

2023); *In the Matter of Omar Polanco* (CSC, decided September 20, 2023); *In the Matter of Norhan Mansour* (CSC, decided July 24, 2024); and *In the Matter of Omar Polanco* (CSC, decided July 24, 2024). See also, *In the Matter of Rashon Tyson-Butler* (CSC, decided August 23, 2023); *In the Matter of Richie Lopez* (CSC, decided May 1, 2024); and *In the Matter of Montavious Patten* (CSC, decided May 1, 2024). Similarly, in this matter, the ALJ has rejected this argument after undertaking a thorough and reasoned review. Accordingly, in its *de novo* review and in reliance on its prior cases, the Commission agrees with the ALJ and finds that federal law does not preempt CREAMMA; that the appellant could carry a service weapon without violating federal law; and that the facts of this matter demonstrate that the appellant's termination violated CREAMMA.

The appointing authority also argues that the ALJ did not address the additional associated charges brought against the appellant. The Commission rejects these claims. In the initial decision, the ALJ found, regarding the additional charges:

However, irrespective of the conflict/preemption issue, respondent does point out that this case differs from Mansour and Polanco in that Officer Reilly failed to list marijuana on his Drug Testing Medication Information form (footnote omitted) and that this is the basis for some of the charges he is facing . . .

Per that March 8, 2023, departmental interview, Officer Reilly advised that he had been examined by a doctor and approved for a medical marijuana card within a day or two of his January 22, 2023, purchase. However, that card was not issued until February 17, 2023, after his purchase. Further, since sales tax was charged by the dispensary, by definition, the purchase was for recreational marijuana and not medical marijuana and it was not purchased with a prescription or per New Jersey's Medical Cannabis Program. (footnote omitted)

In other words, no matter the reason for the purchase, by definition, the marijuana purchased by Officer Reilly was neither a "medication" nor was it taken for medicinal purposes but was rather for (legal) recreational use. In reviewing the drug disclosure form questions, there is no requirement to list legally obtained recreational intoxicants (*i.e.*, alcohol) on the form. Is this a "technicality"? Certainly. However, practically all of the decisions on this issue have been based on complicated, technical interpretations of the law and at the time of the purchase;

- a. Officer Reilly had not yet received his Cannabis Card.
- b. The dispensary charged sales tax on the transaction.
- c. Sales tax is only charged for purchases of recreational marijuana.

Respondent argues that by “failing to list marijuana or cannabis on the (form) as part of his random drug test,” Officer Reilly was guilty of “willful refusal and false reporting,” and summary decision must be granted in its favor and the dismissal upheld.

I disagree.

I **FIND** that the undisputed facts demonstrate that at the time the form was completed (February 2, 2023), Officer Reilly had not been issued a medical cannabis card and had bought the marijuana from a legal dispensary for recreational purposes under the authority of CREAMMA and NOT under the auspices of *N.J.S.A. 24:61-1, et seq.* (the Jake Honig Compassionate Use Medical Cannabis Act).

I therefore **CONCLUDE** that there was no requirement for Officer Reilly to list marijuana on the Drug Testing Medication Information Form since his utilization of same was not covered by the disclosures required by it. Since he was not required to disclose his use of cannabis on the form, any discipline based upon that “failure” is clearly improper and shall be nullified.

Upon its review of the record, the Commission agrees with the above analysis and finds nothing in the record or the appointing authority’s exceptions establishing that the ALJ’s determinations in this regard were arbitrary, capricious or unreasonable.

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, per 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 Mackenzie Reilly. 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 14TH DAY OF AUGUST, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 08531-23

AGENCY DKT. NO. ~~N/A~~
2024-466

**IN THE MATTER OF MACKENZIE REILLY,
JERSEY CITY POLICE DEPARTMENT.**

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

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

Record Closed: June 7, 2024

Decided: July 11, 2024

BEFORE **MATTHEW G. MILLER, ALJ**:

STATEMENT OF THE CASE

Appellant, Mackenzie Reilly, was employed as a police officer (PO) by the Jersey City Police Department (JCPD). It is undisputed that a urine sample provided by Officer Reilly during a random screening on February 2, 2023 "tested positive for the use of cannabinoids (THC)." Respondent learned of the positive test on March 8, 2023. That same day, it issued a Preliminary Notice of Disciplinary Action (PNDA) to Officer Reilly, immediately suspending him. Officer Reilly waived a hearing and a Final Notice of

Disciplinary Action (FNDA) was issued on August 25, 2023, in which charges of insubordination, inability to perform duties, conduct unbecoming a public employee and other sufficient cause were sustained. Charges arising out of alleged violations of a multitude of JCPD rules were also sustained. As a result of those findings, Officer Reilly was removed from his position effective that day and he also lost fifty-four days of accrued time.

PROCEDURAL HISTORY

On or about March 8, 2023, respondent served the PNDA to Officer Reilly. Following his waiver of a hearing, by letter dated August 23, 2023, respondent, in addition to advising that an FNDA upholding all charges would be served on him shortly, offered Officer Reilly a variety of other positions in the Department of Public Safety (at substantially lower salaries than a PO's). That letter was followed by the service of an FNDA on or about August 25, 2023, terminating Officer Reilly's employment with respondent effective immediately, along with docking him fifty-four days of accrued leave time.

The following day (August 26, 2023), appellant mailed a Petition for Appeal to the Civil Service Commission. That appeal was perfected on August 29, 2023 and was filed that day with the Commission and the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13; N.J.S.A. 40A:14-202(d).

An initial conference was held on September 15, 2023. Respondent filed a Motion for Summary Decision on October 6, 2023. Following the filing of a Cross-Motion for Summary Decision, an opposition brief by respondent and a reply brief by appellant, oral argument was held on March 15, 2024. Due to the rapidly evolving and emerging case law on this issue, the record was held open before closing on June 7, 2024.

