



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of David Negra, City of East Orange

CSC Docket No. 2015-287 OAL Docket No. CSR 9800-14

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ISSUED: JUN 05 2015 (EG)

The appeal of David Negra, a Police Officer with the City of East Orange, of his removal, on charges, was heard by Administrative Law Judge Barry E. Moscowitz, (ALJ), who rendered his initial decision on April 23, 2015. Exceptions were filed by the appointing authority and cross-exceptions were filed by the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 20, 2015, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission imposed a six-month suspension and ordered the appellant to undergo a pre-reinstatement psychological examination.

DISCUSSION

The appellant was charged with inability to perform duties and other sufficient cause. Specifically, the appointing authority asserted that the appellant was found to be unfit for duty and failed a reasonable suspicion drug test. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in his initial decision that on October 30, 2013, the appellant escorted a prisoner to a hospital emergency room. While waiting outside the holding room, the appellant was observed by Nurse Margaret Smith. Smith

testified that she was standing approximately 30 feet from the appellant when she saw him rocking back and forth and talking to himself. She also witnessed him sitting in a chair pretending to drive a car. Smith contacted security because she was concerned that the appellant was acting strangely and was in possession of a weapon. Police Lieutenant Calvin Anderson testified that he spoke to the appellant on the night in question and he appeared to be sluggish. Anderson added that the appellant indicated that he had taken a Celebrex for back pain. Anderson processed the complaint from Smith about the appellant.

On October 31, 2013, the appellant was examined by Dr. Michael Basista. Basista testified that his report indicated that the appellant seemed perfectly fine but found him unfit for duty based on the statements provided by the appointing authority concerning the appellant's alleged behavior the previous evening. The appellant was also examined by his psychiatrist, Thomas Skorupski, D.O., on October 31, 2013. Skorupski cleared the appellant to return to duty. Skorupski had indicated in a report that the appellant had been seen in his office the prior day, before the alleged incident, for medication monitoring and psychotherapy. The appellant had tested positive for amphetamines, benzodiazepines, and opioids, all of which had been prescribed. Skorupski also indicated that the appellant seemed tired and that this, along with the heat on the night in question, could explain the appellant's odd behavior. This explanation was rejected by Basista and he recommended that the appellant undergo a full evaluation by another psychiatrist. However, this evaluation was never performed.

Further, the appellant had taken a drug screen, in which he tested positive for alpha-hydroxy-alprazolam, total oxymorphone, total oxycodone, and amphetamine. The alpha-hydroxy-alprazolam was not on the list of medications that the appellant submitted. The brand name for alpha-hydroxy-alprazolam is Xanax. Thus, the appellant was charged with failing a reasonable suspicion drug test. The appellant testified that had been staying with his brother and had mistakenly taken his brother's Xanax instead of his prescribed Ativan. The appellant testified that the bottles and pills for Ativan and Xanax look very similar. Skorupski also testified that the pills look similar. The appellant also testified that he was tired on the night in question but he does not remember talking to himself or pretending to drive a car.

The ALJ found that while the appointing authority had charged the appellant with being rude and using foul language with a patient, no one testified that he or she witnessed this action. With regard to the allegations that he talked to a wall and pretended to drive a car, the ALJ determined that Smith, who was 30 feet away from the appellant at the time, did not see what she thought she saw. Additionally, the ALJ found that the appellant was fit for duty. The ALJ explained that Basista relied on the alleged incident witnessed by Smith to find the appellant not fit for duty. But, since the ALJ found that appellant did not engage in the

reported behavior, Basista's reliance on those reports was misplaced. Further, the ALJ found that the preponderance of the evidence indicated that the appellant mistakenly took one of his brother's Xanax. It was due to this error that the appellant did not indicate his use of this drug on his medication sheet. Accordingly, based on the foregoing, the ALJ reversed the appellant's removal.

In its exceptions, the appointing authority argues that the ALJ provided no rational basis to dismiss Smith's testimony. It adds that while no other medical professional was available to testify, several statements were taken and should have been admitted. Further, it argues that the ALJ's finding that the appellant did not fail the drug test is inaccurate. The appellant did not have a valid prescription for Xanax and tested positive for this drug. It contends that the ALJ's finding that the appellant mistakenly took his brother's Xanax is not supported by any evidence in the record. No evidence was provided that the appellant's brother had been prescribed Xanax. Also, at no time prior to the OAL hearing did the appellant indicate that he had taken his brother's medication. Finally, it argues that the ALJ ignored *In the Matter of Arnaldo Lopez* (CSC, decided February 24, 2010), in which the Commission ordered the removal of a Police Officer who tested positive for Xanax, which he had not been prescribed.

