STATE OF NEW JERSEY

In the Matter of Steven Allen,
Gloucester County Sheriff's Office

CSC DKT. NO. 2021-1765
OAL DKT. NO. CSR 04816-21

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: February 22, 2023 (EG)

The appeal of Steven Allen, Sheriff's Officer, Gloucester County Sheriff's Office, of his removal effective May 12, 2021, on charges, was heard by Administrative Law Judge Jeffrey N. Rabin, who rendered his initial decision on January 25, 2023. Exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of February 22, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

As indicated above, the Commission thoroughly reviewed the exceptions filed in this matter. Upon that review, it finds no reason to extensively comment as those filings do not persuade the Commission that the ALJ's findings and conclusions, or his recommendation to uphold the removal were arbitrary, capricious or unreasonable. Accordingly, it upholds those actions for the reasons expressed by the ALJ. It makes only the following comments.

In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including

removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). 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 this regard, the Commission emphasizes that a Sheriff's Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). Moreover, even when a Sheriff's Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense such as in this matter may, nevertheless, warrant the penalty of removal.

While the appellant contends that he was taking marijuana due to post traumatic stress disorder (PTSD) suffered on the job and that the appointing authority had "unclean hands" in this matter, the ALJ found that the evidence failed to show that the appellant's drug use resulted from any actions taken by the appointing authority. Moreover, the ALJ determined that the evidence failed to show that the appellant ever advised the appointing authority about his mental health issues and failed to establish that he suffered PTSD. The Commission agrees with the ALJ's findings in this matter and that such findings do not mitigate against removal. In this regard, the ALJ stated:

> The within matter is not one of progressive discipline, as no past disciplinary issues regarding appellant were raised at the hearing.
>
> Appellant cited to several cases where LEOs [law enforcement officers] were not terminated from their positions for illegal drug use. But those cases involved an accidental ingestion of a prohibited drug or where a LEO failed to disclose a prescription before submitting to drug testing. Those cases carried no weight in the within scenario; here, appellant intentionally sought the prohibited drug, fully aware that using marijuana without a medical marijuana card was illegal and constituted violations of State and departmental rules and regulations. There was no element of error or inadvertent action on the part of the officer.
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> * * *
>
> Regarding the within appellant, not only did he violate State and County guidelines regarding illegal drug use, his use of marijuana for months before being caught, and failing a drug test while he was on duty, certainly encompassed conduct that would adversely affect the morale or efficiency of a governmental unit or that had a tendency to

> destroy public respect in the delivery of governmental services . . . The uncertainty of how appellant was obtaining a then-illegal and unregulated intoxicating drug, and uncertainty as to how long he had been using marijuana, and the fact that he tested positive for marijuana while on duty, all went to the heart of the officer's ability to be trusted to function appropriately in his position, and fall within the guidelines and caselaw that call for dismissal.

The Commission wholeheartedly agrees with the above assessment and finds that removal from employment is neither disproportionate to the offenses nor shocking to the conscious.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Steven Allen.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22ND DAY OF FEBRUARY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 04816-21
AGENCY DKT. NO. N/A
2021-1765

IN THE MATTER OF STEVEN ALLEN,
GLOUCESTER COUNTY (SHERIFF'S OFFICE).

Arthur J. Murray, Esq., for appellant (Alterman & Associates, attorneys)

Michael J. DiPiero, Esq., for respondent (Brown & Connery, LLP, attorneys)

Record Closed: December 5, 2022 Decided: January 25, 2023

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, Steven Allen (Allen), has appealed the termination of his position with respondent, the Gloucester County Sheriff's Office (respondent or Gloucester), for conduct unbecoming a public employee for allegedly possessing and ingesting marijuana, in violation of New Jersey Attorney General's Law Enforcement Drug Testing Policy and the Gloucester County Sheriff's Office Rules of Conduct Manual.

PROCEDURAL HISTORY

On May 12, 2021, appellant Allen was served with a Final Notice of Disciplinary Action (FNDA) dated May 11, 2021, calling for appellant's termination, effective May 12, 2021.

An appeal was filed by appellant on May 17, 2021, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on June 1, 2021, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. (OAL Dkt. No. CSR 16941-19).

Hearings were heard via Zoom due to Covid-19 protocols, on August 30 and August 31, 2022. Briefs were received by December 5, 2022, and the record closed on that date.

