

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6th DAY OF FEBRUARY, 2019

Deirdre' L. Webster Cobb

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Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT.NO. CSR 14018-18
AGENCY DKT. NO. N/A

**IN THE MATTER OF GRAYLAND MEEKS,
CITY OF NEWARK FIRE DEPARTMENT.**

Bette R. Grayson, Esq., appearing on behalf of appellant (Grayson & Associates, attorneys)

Joyce Clayborne, Esq., appearing on behalf of respondent (City of Newark, Department of Law)

BEFORE KIMBERLY A. MOSS, ALJ:

Record Closed: December 17, 2018

Decided: January 8, 2019

STATEMENT OF THE CASE

Appellant, Grayland Meeks (Meeks), appeals his removal by respondent, City of Newark Fire Department Fire Department (NFD or respondent), on charges of incompetency, inefficiency, or failure to perform duties, neglect of duty, and other sufficient cause. He was also charged with violation of the following NFD rules and regulations: Article 6 neglect of duty, Article 17, absence from quarters or assignments, Article 23 conduct of members, Article 28, use of intoxicating beverages and/or controlled substances, Article 58 commission or omission of acts, Article 59, official

inefficiency or incompetence, and Article 60, chronic inefficiency or incompetence. The charges result from Meeks having a positive drug test on September 20, 2017. At issue is whether Meeks engaged in the alleged conduct and, if so, whether it constitutes incompetency, inefficiency, or failure to perform duties, neglect of duty, failure to follow NFD rules and regulations, and other sufficient cause that warrants removal.

PROCEDURAL HISTORY

On September 26, 2017, respondent served Meeks with a Preliminary Notice of Disciplinary Action. A departmental hearing was held on October 5, 2017. A Final Notice of Disciplinary Action was served on July 14, 2018, sustaining charges of incompetency, inefficiency, failure to perform duties, neglect of duty, failure to follow NFD rules and regulations, and other sufficient cause. Meeks requested a hearing and forwarded simultaneous appeals to the Civil Service Commission and the Office of Administrative Law (OAL). The appeal was filed with the OAL on September 12, 2018. Hearings were held on November 15, 29, and December 17, 2018.

On the last day of the hearing, appellant requested to be allowed to have a handwriting expert testify. Appellant's position was that a signature on a Concentra documents was not Meeks. I denied the request since appellant had the documents in question before the hearing and did not list a handwriting expert as a witness. The supplemental testimony of Mark Reider (Reider) was inadvertently not recorded at the December 17, 2018 hearing date. I have attached my written summary of his December 17, 2018 testimony from my notes.

Although the record closed on December 17, 2018, my assistant received several emails and letters on behalf of appellant. Neither counsel for appellant or respondent were copied on said emails or letters. Its contents were unread by the undersigned and will have no impact in this decision.

Testimony

Scott Richardson

Scott Richardson (Richardson) is a battalion chief and medical officer for the NFD. The medical officer handles vacation days, personal days, and sick leave. He does not handle discipline. On August 27, 2017, Richardson received a letter from Chief Jackson that Meeks did not appear for work. A letter from Chief Burke stated that Meeks had not taken a personal or a sick day. Meeks could not be reached that day.

Meeks contacted Deputy Chief Zieser on September 4, 2017, stating that he believed that he was on vacation on August 27, 2017, and requested he be allowed to use two of his vacation days to cover the August 27, 2017, absence. Meeks' request was approved.

Richardson was informed that Meeks had signed a Conditional Letter of Employment on June 19, 2015. The Conditional Letter of Employment was done because Meeks had an issue with substance abuse. It gave Meeks an opportunity to get treatment and come back to work. The Conditional Letter of Employment states that Meeks must successfully complete the Employee Assistance Program (EAP) substance-abuse program and that he will be subject to random urine monitoring.

When Meeks missed a day from work without previously notifying NFD, Fire Chief Jackson and Assistant Public Safety Director Malave determined that Meeks should be sent for random drug testing. Richardson scheduled Meeks drug testing at Concentra. The test was the non-DOT standard rapid drug test. On September 20, 2017, Meeks was taken for drug testing by an officer. Richardson received the results of the drug tests on the same date. The results from Concentra showed that Meeks tested non-negative and the test was sent for further analysis. A non-negative result is a positive result. The final result was positive for marijuana. The Conditional Letter of Employee had the condition that Meeks refrain from use of illegal drugs. A violation of

the Conditional Letter of Employment results in an automatic discharge. There is no second chance. A Conditional Letter of Employment is a Last Chance Agreement.

