

tolerance for unregulated marijuana consumption by officers at any time, on or off duty, while employed in this State.” In the present matter, because the regulated market had not yet begun, it would be impossible for Lopez to have used regulated recreational cannabis. As such, based on the present record, the ALJ incorrectly held that the appointing authority categorically could not take an adverse employment action against Lopez based on his positive testing result. Accordingly, the Commission rejects that determination.

Given the above, the Commission finds it necessary to remand this matter to the OAL for further proceedings. Specifically, there needs to be a hearing to develop a factual record as to how the marijuana/cannabis was obtained and ingested. Because the regulated recreational market had not yet opened, Lopez could have only ingested unregulated marijuana (which he could be terminated for), or regulated medical cannabis (for which he would have protections). There are no facts in the record establishing either scenario. Thus, on remand, a factual finding should be made as to whether Lopez’s use was unregulated or not. Moreover, on remand, additional mitigating facts could plausibly be developed, such as accidental exposure, *see e.g., In the Matter of Alberto Aponte*, Docket No. A-1782-19 (App. Div. July 20, 2021), or prescribed use of a derivative product like CBD, *see, e.g., In the Matter of William Shorter*, Docket No. A-3150-18T3 (App. Div. May 4, 2020).

Further, the Commission finds the ALJ’s determination regarding the preemption issue raised by the appointing authority referencing 18 U.S.C. § 922(d) and 18 U.S.C. § 922(g) is moot as the matter is being remanded back to OAL for a determination of the charges and a possible penalty.

ORDER

The Civil Service Commission remands the matter to the Office of Administrative Law as directed above.

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



Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 08567-22

**IN THE MATTER OF RICHIE LOPEZ,
CITY OF JERSEY CITY.**

Michael Rubas, Esq., for appellant Richie Lopez (Rubas Law Offices, attorneys)

Kyle Trent, Esq., for respondent City of Jersey City (Apruzzese, McDermott,
Mastro & Murphy, attorneys)

Record Closed: January 6, 2023

Decided: January 19, 2023

BEFORE SUSANA E. GUERRERO, ALJ:

STATEMENT OF THE CASE

The appellant, Richie Lopez (Lopez), appeals the determination by the respondent, City of Jersey City, to remove him from his position as a police officer in Jersey City as a result of a positive drug test. The appellant filed a motion for summary decision, asserting that the charges in the Final Notice of Disciplinary Action (FNDA) should be dismissed because the termination was unlawful as it violates the New Jersey Constitution and the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, N.J.S.A. 24:6I-31 to -56 (the CREAMM Act). The respondent opposes

the motion for summary decision and filed a cross-motion seeking to amend the FNDA to include additional charges.

PROCEDURAL HISTORY

The respondent served the appellant with a Preliminary Notice of Disciplinary Action (PNDA) dated November 20, 2021, and an FNDA dated August 23, 2022, sustaining all charges set forth in the PNDA. The disciplinary action taken against Lopez was removal, effective August 23, 2022.

The within matter was filed at the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 40A:14-202(d), and the appeal was perfected on September 28, 2022. The appeal was assigned to the undersigned, and a telephone pre-hearing conference was held on October 25, 2022, during which a hearing was scheduled and the appellant was granted leave to file a motion for summary decision.

The appellant filed a motion for summary decision on or around November 15, 2022. The respondent filed an opposition to the motion and a cross-motion to amend the pleadings on or around December 1, 2022. The appellant filed a reply brief on December 12, 2022, and on December 14, 2022, the respondent filed a reply to the appellant's opposition to the cross-motion to amend the pleadings. A telephone status conference was held on January 6, 2023, at which time the record closed.

FACTUAL DISCUSSION

Upon review and consideration of all documents submitted in support of and in opposition to the motion for summary decision, and the cross-motion, I **FIND** the following **FACTS**, which are undisputed:

Lopez, a Jersey City police officer, was selected for random drug testing on September 14, 2021, pursuant to Jersey City Police Department (JCPD) General Order 12-18 and the New Jersey Attorney General's Law Enforcement Drug Testing Policy.

Prior to undergoing the drug test in September 2021, Lopez signed an acknowledgement of receipt of JCPD General Order 12-18. Section 7.3 of General Order 12-18 puts JCPD officers, including Lopez, on notice that if an officer tests positive for illegal drug use, he/she will be terminated upon final disciplinary action. Lopez also signed an acknowledgement indicating that he understood that a negative drug test result was a condition of his continued employment.

