



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of William Shorter, Department of Corrections

Reconsideration & Stay

CSC Docket No. 2019-81

ISSUED: February 8, 2019 (EG)

The Department of Corrections (DOC), represented by Jessica M. Saxon, Deputy Attorney General, petitions the Civil Service Commission (Commission) for reconsideration and a stay of the attached administrative decision, rendered on June 6, 2018, in which the Commission modified William Shorter's removal to a 120 calendar day suspension and granted back pay, benefits and seniority.

By way of background, the appointing authority removed Shorter from his position of Correction Sergeant<sup>1</sup> on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that Shorter violated departmental policy by taking cannabidiol (CBD) oil and neglecting to indicate this on the medication sheet prior to a random urine test and that his urine sample tested positive for Carboxy-THC. Upon Shorter's appeal, the matter was transmitted to the OAL for a hearing as a contested case. The ALJ set forth in her initial decision that Shorter had been subjected to a random drug test and that he had been required to complete a Drug Testing Medication Information sheet indicating the names of all prescription and nonprescription medication he had taken in the past 30 days, the date last taken, and the prescribing physician. The results of the drug test indicated a positive result for cannabinoids (THC) that was not related to any of the medications listed on the medication form. The State Toxicologist testified that Shorter's sample indicated THC carboxy levels of 23 nanograms per milliliter which was over the 15 nanograms per milliliter cutoff for a positive sample. When notified of the positive result, Shorter provided investigators

<sup>1</sup> Pursuant to P.L.2017, c.293, the title of Correction Sergeant has been retitled Correctional Police Sergeant.

with a handwritten note on a prescription pad dated October 20, 2107, from Russel Little, APN, indicating Shorter was under his care and was prescribed CBD oil. The ALJ found the testimony of Shorter, that he forgot to list a cannabis product he took as recently as the morning of the drug test, not credible. The ALJ stated that the appointing authority had a zero tolerance drug use policy and that Shorter failed his random drug test by testing positive for THC. With regard to the penalty, the ALJ found that DOC's drug policy provided that the only option for a violation of the drug policy was removal. Therefore, the ALJ concluded that removal was the appropriate penalty. Upon its *de novo* review of the record, the Commission agreed with the ALJ's determination regarding the charges but modified the removal to a 120 calendar day suspension. In determining the penalty, the Commission noted that Shorter had no prior major disciplinary actions since his employment began in May 2001 and his record indicated that he received one minor disciplinary action. Further, the Commission found that while it was clear Shorter tested positive for small amounts of THC, the record also indicated that the CBD oil, for which the appellant had a valid prescription, likely caused the positive result. Moreover, while Shorter should have indicated his CBD oil use on the medication form, under the circumstances his failure to do so should not result in his termination. Therefore, the Commission imposed a 120 calendar day suspension.

In the instant matter, DOC argues that the Commission made a clear material error by modifying the penalty of removal it had imposed on Shorter. It asserts that the Commission based its decision on the mistaken and factually incorrect reason that Shorter had a valid prescription for CBD oil. It contends that during cross examination, Little indicated that it was a note and not a prescription that he had written Shorter. Additionally, it argues that the only legal way to obtain marijuana is via a card issued by the State, which Shorter did not possess. Further, it contends that based on its procedures and on the severity of Shorter's actions in testing positive for an illegal drug, removal was the proper penalty. Moreover, the DOC requests a stay in restoring Shorter to his position. It contends that it is likely to prevail on the merits due to the clear material error made by the Commission in the prior decision. It also asserts that it will suffer immediate and irreparable harm to the security of the correctional instruction and the public's trust of DOC should it be required to reinstate Shorter. DOC asserts that Shorter will be minimally affected upon the granting of a stay and that should he ultimately prevail, he would receive all compensation due to him. Finally, it argues that the public interest would be met by granting the stay as it would be holding correction officers to the high standard of conduct the public expects.

In reply, Shorter, represented by Frank Crivelli, Esq., argues that the Commission's decision was proper, and that no clear material error is present. He asserts that he was directed by his healthcare provider to take CBD oil for his back pain in lieu of a narcotic and/or opiate medication. Shorter adds that the CBD oil he consumed is a legal, over-the-counter medication that was purchased at his

physician's healthcare facility. Thus, a prescription was not necessary to purchase the legal over-the-counter medication. Additionally, Shorter argues that there is a plethora of evidence in the record that he was taking CBD oil before the random urinalysis and that the CBD oil was likely to have caused the positive drug result. Further, he contends that DOC has not met the standard for a stay. In this regard, he asserts that DOC is unlikely to prevail on the merits. Additionally, Shorter asserts that the DOC will not suffer any immediate harm by returning him to work and that his matter does not interfere with DOC's interest in ensuring a drug free environment as he did not take any drugs illegally. Moreover, he is suffering substantial injury as he has not been returned to work and is suffering economically. Shorter also states that the public interest would be served best if DOC complied with an order from the Commission. Finally, Shorter argues that the Commission's prior decision must be enforced thereby mandating his reinstatement immediately and providing him with the back pay and benefits he is owed.

In reply, DOC argues that it is disingenuous for Shorter to call CBD oil a legal medication as it caused him to fail his drug test.

### CONCLUSION

*N.J.A.C.* 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

Further, *N.J.A.C.* 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for a stay:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

In the instant matter, the appointing authority argues that the Commission erred in modifying Shorter's removal to a 120 calendar day suspension. It contends that the Commission based its decision on the mistaken and factually incorrect reason that Shorter had a valid prescription for CBD oil. It asserts that Little indicated that it was a note and not a prescription that he had written Shorter. Shorter asserts that he was directed by his healthcare provider to take CBD oil and that a prescription was not necessary to purchase a legal over-the-counter medication. The Commission agrees with Shorter. It is clear in the record that Shorter was directed by his healthcare provider to take CBD oil. Whether it was an

actual "prescription" is not the seminal fact in this matter, as a prescription is not necessary for a medication that can be obtained over-the-counter. The important fact was that Shorter was directed by his health care official to take this type of medication.

DOC also argues that the Commission erred in its determination of the proper penalty. It contends that based on its procedures, zero-tolerance drug policy and the severity of Shorter's actions in testing positive for an illegal drug, removal was the proper penalty. However, the Commission considered these issues when determining the proper penalty in its prior decision and determined that 120 calendar day suspension was the appropriate penalty. DOC has not presented any new evidence or arguments which would cause the Commission to consider a different penalty at this time.

Accordingly, based on the foregoing, DOC has not presented any persuasive evidence or arguments that the Commission erred in its prior decision and its request for reconsideration is denied. Further, as the Commission has denied the request for reconsideration on the merits, DOC's request for a stay is also denied.

Finally, Shorter has requested enforcement of the Commission's prior decision, which includes his reinstatement and back pay and benefits. In this regard, as DOC's requests have been denied, it is required to immediately reinstate the appellant to his permanent position. Further, as indicated in 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.

### ORDER

Therefore, it is ordered that the appointing authority's requests for reconsideration and a stay be denied. It is further ordered that the appointing authority immediately reinstate William Shorter to his position of Correctional Police Sergeant and provide him with back pay, benefits and seniority as indicated in the Commission's previous decision.

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

*Deirdre L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
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Christopher S. Myers  
Director  
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Attachment

c: Jessica M. Saxon, DAG  
Frank Crivelli, Esq.  
William Shorter  
Kelly Glenn  
Records Center



## STATE OF NEW JERSEY

DECISION OF THE  
CIVIL SERVICE COMMISSION

In the Matter of William Shorter,  
Department of Corrections

CSC Docket No. 2018-1384  
OAL Docket No. CSR 17546-17

ISSUED: June 22, 2018 (EG)

The appeal of William Shorter, a Correction Sergeant<sup>1</sup> with South Woods State Prison, Department of Corrections, of his removal effective October 3, 2017, on charges, was heard by Administrative Law Judge Catherine A. Tuohy (ALJ), who rendered her initial decision on May 8, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 6, 2018, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a 120-calendar day suspension.

## DISCUSSION

The appellant was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant violated departmental policy by taking cannabidiol oil and neglecting to indicate this on the medication sheet prior to a random urine test and that his urine sample tested positive for Carboxy-THC. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

<sup>1</sup> Pursuant to P.L.2017, c.293, the title of Correction Sergeant has been retitled to Correctional Police Sergeant.

The ALJ set forth in her initial decision that appointing authority witnesses testified that on September 12, 2017, the appellant was subjected to a random drug test in which he was required to submit a urine sample. As part of the testing procedure the appellant was required to complete a Drug Testing Medication Information sheet indicating the names of all prescription and nonprescription medication he had taken in the past thirty days, the date last taken, and the prescribing physician. Completion of the form was not witnessed by the monitor but is placed in a separate envelope and sent to the lab with the urine sample. A second sample was maintained frozen in case of a positive result to allow for the appellant to have an independent test done on the urine. The results of the test indicated a positive result for cannabinoids (THC) that was not related to any of the medications listed on the medication form. The State Toxicologist testified that the appellant's sample indicated THC carboxy levels of 23 nanograms per milliliter which was over the 15 nanograms per milliliter cutoff for a positive sample. The State Toxicologist also testified that the source of the THC was not clear and that there was no way knowing or identifying the source of the THC. Upon the appellant being notified of the positive result he provided investigators with a handwritten note on a prescription pad dated October 20, 2107, from Russel Little, APN, indicating the appellant was under his care and was prescribed CBD oil.