Meeks checked into the Rebound Institute (Rebound). Richardson received correspondence from the Rebound. One email stated that Meeks enrolled in Rebound on October 7, 2017, and would complete the program on November 27, 2017. The second email stated that Meeks completed the program on November 24, 2017, and was cleared to return to regular employment. Richardson does not recall if he spoke to anyone at Rebound.

Richardson gets responses from employees who attend EAP. He is informed when a person is attending an EAP program and when they can return to work. Most EAP programs are stress related. Meeks EAP report is probably in his medical file, but Richardson did not review it. NFD does not have random drug monitoring.

Jeray Walker

Jeray Walker (Walker) is the Internal Affairs (IA) captain in NFD. He investigates fire personnel for major and minor infractions. He was in the Arson-IA division in which he investigated arson and infractions. In his investigations, Walker finds facts but does not make recommendations. His findings are submitted to the chief, who is responsible for discipline.

Walker was contacted by the chief regarding Meeks being AWOL. On September 20, 2017, he was instructed to transport Meeks to Concentra for a urine drug test, due to the Letter of Conditional Employment. Walker printed out a profile of Meeks, which included his picture. He then picked up Meeks and told him that he was being transported to Concentra.

At Concentra Walker signed in. Meeks did not have identification with him, so Walker vouched that it was in fact Meeks. Both signed the documents. Walker waited with Meeks until he was called for the test. Walker and Detective Casais sat across from Meeks. Walker escorted Meeks to the door of the restroom to the technician. At

that point the technician took over. Walker identified Meeks to the director of Concentra. He was handed Meeks' receipt. After the test, Walker was informed at Concentra that the results were non-negative. The Director of Concentra said that the results of Meeks test would be sent to the medical officer. Concentra stated that Meeks was not fit for duty. Meeks was taken back to the station to get his belongings and then taken to his grandmother's house.

Walker wrote the investigation report on September 27, 2017, after the test results were received. The report was sent to Malave. The report stated that there was a positive drug finding.

A positive drug test violates the rules and regulations of the NFD. It violates Article 23 members being liable for disorderly conduct, Article 28 involving the use of intoxicating beverages or controlled dangerous substances, and Article 60 inefficiency and incompetence. The common practice when someone violates a Letter of Conditional Employment is termination.

Walker's investigation involved transporting Meeks to Concentra and getting the results of the drug test. He had Meeks disciplinary file which included the Letter of Conditional Employment and the reason for that letter. He reviewed the incident that led up to the Letter of Conditional Employment but does not remember the facts.

Meeks was in Walker's custody for three hours. Meeks was nervous but did not smell of alcohol. Meeks was in the back seat of the vehicle on the way to Concentra. Detective Casais was in the front passenger seat of the vehicle.

Raul Malave

Raul Malave (Malave) is the Assistant Public Safety Director for Newark. He oversees discipline for police department, fire department, and emergency management. He is familiar with Meeks. In approximately 2013-2014, Meeks received a written reprimand for excessive absenteeism. In May 2015, Meeks was arrested for possession of marijuana and possession of drug paraphernalia. He was sent to

Concentra for drug testing at that time. The result of the drug test was positive. The positive results were sent to Captain Robles, who was the medical officer at that time.

Meeks was suspended because of the arrest. Meeks signed a Conditional Letter of Employment. The FNDA was copied to the union president at the time, Charles West. Conditional Letters of Employment are used in administrative cases where the employee has tested positive for drugs or alcohol. Meeks Conditional Letters of Employment required him to refrain from narcotics and illegal drugs and do the job at a satisfactory level. It states if he tests positive for narcotics, he will be subject to immediate termination. The union represented Meeks for the 2015 discipline. A Conditional Letter of Employment is commonly called a Last Chance Agreement. The Conditional Letter of Employment requires two signatures, the Director and appellant. It is drafted by the law department and sent to Meeks' representative. It is negotiated between the both sides.

Richardson reports to Malave. The results of drug tests are part of the employees' discipline and medical files. After Meeks missed a day from work in 2017, Malave told Richardson to have Meeks drug tested. A Preliminary Notice of Disciplinary Action (PNDA) was issued to Meeks on September 25, 2017, after his positive drug test. Meeks requested a limited purpose hearing. Meeks was represented by the union. A Final Notice of Disciplinary Action (FNDA) was issued to Meeks after the limited purpose hearing on November 17, 2017.

Meeks went to Rebound for forty-five days. Rebound sent emails and documents to Richardson regarding Meeks. Richardson received medical documents for Meeks. Malave believes that Rebound is not truthful, another officer was at Rebound. Rebound stated that he was there for stress, but he was actually there for opioid and marijuana addiction. Malave did not speak to directly anyone at Rebound.

