



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049
(609) 438-6316

Barry E. Moscovitz
Acting Director and Chief
Administrative Law Judge

Candice Hendricks
Assistant Director

February 7, 2025

By E-mail: opra+request-71672-aac3b537@requests.opramachine.com

fratlaw

Re: OPRA Request

Dear Requestor:

The Office of Administrative Law ("OAL") received your request under the Open Public Records Act on February 6, 2025. You requested:

"Case Numbers and Scheduled Proceeding Dates:

A list of all case numbers associated with the proceedings of Officers Norhan Mansour, Omar Polanco, Mackenzie Reilly, Montavious Patten, and Richie Lopez.

Copies of any documents detailing scheduled proceeding dates for these cases.

Parties' Briefs:

Briefs or position statements submitted by both the officers and the City of Jersey City, outlining their primary arguments in these cases.

Final Orders:

All final orders or decisions issued by Administrative Law Judges pertaining to the aforementioned officers."

Your request is granted in part and denied in part. In response to your request, please find attached responsive documents including the initial decisions of the administrative law judges and the final decisions of the Civil Service Commission. The matters are closed at the OAL, so the files have been sent back to the agency and there are no further proceedings scheduled. For a copy of any briefs or submissions, you may contact the Civil Service Commission, PO Box 310, Trenton, NJ 08625-031.

Sincerely,

/s/Candice G. Hendricks
OPRA Custodian/Assistant Director
Judicial Standards and Procedures

State of New Jersey
Office of Administrative Law
GOVERNMENT RECORDS REQUEST FORM

Important Notice

Page two of this form contains important information related to your rights concerning government records. Please read it carefully.

Requestor Information – Please Print

First Name fratlaw MI _____ Last Name _____

Company _____

Mailing Address _____

City _____ State NJ Zip _____ Email opra+request-71672-aac3b537@requests.opramachine.com>

Business Hours Telephone: Area Code _____ Number _____

Preferred Delivery: Pick Up _____ US Mail _____ On Site Inspect _____ Email ☒ X

Circle One: Under penalty of *N.J.S.A. 2C:28-3*, I certify that I ***HAVE / HAVE NOT*** been convicted of any indictable offense under the laws of New Jersey, any other state, or the United States.

Signature fratlaw Date 2/6/25

Payment Information

Maximum Authorization Cost \$ _____

Select Payment Method

Cash _____ Check _____ Money Order _____

Fees: \$.01/page (500
pages or over)

Delivery: Delivery/postage fees
additional depending upon
delivery type.

Extras: Extraordinary service fees
dependent upon request.

Record Request Information: To expedite the request, be as specific as possible in describing the records being requested. Also, please include the type of access requested (copying or inspection), and if data, the medium requested.

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Briefs or position statements submitted by both the officers and the City of Jersey City, outlining their primary arguments in these cases.
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AGENCY USE ONLY

Est. Document Cost	_____
Est. Delivery Cost	_____
Est. Extras Cost	_____
Total Est. Cost	_____
Deposit Amount	_____
Estimated Balance	_____
Deposit Date	_____

AGENCY USE ONLY

Disposition Notes

Custodian: If any part of request cannot be delivered in seven business days, detail reasons here.

In Progress	-	Open	_____
Denied	-	Closed	_____
Filled	-	Closed	_____
Partial	-	Closed	_____

AGENCY USE ONLY

Tracking Information

Tracking #	
Rec'd Date	2/6/25
Ready Date	2/7/25
Total Pages	

Final Cost

Total	_____
Deposit	_____
Balance Due	_____
Balance Paid	_____

/s/Candice G. Hendricks

Custodian Signature

2/7/25

Date

Requesting Access to Government Records Under the New Jersey Open Public Records Act (N.J.S.A. 47:1A-1 et seq.)

1. This form should only be used to submit records requests to the Office of Administrative Law.
2. In order to request access to government records under OPRA, you must complete and date this request form and deliver it in person during regular business hours or by mail, fax or electronically to the records custodian of the Office of Administrative Law. Your request is not considered filed until the custodian has received a completed request form. If you submit the request form to any other officer or employee of the Office of Administrative Law, that officer or employee may not have the authority to accept your request form on behalf of the Office of Administrative Law and your request will be directed to the records custodian. The seven-business-day response time will not commence until the custodian reviews the request to determine if it is complete.
3. If you submit a request for access to government records to someone other than the records custodian, do not complete the Office of Administrative Law request form, or attempt to make a request for access by telephone; the Open Public Records Act and its deadlines, restrictions and remedies will not apply to your request.
4. The fees for duplication of a government record in printed form are listed on the front of this form. We will notify you of any special charges, special service charges or other additional charges authorized by State law or regulation before processing your request. Payment shall be made by check or money order payable to the State of New Jersey.
5. If it is necessary for the records custodian to contact you concerning your request, providing identifying information, such as your name, address and telephone number or an e-mail address is required. Where contact is not necessary, anonymous requests are permitted, except that anonymous requests for personal information are not honored.
6. **You may be charged a 50% or other deposit when a request for copies exceeds \$25.** The custodian will contact you and advise you of any deposit requirements. Anonymous requests, when permitted, require a deposit of 100% of estimated fees. You agree to pay the balance due upon delivery of the records.
7. Under OPRA, a custodian must deny access to a person who has been convicted of an indictable offense in New Jersey, any other state, or the United States, and who is seeking government records containing personal information pertaining to the person's victim or the victim's family.
8. By law, the Office of Administrative Law must notify you that it grants or denies a request for access to government records within seven business days after the records custodian receives the request, provided that the record is currently available and not in storage. If the record requested is not currently available or is in storage, the custodian will advise you within seven business days when the record can be made available and the estimated cost. You may agree with the custodian to extend the time for making records available, or granting or denying your request.
9. You may be denied access to a government record if your request would substantially disrupt agency operations and the custodian is unable to reach a reasonable solution with you.
10. If the Office of Administrative Law is unable to comply with your request for access to a government record, the custodian will indicate the reasons for denial on the request form and send you a signed and dated copy.
11. Except as otherwise provided by law or by agreement with the requester, if the records custodian fails to respond to you within seven business days of receiving a request form, the failure to respond will be considered a denial of your request.
12. If your request for access to a government record has been denied or unfilled within the time permitted by law, you have a right to challenge the decision by the Office of Administrative Law to deny access. At your option, you may either institute a proceeding in the Superior Court of New Jersey or file a complaint in writing with the Government Records Council (GRC). You may contact the GRC by toll-free telephone at 866-850-0511; by mail at PO Box 819, Trenton, NJ 08625; by e-mail at grc@dca.state.nj.us; or at their web site at www.state.nj.us/grc. The Council can also answer other questions about the law.
13. Information provided on this form may be subject to disclosure under the Open Public Records Act.



STATE OF NEW JERSEY

In the Matter of Norhan Mansour,
Jersey City Police Department

CSC DKT. NO. 2023-1987
OAL DKT. NO. CSV 03569-23

**DECISION OF THE
CIVIL SERVICE COMMISSION**

ISSUED: AUGUST 2, 2023

The appeal of Norhan Mansour, Police Officer, Jersey City Police Department, removal, effective March 1, 2023, on charges, was before by Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on June 21, 2023. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 2, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision and her recommendation to grant the appellant's motion for summary decision and reverse the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive as the ALJ's findings and conclusions in reversing the removal was based on her thorough assessment of the record and are not arbitrary, capricious, unreasonable or legally incorrect.

The Commission notes that the ALJ's decision was based on her determination that there were no material issues of fact in this matter in dispute. In this regard, the ALJ concluded that the removal was properly reversed under the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA). She further found that federal law did not preempt CREAMMA. Specifically, the ALJ indicated that:

I am not persuaded by the respondent's arguments that the federal law cited by the respondent in its brief preempts the CREAMM Act as it applies to police officers. There is an obvious conflict between the CREAMM Act, which legalizes the personal use of marijuana in New Jersey, and federal law, which stills considers marijuana an unlawful controlled substance, and this conflict was recognized by the State of New Jersey Legislature when it enacted the CREAMM Act.