The appellant testified that he failed to list the CBD oil he had been taking for just a few days on the medication form. He indicated that he was concentrating on listing all of the prescription medication he had been on for a while and simply forgot to list the CBD oil. The appellant provided a copy of a receipt indicating that he had purchased the CBD oil on September 7, 2017. He testified that he had taken 15 droplets under his tongue twice a day as directed by his physician on September 8, 9, 10, 11 and again on he morning of the urinalysis, September 12, 2017. The appellant stated that he was taking the CBD oil due to debilitating pain caused by degenerative arthritis of his spine. Additionally, the appellant testified that he was not aware that the website for the CBD oil he was taking indicates that their oil contains 0.3% THC. The appellant did state that he was aware that THC was a prohibited substance.

Dr. Gary Lage, who testified on behalf of the appellant, was accepted as an expert in the field of toxicology. Dr. Lage indicated that in his professional opinion, the low level of THC present in the appellant's sample was consistent with the use of CBD oil rather than the use of marijuana. Dr. Lage also testified that the website for the CBD oil the appellant used indicated that it was produced from hemp, which would contain small quantities of THC.

The ALJ found the testimony of the appellant, that he forgot to list a cannabis product he took as recently as the morning of the drug test, not credible. The ALJ also found the testimony of the State Toxicologist more persuasive than

that of Dr. Lage. She stated that the appointing authority has a zero tolerance drug use policy. Additionally, the ALJ found that the appellant failed his random drug test by testing positive for THC. She indicated that as a Correction Sergeant, the appellant represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is conduct which adversely affects the morale and efficiency of a governmental unit and has a tendency to destroy public respect. Therefore, that ALJ found that the appointing authority met its burden of proof in establishing conduct unbecoming, other sufficient cause, and violation of policies. Further, the ALJ found that the appellant's argument that his substantive due process rights were violated because the State lab did not advise his testing lab, Relievus, of what were the proper parameters for the testing of the frozen sample was without merit. The ALJ determined that Relievus lab did not check with the State lab prior to running its test and the appellant's own expert witness, Dr. Lage, concurred with the State toxicology lab report that the THC was present in the appellant's urine sample. With regard to the penalty, the ALJ found that the appointing authority's drug policy provided that the only option for a violation of the drug policy was removal. Therefore, the ALJ concluded that removal was the appropriate penalty.

In his exceptions, the appellant argues, in pertinent part, that the evidence presented at OAL indicated that the presence of THC in his system was due to the prescribed CBD oil and not an illegal or controlled substance. He argues that the State Toxicologist and his own expert witness testified that hemp, an ingredient in the CBD oil he took, does contain small amounts of THC. Further, the appellant relies on Dr. Lage's testimony that in his professional opinion, the low levels of THC present in the appellant's sample was consistent with the use of CBD oil rather than the use of marijuana. Moreover, the appellant argues that he was not terminated for not disclosing the CBD oil on the medication sheet but rather for failing a drug test. The appellant also argues that his due process rights were violated because the State lab did not advise Relievus lab of what were the proper parameters for the testing of the frozen sample. In this regard it argues that the failure of the appointing authority to provide the testing parameters was contrary to administrative precedent and the Attorney General guidelines regarding the testing of a second urine sample by an outside agency.

In its reply to the exceptions, the appointing authority argues, in pertinent part, that it does not need to prove the source of the THC that resulted in a positive drug result. It argues that it has a zero tolerance policy with regard to positive drug tests. In addition, it contends that it followed its policies and procedures with regard to the handling of a second or frozen sample, which does not indicate that it is responsible for ensuring the appellant's laboratory of choice uses the proper cut off level. Further, it asserts that it is exempt from and not subject to the Attorney General's Law Enforcement Drug Testing Policy.



Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's recommendation to uphold the removal. Rather, the Commission modifies the removal to a 120-calendar day suspension. In his exceptions, the appellant argues that the evidence presented at OAL indicated that the presence of THC in his system was due to the prescribed CBD oil and not an illegal or controlled substance. The appointing authority responds that it does not need to prove the source of the THC that resulted in a positive drug result. The Commission agrees. The fact that the appellant tested positive for THC is sufficient to uphold the charges against him. Given the myriad of ways an individual could end up with a drug in their system, it would be unreasonable to require an appointing authority to pin point the exact cause which led to a positive drug result. Further, while the appellant contends that he was terminated for not disclosing the CBD oil on the medication sheet, such a listing prior to the testing would have alerted the appointing authority to a prescribed drug he was taking which could result in a positive drug test.

Moreover, the Commission agrees with the ALJ's credibility determination regarding the appellant's failure to list the CBD oil on the medication sheet. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In the instant matter the ALJ clearly stated that she did not find the appellant's reason for not including the CBD oil on the medication sheet credible. The Commission agrees with this finding. It is not credible that the appellant would forget to indicate a drug that he just took the morning of the drug screening and that required a more elaborate method of ingestion, 15 drops under the tongue, than merely taking a pill. Therefore, based on the foregoing the Commission agrees with the ALJ's determination that the appellant tested positive for THC and that the appointing authority met its burden of proof with regard to the charges.

With regard to the appellant's contention that his due process rights were violated because neither the State lab nor the appointing authority advised

Relievus lab of the proper parameters for the testing of the frozen sample, the Commission agrees with the ALJ's findings. The ALJ concluded that Relievus lab did not check with the State lab prior to running its test and Dr. Lage concurred with the State toxicology lab report that the THC was present in the appellant's urine sample.

In determining the proper penalty, the Commission's review is *de novo* and it is not bound by an appointing authority's penalty schedule. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission 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). In the instant matter, the appellant had no prior major disciplinary actions since his employment began in May 2001 and his record indicates that he received one minor disciplinary action, a written reprimand in 2003. Moreover, given the actual incident in question, the Commission does not find removal to be appropriate under these circumstances. In this regard, while it is clear the appellant tested positive for small amounts of THC, the record also indicates that the CBD oil, for which the appellant had a valid prescription, likely caused the positive result. Further, while the appellant should have indicated his CBD oil use on the medication form, in the present case his failure to do so should not result in his termination. Accordingly, the Commission imposes a 120-calendar day suspension, which will serve as an indication that any further infractions committed by the appellant will potentially subject him to removal from employment. In addition, the appellant is advised that he must properly and fully complete any future medication forms given as part of a drug screening.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the 120-calendar day suspension up to his date of reinstatement. 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*, 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 removing the appellant was not justified. Therefore, the Commission modifies the removal to a 120-calendar day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 120-calendar day suspension through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 6TH DAY OF JUNE, 2018



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

**Inquiries  
and  
Correspondence**

**Christopher S. Myers  
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**Attachment**



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSR 17546-17

AGENCY DKT. NO. N/A

2018-1384

**IN THE MATTER OF WILLIAM SHORTER,  
SOUTH WOODS STATE PRISON.**

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**Frank M. Crivelli, Esq.,** for appellant (Crivelli and Barbatì, LLC, attorneys)

**Jessica M. Saxon, Deputy Attorney General,** for respondent (Gurbir S. Grewal,  
Attorney General of New Jersey, attorney)

Record Closed: April 13, 2018

Decided: May 8, 2018

**BEFORE CATHERINE A. TUOHY, ALJ:**

**STATEMENT OF THE CASE**

Appellant, William Shorter, a Corrections Sergeant at South Woods State Prison (respondent) appeals his removal, effective November 7, 2017, after testing positive for tetrahydrocannabinol (THC) following a random drug urine screening on September 12, 2017. Appellant was charged with violations of N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12, Other sufficient cause; Human Resources Bulletin (HRB) 84-17, C-11, Conduct unbecoming a public employee; HRB 84-17, C-2, Reporting for duty while under the influence of intoxicating liquors or drugs; HRB 84-17 C-30, Use, possession, or sale of any controlled dangerous substance

(custody); HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. The appellant denies the allegations and states he was taking cannabinoid (CBD) oil for back pain on the advice of his healthcare provider.

### PROCEDURAL HISTORY

On October 20, 2017 respondent issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against the appellant (J-1). Appellant waived a departmental hearing. On November 6, 2017 the respondent issued a Final Notice of Disciplinary Action sustaining the charges in the Preliminary Notice and removing appellant from employment, effective November 7, 2017 (J-2). Appellant filed a direct filing removal appeal on November 13, 2017 to the Office of Administrative Law (OAL) where it was filed on November 21, 2017 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearing was held on March 23, 26 and 27, 2018. The record remained open to allow the parties to submit post-hearing submissions and the record closed on April 13, 2018.

### FACTUAL DISCUSSIONS AND FINDINGS

**Dwayne Grade** testified on behalf of the respondent. He has been employed by the New Jersey State Department of Corrections (DOC) for twenty-two years and has been the Chief Investigator of the Special Investigations Unit since July 2017. As Chief Investigator, he oversees the criminal and administrative investigations for the DOC. He is familiar with the drug screening process and he has undergone several random drug screenings throughout his career. There is a zero-tolerance policy for drug use in the Department and all sworn law enforcement personnel are subject to random drug testing. The first workday of every month the special investigations unit receives from OIT a computer printout list of those random individuals selected by a computer algorithm to be drug tested. All of the union representatives are made aware of the random urine selection process (R-29). William Shorter was on the Master List for Donor Notifications for the period September 1, 2017 to September 30, 2017.