Donna Cook

Donna Cook (Cook) is a registered nurse who is trained in drug testing. She works at Concentra. Meeks came to Concentra accompanied by Walker. Meeks was

to receive a non-DOT drug test. Cook receives the authorization from the employer as to what tests it wants done and why. The authorization could be verbal. Meeks was identified by Walker because he did not have identification. When Meeks is registered, his information is put into the computer. Meeks home and work numbers are reversed. He was registered in for the first test at 12:10 p.m. and out at 12:56 p.m. He was registered in for the second test at 12:49 p.m. and out at 1:05 p.m. Meeks was re-registered because Walker asked for a second test.

Meeks was told to empty his shirt and pants pockets and verify his information in the computer. He was also told to wash his hands with soap and water and given a sealed container. The container was then opened. He has four minutes to give a specimen. Once Cook receives the specimen, she checks the temperature. It must be between ninety and one hundred degrees. The specimen was then split into one thirty-cc specimen and a fifteen-cc specimen both of which are put into separate vials, which were sealed in Meeks' presence. The paperwork was filled out stating that the temperature and quantity of the specimen was not tampered with. Meeks and Cook signed the specimen. The specimens were sealed and dated in Meeks' presence. Four copies are made of the document. One goes with the specimen, one stays with Concentra, one goes to Meeks, and one goes to his employer. The document and specimen are sent to Qwest lab. Qwest picks up the specimens at approximately 6:00 p.m. The chain of custody form is in the bag with the specimen. Each specimen has an identification number. Meeks initialed each specimen.

Meeks was given a copy of the chain of custody form. Cook is present when the chain of custody form is filled out and when she and Meeks signed it. Meeks verified that the information was correct. The phone numbers that Concentra had for Meeks were supplied by him.

After Meeks gave the specimens Walker asked what the results were. Cook told him that the specimens were sent to the lab. Meeks was then re-registered and gave a second specimen for a rapid test. The rapid-test procedure is the same as the non-rapid-test procedure. The specimen is placed in a sealed cup dated and initialed. It is put into an e-reader that tests the specimen. The result of the rapid test was non-

negative needs to go to the lab. The result of the first test was positive dilute from the lab. The result of the rapid test from the lab was positive unable to contact donor.

When the results come in the medical review officer calls the person if the result is positive. As a rule, Concentra does not get the results. The Concentra form lists visit type as new for both tests because each test was for a separate specimen.

The type of test done is determined by the employer. Newark has a package of what it wants done on drug tests.

Dr. Steven Krucht

Dr. Steven Krucht is a physician who is a certified Medical Review Officer (MRO). As a MRO he reviews results from drug tests and contacts the donor if the results are positive to determine if the result is due to a medical condition, if not the result remains positive and it is sent to the employer.

Krucht received the lab results from Qwest Labs for Meeks' tests of September 20, 2017. Two tests were done on that day. The results were positive for marijuana for specimen with the identification number of 30704345. The results for the second test 9287645 were also positive for marijuana. The confirmation test was also positive for marijuana. The screening cut off for marijuana is 50ng/ml. The final result for Meeks first test was positive, unable to contact donor. The final result for Meeks' second test was positive dilute. Krucht only reviewed the second test of Meeks 9287645. The first test results were not sent to him.

Marinol is the only prescription drug that can give a positive marijuana result. Meeks was not prescribed Marinol. Marinol is a drug that can be given to cancer patients. Meeks was told that he could have his results retested within three days. If he chose to be retested, he had to call E-Screen and speak to the person from E-Screen who called him initially and say he wanted the specimen retested. Meeks did not request that the specimen be retested.

Mark Reider

Reider is a certified addiction professional and a substance abuse counselor. He has worked for Rebound for one and one-half years. Prior to that, he worked at a methadone treatment center in West Palm Beach, Florida. Meeks was treated at Rebound for anxiety and depression. When Meeks entered Rebound on October 7, 2017, he took a drug test. The results were not positive for marijuana. Marijuana stays in a person's system for sixty to ninety days. Meeks did group and adventure therapy.

Mike Porter was a case manager at Rebound. He helped people transition from Rebound. Porter had no authority to issue reports or write evaluations. Porter did not treat Meeks. Reider speaks to Meeks once a week for fifteen to thirty minutes. Meeks did not have an addiction problem. He was never diagnosed as an addict or a recovering addict. Meeks is making a good transition. Meeks never tested positive for drugs while he was at Rebound.

Reider is not the case manager, Porter was. Porter's letter stating that Meeks had marijuana issues was inaccurate. He does not know why Porter wrote that Meeks had marijuana issues. Sean Nassive is the owner of Rebound. The letter from Porter was not done with the approval of Nassive. Porter was dismissed from Rebound. Meeks' medical records state "severe cannabis" use on the intake sheet. This was written by Daniel Farga who is a licensed mental health practitioner. He was Meeks's primary therapist. Meeks was at Rebound for forty-five days.