CHARGES AND SPECIFICATIONS

After Officer Reilly waived a departmental hearing, respondent sustained the following charges listed in both the PNDA (R-6) and the FNDA (P-H):

- a. N.J.A.C. 4A:2-2.3(a)(1)—failure to perform duties
- b. N.J.A.C. 4A:2-2.3(a)(2) —insubordination
- c. N.J.A.C. 4A:2-2.3(a)(3) —inability to perform duties
- d. N.J.A.C. 4A:2-2.3(a)(6) —conduct unbecoming a public employee
- e. N.J.A.C. 4A:2-2.3(a)(7) —neglect of duty
- f. N.J.A.C. 4A:2-2.3(a)(12) —other sufficient cause

Officer Reilly was also found guilty of violating multiple sections of Jersey City Police Department rules:

- a. J.C.P.D. Rule 3:108—misconduct
- b. J.C.P.D. Rule 3:123—obedience to laws, rules, regulations and orders
- c. J.C.P.D. Rule 3:126—neglect of duty
- d. J.C.P.D. Rule 3:127—violation of orders
- e. J.C.P.D. Rule 3:157—violation of rules and regulations
- f. J.C.P.D. Rule 3:169—breach of code of ethics

He was also found guilty of a violation of the Attorney General's Policy on Drug Testing Law Enforcement. (R-7.)

In the FNDA, the occurrence was described thusly:

On March 8, 2023 this agency was made aware of a urine sample submitted by Officer Reilly on February 2, 2023, tested positive for the use of cannabinoids (THC). The same was obtained pursuant to random drug testing required by the NJ Attorney General Policy on Drug Testing Law Enforcement Officers. Officer Reilly admitted to knowingly and voluntarily ingesting cannabis prior to and after February 2, 2023 and admitted that he knowingly violated department orders issued on or about April 20, 2022, that directed police officers cannot use cannabis, admitting that he chose to willfully ignore orders. Officer Reilly is unable to perform an essential

function of his position as a police officer—carry and possess a firearm and ammunition—making him unfit for duty.

On or about February 2, 2023, Officer Reilly was randomly tested for drug consistent with the New Jersey Attorney General’s Policy on Drug Testing Law Enforcement. Officer Reilly admitted that prior to being tested he had ingested marijuana by vaping it. Office Reilly stated that he was approved for medical marijuana by a doctor a few days before he was randomly tested and he ingest it after speaking with and being approved for medical marijuana by a doctor due to underlying serious medical conditions. Officer Reilly did not notify the department that he had a medical marijuana card and he failed to list marijuana or cannabis on the Drug Testing Medication Form at the time of his random drug test.

[P-H.]

FINDINGS OF UNDISPUTED FACT

The following **FACTS** of the case are not in dispute:

1. At all times relevant to this matter, appellant Mackenzie Reilly was employed as a police officer by the City of Jersey City.
2. On February 21, 2021, New Jersey enacted the Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31, et. seq. This act effectively legalized marijuana for recreational use in New Jersey.
3. Following the issuance of the Cannabis Regulatory Commission’s (CRC) Personal Use Cannabis Rules on April 19, 2021, CREAMMA became operational as the rights, obligations and limitations on employers.
4. On April 13, 2022, Acting Attorney General Matthew J. Platkin issued a memorandum providing guidance to law enforcement agencies that they “may not take any adverse action against any officers because they do or do not use cannabis off-duty.” (C-2.)
5. On January 22, 2023, Officer Reilly purchased marijuana from a licensed dispensary in Montclair, New Jersey. (P-K.)

6. On January 24, 2023, Officer Reilly was one of ninety-three Jersey City police officers randomly selected to undergo a drug test.
7. On either January 29 or January 30, 2023, Officer Reilly consumed marijuana.
8. On February 2, 2023, Officer Reilly was called into the Office of Internal Affairs to provide a urine sample. In connection with that test, he completed a "Drug Testing Medication Information" form. He did not list marijuana or cannabis on that form.
9. On February 17, 2023, Officer Reilly was issued a card by the New Jersey Cannabis Regulatory Commission Medicinal Cannabis Program.
10. In February 2023, the revised Attorney General's Law Enforcement Drug Testing Policy was released. (R-7.)
11. On March 1, 2023, Officer Reilly's urine was tested and was determined to be positive for the use of cannabinoids. (R-5.)
12. Respondent learned of the positive test result on March 8, 2023 and appellant was suspended from his job that day. (P-A.)
13. A PNDA was issued on March 9, 2023, confirming Officer Reilly's suspension. (P-B.)
14. An amended PNDA was then issued on April 12, 2023. (R-6.)
15. After the denial of his request for a Loudermill¹ hearing on March 23, 2023, Officer Reilly waived a formal hearing to contest the charges and an FNDA was issued on August 25, 2023. (P-E, C-1 and P-H.)
16. As part of their job duties, Jersey City police officers are required to carry a firearm while on-duty and, while within the confines of Jersey City, off-duty as well. (R-1 at 35.)

Motions

Appellant has filed a Motion for Summary Decision, arguing:

Appellant's termination was unlawful, violating the New Jersey Constitution and the New Jersey Cannabis, Regulatory,

¹ N.J.A.C. 4A:2-2.5(c).

Enforcement Assistance, and Marketplace Modernization Act
("CREAMM Act").

Respondent opposes the motion and has filed a Cross-Motion for Summary Decision, arguing:

While the New Jersey Cannabis, Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA") may have legalized recreational use of cannabis in New Jersey, Federal law prohibits users of controlled substances, such as cannabis, from receiving or possessi(ng) firearms and/or ammunition, irrespective of whether cannabis is legal for medicinal or recreational use by State law. By failing to remove Appellant, the City would be employing a "user of substance," in contravention of 18 U.S.C. 922(g), and would be required to issue ammunition for his firearm in contravention of 18 U.S.C. 922(d), thereby subjecting it to penalties and prosecution by the Federal Government under 18 U.S.C. 924 ("Whoever knowingly violates subsection (d) and (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both.")

Since Officer Reilly has admitted being a regular cannabis user and willfully disobeying Jersey City's order to abstain from such use and because he is legally unable to either carry a firearm or have respondent issue one to him, his termination was "the only proper recourse." It was also argued that by failing to list marijuana or cannabis on the Drug Testing Medication Information form, he willfully refused to disclose that he had obtained a medical marijuana card and falsely reported that he had not taken any drugs or medication.

There are no factual disputes between the parties.

Appellant's motion avers that Officer Reilly's suspension and ultimate termination violate CREAMMA and should be reversed and that an award of back pay should also be entered.