Law Enforcement Personnel Rules and Regulations, Article IV, Section 1 states

No officer shall

- a. Report to duty under the influence of alcohol.
- b. Use, possess or sell any illegal drug or controlled dangerous substance, whether on or off duty,
- c. Frequent any business, private house or establishment where illegal drugs or controlled dangerous substances may be used, purchased or sold with the exception of any appropriate medical establishment for the purpose of receiving appropriate medical care. (R-34)

Section 2 provides that an officer shall report the use, possession, or sale of any illegal drug or controlled dangerous substance by another officer, whether on or off duty. The report shall be made as soon as possible to the institutional Administrator or his/her designee. (R-34)

All new employees acknowledge that they receive the various policies. William Shorter acknowledged that he received the Rules and Regulations when he was hired (R-25).

The Department of Corrections Human Resources Bulletin 99-01, Amended November 6, 2009 sets forth the Drug Testing Policy (R-22).

Section IV, paragraph 3 provides that "Prior to the submission of a urine specimen, all individuals shall complete a medical questionnaire which clearly describes all medications, both prescription and over the counter (non-prescription), ingested in the past thirty days (R-22, page 5).

Section VIII entitled "Consequences of a Positive Result"

- A. Any covered person who tests positive for illegal drug use shall be:
  1. Suspended immediately from all duties and subjected to Loudermill and Departmental disciplinary procedures;
  2. Processed for termination from service;
  3. Reported by Internal Affairs to the Central Drug Registry maintained by the Division of State Police, and
  4. Barred permanently from future law enforcement in New Jersey. (R-22, page 8)

Sgt. Shorter acknowledged that he received Human Resources Bulletin (HRB) 99-01 (Drug Testing Policy) dated February 26, 1999 on August 22, 2001 (R-27, page 091).

Chief Grade is familiar with Human Resources Bulletin 84-17 as amended and the Table of Offenses and Penalties (R-23). Section C.2 Personal Conduct – Selling or possession of alcoholic beverages or controlled dangerous substances while on State

property and/or duty. The penalty for the first offense is removal. (R-23, page 072). C.11 Conduct unbecoming an employee, the first offense is a minimum of a three-day suspension to removal (R-23, page 074). C.30 Use, possession or sale of any controlled dangerous substance (custody), the first offense is removal (R-23, page 077). E.1 General Violation of a rule, regulation, policy, procedure, order or administrative decision, the first offense warrants anywhere from an official written reprimand to removal (R-23, page 082). Sgt. Shorter acknowledged receipt of this policy (R-25, page 085).

Chief Grade is familiar with Sgt. Shorter's work/disciplinary history (R-24) which was moved into evidence for purposes of progressive discipline only.

**Bryan Bonomo** testified on behalf of the respondent. He is a twenty-two -year employee of the N.J. DOC and has been employed as a Principal Investigator at South Woods State Prison since August 2017. Prior to that he was employed as a Special Investigations Division (SID) Officer since February 2001. His responsibilities as an Investigations officer is to conduct all administrative and criminal investigations for the department in the field unit that he is assigned. They maintain all the evidence at the facility and investigate all crimes that occur in the facility and monitor the staff drug testing. He has monitored hundreds if not a thousand of drug tests. When first hired as an investigator, they receive the policy as to how the drug testing should be administered and then are assigned to a senior investigator to conduct the drug testing until they are ready to administer it on their own. He himself has undergone several random drug tests in the course of his career.

The first working day of the month, the central office draws a list of random names and social security numbers of those officers to be tested that month. Central office notifies the investigator who then goes to central office to pick up the list and then goes to the facility with the list of those to be drug tested. Sgt. Shorter's name was on the Master List for Donor Notifications for September 2017 (R-17). Investigator Bonomo called the shift commander to have Sgt. Shorter report to SID and when Sgt. Shorter reported, he was advised that he had been selected to provide a random urine sample for that month. Investigator Bonomo monitored Sgt. Shorter's drug test. There is a drug testing booklet that is filled out with the individuals' name and social security number (R-11). There are



monitor instructions that are checked off outlining the procedures to be followed. Attachment A-1 is the Drug Testing Employee Notice and Acknowledgement form signed by Sgt. Shorter and witnessed by Investigator Bonomo dated September 12, 2017. It provides as follows:

"I understand that if I produce a positive test result for illegal drug use, I will be dismissed from the New Jersey Department of Corrections and from my position as a "Covered Person".

I understand that if I produce a positive test result for illegal drug use, that information will be forwarded to the Central Drug Registry maintained by the Division of State Police, Information from the registry can be made available by court order as part of a confidential investigation relating to law enforcement employment.

I understand that if I produce a positive test result for illegal drug use, I will be permanently barred from serving as a law enforcement officer in New Jersey." (R-11, page 022).

After Sgt. Shorter signed the acknowledgement, he was given the Drug Testing Medication Information sheet to fill out indicating the names of all prescription and nonprescription medication he had taken in the past thirty days, the date last taken and prescribing physician (R-11, page 025). This form is not witnessed by the monitor but is placed in a separate envelope and sent to the lab with the urine sample.

The medication form and the urine sample are the only two things that are sent to the laboratory. The Continuity of Evidence – Urine Specimen form (R-12, page 026) summarizes the procedure for the drug testing. It indicates that it was a random drug screening on September 12, 2017 of Sgt. Shorter that was ordered at 9:20 a.m. on September 12, 2017 at the South Woods State Prison facility. Sgt. Shorter gave the urine sample at 9:39 a.m. on September 12, 2017. Investigator Bonomo placed the specimen in the evidence refrigerator at 9:40 a.m.

The procedure followed is that after the medication form is filled out and the employee advises that they are ready to provide a sample, they are taken into the bathroom and wash their hands with soap and water to make sure there is nothing on their hands that could dilute the sample. There is a box of sealed urine containers, they are directed to pick a container or two if they are going to be providing a second sample to be

frozen. There are labels inside the sealed containers that the employee fills out using a number two pencil to write their social security number and the date and place back in the container away from the temperature strip, so it can be read once the sample is provided. Then they are walked into the bathroom with the containers and are directed to provide at least thirty milliliters or more in each container. They seal it up in the restroom and bring it to the monitor who verifies the social security number and the date. The temperature is checked to make sure it reads between ninety to ninety-six degrees on the temperature sticker on the side of the bottle. This is to ensure the sample was not tampered with. Mr. Shorter provided two samples simultaneously at 9:39 a.m. The last thing Investigator Bonomo did was place the sample into the freezer. Mr. Shorter also provided a second sample that was to be frozen in case of a positive result to allow for the employee to have an independent test done on the urine (R-13). The second sample is maintained in their freezer until such time as they are notified the test was negative or the employee directs that the sample be released to another lab for testing as was done in this case.

Pursuant to the directions of Sgt. Shorter, Investigator Bonomo released the frozen sample to Hamwon Seo (Jayden), a courier for Relievus, at 3:40 p.m. on October 25, 2017, after verifying the identity of the courier (R-13, page 029). A summary worksheet is prepared of the process: on September 12, 2017 at 9:41 at South Woods State Prison, a random drug test was administered to Mr. Shorter, Principal Investigator Bonomo was the monitor; there was an order to submit to the random test; the medication form was completed; an acknowledgement form was signed; the chain of evidence form was signed; the sample was obtained on September 12, 2017 at 9:39 a.m.; Sgt. Shorter provided a second sample to be frozen; water was made available to him; and the sample was sealed (R-14, page 031). Investigator Bonomo acknowledged that he received the frozen specimen provided by Sgt. Shorter on September 12, 2017 at 9:39 a.m. (R-15, page 032). The lab submission form is maintained in their office with the social security number, the test basis which is or "officer random", the date collected, that the temperature was checked, and the monitor's initials (R-16). This form is submitted to the laboratory with all of the urine samples taken around that time.

Investigator Bonomo was notified of the results that there was a positive of one of the samples that was not related to any of the medications listed on the medication form.

Sometimes there may be a positive reading related to a medication that an employee is taking. The toxicology report for Sgt. Shorter's social security number came back positive for cannabinoids (THC). The medical review officer's review indicated that the controlled substance was found and was not listed on the medication sheet (R-10).

After Sgt. Shorter was notified of the positive results, he provided the investigations unit with a handwritten note on a prescription pad dated October 20, 2017, from Russel Little, APN indicating that William Shorter was under his care and was prescribed CBD oil (R-18, page 037).

Investigator Bonomo prepared and signed an administrative investigation report summarizing this incident and consistent with his testimony (R-9).

On cross-examination Investigator Bonomo was asked what conversation he had with the lab courier when he handed the lab courier the frozen sample. He did not provide him with any information as to what levels the specimen should be tested. Investigator Bonomo just requested that the courier provide his drivers' license as identification to make sure the individual Sgt. Shorter had advised was coming to pick up the sample was the correct person. Investigator Bonomo only monitored one urine test that month and it was the one involving Sgt. Shorter. He is the supervisor and only had time to do one that month and that sample came back positive.

