples must have been mislabeled or misidentified because neither sample (neither the one tested at the State lab nor the one tested at the independent lab) tested positive for Percocet, which O'Brien had listed on his medication sheet as haven taken on September 22, 2013.

Significantly, Kaul provided no additional explanation or explication for his conclusion.

B.

Kaul stated that the sample tested at the independent lab was tested for even trace amounts of Percocet.

Kaul then explained that the amount of cocaine detected in both samples was more than ten times the cut-off amount, and that O'Brien would have had to have ingested significant amounts of cocaine within four to twelve hours before he provided the urine specimen to the police department.

Finally, Kaul acknowledged that his conclusion about the mislabeling or misidentification was predicated on his belief that O'Brien had been truthful about what he had listed on his medication sheet.

C.

In his report dated February 14, 2014, Kaul concluded that the samples must have been mislabeled or misidentified, but he did so without providing an explanation, other than juxtaposing his belief that O'Brien had been truthful about what he had listed on his medication sheet:

From the details of the collection process it appears that the procedure was followed according to the protocol. However, the chain of custody and multiple steps at the laboratory can sometimes result in error for preserving the identity of a sample. In this case there is a way that the identity and integrity of the sample and the result can be verified by demonstrating at least presence of trace amount of Oxycodone.

[R-16.]

Then, in his report dated April 17, 2014, Kaul provided even less reasoning, and even less certainty, simply writing that the samples might have been invalid:

This report confirms the presence of the cocaine metabolite (benzoylecgonine), but is negative for the presence of both free & total oxycodone.

Therefore the urine specimen(s) identified with PO O'Brien may not be valid as one would show the presence of even a trace amount of oxycodone based on the medication history provided by him prior to submitting his urine specimen.

Therefore within a reasonable degree of scientific probability a urine sample labeling error appears to have occurred.

[R-17.]

Once again, Kaul provided no additional explanation or explication for his conclusion when he testified, and as I will note below, neither did O'Brien when he testified.

IV.

O'Brien testified that he had never ingested cocaine in his entire life and that he had only been taking Percocet because he had rushed his return to work after suffering a broken hand and was in pain. Importantly, O'Brien provided proof of his prescription. O'Brien then asserted that he filled out the medication sheet admitted into evidence as R-12 and that it is accurate as written.

A.

O'Brien explained that he had broken his hand twice before and that both breaks required surgery for which he had been prescribed Percocet. But O'Brien asserted that he had not taken all of the Percocet from those prescriptions because he did not like the way he had felt when he had taken the Percocet. O'Brien specified that he had taken none of the Percocet from the first prescription; that he had taken only some of the Percocet from the second prescription; but that he had taken Percocet from the third prescription because he had rushed his return to work.

O'Brien was emphatic that he had never ingested cocaine in his life and that he had taken the Percocet on September 22, 2013.

Indeed, O'Brien stated that he was "shocked" and "floored" that the test results came back positive for cocaine.

B.

Still, O'Brien confirmed that he provided the urine specimen on September 24, 2014, that he filled the two bottles with 45 ml of urine each, that he labeled the bottles, that he sealed the bottles, and that he placed the two bottles in the dedicated freezer at

Internal Affairs for storage. As much as I may believe O'Brien when he testified that he never ingested cocaine in his life, and when he had written that he had taken Percocet on September 22, 2014, no explanation was given how his urine samples could have been mislabeled or misidentified. Had the other nine samples been tested for Percocet, for example, and one of them tested positive for Percocet, then perhaps the conclusion could be drawn that the samples had been mislabeled or misidentified. Indeed, the only evidence that the samples were mislabeled or misidentified is O'Brien's self-serving testimony that he had never ingested cocaine in his life, and his self-serving statement that he had taken Percocet on September 22, 2014.

V.

In the absence of any additional evidence that the samples had been mislabeled or misidentified, I **FIND** that a preponderance of the evidence exists that the two samples, which tested positive for cocaine, were O'Brien's, especially since he filled the bottles, labeled the bottles, sealed the bottles, and then placed the bottles in the freezer at Internal Affairs. I also make this finding based on the fact that the sample tested at the State lab and the sample tested at the independent lab was identical. Indeed, it would be one thing for the State lab to have mislabeled or misidentified the first sample, but it is quite another for the independent lab to have also done so.

To remove all doubt, I also **FIND** that the chain of custody has been sufficiently established, especially since the custodian was an arm of the State.¹

¹ Although the parties had reported that the chain of custody was not in dispute, Kaul put the chain of custody in dispute when he testified that the samples, which had tested positive for cocaine but not Percocet, must have been mislabeled or misidentified, as did O'Brien when he testified that the samples were not his.

To be clear, while the proper foundation for the admission of such evidence requires an uninterrupted chain of possession, it is not necessary for the party introducing the evidence to negate every possibility of substitution or change in condition between the provision of the specimen and the time of trial, especially when the custodian is an arm of the State. See State v. Brown, 99 N.J. Super. 22, 27-28 (App. Div. 1968), certif. denied, 51 N.J. 468 (1968). The question is one of "reasonable probability" that no tampering has occurred. Ibid. Moreover, a defect in the chain of custody goes to the weight, not the admissibility, of the evidence. State v. Morton, 155 N.J. 383 (1998).

In this case, O'Brien testified that he provided the specimen, Jackson testified that he monitored O'Brien provide the specimen, and Alamo testified that he brought the specimen to the State lab. In addition, Kaul testified that he had full confidence in the ability of the State lab to test the urine sample accurately.

Finally, I **FIND** as a matter of reasonable probability that no tampering had occurred.²

DISCUSSION AND CONCLUSIONS OF LAW

I.