Reider never spoke to Richardson, but he emailed him to give updates on Meeks. He has not dealt with NFD.

Reider was not aware that Meeks tested positive for cannabinoid. THC is the active ingredient in marijuana that causes people to become high. Cannabinoid can be purchased online. If Meeks used marijuana he would have tested positive for THC. He does not know the amount of cannabinoid a person needs in his system to test positive. He never asked Meeks if he used cannabinoid. Meeks told Reider that he had

previously tested positive for marijuana before coming to Rebound, Meeks did not state when that occurred.

Reider did not review Meeks's medical records that were not from Rebound. Reider is not familiar with Jane Cohn. Initially Reider stated that he was not required to review Meeks medical records from Rebound. He later testified that the program director, the primary therapist and himself were required to review at Meeks medical records from Rebound. When he writes a group note, it is a general note for the group.

Katia Stuart

Katia Stuart (Stuart) testified that she has been in a relationship with Meeks for seventeen years and they have two children and live together. She has never seen marijuana in their house. She does not use marijuana and has not seen Meeks under the influence of marijuana.

In August 2017, Meeks received a call stating that his father's cancer had come back. His father was given six months to one year to live. Meeks became extremely withdrawn. During this time, they went to a housewarming party. Subsequent to the house party, Meeks received a call from NFD that he failed to report for work. Meeks thought that he was on vacation. He went to work two weeks later and had a random drug test and tested positive for marijuana. Stuart and Meeks were shocked by the results. They contacted the friends whose house warming party they attended and were told that there may have been marijuana in the brownies. She ate the brownies but did not feel any different.

Stuart knows that Meeks tested positive for marijuana in 2015 and signed a Conditional Letter of Employment. Stuart and Meeks have the same circle of friends. Their friends do not use marijuana.

Grayland Meeks

Meeks was employed by the Newark Police Department for eleven years prior to his employment with NFD. Meeks states that he did not have any disciplinary issues with NFD other than a written reprimand due to his back surgery. He later stated that his only infraction was when he received his check early which was a breach of the chain of command.

In 2015 Meeks's father was diagnosed with lung cancer. In April 2015 his father had surgery due to the cancer and was in a coma after the surgery for approximately one month. In May 2015, Meeks used marijuana in Passaic and was arrested. He was advised to call the fire captain by the police, which he did. Meeks signed a Conditional Letter of Employment with NPD on June 19, 2015. As part of the Conditional Letter of employment, he was required to go to an EAP, which he did. After completion the EAP program, Meeks returned to work. Meeks is not familiar with Conditional Letters of Employment, but he knows that he had to sign it to get back to work. Once Meeks's father awakened from the coma, he recovered from the cancer. In August 2017, Meeks was informed that his father had terminal cancer. He became depressed and withdrawn.

Meeks believed that he was on vacation from August 8, 2017, until the beginning of September. He received a call from NFD on August 27, 2017, which he did not answer. Later that morning he received a text from a friend stating that Meeks was supposed to be at work. Meeks called his captain, who told him to submit a report and use vacation days to cover the day he missed. Meeks returned to work on September 4, 2017. At that time, he wrote to the chief regarding the missed day and requesting to use vacation days to cover the day.

On September 30, 2017, Detective Walker from arson came to take Meeks for drug testing. Meeks was told he was going for drug testing because he was AWOL on August 27, 2017, and was taken to Concentra. Meeks did not have identification, Walker identified Meeks to Concentra and walked Meeks to the person who gave appellant the breath test. That person walked Meeks to Cook. Meeks signed a screen

verifying that the information was correct. Cook explained how to use the specimen cup. Meeks gave Cook a urine specimen.

Meeks agrees that his signature is on custody control form 30704345 (Exhibit A-2 page 00003). The information regarding his date of birth, social security number, daytime and night time phone numbers is correct. On custody control form 92898645 (Exhibit A-2 page 00004), Meeks states that his social security number and date of birth are correct, but the daytime and evening phone numbers are not correct. He states that the signature does not appear to be his. Meeks further states that he only took one drug test on September 30, 2017, and the results of the test were done at that time. Meeks did not know what a non-negative test result meant.

Meeks received a call about the lab results explaining that he tested positive for marijuana and that his employer would be informed. He was asked if he ever smoked marijuana and he said yes. He was told that he had three days to dispute the results. If he disputed the results, the specimen would be sent to another lab to be tested. He did not dispute the results because he wanted to speak to a union representative first but did not get around to it.