**Maria Jackson** has been an investigator with the special investigations unit of the DOC for two years. She has been employed by the DOC for sixteen years. She was an instructor at the DOC academy for four and a half years and a corrections officer for nine years. As an investigator they do criminal and administrative investigations and monitor urine drug tests. She has monitored approximately two hundred urine tests. The process is that they receive a master donor list of those to be tested. They then notify those staff on the list and give them the option of producing one or two samples. They fill out the paperwork including the medication sheet indicating all medications they are taking and put their social security number on it and sign and initial it. They put the white copy in the envelope and seal it and write their social security number on the outside and the date the sample is produced. They seal it up and then the monitor takes them into the bathroom

to wash their hands and instruct them on how to fill out the label. The cup is sealed in a plastic bag that is sealed. They open it up take out the white label and write their social security number and the date they produced the sample on the label. They put it back inside, go into the bathroom to produce their urine, they void and then they seal it up themselves and put it in the freezer. The monitor does not review the medication sheet. The monitors are assigned male to male, female to female.

She is familiar with William Shorter as a sergeant at South Woods state prison. She is aware that he was randomly drug screened by Investigator Bryan Bonomo. She did not play any part in the collection or storage of the urine sample. The samples are stored in the SID office in a secured closet inside of which is a secured freezer. When the donor comes with their sample it is unlocked in front of them and they place the sample on the one side that is going to the lab and the other side is for the frozen sample. Attachment E2 is part of the packet that Investigator Bonomo prepared. At the bottom of the form is Investigator Jackson's signature indicating that she took the specimen out of the freezer for it to be taken to the lab on September 13, 2017 (R-12). The booklets are stored in a file cabinet and there is also a white sealed envelope containing the donor's medical paperwork. Investigator Jackson makes sure all three items, the booklet, medical paperwork and the urine sample all match with the dates and social security numbers. Then she puts the envelopes and the urines in a box and gives it to the driver who also inspects them and then he signs the booklet at the time he is taking the samples out. R-16 is kept by the freezer and every time a urine sample is done, the social security number of the donor, the test basis or, the date of collection, and the monitor's initials are all listed on the form. This document also goes with the urine samples, booklets and envelopes and everything has to match. Once she gives it to the courier she waits for the courier to return with the paperwork showing they were delivered to the lab.

Paul Zoyac testified on behalf of the respondent. He has been employed by the DOC as a courier for ten years and his title is ITI 2. He is assigned to the institutional warehouse at South Woods State Prison. He does daily runs to Trenton and does urine runs for the staff to the Medical Examiners' office in Newark as needed, usually once a week. On September 13, 2017, he transported urine to the Medical Examiner's office. R-16 is the log of urine samples he took that day. He makes sure the number of urines match

the log. The urines are transported in a divider box and transported in a van. When he gets to the lab he signs in and gives his identification and goes to the lab on the second floor. His signature is on the log indicating he picked up the samples at the facility and delivered it to the lab (R-16).

On cross-examination Mr. Zoyac stated he signed R-16 when he received the samples at South Woods facility at approximately 8:00 a.m. The lab signs off on the form under 'received by'. The box is open and has thirty-six slots. He transported seven samples of urine that day. He delivered the box opened. He could remove urine and others could be placed in there. The box is never sealed.

On re-direct Mr. Zoyac stated that he has never removed a urine sample from the box.

**Robert Havier** testified on behalf of the respondent. Dr. Havier is the Acting Director of the state toxicology laboratory in Newark, N.J. He has been employed by the state for thirty-nine years as a forensic toxicologist. As the acting director, he sets the goals for the laboratory and specifies the methods for analysis, certifies data and finalizes reports for law enforcement drug testing. He has a B.S. degree in chemistry from Long Island University, an M.S. from Adelphi University in organic chemistry and biochemistry, and a Ph.D. from the State University of New York at Buffalo in Biochemistry with a minor in organic and medicinal chemistry (R-31). Forensic toxicology is an interdisciplinary field of science that involves analytical chemistry, pharmacology and toxicology towards the analysis and interpretation of drugs in a legal setting. He has been conducting drug tests for thirty-nine years. There are two sections in the lab, the post-mortem and law enforcement drug testing. Seventeen thousand tests are done a year for the law enforcement drug testing, approximately fourteen hundred a month just from the urine drug testing. Of those seventeen thousand tests, only about two percent or less are positive for drugs. He has qualified as an expert witness in approximately thirty cases. Dr. Havier was qualified as an expert witness in drug testing and toxicology.

He is familiar with the DOC's drug testing policy. The state toxicology lab is the only lab authorized to conduct the drug testing for the law enforcement drug testing. When

he finalizes a report for a case, he reviews all the data submitted from the screening and confirmation testing as well as the certification from the medical review officer. Exhibit R-30 is the litigation packet for a law enforcement drug testing case. The first page is the submission form containing the social security numbers of the people donating specimens for analysis. The form is filled out by the monitor in charge of collecting the specimens. The donor will give the specimen to the monitor who will check the temperature of the specimen and indicate that the temperature was checked. The date of submission must be within thirty days of its submission to the lab and preferably overnight or the same day. This form is presented with all the specimens that are submitted for testing and usually are sent by courier or overnight mail. A receptionist in the laboratory receives all drug testing specimens. In this case, Jean Smith received the specimens and accepted each specimen for testing as indicated by her initials after each specimen and her name at the bottom of the submission form (R-30, page 176). The criteria she follows for accepting the sample is to check that the container has not been opened once it was sealed or tampered with in any way. She also checks the volume and appearance of the sample. The social security on the label inside of the container is checked and compared to the submission form and put into the computer which generates a toxicology number. The case is then referred to by the toxicology number. The toxicology number assigned to Mr. Shorter was 17L012120 (R-30, page 194).

After the samples are received and accepted for testing they are stored in the refrigerator and collected by an analyst from the law enforcement drug testing section and placed in a secured refrigerator in that unit. The sample will be subjected to a first screening procedure, an immunoassay procedure using antibodies to identify drugs or classes of drugs that may be present in the sample. If the sample is screened positive, that is, it contains one or more of the drugs they are looking for, the original specimen will be tested by a confirmation method completely different from the screening method. The equipment used for the screening procedure is the Architect which is manufactured by Abbot laboratories.

The drugs tested for are amphetamines, barbiturates, benzodiazepines, cocaine, creatinine for validity (to make sure the urine is human), methadone, opiates, oxycodone, phencyclidine (PCP) and tetrahydrocannabinol (THC) the major metabolite of

tetrahydrocannabinol, the active ingredient in marijuana. The results of the immunoassay drug screening test in this matter were positive for cannabinoids (R-30, page 190). The creatinine level was normal. The test identifies whether a certain level of drug is present or not. Once a sample screens positive for a drug another aliquot of the original sample will be confirmation tested by a procedure called gas chromatography/ mass spectrometry (GCMS) which is the benchmark for the whole industry as far as confirming the identity and the amount of any particular drug. An aliquot is a small portion of the original sample for testing. An aliquot of the original sample is taken and is subjected to an extraction procedure to obtain a metabolite of marijuana, tetrahydrocannabinol. The criteria for identifying a particular compound includes the retention time, the weight of the fragments that it produces and the ratio of the fragments to one another. The GC/MS drug confirmation report identified the drug as a metabolite of THC 11th carboxy THC and the amount of that metabolite was twenty-three nanograms per milliliter (R-30, page 194). This information was sent to the medical review officer to review whether anything listed on the medication sheet would account for this positive result. In this case, there was not.

Dr. Havier reviewed all the screening and confirmation data and the report from the medical review officer. He concluded all the testing was properly conducted and he generated a final report for this case. The medication form submitted by the urine donor was reviewed only by the medical review officer and was not submitted to the lab (R-30, page 193). The medical review officer certification indicated that the screening results were positive for cannabinoids and the GC/MS results were positive for 11 carboxy THC. This was not accounted for on the medication sheet (R-30, page 191).

The electronic chain of custody record for 17LD12120 sets forth precisely what was done to the sample, when it was done and by whom (R-30, page 222).

All of the instruments that are used for the screening and confirmation testing are tested and checked in advance to make sure they are functioning properly and calibrated properly before the tests are run that day (R-30, pages 177 – 190, 196-197).

The cutoff level of fifteen nanograms is used because that is the industry accepted level for the drug based on possible passive inhalation or casual exposure that cannot produce a reading over fifteen nanograms.

The toxicology report indicated that the screening result by immunoassay was positive for cannabinoids and the confirmation results by mass spectrometry were positive for eleven carboxy THC with a cutoff limit of fifteen nanograms per milliliter (R-30, page 221) The toxicology report indicated carboxy levels of twenty-three nanograms per milliliter. Dr. Havier was aware that a second sample was tested by Relievus lab at the request of Sgt. Shorter and requested a copy of the results. All of the drugs listed were not detected (R-20, page 48). The cutoff level the Relievus lab used for THC was one hundred nanograms per milliliter and not the fifteen nanograms per milliliter which is the accepted cut off level used by the state toxicology lab.

Dr. Havier also had occasion to review the ToxicLogics expert report of the appellant. He disagrees with the statement that most laboratories recognize that any reported value have a margin of error recognizing the uncertainty associated with quantitative value. For Delta-9 – carboxy THC this uncertainty is usually +/- 20-25% of the reported value. Dr. Havier disagrees with this statement and believes that margin of error is too high. However, Dr. Havier points out that even if he accepted that premise, the conclusion that "This means that Mr. Shorter's value of 21 – 23 ng/ml on September 12, 2017 could be as low as 15.75 ng/ml" support respondent's position that Sgt. Shorter's levels were over the 15 ng/ml acceptable level (P-2, page 4). Furthermore, Dr. Havier points out that Dr. Lage supports Dr. Havier's analysis of the test results. "Since the Relievus product is an extract of hemp it would contain both Cannabidiol and small levels of THC. This small level of THC is, in my opinion, responsible for the very low level of THC – COOH identified in Mr. Shorter's urine." (P-2, page 4). Dr. Havier said there is no way of knowing the source of the THC.