SUMMARY DECISION STANDARD

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life

Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

Given the lack of factual dispute in this case, it is clear that summary decision must be granted. The question is to whom.

LAW AND GUIDANCE

The genesis of this case is N.J.S.A. 24:6I-31 et seq., the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA or “Act”), which governs the regulation and use of cannabis and was signed into law on February 22, 2021. While the Act became effective immediately upon signing, some of its provisions, 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. CREAMMA tasked 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 CREAMMA operative as of that date. See, N.J.A.C. 17:30.

In other words, all relevant aspects of CREAMMA were in effect prior to Officer Reilly’s positive drug test.

That being said, N.J.S.A. 24:6I-52(a)(1) covers the limitations CREAMMA places on employers concerning marijuana use:

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 . . . 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.).

While N.J.S.A. 24:6I-3 limits its definitions to medical marijuana, there is no real question that “adverse employment action” includes the discharge of an employee from employment.

Another key aspect of CREAMMA is N.J.S.A. 24:6I-54, which concerns New Jersey's refusal to cooperate with the federal government on related issues. For the purposes of this case, it is N.J.S.A. 24:6I-54(a) that is most relevant:

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.24:6I-31 et al.), except pursuant to a valid court order.

While CREAMMA does authorize drug testing of employees when there is reasonable suspicion of the employee's use of cannabis while working or when there are observable signs of intoxication, that has not been alleged here. N.J.S.A. 24:6I-52(a)(1). This was simply a random drug test that happened to turn up positive for marijuana.

JERSEY CITY'S POSITION

On April 20, 2022, James R. Shea, respondent's Director of Public Safety, issued a memorandum dictating Jersey City's position on the CREAMMA and its impact on the police department.

In the memo, he cites to CREAMMA, but notes:

The United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, maintains its prohibition against any firearms purchased using marijuana, including marijuana which has been legalized or decriminalized for medicinal or recreational purposes (see ATF form 4473 (5300.9), revised May 2020). This prohibition has been affirmed in the most recent guidance found, an open letter to all federal firearms licensees dated 9/21/11, and signed by the ATF Assistant Director of Enforcement Programs and Services.

[R-3.]

The memo continues, noting that Jersey City police officers are required to purchase their service weapon and any off-duty weapons personally and that "(u)nder current ATF guidelines, any such purchase by a user of marijuana would be denied," making the officer unable to perform his duties.

Because of this, "the use of marijuana will remain prohibited in the Jersey City Police Department, both for current members and applicants." The policy was enacted, subject to review if either federal or state law were to change.

NEW JERSEY INTERPRETATION

On April 13, 2022, Matthew J. Platkin, New Jersey's Acting Attorney General, issued a two-page memorandum which provided guidance for law enforcement agencies in the state. It reads, in pertinent part:

I write to remind law enforcement of the provisions of the CREAMMA that set the parameters for departments issuing policies pertaining to cannabis use—please be reminded, however, that unregulated marijuana continues to be a controlled dangerous substance, N.J.S.A. 24:21-2, and the cannabis legalization law in no way insulates employees from adverse consequences from their employers for the possession or consumption of unregulated marijuana. Law enforcement agencies shall continue to maintain a drug- and alcohol-free workplace, which prohibition includes marijuana/cannabis whether regulated or illicit. The CREAMMA does not require law enforcement agencies to permit or accommodate the possession, use, or consumption of cannabis in the workplace, or restrict the ability of an agency to implement a policy prohibiting use of cannabis items or intoxication by employees "during work hours." N.J.S.A. 24:61-52(b)(1)(a).

The CREAMMA further provides that law enforcement agencies may not take any adverse action against any officers because they do or do not use cannabis off-duty. But should there be reasonable suspicion of an officer's use of cannabis while engaged in the performance of their duties, or upon finding any observable signs of intoxication related to cannabis use (including following a work-related accident subject to investigation by the agency), that officer may be

required to undergo a drug test. N.J.S.A. 24:6I-52(a)(1). Per the CREAMMA, the drug test shall include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation, set forth in the CREAMMA, in order to determine the officer's state of impairment. N.J.S.A. 24:6I-52(a)(1)–a)(2)(b). Per the CREAMMA, law enforcement agencies may randomly require a drug test as part of pre-employment screening or regular screening of employees “to determine use during an employee’s prescribed work hours[.]” following the above described process for drug testing, including the physical evaluation. The law enforcement agency may use the results of the drug testing procedure, defined above, to determine the appropriate employment action concerning the officer, including, but not limited to dismissal, suspension, demotion, or other disciplinary action. A revised Law Enforcement Drug Testing Policy to reflect the CREAMMA is forthcoming.

While marijuana is a schedule I controlled dangerous substance under federal law, 21 U.S.C. § 812, the CREAMMA makes clear that no agency in this State may refuse to perform any duty under the CREAMMA “on the basis that manufacturing, transporting, distributing, dispensing, delivering, possessing, or using any cannabis item or marijuana is prohibited by federal law.” Such a duty under the law would include the agency's obligation to refrain from “tak[ing] any adverse action against any employee . . . because that person does or does not . . . 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 [the CREAMMA.]” N.J.S.A. 24:6I-54(b). But to be clear, there should be zero tolerance for cannabis use, possession, or intoxication while performing the duties of a law enforcement officer. And there should be zero tolerance for unregulated marijuana consumption by officers at any time, on or off duty, while employed in this State. The safety of our communities and our officers demands no less.

[C-2.]

In other words, as long as the police officer was using legally obtained marijuana, did not use at work and did not show any effects at work, their employer could not take adverse action against them.

Then, in February 2023, the revised Attorney General's Law Enforcement Drug Testing Policy was issued. (R-7.) As for marijuana, the policy was consistent with the Attorney General's April 2022 memo in that it continued to permit law enforcement agencies to prohibit officers from consuming or being under the influence of marijuana while on the job and that testing could be performed either "(u)pon reasonable suspicion of the officer's use" while on duty or "(u)pon a finding of observable signs of (cannabis) intoxication" while on the job. (R-7 at 5.)

