

the Commission remands this matter to the Office of Administrative Law to have the ALJ specifically clarify whether the chain of custody issues served as a basis to invalidate the drug test results. If so, the charges should be dismissed completely, and the removal should be reversed. If not, the ALJ should indicate whether her originally recommended reduction in penalty remains as such absent any consideration of the chain of custody issues. No further hearing proceedings appear necessary, unless the ALJ believes such proceedings will lead to further clarification of the initial decision.

ORDER

The Civil Service Commission remands this matter to the Office of Administrative Law for further proceedings as detailed above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2023

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 06558-22

AGENCY DKT. NO. N/A

2023-220

**IN THE MATTER OF JASMINE GOVENS,
SOUTH WOODS STATE PRISON.**

Michael P. DeRose, Esq., for appellant Jasmine Govens (Crivelli, Barbati & DeRose, LLC, attorneys)

Ryan J. Silver, Deputy Attorney General, for respondent South Woods State Prison, New Jersey Department of Corrections (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: July 7, 2023

Decided: August 15, 2023

BEFORE KATHLEEN M. CALEMMO, ALJ:

STATEMENT OF THE CASE

Appellant, Jasmine Govens (Govens), a Senior Corrections Police Officer (SCPO) at South Woods State Prison (South Woods), appealed her removal by the respondent, New Jersey Department of Corrections (DOC), effective July 20, 2022. DOC removed appellant after she tested positive for Cannabinoids, 11-Carboxy-THC (THC) on a random urine drug screening. The sustained charges in the Final Notice of Disciplinary Action (FNDA) were 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-30, use, possession, or sale of any controlled dangerous substance (custody); and HRB 84-17, E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. Govens denied ever consuming illegal marijuana but admitted to daily and repeated use of a hemp-based face cream and other hemp-based/CBD products.

PROCEDURAL HISTORY

On February 17, 2022, the DOC issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications. (J-1.) Appellant requested a departmental hearing, which was held on June 30, 2022. On July 20, 2022, the respondent issued the FNDA removing appellant from employment, effective July 20, 2022. (J-2.) Appellant filed a direct filing removal appeal to the Office of Administrative Law (OAL), where it was filed on August 3, 2022, 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 appeal was perfected on July 28, 2022.

The hearing dates were scheduled for November 14, 2022, and November 15, 2022. Appellant requested an adjournment of the hearing dates until December 16, 2022, and January 13, 2023, subject to N.J.S.A. 40A:14-201(b)(2). As such, 60 days was added to the 181 days when appellant would be required to be returned to pay status. Thereafter, by mutual consent the parties added another hearing date of January 23, 2023, requested transcripts, and extended the time to submit closing summations. By agreement, the parties continued to toll the time for returning the officer to pay status. The last summation brief was submitted on June 26, 2023. I closed the record on July 7, 2023, when the summation briefs were exchanged between the parties. The appellant was not returned to pay status.

FACTUAL DISCUSSION

The following is not in dispute, and is therefore **FOUND** as **FACT**:

Govens is a single mother of a sixteen-year-old daughter. She served as a Senior Correctional Police Officer (SCPO) for fifteen years at South Woods.

All correction officers are subject to random drug testing. The Attorney General's Law Enforcement Drug Testing Policy (R-20) is the guideline for all law enforcement personnel in New Jersey.

The DOC's policy is codified at HRB 99-01 as amended November 6, 2009. (R-18). The consequences of a positive test for illegal drug use are termination from service and permanent debarment from future law enforcement employment in New Jersey.

All officers are bound by the Law Enforcement Personnel Rules and Regulations (R-23) and the Standards of Professional Conduct (R-24) which apply to conduct on or off duty. All employees of the DOC receive a Handbook of Information and Rules (R-25) wherein they are informed that violations of their code of ethics or violations of the general principles of the rules and regulations may subject them to termination of employment. Accordingly, a positive drug test is a violation of the rules and regulations subjecting an officer to removal.

As of her hire date of March 25, 2008, Govens received documents that contained information as to the DOC's policies, rules and regulations, and expectations. (R-29.) On December 12, 2007, Govens signed a policy receipt for HRB 99-01, the drug testing policy. (R-31.) In addition, officers receive training on drug recognition. (R-33.)

In accordance with HRB 84-17(c)30 for a personal conduct offense involving use, possession, or sale of any controlled dangerous substance, the penalty for a first offense is removal. (R-27.)

Senior Investigator, Jennifer Pesce, assigned as the urine coordinator in the Special Investigations Division (SID), of South Woods administered the drug test to Govens on November 8, 2021. (R-4.) Govens' name had been randomly placed on the donor list for November 2021. (R-3.) After receiving the call, Govens reported to SID. Pesce gave her a copy of the Drug Screening Program Monitor. (R-5.) There were no issues with Govens' demeanor, conduct, or ability to provide a urine sample. Govens completed the form listing her prescription and non-prescription medications. (R-6.)

Pesce, without reviewing the completed form, placed it in a sealed envelope. Govens had provided approximately eight negative random urine samples over her career at South Woods.

Govens provided her urine sample on November 8, 2021, at 10:15 a.m. Pesce placed the specimen in the evidence refrigerator at 10:16 a.m., where it remained until December 2, 2021. (R-5 at DOC 416.) Senior Investigator Robert Nicotera received Govens' specimen from Pesce at 8:00 a.m. on December 2, 2021. Id. As part of his duties, Nicotera collected specimens from the three southern prisons on the same day and drove them to the New Jersey State Toxicology Laboratory (toxicology lab) in Newark. Nicotera never transported specimens on the weekend, he only worked Monday through Friday.

December 2, 2021, was a Thursday. The toxicology lab's records showed that the specimen was received on Saturday, December 4, 2021. (R-15 at DOC 058.) The toxicology lab's chain of custody record contained the following information: "[o]n December 6, 2021, the following specimen was received from WATKINS of the NJDOC South Woods State Prison (SWSP)." (R-15 at DOC 143.) According to Pesce and Nicotera, who testified at the hearing, Watkins was a previous courier used by the DOC to transport urine specimens. Neither Nicotera's nor Watkin's signatures appeared on the lab's sign-in sheets covering dates from November 30, 2021, through December 8, 2021. (R-37.) According to Dr. Jackson, the executive director of the toxicology lab, the person making the delivery signs the sign-in sheet and writes the date and time of the visit.

Dr. Jackson testified as an expert in forensic toxicology. (R-16.) For all drug testing, the toxicology lab follows the Attorney General's guidelines for the Law Enforcement Drug Testing Program (LEDTP). The lab provides an analytical role, securing every sample within a chain of custody in a secure environment. Specimens are received by mail or carrier to a restricted access specimen receiving area. Each specimen is given a unique identifying number. The specimen under chain of custody is transferred to the screening section, where a small portion is removed and analyzed for various classes of

drugs. If everything is negative the testing stops. If a positive is received at the screening stage, the sample goes to step two, the confirmation process.

The LEDT program utilizes a split sample, labeled A and B. The B sample is frozen and is available if the donor wants confirmation from another laboratory.

According to Dr. Jackson's testimony, the urine sample bearing the identification number blindly assigned to Govens was received by the laboratory on December 4, 2021, and transferred for processing on December 6, 2021. No explanation was provided as to the discrepancy in the chain of custody documents from South Woods (R-5 at DOC 416) to the toxicology lab (R-15 at DOC 058 and DOC 143).

The first part of the testing is quality control. The lab tests for nine drug classes. Marijuana is detected as a cannabinoid and listed as THC. The cutoff for screening for THC is 20 nanograms per milliliter (ng/ml). The screening test was presumptive positive for THC. (R-15 at DOC095.) The confirmation testing is by gas chromatography mass spectrometry or GC Mass Spec.

A confirmed positive must be 15 ng/ml or above. The cut-off allows for passive inhalation of marijuana. The initial testing of the non-diluted sample was not acceptable by scientific standards. Dr. Jackson explained that the calibration curve cannot be higher than 75. When the non-diluted sample was tested, the result was above the curve so it could not be counted as an accurate measure. The result from the first confirmation was rejected. The sample was diluted, using a one-to-two dilution of the urine sample. By dividing the final reading in half, to account for the dilution, the final concentration of 41.5 fell within the calibration curve. With the diluted sample, the calibration curve passed the quality control. (R-15 at DOC129.) The acceptable confirmation was reviewed on December 21, 2021, and finally reviewed by Dr. Jackson on December 22, 2021. (R-15 at DOC119.) The confirmed positive for THC concentration was 83 ng/ml, after the 41.5 was multiplied by the dilution factor.

The final concentration of 83 ng/ml exceeded the 15 ng/ml industry cut-off. The confirmed positive results triggered another review of the data by the analyst and final

review by Dr. Jackson. After Dr. Jackson's final review and acceptance of the results, the findings were sent to the Chief Medical Review Officer, Dr. Anthony Falzon.

Dr. Falzon is the only person authorized to review the medication sheet that accompanied the sample to the lab. He reviews the medication log sheet listing all prescription and non-prescription medications, to see if there is anything that would explain the positive finding. Dr. Falzon determined that there was nothing listed on the medication sheet that would explain the positive finding. Dr. Falzone signed the Medical Review Officer's Certification Form on January 7, 2022. (R-15 at DOC096.)

After Dr. Falzon's review, Dr. Jackson performed the final review. He approved the positive test result for THC included on the Toxicology Report as accurate. (R-7.) The Toxicology Report was sent to SID at South Woods on January 31, 2022. (R-14.)

Pesce interviewed Govens on January 31, 2022. During the interview, Pesce advised Govens of her positive test result for THC. Pesce asked Govens whether she ingested anything that would have caused the positive result. Govens denied using drugs or smoking marijuana. She provided no explanation for how THC showed up in her drug screening. Govens provided Pesce with medical authorizations to allow access to her medical and pharmacy records to see if there was any explanation for the positive test. (R-11.) Thereafter, Govens was suspended. Pesce prepared a report of her investigation. (R-14.)

Govens testified that she did not understand how she could have tested positive for THC. She explained that she has asthma and would never smoke. She searched topical products for answers. In the past, she had gotten massages where CBD oil was applied. She had such massages on July 21, 2021, and September 29, 2021. (P-2.) In April or May of 2021, she started using a night cream and day cream purchased legally at Ollie's Discount Store in Bridgeton that contain hemp and hemp collagen in both. She applies these products at least three times a day to her face and hands. Although Govens was regularly using these creams, she never thought to list them on her medication sheet. During her interview, Pesce asked her whether she ingested anything, so she never thought to disclose the creams.

The morning of her random drug test had been a particularly stressful time for Govens because of a personal incident involving her daughter. When asked during her interview about whether she could recall any event prior to the November 8, 2021, random drug test, all she could remember was a crisis with her daughter. When Govens finished her shift on Friday night, November 5, 2021, she found a suicide note from her daughter and learned that her daughter was missing. After her daughter was found, she was taken to the police station. At 9:00 a.m. on Saturday morning, Govens drove to Cherry Hill to admit her daughter to a crisis hospital. Govens was allowed a two-hour visit on Sunday afternoon. On Sunday, Govens received a call from South Woods asking her to work on Monday. Because she needed to keep her mind occupied, she accepted. During the Monday shift, Govens was ordered to provide the random drug sample. For Govens, the preceding weekend had been a blur; she spent the bulk of her time between the State Trooper's Barracks in Upper Deerfield and the hospital with her daughter.

Govens maintained that she never smoked or ingested marijuana of any sort leading up to her positive drug test. Moreover, she testified that she never ingested an illegal drug or controlled dangerous substance during her career with DOC.

EXPERT TESTIMONY

Dr. Jackson, an expert in forensic toxicology, explained that the urine drug testing program shows exposure to a compound. The mechanism for exposure is not determined. When asked whether hemp-based CBD products could potentially produce a positive urine test for THC, Dr. Jackson answered affirmatively, depending on the amount of the exposure. He was aware of scientific studies that showed carboxylic acid THC, in the urine, from these products. He further explained that although the law requires that CBD and hemp products contain no more than .3 percent of THC, the market is unregulated. There are no enforcement procedures. The various over-the-counter products contain a wide variance of THC percentages, not just .3, but some are way above the .3. How these products are being used is also a factor in determining whether the inactive metabolite will be seen in the urine. Despite the presence of THC in those

products, Dr. Jackson opined that he would not expect to see a concentration reading of 83 ng/ml from solely using topical creams and oils containing CBD.

Dr. Falzon testified as an expert in forensic pathology. In his opinion, the scientific literature does not support the proposition that face creams or CBD oil massages could be the cause of a positive urine test for THC. In his opinion, topical applications do not penetrate deep enough through the skin and muscles to reach blood vessels and bloodstream. Dr. Falzone agreed that the more vascular areas of the body, such as the face and neck, tend to absorb faster. However, Dr. Falzon still believed that given the low concentration of THC in CBD products and given the low rate of absorption of topical lotions through the skin, topical application would not produce a positive THC result in blood and urine.

Appellant's expert, Dr. Jerry Lage, testified as an expert witness in the field of toxicology and pharmacology. By looking at the picture on the box of the face cream that Govens had been using, Dr. Lage read the words "hemp" and "hyaluronic acid." According to Dr. Lage, hyaluronic acid enhanced the absorption of fat-soluble substances through the skin. THC is extremely fat-soluble and can be stored in body fat for up to thirty days. Dr. Lage believed that continued use of products that contain THC can produce a positive urine test. There was consensus between Dr. Lage and Dr. Jackson on that premise.

Dr. Lage also explained that the concentration of one's urine is an important factor in determining the concentration of a drug in the urine. According to Dr. Lage, concentrated urine also concentrates the drug level detectable in the urine. Dr. Lage is familiar with the drug testing procedures at the State Toxicology Lab, which uses a screening procedure followed by a confirmatory procedure. Testing the creatinine in the urine is done to ensure that the sample is urine and to make sure that no other liquid was added to the sample. This was consistent with Dr. Jackson's testimony, about his concern being a minimum amount of creatinine not a maximum number. According to the testing at the toxicology lab, Govens' creatinine level was 357 milligrams per deciliter (mg/dl). This number indicated that her urine was quite concentrated. However, Dr. Jackson's testing confirmed Govens' results after diluting her sample, which Dr. Lage did not

address. I simply do not have enough information to make a finding that would change the results of the testing based on Dr. Lage's opinion without scientific data that Govens' high creatinine level should have been factored into the equation. There is not enough evidence that would allow me to accept this theory of reducing the confirmed test result of 83 ng/ml by a factor of 2.4, which represented an average level of creatinine of 148 mg/dl.

Accordingly, I **FIND** based on the expert testimony that the use of CBD products can account for THC in the urine. The federal and state legislation permits up to 0.3 percent THC in CBD products; however, there is no regulatory testing by any agency as to the THC content or the accuracy of THC labeling on CBD products. Govens clearly stated that she used face and hand cream products. Herein, the products were not analyzed, only a picture of the box which contained the cream was admitted into evidence. (P-1.) It cannot be determined whether Govens regular use of CBD face and hand cream was the cause of her THC result of 83 ng/ml.

CHARACTER WITNESS TESTIMONY

Michael Sharp worked as a Senior Corrections Officer at South Woods for twenty-six years. Sharp worked with Govens from her start date in 2008 until his retirement in 2013. He described Govens as committed to family and work, with 100 percent commitment to her daughter. Since his retirement, Sharp and Govens saw each other occasionally at social gatherings and union meetings. Based on his interactions and experiences with Govens, he would never suspect her of using recreational marijuana. Sharp admitted that no one can be 100 percent certain of what another person would do, but he was as certain as he could be about Govens.

Stephen Hunter served twenty years in the United States Air Force and twenty-two years with the DOC. He worked with Govens as a fellow officer until 2012, when he was promoted to sergeant and became her supervisor at South Woods State Prison. He stated that Govens was so good at her job that he wished he had fifteen Govens working for him. He described her as doing everything by the book and having a full understanding of her job.

Between his experiences in the Air Force and at DOC, Hunter believed he was a good judge of character. Hunter did not believe it was in Govens' nature to do anything illegal. Hunter retired in 2021. He described Govens as a workaholic. At one time, she had the most hours of any staff member. He recalled teasing her about working too much. Officially, Govens worked from 10:00 p.m. to 6:00 a.m., however she would come back and work from 10:00 a.m. to 2:00 p.m. She also took shifts on her days off.

Character witness testimony has no bearing on whether Govens used THC illegally at some time prior to November 8, 2021. However, the witnesses' testimony was persuasive evidence of Govens' strong work ethic, devotion to her job, and reputation as a first-rate officer.

ADDITIONAL FINDINGS

Appellant raised a violation of the Attorney General's Law Enforcement Drug Testing Procedures and the DOC's own drug testing policy regarding how long it took for Govens' specimen to be transported to the toxicology lab. The Attorney General's Law Enforcement Drug Testing Procedures provide that "[u]rine specimens should be submitted to the State Toxicology Laboratory as soon as possible after their collection." (R-20 at DOC 225-226.) Under the DOC's own Drug Testing policy, urine specimens must be submitted to the State Toxicology Laboratory within one working day of collection. (R-19 at DOC 197.) Dr. Jackson testified that he preferred to receive the samples as soon as possible but acknowledged that some samples were transported within a week or a week and a half. Under the policies, if the specimen cannot be transported within one working day, the specimen must be stored in a controlled access refrigerated storage area. South Woods' records showed that after Govens voided at 10:15 a.m. on November 8, 2021, Pesce placed her specimen in the evidence refrigerator at 10:16 a.m. where it remained until 8:00 a.m. on December 2, 2021, when it was

transported by Nicotera to the toxicology lab. (R-5 at DOC 416.) The only explanation for the delay of twenty-two days in transporting was convenience.

More concerning is the conflicting chain of custody records from the toxicology lab. One document used December 4, 2021, as the date the specimen was "RECEIVED AT LAB" without reference to a time. (R-15 at DOC 058.) This document is in accordance with Dr. Jackson's testimony. However, the other document refers to a "Watkins" not Nicotera as the courier and used December 6, 2021, as the date received. (R-15 at DOC 143.) The toxicology lab's "sign-in sheet" has no record of this specimen being delivered by Nicotera on December 2, 2021, or by Watkins on December 6, 2021. (R-37.) The testimony and records show that this specimen was not maintained within a chain of custody after leaving South Woods with Nicotera at 8:00 a.m. on December 2, 2021. The specimen remained unaccounted for until December 4, 2021. The document entitled "Chain of Custody for 21LE018157" is even more troubling. (R-15 at DOC 143.) The document stated that "[o]n December 6, 2021, the following specimen was received from WATKINS of the NJ DOC South Woods State Prison." *Id.* According to the testimony of Pesce and Nicotera that is simply not true. Dr. Jackson had no explanation other than to reiterate that the specimen was received on December 4, 2021. Given the detailed and meticulous records that the policy demands, the lack of accountability for this specimen is not harmless error. This specimen was not only received well after the time which Dr. Jackson would have liked but there is also no record of the toxicology lab's receipt of it on December 2, 2021. Accordingly, I **FIND** that the DOC has not established a clean and sufficient chain of custody for Govens' sample.

LEGAL ANALYSIS AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972) (citing Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 145, 147 (1965)).

A civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2, 11A:2-20; N.J.A.C. 4A:2-2. Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. N.J.S.A. 11A:1-2(a). Thus, a public entity may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2; N.J.A.C. 4A:2-2.2.

The appointing authority employer has the burden of proof to establish the truth of the disciplinary action brought against a civil service employee. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is considered 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). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958).

In the case at bar, appellant was determined to have violated:

N.J.A.C. 4A:2-2.3(a)—General causes:

- (6) Conduct unbecoming a public employee;
- (12) Other sufficient cause—specifically HRB 84-17, As Amended
 - C-11 (Conduct Unbecoming an Employee);
 - C-30 (Use, possession, or sale of any controlled dangerous substance)

- E-1 (Violation of a Rule, Regulation, Policy, Procedure, Order, or Administrative Decision).¹

N.J.A.C. 4A:2-2.3(a)(6)—Conduct Unbecoming a Public Employee

Conduct unbecoming a public employee is an elastic phrase that 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 Atl. 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, 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)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. In re Emmons, 63 N.J. Super. at 140.

Appellant’s status as a correction officer subjects her to a higher standard of conduct than an ordinary public employee. In re Phillips, 117 N.J. 567, 576–77 (1990). Law-enforcement employees, such as a correction officer, 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), certif. denied, 47 N.J. 80 (1966). In military-like settings such as police departments and prisons, it is of paramount importance to maintain strict discipline of employees. Rivell v. Civil Serv. Comm’n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971); Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

It is the policy of the DOC to ensure that “law enforcement employees do not report for work or enter NJ DOC grounds under the influence of drugs or in an impaired condition

¹ See footnote 4.

resulting from the use of drugs or consume illegal substances either off duty or while on duty.” (R-19.) In furtherance of this objective, the DOC has a zero-tolerance policy for drug use and requires that all “covered persons” submit to random urine drug testing to maintain their employment. The policy further mandates that a negative result is required to maintain employment and a positive finding will result in termination.

The facts in this case are undisputed that appellant, after submitting to a random drug test, tested positive for THC. (R-7.) As a senior correction officer, appellant represents law and order to the public and must present an image of personal integrity.

Govens denied all illegal drug use and submitted that her positive test must be the result of her lawful use of CBD products. Her positive result of 83 ng/ml far exceeded the cut-off of 15 ng/ml making it improbable that lawful CBD products caused this result. While her creatinine levels were exceedingly high, I did not accept Dr. Lage’s expert testimony that her result should have been adjusted lower to reflect the concentration factor. While I also found that the chain of custody was not maintained regarding this specimen, I accepted Dr. Jackson’s testimony that the sample was valid based on confirmation testing. Based on the preponderance of the evidence, I **CONCLUDE** that the DOC has established that appellant tested well over the allowable limit for THC.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden in establishing a violation 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

Appellant has been charged with other sufficient cause, specifically, violations of HRB 84-17 As Amended—C(11) conduct unbecoming an employee, C(30) use, possession or sale of any controlled dangerous substance, and E(1) violation of a rule, regulation, policy, procedure, order, or administrative decision.

Having concluded that appellant’s positive random drug test constituted a violation of conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6), I similarly

CONCLUDE that Govens' positive test result constituted a violation under the Human Resources Bulletin, C(11) conduct unbecoming an employee and C(30) use, possession, or sale of any controlled dangerous substance.

On the charge of violation of HRB 84-17 E(1), on October 5, 2020, appellant submitted to a random drug screening as required under the DOC drug-testing policy, the result of which came back positive. Based on the foregoing, I **CONCLUDE** that appellant's conduct was in direct violation of the DOC drug-testing policy set forth in HRB 99-01, DOC Policy PSM.001.019, and the Law Enforcement Personnel Rules and Regulations.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden in establishing a violation of N.J.A.C. 4A:2-2.3(a)(12)—other sufficient cause, specifically, violation of HRB 84-17 As Amended—C(11) conduct unbecoming an employee, C(30) use, possession or sale of any controlled dangerous substance and E(1) violation of a rule, regulation, policy, procedure, order, or administrative decision.

PENALTY

The next question is the appropriate level of discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered an appropriate analysis for determining the reasonableness of the penalty. West New York v. Bock, 38 N.J. 500 (1962). The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is that the nature, number, and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See In re Herrmann, 192 N.J.

19 (2007) (Division of Youth and Family Services worker snapped lighter in front of five-year-old), in which the Court stated:

[J]udicial 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.

[192 N.J. at 33.]

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

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, 38 N.J. at 522–24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

With the above in mind, and turning to the instant matter, appellant was unable to account for her positive test result, other than her legal use of products containing THC. Aside from one prior ten-day suspension pursuant to a settlement agreement in 2014, her disciplinary history has been exemplary over the course of her fifteen-year career. (R-34.) Moreover, just one month prior to the positive drug test, October 9, 2021, Govens received a commendation for her utmost professionalism. This award corroborated the testimony from her character witnesses, who praised her work ethic, standards, and dedication to duty.

Citing to recent cases believed to be factually similar wherein the discipline imposed was short of termination, appellant contends that she is entitled to the same consideration. See Lawrence Flanagan v. East Orange Police Department, OAL Dkt. No. CSV 7430-01; Agency Dkt. No. 2002-446 (experts conceded that the ingestion of hemp oil could result in the presence of THC in one's urine); Nicholas Horin v. Department of Corrections Training Academy, 2004 N.J. AGEN LEXIS 709 (positive result caused by drinking Coca de Mate tea); and In the Matter of William Shorter, N.J. Dep't of Corr., No. A-3150-18 2020 N.J. Super. Unpub. 821(App. Div. May 9, 2020) (positive result stemmed from use of hemp/CBD oil.)

In further support of discipline short of removal is the recent Attorney General Guidelines legalizing cannabis and providing that law-enforcement officers will not be terminated from their employment when they ingest legally sanctioned cannabis while off duty.

Respondent, on the other hand, contends that appellant's removal should stand. As the record reflected, Govens' positive result of 83 ng/ml was nearly five and half times over the cut off limit for THC. Respondent also argued that even after the enactment of the new guidelines, Govens could not have legally purchased marijuana until April 21, 2002. Because she tested positive in November 2021, she could only have ingested "unregulated marijuana." As a law-enforcement agency, the DOC is bound by the Attorney General's Law Enforcement Drug Testing Policy. This policy requires that a correction officer's positive drug test will result in that officer's immediate suspension and termination from service. It further requires that officers who test positive will be reported by the Special Investigation Division to the Central Drug Registry maintained by the New Jersey State Police and that they will be barred permanently from future law-enforcement employment in New Jersey. The policy does not call for a range of discipline, and removal is the only option for a violation of the drug-testing policy.

Respondent is requesting that the Attorney General's Law Enforcement Drug Testing Policy be strictly enforced. Strict enforcement would also apply to the maintenance of the sample within a strict and controlled chain of custody. My acceptance of Dr. Jackson's testimony that the sample was valid, does not excuse the lack of proper

documentation regarding the chain of custody. There was no signature on the sign-in sheet, the date of December 4, 2021, was inconsistent with the pickup date from South Woods of December 2, 2021, and the chain of custody contained false information about the courier and the date. It was respondent's burden to show an uninterrupted chain of possession over this sample. Respondent was unable to meet this burden. These irregularities and falsehoods in the chain of custody, mitigate against removal for Govens' positive test result.

There are other factors that mitigate against removal. Govens was never impaired on duty or received any for-cause urine screens; she received a commendation for utmost professionalism in the month before this test; her supervisor testified to her work ethic and devotion to duty, and her fifteen years of exemplary service, leaves room for progressive discipline. Govens was not scheduled to work on the day of her random drug test, she volunteered. Although she never disclosed her lawful and regular CBD product use, she was only questioned about ingesting products.

Under the totality of the circumstances, I **CONCLUDE** that the penalty of removal is not warranted here. Considering progressive discipline, I **CONCLUDE** that the imposition of discipline of a 120-day--suspension without pay is appropriate for the sustained charges, stemming from Govens' positive unexplained random drug test for THC.

I **CONCLUDE** the original removal penalty shall be **MODIFIED** to a 120-day suspension without pay.

ORDER

It is **ORDERED** that the FNDA removing appellant, Jasmine Govens from her position effective July 20, 2022, is **REVERSED**. It is further **ORDERED** that appellant be reinstated with back pay subject to a suspension of 120 days without pay and emoluments.

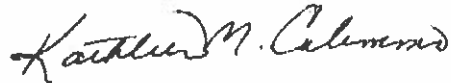
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

August 15, 2023

DATE



KATHLEEN M. CALEMMO, ALJ

Date Received at Agency:

Date Mailed to Parties:

KMC:ser

APPENDIX

WITNESSES

For appellant

Jasmine Govens
Gary Lage, Ph.D.
Michael Sharp
Stephen Hunter

For respondent

Major Michael Ryan
Robert Nicotera
Jennifer Pesce
Dr. George Jackson
Dr. Andrew Falzon

EXHIBITS

Joint

J-1 PND
J-2 FNDA

For appellant

P-1 Pictures of CBD /hemp cream
P-2 Appointment history at Utopia Salon
P-3 CV of Gary Lage, Ph.D.
P-4 Report of Dr. Lage

P-5 copy of CBD/hemp cream box

For respondent*

- R-3 DOC Master List for Donor Notification
- R-4 Schedule for November 8, 2021
- R-5 Drug Screening Monitor Program
- R-6 Medication Form
- R-7 Toxicology Report
- R-8 Weingarten Rights Form
- R-9 Representative Non-Disclosure Form
- R-10 SID Interview
- R-11 Authorization for release of prescription form
- R-12 SID letter to medical provider
- R-13 SJ Regional Medical Center report
- R-14 SID investigation report
- R-15 New Jersey State Toxicology Laboratory Litigation Packet
- R-16 Curriculum Vitae, Dr. George Jackson
- R-17 Curriculum Vitae, Dr. Andrew L. Falzon
- R-18 HRB 99-01 Drug Testing Policy
- R-19 PSM 01.019 Drug Testing Policy
- R-20 AG's Law Enforcement Drug Testing Policy
- R-21 EO 204
- R-22 AG Platkin Memo April 13, 2022
- R-23 Law Enforcement Personnel Rules and Regulations
- R-24 ADM. 010.001 Standards of Professional Conduct
- R-25 Handbook of Information and Rules
- R-26 Directive Com: 03.003
- R-27 HRB 84-17
- R-28 SCPO CSC Job Description
- R-29 New hire checklist
- R-30 Personnel Rules & Regulations Policy Receipt
- R-31 HRB 99-01 Policy Receipt

- R-32 Annual Ethics Briefing Policy Receipts
- R-33 Training summary.
- R-34 Govens' employment history
- R-35 Govens' disciplinary history
- R-36 Cannabis Regulatory Commission Public Press Releases
- R-37 Toxicology Lab's sign-in sheet