Dr. Havier's expert report considered all of the information from the confirmation analysis and all of the criteria for identification and quantification of the metabolite, and concluded that the urine specimen contained the metabolite of THC at the level of 23 ng/ml which is above the generally accepted cutoff value of 15 ng/ml (R-32).



On cross-examination, Dr. Havier admitted that analysts perform the testing so there is a human element as well as the instruments used to test the sample. The screening is done by a machine called the Architect and there are five machines for the confirmation test. The submission form contains stickers on the far-right hand side of the form which is a laboratory number used as the identifier once the drug sample is accepted by the laboratory (R-30, page 176). Labels are printed out with the toxicology laboratory number and the stickers are attached to the sample and the medication form. There is a label printed to identify the aliquot (R-30). An aliquot is taken from the original container and placed in a smaller plastic conical tube that is labeled with a bar code. Moving the urine from the container to the various smaller containers is reflected in the electronic chain of custody. As far as he is aware, no mistakes have been made in the transfer of the urine in the thirty-nine years Dr. Havier has been with the state lab, even though seventeen thousand tests are done a year. If the instrument used to perform the test is not functioning properly, no test will be performed until the equipment is working properly. The machine malfunctioned in a preliminary test for testing oxycodone the first time (R-30, page 177). The analyst made a mistake the second time (R-30, page 178). The third time the test was checked, it was found to be running properly (R-30, page 179). Blanks, urine samples that contain no illegal substances, are used as controls and are purchased from a commercial source.

The sample at issue in this case came back positive for the active metabolite for THC in the screening test and thereafter was sent through GC/MS for confirmation.

The tabulation of the confirmation testing for cannabinoids from instrument five, one of the GC/MS machines, was set forth at R-30, page 196. The instruments are not inspected for accuracy by any outside agency, but are maintained internally according to the manufacturers guidelines. This particular test was run with a cutoff analysis of 15 ng/ml. The frozen sample sent to the outside lab used a cutoff off of 100 ng/ml. No information was provided to the second lab as to what standards they should have used but the state lab should have been notified. The donor can choose the lab, but the lab has to be certified to do the testing. Dr. Havier was not notified that the second sample was released to the second lab. If he had been notified, they would have advised the other lab as to the proper cutoffs that should have been used for the testing.

There were twenty-eight samples that were tested. Items 1-12 are controls and blanks samples. Items 13-23 were actual urine samples that were received by the lab and tested (R-30, page 196). Items #1 – 5 were also urine samples received by the lab for testing (R-30, page 197). There were two aliquots taken for testing of Mr. Shorter's urine which produced positive readings for THCC at 21 ng/ml (diluted) and 23 ng/ml. (R-30, page 197). Another urine sample at Item # 19 had a reading of 806.6 and item # 20 had a reading of 605.5. The concentration was too high and fell outside the normal range for accuracy. The reason for this may be that the donor of the sample metabolized the THC either at a high dose or that the exposure to the drug occurred shortly before the urine sample was collected. Items # 19 and #20 were not accepted as a positive because the concentration was too high. The analysis would be repeated.

Dr. Havier was asked if he was familiar with the term cross-contamination as it pertains to urine testing for controlled dangerous substances and that is when one sample gets mixed in with another sample.

There is no way to confirm how the metabolite got into the urine in the case of THC. The exposure is not identifiable. The exposure from a pure CBD oil would not produce a positive result for THC. However, exposure to hemp oil would produce a positive result for THC.

On redirect-examination, Dr. Havier stated that the other laboratory did not contact the state laboratory regarding how to conduct the testing or standards to be used prior to performing the testing on the frozen sample.

**Charles Warren** testified on behalf of the appellant. He is currently employed as the Deputy Warden for the Cumberland County jail but was previously employed by the DOC for twenty-six years. He started his career in 1987 at the New Jersey State prison; moved to the rank of sergeant at South Woods State Prison in Cumberland county; then became the assistant superintendent at the New Jersey State Prison; left that position to become the associate administrator at Southern State Correctional Facility; then became the Administrator at Southern State Correctional Facility; then returned to the New Jersey

State Prison as the Administrator from where he ultimately retired. The administrator oversees every facet of the correctional facility and is also known as the warden.

He has known Sgt. Shorter since 2001 and was one of his supervisors when he first started working at South Woods State Prison. They socialized together at Christmas parties and family events since one of Sgt. Shorter's cousins is a very good friend of his. He has never known Sgt. Shorter to use illegal drugs or talk about using illegal drugs. His opinion as to Mr. Shorter's character as a sworn law enforcement officer is that he knows him to be an upstanding young man. Mr. Warren has no time for people who use or sell drugs and certainly would not invite him into his home if that was the case.

**Cesare Coslop IV** testified on behalf of the appellant. He is a lieutenant presently employed as a shift commander at South Woods State Prison. He has been a corrections officer with the DOC since June 1997. In 2004, he made sergeant and was transferred to Southern State Correctional facility for approximately six months and then returned to South Woods. He knows Sgt. Shorter since 2001 when he started and they were officers together and worked at the same facility. They ended up being partners together and they continue to work together. They have a mutual friend in common outside of the department and socialize outside of work as well as attending retirement and graduation parties. When Lt. Coslop returned as a sergeant to South Woods in 2004, he was Sgt. Shorter's direct supervisor until Lt. Coslop made lieutenant. Lt. Coslop was Sgt. Shorter's last direct supervisor at South Woods. He has never known Sgt. Shorter to use illegal substances. He has never heard him speak about using illegal substances. His opinion is that Sgt. Shorter is a fantastic officer and a great guy, he speaks to him daily and he has never been under the influence of any narcotics. He is proud of his family and proud to wear the badge and would never do anything to jeopardize this by using drugs.

On cross-examination, Lt. Coslop admitted he was not with Sgt. Shorter at night or on weekends.

**William Shorter** testified on his own behalf. He is not employed at the present time. He was employed as a sergeant with the DOC at South Woods State Prison until he was terminated in October 2017. He is forty years old and lives and grew up in Vineland. He is married and has a sixteen-year old daughter. He had been a sergeant for five and

a half years and prior to that was a corrections officer for eleven and a half years, since May 2001. Sgt. Shorter was the Vice President of his labor union, the New Jersey Law Enforcement Supervisors Association (NJLESA). Prior to working for the DOC, Sgt. Shorter worked as a class I special officer for the City of Vineland Police Department for two and a half years. He then worked for four months with the Federal Bureau of Prisons as a corrections officer until he switched to the State of New Jersey DOC because of better benefits and pay.

Sgt. Shorter attended the corrections officer training academy before starting work with the DOC. Besides the instant matter, he had one prior discipline in his work history (R-24). In December 2003 his power went out and his alarm did not go off and he was late for work. He received a written reprimand.

He has received several commendations. In 2003, during a snow emergency he came to work in a blizzard and stayed an extra shift to cover for the shortage. He received a letter of commendation from the administrator at the time. In 2008 he received a letter of commendation for gathering information that led to a major drug bust at South Woods. In April 2013 he received a letter of commendation for saving an inmates life who had been stabbed several times.

Sgt. Shorter is familiar with the DOC policy on illegal drug use. It is against policy to own, distribute, use and be in possession of illegal narcotics. This has been the policy as long he has been a corrections officer.

On September 12, 2017, he was working as the master center sergeant/ manpower sergeant. As master center sergeant, he was to keep up with the blotter and keeping up with the inmates going in and out for trips or transfers. As the manpower sergeant he was in charge of any extra officers as well as all of the general assignment officers as well as assigning anyone to go out on any emergency trips. Back in September 2017, his regular shift was Monday through Friday 5:30 a.m. – 1:30 p.m., with Saturday and Sunday being his regular days off.

On September 12, 2017 at 9:00 a.m., Sgt. Shorter received an order from his shift commander, Lt. Cesare Coslop, to report to SID (Special Investigations Division). Lt. Coslop told Sgt. Shorter that Investigator Bonomo needed to see him in SID. Sgt. Shorter asked what it was in regards to and Lt. Coslop said that Investigator Bonomo did not specify what it was in regards to but that he did not need a union representative. Sgt. Shorter did not respond to SID immediately because Lt. Coslop needed Sgt. Shorter to train someone to take over his duties while Sgt. Shorter reported to SID. That took about a half hour. Sgt. Shorter then telephoned Investigator Bonomo as to why he needed to report. Sgt. Shorter explained that as a union representative, they never encourage anyone to report to SID without knowing why they were going there. Sgt. Shorter stated that Investigator Bonomo advised him that he did not need a union representative and to report to SID immediately. Sgt. Shorter then reported to SID following the phone call. When he arrived at SID, Investigator Bonomo wanted to know why it took Sgt. Shorter so long to report to SID and why Sgt. Shorter did not respond to his orders. Sgt. Shorter responded that Investigator Bonomo was not in his chain of command and that his commander, Lt. Coslop had ordered him to train another sergeant to take over so that Sgt. Shorter could report to SID. He also reminded Investigator Bonomo that it only took a half hour.