In enacting the CREAMM ACT, the State Legislature recognized that the personal use of cannabis remains illegal under federal law, and in the CREAMM Act itself, our Legislature expressly directs law-enforcement agencies in New Jersey not to cooperate with or assist the federal government in enforcing these federal laws . . .

* * *

The respondent argues that police officers are required to possess a firearm and regularly receive ammunition as a condition of their job duties, and because of this, the federal law cited above, 18 U.S.C. § 922 and 21 U.S.C. § 812, preempts the CREAMM Act. I am not persuaded. The respondent did not offer a sufficient factual or legal basis to support this position, and I cannot conclude that "conflict preemption" exists here. Conflict preemption applies when "it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hager v. M&K Constr.*, 462 N.J. Super. 146, 153 (App. Div. 2020) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (first citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), and then quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)), *aff'd*, 246 N.J. 1 (2021). The respondent has failed to demonstrate that a "positive conflict" exists between the CREAMM Act and the federal law cited because even if marijuana consumption remains unlawful 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.

* * *

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 (sic) is required to fill out this form as part of his (sic) 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.

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.

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

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

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Norhan Mansour. 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 2ND DAY OF AUGUST, 2023



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 03569-23

AGENCY DKT. NO. N/A

2023-1987

**IN THE MATTER OF NORHAN MANSOUR
JERSEY CITY POLICE DEPARTMENT,**

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

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

Record Closed: June 13, 2023,

Decided: June 21, 2023

BEFORE: KIMBERLY A. MOSS, ALJ:

Appellant Norhan Mansour appeals her removal by the Jersey City Police Department (JCPD) for testing positive for cannabis. Appellant filed a motion for summary decision on March 26, 2023. Respondent filed a cross motion for summary decision on June 13, 2023. The hearing is scheduled for July 10, 2023.

Having received the motions, I **FIND** the following **FACTS**:

Mansour was a police officer with the JCPD. At all times JCPD officers are required to carry a firearm while on duty. In April 2022, JCPD Police Director and

Deputy Chief issued an order stating that officers were prohibited from using cannabis on or off duty as it is illegal under federal law for cannabis users to possess, carry or use firearms. On September 20, 2022, Mansour was randomly selected and submitted to a random urine sample for drug testing. On January 9, 2023, Mansour was served a preliminary notice of disciplinary action (PNDA). The PNDA charged her with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause by ingesting cannabis prior to and after September 20, 2022, regularly using cannabis and violating JCPD drug policy due to the presence of cannabinoid metabolites, specifically THC in her system. A Final Notice of Disciplinary action was issued on March 23, 2023, sustaining the charges in the PNDA.

In September 2022 regulated marijuana, cannabis was legal in New Jersey and available for purchase from in state cannabis dispensaries. There were no allegations of on duty cannabis use or impairment. There is no allegation that Mansour used unregulated cannabis.

Mansour knowingly and voluntarily ingested cannabis prior to the August 2022 random drug test.

LEGAL ARGUMENT AND CONCLUSION

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

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

There is no material issue of fact in this matter.

Mansour's termination in March 2023 occurred when the CREAMM Act was operational, the CREAMM Act, and the Personal Use Cannabis Rules, N.J.A.C. 17:30-1.1 to -17.9.

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

Consequently, with the initial publishing of the CRC's Personal Use Cannabis Rules in August 2021, N.J.S.A. 24:6I-52 became operative, and this pre-dated Mansour's drug screening and subsequent termination.

N.J.S.A. 24:6I-52(a)(1), which provides in pertinent part:

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, . . . or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c. 16 (C.24:6I-31 et al.).

[Emphasis added.]

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

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

N.J.S.A. 24:6I-52(a)(1) states that employers may still require employees to undergo drug tests, including random drug screenings, when there is reasonable suspicion of an employee’s cannabis usage while working or when the employee appears impaired. And the employer can take appropriate employment action when an employee uses marijuana/cannabis during working hours, or when he/she is impaired. This provision governing drug testing in the workplace is consistent with the legislative intent behind the CREAMM Act, which was to adopt a new approach to the State’s marijuana/cannabis policies by legalizing cannabis in a similar fashion to that of alcohol. See N.J.S.A. 24:6I-32. What the CREAMM Act precludes is adverse employment action simply for testing positive for cannabinoid metabolites, or for using cannabis, so long as it is not used during the workday and the employee is not intoxicated or impaired at work.

... A drug test may also be done randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee’s prescribed work hours.
[N.J.S.A. 24:6I-51(a)(1).]

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

Here, there is no proffered evidence that there was ever reasonable suspicion of cannabis use on the job by Mansour, nor were there any purported signs of intoxication, suspected drug use, or impairment during work hours. Mansour was terminated because of a random drug test revealed cannabinoids/THC in her urine, and a negative drug-test result was a condition of her continued employment. N.J.S.A. 24:6I-52 clearly states that no employer "***shall discharge from employment or take any adverse action against any employee . . . because that person does or does not smoke, . . . or otherwise use cannabis items.***" (emphasis supplied) The respondent did just that—it terminated Mansour for using cannabis once the results of the urinalysis showed the presence of cannabinoids/THC—when the clear language of N.J.S.A. 24:6I-52(a)(1) precludes employers from terminating an employee simply because the employee uses cannabis and precludes employers from terminating their employees solely due to the presence of cannabinoid metabolites in the employee's system.

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

Preemption

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

With regard to the preemption issue raised by the respondent, Jersey City specifically references 18 U.S.C. § 922(d) and 18 U.S.C. § 922(g), and argues that the US Congress enacted legislation prohibiting certain individuals from possessing or receiving firearms or ammunition, and prohibiting individuals from providing firearms or ammunition to such an individual based upon the person's drug use.⁵ Moreover, the respondent notes that marijuana is a Schedule I controlled dangerous substance under federal law (21 U.S.C. § 812), and the US Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has advised that under the federal firearms law "any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition." (September 21, 2011, open letter to all firearms licensees.) The respondent argues, therefore, that conflict preemption nullifies the CREAMM Act because the CREAMM Act might suggest that police officers can utilize marijuana while continuing to work in a position that requires receipt of or possession of a firearm and ammunition.

I am not persuaded by the respondent's arguments that the federal law cited by the respondent in its brief preempts the CREAMM Act as it applies to police officers. There is an obvious conflict between the CREAMM Act, which legalizes the personal use of marijuana in New Jersey, and federal law, which still considers marijuana an unlawful controlled substance, and this conflict was recognized by the State of New Jersey Legislature when it enacted the CREAMM Act.

In enacting the CREAMM Act, the State Legislature recognized that the personal use of cannabis remains illegal under federal law, and in the CREAMM Act itself, our Legislature expressly directs law-enforcement agencies in New Jersey not to cooperate with or assist the federal government in enforcing these federal laws. Specifically, N.J.S.A. 24:6I-54 provides in part:

5 18 U.S.C. § 922(d) provides:

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

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

18 U.S.C. § 922(g) provides:

[i]t shall be unlawful for any person –

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

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

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

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

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

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

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

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

1. Preventing the distribution of marijuana to minors;
 2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
 3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
 4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
 5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
 6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
 7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
 8. Preventing marijuana possession or use on federal property.
- [<https://www.nj.gov/cannabis/resources/cannabis-laws/>.]

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

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

[<https://www.nj.gov/cannabis/adult-personal/workplace-duilaws/>.]

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

aff'd, 246 N.J. 1 (2021). The respondent has failed to demonstrate that a "positive conflict" exists between the CREAMM Act and the federal law cited because even if marijuana consumption remains unlawful under federal law, nothing in the CREAMM Act requires anyone to violate federal law, and while the CREAMM Act provides immunity from State prosecution and from adverse employment actions, it does not purport to offer any immunity from any violation of federal law—the federal government is still free to prosecute cannabis users in New Jersey even though State prosecutors and law enforcement may not.

I am also not convinced that it is impossible to comply with the CREAMM Act, and specifically N.J.S.A. 24:6I-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.