The guidelines further noted that the officer's sample will be screened for marijuana/cannabis under these terms:

(only to be included in the testing process when: the officer is assigned to a federal task force; the officer holds a federally regulated license, which requires testing (e.g. pilot or commercial driver's license); the law enforcement agency is specifically required to test by the terms of a federal contract or federal grant; or as outlined in the reasonable suspicion sections II.C.2 and II.C.3 herein)

[R-7 at 12.]

FEDERAL GUIDANCE

Jersey City's April 20, 2022, policy memorandum relied in part upon a September 21, 2011, "Open Letter to All Federal Firearms Licensees" that was authored by Arthur Herbert, the then Assistant Director of Enforcement Programs and Services of the ATF. (C-3.) At that time, sixteen states (including New Jersey) had legalized marijuana for medical use, with Delaware being the most recent to join the ranks, effective July 1, 2011. No state had legalized marijuana for recreational use (that first occurred in 2012).²

With that as background, the ATF reminded licensees that marijuana remained a Schedule 1 drug, which, by definition, has no medicinal use. The letter then stated:

² <https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws> (last accessed June 6, 2024).

As you know, Federal law, 18 U.S.C. § 922(g)(3), prohibits any person who is an “unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))” from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law. Further, Federal law, 18 U.S.C. § 922(d)(3), makes it 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 is an unlawful user or addicted to a controlled substance. As provided by 27 C.F.R. § 478.11, “an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern or use or possession that reasonably covers the present time.”

Therefore, 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. Such persons should answer “yes” to question 11.e. on ATF Form 4473 (August 2008), Firearms Transaction Record, and you may not transfer firearms or ammunition to them. Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have “reasonable cause to believe” that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person, even if the person answered “no” to question 11.e. on ATF Form 4473.

[C-3.]

On August 29, 2013, United States Deputy Attorney General James M. Cole issued a memorandum entitled “Guidance Regarding Marijuana Enforcement.” (C-4.) This memo provided an update concerning federal law enforcement priorities concerning marijuana in light of continuing state legalization, clearly de-emphasized base possession and focused on more serious criminal activities;

[A]s several states enacted laws relating to the use of marijuana for medicinal purposes, the Department in recent

years has focused its efforts on certain enforcement priorities that are particularly important to the Federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

[C-4.]

The memo also noted that traditionally, the prosecution of individuals whose conduct is limited to possession of small amounts of marijuana for personal use has been left more to local law enforcement agencies.

However, on January 4, 2018, U.S. Attorney General Jeff Sessions issued a memorandum to all United States Attorneys, re: Marijuana Enforcement, which rescinded all previously propounded guidance (including the August 29, 2013 memo) and reinforcing that,

[i]n deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions...These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law

enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community. Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately. This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

[C-5.]

The respondent asserts here that CREAMMA is in direct conflict with the Federal Gun Control Act, 18 U.S.C. § 921, more specifically, 18 U.S.C. § 922(d)(3) and (g)(3). These provisions prohibit the receipt, possession and provision of a firearm or ammunition by users of marijuana and that it properly terminated the appellant for using marijuana due to his "unbecoming use of such substance in dereliction of federal law."

Because of the direct conflict, respondent argues that federal law preempts CREAMMA's disciplinary prohibitions concerning the utilization of marijuana by police officers (or corrections officers for that matter) because federal law prohibits those officers from fulfilling their job duties by receiving and possessing firearms and ammunition if they are cannabis users.

RECENT DEVELOPMENT

A major development that only enhances the CSC's current position occurred on May 16, 2024. Per a United States Department of Justice press release, that day the Attorney General submitted a proposed rule to move marijuana from a Schedule I drug to Schedule III under the Controlled Dangerous Substances Act, "emphasizing its currently accepted medical use in treatment in the United States."³

³ <https://www.justice.gov/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana> (last accessed June 14, 2024).

Schedule III is the middle tier of five in the CDSA and is described thusly by the United States Drug Enforcement Agency (DEA):

Schedule III drugs, substances, or chemicals are defined as drugs with a moderate to low potential for physical and psychological dependence. Schedule III drugs abuse potential is less than Schedule I and Schedule II drugs but more than Schedule IV. Some examples of Schedule III drugs are: products containing less than 90 milligrams of codeine per dosage unit (Tylenol with codeine), ketamine, anabolic steroids, testosterone.

[<https://www.dea.gov/drug-information/drug-scheduling> (last accessed June 15, 2024).]

If the rule change is ultimately approved, it will make possession of marijuana legal as long as it is prescribed by a medical practitioner. It will neither legalize marijuana outright nor will it legalize distribution by non-medical providers. Questions Related to the Potential Rescheduling of Marijuana, 48 Op. O.L.C. ____ (Apr. 11, 2024).⁴

PREEMPTION AND CONFLICT LAW

Respondent argues that there is an irredeemable conflict between CREAMMA and the Federal Gun Control Act and argues, therefore, that the federal law preempts the state law and that it should be permitted to enforce its own rules and impose discipline on its officers for using cannabis.

The basic law was very well briefed by the parties and, in the context of New Jersey versus federal law, was discussed in detail in Federal Law Enforcement Officers Association v. Grewal, 2022 U.S. Dist. LEXIS 109902 (D.N.J., June 21, 2022).

However, at its most basic, "Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that 'interfere with, or are contrary to the laws of Congress, made in

⁴ See also, Schedules of Controlled Substances: Rescheduling of Marijuana, Dept. of Justice, Drug Enforcement Agency, 21 C.F.R. § 1308.

pursuance of the Constitution' are invalid." Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (quoting Gibbons v. Ogden, 9 Wheat 1, 211 (1824)).

State law is preempted by federal law when one of three things occurs:

1. Congress states its intent for preemption through explicit statutory language;
2. State law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively" or;
3. State and federal laws conflict.

[English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990).]

Conflict preemption occurs where there is a conflict between a state law and a federal law. This issue was discussed in detail in Grewal. That case involved a New Jersey law that restricted retired law enforcement officers from carrying firearms and utilizing hollow-point bullets, which, it was argued, was in direct conflict with federal law.