Investigator Bonomo informed Sgt. Shorter that he would be taking a urine test and provided Sgt. Shorter with the paperwork. Prior to taking the test, Sgt. Shorter filled out a medication sheet in his own handwriting (P-9 and R-30, page 193). Looking back, Sgt. Shorter admitted that he failed to list the CBD oil he had been taking for just a few days that was prescribed by Dr. Young Lee, his pain management doctor. Sgt. Shorter indicated that his adrenaline was running after the confrontation with Investigator Bonomo and he was concentrating on listing all of the prescription medication he had been on for a while and simply forgot to list the CBD oil he had been on for only a few days. CBD oil is not listed on the medication sheet Sgt. Shorter filled out. P-7 is a photocopy of a photograph of a droplet bottle reading "Relievis CBD Oil" that was taken by Sgt. Shorter of what Dr. Lee had prescribed for him.

At the time of the urinalysis, Sgt. Shorter had been using the CBD oil for four days. He purchased the CBD oil from Relievis at Dr. Lee's office in Vineland. Dr. Lee

recommended that he take the CBD oil. Sgt. Shorter purchased the CBD oil on his debit card and received a receipt for the purchase dated September 7, 2017 (P-4). Dr. Lee suggested he take it the next morning on September 8, 2017. He was to take fifteen droplets twice a day under his tongue in the morning and again at night before bedtime. He took the CBD oil twice a day on September 8, 9, 10 11 and again the morning of the urinalysis, September 12, 2017 before reporting to work. Sgt. Shorter was taking this medication for pain relief due to debilitating pain caused by degenerative arthritis of his spine which he has suffered from for two years. Sgt. Shorter also takes an anti-inflammatory, a muscle relaxer and Tylenol 5 for his pain, all of which were listed on his medication sheet (R-30 & P-9, page 193).

Sgt. Shorter took the random drug test on September 12, 2017 and was informed in October by his major that it came back positive. He was telephoned at home and told to report with his union representative to the prison within two hours which he did and that is when he learned the test had come back positive.

When he gave samples for the urinalysis on September 12, 2017, he voided a second sample to be frozen for later testing if needed. This is the normal procedure he always followed whenever he took a urinalysis. He had the second sample tested. He was informed that he would bear the cost and Investigator Bonomo told Sgt. Shorter to follow the policy. Sgt. Shorter reached out to Lab Corps and Quest lab who advised that they only test urine samples for their clients, one of them being the state of New Jersey who would have to request that the sample be tested. Sgt. Shorter did not reach out to anyone from the State of New Jersey thereafter. His doctor, Dr. Lee volunteered to have his lab test the second sample for Sgt. Shorter. Sgt. Shorter reached out to Investigator Bonomo as to how to accomplish this. The lab had to be accredited, written instructions on the company letterhead and identification had to be provided to allow the lab to pick up the frozen sample. These procedures were followed and the Relievus lab did perform the urinalysis test on the frozen sample (R-8).

Since starting his employment with DOC, he has never ingested any illegal substances. He has had approximately ten random urinalyses since becoming employed by the DOC. Prior to voiding the urine sample on September 12, 2017, he never smoked

or ingested marijuana in any way. He has been suspended since October 2017. He is not working and is collecting unemployment. He wants to return to the DOC and continue his career as a sergeant.

On cross-examination, Sgt. Shorter admitted that he was prescribed the CBD oil on September 7, 2017 and took it twice a day for four days, yet on September 12, 2017, he did not remember he was taking it and failed to list it on the medication sheet. Sgt. Shorter did not go to a pharmacy to get the CBD oil. Dr. Lee's office is Relievus. Sgt. Shorter did not do any research on CBD oil or look on the Relievus website. He was not aware that the Relievus website listed their CBD oil as containing 0.3% THC. He is aware that THC is a prohibited substance. Sgt. Shorter was asked if he is aware that as a law enforcement officer he cannot have THC in his system. He replied that he is aware that he cannot take any illegal substances, but that he was taking the medication that his doctor prescribed.

**Stephanie Shorter** testified on behalf of the appellant. She has been married to William Shorter for eight years. As a couple, they are homebodies. They like to stay home and watch movies. They will go out to dinner on weekends or attend family events or work-related events such as retirement parties. Every once in a while, Mr. Shorter will go out with his friends. Since she has been with Mr. Shorter, she has not known him to have ever used any illegal substances at any time.

**Gary Lage** testified on behalf of the appellant. He has a B.S. degree in pharmacy from Drake University and a M.S. and PhD. in pharmacology from the University of Iowa, all of which were conferred in the 1960's. He has been employed since 1996 by ToxiLogics in Landenberg, Pa. He is the president and founder of the company. After he received his PhD., he became an assistant professor of pharmacology and toxicology at the University of Kansas for approximately six years. He then became an associate professor of pharmacology and toxicology at the University of Wisconsin for approximately six years. Then he became a professor of Toxicology at the Philadelphia College of Pharmacy and Science for approximately nine years, the last four of which he was the Chairman of the toxicology and pharmacology department. In the late 1980's he left academia and became a consultant for Roy F. Westin for five years. After that, he became a consultant with Environ Corp. in Princeton for approximately five years and then consulted for ERM for a

couple of years before starting ToxiLogics in 1996 (P-1). At ToxiLogics he works on a wide range of projects involving drugs, alcohol and chemicals and their effects on the human body and the analysis relating to those chemical substances in relation to their toxic effects. He was board certified in toxicology until 2015 when he let his certification lapse. Board certification in toxicology began in 1980 and required experience in the field of toxicology demonstrated by peer review and taking an extensive test to be board certified. Board recertification was required every five years. He belongs to the American Society of Pharmacology and Experimental Therapeutics which is the major scientific society for pharmacology. Dr. Lage is also a member of the Society for Toxicology, which is the major scientific society for toxicology. He has written numerous articles and peer review publications. His major interest is in the relation of toxic chemicals to their effects on the human body. Dr. Lage has qualified as an expert witness in the field of toxicology in the state courts in New Jersey, New York, Pennsylvania, Wisconsin, Indiana, Arizona and Alaska. He has also been accepted as a toxicology expert in the OAL in other cases.

Dr. Lage was accepted as an expert in the field of toxicology. Dr. Lage was contacted by Mr. Crivelli's office to serve as an expert witness in this case. Dr. Lage was asked to evaluate the urine drug sample of Mr. Shorter in relation to whether it represented use of marijuana or whether it was consistent with his use of CBD oil. Based upon his review of the material that was sent to him, it was his opinion that the low levels of the marijuana metabolite identified in Mr. Shorter's urine was most likely the result of his use of the CBD oil. This opinion is reflected in his expert report and supplemental report (P-2, P-3).

Marijuana is a recreational drug that causes euphoria, sedation, changes in mood and in certain doses it can cause changes in coordination and memory. The active ingredient of the marijuana plant is THC, tetrahydrocannabinol, and most of the effects are due to THC. Marijuana is most commonly smoked but can be ingested as well in any kind of food substance such as brownies and would be absorbed through the intestinal tract. CBD is an abbreviation for cannabidiol which is another ingredient of the hemp plant which is where marijuana comes from. It is not a psychoactive substance that causes the effects that THC does and it has been shown to have some positive medical benefits in terms of pain and anxiety and is being recognized as a significant medical treatment for a lot of



people. Hemp oil is an extract and will have small levels of THC present but not enough to cause a psychoactive effect. CBD oil can be more purified than hemp oil and not have any small levels of THC in it. In comparison to marijuana, the difference in the toxicology of hemp oil and CBD oil is that they will not produce the psychoactive effect that marijuana will produce and although hemp oil may contain small levels of THC, it is insufficient to produce a psychoactive effect.

Dr. Lage visited the Relievas website and found that the product that Mr. Shorter was prescribed and using was an extract of the hemp plant and by definition would contain small quantities of THC. The website did disclose that there were small amounts of THC in the product. He also reviewed the urinalysis test results at issue in this case and found that the state initially and appropriately used an immunoassay screening test commonly used in the drug testing industry which gives a positive or negative for different drug classes. Then the procedure that is used and was used in this case, once the screening test was positive, is to do the more definitive, confirmatory and quantitative test using the GC/MS to confirm that the drug is present and in what amounts. The GC/MS test was done twice, which was appropriate. The first test showed 23 ng/ml and the diluted test showed 21 ng/ml. Both readings are relevant. The cutoff used in this test was 15 ng/ml. Mr. Shorter's readings were quite low, just above the cutoff. He has seen quite high levels in the several hundreds up to thousands. All scientific tests have a margin of error a plus minus for the results obtained. Some laboratories actually report the test results with the plus/ minus margin of error with their analysis. NMS Labs in Willingrove, Pennsylvania, one of the largest toxicology labs in the country, in the last two years has reported their test results for THC drug testing with a 20 – 25% margin of error. This is used because nanograms per milliliter is an extremely small quantity and the analysis is not that accurate. Although they did not find THC in Mr. Shorter's urine, they found THC carboxy which is an inactive metabolite of THC. Based on the margin of error, Dr. Lage calculated that the amount of THC in Mr. Shorter's urine could be as low as 15.75 ng/ml or slightly above the 15 ng/ml cutoff. Drug levels measured in concentrated urine would read higher than drug levels present in diluted urine. The concentration of urine is measured by the creatinine levels. Mr. Shorter's 188.6 creatinine level is mostly normal, maybe slightly concentrated, but not very concentrated. Most labs use a twenty-creatinine level as a cutoff as urine being too diluted to test.