In his cross exceptions, the appellant asserts that the ALJ specifically indicated in his initial decision that Smith was at a distance of more than 30 feet away from the appellant when she allegedly witnessed him talking to the wall. Additionally, he argues that the statements of the other medical professionals who were alleged to have witnessed his odd behavior were properly excluded. These medical professionals should have testified if the appointing authority wanted to include their statements. With regard to the drug test, the appellant argues that he did not fail the drug test because he did not intentionally ingest the violating drug. Further, the appellant claims that while the appointing authority claims that no evidence was provided that his brother had been prescribed Xanax and that he mistakenly took it, the appellant testified to these facts and his testimony was found credible by the ALJ. Moreover, the appellant argues that the present case is distinguishable from *Lopez, supra*, in that he unknowingly took his brother's medication unlike Lopez who knowingly took his father's Xanax.

Upon its *de novo* review of the record, the Commission does not agree with the ALJ's determination regarding the charges or the ALJ's recommendation to reverse the removal. Rather, the Commission finds that a six-month suspension is warranted. In its exceptions, the appointing authority argues that the ALJ incorrectly found that the appellant did not fail the drug test. The Commission agrees. Clearly, the appellant had a substance in his system which he had not listed on his drug sheet. Further, Xanax is a controlled substance that can only be legally obtained with a prescription. The appellant did not have a valid prescription for Xanax and tested positive for this drug. Regardless of the appellant's assertion that

he mistakenly took the drug, the fact remains that he tested positive for a drug that he was not prescribed and was not on his drug sheet.

With regard to the penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). Further, even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. *See Henry v. Rahway State Prison, supra*, 81 N.J. at 579-80. In this regard, the Commission emphasizes that a Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990). Moreover, the Commission notes that an unrefuted positive test result for controlled substance use has generally 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); *In the Matter of Alfred Keaton* (MSB, decided November 8, 2007). In the instant matter, the appointing authority contends that the present case is similar to *Lopez, supra*, and that the appellant should be removed for failing the drug test. The Commission does not agree. In *Lopez*, the officer **knowingly** took a drug not prescribed to him. Here, the appellant **unknowingly** took his brother's medication. This distinction plays a significant role in determining the proper penalty. Accordingly, based on the totality of the record, and the fact that the appellant failed a drug test, albeit for unknowingly taking a drug not prescribed to him, the Commission concludes that the proper penalty is a six-month suspension.

However, given the nature of the charges and the fact that the appellant never underwent the follow-up psychological evaluation suggested by Dr. Basista, the Commission orders that prior to his reinstatement, the appellant be scheduled for an evaluation with an independent qualified psychiatrist or psychologist. The selection of the psychiatrist or psychologist shall be by agreement of both parties within 30 days of the date of this decision. The appointing authority shall pay for the cost of this evaluation. If the psychiatrist or psychologist determines that the

appellant is fit for duty, without qualification, the appellant is to be immediately reinstated to his position. If the psychologist or psychiatrist determines that the appellant is unfit for duty, then the appointing authority should initiate a new charge for the appellant's removal due to his inability to perform duties based on his current unfitness, with a current date of removal. Upon receipt of a Final Notice of Disciplinary Action on that charge, the appellant may appeal that matter to the Commission in accordance with *N.J.A.C. 4A:2-2.8*. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current finding of unfitness only. In either case, pursuant to *N.J.A.C. 4A:2-2.10*, the appellant would be entitled to mitigated back pay, benefits, and seniority from the end of the six-month suspension until the time he is either reinstated or removed.

With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. See *N.J.A.C. 4A:2-2.12*. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, charges were upheld and major discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

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

ORDER

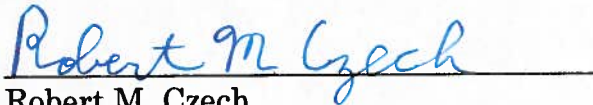
The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a six-month suspension. The Commission also orders, prior to reinstatement, the appellant undergo a psychological fitness-for-duty examination. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. In either case, the appellant is entitled to back pay, benefits and seniority for the period after the imposition of the six-month suspension through the date of his actual reinstatement or removal. The

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

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF MAY, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 9800-14

**IN THE MATTER OF DAVID NEGRA,
EAST ORANGE POLICE DEPARTMENT.**

John Anello, Esq., for David Negra (Caruso Smith Picini, attorneys)

**Marlin Townes III, Esq., Assistant Corporation Counsel, for the City of East
Orange**

Record Closed: March 25, 2015

Decided: April 23, 2015

BEFORE BARRY E. MOSCOWITZ, ALJ:

STATEMENT OF THE CASE

On October 31, 2013, a physician determined that Negra was unfit for duty based on hearsay statements. A preponderance of the legally competent evidence, however, does not exist to support any of those statements. Should Negra be removed from his position? No. Under N.J.A.C. 1:1-15.5(b), 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 or appearance of arbitrariness.

PROCEDURAL HISTORY

I.