In ruling in favor of the plaintiffs, the court noted that:

Conflict preemption occurs where there is a conflict between a state law and a federal law. PPL EnergyPlus, LLC v. Hanna, 977 F. Supp. 2d 372, 410 (D.N.J. 2013), aff'd sub nom. PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) ("[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute."). "[C]onflict preemption results when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Holk v. Snapple Beverage Corp., 575 F.3d 329, 339 (3d Cir. 2009) (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)); C.E.R. 1988, Inc. v. Aetna Cos. & Sw. Co., 386 F.3d 263, 269 (3d Cir. 2004). "When confronting arguments that a law stands as an obstacle to Congressional objectives, a court must use its judgment: 'What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.'" PPL Energy Plus, LLC, 917 F. Supp. 2d at 410 (quoting Crosby, 530 U.S. at 372).

[Grewal, 2022 U.S. Dist. LEXIS 109902 at *44.]

Effectively, conflict preemption occurs when “compliance with both laws is impossible or where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Farina v. Nokia Inc., 625 F.3d 97, 115 (3d Cir. 2010) (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).

When confronting arguments that a law stands as an obstacle to congressional objectives, a court or administrative agency must use its judgment. “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” Grewal, 2022 U.S. Dist. LEXIS 109902 at *15. Additionally, “[f]ederal regulations preempt state laws in the same fashion as congressional statutes.” Ibid.; see also Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237, 243 (3d Cir. 2008) (explaining that “[w]here Congress has delegated the authority to regulate a particular field to an administrative agency, the agency’s regulations issued pursuant to that authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency’s delegated authority.”).

While two principles guide the analysis of whether federal law preempts state law, here, given the order in which the laws were passed (federal, then state), we can focus on the first principle, “the intent of Congress,” which has been described as the “ultimate touchstone” of the analysis. Farina, 625 F.3d at 115 (citing Medtronic, Inc., v. Lohr, 518 U.S. 470, 485 (1996)).

In discerning Congress’s intent, a court must “look not only to Congress’s express statements, but also to the ‘structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.’” Ibid. (quoting Medtronic, 518 U.S. at 486 (citations and internal quotation marks omitted)).

The second principle, again somewhat less vital given the specifics here, is that courts “start[] with the basic assumption that Congress did not intend to displace state law.” Farina, 625 F.3d at 115 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

CASE LAW

JERSEY CITY POLICE DEPARTMENT

Variations of this issue involving the Jersey City Police Department have now been addressed four times by the OAL and the CSC, with the irony being that the first decision by an ALJ is actually the last one ultimately addressed by the CSC.

In reviewing the cases, the most logical one to begin with is In the Matter of Norhan Mansour, 2023 N.J. Agen. LEXIS 252 (June 21, 2023). There, Officer Mansour underwent a random drug test on September 22, 2022 and the JCPD was advised that it had returned positive findings for the presence of TCH on or about January 9, 2023, and he was ultimately fired.

On appeal, respondent argued that CREAMMA is preempted by 18 U.S.C. § 922(d) and 18 U.S.C. § 922(g), which prohibit certain individuals from possessing or receiving firearms or ammunition and prohibit individuals from providing those items to such an individual based upon their drug use. Respondent further argued that since it is a Schedule 1 drug, given the September 21, 2011, ATF guidance that anyone “knowing or having reasonable cause to believe that such person is an unlawful user” that someone is a user (for whatever reason, medical or otherwise), it cannot provide firearms or ammunition to them, nor can that person possess firearms or ammunition. Jersey City argued therefore that CREAMMA conflicts directly with federal law in that “it is impossible for (them) to comply with both state and federal requirements” and that its decision to terminate Officer Mansour (and others similarly situated) was justified.

The ALJ disagreed, concluding:

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. 24:6I-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. 24:6I-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 use 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:396(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.

[Id. at **14–15.]

The CSC adopted the Initial Decision in In the Matter of Norhan Mansour, 2023 N.J. CSC LEXIS 295 (Aug. 2, 2023), concluding very simply:

Upon its de novo review of the record, as indicated above, the Commission agrees with the ALJ's determinations that federal law does not preempt CREAMMA; that Mansour could carry a service weapon without violating federal law; and that the facts of this matter demonstrate that the appellant's termination violated CREAMMA.

[Id. at **4–5.]

The next time this issue was addressed was in In the Matter of Omar Polanco, 2023 N.J. Agen. LEXIS 624 (Aug. 18, 2023). Officer Polanco underwent a random drug test on September 22, 2022 and respondent was advised of the positive findings for marijuana on or about November 9, 2022. The ALJ largely deferred to and agreed with the findings in Mansour, emphasizing that

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.

[Id. at *10.]

In affirming the Initial Decision, the CSC acknowledged that Polanco “is essentially factually identical to (Mansour),” and,

[a]s 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.

[In the Matter of Omar Polanco, 203 N.J. LEXIS 446 (Sept. 20, 2023) at **2–3.]

The issue in In the Matter of Montavious Patten (OAL Dkt. No. CSR 12961-23) (Mar. 22, 2024) was a little different. There, Officer Patten admitted to, effectively, purchasing marijuana on the street (through a conduit), purportedly to deal with pain for

a work-related injury. He consumed it from December 2022 through January 2023. He was then selected for random drug testing on January 24, 2023 which came back positive on March 9, 2023 and he was served with a PNDA. After advising the JCPD of the manner of purchase of the marijuana, an amended PNDA was issued and he was ultimately terminated from his employment on October 2, 2023.

Ultimately, it was this illegal purchase that led to the upholding of his termination. The ALJ found that due to the “street” purchase of the marijuana, Officer Patten had violated CREAMMA and was guilty of conduct unbecoming a public employee, other sufficient cause (for a violation of JCPD rules and regulations) and also a violation of the Attorney General’s Policy on Drug Testing Law Enforcement. He was not, however, found guilty of the other charges, since the violations were all based on the manner in which he obtained the marijuana, not his consumption of it.

The CSC affirmed the Initial Decision in In the Matter of Montavious Patten, 224 N.J. Agen. LEXIS 228 (May 10, 2024). Citing to both Polanco and Mansour, the Commissioner agreed that the mere use of marijuana in a situation such as this⁵ is insufficient to warrant disciplinary proceedings. It was reiterated

that federal law did not preempt CREAMMA; that Mansour and Polanco could carry a service weapon without violating federal law; and that the facts of those matters demonstrated that the terminations violated CREAMMA. Therefore, the Commission, in its de novo review, again finds that federal law does not preempt CREAMMA; and that the appellant could carry a service weapon without violating federal law.