In Dr. Lage's opinion, the positive results of Mr. Shorter's urine test were consistent with his CBD oil use and not consistent with marijuana use. Dr. Lage bases his opinion on the fact that Relievas recognizes that there are small levels of THC in their CBD oil and this would be consistent with Mr. Shorter's use of the CBD oil. The levels of 23 ng/ml and 21 ng/ml found in Mr. Shorter's urine are consistent with his use of the CBD oil. Dr. Lage's opinion is based upon a reasonable degree of scientific certainty.

On cross-examination, Dr. Lage was referred to his expert report where he opined that "Since the Relievas product is an extract of hemp it would contain both Cannabidiol and small levels of THC. This small level of THC is, in my opinion, responsible for the very low level of THC-COOH identified in Mr. Shorter's urine" (P-2, page 4). Dr. Lage accepts the fact that the carboxy THC was present in Mr. Shorter's urine.

**Stephen Serbeck** testified on behalf of the appellant. Sgt. Serbeck has been employed by the N.J. DOC for twenty-one years, eight years as a sergeant, and has been assigned to the South Woods State Prison the entire time. He has known Sgt. Shorter for approximately twenty-four years since high school where they were friends and football team mates. He socializes with Sgt. Shorter a couple of times a year outside of work. He has never seen Sgt. Shorter use or discuss using illegal drugs. In his opinion, Sgt. Shorter is one of the best men he knows and always does his job in the most honorable way he can. Besides his abilities as a sergeant, he is a good man and cares about others and helps whenever he can.

**Russell Little** testified on behalf of the appellant. He has a masters of science in nursing (MSN) from Rutgers Camden and is a nurse practitioner/advanced practice nurse currently employed by Relievas Pain Management. He identifies any problems that his patients are experiencing and recommends treatment options and pain medications based on their diagnosis. A nurse practitioner is an advanced practice nurse who is able to diagnose, treat and prescribe medications, order x-rays and recommend treatment options. A regular nurse carries out orders whereas an advanced practice nurse can diagnose a patient, write orders and prescribe medications. Relievas is mainly an interventional pain management practice. They do injections, nerve blocks and epidurals.

Mr. Little has been a nurse practitioner for approximately three years and has worked at Relievus for two and a half years.

Mr. Little knows Mr. Shorter who has been a patient approximately one year and who Mr. Little has seen at least six times. Mr. Shorter has degenerative changes in his spine as well as bulging and herniated discs that cause pain. They initially treated Mr. Shorter with a sacroiliac joint injection, nerve blocks and nerve burning as well as an epidural. Mr. Shorter was referred by a chiropractor and tried chiropractic therapy first, which is usually the first line of treatment. They tried oral medications and that is when Mr. Little recommended the CBD oil because Mr. Shorter wanted to get better without the use of narcotics. Mr. Little recommended the CBD oil product to Mr. Shorter. The CBD oil was a product sold by Relievus. Mr. Little knew where Mr. Shorter worked and was aware that Mr. Shorter was subject to urine drug screenings. He recommended Mr. Shorter try the CBD oil because as far as Mr. Little was aware, it would not cause a positive THC result. He had a conversation with Mr. Shorter as far as whether the drug would show up in a drug screen and Mr. Little told Mr. Shorter it would not. Mr. Little had discussions with the head doctors at Relievus during monthly meetings regarding the best way to treat patients and they said it would not show up. Mr. Little wrote a letter dated October 23, 2017 "To Whom It May Concern: Mr. William Shorter has been under our care and was prescribed CBD oil. There is a difference between CBD oil and THC, however CBD can give a false positive to THC. It is required that a second test called a GC/MS test be done in order to confirm that it is in fact not THC. Please call me if you have any questions. Thank you so much. Sincerely, Russell Little, APN Relievus" (P-12).

Mr. Little also authored an undated note on Relievus letterhead which stated as follows:

"Mr. William Shorter came to our practice to help alleviate pain in his lumbar spine. He has been through multiple treatments with us as well as prescribed medication with no relief. After seeing William multiple times, it was my recommendation that he try CBD oil also known as hemp oil. This has been proven to help with inflammation and pain. He did not want to rely on narcotic medication and I believed this to be our best alternative. On September 7, 2017 William purchased the CBD oil through our practice with his credit card. We will provide original receipt with this letter. William has been a great patient and only doing as

recommended by our practice and that is why he tried the CBD oil to begin with. If there are any questions please contact me personally. Thank you so much."

Mr. Little no longer recommends CBD oil to any of his patients as a result of this incident.

On cross-examination, Mr. Little stated that CBD oil is not a prescription medication so a prescription is not required although he wrote the recommendation on a prescription blank dated October 20, 2017 (R-18, page 037). Mr. Little was the provider who recommended Mr. Shorter take CBD oil, not Dr. Lee. Relievus was also the facility that tested Sgt. Shorter's frozen urine sample (R-20, page 048). Prior to testing, the urine Mr. Little did not contact the state lab as to how the test should be conducted. Mr. Little had written that there was a difference between CBD oil and THC, however CBD can give a false positive to THC (P-12, page 039). Mr. Little was aware Mr. Shorter retained an expert in this case although he did not review the expert's report. Mr. Little could not answer whether it would come as a surprise to him that the expert confirmed the presence of THC in Mr. Shorter's urine sample.

On redirect-examination, Mr. Little admitted that he has no formal training or degrees in toxicology. The drug screening by Relievus was ordered by Mr. Little (P-20). He made the arrangements to obtain the second sample to run the confirmation testing, but did not speak to anyone at the state lab as to what levels should be used to run the confirmation test.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9<sup>th</sup> Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne

by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958).

Sgt. Shorter was a corrections officer for eleven and a half years and a sergeant of corrections for five and a half years before his removal. He also was the vice president of his labor union, the New Jersey Law Enforcement Supervisors Association. He was familiar with the DOC drug testing protocol and has submitted to approximately ten random drug screenings as a condition of his employment. Prior to producing the urine sample for testing on September 12, 2017, Sgt. Shorter completed "Attachment D, Drug Testing Medication Information" (P-9 and R-30, page 193). The form indicates that "As part of the drug testing process, it is essential that you inform us of all medications you have taken in the last thirty (30) days. Please carefully complete the information below." Sgt. Shorter indicated that during the past thirty days he had taken the following medication prescribed by a physician:

<b>Name of Medication</b>	<b>Prescribing Physician</b>	<b>Date Last Taken</b>
Tylenol 4	Dr. Young Lee	8/12/17
Nucynta	Dr. Young Lee	9/10/17
Metformin	Dr. Young Lee	9/11/17
Ramipril	Dr. Young Lee	9/11/17
Meloxicam	Dr. Young Lee	9/11/17
Amrix	Dr. Young Lee	9/11/17

Sgt. Shorter further indicated that during the past 30 days, he had taken the following non-prescription medications (cough medicine, cold tablets, aspirin, diet medication, nutritional supplements, etc.)

<b>Non-prescription Medication</b>	<b>Date Last Taken</b>
Centrum multi vitamin	Daily
Excedrin migraine	9/5/17
Rolaids	9/8/17

Sgt. Shorter did not list the CBD oil he testified was prescribed by Mr. Little on September 7, 2017. Sgt. Shorter did not list the CBD oil on the medication sheet despite the fact that he testified he took fifteen droplets of the CBD oil under his tongue twice a day in the morning and again before bedtime on September 8, 9, 10, 11 and again on the morning of the urine drug test, September 12, 2017. He testified that his adrenaline was running after the confrontation with Investigator Bonomo and he was concentrating on listing all of the medication he had been on for a while and simply forgot to list the CBD oil he had only been on for a few days. Sgt. Shorter's testimony in this regard is not believable. He was very familiar with the drug testing protocol and the need to list every medication he was taking, both prescription and non-prescription. He listed Roloids and Excedrin that he took the week before the random drug test, yet he forgot to list a cannabis product he took as recently as the morning of the drug test. I DEEM that Sgt. Shorter's testimony in this regard is not credible.

The testimony of Dr. Havier was highly credible. His knowledge of the laboratory testing and procedures were precise and technical. He disagreed with Dr. Lage's opinion that there was a margin of error of 20-25% in the testing, however pointed out that even calculating with that number, Sgt. Shorter was still over the accepted cut off rate at 15.75 ng/ml. Dr. Havier also testified that there is no way of knowing the source of the THC metabolite, only that the THC metabolite was present in Sgt. Shorter's urine. Dr. Havier also pointed out that Dr. Lange agreed with Dr. Havier's test results. The Relievus lab did not test the frozen sample according to the accepted cut off level of 15 ng/ml but rather used a much higher cut off level of 100 ng/ml. Although both Dr. Havier and Dr. Lage testified credibly, I DEEM Dr. Havier's testimony to be more persuasive.

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

On September 12, 2017, Sgt. Shorter was randomly selected for a urine drug screening pursuant to the DOC drug testing policy set forth in HRB 98-01 (R-22). Sgt. Shorter was fully familiar with the drug testing policy and the consequences of a positive result. Investigator Bonomo monitored Sgt. Shorter's drug testing and the drug testing

booklet was completed outlining the procedures followed (R-11). Prior to producing the specimen, Sgt. Shorter filled out a medication sheet listing all prescription and non-prescription medications he had taken in the last thirty days (P-9, R-30, page 193). Sgt. Shorter did not list the CBD oil as a medication he was taking.