On January 2, 2014, East Orange served Negra with a Preliminary Notice of Disciplinary Action. In its notice, East Orange charged Negra with inability to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(3), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). East Orange specified that on October 30, 2013, Negra was unfit when he responded to duty. East Orange further specified that an agency physician, Michael Basista, M.D., later examined Negra and found him unfit for duty. As a result, East Orange sought his removal.

On June 3, 2014, East Orange served Negra with a Final Notice of Disciplinary Action. In its notice, East Orange sustained the charges and specifications contained in its preliminary notice but added the specification that Negra had also failed a reasonable suspicion drug test. As a result, East Orange removed Negra from his position of police officer, effective June 25, 2014.

On July 24, 2014, Negra appealed the determination to both the Civil Service Commission and the Office of Administrative Law.

On August 15, 2014, Negra filed a motion to be restored to the active payroll, and on December 1, 2014, I denied the motion.

On September 23, 2014, Negra filed a motion to bar the progress notes or expert reports upon which East Orange relies, and on December 10, 2014, I denied the motion.

The hearing was finally held on March 18 and March 25, 2015.

On March 25, 2015, I closed the record.

DISCUSSION OF FACTS

I.

The Alleged Incident

A.

Smith

Margaret Smith is a registered nurse at East Orange General Hospital where she has worked for the past twenty years.

Smith testified that on October 30, 2013, she saw Negra escort a prisoner into the emergency room and place him in a holding room. Smith explained that Negra stood outside the hallway while the prisoner was in the room. More significantly, Smith asserted that she saw Negra facing the wall, rocking back and forth and talking to himself.

When asked on cross-examination whether Negra was talking to the prisoner in the room, Smith assured the questioner that Negra was not, even though she stood more than thirty-feet away when she allegedly witnessed this.

Smith further testified that she offered Negra a chair, which he accepted, but that she later saw him pretend to drive a car while sitting in it. Smith specified that she saw Negra turning an imaginary wheel and stepping on an imaginary pedal. Smith continued that she called security because Negra was acting strangely and she was concerned because Negra was a police officer who carried a gun.

Smith stated that security personnel then walked Negra out of the waiting room without incident.

B.

Anderson

1.

Calvin Anderson is a lieutenant with the East Orange Police Department but was the sergeant in charge the night of the alleged incident and the one who assigned Negra to escort the prisoner to the hospital. Anderson testified that a fellow officer had been injured responding to a domestic violence call and needed medical attention so he ordered Negra to accompany the officer and the prisoner to the emergency room. Anderson explained that Negra rode in the ambulance with the prisoner because the prisoner was under the influence of alcohol and still combative but that the emergency medical technician told him to watch Negra once they arrived at the hospital. Anderson stated that he spoke to Negra, that Negra appeared sluggish, but that Negra explained he had taken a Celebrex for back pain.

The emergency medical technician did not testify at the hearing.

2.

In his report, Anderson wrote that Negra “appeared to be moving slowly,” that “his speech was sluggish,” and that Negra “appeared to be distracted.” But Anderson wrote that Negra explained he was fine and could continue to work. Nevertheless, Anderson wrote that a nurse told him a patient had made a complaint about Negra using profanity and thought Negra might have been under the influence of something.

The patient did not testify at the hearing and the nurse did not testify that she thought Negra was under the influence of something—only that he was acting strangely.

3.

On cross-examination, Anderson acknowledged that Negra was not a danger to himself or others.

On redirect, Anderson specified that Negra is usually "upbeat" but that Negra was not as "upbeat" the night of the incident.

Returning to his report, Anderson wrote that Negra returned to police headquarters and that he notified Captain Blind of the concerns about Negra.

C.

Blind

Phyllis Blind was the captain in command the night of October 30, 2013. Blind could not recall much from that evening and read from her report. In her report, Blind wrote that a lieutenant had called her to advise her that something might have been wrong with Negra, that he might not have been fit for duty, and that the lieutenant was returning to police headquarters with Negra. Blind specified that at police headquarters Negra appeared to be lethargic but Negra explained he was extremely tired because he was suffering from back pain and had not slept well the past few days. Blind added that Negra told her he had taken a Celebrex earlier that day but no other medication.

The lieutenant did not testify at the hearing.

II.

The Family Practitioner

Basista

Michael Basista, M.D. is a medical doctor in his own practice. He is an experienced medical professional, having been a family practitioner for the past thirty-eight years. Basista explained that he has treated police officers for the East Orange Police Department for psychological issues in the past but usually just verifies their illnesses when they take leave, performs fitness for duty examinations upon request, or conducts independent medical examinations when hired. Significantly, Basista was not offered as an expert in evaluating whether a police officer is under the influence of drugs or alcohol or whether a police officer is fit for duty.

A.