[Id. at *3.]

However, Officer Polanco’s termination was upheld, with the Commissioner noting:

In the instant matter, the appellant’s taking of unregulated cannabis was clearly egregious enough to warrant removal. His actions were in direct contradiction of New Jersey Attorney General’s Law Enforcement Testing Policy and the

⁵ With no indication of on-duty impairment/good-cause testing.

appointing authority's drug testing policy. The appellant's actions clearly undermine the public trust.

[Id. at *5.]

Ironically, the first Jersey City CREAMMA case is also the most recent. The saga of this Jersey City police officer began with In the Matter of Richie Lopez, 2023 N.J. Agen. LEXIS 58 (Jan. 19, 2023). In this Initial Decision, the ALJ's analysis was similar to those in Polanco and Mansour, and Officer Lopez's termination was overturned. However, in In the Matter of Richie Lopez, 2023 N.J. Agen. LEXIS 369 (Feb. 22, 2023), the Commissioner remanded the case back to the OAL, because based on the timing of Officer Lopez's positive drug test and marijuana use (he tested positive on September 14, 2021), it would have been impossible for him "to have used regulated recreational cannabis," since the recreational cannabis market did not begin until April 21, 2022. It concluded that further proceedings were needed

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.

[Id. at *3.]

On remand, the matter was assigned to the same judge for In the Matter of Richie Lopez, OAL Dkt. No. CSR 01695-23 (Apr. 1, 2024). She made a factual finding that Officer Lopez's use of marijuana was purposeful and recreational in nature. Given the timing of the test and the date of the opening of the recreational cannabis market, it was determined that his use constituted conduct unbecoming a police officer (as well as other departmental violations) and his termination was upheld.

Similar to its reasoning in Patten (which was decided the same day), in In the Matter of Richie Lopez, 2024 N.J. Agen. LEXIS 226 (May 10, 2024), the CSC affirmed

the OAL's determinations, citing Officer Lopez's lack of credibility regarding the ingestion of the drug and dismissing his "fundamental fairness" argument. In essence, it ruled that Officer Lopez's transgression was not so much that he tested positive, but rather the manner in which he obtained the drug that caused the positive test. Like Patten, if the marijuana had been obtained legally (i.e., Lopez had a medical marijuana card and had obtained it through his doctor), his result would have been similar to those in Polanco and Mansour. Because it was not, he suffered the same fate as Officer Patten.

OTHER CASES

For the sake of completeness, I would note that similar issues were addressed in In the Matter of Rashon Tyson-Butler, 2023 N.J. Agen. LEXIS 495 (July 19, 2023). Here, in a case involving a Hudson County correction officer who tested positive in 2020, there was an underlying issue concerning the reason for his positive test. He claimed, credibly according to the court, that he had unknowingly eaten some food laced with marijuana. As part of his analysis, the judge theorized that the passage of CREAMMA in 2022 "casts serious doubt on the enforceability of any disciplinary action, and certainly not termination, for cannabis use while not on duty." Ultimately, Officer Tyson-Butler was found guilty of only neglect of duty and his termination was reversed and his discipline amended to a thirty-day suspension.

While the CSC upheld the underlying determination in In the Matter of Rashon Tyson-Butler, 223 N.J. Agen. LEXIS 418 (Aug. 23, 2023), it disagreed with the ALJ's analysis of the impact of CREAMMA, citing to its remand in Lopez to determine the legality of how the marijuana in question was obtained. However, given the credibility finding that Officer Tyson-Butler's ingestion had been accidental, it found that the "obtaining" question was irrelevant and upheld both the limited finding of guilt as well as the reduced penalty. Id. at *4.

The only other case that discusses CREAMMA⁶ in this context is In re S.D., 2024 N.J. Super. Unpub. LEXIS 266 (App. Div. Feb. 22, 2024). This matter involved a Freehold, New Jersey, police officer who tested positive for marijuana in 2020 and attempted to both escape a violation and mitigate his discipline by citing the Act. The court was not receptive:

We also reject S.D.'s argument that the Cannabis Regulatory Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 to -56, legalizing the recreational use of marijuana, applied to his matter. CREAMMA, effective February 22, 2021, applied prospectively per the express language of the statute. S.D. tested positive on December 17, 2020, and was terminated by the Department on February 17, 2021, prior to CREAMMA's effective date. Nor does the Attorney General's revised Law Enforcement Drug Testing Policy apply to S.D.'s matter. The revised policy became effective in February 2023, and the conduct leading to S.D.'s termination occurred two years before the Attorney General's revised drug testing policy.

[Id. at *22.]

Respondent cites to Ortiz v. Department of Corrections, 368 So. 3d 33 (Fla. Dist. Ct. App. 1st Dist. 2023), in support of its case. Florida legalized the use of medicinal marijuana in 2016. However, after the plaintiff tested positive in 2021 following a random drug test, he was terminated from his position as a corrections officer. It was uncontested that his job required utilization of a firearm. Id. at *3.

In a notably simplistic decision, citing to 18 U.S.C. § 924(a)(8) and noting marijuana's continuing status as a Schedule 1 drug under the Controlled Dangerous Substances Act, the Court determined that the mere possession of marijuana is a violation of federal law, thereby disqualifying that person from possessing a firearm. Given that the ability to possess a firearm is a statutory requirement of Florida law, Officer Ortiz's termination was warranted. Id. at **3-4.

⁶ There is a case that discusses CREAMMA in the context of a police officer hiring list. In In the Matter of J.B., et al., Police Officer (M0034D), East Orange, 2024 N.J. CSC LEXIS 64 (Mar. 20, 2024), the CSC's ruling is consistent with its position taken in the above-cited cases, both as to basic use and how it was obtained.