Meeks testified that he did not know how he tested positive. He suspects that it is from brownies that he ate at a house-warming party for a friend. He was later told that the girlfriend of a friend made brownies with marijuana. The person who made the brownies did not confirm this. He also thought he could have tested positive from taking his father's prescribed cancer medication which his mother gave him, but he does not know what the pills were. Meeks received no complaints regarding how he did his job.

Once Meeks tested positive he was suspended from NFD. He went to the Rebound because he had depression, anxiety, and was under extreme stress. The fire chief and captain recommended that he go to Rebound. Meeks was admitted to Rebound on October 8, 2017, and released on November 24, 2019. At Rebound he said that he did not smoke marijuana and he does not have a drug problem. At Rebound Meeks had sober support and 12-step involvements. Meeks states that the

12-step program helps people get their life on track. At Rebound he went to NA and AA meetings.

The master problems listed for Meeks at Rebound includes severe cannabis use disorder. Meeks states that this was listed so that he could be treated at Rebound. He does not believe that he has a severe cannabis disorder. A physician's assistant notes by Jane Cohn for Meeks states "Inability to abstain from substance use w/o structure, support and supervision, lacks coping skills, poor insight impulsive behavior, situational depression and anxiety." Meeks does not know why Cohn wrote this and he disagrees with it. A concurrent review form dated October 25, 2017, lists no current withdrawal or post-acute withdrawal symptoms. It states that he has had continued periods of increased anxiety and depression.

A psychoeducational group note dated November 22, 2017, for Meeks states that client shared how his substance use can block his thought patterns which keep him from reaching his goals. A physician's assistant note of Jane Cohn dated October 27, 2017, states "pt presented with paperwork for disability c/o white spots on his skin." It also stated an inability to abstain from substance abuse. Meeks states that he never presented disability paperwork or had white spots on his skin. Meeks signed the initial treatment plans at Rebound. He states that he only met with a physician assistant once or twice.

Rebound was beneficial to Meeks. He was there for forty-eight days. The Rebound discharge plan states that he will be linked with outpatient mental health and substance-abuse treatment providers. Under current risk, it states that he has the desire to make the necessary changes to maintain a drug-free lifestyle. He does not know if the discharge plan was individualized to him. He remains in touch with his counselor from Rebound. Meeks states that he has not used drugs since May 2015. Meeks does not believe that he used illegal drugs since May 2015. Meeks states that he did not abuse any substances as a firefighter.

Kevin Freeman

Kevin Freeman (Freeman) has been a friend of Meeks for over thirty years. He has never seen Meeks ingest or use marijuana. On September 2, 2017, he had a house-warming party and invited Meeks. Freeman's wife made brownies and the girlfriend of Enri Rich, a friend of Freeman and Meeks, also made brownies. Meeks was unusually quiet at the party. Later, Meeks told Freeman that he had tested positive for marijuana and the only places he had been was home, his father's home, and Freeman's house-warming party. Rich told Freeman that Rich's girlfriend told him that she had put marijuana in the brownies. Freeman was not aware of this. Freeman had brownies and wine that night but does not know if the wine or the brownies were affecting him.

Freeman does not use marijuana. He was not aware of Meeks being arrested for possession of marijuana. Meeks told Freeman that he had been pulled over by the police. Freeman saw brownies on Meeks plate but did not actually see Meeks eat a brownie.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant and his witness, the resolution of the charges against Meeks requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not

contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-522 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Richardson, Walker, Malave, Cook, Krucht, Stuart, and Freeman to be credible. Richardson, Malave, and Cook's testimony was clear and concise. Walker's testimony was also clear. Although appellant argued that Walker did not state that Meeks was tested twice at Concentra, he did not state how many times Meeks was tested at Concentra on September 20, 2017, but he did state that he receives non-negative results from Concentra. Cook testified in detail regarding the procedures that are taken when administering a drug test. She admitted that the phone numbers for Meeks on the second test results did not match the phone numbers for Meeks on the first test results. Cook was not the person who received the phone numbers. Krucht clearly testified regarding the test results that he reviewed, and the procedures employed when someone tests positive. Stuart testimony of her life with Meeks was believable. Freeman was clear and concise; however, his testimony regarding marijuana in the brownies was told to him by a friend, Rich, whose girlfriend allegedly told Rich she put marijuana in the brownies. There is no direct testimony or evidence that Meeks ate Brownies with Marijuana or that marijuana was baked into brownies.

I did not find Reider to be credible. He stated that Meeks was in Rebound for anxiety and depression, but documents from Rebound states he was also there for severe cannabis use disorder. He stated that he did not know Jane Cohn, who was a Physician Assistant at Rebound. He also testified that he was not required to review Meeks medical records at Rebound. However, he later testified that he was required to review Meeks medical records at Rebound.