At approximately 9:39 a.m. Sgt. Shorter provided two urine samples, one for testing at the N.J. State Toxicology Lab and a one to be frozen for later testing if the first sample tested positive. Both samples were placed in the evidence refrigerator by Investigator Bonomo at 9:40 a.m. On September 13, 2017 at 8:00 a.m. Investigator Maria Jackson removed the first sample from the evidence refrigerator and gave it to Paul Zoyac, the South Wood State Prison courier, for transport to the State Toxicology Lab for testing (R-12.) The sample was received at the State Lab on September 13, 2017 and an electronic chain of custody was maintained (R-30, page 222). The continuity of evidence was maintained at all times and there was no break in the chain of custody of the urine samples from the time it was produced up to and including the time it was confirmation tested at the state lab. The equipment used to test the urine was functioning and calibrated properly before the urine was tested (R-30, pages 177-190, 196-197).

The immunoassay drug screening test was positive for cannabinoids (R-30, page 190). A further confirmation drug test was performed using gas chromatography/mass spectrometry (GC/MS) which indicated that 11 – Carboxy-THC was detected in the amount of 23.0 ng/ml with a confirmation cutoff concentration of 15.0 ng/ml (R-30, page 194). The Medical Review Officer reviewed the results and indicated that the controlled substance found was not listed on the medication sheet (R-30, page 191, 221).

### **LEGAL ANALYSIS AND CONCLUSIONS**

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained -of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellants status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority



cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

The DOC has a zero tolerance for drug use policy and requires that as a condition of employment officers submit to random urine drug testing. The DOC policy requires that a negative result is required to maintain employment and a positive result will result in termination. Sgt. Shorter failed his random drug test on September 12, 2017 by testing positive for the metabolite of THC. The New Jersey DOC Rules and Regulations for Law Enforcement Personnel prohibit an officer from using any illegal drug or controlled dangerous substance, whether on or off duty. As a sergeant of corrections, Sgt. Shorter represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is certainly conduct that adversely affects the morale or efficiency of a governmental unit and has a tendency to destroy public respect in the delivery of governmental services. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing conduct unbecoming.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Sgt. Shorter tested positive for the THC metabolite following his random drug test on September 12, 2017. Law enforcement personnel are prohibited from using illegal drugs or controlled dangerous substances. Appellant's conduct violates the implicit standard of good behavior one would expect from a sergeant of corrections. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause.

Appellant has also been charged with various offenses set forth in HRB 84-17, including C-11, Conduct unbecoming a public employee; HRB 84-17, C-2, Reporting for duty while under the influence of intoxicating liquors or drugs; HRB 84-17 C-30, Use, possession, or sale of any controlled dangerous substance (custody); HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. As stated above, the same reasons for finding that the respondent has met its burden of proof for the conduct unbecoming violations set forth in N.J.A.C. 4A:2.3(a)6 apply to the C-11

conduct unbecoming charge. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17, C-11.

As far as the violation of HRB 84-17, C-2, Reporting for duty while under the influence of intoxicating liquors or drugs, the fact that Sgt. Shorter was subjected to the random drug test while on duty on September 12, 2017 and tested positive for the THC metabolite supports the fact that he was under the influence of drugs while on duty that day. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17, C-2.

Appellant has also been charged with a violation of HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance. On September 12, 2017 Sgt. Shorter was subjected to a random drug test and tested positive for the THC metabolite. Therefore, I **CONCLUDE** that appellant was in possession and used a controlled dangerous substance and respondent has met its burden of proof in establishing a violation of HRB 84-17, C-30.

Appellant has also been charged with a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. On September 12, 2017 Sgt. Shorter submitted to a random officer drug screening as a condition of his continued employment with the DOC. Sgt. Shorter tested positive for the metabolite of THC. Sgt. Shorter's conduct is in violation of the Law Enforcement Personnel Rules and Regulations prohibiting an officer from possessing or using any illegal drug or dangerous substance whether on or off duty. Sgt. Shorter's conduct is also in violation of the DOC's drug testing policy set forth in HRB 99-01, Amended November 6, 2009. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision.

Appellant argues that his substantive due process rights have been violated because the state lab did not advise the Relievis lab what the proper parameters were for the testing of the frozen sample and the sample was tested far above the cut-off level utilized by the state lab. I **FIND** this argument to lack merit. Mr. Little was the individual

at Relievus who made the arrangements with the DOC to have the second sample released to be tested by the Relievus lab, at the request of Sgt. Shorter. The Relievus lab did not check with the state lab to inquire as to how the test should be run before they tested the frozen sample. However, more importantly, appellants own expert, Dr. Lage, concurs with the results of the state toxicology lab report and the fact that the carboxy THC was present in Mr. Shorter's urine.

Dr. Lage reviewed the State Toxicology Lab test results in this case and found that the state initially and appropriately used an immunoassay screening test commonly used in the drug testing industry which gives a positive or negative for different drug classes. Then the procedure that is used and was used in this case, once the screening test was positive, is to do the more definitive, confirmatory and quantitative test using the GC/MS to confirm that the drug is present and in what amounts. The GC/MS test was done twice, which was appropriate. The first test showed 23 ng/ml and the diluted test showed 21 ng/ml. Both readings are relevant. Dr. Lage does not dispute the state's lab test results. What he does opine is that certain labs recognize that there is a 20-25 %+/- margin of error for THC drug testing. Dr. Lage further opined that if you calculate the margin of error on the high side, Sgt. Shorter's level could be as low as 15.75 ng/ml. In any event, that is still above the 15 ng/ml cut off level.

### PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523-24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), *aff'd*, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

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 In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

. . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Pursuant to the DOC HRB 99-01, Amended November 6, 2009, any covered person who tests positive for illegal drug use shall be suspended immediately from all duties and processed for termination from service (R-22, page 5). The DOC drug policy does not call for a range of discipline and removal is the only option for a violation of the drug testing policy. Appellant knew that as a condition of his continued employment he had to pass the random drug urine screens. Sgt. Shorter acknowledged that he understood that if he produced a positive result for illegal drug use, he would be dismissed from his position with the NJDOC (R-11, page 22). Therefore, the only appropriate penalty in this case is removal. I CONCLUDE that the removal of the appellant was appropriate.

### ORDER

Accordingly, I ORDER that the action of the respondent is **AFFIRMED**, as set forth above. Appellant's appeal is **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO 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.



May 8, 2018  
DATE

\_\_\_\_\_  
CATHERINE A. TUOHY, ALJ

Date Received at Agency: May 8, 2018 (emailed)

Date Mailed to Parties: May 8, 2018 (emailed)

/mel

**APPENDIX**

**WITNESSES**

**For Petitioner:**

Charles Warren  
Cesar Coslop, IV  
William Shorter  
Stephanie Shorter  
Gary Lage  
Stephen Serbeck  
Russell Little

**For Respondent:**

Dwayne Grade  
Bryan Bonomo  
Maria Jackson  
Paul Zoyac  
Robert Havier

**EXHIBITS**

**Joint**

- J-1 Preliminary Notice of Discipline dated October 20, 2017
- J-2 Final Notice of Discipline (31-C) dated November 6, 2017

For Petitioner:

- P-1 CV of Gary Lage, Ph.D. – twenty-three pages
- P-2 Expert Report of Gary Lage, Ph.D. - five pages
- P-3 Supplemental Report of Dr. Lage dated March 14, 2018
- P-4 Receipt and Invoice from Advanced Spine & Pain for CBD oil dated September 7, 2017 – two pages
- P-7 Photocopy of picture of dropper bottle of CBD oil (038)
- P-8 Lab results from Relievis of drug testing on second sample, dated October 26, 2017 – four pages
- P-9 Drug testing Medication Information Attachment D (193) same as R-30 (193)
- P-12 October 23, 2017 letter from Russell Little (039)

For Respondent:

- R-9 Administrative Investigation Report by Bryan Bonomo – two pages (015-016)
- R-10 Toxicology Report/LEDT – (017)
- R-11 Drug Screening Program Monitor booklet – eight pages (018-025)
- R-12 Continuity of Evidence- Urine Specimen Form Attachment E2 – (026)
- R-13 Continuity of Evidence- Urine Specimen Form Frozen Specimen Attachment EA2- (029)
- R-14 Summary Attachment F – (031)
- R-15 Frozen Specimen Receipt – (032)
- R-16 Lab LEDT chain of custody – (033)
- R-17 Master List for Donor Notification (034)
- R-18 Note on Prescription pad (037)
- R-20 Relievis Lab Results from testing of second sample- four pages (047-050)
- R-22 HRB 99-01, Amended November 6, 2009, Subject: Drug Testing Policy- twelve pages (056-067)
- R-23 HRB 84-17 Table of Offenses and Penalties – sixteen pages (068-083)
- R-24 Work History (084)
- R-25 New Hire Checklist for William Shorter – (085)



- R-27 Policy Receipt (091)
- R-29 Random Urine Selection process – six pages (170-175)
- R-30 LEDT Litigation Packet - forty-eight pages (176-222)
- R-31 CV of Robert Havier, PhD. – three pages (223-225)
- R-32 Expert Report of Robert Havier, PhD. – four pages (226-229) and additional supporting documents – five pages (270-274)
- R-34 Law Enforcement Personnel Rules and Regulations – twenty-two pages (248-269)