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

ORDER

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

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

June 21, 2023



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

June 21, 2023

Date Mailed to Parties:
ljb

June 21, 2023

DOCUMENTS RELIED ON

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

DECISION OF THE CIVIL SERVICE COMMISSION

CSC DKT. NO. 2023-1988
OAL DKT. NO. CSV 03570-23

The appeal of Omar Polanco, Police Officer, Jersey City Police Department, removal, effective March 1, 2023, on charges, was before by Administrative Law Judge Joann LaSala Candido (ALJ), who rendered her initial decision on August 18, 2023. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 20, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision and her recommendation to grant the appellant's motion for summary decision and reverse the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive as the ALJ's findings and conclusions in reversing the removal was based on her thorough assessment of the record and are not arbitrary, capricious, unreasonable or legally incorrect.

The Commission notes that the ALJ's decision was based on her determination that there were no material issues of fact in this matter in dispute. In this regard, the ALJ concluded that the removal was properly reversed under the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA). She further found that federal law did not preempt CREAMMA. In this regard, the ALJ relied in part on the Commission's decision in *In the Matter of*

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

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

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

ORDER

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

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

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

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



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 03570-23

AGENCY DKT. NO. N/A

2023-1988

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

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

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

Record Closed: August 9, 2023,

Decided: August 18, 2023

BEFORE: JOANN LASALA CANDIDO, ALAJ:

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

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

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

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

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

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

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

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

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

The CREAMM Act, P.L. 2021, c. 16, which governs the regulation and use of cannabis, was signed into law on February 22, 2021. While the Act became effective immediately upon signing, some sections of the Act, including section 52, which is the section that applies to employers, only became operative upon adoption of the Cannabis Regulatory Commission's (CRC) Personal Use Cannabis Rules. The CREAMM Act tasks the CRC with promulgating rules to carry out the Commission's duties and powers with respect to overseeing the development, regulation, and enforcement of activities associated with the personal use of cannabis pursuant to P.L.

2021, c.16. The CRC initially issued the Personal Use Cannabis Rules on or around August 19, 2021, which made the CREAMM Act operative as of that date. See N.J.A.C. 17:30.

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

N.J.S.A. 24:6I-52(a)(1), which provides in pertinent part:

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, . . . or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c. 16 (C.24:6I-31 et al.).
[Emphasis added.]

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

It is important to note that the CREAMM Act authorizes drug testing of employees by their employer when there is reasonable suspicion of the employee's use of cannabis while working or when there are observable signs of intoxication; and random drug testing is also permitted but only to determine use during prescribed work hours. That has not been alleged in this matter. The CREAMM Act precludes adverse employment action simply for testing positive for cannabinoid metabolites, or for using cannabis, so long as it is not used during the workday and the employee is not intoxicated or impaired at work.

Because N.J.S.A. 24:6I-52, was in effect at the time that Polanco was tested in September 2022, which led to his termination, the JCPD is subject to the CREAMM Act. There is nothing in the CREAMM Act to suggest that N.J.S.A. 24:6I-52 does not apply to law enforcement. For the reasons set forth herein, I also **CONCLUDE** that the appellant's termination violates the CREAMM Act, and specifically N.J.S.A. 24:6I-52(a)(1).

Furthermore, because the appellant was terminated in part for violating JCPD Rules in it's FNDA as a result of the drug test results, I **CONCLUDE** and agree with the reasoning in Mansour, that the JCPD Rules that form the basis for Polanco's removal are preempted by the CREAMM Act to the extent that these Rules allow for the removal or discipline of a police officer simply for testing positive for the use of cannabinoids and nothing more.

The respondent asserts here, as in the Mansour matter, that despite the language in the CREAMM Act, federal law prohibits the receipt or possession of a firearm or ammunition by users of marijuana, and that the respondent properly terminated the appellant for using marijuana due to his "unbecoming use of such substance in dereliction of federal law." The respondent argues that federal law preempts the CREAMM Act as it relates to discipline of police officers' use of marijuana because federal law prohibits those officers from fulfilling their job duties by receiving and possessing firearms and ammunition if they use marijuana. The respondent further asserts that appellant cannot continue as a police officer if he is a user of marijuana because federal law prohibits him from possessing a firearm or ammunition, which are required job duties. Respondent relies in part upon the Florida Court of Appeals decision in Ortiz v. Dep't of Corr., 1D22-375, 2023 WL 4101330 at *2 (Fla. Dist. Ct. App. June 21, 2023), whereby a corrections officer who used prescription marijuana tested positive for marijuana metabolites after a random drug test, and was terminated because he could not perform the important requirement of the job of a corrections officer, training and using a firearm without being in violation of federal law. This case is not instructive here since it is clear in enacting the CREAMM Act, the State Legislature recognized that the personal use of cannabis remains illegal under federal law, and in the CREAMM Act, our Legislature expressly directs law-enforcement agencies in New Jersey not to cooperate with or assist the federal government in enforcing these federal laws. Specifically, N.J.S.A. 24:61-54 provides in part:

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

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802))[] 18 U.S.C. § 922(g) provides:

[i]t shall be unlawful for any person –

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

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

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

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

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

Hence, the CREAMM Act itself expressly directs all agents of the State, such as police departments, to comply with the CREAMM Act despite recognizing that federal cannabis laws may conflict with the CREAMM Act.

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

ORDER

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

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

This recommended decision may be adopted, modified, or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

August 18, 2023
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

August 18, 2023

Date Mailed to Parties:

August 18, 2023

ljb

DOCUMENTS RELIED ON

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 12961-23

**IN THE MATTER OF MONTAVIOUS PATTEN,
JERSEY CITY POLICE DEPARTMENT.**

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

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

Record Closed: March 11, 2024

Decided: March 22, 2024

BEFORE **PATRICE E. HOBBS**, ALJ:

STATEMENT OF THE CASE

Appellant, Montavious Patten (“Patten”), a police officer for the Jersey City Police Department (JCPD), purchased cannabis from an individual who was employed by a liquor store and not a licensed dispensary. Must Patten be terminated because he did not purchase cannabis from a licensed dispensary? “Yes.” Under N.J.S.A. 17:30-2.1(b)(1), it is unlawful for any person to obtain or possess a controlled dangerous substance, unless the substance was obtained directly, or through a prescription, from a licensed dispensary.

PROCEDURAL HISTORY

On March 9, 2023, Patten was served a one-page Preliminary Notice of Disciplinary Action (PNDA) and a Notice of Immediate Suspension (NOIS). The PNDA charged Patten with violations of JCPD Rule 3:108 (Conduct), Rule 3:123 (Obedience to Laws, Regulations and Orders), Rule 3:126 (Neglect of Duty), Rule 3:127 (Orders), Rule 3:157 (Rules and Regulations), and Rule 3:169 (Code of Ethics) for being unable to perform an essential function of his position as a police officer, carrying and possessing a firearm and ammunition. Further charges were N.J.A.C. 4A:2-2.3(a) (Insubordination, Inability to Perform Duties, Conduct Unbecoming a Public Employee, Neglect of Duty, and Other Sufficient Cause), as well as N.J.S.A. 40A:14-147 (Incapacity).

On March 8, 2023, because of the PNDA, Patten was interviewed by Internal Affairs. On April 12, 2023,¹ a two-page Amended PNDA was served on Patten. The Amended PNDA had two additional charges, violation of JCPD Rule 3.164 (Narcotics Use) and violation of the Attorney General's Policy on Drug Testing Law Enforcement. On September 14, 2023, a departmental hearing was held, and on October 2, 2023, the JCPD served Patten with a Final Notice of Disciplinary Action (FNDA). In the FNDA, the JCPD alleges that Patten violated N.J.A.C. 4A:2-2.3(a)(2) (Insubordination), N.J.A.C. 4A:2-2.3(a)(3) (Inability to Perform Duties), N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming a Public Employee), N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty), N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause), and N.J.S.A. 40A:14-147 (Incapacity). The FNDA also alleges a violation of Jersey City Police Department Rules: Rule 3:108 (Conduct), Rule 3:123 (Obedience to Laws, Rules and Regulations and Orders), Rule 3:126 (Neglect of Duty), Rule 3:127 (Orders), Rule 3:157 (Rules and Regulations), Rule 3:164 (Narcotics Use), and Rule 3:169 (Code of Ethics). Finally, the FNDA alleges a violation of the Attorney General's Policy on Drug Testing Law Enforcement.

¹ The date was deduced from the FNDA, as the Amended PNDA was not dated, nor is there any indication that it was served by mail or personal service. Service of the PNDA is, however, not contested, as there was a departmental hearing on the matter.