FACTUAL DISCUSSION

Testimony:

For respondent:

Edward McCormick was an Internal Affairs (IA) investigator for respondent. He handled random drug tests. Appellant's number was called for a random drug test, but he did not appear for the test and immediately requested sick time. McCormick and the Chief Warrant Officer went to appellant's house and administered the test. Appellant told McCormick that he had a problem and admitted using marijuana; he had never previously divulged this to respondent. The test was administered and appellant tested positive for THC (the active ingredient in marijuana) and (prescribed) amphetamines. Officers were prohibited from using marijuana.

McCormick was questioned regarding an Officer Sherman, who had previously assaulted appellant. Sherman was ultimately rehired by respondent.

For appellant:

Appellant **Steven Allen** started working for respondent in 2004. Prior to the positive drug test on September 10, 2020, appellant had been drug tested approximately seven to ten times, and never failed a drug test. Appellant admitted to using marijuana, testifying that he was "self-ingesting" marijuana off-duty due to an assault. He had been using marijuana for "a couple of months" prior to the positive drug test. He described an assault incident from December 23, 2016, when a disagreement with investigator Sherman over the moving of some keys led Sherman to threaten appellant, grab him by the neck, push him against a wall, then throw him to the ground and choke him. Two officers removed Sherman. Appellant "blacked out" during the assault.

He missed a total of six months of work and had two surgeries. Appellant won a workers compensation claim against Gloucester County due to injuries suffered in the assault. Appellant was released from doctor's care with no restrictions in September 2019. When appellant returned to work in 2016, Sherman was still working there. There were no further incidences between Sherman and appellant. Sherman then left Gloucester County but returned in October 2019. Steps were taken to keep appellant and Sherman apart. But appellant advised his supervisors that Sherman's return was causing him trepidation and anxiety, although he was not sent for a Fitness For Duty examination (FFD). By December 2020 appellant was seeing Sherman at work on a regular basis, although they had no encounters and did not speak. Sherman was then assigned to be appellant's range instructor; appellant reported that and was assigned a different range instructor. But he began occasionally seeing Sherman around the county courthouse. There were no verbal or physical encounters between the two, but it caused appellant further trepidation and anxiety and nightmares, which he reported to several sergeants, but the department did nothing, and he filed no formal complaints.

Appellant sought no medical help other than seeing his family doctor. Appellant said he had been diagnosed with Post Traumatic Stress Disorder (PTSD) from the Sherman assault. He could have filed for disability but felt that the department did not "have his back" and would have denied his application.

Appellant began using marijuana in July 2020, two months before the failed the drug test, because Lexipro and Xanax were not helping him. One month prior to the failed drug test, Sherman had sent appellant an email, which caused appellant anxiety. He would have asked for further help, but there was a stigma attached to officers asking for help. He was still taking Lexipro.

Appellant received a marijuana vape cartridge from a friend at a party; he did not pay for it. He was aware he was committing a crime. Appellant's wife purchased marijuana with a medical marijuana card. The day after the failed drug test, appellant went to Shatterproof, a drug rehabilitation center in Florida for thirty-eight days.

Dr. Gary Michael Glass was a physician and psychiatrist, who worked extensively with law enforcement officers (LEOs). He was admitted as an expert in forensic psychiatry. Appellant did not go to Glass for help; rather, Glass saw appellant for purposes of the within litigation.

Glass recounted the Sherman assault incident and appellant's return to work. Appellant went to urgent care; he had bruises, but nothing serious, and he was discharged. Appellant lived in shame and the fear of possibly re-encountering Sherman. He had trouble sleeping. Appellant chose to self-medicate with marijuana, not alcohol.

Glass diagnosed appellant with acute stress reaction that became ongoing chronic, moderate (not severe) PTSD. PTSD can take a while to develop. Although PTSD was often abused, here appellant had been seriously assaulted, requiring two surgeries, and suffered anxiety, depression, derealization, nightmares and flashbacks. The PTSD was caused by the Sherman assault. Appellant was emotionally impaired and humiliated. It was common for LEOs not to seek help. If Glass had performed a FFD, he would not have returned appellant to work.

Glass did not review the records of appellant's other treatments, and was not aware that he had been taking anti-anxiety drugs. Glass could not explain why appellant would use

marijuana when he was taking Lexipro and Xanax. Appellant had options: he could have gone through his union for help, or gone to his employer for one of their employee assistance programs, but chose not to. Appellant had lost trust in his employer.