Prior to testing, Lopez completed a Drug Testing Medication Information form in which he listed medications that he had taken during the fourteen days prior to the random drug test. Lopez did not indicate on the form that he used prescribed or unprescribed marijuana.

The New Jersey State Toxicology Laboratory completed a mass spectrometer drug test of the urine sample submitted by Lopez, and confirmed a positive result for cannabinoids (THC).

The respondent initiated disciplinary action against Lopez based on the results of the random drug test. The FNDA dated August 23, 2022 charges Lopez with having violated Jersey City Police Department (JCPD) Rule 3:164,¹ for Narcotics Use; JCPD Rule 3:108,² for Conduct; and N.J.A.C. 4A:2-2.3(a)(6), for conduct unbecoming a public employee. The incident giving rise to the charges is as follows:

On October 19, 2021, this agency was made aware of a urine sample submitted by Police Officer Richie Lopez on September 14, 2021, [that] tested positive for the use of Cannabinoids (THC). The sample was obtained pursuant to random drug testing as delineated by the New Jersey Attorney General Guideline Policy of Law Enforcement Drug

¹ JCPD Rule 3:164 provides that “[a] member will not use narcotics, hallucinating, stimulating or dangerous drugs while on-duty or off-duty, unless prescribed by a physician for illness.”

² JCPD Rule 3:108 provides that “[m]embers will not engage in any conduct which constitutes conduct unbecoming an officer or neglect of duty. They will conduct their private and professional lives in such a manner as to be a credit to the department.”

Testing.³ P.O. Lopez had a departmental hearing on August 19, 2022, and the charges were sustained after a vote of 2-1.

Based on a review of the FNDA and all documents submitted, I **FIND** that the sole reason for Lopez's removal was the presence of "Cannabinoids (THC)" in his urine during the random drug testing, which the respondent alleges violated JCPD rules prohibiting narcotics use, and constituted unbecoming conduct. The respondent does not assert, and there is no purported evidence to suggest, that Lopez used marijuana or cannabis while on duty, nor that he was in any way intoxicated or impaired while on the job at or around the time he submitted to the random drug test in September 2021.⁴

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This regulation is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules, R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

³ The respondent points out that the New Jersey Attorney General's Law Enforcement Drug Testing Policy provides law enforcement agencies, including the JCPD, "with a mechanism to identify and remove those law enforcement officers engaged in the illegal use of drugs." (Page 1 of Attorney General's Law Enforcement Drug Testing Policy, Revised December 2020.) This policy required municipal police departments to conduct random drug tests, including screenings for marijuana/cannabis. However, in an April 13, 2022, memorandum from then Acting Attorney General Matthew J. Platkin to all law enforcement chief executives, he acknowledged that the CREAMM Act applied to law enforcement and announced that a revised Law Enforcement Drug Testing Policy to reflect the CREAMM Act was forthcoming.

⁴ The respondent asserts that, in his motion papers, Lopez denied consuming marijuana while employed by the JCPD when he was interviewed by the Internal Affairs office, but that in Lopez's motion, he now appears to be admitting to having consumed marijuana, and that this alleged inconsistency amounts to a dispute over an issue of material fact warranting the denial of the appellant's motion for summary decision, as well as an amendment to the FNDA. I **FIND** that while Lopez may have denied consuming marijuana to Internal Affairs, there is insufficient reliable evidence that Lopez is now maintaining that he did in fact consume marijuana. Lopez did not present a certification or affidavit with his motion in which he admits to having consumed marijuana, and the legal brief submitted on Lopez's behalf does not represent that he intentionally ingested marijuana/cannabis. I **FIND** that while the record may be inconclusive as to whether Lopez did in fact intentionally consume marijuana prior to the random drug test, this is not a genuine issue of material fact for purposes of considering the appellant's motion for summary decision.

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that “if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful, frivolous, gauzy, or merely suspicious,’ he will not be heard to complain if the court grants summary judgment.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)). The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)).

In evaluating a motion for summary decision on the merits, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, “[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” N.J.A.C. 1:1-12.5(b).