Finally, there is a pending federal court case, Shea v. State of New Jersey, Docket No. 2:23cv21196-JXN-ESK, in which Jersey City's Director of Public Safety is suing the State, the CSC and the individual officers (including Officer Reilly) over this policy. In conjunction with a currently pending Motion to Dismiss for lack of jurisdiction, the CSC clarified its position and sought to differentiate/distinguish Ortiz.⁷

In its opposition brief, respondent pointed to, as here, the Federal Gun Control Act, 18 U.S.C. 921, et seq. as prohibiting drug users from obtaining and utilizing firearms and that when they do so, they are committing felonies. Relying heavily on Ortiz, it is argued that the preemption/conflict issue between federal law and CREAMMA has never been adequately addressed by the CSC and that the State is seeking to keep these cases out of federal court by any means necessary. Attached to that brief is a May 30, 2023, news release from the ATF, which effectively reiterates the position taken by the agency in the 2011 open letter referenced above. (C-6.)

In its reply brief, New Jersey argued that there is no conflict between the Gun Control Act and CREAMMA for two primary reasons:

- a. 18 U.S.C. § 922(d)(3) lifts the "drug" restrictions if the weapons "are issued for the use of" a governmental entity such as Jersey City.
- b. 27 C.F.R. § 478.134(a) provides an alternate pathway for law-enforcement officers to lawfully obtain their service weapons.

More specifically, the State points to 18 U.S.C. § 925(a)(1), which reads as follows:

The provisions of this chapter [18 U.S.C.S §§ 921 et seq.], except for sections 922(d)(9) and 922(g)(9) [18 USCS §§ 922(d)(9) and 922(g)(9)], shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department

⁷ The original motion seeks dismissal primarily due to a lack of standing, since Jersey City does not supply firearms to its officers, but rather requires that they purchase their own. Per counsel, as of June 7, 2024, the motion is still pending.

or agency thereof or any State or any department, agency, or political subdivision thereof.

More importantly, 27 C.F.R. § 478.134(a) assuages the fears professed by Jersey City concerning potential federal crimes:

Law enforcement officers purchasing firearms for official use who provide the licensee with a certification on agency letterhead, signed by a person in authority within the agency (other than the officer purchasing the firearm), stating that the officer will use the firearm in official duties and that a records check reveals that the purchasing officer has no convictions for misdemeanor crimes of domestic violence are not required to complete Form 4473⁸ or Form 5300.35.⁹ The law enforcement officer purchasing the firearm may purchase a firearm from a licensee in another State, regardless of where the officer resides or where the agency is located.

Ultimately, this is not an easy decision, and there are, respectfully, more layers and nuance to it that have been explored in prior decisions.

With all due respect to those prior decisions which upheld CREAMMA's employment clause and determined that there is no conflict between it and the Federal Gun Control Act, as noted by respondent, I am under no constraint to follow same. Those decisions are not precedential and no higher court has made a decision on this issue. In fact, based upon the facts and law as discussed in Mansour and Polanco, as well as the state of federal law concerning marijuana's status on the drug schedule, there is no certainty that I would have arrived at the same conclusion.

Basing my analysis solely upon what was provided in Mansour, I am not convinced that CREAMMA does not directly conflict with the Federal Gun Control Act merely because the New Jersey Attorney General says it doesn't. I am also concerned that there was substantial reliance on federal prosecutorial guidance from 2013 that was specifically withdrawn in 2018. That, in addition to the 2023 ATF press release, caused me to take a long pause before issuing this decision.

⁸ Federal Firearms Transaction Record (C-7).

⁹ Federal Report of Firearms Transactions (C-8).

In truth, I was having significant difficulty in reconciling the clear marijuana-related prohibitions contained in the Federal Gun Control Act and CREAMMA's pronouncements that New Jersey will not cooperate with federal law enforcement and will effectively ignore marijuana's federal illegality and status as a drug of abuse. In reality, federal law, at least at this point in time, is clear that illegal drug users cannot obtain or possess firearms and entities cannot provide firearms to them. CREAMMA effectively mandates that police departments ignore those laws.

However, the combination of 18 U.S.C. § 925(a)(1) and 27 C.F.R. § 478.134(a) (primarily) and the proposed rescheduling of marijuana to Schedule 3 from Schedule 1 leads me to **CONCLUDE** that there is no conflict of law between CREAMMA and the Federal Gun Control Act. Those two provisions demonstrate that there is a pathway for New Jersey police officers to obtain and possess (and for police departments to effectively supply) firearms without running afoul of the Federal Gun Control Act.

First, it should be noted that I understand Jersey City's reticence in allowing marijuana users, especially chronic marijuana users, to possess weapons. Even as to the basic legalization of cannabis, whatever respondent's position as an entity is (or, for that matter, anyone's personal position on the legalization of medical and/or recreational marijuana), in New Jersey, that ship has sailed. Marijuana is, for all intents and purposes, treated similarly to alcohol and with more and more states fully legalizing, legalizing for medicinal use or decriminalizing it, there are now only four states where marijuana remains fully illegal (Idaho, Wyoming, Kansas and South Carolina).¹⁰ With the federal government now proposing to reschedule it, this entire question may become moot sooner rather than later.

Ironically, it was the CSC's citations to 18 U.S.C. § 925(a)(1) and 27 C.F.R. § 478.134(a) in its reply brief in Shea that led me to **CONCLUDE** that there is no direct conflict between federal law and CREAMMA.

¹⁰ <https://disa.com/marijuana-legality-by-state> (last accessed June 7, 2024).

Both the statutory and code provisions detail a specific exemption for law enforcement officers to obtain and possess firearms and the only thing that Jersey City apparently needs to do is sign off on it (“certification on agency letterhead”). With a clear avenue to avoid the prohibitions of the Federal Gun Control Act, the direct conflict disappears. It is here where CREAMMA takes over and its prohibition against employment actions due to a positive (random) marijuana test restricts respondent from implementing discipline against the officer in question.

Further, while the ATF and the Department of Justice have in the past sent out very mixed signals concerning marijuana and weapons, the current administration, by openly advocating for the long-anticipated rescheduling of marijuana, has delivered a clear message that the goals of the federal government do not align with unchanged or additional restrictions on cannabis. While falling short of legalization or deeming it “uncontrolled,” there is an unequivocal de-emphasizing of restrictions on both medical and recreational marijuana use.

With no direct conflict (i.e., by following one law, you literally cannot avoid violating the other) and with New Jersey law not being pre-empted, I **FIND** that any discipline imposed upon Officer Reilly based solely on his positive urine test was in violation of CREAMMA and, therefore, improper.