Marijuana does work. Marijuana was not physically addictive. Marijuana was safer than alcohol. Appellant could have smoked the marijuana his wife had but did not want to take it away from her. Marijuana was not legal in New Jersey at the time appellant used it, but has since been legalized. Appellant went to drug rehabilitation at Shatterproof in Florida for thirty-eight days after his two to three months of marijuana use. Marijuana stayed in one's body for approximately twenty-six days. Appellant had been smoking marijuana daily for two to three months prior to the drug test. Psychiatrists did not usually deal with substance abuse, which was handled by the rehabilitation community. Glass never prescribed marijuana to patients.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, at pages 521–22; See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. denied., 10 N.J. 316 (1952). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Edward McCormick was a straightforward witness who spoke clearly and was very knowledgeable on issues regarding law enforcement officers. I found him to be a credible and persuasive witness.

Appellant **Steven Allen** offered detailed but seemingly rehearsed, self-serving testimony. The fact that he "blacked out" during the Sherman assault casts doubt on the veracity of his memory of the assault. He appeared nervous on cross-examination. He testified as to reporting complaints to his superiors regarding the anxiety he was experiencing from potentially having an encounter with Sherman, but he never filed formal, written reports or offered any confirmation of reporting his complaints. He spoke of physical manifestations of his anxiety, but sought no help from doctors other than his family physician. The medical expert he offered at the hearing was not his treating physician, and was only hired for purposes of this litigation. Dr. Glass was not aware that appellant was taking Lexipro and Xanax. Appellant stated he turned to marijuana because Lexipro and Xanax were not helping him, yet he continued taking Lexipro after switching to marijuana. He also did not explain why he did not go to a psychologist or seek a stronger or different prescription.

Appellant said he was given a vape cartridge at a party, but Glass testified that appellant had been smoking daily, not vaping. Appellant failed to testify as to whether that single vape cartridge lasted him the purported two-plus months of his marijuana use, or where he procured any additional marijuana from, or whether he both vaped and smoked marijuana. Glass and appellant both referred to appellant's wife having a medical marijuana card but that appellant did not wish to use her marijuana; no explanation was given for why he did not simply have his wife procure additional marijuana, or whether she purchased smokeable

marijuana or purchased vape cartridges, or whether New Jersey medical marijuana distributors even sold vape cartridges. Neither appellant (nor Glass) explained why thirty-eight days of substance rehabilitation was necessary for a non-addictive drug, when appellant testified he had only been using marijuana for approximately seventy days.

At one point appellant stated that he was aware that when he accepted the vape cartridge he was committing a crime, but later testified that he did not think it might cost him his job. He stated that part of his reason for self-medicating with marijuana was to be a better father, but that did not jibe with the fact that marijuana was an illegal drug, and it appeared illogical that he would wantonly break the law in order to be a better father.

Appellant's testimony also flagged when he stated that he would have put in for disability but he believed the department would deny his application, when a policeman's retirement benefits pension was not controlled internally by an officer's department, but rather would be processed through the Police and Fireman Retirement System.

I ultimately did not find appellant's testimony to be credible.

Dr. Glass appeared to be a calm, knowledgeable and experienced witness. However, he was not appellant's treating physician, and he was unaware that appellant had been taking prescribed anti-anxiety medications at the time he started using marijuana and, therefore, his testimony regarding self-medication was not persuasive. He mischaracterized how appellant ingested marijuana and did not capably explain the need for extensive rehabilitation if appellant had only been using a non-addictive substance for just over two months. Glass praised the use of marijuana without explaining how it addressed each of the maladies suffered by appellant, or the legal ramifications of a person using an illegal drug in lieu of legal alternatives. His approval of marijuana as a cure for anxiety was belied by the fact that Glass had never prescribed marijuana.

I did not find Dr. Glass's testimony persuasive.

Therefore, after reviewing the testimony and the evidence presented, and the summary

briefs of the parties, I **FIND,** by a preponderance of credible evidence, the following **FACTS**:

Appellant's number was called for a random drug test, but he failed to appear at his appointment for the test; rather than take the drug test, appellant attempted to use sick time; Edward McCormick went to appellant's house and administered a drug test; appellant admitted he had a problem and admitted using marijuana; appellant tested positive for THC (active ingredient in marijuana) and (prescribed) amphetamines; officers were prohibited from using marijuana; appellant had been self-medicating with marijuana to deal with an assault he had suffered at the hands of a fellow officer four years prior to the failed drug test.