I **CONCLUDE** that this matter is ripe for summary decision because no genuine issue of material fact exists. The question of whether Lopez lied to Internal Affairs about consuming marijuana is not an issue of material fact in this appeal since the basis for the termination was the result of a random drug test. The appellant asserts that he is entitled to summary decision because the termination itself was unlawful since it is expressly prohibited by the recently enacted CREAMM Act. Whether Lopez lied concerning his marijuana use, or whether he intentionally ingested marijuana/cannabis detected in the screening, is irrelevant to the issue posed here—i.e., whether the respondent is legally permitted to terminate Lopez solely for testing positive for cannabinoids (THC) on a random drug test in September 2021. For the reasons set forth below, and for purposes of considering this motion for summary decision, it is also irrelevant that the drug

screening here took place prior to the official opening of the State's regulated recreational cannabis market, on or around April 21, 2022.

The appellant asserts that Lopez's termination in August 2022 was unlawful because it occurred when the CREAMM Act was operational, and that the termination violates the New Jersey State Constitution, the CREAMM Act, and the Personal Use Cannabis Rules, N.J.A.C. 17:30-1.1 to -17.9. The appellant also asserts that while the JCPD Rules and Regulations may allow for, or require, the termination of a police officer for having cannabinoid metabolites in his system, these Rules and Regulations are preempted by the CREAMM Act.

The CREAMM Act, P.L. 2021, c. 16, which governs the regulation and use of cannabis, was signed into law on February 22, 2021. While the Act became effective immediately upon signing, some sections of the Act, including section 52, which is the section that applies to employers, only became operative upon adoption of the Cannabis Regulatory Commission's (CRC) Personal Use Cannabis Rules. The CREAMM Act specifically tasks the CRC with promulgating rules to carry out the Commission's duties and powers with respect to overseeing the development, regulation, and enforcement of activities associated with the personal use of cannabis pursuant to P.L. 2021, c.16. The CRC initially issued the Personal Use Cannabis Rules on or around August 19, 2021, which made the CREAMM Act operative as of that date. <https://www.nj.gov/cannabis/documents/rules/NJAC%201730%20Personal%20Use%20Cannabis.pdf>. These CRC rules have since been readopted. See N.J.A.C. 17:30. Consequently, with the initial publishing of the CRC's Personal Use Cannabis Rules in August 2021, N.J.S.A. 24:6I-52 became operative, and this pre-dated Lopez's drug screening and subsequent termination.

Lopez asserts that his termination violates the CREAMM Act, and specifically N.J.S.A. 24:6I-52(a)(1), which provides in pertinent part:

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because

that person does or does not smoke, . . . or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c. 16 (C.24:6I-31 et al.).

[Emphasis added.]

"Adverse employment action" includes the discharge of an employee from employment. See N.J.S.A. 24:6I-3.

The CREAMM Act does, however, authorize drug testing of employees by their employer when there is reasonable suspicion of the employee's use of cannabis while working or when there are observable signs of intoxication; and random drug testing is also permitted but only to determine use during prescribed work hours. Specifically, it states:

. . . [A]n employer may require an employee to undergo a drug test upon reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities, or upon finding any observable signs of intoxication related to usage of a cannabis item, or following a work-related accident subject to investigation by the employer. A drug test may also be done randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee's prescribed work hours. The drug test shall include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation in order to determine an employee's state of impairment. The physical evaluation shall be conducted by an individual with the necessary certification to opine on the employee's state of impairment, or lack thereof, related to the usage of a cannabis item The employer may use the results of the drug test when determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.

[N.J.S.A. 24:6I-51(a)(1).]

I agree with the appellant and **CONCLUDE** that the respondent is subject to the CREAMM Act, and specifically N.J.S.A. 24:6I-52, and that this provision was in effect at the time that Lopez was tested in September 2021, and later terminated. There is nothing in the CREAMM Act to suggest that N.J.S.A. 24:6I-52 does not apply to law enforcement. It is also worth noting that there is nothing in the CREAMM Act that limits the application of this provision only to employees who ingested cannabis/marijuana after the CRC's opening of New Jersey's regulated recreational cannabis market in April 2022. For the reasons set forth herein, I also **CONCLUDE** that the appellant's termination violates the CREAMM Act, and specifically N.J.S.A. 24:6I-52(a)(1).

Here, there is no proffered evidence that there was ever reasonable suspicion of cannabis use by Lopez, nor were there any purported signs of intoxication, suspected drug use, or impairment during work hours. Lopez was terminated because a random drug test revealed cannabinoids/THC in his urine, and a negative drug-test result was a condition of his continued employment. N.J.S.A. 24:6I-52 clearly states that no employer "shall discharge from employment or take any adverse action against any employee . . . because that person does or does not smoke, . . . or otherwise use cannabis items." The respondent did just that—it terminated Lopez for using cannabis once the results of the urinalysis showed the presence of cannabinoids/THC—when the clear language of N.J.S.A. 24:6I-52(a)(1) precludes employers from terminating an employee simply because the employee uses cannabis, and precludes employers from terminating their employees solely due to the presence of cannabinoid metabolites in the employee's system. There is nothing in the CREAMM Act that limits the application of this statutory provision to those employees who used or were screened for cannabis after the regulated recreational cannabis market opened about eight months after this statute became operative.