I did not find Meeks to be credible. He testified that he did not use marijuana to the best of his knowledge in September 2017. However, within two weeks of failing the drug test, he entered the Rebound. He stated that he did not have a serious cannabis problem but Rebound lists one of his master problems as severe cannabis use disorder.

There are references to substance abuse in Meeks medical records from Rebound. In addition, Meeks alleged that he took his father's prescription cancer medication which is an abuse of prescription medication. He did not know the name of his father's cancer medication.

Having reviewed the testimony and evidence and credibility of the witnesses, I make the following **FINDINGS of FACT**.

Meeks was employed by NFD since 2007. He was arrested for possession of marijuana on in May 2015. On June 19, 2015, he signed a Conditional Letter of Employment, the terms of which had been negotiated. Paragraph seven of the Conditional Letter of Employment states:

You will refrain from the use of illegal drugs, and any mood-altering substance and the abuse of alcohol for the duration of your career with the City. Further you will refrain from the abuse of any prescription pharmaceuticals for the duration of your career.

Paragraph Eleven of the Conditional letter of Employment states:

You will continue to perform your job to satisfactory levels expected of all city employees. For a period of three years after the date executed on this Letter of Conditional Employment, you will submit to unannounced mandatory drug testing when ordered to do so. Failure to submit to testing or testing that results in positive reading will result in termination.

On August 27, 2017, Meeks was scheduled to work. He did not appear for work. NFD attempted to contact him. He did not answer the phone. He returned to work on September 4, 2017. At that time, he wrote to the NFD chief requesting that he be allowed to use two vacation days to cover the day he missed.

Since Meeks did not appear for work on August 27, 2017, Malave told Richardson to have Meeks drug tested. Richardson scheduled Meeks to be drug tested at Concentra on September 20, 2017. Captain Walker, who was a detective at that time

printed out a profile of Meeks, which included his picture and picked Meeks up from the fire station. Walker told Meeks that he was going to be drug tested. Detective Cassis accompanied Walker and Meeks to Concentra.

Meeks did not have identification when they reached Concentra. Walker vouched for Meeks identity. They signed documents and waited. Walker and Cassis sat across from Meeks while they waited. Walker escorted Meeks to the technician.

Cook had Meeks verify his information in the computer. She told him to wash his hands with soap and water and given a sealed container. She opened the container and Meeks was given four minutes to give a urine sample. Cook split the sample into a thirty-cc sample and a fifteen-cc sample. The samples were put into separate vials and sealed in Meeks presence. Paperwork was filled out stating that the temperature and the quality of the sample were not tampered with. Meeks was given a copy of the chain of custody form. The result of this test was determined to be positive unable to contact donor by the lab. The identification number for this specimen was 30704345. Walker requested a rapid test be done, which Cook did. The procedure for this test was the same as the non-rapid test. The specimen is put in a sealed cup, dated and initialed. It is then put into an e-reader that tests the sample. The result of the test was non-negative. It was sent to Qwest labs. The identification number for this specimen was 92898645.

Meeks disputes that there was a second drug test on September 20, 2017. He stated that his specimen was tested at Concentra on September 20, 2017. He also says that the signature on the custody control form number 92898645 does not look like his signature and the phone numbers are not correct. He states the signature on custody control form 30704345 is his signature and the phone numbers are correct. Both signatures were done on a computer screen. Although the signatures do not look identical that could be accounted for by the fact that they were signed on a screen.

Dr. Krucht is a certified medical review officer. He tested specimen 92898645, the results were positive. His confirmation test was also positive for marijuana. Krucht did not review the other test done by Concentra because it was not sent to him. The

final result was positive for marijuana. E-Screen is a third-party administrator for Concentra. Concentra sends its results to Qwest labs and E-Screen houses the results. E-Screen sent the results to Krucht. Dr. Dew spoke to Meeks about the test results, Meeks was informed that he could have the sample retested in three days. Meeks was told the procedure for retesting the specimen but did not request that the specimen be retested.

On September 27, 2017, Meeks was sent a preliminary notice of disciplinary action charging him with incompetence, inefficiency or failure to perform duties, neglect of duty, and other sufficient cause. On October 7, 2017, Meeks entered Rebound. Conflicting letters from Rebound were sent NFD. Letters from Mark Porter, case manager at Rebound states that Meeks was at Rebound for marijuana issues, stressful situations, and substance-abuse recovery. A letter from Mark Reider primary therapist Meeks was sent in support of Meeks continued ability to demonstrate necessary behavioral changes to cope with anxiety, depression, and prevention of relapse.