LEGAL ARGUMENT AND CONCLUSION

The issue is whether the respondent, the Gloucester County Sheriff's Office, had proven by a preponderance of the credible evidence that it acted properly in terminating appellant's employment as a sheriff's officer for conduct unbecoming an officer, due to appellant failing a drug test due to admitted marijuana use, in violation of New Jersey Attorney General's Law Enforcement Drug Testing Policy and the Gloucester County Sheriff's Department Drug Policy set forth in its Gloucester County Sheriff's Office Rules of Conduct Manual.

An appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who committed 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. 4A:2-2.

In a civil service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.A.C. 4A:2-1.4. Thus, respondent had both the burden of persuasion and the burden of production, and was required to demonstrate by a preponderance of the competent, relevant and credible evidence that appellant committed the charged infractions listed in the Final Notice of Disciplinary Action. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). See generally Coleman v. E. Jersey State Prison, OAL Dkt. No. CSV 01571-03, Initial Decision (February 25, 2004); Atkinson v. Parsekian, 37

N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J.Super. 454, 458 (App.Div. 1971).

The Court in In re Polk, 90 N.J. 550, 560 (1982) held:

> This jurisdiction has long recognized that the usual burden of proof for establishing claims before state agencies in contested administrative adjudications is a fair preponderance of the evidence. In Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), we observed that: "In proceedings before an administrative agency, . . . it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt." See In re Suspension or Revoc. License of Kerlin, 151 N.J. Super. 179, 184 n.2 (App. Div. 1977) ("Where disciplinary proceedings with respect to a profession or occupation are vested in an administrative agency in the first instance, the charges must be established by a fair preponderance of the believable evidence").

A preponderance of the evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dept., OAL Dkt. No. CSV 7553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J.Super. 93, 104 (App.Div. 1959)). "Fair preponderance of the evidence" means the greater weight of credible evidence in the case; it does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) citing Model Jury Charge, Criminal, 3:180. See also, Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457 (2005)(applying the standard to a wrongful termination).

The burden of proof cannot be accomplished only by introducing hearsay evidence. N.J.A.C. 1:1-15.1(b). In the Matter of Nathaniel Parker, Juvenile Justice Commission, 2009 N.J. AGEN LEXIS 250, *14-15, OAL Dkt.. No. CSV 02994-08 (April 15, 2009), the Court held, in relevant part,

> While hearsay evidence is admissible in administrative hearings, N.J.A.C. 1:1-15.5, in order to prove its case, the appointing authority must produce a residuum of competent evidence to prove any ultimate fact. Weston v. State, 60 N.J. 36 (1972). Although credible hearsay evidence may serve to buttress the foundation of credible competent evidence such as to provide a more satisfactory degree of proof of guilt, hearsay that is not otherwise admissible under the Rules of Evidence (thus competent) cannot by itself support an ultimate finding of fact.

"Conduct unbecoming a public employee" is one of the grounds for discipline of public employees. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" encompasses conduct that would adversely affect the morale or efficiency of a governmental unit or that had 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 NJ. Super. 136, 140 (App. Div. 1960). It was sufficient that the complained-of-conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, at 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)). Conduct unbecoming is a fact sensitive determination rather than one based on a legal formula. In the Matter of Craig Venson, City of Plainfield, OAL Dkt. No. CSV 07545-07, Initial Decision (June 9, 2009), aff'd, Civil Service Commission (August 6, 2009).

In the within matter, a LEO using a drug such as marijuana, which at the time of appellant's failed test was a legal and regulated drug available for medical use with a medical marijuana card but illegal to the general public, was a violation of the New Jersey Attorney General's Law Enforcement Drug Testing Policy (Exhibit R-5) and the Gloucester County Sheriff's Department Drug Policy set forth in its Gloucester County Sheriff's Office Rules of Conduct Manual. (Exhibit R-6.)

The Attorney General guidelines stated that its goal was to deter illegal drug use by law enforcement officers. It provided a mechanism to identify and remove those LEOs engaged in the illegal use of drugs. It stated that illegal drug use was inconsistent with the duties, obligations and responsibilities of sworn law enforcement officers, and held that officers who tested positive should be terminated from employment.