N.J.S.A. 24:6I-52(a)(1) goes on to clarify that employers may still require employees to undergo drug tests, including random drug screenings, when there is reasonable suspicion of an employee's cannabis usage while working or when the employee appears impaired. And the employer can take appropriate employment action when an employee uses marijuana/cannabis during working hours, or when he/she is impaired. This provision governing drug testing in the workplace is consistent with the

legislative intent behind the CREAMM Act, which was to adopt a new approach to the State's marijuana/cannabis policies by legalizing cannabis in a similar fashion to that of alcohol. See N.J.S.A. 24:6I-32. What the CREAMM Act precludes is adverse employment action simply for testing positive for cannabinoid metabolites, or for using cannabis, so long as it is not used during the workday and the employee is not intoxicated or impaired at work.

As the appellant was terminated in part for violating certain JCPD Rules as a result of the drug test results, I also **CONCLUDE** that the JCPD Rules that form the basis for Lopez's removal are preempted by the CREAMM Act to the extent that these Rules allow for the removal or discipline of a police officer simply for testing positive for the use of cannabinoids and nothing more.

Preemption

The respondent asserts that despite the language in the CREAMM Act, preempting federal law prohibits the receipt or possession of a firearm or ammunition by users of marijuana, and that the respondent properly terminated the appellant for using marijuana due to his "unbecoming use of such substance in dereliction of federal law." The respondent argues that federal law preempts the CREAMM Act as it relates to discipline of police officers' use of marijuana because federal law prohibits those officers from fulfilling their job duties by receiving and possessing firearms and ammunition if they use marijuana. The respondent asserts that Lopez cannot continue as a police officer if he is a user of marijuana because federal law prohibits him from possessing a firearm or ammunition, which are required job duties.

With regard to the preemption issue raised by the respondent, Jersey City specifically references 18 U.S.C. § 922(d) and 18 U.S.C. § 922(g), and argues that the US Congress enacted legislation prohibiting certain individuals from possessing or receiving firearms or ammunition, and prohibiting individuals from providing firearms or

ammunition to such an individual based upon the person's drug use.⁵ Moreover, the respondent notes that marijuana is a Schedule I controlled dangerous substance under federal law (21 U.S.C. § 812), and the US Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has advised that under the federal firearms law "any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition." (September 21, 2011, open letter to all firearms licensees.) The respondent argues, therefore, that conflict preemption nullifies the CREAMM Act because the CREAMM Act might suggest that police officers can utilize marijuana while continuing to work in a position that requires receipt of or possession of a firearm and ammunition.

I am not persuaded by the respondent's arguments that the federal law cited by the respondent in its brief preempts the CREAMM Act as it applies to police officers. There is an obvious conflict between the CREAMM Act, which legalizes the personal use of marijuana in New Jersey, and federal law, which still considers marijuana an unlawful controlled substance, and this conflict was recognized by the New Jersey State Legislature when it enacted the CREAMM Act. In enacting the CREAMM Act, the State Legislature recognized that the personal use of cannabis remains illegal under federal law, and in the CREAMM Act itself, our Legislature expressly directs law-enforcement agencies in New Jersey not to cooperate with or assist the federal government in enforcing these federal laws. Specifically, N.J.S.A. 24:6I-54 provides in part:

⁵ 18 U.S.C. § 922(d) provides:

[i]t shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person, including as a juvenile- . . .

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)).]

18 U.S.C. § 922(g) provides:

[i]t shall be unlawful for any person –

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transpired in interstate or foreign commerce.

a. Law enforcement agencies in this State shall not cooperate with or provide assistance to the government of the United States or any agency thereof in enforcing the "Controlled Substances Act," 21 U.S.C.s.801 et seq., solely for actions consistent with P.L.2021, c.16 (C.24:6l et al.), except pursuant to a valid court order.

b. No agency or subdivision of an agency of this State may refuse to perform any duty under P.L.2021, c.16 (C.24:6l-31 et al.) on the basis that manufacturing, transporting, distributing, dispensing, delivering, possessing, or using any cannabis item or marijuana is prohibited by federal law. [emphasis added]

[N.J.S.A. 24:6l-54(a) and (b).]