On October 22, 2023, Patten requested a hearing before the Office of Administrative Law (OAL). The matter was filed as a contested case pursuant to N.J.S.A. 40A:14-202(d), and the appeal was perfected on November 14, 2023. On December 6, 2023, a telephone prehearing conference was held, during which a briefing schedule was established for motions for summary decision.

On January 2, 2024, Patten filed a motion for summary decision arguing that termination for testing positive for cannabis is a violation of the NJ Cannabis Regulatory, Enforcement, Assistance and Marketplace Modernization Act (CREAMM Act). Patten's motion for summary decision did not address the termination charges for purchasing unregulated cannabis. On January 22, 2024, the JCPD filed an opposition and cross-motion for summary decision, arguing that termination is warranted for both testing positive for cannabis and purchasing unregulated cannabis. Oral argument was held on February 12, 2024. Summary decision was denied because there were material facts that had to be heard in a full evidentiary hearing. On March 11, 2024, I held the hearing and closed the record.

FINDINGS OF FACT

Based upon the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following **FACTS**:

Patten was born and raised in Jersey City, New Jersey. He served six years in the military and was honorably discharged. After his discharge he entered the Bergen County Police Academy, and in 2022 he was hired as a police officer with the JCPD.

On April 13, 2022, Attorney General Matthew Platkin issued a memorandum to all law enforcement reminding police departments that law-enforcement agencies must not take adverse action against officers who use cannabis off duty under the CREAMM Act. The memorandum also states that law-enforcement agencies should have zero tolerance for unregulated marijuana use, possession, or intoxication at any time. (R-10.) On April 20, 2022, the JCPD police director and deputy chief issued an order

stating that officers were prohibited from using cannabis on or off duty, as it is illegal under federal law for cannabis users to possess, carry, or use firearms. (R-11.)

Patten had been on disability leave for a work-related, left-hand injury on December 28, 2022. (R-5.) He was prescribed pain medication which he felt was not effective. He wanted to try to manage his pain with cannabis. He was not sure if he could just go into a dispensary to purchase cannabis legally. He had a friend, Sal, who worked at the corner liquor store and procured cannabis for Patten. Patten paid Sal \$40 for cannabis, which he consumed sometime between December 2022 and January 2023. On January 24, 2023, Patten was randomly selected for drug testing, and he submitted a urine sample. (R-9.) On March 9, 2023, Patten was served a one-page PNDA and a NOIS. (A-6.) The PNDA of March 9, 2023, charged Patten with violations of JCPD Rule 3:108 (Conduct), Rule 3:123 (Obedience to Laws, Regulations and Orders), Rule 3:126 (Neglect of Duty), Rule 3:127 (Orders), Rule 3:157 (Rules and Regulations), and Rule 3:169 (Code of Ethics) for being unable to perform an essential function of his position as a police officer, carrying and possessing a firearm and ammunition. Further charges were N.J.A.C. 4A:2-2.3(a) (Insubordination, Inability to Perform Duties, Conduct Unbecoming a Public Employee, Neglect of Duty, and Other Sufficient Cause), as well as N.J.S.A. 40A:14-147 (Incapacity).

As a result of the PNDA, Patten was interviewed by Internal Affairs on March 8, 2023. (R-5.) Patten admitted to knowingly and voluntarily ingesting cannabis prior to the January 2023 random drug test. (R-5.) Patten admitted that he knowingly purchased cannabis from an individual by the name of Sal who worked at the corner liquor store. (R-5.) Patten did not have receipts for the cannabis that was ingested. (R-5.) This was Patten's first purchase and use of cannabis. (R-5.) Patten has not purchased or consumed cannabis since his positive test result. (R-5.)

After the Internal Affairs interview, a two-page Amended PNDA was issued on April 12, 2023. (R-1.) The Amended PNDA had two additional charges, a violation of JCPD Rule 3.164 (Narcotics Use) and a violation of the Attorney General's Policy on Drug Testing Law Enforcement. (R-8.) A departmental hearing was held on September 14, 2023. (R-2.) A Final Notice of Disciplinary Action was issued on October 2, 2023,

sustaining the charges in the PNDA. (R-2.) Patten was removed from the Jersey City Police Department effective October 2, 2023. (R-2.) There were no allegations of on-duty cannabis use or impairment.

CONCLUSIONS OF LAW

On February 22, 2021, the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMM Act), P.L. 2021, c. 16, which governs the regulation and use of cannabis, was signed into law. While the CREAMM Act became effective immediately upon signing, some sections of the CREAMM Act, including section 52 that applies to employers, became effective upon adoption of the Cannabis Regulatory Commission's (CRC) Personal Use Cannabis Rules (PUCR), N.J.S.A. 17:30 et seq. The CREAMM Act tasks the CRC with formulating the 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. On August 19, 2021, the CRC initially issued the PUCR, which made the CREAMM Act operative as of that date. See N.J.A.C. 17:30. I **CONCLUDE** that the CREAMM Act was in effect at the time of Patten's drug screening and subsequent termination in 2023.

The section of the CREAMM Act that applies to employers is codified at N.J.S.A. 24:6I-52(a)(1), and states that an employee shall not be subject to adverse action by an employer solely for testing positive for cannabis. "Adverse employment action" includes the discharge of an employee from employment. See N.J.S.A. 24:6I-3. It is important to note that the CREAMM Act authorizes drug testing of employees by their employer when there is reasonable suspicion of the employee's use of cannabis while working or when there are observable signs of intoxication, and random drug testing is also permitted but only to determine use during prescribed work hours. See N.J.S.A. 24:6I-52(a)(1). The CREAMM Act precludes adverse employment action simply for testing positive for cannabinoid metabolites, or for using cannabis, so long as it is not used during the workday and the employee is not intoxicated or impaired at work. See N.J.S.A. 24:6I-52(b)(1). Here, there are no allegations of cannabis use on duty or signs of intoxication while on duty.

There is no dispute that Patten tested positive for cannabis. There is no dispute that Patten consumed cannabis. The CREAMM Act applies to all employers, and there is nothing contained within the CREAMM Act to suggest that it does not apply to law enforcement or the JCPD. I **CONCLUDE** that Patten's termination for testing positive for cannabis violates the CREAMM Act, and specifically N.J.S.A. 24:6I-52(a)(1).

The JCPD, however, argues that Patten's termination is a violation of the CREAMM Act because Patten purchased and consumed "unregulated" cannabis from an unlicensed person. Patten argues in response that no evidence exists to show that the cannabis was "unregulated." Patten's argument falls short because he does not take into consideration the fact that he did not purchase the cannabis directly from a dispensary. Whether or not the cannabis was regulated or unregulated is irrelevant to the charge. It is the purchase, in and of itself, that is a violation of N.J.S.A. 17:30-2.1(b)(1). The PUCR states that a consumer can purchase, possess, use, or transfer cannabis **without remuneration** where the "cannabis item is obtained **directly from a licensed cannabis retailer.**" N.J.S.A. 17:30-2.1(b)(1) (emphasis added). The purpose for this requirement is stated in the CREAMM Act; it was designed to eliminate the problems caused by the unregulated manufacturing, distribution, and use of illegal marijuana within New Jersey. N.J.S.A. 24:6I-32(c). There is no dispute that Patten purchased the cannabis from Sal. There is no dispute that Sal worked at the liquor store. There is no dispute that Sal is not a licensed cannabis dispensary. Patten's purchase of the cannabis was not directly from a licensed cannabis retailer and is therefore a violation of the law. I **CONCLUDE** that Patten's purchase violated the CREAMM Act, specifically, N.J.S.A. 24:6I-32(c), for engaging in the unregulated distribution of cannabis; N.J.S.A. 2C:35-10a, for the unlawful possession of cannabis which was not prescribed for him or that was not directly obtained from a licensed dispensary or practitioner; and N.J.S.A. 17:30-2.1(b)(1), for the unlawful purchase of cannabis from an unlicensed dispensary.