A law enforcement officer was held to a higher standard of conduct than other employees, and was expected to act in a responsible manner, with honesty, integrity, fidelity, and good faith. In re Phillips, 117 N.J 567, 576 (1990); Reinhardt v. E. Jersey State Prison, 97 N.J.A.R.2d (CSV) 166. This higher standard of conduct was an obligation that an officer voluntarily assumed when accepting the job. In re Emmons, at 142. 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." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). Not only did appellant violate State and County guidelines regarding illegal drug use, his use of marijuana for months before being caught, and failing a drug test while he was on duty, certainly encompassed conduct that would adversely affect the morale or efficiency of a governmental unit or that had a tendency to destroy public respect in the delivery of governmental services. This behavior met the definition of "conduct unbecoming" as set forth herein and described in Karins, at 554.

In addition to a failed drug test, appellant himself admitted to using marijuana. I **FIND** that respondent has shown by a preponderance of the credible evidence that appellant violated the New Jersey Attorney General's Law Enforcement Drug Testing Policy and the Gloucester County Sheriff's Department Drug Policy set forth in its Gloucester County Sheriff's Office Rules of Conduct Manual. I **CONCLUDE** that appellant's drug violations met the definition of "conduct unbecoming a public employee.

Having admitted to the use of an illegal drug, appellant's defense was to blame his drug use on the respondent. He sought to apply the "doctrine of unclean hands," claiming that he should be reinstated because respondent failed to protect him from Sherman. Employers do have a duty to protect their employees from a hostile work environment; an employer may be liable when a co-worker created a hostile work environment, and the employer "knew or should

have known of the harassment and failed to take prompt remedial action." See Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293–94 (3d Cir. 1999).

Respondent was aware of the 2016 assault by Sherman against appellant and took measures to protect appellant. Respondent brought charges against Sherman, who resigned his position before having to defend those charges. When Sherman was rehired in 2019, appellant was advised; there was no evidence presented that appellant objected to the rehiring. Respondent assigned Sherman to work out of a different department than appellant. When appellant was inadvertently scheduled to have Sherman as his range instructor, respondent immediately remedied the situation by arranging for a different instructor for appellant.

"Unclean hands" may be a defense in equity, but was not applicable in the within matter. Respondent was not a "suitor" and was not a party seeking equitable relief. Appellant was the only party seeking relief, that is, being reinstated to his position or receiving a suspension instead of dismissal. Respondent was a party hereto only in defense of the action they took to enforce State and County rules and regulations regarding appellant's illegal drug use. Even if "unclean hands" was applicable here, the evidence failed to show that appellant's drug use resulted solely from the incident with Investigator Sherman. The evidence failed to show that appellant's drug use resulted from any actions taken by respondent; towards that end, appellant and his expert witness both failed to address whether appellant had any pre-existing mental or physical issues. The evidence failed to show that appellant ever advised respondent about his mental health issues. The evidence failed to prove that appellant suffered PTSD. The evidence failed to show that there was an objective chance that a second assault might take place.

In fact, the evidence showed that appellant's employer made efforts to keep appellant and Sherman apart, and when those efforts failed, the employer addressed the issue and continued to attempt to keep the two men apart. The evidence showed that appellant and Sherman did not have a second physical encounter. The evidence showed that appellant failed to file written complaints against his employer for the wrongs he perceived. The evidence showed that appellant failed to seek proper medical care or to avail himself of psychological

assistance offered by his employer. The evidence showed that appellant lived in a house where marijuana was used; his wife could have advised appellant on the legalities and protocols for medical marijuana, but appellant chose to procure marijuana illegally. It was appellant who came to this case with unclean hands. Further, having failed to offer evidence to prove the same within-referenced facts to support his argument of unclean hands, a defense of equitable estoppel would not be available to appellant.

Appellant advised this court that (then Acting) New Jersey Attorney General Matthew J. Platkin had, on April 13, 2022, issued a memorandum making changes to marijuana policies in light of the voter-passed legalization of recreational marijuana in New Jersey. (Appellant Brief, Exhibit G.) However, the memorandum post-dated appellant's failed drug test. Further, the new policy still prohibited law enforcement officers from using unregulated marijuana, even off-duty. Appellant admitted that he received marijuana from a friend, and therefore had not purchased legal, regulated marijuana. Further, appellant was on duty when he was administered and then failed a drug test, and he offered no proofs that he was not intoxicated at the time he failed the drug test, nor proofs as to the last time he ingested marijuana prior to the beginning of his shift on the date of the failed drug test. Accordingly, the April 2022 memorandum did not serve as a defense to appellant's use of illegal, unregulated marijuana in 2020.