The CREAMM Act itself expressly directs all agents of the State, such as police departments, to comply with the CREAMM Act despite recognizing that federal cannabis laws may conflict with the CREAMM Act. The CRC also addressed this conflict on its website by providing some guidance to U.S. Attorneys. According to the CRC website:

New Jersey's cannabis regulations conflict with Federal law, however "States are not required to enforce [Federal] law or prosecute people for engaging in activities prohibited by [Federal] law; therefore, compliance with [the Act] does not put the State of New Jersey in violation of [Federal] law," and N.J.S.A. 24:6l-54 further directs law enforcement in New Jersey to not cooperate with federal agencies enforcing The Controlled Substances Act for activities solely authorized by the Act.

United States Attorneys are instructed to focus on the following eight enforcement interests in prioritizing the prosecution of Federal laws criminalizing marijuana-related activity:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.

[[https://www.nj.gov/cannabis/resources/cannabis-laws/.](https://www.nj.gov/cannabis/resources/cannabis-laws/)]

Moreover, concerning “workplace” laws and the CREAMM Act, the CRC also states on its website:

While general cannabis use cannot be a determining factor for hiring or firing someone, employers do have the right to maintain a drug and alcohol-free work environment. In-house or contracted Drug Recognition Experts may perform random drug tests for intoxication at work, and may test anyone who appears to be impaired on the job, or who has been in a workplace accident.

[[https://www.nj.gov/cannabis/adult-personal/workplace-dui-laws/.](https://www.nj.gov/cannabis/adult-personal/workplace-dui-laws/)]

The respondent argues that police officers are required to possess a firearm and regularly receive ammunition as a condition of their job duties, and because of this, the federal law cited above, 18 U.S.C. § 922 and 21 U.S.C. § 812, preempts the CREAMM Act. I am not persuaded. The respondent did not offer a sufficient factual or legal basis to support this position, and I cannot conclude that “conflict preemption” exists here. Conflict preemption applies when “it is impossible for a private party to comply with both state and federal requirements, or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Hager v. M&K Constr., 462 N.J. Super. 146, 153 (App. Div. 2020) (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (first citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963), and then quoting Hines v. Davidowitz, 312 U.S. 52 (1941)), *aff’d*, 246 N.J. 1 (2021)). The respondent has failed to demonstrate that a “positive conflict”

exists between the CREAMM Act and the federal law cited because even if marijuana consumption remains unlawful under federal law, nothing in the CREAMM Act requires anyone to violate federal law, and while the CREAMM Act provides immunity from State prosecution and from adverse employment actions, it does not purport to offer any immunity from any violation of federal law—the federal government is still free to prosecute cannabis users in New Jersey even though State prosecutors and law enforcement may not.

I am also not convinced that it is impossible to comply with the CREAMM Act, and specifically N.J.S.A. 24:61-52, and the federal law cited. While there may be a federal prohibition against an “unlawful user” of marijuana possessing any firearm or ammunition, I am not persuaded that this law preempts the CREAMM Act, and specifically the provision of N.J.S.A. 24:61-52(a)(1) that prohibits adverse employment action against certain employees who use or test positive for cannabis/marijuana. The respondent has failed to illustrate sufficient legal authority to support its preemption argument and to neglect its obligations under the CREAMM Act. The respondent cannot disregard State law in order to enforce federal law.

Finally, the respondent adds that the ATF's Firearms Transaction Record, Form 4473, states that an unlawful user of marijuana is prohibited from receiving or possessing a firearm. This Form is used when a person proposes to purchase a handgun from a Federal Firearms License Holder, and the respondent does not even assert that Lopez is required to fill out this form as part of his job duties. In fact, pursuant to N.J.S.A. 2C:39-6(a)(7)(a), municipal police officers are exempt from the requirement to have a firearms permit to carry a firearm in any place in the State, provided they have had firearms training in the Police Academy and qualify each year pursuant to N.J.S.A. 2C:39-6(j). The respondent does not provide sufficient legal support to conclude that the appellant cannot carry a weapon as a police officer because of a positive drug test for THC.

Accordingly, I **CONCLUDE** that the respondent has failed to demonstrate that federal law preempts the CREAMM Act as it relates to the discipline of police officers' use of marijuana/cannabis.