Basista testified that on October 31, 2013, he performed a fitness for duty examination on Negra at the request of the East Orange Police Department. His report was admitted into evidence as R-3. Basista had no independent recollection of the examination and read from his report.

Upon reading his report, Basista recalled that nothing about Negra was "off" when he examined him and that the examination was "perfectly fine." Basista, however, concluded that Negra was unfit for duty based on the hearsay statements provided to him by the East Orange Police Department. In his report, Basista specified that an emergency medical technician, a patient, a nurse, and a sergeant expressed concern about Negra:

The request for a fitness for duty exam was precipitated by events that occurred yesterday evening while this officer was accompanying an arrestee to the emergency room. It was reported that the EMT who accompanied this officer and the arrestee expressed concern about the condition of the officer without any specific examples. A patient in the emergency room complained that the officer was rude and used foul language when the patient requested a cup of water because Mr. Negra happened to be standing near it. A nurse apparently reported that she observed that the officer was seated and was going through the motions of driving a vehicle. He appeared to be "nodding off," according to the accompanying officers.

Internal Affairs was summoned and the sergeant also felt that Mr. Negra was "off." He appeared disheveled. Mr. Negra was ordered to have a urine drug test collected. He had his weapon confiscated and placed on administrative leave without pay pending this fitness for duty evaluation.

[R-3.]

To repeat, only the nurse and the sergeant testified at the hearing.

B.

Basista's conclusion that Negra was not fit for duty is puzzling given Basista's report that Negra was taking his prescription medication appropriately; Basista's report that Negra had not filled any opiate prescriptions since going through a detox program; and Basista's report that Negra had been compliant with his return-to-work agreement following the program.

Basista's conclusion that Negra was not fit for duty is also puzzling given Basista's report that Negra appeared calm, coherent, oriented, and cooperative throughout the examination, as well as Basista's report that Negra was tired as a possible explanation for the reported behavior:

Mr. Negra was seen the following day after the incident. He appeared calm, coherent, oriented, and cooperative throughout the interview and examination. He is puzzled as to why this was happening. He states he was tired last night, which might explain the observed behavior. He is not fully cognizant of the alleged rude behavior to a patient and thinks he might have been addressing the rude remark with profanities to his partner in a joking manner. He has no recollection of the imaginary driving incident.

[R-3.]

Moreover, Basista's conclusion that Negra was not fit for duty was puzzling given Basista's report that he wanted Negra to make an appointment with his treating psychiatrist, Thomas Skorupski, D.O., so Skorupski could clear Negra for duty.

C.

On October 31, 2013, Skorupski examined Negra and cleared him for duty. In his letter to Basista dated November 7, 2013, Skorupski wrote that Negra had a regularly scheduled appointment with him on October 30, 2013, at two o'clock in the afternoon, just hours before the alleged incident, for medication monitoring and psychotherapy, and that Negra had tested positive for amphetamines, benzodiazepines, and opioids, all of which had been prescribed and were being monitored. His letter was admitted into evidence as R-4.

More significantly, Skorupski reported that Negra was tired, among other reasons, as a possible explanation for the reported behavior, just as Basista had speculated:

It seems that the possibility that he was tired that evening at the hospital could have been due to being close to the end of his shift, being in the emergency room where the heat may have been excessive as he was wearing all of his police gear which could make most people tired.

[R-4.]

Basista, however, rejected Skorupski's explanation. Basista testified that he rejected Skorupski's explanation because he thought Negra had lied. More specifically, Basista explained that he rejected Skorupski's explanation because Negra had taken an oxycodone on October 30, 2013, and failed to mention this to him.

In his follow-up report dated November 20, 2013, Basista offered nothing more than this supposition. In other words, Basista provided no medical reason why Skorupski's explanation should have been rejected. Instead, he besmirched Skorupski as biased and recommended that Negra undergo a full psychiatric evaluation by another psychiatrist:

I do not agree with Dr. Skorupski's conclusion that Mr. Negra's observed behavior in the emergency room was due to fatigue and excessive heat. The witnessed observations seem to be too bizarre to be explained by fatigue and

excessive heat. I am still classifying Officer David Negra as not fit for duty as a police officer for the City of East Orange, N.J. Unless I receive a more [] unbiased full psychiatric evaluation, explanation, and recommendation from a qualified psychiatrist, I do not foresee ever clearing this individual for full duty as a police officer. Unless this document can be produced, I consider my decision final.

[R-5.]

Most significantly, East Orange never sent Negra for another fitness for duty examination as Basista had recommended and continues to reject Skorupski's evaluation—the only full psychiatric evaluation ever performed in this case.

III.

No Other Evaluation

Patrick

Christin Patrick is a lieutenant with the East Orange Police Department and was the medical officer for the East Orange Police Department at the time the alleged incident occurred. As the medical officer for the East Orange Police Department, Patrick reported the results of Basista's examination to the Chief of Police. Patrick testified that Negra was never diagnosed with a disease or deficit and confirmed that East Orange never sent Negra for another fitness for duty examination as Basista had recommended.

IV.

The Toxicology Report

Havier

Robert Havier is a forensic toxicologist and the acting director of the State toxicology lab. He was accepted as an expert in toxicology without objection. Havier is

the one who oversaw the toxicology screening of the urine sample Negra provided. At the hearing, Havier read from the toxicology report.

A.

Under "Screening Results by Immunoassay," Havier noted that Negra tested positive for amphetamines, benzodiazepines, and oxycodone.

And under "Confirmation Results by Mass Spectrometry," Havier noted that Negra tested positive for alpha-hydroxy-alprazolam, total oxymorphone, total oxycodone, and amphetamine.

But under "Medical Review Officer Review," Havier noted that that alpha-hydroxy-alprazolam was not listed on the medication sheet Negra submitted.¹

Finally, Havier noted that the brand name for alpha-hydroxy-alprazolam is Xanax.

B.

On cross-examination, Havier reviewed the report Richard Saferstein, PhD, a forensic toxicologist, wrote in reaction to the toxicology report. In his report, Saferstein wrote that no correlation exists between the presence of alpha-hydroxy-alprazolam in the urine and the alleged impairment on October 30, 2013, because the pharmacological effects of alprazolam last only six to eight hours while the presence of the alpha-hydroxy-alprazolam can be detected in the urine for up to two to three days. As such, Saferstein wrote that "the detection of alpha-hydroxy-alprazolam in Mr. Negra's urine could have occurred long after the drug's effects on Mr. Negra had terminated."

After reviewing the report, Havier agreed with Saferstein.

¹ Total oxymorphone, total oxycodone, and amphetamine were listed on the medication sheet Negra submitted.

Notwithstanding Havier's agreement with Saferstein that the effects of alprazolam last only six to eight hours, East Orange still maintained that Negra had failed a reasonable suspicion drug test, the specification it had added to its Final Notice of Disciplinary Action.

V.

The Medication Sheet

Reynolds

Jose Reynolds is a detective-sergeant with the East Orange Police Department in the Professional Standards Unit and the one who was with Negra when Negra completed the medication sheet. The medication sheet was admitted into evidence as R-20. In short, the medication sheet required Negra to list of all prescription and non-prescription medications he had taken in the past fourteen days.

Under prescription medications, Negra listed Percocet, Inderal, Adderall, and Ativan. Under non-prescription medications, Negra listed Advil and Muscle Milk. But nowhere did Negra list alpha-hydroxy-alprazolam, alprazolam, or Xanax. As a result, East Orange seeks to remove Negra from his position as a police officer because Negra did not have a prescription for Xanax and failed to write Xanax on his medication sheet—a specification not contained in the Final Notice of Disciplinary Action and only brought out through this testimony.

VI.

The Addiction Specialist

Skorupski

Skorupski is Negra's treating psychiatrist and the one who monitors Negra's medications and provides Negra's psychotherapy.

A.

Skorupski received a B.S. in pharmacology and toxicology from the Philadelphia College of Pharmacy and Science and his D.O. from the University of Medicine and Dentistry of New Jersey. Skorupski has a fellowship in pain medicine and runs the detox and rehab units at Summit Oaks Hospital in Summit, New Jersey, which is a twenty-four-hour, seven-day-a-week facility. His official title is Director of Substance Abuse Services. Skorupski approximated that he spends about ten percent of his professional time practicing pain medicine and about ninety percent of his time practicing addiction medicine.

Skorupski was offered and accepted as an expert in addiction treatment medicine without objection.

Skorupski was also offered and accepted as an expert in psychiatry without objection.

B.

Skorupski testified that Negra had been seeing a doctor for pain management due to a back injury he had received. Negra would later explain that he received the injury in a car accident at work. Skorupski further testified that Negra would come to him twice a month: once for medication monitoring and once for psychotherapy.

Skorupski continued that on October 30, 2013, he performed a drug test on Negra, which he supervised and monitored himself, and that Negra tested positive for the medications he had prescribed.

In his letter to Basista dated November 7, 2013, Skorupski had specified that he had prescribed Adderall, Ativan, and Inderal, and at the hearing on March 25, 2015, Skorupski explained that he had prescribed the Adderall for attention-deficit and hyperactivity disorder, the Ativan for generalized anxiety disorder, and the Inderal for high blood pressure.

In his letter to Basista dated November 7, 2013, Skorupski had also specified that he had given Negra permission on October 28, 2013, to take an oxycodone left over from a prior prescription for his acute back pain, which he had been experiencing that day.

C.