PENALTY

As stated above, an appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. Further, a civil service employee who committed a wrongful act related to his or her employment may be subject to discipline, and that discipline may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV)(1996).

Progressive discipline would be required in those cases where an employee was guilty of a series of offenses, none of which was sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV)(1994); West New York v. Bock, 38 N.J. 500, at 522. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct could be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, 38 N.J. at 522-23. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. Henry v. Rahway State Prison, 81 N.J. 571 (1980).

However, it is well established that when the underlying conduct was of an egregious nature, the imposition of a penalty up to and including removal would be appropriate, regardless of the individual's disciplinary history. See Henry, 81 N.J. at 571. 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. In re Carter, at 484.

The within matter is not one of progressive discipline, as no past disciplinary issues regarding appellant were raised at the hearing.

Appellant cited to several cases where LEOs were not terminated from their positions for illegal drug use. But those cases involved an accidental ingestion of a prohibited drug or where a LEO failed to disclose a prescription before submitting to drug testing. Those cases carried no weight in the within scenario; here, appellant intentionally sought the prohibited drug, fully aware that using marijuana without a medical marijuana card was illegal and constituted violations of State and departmental rules and regulations. There was no element of error or inadvertent action on the part of the officer.

Courts have found the penalty of dismissal appropriate for those "infractions that went to the heart of the officer's ability to be trusted to function appropriately in his position." In re Herrmann, at 36. "Acts that subvert good order and discipline in a police department" have

been deemed to constitute conduct so unbecoming a police officer as to warrant dismissal. In re Herrmann, at 35. In the context of disciplining police and correction officers, "public safety concerns may also bear upon the propriety of the dismissal sanction." In re Carter, at 485 (upholding the removal of a police officer for sleeping on duty). Maintenance of strict discipline was 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.), cert. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

As stated above, a LEO was held to a higher standard of conduct than other employees, and was expected to act in a responsible manner, with honesty, integrity, fidelity, and good faith. In re Phillips, at 576. This higher standard of conduct was an obligation that an officer voluntarily assumed when accepting the job. In re Emmons, at 142. Regarding the within appellant, not only did he violate State and County guidelines regarding illegal drug use, his use of marijuana for months before being caught, and failing a drug test while he was on duty, certainly encompassed conduct that would adversely affect the morale or efficiency of a governmental unit or that had a tendency to destroy public respect in the delivery of governmental services. This behavior met the definition of "conduct unbecoming" as set forth herein and described in Karins, at 554. The uncertainty of how appellant was obtaining a then-illegal and unregulated intoxicating drug, and uncertainty as to how long he had been using marijuana, and the fact that he tested positive for marijuana while on duty, all went to the heart of the officer's ability to be trusted to function appropriately in his position, and fall within the guidelines and caselaw that call for dismissal.

I **CONCLUDE** that the removal of appellant from his position as an officer with the Gloucester County Sheriff's Office was warranted.

ORDER

I **ORDER** that the disciplinary action of the respondent, Gloucester County Sheriff's Office, in removing appellant Allen from his position as a sheriff's officer, is **AFFIRMED**, and that the within appeal is hereby **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** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, 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.

January 25, 2023
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: January 25, 2023

Date Mailed to Parties: January 25, 2023

JNR/dw

APPENDIX

WITNESSES

For respondent:

Edward McCormick

For appellant:

Steven Allen, appellant

Dr. Gary Michael Glass

EXHIBITS

For appellant:

P-1 Curriculum Vitae of Dr. Glass

P-2 Glass Report, dated July 17, 2021

P-3 McCormick Letter, dated January 26, 2017

P-4 McCormick Letter, dated January 26, 2017

P-5 Appellant Performance Notices

For respondent:

R-1 Final Notice of Disciplinary Action, dated May 11, 2021

R-2 Appellant drug test, dated September 10, 2020

R-3 Lab results, dated September 28, 2020

R-4 Gloucester Standard Operating Procedures, dated January 21, 2020

R-5 Attorney General's Law Enforcement Drug Testing Policy, revised April 2018

R-6 Gloucester Rules of Conduct

R-7 Drug Test Chain of Custody, dated September 10, 2020