Cross-Motion to Amend FNDA

Finally, in its cross-motion, the respondent seeks to amend the FNDA to include additional charges based on information gleaned in the appellant's motion. The respondent asserts that because information contained in the appellant's motion allegedly suggests that he did in fact use marijuana, after denying this when questioned by internal affairs, the respondent should be permitted to amend the disciplinary charges at issue to "address that new but related misconduct as part of this proceeding in the interest of efficiency and expediency consistent with N.J.A.C. 1:1-6.2." Specifically, the respondent seeks to amend the FNDA to include, in addition to the three charges already in the FNDA before us, ten new charges for allegedly: "making untruthful statements when interviewed by internal affairs, . . . including when he denied ever consuming marijuana while employed at the Jersey City Police Department. In the alternative, Lopez made untruthful statements when he asserted that he used marijuana in support of his Motion for Summary Decision"

These ten charges include: "JCPD Rule 3:123 Obedience to Laws, Regulations & Orders; JCPD Rule 3:126 Neglect of Duty; JCPD Rule 3:139 Truthfulness; JCPD Rule 3:157 Rules and Regulations; JCPD Rule 3:169 Code of Ethics; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)(7)⁶ Neglect of Duty; and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause.

For the reasons set forth below, I **CONCLUDE** that the request to amend the FNDA is inappropriate and should be denied.

Appeals before the Civil Service Commission are conducted as hearings de novo. East Patterson v. Dep't of Civil Serv., 47 N.J. Super. 55 (App. Div. 1957); Newark v. Civil Serv. Comm'n, 114 N.J.L. 406, 413 (1935). N.J.S.A. 11A:2-14 states that "the employee shall have a right to appeal to the Civil Service Commission," and N.J.S.A. 11A:2-15 states that appeals are from "adverse actions" of the appointing authority. The de novo

⁶ Incorrectly listed in the brief as N.J.A.C. 4A:2-2.3(a)(6).

hearing on an administrative appeal is limited to charges made below. Appeal of Darcy, 114 N.J. Super. 454, 459 (App. Div. 1971) (citing West New York v. Bock, 38 N.J. 500, 522 (1962)).

In Civil Service matters, the appointing authority, on appeal, is not entitled to broaden the charges determined on the local level. Hammond v. Monmouth Cnty. Sheriff's Dep't, 317 N.J. Super. 199 (App. Div. 1999). As the court explained in Hammond, an appeal to the Civil Service Commission is from the FNDA issued by the appointing authority, and the Civil Service Act itself "mandates review only of the adverse decision of the appointing authority as stated in the [FNDA] since that is where the employee appeals to the . . . [Commission]. To hold that the appointing authority, on appeal, is entitled to broaden the charges as determined on the local level, would be to surcharge the right to appeal with a cost which violates any decent sense of due process and fair play." Id. at 206.

Here, the respondent seeks to amend the FNDA to include a host of additional charges not included in the FNDA because the motion filed on behalf of Lopez seems to suggest that Lopez was untruthful to internal affairs. Not only is the respondent's motion to amend the FNDA inconsistent with controlling law, the factual basis to seek this amendment is also questionable and unsupported by the current record. Lopez did not even submit an affidavit or certification making a contradictory statement concerning his drug use, and Lopez's counsel simply made legal arguments in the motion based on the record provided by the respondent in the FNDA, and never asserted that Lopez intentionally ingested marijuana. In fact, during a telephone conference with counsel on January 6, 2023, Lopez's counsel confirmed that his client still denies any intentional use of marijuana/cannabis. Not only is it procedurally improper to amend the FNDA to broaden the charges determined at the local level, but it would also not serve the interest of efficiency or expediency to add to this appeal these unrelated and speculative charges. The respondent is, of course, free to file separate charges against the appellant, and Lopez is free to appeal any FNDA on any new charges.

ORDER

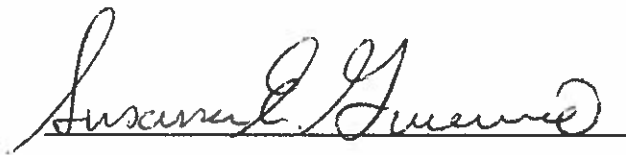
Accordingly, and for the reasons set forth herein, it is hereby **ORDERED** that the motion for summary decision filed on behalf of Richie Lopez is **GRANTED**, and that the termination of the appellant Richie Lopez's employment be **REVERSED**. It is further **ORDERED** that the respondent's motion to amend the FNDA is hereby **DENIED**.

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.

January 19, 2023
DATE


SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb