

Norhan Mansour (CSC, decided August 2, 2023). In that matter, which is essentially factually identical to this matter, the Commission adopted that ALJ's granting of summary decision reversing Mansour's removal. In that case, the Commission agreed with the ALJ that federal law does not preempt CREAMMA; that Mansour could carry a service weapon without violating federal law; and that the facts of that matter demonstrate that the appellant's termination violated CREAMMA. As the ALJ's analysis in this matter comports with *Mansour, supra*, the Commission, in its *de novo* review, again finds that federal law does not preempt CREAMMA; that Polanco could carry a service weapon without violating federal law; and that the facts of this matter demonstrates that the appellant's termination violated CREAMMA.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the first date of separation without pay until the date of reinstatement. Moreover, as the removal has been reversed, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to her position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Omar Polanco. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation without pay until the date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

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

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



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 03570-23

AGENCY DKT. NO. N/A

2023-1988

**IN THE MATTER OF OMAR POLANCO, JERSEY
CITY POLICE DEPARTMENT,**

Michael Peter Rubas, Esq. for petitioner (Law Offices of Michael Peter Rubas, LLC., attorneys)

Arthur R. Thibault, Jr., Esq. and Kyle Trent, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: August 9, 2023,

Decided: August 18, 2023

BEFORE: JOANN LASALA CANDIDO, ALAJ:

Appellant, Omar Polanco, appeals his removal by the Jersey City Police Department (JCPD) for testing positive for cannabis from a random urine drug screen on September 20, 2022. Appellant filed a motion for Summary Decision on July 5, 2023. Respondent filed opposition and a cross motion for Summary Decision on July 24, 2023. The hearing was scheduled for August 9, 2023. A telephone status conference was held on July 26, 2023, whereby the parties agreed to put the Motion on hold until the Civil Service Commission issued its Final Decision in In the Matter of Norhan Mansour, Jersey City Police Department, OAL Docket No: CSR-03569-2023. The Civil Service Commission, in its Decision issued on August 2, 2023, agreed with

Judge Kimberly Moss' Initial Decision reinstating the Jersey City police officer with facts being the same as the matter before the undersigned. JCPD requested the Motion and Cross-Motions for Summary Decision before the undersigned proceed. There is no material issue of fact in this matter, and it is therefore ripe for Summary Decision. The record closed on August 9, 2023.

Having reviewed the Summary Decision Motion and its opposition as well as the JCPD Cross-Motion filed, I **FIND** the following **FACTS**:

Polanco was a police officer with the JCPD. At all times JCPD officers are required to carry a firearm while on duty. In April 2022, JCPD Police Director and Deputy Chief issued an order stating that officers were prohibited from using cannabis on or off duty as it is illegal under federal law for cannabis users to possess, carry or use firearms. On September 20, 2022, Polanco was randomly selected and submitted to a random urine sample for drug testing. On November 9, 2022, Polanco was served a two-page preliminary notice of disciplinary action (PNDA) and a Notice of Immediate Suspension. These were rescinded for further investigation. The PNDA of January 9, 2023, charged him with JCPD Rule 3:164 (Narcotics Use); Rule 3:108 (Conduct); Rule 3:123 (Obedience to Laws, Regulations and Orders); Rule 3:126 (Neglect of Duty); Rule 3:127 (Orders); Rule 3:157 (Rules and Regulations); and Rule 3:169 (Code of Ethics), for being unable to perform an essential function of his position as a police officer, carrying and possessing a firearm and ammunition. Further charges were N.J.A.C. 4A:2-2.3a, insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause due to the presence of cannabinoid metabolites, specifically THC in his system and regularly using cannabis, violating JCPD drug policy, by ingesting cannabis prior to and after September 20, 2022, as well as N.J.S.A. 40A:147 (Incapacity). A Final Notice of Disciplinary action was issued on March 23, 2023, sustaining the charges in the PNDA. Omar Polanco was removed from the Jersey City Police Department effective March 1, 2023.

In September 2022 regulated marijuana, cannabis was legal in New Jersey and available for purchase from in-State cannabis dispensaries. There were no allegations of on-duty cannabis use or impairment. Polanco admitted to knowingly and voluntarily

ingesting cannabis prior to the September 2022 random drug test. There is no allegation that Polanco used unregulated cannabis.

The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in *Judson v. Peoples Bank and Trust Company of Westfield*, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion 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 alleged disputed issue in favor of the non-moving party.

Appellant's Motion avers that Polanco's termination in March 2023 occurred when the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMM Act) was operational.

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 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. See N.J.A.C. 17:30.

The initial publishing of the CRC's Personal Use Cannabis Rules, N.J.S.A. 24:6I-52, was effective in August 2021, it clearly pre-dated Polanco's drug screening and subsequent termination.

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.

It is important to note that the CREAMM Act authorizes 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. That has not been alleged in this matter. The CREAMM Act precludes 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.

Because N.J.S.A. 24:6I-52, was in effect at the time that Polanco was tested in September 2022, which led to his termination, the JCPD is subject to the CREAMM Act. There is nothing in the CREAMM Act to suggest that N.J.S.A. 24:6I-52 does not apply to law enforcement. 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).

Furthermore, because the appellant was terminated in part for violating JCPD Rules in it's FNDA as a result of the drug test results, I **CONCLUDE** and agree with the reasoning in Mansour, that the JCPD Rules that form the basis for Polanco'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.

The respondent asserts here, as in the Mansour matter, that despite the language in the CREAMM Act, 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 further asserts that appellant 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. Respondent relies in part upon the Florida Court of Appeals decision in Ortiz v. Dep't of Corr., 1D22-375, 2023 WL 4101330 at *2 (Fla. Dist. Ct. App. June 21, 2023), whereby a corrections officer who used prescription marijuana tested positive for marijuana metabolites after a random drug test, and was terminated because he could not perform the important requirement of the job of a corrections officer, training and using a firearm without being in violation of federal law. This case is not instructive here since it is clear 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, 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. 24:61-54 provides in part:

[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).]

Hence, 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.

I agree with the Mansour analysis by ALJ Moss and adopted by the Civil Service Commission that the federal law cited by the respondent in its brief does not preempt the CREAMM Act as it applies to police officers in New Jersey. Not repeating ALJ Moss' Initial Decision in its entirety, I concur with her entire Analysis and Conclusions. I therefore **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. I further **CONCLUDE** that the respondent has failed to sustain its burden of proof as to any of the charges herein based upon the above.

ORDER

For the reasons set forth herein, it is **ORDERED** that the Motion for Summary Decision filed on behalf of Omar Polanco be and is hereby **GRANTED**, and that the termination of Omar Polanco's employment be **REVERSED**. It is further **ORDERED** that the respondent's cross-motion for Summary Decision be **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.

August 8, 2023
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

August 18, 2023

Date Mailed to Parties:

August 18, 2023

ljb

DOCUMENTS RELIED ON

- Appellant's Motion for Summary Decision
- Respondent's reply to Motion and Cross-Motion