STATE OF NEW JERSEY

In the Matter of Tyhaira M. Matlock, Mercer County, Department of Corrections

CSC Docket No. 2022-206
OAL Docket No. CSR 06755-21

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 14, 2024

The appeal of Tyhaira M. Matlock, County Correctional Police Officer, Mercer County, Department of Corrections, removal, effective March 11, 2021, on charges, was heard by Administrative Law Judge Joan M. Burke (ALJ), who rendered her initial decision on April 29, 2024. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 12, 2024, rejected the recommendation contained in the ALJ's initial decision and acknowledged the attached settlement, which provides for the imposition of a six-month suspension on the appellant.

In this matter, the parties contacted the Commission subsequent to the issuance of the ALJ's initial decision. Specifically, the parties indicated that they had settled the matter and forwarded the settlement to the Commission for review and acknowledgment. The policy of the judicial system strongly favors settlement. *See Nolan v. Lee Ho*, 120 *N.J.* 465 (1990); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472 (App. Div. 1961), *cert. denied,* 35 *N.J.* 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. Upon review of the settlement, the Commission finds that it complies with Civil Service law and rules. As such, the Commission rejects the initial decision and acknowledges the settlement.

ORDER

The Civil Service Commission rejects the initial decision and acknowledges the settlement.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF JUNE, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Dulce A. Sulit-Villamor
Deputy Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 06755-21
AGENCY DKT. NO: N/A
2022 - 206

IN THE MATTER OF TYHAIRA M. MATLOCK, MERCER COUNTY, DEPARTMENT OF CORRECTIONS.

Stuart J. Alterman, Esq., for appellant Tyhaira M. Matlock (Alterman & Associates, LLC)

Michael Amantia, Esq., Mercer County Counsel's Office, for respondent Mercer County Department of Corrections

Record Closed: March 15, 2024 Decided: April 29, 2024

BEFORE **JOAN M. BURKE**, ALJ:

STATEMENT OF THE CASE

Respondent, Mercer County Department of Corrections (DOC, County), removed appellant, Tyhaira Matlock, from her position as a corrections police officer, effective March 11, 2021. The County alleges there was just cause for the disciplinary action under N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, because the appellant's return-to-work drug screen

tested positive for marijuana, in violation of the 2000 and 2017 Drug and Alcohol Free Workplace Program (the D & AFW Program).

PROCEDURAL HISTORY

On March 10, 2021, the DOC issued a Preliminary Notice of Disciplinary Action (PNDA), setting forth charges against appellant and suspending her effective March 11, 2021, without pay. A departmental hearing was conducted on June 10, 2021, and the DOC sustained the following charges, which were incorporated into a Final Notice of Disciplinary Action (FNDA) dated July 28, 2021, with removal from her position effective March 11, 2021: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violating the Mercer County Table of Offenses and Penalties: C-1, reporting to work unfit for duty; D-6, violation of administration procedures and/or regulations involving safety and security; and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision—violation of the 2000 & 2017 D & AFW Program.

The appellant requested an appeal, and the matter was filed with the Office of Administrative Law (OAL) on August 4, 2021, to be scheduled for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. The matter was scheduled for a hearing on October 18, 2021; however, the appellant requested an adjournment to obtain an expert. The appellant also agreed to toll the 180-day rule during the delay until the next scheduled hearing date. On October 11, 2023, the appellant filed its Motion for Summary Decision. Respondent filed its opposition to the appellant's Motion on October 20, 2023. The undersigned denied the motion. A hearing was conducted on January 18, 2024. The parties requested that they obtain transcripts and submit their closing summations in writing. The closing summations were received on March 15, 2024, and the record closed.

FACTUAL DISCUSSION

The following facts are not in dispute, and I therefore **FIND** them as **FACTS**:

1. Tyhaira Matlock began employment with the Mercer County Correction Center on February 13, 2017. (R-17.)

2. Her permanent Civil Service title at the time of removal was County Police Officer. (R-22.)

3. Prior to the drug test on February 26, 2021, the appellant never tested positive for drugs in connection with her employment with the County, nor had there been any issues in connection with any prior drug test administered by the County to Ms. Matlock in connection with her employment. (T 59:1–25.)

4. Ms. Matlock sustained an alleged hand/wrist injury while at the job on or about January 8, 2021, and was placed on modified duty, resulting in an out-of-work status under Workers' Compensation on January 9, 2021. (R-5.)

5. The appellant was scheduled to return to work on March 1, 2021. (R-5.)

6. The appellant was required to complete a 'return-to-work' evaluation that included a drug screening prior to returning to work because she was out of work for more than thirty days. (R-17.)

7. On February 26, 2021, as part of the return-to-work drug screening, Ms. Matlock submitted a urine sample. (R-2.)

8. The urine sample was submitted to Quest Diagnostics, which confirmed the positive result for marijuana on March 23, 2021. (R-3.)

9. On February 14, 2017, as part of the new employee training program, the appellant signed off on various standard operating procedures (SOP), including SOP 004, the employee handbook. (R-6.) On February 24, 2017, the appellant signed the training SOP regarding the Mercer County Handbook dated 2008 and acknowledged that she had received the handout and understood its content. (R-13.)

10. On February 13, 2017, the appellant signed off on the Mercer County Employee 2000 D & AFW Program training SOP. (R-7.)

11. On February 13, 2017, the appellant received and signed the County Random Drug Testing Policy and agreed to the statement: "I am in complete understanding of this policy." (R-8.)

12. On February 16, 2017, the appellant signed the drug use SOP 102. (R-16.) This policy states "It is the policy of the Mercer County Correction Center to terminate employees who are involved in illegal drug use." Ibid.

Testimony for Respondent:

Alejandra M. Silva (Silva) is the deputy director of Human Services at Mercer County. As the deputy director, she wears many hats, which include staff development and overseeing policies regarding workplace injuries. When an employee is injured, he/she is seen by a treating physician. If the employee is out of work for more than thirty days, the employee must be cleared by his or her treating physician and complete a return-to-work evaluation. As part of the return-to-work evaluation, a urine analysis is done. The employees are sent to Robert Wood Johnson hospital (RWJ), the contracted healthcare facility where the drug analysis is conducted. Silva oversees 1700 employees. Silva is the custodian on record for all 1700 employees' medical files. Mercer County is a drug-free environment, and no drug use is tolerated.

A urine analysis or drug test is done when an employee is new, an employee is out of work for thirty days, or there is suspicion that an employee is under the influence of some legal or illegal substance. In this matter, the appellant was returning to work after being out for a work-related injury and was required to submit to a drug test. When the result is a non-negative, it is sent to two labs to determine what substance(s) was causing the non-negative. At the conclusion of the lab's determination, it is reported to RWJ, which would call Mercer County HR and inform them what substance was found. HR would call the employee and ask if he/she has a prescription.

In this case, the appellant was found to have marijuana in her urine. Silva testified that the employees receive the Mercer County handbook, which has all the policies and procedures, upon employment. All employees are required to sign off on receiving it. (R-4.) The current handbook was updated in 2008, and the appellant was hired in 2017. The 2008 edition was what the employee received when she was hired, and the same would be given currently to new employees.

On cross-examination, Silva testified that her office oversees all drug testing. However, law enforcement officers receive additional testing. Here, the appellant failed the return-to-duty drug test. When RWJ conducts drug tests for new employees, a pre-employment package is provided. Existing employees are cleared by their personal physician and would go to RWJ to have a return-to-duty drug test completed. There is no test that is done to determine whether there is a difference between medical and non-medical marijuana. There is no test that also tells how it was ingested or consumed and how far prior to the testing it was taken.

Individuals can be on medications for a number of health issues, but as long as it does not affect their performance, it is ok. If it impacts their work performance, the individual's supervisor would inform HR, who would send them for a "fitness-for-duty test." The department of human resources conducts what is considered a "reasonable suspicion" drug test. Supervisors are given training on what reasonable suspicion is and what to look for in an employee.

The New Jersey Attorney General conducts random drug tests on corrections officers and police officers. Silva admitted that marijuana is legal in New Jersey. The policy, however, has not changed for Mercer County in terms of it being a drug-free environment. Because the law was changed in 2021, corrections officers would not be penalized today if they had been found to have medical marijuana. Currently, in combination with the new law and the county's policies and procedures, Silva explained that officers with proof of a medical marijuana card would be given an exemption; "however, absent a medial marijuana card, we wouldn't be able to hold that against them either." (T 32:2–14.)

Captain Michael Kownacki (Captain Kownacki) works for the County of Mercer and is the captain for the Mercer County Correction Center. He assists the warden in managing the facility and is in charge of discipline. Captain Kownacki is familiar with the training received by new employees and the policies and procedures that are provided to them. A new employee would receive the SOP; the Employee 2000 D & AFW program; and the County's random drug testing policy. (See R-6; R-7; R-8.) SOP 004 is the general procedure on how the correction facility works. This also augments the county's handbook. (R-15.) Under Section 1.02-7 of SOP 004, it states, "Officers/Correctional Employees shall not possess or use any controlled dangerous substance, narcotics, or hallucinogens, except as prescribed, Officers/Correctional Employees are to notify the Shift Commander immediately upon reporting to duty." (Id. at 3.)

SOP 102 is the employee Drug Use policy. (R-16.) Paragraph A of SOP 102 states: "It is the policy of the Mercer county Correction Center to terminate employee[s] who are involved in illegal drug use. However, provisions have been made to allow for appropriate treatment of employees who admit to a drug dependency problem." Ibid.

Captain Kownacki testified that B-5 of the Drug policy states that "any employee who tests positive for drug abuse will be subject to the following:

a. Immediate suspension without pay.

b. Scheduled for a Department Hearing pursuant to the Notice of Major Disciplinary Action. The scheduled sanction is termination from service."

According to Captain Kownacki, the above procedure was followed in this matter.

On cross-examination, Captain Kownacki testified that he is in charge of discipline, but he did not complete the PNDA or the FNDA charges or specification of the charges in this matter. He admitted that Ms. Matlock tested positive on a return-to-work drug test. He stated the Table of Offenses and Penalties was based on collective bargaining between the PBA 167 and the PBA 167A. (R-19.) Captain Kownacki believed that based on the positive test, Ms. Matlock was unfit for duty. However, the violation of administrative procedures and/or regulations involving safety and security charged on the FNDA is not applicable in this matter, as she was not at the jail. (T 53:12–16.)

Appellant's disciplinary history reflects one reprimand in 2018, which is the totality of her discipline. (R-20.) Disciplinary matters are only kept for six months, so if one was to produce the disciplinary record today of Ms. Matlock, there would be none. Since marijuana became legal in New Jersey, Captain Kownacki has not received any instructions from HR regarding discipline change to charges involving marijuana.

Testimony for Appellant:

Tyhaira Matlock (Matlock, appellant) is thirty-three years old, and she is a high school graduate with some community college work. She had worked at various positions before becoming a corrections officer. She has never undergone any psychological examination and has had no previous medical issues with substance abuse. The appellant has never failed any previous drug test and was not subjected to any random drug test.

Ms. Matlock testified that while visiting her grandmother, she took from a jar of what looked like gummies. This occurred two to three weeks before the February 26, 2021, drug test. Ms. Matlock testified that the gummies were in a clear jar. There was no writing on the jar. The gummy was multicolored. After she ate the gummy, Matlock

did feel relaxed. Matlock testified that it was after taking the gummy that her grandmother told her that it was medical marijuana. According to Matlock, the gummy had no smell, scent, or taste to suggest it was marijuana. Ms. Matlock never reported that she took it to her supervisor or the union representative. Ms. Matlock testified that in hindsight, that is what she should have done. Ms. Matlock believes that she should not be dismissed. She posits that if this judge was to order a fitness evaluation, increase drug testing, or conduct a random drug test immediately, there would not be an issue with submitting to each one.