RESPONDENT’S “ADDITIONAL” ARGUMENT

Unlike Lopez and Patten, this is a relatively “clean” case, with no allegations that Officer Reilly obtained the marijuana through illicit sources or that anything occurred in the pre-CREAMMA timeframe.

However, irrespective of the conflict/preemption issue, respondent does point out that this case differs from Mansour and Polanco in that Officer Reilly failed to list marijuana on his Drug Testing Medication Information form¹¹ and that this is the basis for some of the charges he is facing. That form asks three relevant questions:

¹¹ R-7 at 23.

DRUG TESTING MEDICATION INFORMATION

As part of the drug testing process, it is essential that you inform us of all medications you have taken in the last fourteen (14) days. Please carefully complete the information below.

- a. During the past 14 days I have taken the following medication prescribed by a physician.
- b. During the past 14 days, I have taken the following non-prescription medication medications (cough medicine, cold tablets, aspirin, diet medication, nutritional supplements, etc.)
- c. During the past 14 days, I have taken NO prescription or non-prescription medication.

Although I have not been provided with the completed form, per his departmental interview, Officer Reilly did not list marijuana on it. The only real evidence concerning this issue demonstrates the rather unfortunate timing of this entire scenario.

Per that March 8, 2023, departmental interview, Officer Reilly advised that he had been examined by a doctor and approved for a medical marijuana card within a day or two of his January 22, 2023, purchase. However, that card was not issued until February 17, 2023, after his purchase. Further, since sales tax was charged by the dispensary, by definition, the purchase was for recreational marijuana and not medical marijuana and it was not purchased with a prescription or per New Jersey's Medical Cannabis Program. (P-K.)¹²

In other words, no matter the reason for the purchase, by definition, the marijuana purchased by Officer Reilly was neither a "medication" nor was it taken for medicinal purposes but was rather for (legal) recreational use. In reviewing the drug disclosure form questions, there is no requirement to list legally obtained recreational intoxicants (i.e.,

¹² <https://www.nj.gov/cannabis/documents/toolkits/About%20the%20Medicinal%20Cannabis%20Program.pdf> (last accessed June 14, 2024).

alcohol) on the form. Is this a “technicality”? Certainly. However, practically all of the decisions on this issue have been based on complicated, technical interpretations of the law and at the time of the purchase;

- a. Officer Reilly had not yet received his Cannabis Card.
- b. The dispensary charged sales tax on the transaction.
- c. Sales tax is only charged for purchases of recreational marijuana.

Respondent argues that by “failing to list marijuana or cannabis on the (form) as part of his random drug test,” Officer Reilly was guilty of “willful refusal and false reporting,” and summary decision must be granted in its favor and the dismissal upheld.

I disagree.

I **FIND** that the undisputed facts demonstrate that at the time the form was completed (February 2, 2023), Officer Reilly had not been issued a medical cannabis card and had bought the marijuana from a legal dispensary for recreational purposes under the authority of CREAMMA and NOT under the auspices of N.J.S.A. 24:61-1, et seq. (the Jake Honig Compassionate Use Medical Cannabis Act).

I therefore **CONCLUDE** that there was no requirement for Officer Reilly to list marijuana on the Drug Testing Medication Information Form since his utilization of same was not covered by the disclosures required by it. Since he was not required to disclose his use of cannabis on the form, any discipline based upon that “failure” is clearly improper and shall be nullified.

CONCLUSION

I hereby **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 Mackenzie Reilly be and is hereby **GRANTED** and that the termination of his employment be **REVERSED**. It is further **ORDERED** that the respondent's Cross-Motion for Summary Decision be and 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.



July 11, 2024
DATE

MATTHEW G. MILLER, A.L.J.

Date Received at Agency:

July 11, 2024

Date Mailed to Parties:
sej

July 11, 2024

APPENDIX

EXHIBITS

For Court:

- C-1 Memorandum acknowledging waiver of hearing (August 23, 2023)
- C-2 New Jersey Attorney General memorandum, CREAMMA (April 13, 2023)
- C-3 Open Letter to All Federal Firearms Licensees (September 21, 2011)
- C-4 United States Deputy Attorney General memorandum, Guidance Regarding Marijuana Enforcement (August 29, 2013)
- C-5 United States Attorney General memorandum, Marijuana Enforcement (January 4, 2018)
- C-6 ATF Press Release (May 30, 2023)
- C-7 USDOJ Form 4470
- C-8 UDDOJ Form 5300-35

For Appellant:

- P-A Notice of Immediate Suspension (March 8, 2023)
- P-B Preliminary Notice of Disciplinary Action (March 9, 2023)
- P-C Email from appellant's attorney to respondent requesting a Loudermill hearing (March 9, 2023)
- P-D Email from appellant's attorney to respondent concerning the status of the Loudermill decision (March 24, 2023)
- P-E Letter from respondent to appellant; denial of the Loudermill hearing request (March 23, 2023)
- P-F(1) In the Matter of Norhan Mansour, 2023 N.J. CSC LEXIS 295 (Aug. 2, 2023)
- P-F(2) In the Matter of Norhan Mansour, 2023 N.J. Agen. LEXIS 252 (June 21, 2023)
- P-G In the Matter of Omar Polanco, 2023 N.J. Agen. LEXIS 624 (Aug. 18, 2023)

- P-H Final Notice of Disciplinary Action (August 25, 2023)
- P-I Letter from respondent to appellant, re: FNDA (August 23, 2023)
- P-J In the Matter of Omar Polanco, 2023 N.J. Agen. LEXIS 446 (Sept. 20, 2023)
- P-K Dispensary receipt (January 22, 2023)

For Respondent:

- R-1 Jersey City Police Department rules and regulations
- R-2 Jersey City Police Department General Order 1-19
- R-3 Jersey City Police Department memorandum; Marijuana Usage by Police Officers Employed by Jersey City Under State Laws Taking Effect 4/1/22 (April 20, 2022)
- R-4 Investigation report (April 3, 2023)
- R-5 Toxicology report (March 1, 2023)
- R-6 Amended PNDA (April 12, 2023)
- R-7 Attorney General's Law Enforcement Drug Testing Policy (February 2023)