The oxycodone accounts for the Percet, which Negra had listed on his medication sheet, as well as the oxycodone and oxymorphone, which Havier noted in the toxicology report, but it does not account for the alpha-hydroxy-alprazolam or the alprazolam, that is, the Xanax, which Havier had also noted in the toxicology report, but Negra had not listed on his medication sheet.²

Significantly, Skorupski testified that Negra would not have tested positive for the Xanax on the test he performed in his office because the test her performs in his office is not a sensitive or as specific as the test the State performs in its lab.

More significantly, Skorupski described how the generic form of Xanax, which he had not prescribed, and the generic form of Ativan, which he had prescribed, look identical. This was most significant because Negra would later explain to Skorupski and then testify at the hearing that he had been staying at his brother's house and had mistaken his brother's Xanax for his Ativan in the early morning of October 28, 2013. Besides crediting Negra with this explanation, Skorupski surmised that this mistaken Xanax, combined with the prescribed Ativan, could have also accounted for the reported behavior the night of October 30, 2013.

D.

Taking all of this into account, Skorupski still asserted at the hearing that Negra was fit for duty on October 30, 2013, when he saw Negra for his medication monitoring, that Negra was fit for duty on October 31, 2013, when Negra returned to him at the

² For the sake of completeness, the Adderall accounts for the amphetamine and the Ativan accounts for the benzodiazepine.

behest of Basista, and that Negra was fit for duty on March 25, 2015, when Skorupski testified at the hearing, because he had monitored Negra continuously since October 30, 2013, and he had determined Negra had remained compliant with his treatment.

Indeed Skorupski had written to Basista in his letter dated November 7, 2013, that Negra was mentally and physically stable, doing very well, and compliant with his treatment:

The following day, 10/31/13, I saw David again because of this incident and he was mentally and physically stable. He was once again tested and the results were the same as 10/30/13. I monitor him closely and he is doing very well and is compliant with all aspects of treatment. I see no reason why he should be able to return to work full duty with no restriction.

[R-4.]

So Skorupski—who was the only expert in addiction treatment medicine to testify in this case—still determined that Negra had been compliant with his treatment and still concluded that Negra was fit for duty—notwithstanding the fact that Negra did not have a prescription for Xanax and failed to write Xanax on his medication sheet.

VII.

The Subject Officer

Negra

A.

Negra testified that he had been a police officer with the East Orange Police Department since 2006 and that he had always wanted to be a police officer because he had always wanted to help people and deter crime in his hometown. Negra described himself as “warm-hearted” and “very energetic.” As Negra put it, he was not a “sitting person.”

Negra stated that he had been taking Neurontin for nerve pain and ibuprofen as needed for neck and back pain due to his car accident. Negra then reiterated that Skorupski had prescribed the Aderall for his attention-deficit and hyperactivity disorder, Ativan for his anxiety, and Inderal for his blood pressure. Moreover, Negra recalled that Skorupski had only prescribed the Ativan about two weeks before he mistakenly took the Xanax and that he did not write Xanax on his medication sheet because he did not know he had taken it.

More expansively, Negra explained that he had been staying with his brother from October 14 to October 28, 2013, because his apartment was being fumigated. Negra also explained that he had recently gone through a "bad divorce." Moreover, Negra explained that he had kept his medication in his brother's medicine cabinet, which is where his brother also kept his medication.

Negra insisted that he had not been drinking, that he had not taken any illicit drugs, and that he had not taken the Xanax on purpose. Negra recounted that he had been cleaning out his storage locker, where he had stored his belongings from his divorce, and that he was physically tired and emotionally drained from the ordeal. Negra assumed that he had mistakenly taken his brother's Xanax because the bottles looked exactly the same and the pills looked exactly the same. Negra also thought that he had taken a Celebrex but had apparently taken an ibuprofen instead.

B.

Negra testified that he was on the four-to-twelve shift the night of October 30, 2013, and that he had already been on duty for five to six hours before he escorted the prisoner to East Orange General Hospital.

Negra recalled that he politely accepted a chair from a nurse at the hospital because the nurse said he looked tired; and he admitted that he was not himself the day of the alleged incident; but Negra stated that he did not remember ever talking to the wall or pretending to drive a car.

Finally, Negra asserted that he had never been disciplined before and that he had received commendations for his police work.

VIII.

My Ultimate Findings

Given this discussion of the facts, I **FIND** that a preponderance of the legally competent evidence does not exist that Negra talked to a wall in the emergency room of East Orange General Hospital or pretended to drive a car in the waiting room the night of October 30, 2013.

In addition, I **FIND** that a residuum of competent evidence does not exist that Negra was rude to a patient and used foul language when a patient requested a cup of water because no one testified that he or she witnessed it.

Having found that Negra did not engage in the reported behavior at the hospital upon which Basista relied to conclude that Negra was unfit for duty the night of October 30, 2013, I **FIND** that a preponderance of the evidence does not exist that Negra was unfit for duty the night of October 30, 2013.

To the contrary, I **FIND** that a preponderance of the legally competent evidence exists that Negra was fit for duty the night of October 30, 2013, and remains fit for duty as of the date of the hearing.

Finally, I **FIND** that a preponderance of the legally competent evidence exists that Negra mistakenly took one of his brother's Xanax when he stayed at his apartment on October 28, 2013, which is why he did not write Xanax on his medication sheet, but that a preponderance of the legally competent evidence does exist that Negra was not under the influence of Xanax the night of October 30, 2013.

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.

Under the rules of procedure at the Office of Administrative Law, expert testimony is admissible if such testimony will assist the judge to understand the evidence or determine a fact in issue, and the judge finds that (1) the opinions or inferences are based on facts and data "perceived or made known" to the witness at or before the hearing, and (2) the opinions or inferences are within the special "knowledge, skill, experience, or training" of that witness. N.J.A.C. 1:1-15.9(b).

Indeed facts and data upon which expert witnesses reasonably rely need not even be admissible:

If facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, those facts and data upon which an expert witness bases opinion testimony need not be admissible in evidence.

[N.J.A.C. 1:1-15.9(f).]

Moreover, hearsay evidence is admissible at the Office of Administrative Law. Under our rules of procedure, hearsay evidence shall be admissible and accorded whatever weight the judge deems appropriate, subject to the residuum rule. N.J.A.C.

1:1-15.5. As such, some legally competent evidence must still exist under the residuum rule to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the appearance of arbitrariness. N.J.A.C. 1:1-15.5(b).

III.

In my ruling denying Negra's motion to bar Basista's progress notes or expert reports, I noted that the opinions and inferences Basista rendered or made in them were based on hearsay statements, which had not yet been established as fact in the case. More pointedly, I noted that East Orange could produce the witnesses who made those statements and that I could find those statements as fact. In addition, I noted that Basista could testify that such hearsay statements are the kinds of data upon which he reasonably relies. Either way, I wrote that such hearsay statements are admissible at the Office of Administrative Law and concluded that the motion to bar the progress notes or expert reports based on those hearsay statements was premature.

Similarly, I noted that the motion to bar the second progress note or expert report, based on the argument that Basista had dismissed the letter Skorupski wrote to him on November 7, 2013, without explanation, was also premature because Basista had yet to testify, and his progress note or expert report had yet to be offered into evidence. Besides, such an argument, I continued, goes to weight of the evidence, not to its admissibility. Therefore, I concluded that the motion to bar the second progress note or expert report was more properly understood as an argument against its weight.

Finally, I wrote that whether Basista, as a general practitioner, is competent to testify about a psychological or psychiatric issue was likewise premature because his knowledge, skill, experience, and training had yet to be explored. To be sure, I noted that Negra would have the opportunity to explore those qualifications at the hearing, should Basista testify. Therefore, I concluded that the motion to bar the progress notes or expert reports had to be denied at that time.

IV.

At the hearing, Basista did testify. But Basista was neither offered nor accepted as an expert in evaluating whether a police officer is under the influence of drugs or alcohol or whether a police officer is fit for duty. And he was neither offered nor accepted as an expert in addiction medicine treatment or psychiatry. Only Skorupski was offered and accepted as an expert in addiction treatment medicine and psychiatry.

Even if Basista had been accepted as an expert in evaluating whether a police officer is under the influence of drugs or alcohol or whether a police officer is fit for duty, only the nurse and sergeant testified at the hearing, and I adjudged that their testimony did not amount to a preponderance of the evidence Negra had talked to a wall or pretended to drive a car the night of October 30, 2013.

More specifically, Smith was the only witness who testified that she saw Negra talking to the wall, yet Smith stood more than thirty feet away from Negra when she allegedly witnessed it. More significantly, I did not believe that Smith saw what she thinks she saw. While I believe that Smith believes she saw Negra talking to a wall and pretending to drive a car, a preponderance of the evidence does not exist that Negra actually did so.

In fact Anderson—who was the only other witness to testify about the alleged incident at East Orange General Hospital the night of October 30, 2013—did not testify that he saw Negra talking to a wall or pretending to drive a car. He did not even testify that he saw Negra acting strangely. He simply stated that Negra appeared sluggish and was not as upbeat as usual.

Similarly, Anderson merely wrote in his report that Negra appeared to be moving slowly, that his speech was sluggish, and that Negra appeared to be distracted.

Thus, Anderson did not write or testify that Negra had talked to a wall or pretended to drive a car—and nowhere did Anderson write or testify that Negra could not or did not do his job properly.

Blind also did not write or testify that Negra could not or did not do his job properly. Blind simply stated that Negra was acting lethargic. As such, their collective testimony amounts to no more than mere speculation—mere speculation that Negra was under the influence of drugs or alcohol the night of October 30, 2013, and that he might have been unfit for duty.