On cross-examination, Matlock admitted that her return-to-duty drug test was non-negative. Matlock testified that she did not read all the lab results. She did not offer any explanation to her supervisor or her union representative at any time. Matlock testified that she naively thought that it would not show up. She was not aware that marijuana could last for thirty days in her system. She admitted to taking a class regarding the impact of marijuana on the body years ago, but she did not remember much. On redirect, Matlock testified that there was no request by the County to be interviewed in this matter.

Geraldine Tucker (Ms. Tucker) is the appellant's grandmother. She is sixty-nine years old. Ms. Tucker is a high school graduate and was a certified nursing aide and a home health aide. She retired in 2010. Ms. Tucker is in the New Jersey Medical Marijuana program, which she applied for in 2019 because of her chronic back pain. Ms. Tucker receives a prescription and takes that prescription to a dispensary where she purchases the edibles. Ms. Tucker confirmed that she is a registered marijuana user. (See P-1; P-2; P-3; P-4.)

On cross-examination, Ms. Tucker testified that she has no conviction record. When she purchases the edibles from the dispensary, they come in a package or a tin container. She places them in a jar in her home. Ms. Tucker recognized that when they are unlabeled in a jar, there can be accidental ingestion. Ms. Tucker found out a week or two before February 26, 2021, that the appellant had accidentally ingested one of the gummies she had in her home. (T 82:4–7.) Ms. Tucker testified that they would not taste any different than a regular gummy. (T 83:8–9.) Ms. Tucker testified that she has never intentionally shared her medical marijuana product with the appellant. (T 83:22–24.)

Credibility is the value that the fact finder gives to a witness' testimony. The word contemplates an overall assessment of the witness' story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives, or bias of a witness is relevant, and a fact finder is expected to base credibility decisions on his or her common sense intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514, 521–22 (1950).

After carefully considering the testimonial and documentary evidence presented and having had the opportunity to listen to the testimony, I consider the testimony of Ms. Silva to be credible, as she addresses that under the current law, having a positive drug screen would not be held against law enforcement officers. (T 32:2–14.) I also found Captain Kownacki's testimony credible. I consider the appellant to be credible in that she did not know the gummies she had at her grandmother's house were medical marijuana gummies. I also found Ms. Tucker to be credible; she was calm and poised and explained her process in obtaining and storing the gummies. Ms. Tucker acknowledges that having them in plain sight without any markings can lead to the situation that has occurred here. Now that she knows, she has secured them in a different container.

LEGAL DISCUSSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to -12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super.

583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may properly execute their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). An appeal requires the OAL to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris Cnty. Bd. Of Soc. Serv., 197 N.J. Super. 307 (App. Div. 1984).

The appellant's status as a corrections officer subjects her to a higher standard of conduct than ordinary public employees because when a corrections officer fails in their duties, they may imperil others. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64 (App. Div. 1971). Strict discipline of corrections officers is necessary for the safety and security of other corrections officers and the inmates in their charge. Henry, 81 N.J. at 578. As the Appellate Division explained, this higher standard of conduct and behavior is necessary because:

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships

> between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."
>
> [Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306–307 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Here, the appellant is charged with conduct unbecoming a public employee pursuant to N.J.A.C 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which 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 v. City of Atl. City, 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).

The appellant was out on a work injury. She admitted to having a positive return-to-work drug test. According to the appellant, she accidentally ingested marijuana while visiting her grandmother. She ate a multicolored gummy from a clear jar at her grandmother's home. She admits to not knowing how long marijuana lasts in her system. The Quest Diagnostics test confirmed that the appellant's urine was positive for marijuana when she submitted it on February 26, 2021. The appellant has had no previous positive drug tests. In its Employee Handbook that was in effect on February 26, 2021, Mercer County Correction Center states that "Officers/Correctional Employees shall not possess or use any controlled dangerous substance, narcotics, or hallucinogens, except as prescribed for treatment by a physician or dentist." (R-15 at 3.) Further, in its Standards

and Operating Procedures for Employee Drug Use (R-16), it is stated that "any employee who tests positive for drug abuse will be subject to the following:

a. Immediate suspension without pay.

b. Scheduled for a Departmental Hearing pursuant to the Notice of Major Disciplinary Action. The scheduled sanction is termination from service."

Accordingly, I **CONCLUDE** that the respondent has met its burden of proof to sustain the charges of conduct unbecoming, N.J.A.C. 4A:2-2.3(a)(6), and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violating the Mercer County Table of Offenses and Penalties: C-1, reporting to work unfit for duty and E-1 for the appellant's violation of a rule, regulation, policy, procedure, order, or administrative decision—violation of the 2000 & 2017 D & AFW program.

The appellant submitted a blood test to be cleared for work duty. However, she failed the return-to-work drug test. Therefore, she did not return to work on the designated date of March 1, 2021, and was not on the property. I therefore **CONCLUDE** that the respondent did not meet its burden of proof to sustain the charge of violating Mercer Couty Table of Offenses and Penalties D-6, violation of administrative procedures and or regulations involving safety and security.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, the New Jersey Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Bock Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations, and the like on one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated,

so to speak, by having been previously called to the attention of and admitted by the employee." Bock, 38 N.J. at 523–24.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, Bock, 38 N.J. at 523, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The respondent has proven by a preponderance of the credible evidence the following charges against the appellant: conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violating the Mercer County Table of Offenses and Penalties, C-1, reporting to work unfit for duty, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. The respondent seeks to remove the appellant from her job as discipline for these charges. The remaining question to be resolved, therefore, is whether the discipline sought to be imposed in this case is appropriate.

Although the Civil Service Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's disciplinary history may be outweighed if the infraction at issue is of a serious nature. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The concept of progressive discipline is recognized in this jurisdiction, but:

> That is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial 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.
>
> Thus, 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.
>
> [In re Herrmann, 192 N.J. 19, 33–34 (2007), (citing Henry, 81 N.J. at 580).]

A singular incident of absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See Id. at 32.

The appellant's prior disciplinary history (R-20) shows that, in the approximately four years since the appellant worked for the DOC, this is her first major disciplinary action. While the penalty of termination for a first-time offense is certainly a serious disciplinary penalty, appropriate focus must be given to the nature and seriousness of the appellant's current actions. The appellant's positive drug test was a serious offense committed by someone in a position of public trust, and the penalty should reflect the same. Given the serious nature of these actions—even without a prior disciplinary history—imposition of major discipline would be warranted. (See R-16 (Mercer County Correction Center SOP noting a positive drug test is subject to immediate suspension and that the disciplinary action is termination from service); See also T 69:1–2 (appellant's testimony acknowledging she deserves to receive major discipline for her conduct in this matter).) The appellant's status as a law enforcement officer places her conduct under heightened scrutiny. Her primary duty is to enforce and uphold the law. "He carries a service [weapon] on his person and is constantly called upon to exercise tact, restraint and good judgment." In re Phillips, 117 N.J. 567, 576–77 (1990) (quoting Moorestown, 89 Super. at 566). Being held to this heightened standard of conduct is one of the obligations the appellant undertook "upon voluntary entry into the public service." In re Emmons, 63 N.J.Super. at 142.

The appellant asserts that "removal is not warranted" in this case based on "zero prior disciplines, zero prior failed random drug tests, zero prior FFD[1]'s, and zero prior reasonable suspicion drug tests." (App. Br. at 52.) The respondent contends that the "appellant's testimony is the desperate attempt by this former employee to salvage her

[1] FFD: Fitness for duty

job. The deceit and evasiveness alone casts doubt on the character of the Appellant who seeks and expects to return to a profession where honesty is valued and expected." (Resp. Br. at 11.) In matters of inadvertent misjudgment, there is precedent for providing corrections officers without prior discipline a "second chance" where the offense is a singular momentary lapse of judgment. See, e.g., In re Alberto Aponte, 2019 N.J. AGEN LEXIS 923 (offering a "second chance" of six-month suspension in lieu of dismissal to corrections officer disciplined for ingesting a supplement which he did not know contained a controlled substance and failing a subsequent drug test). See also, e.g., In re Michael Maiorino, 1999 N.J. AGEN LEXIS 1242 (imposing six-month suspension on corrections officer for sleeping on duty and leaving a group of juvenile residents unattended on public property).

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees. The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining [the] statutory scheme." State-Operated Sch. Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463, 465.

Prior to this incident, the appellant was only employed by the DOC for approximately four years. During that time, she had one written warning. The appellant failed her drug test because she accidentally ingested her grandmother's medical marijuana gummy. This conduct today would not garner the same punishment that is recommended by the respondent. On February 22, 2021, the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMM Act) was enacted, legalizing and regulating the sale of marijuana within New Jersey. L. 2021, c. 16. However, several parts of the CREAMM Act, including Section 52, which bars employers from punishing employees for testing positive for THC, did not become

operative until the New Jersey Cannabis Regulatory Commission adopted initial rules implementing the CREAMM Act. Section 52 became effective on August 19, 2021. See A. 21 (stating that Section 52 "shall take effect immediately but shall only become operative upon adoption of the commission's initial rules and regulations"); 53 N.J.R. 1583(a) (special new rules at N.J.A.C. 17:30 adopted on August 19, 2021).

In In re Omar Polanco, Jersey City Police Dep't, 2023 N.J. AGEN LEXIS 446 (Sept. 20, 2023)[2] and In re Norhan Mansour, Jersey City Police Dep't, 2023 N.J. AGEN LEXIS 309 (August 2, 2023),[3] Mansour and Polanco were police officers with the Jersey City Police Department; both were subject to a random drug test on September 20, 2022; both tested positive for THC at this drug screening; and both were served with PNDAs shortly thereafter, citing violations of an order from the Deputy Chief which prohibited Jersey City officers from using cannabis off or on duty, as it is illegal under federal law for cannabis users to possess, carry, or use firearms. Mansour, at **8-9; Polanco, **6-9. In both cases, the OAL found, and the CSC upheld, that because Mansour and Polanco tested positive in September 2022, after Section 52 became operative in August 2021 with the initial adoption of the Cannabis Regulatory Commission's Personal Use Cannabis Rules, their dismissals must be reversed. Mansour, **1-2, 13; Polanco, **1-2, 11.

Therefore, while the CREAMM Act was not effective until August 2021, the law was passed on February 22, 2021, just four days before the appellant was tested positive for marijuana. It seems that the intent of the law was not to severely punish individuals who tested positive for marijuana.

Under Section 52 of the CREAMM Act:

> no employer 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,

[2] The Civil Service Commission's Final Administrative Determination inadvertently listed the OAL docket number for IMO Omar Polanco as CSV as opposed to CSR.
[3] The Civil Service Commission's Final Administrative Determination inadvertently listed the OAL docket number for IMO Norhan Mansour as CSV as opposed to CSR.

> vape, aerosolize 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 [the CREAMM Act].
>
> [N.J.S.A. 24:6I-52(a)(1).]

Here, the appellant accidentally ingested her grandmother's prescribed marijuana gummy. She was not aware that the gummies contained marijuana, as there was no taste or smell to indicate marijuana in the gummies. The appellant testified that it tasted like a regular gummy, and her grandmother also testified that they are odorless and taste like regular gummies.

The DOC has invested in the appellant's employment by way of qualifying her for the position as a correctional police officer; no prior disciplinary action and no poor attendance were noted, thus evidencing prior good employment. Based on these factors, I **CONCLUDE** that the appellant should be given a second chance. In light of the seriousness of her misconduct however, the appellant should be suspended for twenty-four months and thus forfeit her back pay and other emoluments for that period. This suspension reflects the poor judgment in not telling her supervisor when she found out that she had accidentally ingested the gummy at her grandmother's home. Had the appellant quickly addressed the issue by notifying her superiors prior to taking the drug test, she would likely not be here facing possible removal from her employment. She clearly exercised poor judgment and ignored her training in doing so.

While the length of the recommended suspension may be considered punitive, it balances the costs to the DOC that resulted from the appellant's actions against the loss of her career. Although the judgment she displayed was certainly suspect, it does not appear that the appellant is beyond redemption. A suspension of twenty-four months will suffice to emphasize the seriousness of the conduct at issue while affording the appellant a second chance to prove that she is worthy of the Department's trust.

Consequently, I **FIND** and **CONCLUDE** that the appellant's dismissal should be **REVERSED.**

CONCLUSION

After having considered all of the proofs offered in this matter, the impact upon the institution regarding the behavior by the appellant herein, and in light of the seriousness of the offense and in consideration of the appellant's prior disciplinary record, I **CONCLUDE** that the appellant should be **REINSTATED**; however, the appellant's conduct on failing the return-to-duty drug test was so egregious as to warrant a twenty-four month suspension, which, in part, is meant to impress upon her, as well as others, the seriousness of her infractions.

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. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 29, 2024
DATE

JOAN M. BURKE, ALJ

Date Received at Agency: April 29, 2024

Date Mailed to Parties: April 29, 2024

APPENDIX

LIST OF WITNESSES

For Appellant:

Tyhaira Matlock

Geraldine Tucker

For Respondent:

Alejandra M. Silva, Deputy Director, Mercer County Department of Human Service

Captain Michael Kownacki, Mercer County Correction Center

LIST OF EXHIBITS

For Appellant:

P-1 Geraldine Tucker Medical Marijuana Card

P-2 Geraldine Tucker New Jersey Identification Card

P-3 Geraldine Tucker Medical Record, August 3, 2020

P-4 Geraldine Tucker Receipt for Medical Marijuana, December 19, 2020

For Respondent:

R-1 Preliminary Notice of Disciplinary Action, March 10, 2021

R-2 RWJ Hamilton Occupational Corporate Health-Employer Drug Testing Summary Report

R-3 Quest Diagnostics Results Report 1st specimen

R-4 Quest Diagnostics Results Report 2nd specimen

R-5 Edwin Cruz Statement

R-6 Mercer County Correction Center, New Employee Training Sign Off Form

R-7 Mercer County Correction Center, New Employee Training, 2000 Drug and Alcohol-Free Workplace Policy Sign Off Form,

R-8 Mercer County Correction Center, New Employee Training, Random Drug Testing Policy Sign Off Form

R-9 Mercer County Correction Center, New Employee Training, Random Drug Testing Policy Acknowledgement of Receipt

R-10 Mercer County Correction Center, New Employee Training, Random Drug Testing Policy Acknowledgement of Receipt for Personnel Office

R-11 Mercer County Correction Center, New Employee Training, Sign-off Form Day 1

R-12 Mercer County Correction Center, New Employee Training, SOP 102 Sign Off

R-13 Mercer County Employee Handbook Sign Off Form

R-14 Mercer County Employee Handbook

R-15 Mercer County Correction Center, Department of Public Safety Standards and Operating Procedures 004: Employee Handbook

R-16 Mercer County Correction Center, Department of Public Safety Standards and Operating Procedures 102: Drug Use

R-17 Mercer County Drug Testing Policy

R-18 NJ Attorney General's Law Enforcement Drug Testing Policy

R-19 Mercer County Public Safety Table of Offenses and Penalties

R-20 Tyhaira Matlock Disciplinary History

R-21 Was not entered into evidence

R-22 Final Notice of Disciplinary Action