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007).

II.

The purpose of drug testing in the Jersey City Police Department is, among other things, to protect the integrity of the law enforcement function:

To insure the employment of only those members and employees that are free of illegal drug use, to protect the integrity of the law enforcement function, to maintain the safety of the public and personnel, and to enhance the effective delivery of law enforcement services, and to protect the public interest.

[R-11.]

Toward this end, police officers must submit to the random drug testing outlined in the Attorney General's Law Enforcement Drug Testing Policy (R-10), as well as the

Thus, I am satisfied that the chain of custody has been sufficiently established. Accordingly, I give little weight to the assertion that the samples must have been mislabeled or misidentified.

² Because a relaxed standard of admissibility of evidence applies in administrative proceedings, the party seeking to introduce the results of a drug test need only show a "reasonable probability" that the integrity of the sample has been maintained. In re Lalama, 343 N.J. Super. 560, 566 (App. Div. 2001).

Jersey City Police Department's Drug Testing Policy (R-11). If the test is positive, then the police officer is subject to discipline, including termination, as stated in Section 7.3 of the Jersey City Police Department's Drug Testing Policy. Indeed, Rule 3:164 of the Jersey City Police Department explicitly prohibits the use of "narcotics, hallucinating, stimulating, or dangerous drugs while on or off duty, unless prescribed by a physician for illness." (R-4.)

As New Jersey has long recognized, a police officer is a special kind of public employee who represents law and order and must represent an image of integrity and dependability:

It must be recognized that a 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

[Moorestown, supra, 89 N.J. Super. at 566.]

III.

Still, O'Brien argues that the two samples were not his. In terms of argumentation, the evidence O'Brien submits to support his claim that the samples were not his is his statement that he had taken Percocet on September 22, 2013, his testimony that he had never ingested cocaine in his life, and the absence of any Percocet in the samples. Even if I accept this evidence (his statement that he had taken Percocet on September 22, 2013, his testimony that he had never ingested cocaine in his life, and the absence of any Percocet in the samples) I do not regard any of this evidence (either together or apart) as justifying his claim. Thus, a warrant must be provided for the inference from evidence to claim.

The warrant O'Brien provides for the inference from evidence to claim is his assertion that the two samples must have been mislabeled or misidentified. But there is

no evidence to support this warrant or assertion. Once again, it was O'Brien who filled the bottles, labeled the bottles, sealed the bottles, and then placed the bottles in the freezer at Internal Affairs for storage. Moreover, Kaul testified that he had full confidence in the State lab to test the urine sample accurately and provided no explanation how either sample could have even been mislabeled or misidentified. The topic was never even explored. Thus no license exists to make the inference O'Brien suggests.

Given my finding that the samples were in fact O'Brien's, that the chain of custody was sufficiently established, and that neither sample had been tampered, I **CONCLUDE** that a preponderance of the evidence exists that O'Brien used cocaine in violation of Department Rule 3:164.

Since I concluded that a preponderance of the evidence exists that O'Brien used cocaine in violation of Department Rule 3:164, I also **CONCLUDE** that O'Brien engaged in conduct unbecoming a police officer in violation of Department Rule 3:108 and N.J.A.C. 4A:2-2.3(a)(6).

As such, I must also **CONCLUDE** that O'Brien should be removed from his position as a police officer with the Jersey City Police Department.

ORDER

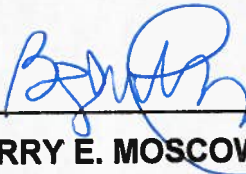
Given my findings of fact and conclusions of law, I **ORDER** that O'Brien be removed from his position as a police officer with the Jersey City Police Department.

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.

12/1/14
DATE


BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

12-1-14

Date Mailed to Parties:

DEC - 2 2014



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Balkrishena Kaul
Keith O'Brien

For Respondent:

Robert Sjosward
William Jackson
Nelson Alamo

Documents

For Petitioner:

- P-1 Not in evidence
- P-2 Not in evidence
- P-3 Toxicology Report by NMS Labs dated April 14, 2014
- P-4 Prescriptions from Rite Aid for O'Brien dated January 1, 2012, to October 1, 2014
- P-5 Accreditation and Licensure of NMS Labs
- P-6 Commendations to O'Brien dated October 22, 2013
- P-7 Memorandum from Sergeant Thomas Engleke, IAU to A/Captain Anthony Genova, IAU Commander dated October 30, 2013

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action dated October 30, 2013
- R-2 Final Notice of Disciplinary Action dated December 5, 2013
- R-3 Notice of Immediate Suspension dated October 30, 2013
- R-4 Rule 3:108 of the Jersey City Police Department
- R-5 Rule 3:164 of the Jersey City Police Department
- R-6 N.J.A.C. 4A:2-2.3
- R-7 Law Enforcement Drug Testing Chain of Custody received September 25, 2013

- R-8 Toxicology Report by State lab ordered September 25, 2013, reported October 21, 2013, and posted October 30, 2013
- R-9 Internal Affairs Report dated November 4, 2013
- R-10 Attorney General's Law Enforcement Drug Testing Policy
- R-11 Jersey City Police Department's Drug Testing Policy
- R-12 Drug Testing Medication Information Form dated September 24, 2013
- R-13 Drug Testing Advisory Form for Random Drug Testing dated September 24, 2013
- R-14 Letter from O'Brien to Internal Affairs dated September 24, 2013
- R-15 Drug Specimen Acquisition Checklist dated September 24, 2013
- R-16 Report from Kaul dated April 17, 2013
- R-17 Report from Kaul dated February 14, 2013