At Rebound Meeks had sober supports and a 12-step involvement. A concurrent Review Form from Rebound dated October 25, 2017, states that "Client has not tested positive for any substances since initial UDS performed on admission." Meeks tested positive for cannabinoid at Rebound on October 1, 2017. A master problem listed for Meeks at Rebound included severe cannabis use disorder. A physician's assistant notes for Meeks, by Jane Cohn, dated October 18, 2017, states, "DOC cannabis depression is slowly subsiding. Inability to abstain from substance use w/o structure, support and supervision, lacks coping skills, poor insight impulsive behavior, situational depression and anxiety." Another physician's assistant note of Cohn dated October 27, 2017, states "patient presented with disability paperwork for white spots on his skin." Meeks states that he never had white spots on his skin or presented disability papers at Rebound. The Rebound discharge planning for Meeks dated November 16, 2017, states, "Client will be linked with outpatient mental health and substance abuse treatment providers."

The testimony of Stuart, Meeks, and Freeman regarding brownies laced with marijuana is not supported by any facts. Meeks, Freeman and Stuart did not speak to

the person who allegedly laced the brownies with marijuana. Freeman spoke to Rich who spoke to the woman who allegedly laced the brownies. Rich and the person who allegedly laced the brownies never testified. There is hearsay from Rich to Freeman of this allegation. There was no testimony that Meeks ate the alleged laced brownies. Meeks stated that he does not know if he ate the alleged laced brownies and Freeman testified that he saw brownies on Meeks plate, but Freeman's wife also made brownies for the house warming that were not laced with marijuana.

Meeks testified that he may have tested positive because he took some of his father's appetite enhancer medication which might have been Marinol, which Dr. Krucht testified is a medication that would give a positive result for marijuana. Meeks did not know the name of his father's medication and it was prescribed to Meeks. There is no evidence that his father's medication was Marinol.

Meeks had a limited purpose hearing where he was represented by the union on October 5, 2017, which resulted in a FNDA issued to Meeks on November 17, 2017. A FNDA was issued to Meeks on August 17, 2018, after the administrative hearing which was final. There were several scheduling delays between the limited purpose hearing in November 2017 and the administrative hearing in August 2018. The administrative hearing was originally scheduled thirteen days after the limited purpose hearing, the union asked for an adjournment. It was scheduled several other times all but one of the dates were adjourned by Meeks representatives.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the, incompetency, inefficiency or failure to perform duties and neglect of duty and, the charge of other sufficient cause are sustained. The NFD rule and regulations violations of Article 6 neglect of duty, Article 17, absence from quarters or assignments, Article 23, Conduct of members, Article 28, use of intoxicating beverages and/or controlled substances, Article 58, Commission or omission of acts, Article 59, Official inefficiency or incompetence and Article 60, chronic inefficiency or incompetence are hereby sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties."

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"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). "In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a County treasurer who couldn't balance the books, after the auditors tried three times to show him how).

In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the

Klusaritz panel stated that “[t]he [MSB’s] application of progressive discipline in this context is misplaced and contrary to the public interest.” The court determined that Klusaritz’s prior record is “of no moment” because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.

[Herrmann, 192 N.J. at 35-36 (citations omitted).]

There is no definition in the administrative code of the term “inefficiency,” and therefore, it has been left to interpretation. In general, incompetence, inefficiency, or failure to perform duties exists where the employee’s conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep’t of Agric., 1 N.J.A.R. 315 (1980).

Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term “neglect” connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). “Duty” signifies conformance to “the legal standard of reasonable conduct in the light of the apparent risk.” Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term “neglect of duty” is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep’t of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep’t of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

In this matter, Meeks had previously been arrested for possession of marijuana in May 2015. As a result of that he signed a Conditional Letter of Employment, the terms of which included refraining from the use of illegal drugs for the duration of his career and refrain from the abuse of any prescription pharmaceuticals for the duration of his career. September 20, 2017, Meeks tested positive for marijuana. This violated the Conditional Letter of Employment that Meeks signed two years prior. Meeks testimony

that he allegedly took his father's prescription medication, which he does not know the name of, is an abuse of prescription pharmaceuticals.

Meeks entered Rebound within two weeks of testing positive for marijuana. Although appellant and Reider stated that he was not in Rebound for substance abuse, the master problem list for Meeks at Rebound lists severe cannabis use disorder first. A physician's assistant notes by Jane Cohn dated October 18, 2017, states "DOC cannabis depression is slowly subsiding. Inability to abstain from substance use w/o structure, support and supervision, lacks coping skills, poor insight impulsive behavior, situational depression and anxiety." The Rebound discharge planning for Meeks dated November 16, 2017, states "Client will be linked with outpatient mental health and substance abuse treatment providers."