"Insubordination" has been defined as a failure to obey a lawful order. In re Williams, 443 N.J. Super. 532, 403 (App. Div. 2016). Here, there is a violation of not only the JCPD rules but also the Attorney General's Policy that specifically states that the purpose of the laws is to ensure that cannabis is bought solely from licensed

dispensaries. Therefore, I **CONCLUDE** that the JCPD has met its burden to support a charge of N.J.A.C. 4A:2-2.3(a)(2), insubordination, for failing to follow the JCPD rules and the Attorney General's Policy.

"Inability to perform duties" is not, strictly speaking, a disciplinary charge. An employee must be able to perform his duties physically, intellectually, and psychologically. A charge under N.J.A.C. 4A:2-2.3(a)(3) challenges Patten's ability to perform the duties associated with the position. Here, there was no evidence or testimony to support any claim that Patten was not able to perform his duties physically, intellectually, or psychologically as a police officer. I **CONCLUDE** that the JCPD has not met its burden to sustain a charge of N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties.

"Conduct unbecoming a public employee" includes 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." 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." Ibid. 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)). Here, Patten admitted to the purchase of cannabis from an individual who was not employed by a licensed cannabis dispensary in violation of the CREAMM Act. I **CONCLUDE** that purchasing cannabis in violation of the CREAMM Act is sufficient to sustain a charge of a violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee.

"Neglect of duty" is not defined by the New Jersey Administrative Code. The charge has been interpreted to be an attitude of indifference based on numerous occurrences over a reasonably short space of time which amounted to neglect. West New York v. Bock, 38 N.J. 500, 522 (1962); see also In re Carter, 191 N.J. 474 (2007)

(neglect of duty found where a police officer fell asleep while on duty). Patten is charged with purchasing cannabis from an individual and not from a licensed dispensary. He was not on duty at the time, nor was he scheduled to report for duty. There are no allegations that he has ever purchased cannabis on duty, used cannabis on duty, or was intoxicated with cannabis on duty. I **CONCLUDE** that the JCPD has not met its burden to support a charge of N.J.A.C. 4A:2-2.3(a)(7), neglect of duty.

“Other sufficient cause” stems from a violation of JCPD Department Rules: Rule 3:108 (Conduct), Rule 3:123 (Obedience to Laws, Rules and Regulations and Orders), Rule 3:126 (Neglect of Duty), Rule 3:127 (Orders), Rule 3:157 (Rules and Regulations), Rule 3:164 (Narcotics Use), and Rule 3:169 (Code of Ethics). Used as a catch-all provision in the Code, discipline does not have to be warranted because of a violation of any or all the rules of the department. It can be based upon the “standard of good behavior.” Hartman v. Police Dep’t of Ridgewood, 258 N.J. Super. at 39–40. The JCPD has rules and regulations established not just for the police officers but for the entire department. As stated above, and in totality, Patten completely disregarded the JCPD rules and regulations. As to these inclusive charges, I **CONCLUDE** that the JCPD has met its burden to support this all-inclusive charge of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, because he disobeyed the rules and regulations established by the department for his conduct, cannabis use, and insubordination.

“Incapacity” is not, strictly speaking, a disciplinary charge. It is used as a part of the statute for a reason to discharge an officer. However, it can be inferred, as with inability to perform duties, that the officer is unable to perform his duties physically, intellectually, and psychologically. Such a charge challenges Patten’s ability to perform the duties associated with the position. Here, no evidence or testimony exists to support any claim that Patten was not able to perform his duty physically, intellectually, or psychologically as a police officer. There are no allegations that his cannabis purchase or use occurred while he was on duty or about to report for duty. I **CONCLUDE** that the JCPD has not met its burden to sustain a charge of N.J.S.A. 40A:14-147, incapacity.

The Attorney General issued clarifications to the CREAMM Act on April 13, 2022, (R-10) which specifically stated that there should be “zero tolerance” for unregulated cannabis consumption by police officers. While the Attorney General’s policy and clarifications issued thereto have not been reviewed by the Court yet, they have been held to have the full force and effect of law on police officers in New Jersey. See In re Gen. Disciplinary Hearing of Carberry, 114 N.J. 574, 577 (1989). Here, there was complete disregard and indifference to the Attorney General’s policy for cannabis use as it relates to police officers. The Attorney General’s clarifications were issued over a year after the CREAMM Act was enacted to ensure that all law-enforcement officers understood how the law applied to them, whether they were on or off duty. Patten ignored them. I **CONCLUDE** that the JCPD has met its burden to support a charge of a violation of the Attorney General’s Policy on Drug Testing Law Enforcement for his purchase of cannabis from an unlicensed dispensary.

Penalty

Termination is a major disciplinary action, and the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission (CSC) may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination. In re Carter, 191 N.J. at 483–86. Thus, an employee’s prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense. Ibid. The past record includes a recent history of promotions or commendations as well as any other disciplinary actions or instances of misconduct. West New York v. Bock, 38 N.J. 524. Consideration should also be given to the timing of the most recently adjudicated disciplinary history. Ibid. A past record, or lack thereof, cannot be used to prove or disprove a present charge. However, it can be used for guidance to determine the appropriate penalty. Ibid.

Progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the

application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. 19, 33 (2007). Thus, the issue is whether such “punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.” In re Carter, 191 N.J. at 484.

It is not necessary that misconduct occur while the officer is on duty. In re Emmons, 63 N.J. Super. at 140. Suspension or removal may be justified even if the misconduct occurred while off duty. Ibid. On- and off-duty conduct is an essential element of the morale and discipline of the force. It is also an essential element of public respect for its officers. Ibid. In the public's eye, a police officer is a model of proper conduct, and it is one of the obligations and duties of voluntary entry into public service. Id. at 142.

New Jersey has long recognized that a police officer is a special kind of public employee who represents law and order and must represent an image of integrity and dependability. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). Police officers are held to a high standard of responsibility and conduct. Ibid. They voluntarily agree to being held to this higher standard of conduct when they enter public service. In re Phillips, 117 N.J. 567, 577 (1990). Courts have affirmed terminations of public servants for serious infractions or if they involve the safety of the public. Klusaritz v. Cape May Cnty., 387 N.J. Super. 305 (App. Div. 2006) (affirming dismissal of incompetent CPA despite no disciplinary record); In re Hall, 335 N.J. Super. 45 (App. Div. 2000) (sustaining dismissal for attempted theft); Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191 (App. Div. 1997) (affirming dismissal of police officer who took unauthorized paid vacation); Bowden v. Bayside State Prison, 268 N.J. Super. 301 (App. Div. 1993) (sustaining removal of prison guard who gambled with inmates for cigarettes); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967) (affirming dismissal of police officer based on his multiple instances of insubordination and careless handling of weapon).

When New Jersey enacted the CREAMM Act, one of its primary purposes was to stop the sale of unregulated marijuana. The Attorney General addressed the specific issue that is in dispute in its memorandum to all State law-enforcement officers. This

memorandum stated that there should be zero tolerance for a police officer's use or possession of unregulated marijuana. The facts in this matter are not in dispute. Patten is not just a public employee. He is a police officer who is employed to enforce the laws of the State. Patten argues that he was on disability for an injured left hand. He alleges that the prescription medicine he was taking was not effective. He wanted to try to manage his pain with cannabis. He admitted that he was not sure if he could just go into a dispensary to purchase cannabis legally. However, he admitted that he knew that purchasing it from an individual is a violation of the law. He purchased the cannabis from Sal, who works for the local corner liquor store. Patten knew that Sal did not work for a licensed dispensary. Patten argues that the JCPD cannot prove that the cannabis was unregulated. However, Sal's possession of the cannabis is not the issue here. The salient fact, which is undisputed, is that Patten did not purchase the cannabis directly from a licensed dispensary, which is a violation of the PUCR and the CREAMM Act.

Patten intentionally violated N.J.A.C. 4A:2-2.3(a)(2) (Insubordination), N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming a Public Employee), N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause), JCPD Rules: Rule 3:108 (Conduct), Rule 3:123 (Obedience to Laws, Rules and Regulations and Orders), Rule 3:126 (Neglect of Duty), Rule 3:127 (Orders), Rule 3:157 (Rules and Regulations), Rule 3:164 (Narcotics Use), Rule 3:169 (Code of Ethics), and the Attorney General's Policy on Drug Testing Law Enforcement, and these violations are sufficient to warrant termination. Patten is not an ordinary citizen. He volunteered to be trained as a police officer and serve the public. He agreed to the rules and regulations of the JCPD. His sworn duty is to defend the laws of the State. One of the laws of the State is to purchase cannabis from a licensed dispensary. He knew what the law was, and he knew that he was violating the law when he purchased cannabis from an unlicensed individual. I therefore **CONCLUDE** that Patten must be terminated from his position as a police officer.

ORDER

I **ORDER** that Patten be **TERMINATED** from his position as a police officer with the JCPD.

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.

March 22, 2024
DATE



PATRICE E. HOBBS, ALJ

Date Received at Agency:

March 22, 2024

Date Mailed to Parties:

March 22, 2024

Isr

APPENDIX

Witnesses

For Appellant:

Montavious Patten

For Respondent:

Sargeant Joseph Anzivino

Exhibits

For Appellant:

- A-1 Not in evidence
- A-2 Not in evidence
- A-3 Not in evidence
- A-4 Not in evidence
- A-5 Attorney General's Law Enforcement Drug Testing Policy, February 2023
- A-6 PNDA dated March 9, 2023, and Notice of Immediate Suspension
- A-7 Not in evidence
- A-8 Not in evidence
- A-9 Not in evidence
- A-10 Officer Patten's US Army Certificate of Release

For Respondent:

- R-1 Amended PNDA dated April 12, 2023
- R-2 FNDA dated October 2, 2023
- R-3 Excerpts of JCPD Rules and Regulations
- R-4 JCPD General Order 12-18
- R-5 Internal Affairs Report dated April 3, 2023
- R-6 Drug Testing Officer Acknowledgment dated January 27, 2023
- R-7 Patten Toxicology report
- R-8 Attorney General's Law Enforcement Drug Testing Policy 12/20

- R-9 Attorney General Frequently Asked Questions 2021
- R-10 Attorney General Memorandum on Cannabis dated April 13, 2022
- R-11 JCPD Director Shea Memorandum dated April 20, 2022
- R-12 Recording of IA Interview (CD)



STATE OF NEW JERSEY

In the Matter of Richie Lopez, Jersey
City Police Department

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2023-631
OAL Docket Nos. CSR 01695-23 and
CSR 08567-22 (on remand)

ISSUED: MAY 10, 2024

The appeal of Richie Lopez, Police Officer, Jersey City Police Department, removal, effective August 23, 2022, on charges, was heard by Administrative Law Judge Susana E. Guerrero (ALJ), who rendered her initial decision on April 1, 2024. Exceptions were filed on behalf of the appellant, and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 1, 2024, accepted and adopted the Findings of Fact and Conclusions as contained in the ALJ's initial decision and her recommendation to uphold the removal.

It is noted that the appellant was removed on charges of conduct unbecoming a public employee and a violation of department rules relating to his positive test for cannabis/marijuana. The ALJ had originally rendered an initial decision on January 19, 2023, reversing the appellant's removal. At that time, exceptions were filed on behalf of the appointing authority, and a reply to the exceptions was filed on behalf of the appellant. Upon its *de novo* review, the Commission remanded the matter to the Office of Administrative Law (OAL) for further hearing to develop a factual record as to how the appellant obtained and ingested the cannabis/marijuana. *See In the Matter of Richie Lopez* (CSC, decided February 22, 2023).

The Commission now makes its final comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant in this matter. The Commission finds the exceptions unpersuasive as the ALJ's findings and

conclusions in upholding the removal was based on her thorough assessment of the record and are not arbitrary, capricious, unreasonable or legally incorrect. In this regard, the Commission notes that the ALJ's findings regarding possible accidental ingestion of cannabis/marijuana were substantially based on her assessment of the credibility of the appellant. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri u. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. In this regard, the ALJ concluded that:

[L]opez was not a credible witness, and I afford his testimony no weight. His testimony concerning his "accidental" and "unknowing" ingestion of cannabis at his friend's house was entirely unconvincing. It is difficult to believe that any reasonable officer would consume gummies and chocolate found in an unlabeled Ziploc bag in someone else's home and not, at a minimum, question the friend about it or suspect that it may contain cannabis. Notably, Lopez's friend did not testify at the hearing to corroborate Lopez's account. Moreover, I was not persuaded by Lopez's unconvincing explanation as to why he never informed the [Jersey City Police Department (JCPD)] that he may have accidentally ingested cannabis. While he testified that he was advised by counsel not to inform the JCPD that his ingestion of cannabis was accidental, this alleged advice constitutes uncorroborated hearsay. Lopez's former counsel could have testified at the hearing to corroborate his testimony but did not.

Given my consideration of the record, including the documentary evidence, testimony presented at the hearing, and my assessment of its credibility, I FIND that Lopez has failed to demonstrate by a preponderance of the credible evidence that his ingestion of cannabis/marijuana was unintentional or accidental. I further FIND that Lopez presented no evidence to demonstrate that the cannabis/marijuana he ingested prior to the random drug test on

September 14, 2021, was regulated. Since there was no regulated market for recreational cannabis in New Jersey prior to April 21, 2022, Lopez had no prescription for cannabis, and the record is bereft of any evidence that the marijuana/cannabis consumed was regulated, I also FIND that the cannabis/marijuana used by Lopez prior to testing was unregulated.

Thus, the Commission finds nothing in the record or the appellant's exceptions to question those determinations or the findings and conclusions made therefrom.

Further, the Commission is unpersuaded by the appellant's fundamental fairness argument. The appellant's drug screening took place on September 14, 2021, and the positive result came back on October 19, 2021. Therefore, the drug screening took place *prior* to the Cannabis Regulatory Commission's opening of New Jersey's regulated recreational cannabis market, which began on April 21, 2022. *See N.J.S.A. 24:6I-34(d)(2)*. The fact that his removal was effective August 23, 2022, and at that time law enforcement officers could purchase and use regulated cannabis is irrelevant. The appellant's transgression occurred at a time when there was no regulated recreational cannabis available in New Jersey.

Similar to its review of the underlying charges, the Commission's review of the penalty is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Further, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In this regard, the Commission notes that even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. The Commission emphasizes that a law enforcement officer is held to a higher standard than a civilian public employee. A Police Officer holds a highly visible and sensitive position within the community, whose primary duty is to enforce and uphold the law. The position represents law and order to the citizenry. A Police Officer also carries a service revolver and is constantly called upon to exercise tact, restraint and good judgment in relationship with the public. Thus, a Police Officer must present an image of personal integrity and dependability in order to have the respect of the public. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). 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 appointing authority's drug testing policy. The appellant's actions clearly undermine the public trust. Accordingly, it is clear that removal is the appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Richie Lopez.

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 1ST DAY OF MAY, 2024



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

Attachment



STATE OF NEW JERSEY

In the Matter of Montavious Patten,
Jersey City Police Department

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2024-1054
OAL Docket No. CSR 12961-23

ISSUED: MAY 10, 2024

The appeal of Montavious Patten, Police Officer, Jersey City Police Department, removal, effective October 2, 2023, on charges, was before by Administrative Law Judge Patrice E. Hobbs (ALJ), who rendered her initial decision on March 22, 2024. Exceptions and replies to the exceptions were filed on behalf of the appellant and on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, including a thorough review of the exceptions and replies, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 1, 2024, accepted and adopted the Findings of Fact and Conclusions as contained in the ALJ's initial decision and her recommendation to uphold the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed on behalf of the appellant in this matter. The Commission finds the exceptions unpersuasive. In this regard, the appellant argues that the Final Notice of Disciplinary Action (FNDA) did not charge him for purchasing cannabis from an unlicensed dispensary. However, the FNDA removed the appellant for testing positive for cannabinoids (THC). Thus, for an employee to raise an affirmative defense under the New Jersey Cannabis, Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), *N.J.S.A. 24:6I-31, et seq.*, the marijuana/cannabis that was purchased and ingested must have come from a regulated source. *See also N.J.S.A. 17:30-2.1.* In the instant matter, apart from the appellant's exceptions and reply which indicate that his testimony was that his friend "Sal" bought the cannabis legally for him without remuneration, and thus obtaining and using regulated cannabis, there is no corroborating competent

evidence that he did. There was no testimony from Sal, nor any receipts provided. Thus, the ALJ found that the appellant purchased cannabis in violation of CREAMMA. Therefore, the ALJ properly determined that the charges of conduct unbecoming a public employee; insubordination, for failing to follow the New Jersey Attorney General's Law Enforcement Testing Policy and the appointing authority's drug testing policy; and other sufficient cause relating to violations of departmental rules were sustained.