Finally, Basista did not testify that the hearsay statements upon which he relied were the kinds of statements upon which he reasonably relies.

Therefore, in the absence of any additional evidence, I found that a preponderance of the legally competent evidence does not exist that Negra was under the influence of drugs or alcohol the night of October 30, 2103, and unfit for duty as a police officer.

To the contrary, I found that a preponderance of the legally competent evidence does exist that Negra was not under the influence of drugs or alcohol the night of October 30, 2013, and that he was in fact fit for duty as a police officer. Again, Skorupski examined Negra before his shift on October 30, 2013, and then after his shift on October 31, 2013, and he determined that Negra had been compliant with his program. Moreover, Skorupski opined that Negra had been fit for duty the night of October 30, 2013, and remained fit for duty as of the date of his testimony.

Meanwhile, Basista, who also examined Negra after his shift on October 31, 2013, did not declare Negra unfit for duty, and then declared that Skorupski, not he, should be the one to clear Negra for duty. Yet Basista rejected Skorupski's opinion that Negra was fit for duty. What is more disconcerting is the fact that Basista did not offer a medical reason why. Instead he inserted his own inexpert opinion that the positive test for Xanax was proof positive that Negra was noncompliant with his treatment program.

Finally, I found that a preponderance of the legally competent evidence exists that Negra mistakenly took one of his brother's Xanax when he stayed at his apartment on October 28, 2013. As Negra testified, he had been staying at his brother's

apartment because his apartment was being fumigated and he had kept his medications in the medicine cabinet along with his brother's medications and might have confused his brother's medication with his own—which is why he did not include Xanax on his medication sheet before he took the drug test. Given these established facts, together with Skorupski's expert opinion, the legal conclusion cannot be reached that Negra failed a reasonable suspicion test.

V.

Having found that East Orange has not proven by a preponderance of the legally competent evidence any of the specifications contained in its Final Notice of Disciplinary Action, I **CONCLUDE** that East Orange has not proven by a preponderance of the legally competent evidence any of the charges contained in its Final Notice of Disciplinary Action and that Negra should be returned to full duty without restriction.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that all of the charges against Negra be **DISMISSED**, that Negra be **REINSTATED** to his position of police officer effective June 25, 2014, and that Negra be **AWARDED** all requisite back pay, benefits, attorney fees, and costs associated with this case.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for its 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.

4/23/15
DATE

BARRY E. MOSCOWITZ
BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

4-23-15
Laura Sanders

Date Mailed to Parties:
dr

APR 27 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Thomas Skorupski, D.O.
David Negra

For Respondent:

Margaret Smith, R.N.
Michael Basista, M.D.
Calvin Anderson
Phyllis Blind
Christin Patrick
Robert Havier, Ph.D.
Jose Reynolds

Documents

For Petitioner:

- P-1 Handwritten drawing of emergency room dated March 18, 2015
- P-2 Report of Richard Saferstein, Ph.D., dated October 3, 2014
- P-3 Curriculum Vitae of Skorupski undated
- P-4(a) State Police, Certification of Course Completion, Level-1, First Responder Awareness, dated October 9, 2001
- P-4(b) Essex County College, Police Academy, Certification of Basic Police Officers Class, dated February 15, 2007
- P-4(c) East Orange Police, Department Citation, dated November 29, 2007
- P-4(d) East Orange Police, Certificate of Excellence, dated November 29, 2012

For Respondent:

- R-1 Not in evidence
- R-2 Curriculum Vitae of Basista undated
- R-3 Progress Note by Basista dated October 31, 2013
- R-4 Letter from Skorupski to Basista dated November 7, 2013
- R-5 Progress Note by Basista dated November 20, 2013
- R-6 Progress Note by Basista dated January 29, 2014
- R-7 Not in evidence
- R-8 Not in evidence
- R-9 Memorandum from Anderson to Reynolds dated October 30, 2013
- R-10 Memorandum from Berkely Jest to Blind dated October 30, 2013
- R-11 Memorandum from Blind to William Robinson dated November 7, 2013
- R-12 Memorandum from Patrick to Robinson dated November 7, 2013
- R-13 Memorandum from Patrick to Thomas Koundry dated November 22, 2013
- R-14 Letter from Robinson to Basista dated January 23, 2014
- R-15 Curriculum Vitae of Havier dated October 2014
- R-16 Toxicology Report for Negra dated December 11, 2013
- R-17 Medical Review Officer Certification Form dated December 4, 2013
- R-18 Preliminary Notice of Disciplinary Action dated December 17, 2013
- R-19 Consent for the Taking of Certain Biological Samples by Negra dated October 30, 2013
- R-20 Medication Sheet by Negra dated October 30, 2013
- R-21 Memorandum from Professional Standards Unit to Robinson dated January 12, 2014