Meeks was scheduled to appear for work on August 27, 2017, and did not appear. He could not be reached by phone when respondent tried to contact him. Meeks was aware that he signed an agreement stating that he must refrain from illegal drugs and abusing prescription drugs, yet he tested positive for marijuana.

When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, 38 N.J. 500. 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, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4. 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. 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 evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007) (citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense)); see also Herrmann, 192 N.J. at 33 (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).

In this matter, Meeks had previously tested positive for marijuana use. He signed a Conditional Letter of Employment which stated if he tested positive for illegal drugs he would be terminated. Meeks tested positive for marijuana a second time within three years of signing the Conditional Letter of Employment.

I CONCLUDE that the discipline of removal is appropriate in this matter.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of the City of Newark Fire Department that Grayland Meeks be removed from employment is **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.

1-8-19

DATE


KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Jan 8, 2019

Date Mailed to Parties:

ljb

APPENDIX

WITNESSES:

For Appellant:

Mark Reider
Katia Stuart
Kevin Freeman
Grayland Meeks

For Respondent:

Scott Richardson
Jeray Walker
Raul Malave
Donna Cook
Dr. Steven Krucht

EXHIBITS:

Court Exhibit:

C-1 Jayde Laboratory Results for Meeks dated October 11, 2017

For Appellant:

- A Letter of Jayson Williams Founder of Rebound dated October 11, 2018
- B Letter of Mark Reider Primary Therapist at Rebound dated December 13, 2017
- C Letter of Sean Nasif, Rebound CEO dated December 13, 2017
- A-1 Newark Personnel Summary Report
- A-2 Concentra Medical Center Service dated September 20, 2017
- A-3 Email from Deputy Chief Richard Zieser to Rufus Jackson dated September 20, 2017

- A-4 Administrative Submission dated September 27, 2017
- A-5 Preliminary Notice of Disciplinary Action dated September 25, 2017
- A-6 Memo from Meeks to Deputy Chief Zieser
- A-7 Preliminary Notice of Disciplinary Action dated September 25, 2017, Request for Hearing dated September 28, 2017, and Notice of Limited Purpose Hearing dated October 4, 2017
- A-8 Final Notice of Disciplinary Hearing dated November 13, 2017
- A-9 Final Notice of Disciplinary Hearing dated August 17, 2018
- A-10 Emails regarding scheduling
- A-11 Medical Records from Rebound Institute for Meeks

For Respondent:

- R-1 Prior Disciplinary Record of Meeks including Conditional Letter of Employment
- R-2 Memo from Chief Burke to Chief Jackson dated August 27, 2017, regarding Meeks Absenteeism
- R-3 Memo from Meeks to Deputy Chief Zieser dated September 4, 2017
- R-4 Administrative Submission from Detective Jeray Walker to Assistant Public Safety Director Raul Malave dated September 27, 2017
- R-5 Concentra Drug Screening Documents dated September 20, 2017, to September 25, 2017
- R-6 Preliminary Notice of Disciplinary Action dated September 25, 2017
- R-7 Final Notice of Disciplinary Hearing dated November 13, 2017
- R-8 Correspondence from Rebound Institute from October 12, 2017, to December 13, 2017
- R-9 Final Notice of Disciplinary Hearing dated August 17, 2018

Testimony of Mark Reider of December 17, 2018

The supplemental testimony of Mark Reider was inadvertently not recorded during the December 17, 2018 hearing. I have attached a written appendix with the supplemental testimony of Reider which comes from my notes of his testimony.

Reider testified that he was not aware of the results of Meeks drug test done for Rebound on or about October 10, 2017. THC is the active ingredient in marijuana. Cannabinoid is an oil that can be purchased online. A positive cannabinoid test does not equal a positive test for marijuana. THC is the ingredient in marijuana that causes people to get high. If Meeks had used marijuana he would have tested positive for THC. Marijuana can stay in the system for sixty to ninety days. Reider does not know how much cannabinoid must be in a person's system for them to test positive for cannabinoid.

Meeks never told Reider that he used cannabinoid oil and Reider never asked. Meeks told Reider that he tested positive months before coming to Rebound. Meeks said that he smoked marijuana before coming to Rebound but did not say when that was.

Reider did not review Meeks's medical records other than those from Rebound. A group note from Rebound dated October 24, 2017, states that, "client shared his thoughts on avoiding relapse." Reider is not familiar with Jane Cohn. He is familiar with Jessica Boff. He is not aware of any statements made by Meeks to Franga. When Reider writes group notes, they are general notes of the group.

Reider testified that he was not required to look at all of Meeks's medicals. He then testified that the Program Director, Meeks's primary therapist, and Reider were required to look at Meeks's medical records.