Regarding the appointing authority's exceptions, it maintains that the charges of inability to perform and neglect of duty levied on the appellant should have been sustained by the ALJ since the appellant is legally barred from possessing a firearm by federal law due to his use of marijuana/cannabis. Thus, it maintains that, while removal should be affirmed, the ALJ's decision should be modified. However, as set forth in *In the Matter of Norhan Mansour* (CSC, decided August 2, 2023) and *In the Matter of Omar Polanco* (CSC, decided September 20, 2023), which reversed the removal of the appellants, the Commission agreed with the ALJs 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. Accordingly, there is not a sufficient basis to modify the ALJ's initial decision in that respect. Nonetheless, for reasons set forth below, the sustained charges warrant the appellant's removal.

Similar to its review of the underlying charges, the Commission's review of the penalty is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Further, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). In this regard, the Commission notes that even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. As set forth by the ALJ, the Commission emphasizes that a law enforcement officer is held to a higher standard than a civilian public employee. A Police Officer holds a highly visible and sensitive position within the community, whose primary duty is to enforce and uphold the law. The position represents law and order to the citizenry. A Police Officer also carries a service revolver and is constantly called upon to exercise tact, restraint and good judgment in relationship with the public. Thus, a Police

Officer must present an image of personal integrity and dependability in order to have the respect of the public. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990). 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 appointing authority's drug testing policy. The appellant's actions clearly undermine the public trust. Accordingly, it is clear that removal is the appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Montavious Patten.

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 1ST DAY OF MAY, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
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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

**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. 24:2I-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. 24:6I-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 irremediable 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:

July 11, 2024

sej

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)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

SALARY PAYMENT

OAL DKT. NO.: CSR 08531-23

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

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

On this date, I issued an Initial Decision in this matter which recommended that the disciplinary charges against appellant be **REVERSED**. Therefore, pursuant to N.J.S.A. 40A:14-203(c), I **ORDER** the appointing authority to begin paying appellant his base salary immediately retroactive to the date of his termination upon the issuance of the Final Decision by the Civil Service Commission.

This Order is effective immediately and shall continue in effect until issuance of the Final Decision in this matter by the Civil Service Commission.

A handwritten signature in cursive script, appearing to read "Matthew G. Miller".

July 11, 2024

DATE

MATTHEW G. MILLER, A.L.J.

Date Received at Agency:

July 11, 2024

Date Mailed to Parties:

July 11, 2024

sej



STATE OF NEW JERSEY

In the Matter of Mackenzie Reilly,
Jersey City Police Department

CSC DKT. NO. 2024-466
OAL DKT. NO. CSR 08531-23

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 14, 2023

The appeal of Mackenzie Reilly, Police Officer, Jersey City, Police Department, removal, effective August 25, 2024, on charges, was before by Administrative Law Judge Matthew G. Miller (ALJ), who rendered his initial decision on July 11, 2024. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 14, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision and his recommendation to grant the appellant's motion for summary decision and reverse the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive as the ALJ's findings and conclusions in reversing the removal was based on his thorough assessment of the record and are not arbitrary, capricious, unreasonable or legally incorrect.

The appointing authority's exceptions are essentially a regurgitation of its challenges in several prior similar matters. Specifically, the appointing authority argues that the ALJ improperly reversed the removal under the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) based on its conflict with federal law. This argument has been rejected by the Commission in *In the Matter of Norhan Mansour* (CSC, decided August 2,

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
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 03569-23

AGENCY DKT. NO. N/A

**IN THE MATTER OF NORHAN MANSOUR
JERSEY CITY POLICE DEPARTMENT,**

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

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

Record Closed: June 13, 2023,

Decided: June 21, 2023

BEFORE: **KIMBERLY A. MOSS**, ALJ:

Appellant Norhan Mansour appeals her removal by the Jersey City Police Department (JCPD) for testing positive for cannabis. Appellant filed a motion for summary decision on March 26, 2023. Respondent filed a cross motion for summary decision on June 13, 2023. The hearing is scheduled for July 10, 2023.

Having received the motions, I **FIND** the following **FACTS**:

Mansour was a police officer with the JCPD. At all times JCPD officers are required to carry a firearm while on duty. In April 2022, JCPD Police Director and

Deputy Chief issued an order stating that officers were prohibited from using cannabis on or off duty as it is illegal under federal law for cannabis users to possess, carry or use firearms. On September 20, 2022, Mansour was randomly selected and submitted to a random urine sample for drug testing. On January 9, 2023, Mansour was served a preliminary notice of disciplinary action (PNDA). The PNDA charged her with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause by ingesting cannabis prior to and after September 20, 2022, regularly using cannabis and violating JCPD drug policy due to the presence of cannabinoid metabolites, specifically THC in her system. A Final Notice of Disciplinary action was issued on March 23, 2023, sustaining the charges in the PNDA.

In September 2022 regulated marijuana, cannabis was legal in New Jersey and available for purchase from in state cannabis dispensaries. There were no allegations of on duty cannabis use or impairment. There is no allegation that Mansour used unregulated cannabis.

Mansour knowingly and voluntarily ingested cannabis prior to the August 2022 random drug test.

LEGAL ARGUMENT AND CONCLUSION

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

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

There is no material issue of fact in this matter.

Mansour's termination in March 2023 occurred when the CREAMM Act was operational, the CREAMM Act, and the Personal Use Cannabis Rules, N.J.A.C. 17:30-1.1 to -17.9.

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

Consequently, with the initial publishing of the CRC's Personal Use Cannabis Rules in August 2021, N.J.S.A. 24:6I-52 became operative, and this pre-dated Mansour's drug screening and subsequent termination.

N.J.S.A. 24:6I-52(a)(1), which provides in pertinent part:

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, . . . or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c. 16 (C.24:6I-31 et al.).
[Emphasis added.]

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

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

N.J.S.A. 24:6I-52(a)(1) states that employers may still require employees to undergo drug tests, including random drug screenings, when there is reasonable suspicion of an employee’s cannabis usage while working or when the employee appears impaired. And the employer can take appropriate employment action when an employee uses marijuana/cannabis during working hours, or when he/she is impaired. This provision governing drug testing in the workplace is consistent with the legislative intent behind the CREAMM Act, which was to adopt a new approach to the State’s marijuana/cannabis policies by legalizing cannabis in a similar fashion to that of alcohol. See N.J.S.A. 24:6I-32. What the CREAMM Act precludes is adverse employment action simply for testing positive for cannabinoid metabolites, or for using cannabis, so long as it is not used during the workday and the employee is not intoxicated or impaired at work.

. . . A drug test may also be done randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee’s prescribed work hours.
[N.J.S.A. 24:6I-51(a)(1).]

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

Here, there is no proffered evidence that there was ever reasonable suspicion of cannabis use on the job by Mansour, nor were there any purported signs of intoxication, suspected drug use, or impairment during work hours. Mansour was terminated because of a random drug test revealed cannabinoids/THC in her urine, and a negative drug-test result was a condition of her continued employment. N.J.S.A. 24:6I-52 clearly states that **no employer “shall discharge from employment or take any adverse action against any employee . . . because that person does or does not smoke, . . . or otherwise use cannabis items.”** (emphasis supplied) The respondent did just that—it terminated Mansour for using cannabis once the results of the urinalysis showed the presence of cannabinoids/THC—when the clear language of N.J.S.A. 24:6I-52(a)(1) precludes employers from terminating an employee simply because the employee uses cannabis and precludes employers from terminating their employees solely due to the presence of cannabinoid metabolites in the employee’s system.

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

Preemption

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

With regard to the preemption issue raised by the respondent, Jersey City specifically references 18 U.S.C. § 922(d) and 18 U.S.C. § 922(g), and argues that the US Congress enacted legislation prohibiting certain individuals from possessing or receiving firearms or ammunition, and prohibiting individuals from providing firearms or ammunition to such an individual based upon the person's drug use.⁵ Moreover, the respondent notes that marijuana is a Schedule I controlled dangerous substance under federal law (21 U.S.C. § 812), and the US Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has advised that under the federal firearms law "any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition." (September 21, 2011, open letter to all firearms licensees.) The respondent argues, therefore, that conflict preemption nullifies the CREAMM Act because the CREAMM Act might suggest that police officers can utilize marijuana while continuing to work in a position that requires receipt of or possession of a firearm and ammunition.

I am not persuaded by the respondent's arguments that the federal law cited by the respondent in its brief preempts the CREAMM Act as it applies to police officers. There is an obvious conflict between the CREAMM Act, which legalizes the personal use of marijuana in New Jersey, and federal law, which still considers marijuana an unlawful controlled substance, and this conflict was recognized by the State of New Jersey Legislature when it enacted the CREAMM Act.

In enacting the CREAMM Act, the State Legislature recognized that the personal use of cannabis remains illegal under federal law, and in the CREAMM Act itself, our Legislature expressly directs law-enforcement agencies in New Jersey not to cooperate with or assist the federal government in enforcing these federal laws. Specifically, N.J.S.A. 24:6I-54 provides in part:

5 18 U.S.C. § 922(d) provides:

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

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

18 U.S.C. § 922(g) provides:

[i]t shall be unlawful for any person –

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

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

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

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

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

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

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

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

1. Preventing the distribution of marijuana to minors;
 2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
 3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
 4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
 5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
 6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
 7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
 8. Preventing marijuana possession or use on federal property.
- [<https://www.nj.gov/cannabis/resources/cannabis-laws/>.]

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

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

[<https://www.nj.gov/cannabis/adult-personal/workplace-duilaws/>.]

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

aff'd, 246 N.J. 1 (2021). The respondent has failed to demonstrate that a "positive conflict" exists between the CREAMM Act and the federal law cited because even if marijuana consumption remains unlawful under federal law, nothing in the CREAMM Act requires anyone to violate federal law, and while the CREAMM Act provides immunity from State prosecution and from adverse employment actions, it does not purport to offer any immunity from any violation of federal law—the federal government is still free to prosecute cannabis users in New Jersey even though State prosecutors and law enforcement may not.

I am also not convinced that it is impossible to comply with the CREAMM Act, and specifically N.J.S.A. 24:6I-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.

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

ORDER

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

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

June 21, 2023



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

June 21, 2023

Date Mailed to Parties:
ljb

June 21, 2023

DOCUMENTS RELIED ON

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

SALARY PAYMENT

OAL DKT. NO.: CSR 03569-23

**IN THE MATTER OF NORHAN MANSOUR,
JERSEY CITY POLICE DEPARTMENT,**

BEFORE: **KIMBERLY A. MOSS, ALJ:**

On this date, I issued an initial decision in this matter which recommended that the disciplinary charges against appellant be reversed. Therefore, pursuant to N.J.S.A. 40A:14-203(c), I Order the appointing authority to begin paying appellant her base salary immediately retroactive to the date of her termination upon the issuance of the final decision by the Civil Service Commission.

This Order is effective immediately and shall continue in effect until issuance of the Final Decision in this matter by the Civil Service Commission.

June 21, 2023

Date

A handwritten signature in black ink, appearing to read "Kimberly A. Moss".

KIMBERLY A. MOSS, ALJ



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 03570-23

AGENCY DKT. NO. N/A

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

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

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

Record Closed: August 9, 2023,

Decided: August 18, 2023

BEFORE: **JOANN LASALA CANDIDO**, ALAJ:

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

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

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

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

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

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

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

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

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

The CREAMM Act, P.L. 2021, c. 16, which governs the regulation and use of cannabis, was signed into law on February 22, 2021. While the Act became effective immediately upon signing, some sections of the Act, including section 52, which is the section that applies to employers, only became operative upon adoption of the Cannabis Regulatory Commission's (CRC) Personal Use Cannabis Rules. The CREAMM Act tasks the CRC with promulgating rules to carry out the Commission's duties and powers with respect to overseeing the development, regulation, and enforcement of activities associated with the personal use of cannabis pursuant to P.L.

2021, c.16. The CRC initially issued the Personal Use Cannabis Rules on or around August 19, 2021, which made the CREAMM Act operative as of that date. See N.J.A.C. 17:30.

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

N.J.S.A. 24:6I-52(a)(1), which provides in pertinent part:

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, . . . or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c. 16 (C.24:6I-31 et al.).
[Emphasis added.]

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

It is important to note that the CREAMM Act authorizes drug testing of employees by their employer when there is reasonable suspicion of the employee's use of cannabis while working or when there are observable signs of intoxication; and random drug testing is also permitted but only to determine use during prescribed work hours. That has not been alleged in this matter. The CREAMM Act precludes adverse employment action simply for testing positive for cannabinoid metabolites, or for using cannabis, so long as it is not used during the workday and the employee is not intoxicated or impaired at work.

Because N.J.S.A. 24:6I-52, was in effect at the time that Polanco was tested in September 2022, which led to his termination, the JCPD is subject to the CREAMM Act. There is nothing in the CREAMM Act to suggest that N.J.S.A. 24:6I-52 does not apply to law enforcement. For the reasons set forth herein, I also **CONCLUDE** that the appellant's termination violates the CREAMM Act, and specifically N.J.S.A. 24:6I-52(a)(1).

Furthermore, because the appellant was terminated in part for violating JCPD Rules in it's FNDA as a result of the drug test results, I **CONCLUDE** and agree with the reasoning in Mansour, that the JCPD Rules that form the basis for Polanco's removal are preempted by the CREAMM Act to the extent that these Rules allow for the removal or discipline of a police officer simply for testing positive for the use of cannabinoids and nothing more.

The respondent asserts here, as in the Mansour matter, that despite the language in the CREAMM Act, federal law prohibits the receipt or possession of a firearm or ammunition by users of marijuana, and that the respondent properly terminated the appellant for using marijuana due to his "unbecoming use of such substance in dereliction of federal law." The respondent argues that federal law preempts the CREAMM Act as it relates to discipline of police officers' use of marijuana because federal law prohibits those officers from fulfilling their job duties by receiving and possessing firearms and ammunition if they use marijuana. The respondent further asserts that appellant cannot continue as a police officer if he is a user of marijuana because federal law prohibits him from possessing a firearm or ammunition, which are required job duties. Respondent relies in part upon the Florida Court of Appeals decision in Ortiz v. Dep't of Corr., 1D22-375, 2023 WL 4101330 at *2 (Fla. Dist. Ct. App. June 21, 2023), whereby a corrections officer who used prescription marijuana tested positive for marijuana metabolites after a random drug test, and was terminated because he could not perform the important requirement of the job of a corrections officer, training and using a firearm without being in violation of federal law. This case is not instructive here since it is clear in enacting the CREAMM Act, the State Legislature recognized that the personal use of cannabis remains illegal under federal law, and in the CREAMM Act, our Legislature expressly directs law-enforcement agencies in New Jersey not to cooperate with or assist the federal government in enforcing these federal laws. Specifically, N.J.S.A. 24:6I-54 provides in part:

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

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)))[.] 18 U.S.C. § 922(g) provides:

[i]t shall be unlawful for any person –

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

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

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

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

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

Hence, the CREAMM Act itself expressly directs all agents of the State, such as police departments, to comply with the CREAMM Act despite recognizing that federal cannabis laws may conflict with the CREAMM Act.

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

ORDER

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

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

This recommended decision may be adopted, modified, or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

August 18, 2023

DATE



JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

August 18, 2023

Date Mailed to Parties:

August 18, 2023

ljb

DOCUMENTS RELIED ON

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

SALARY PAYMENT

OAL DKT. NO.: CSR 03570-23

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

BEFORE: JOANN LASALA CANDIDO, ALAJ:

On this date, I issued an initial decision in this matter which recommended that the disciplinary charges against appellant be reversed. Therefore, pursuant to N.J.S.A. 40A:14-203(c), I Order the appointing authority to begin paying appellant his base salary immediately retroactive to the date of his termination upon the issuance of the final decision by the Civil Service Commission.

This Order is effective immediately and shall continue in effect until issuance of the Final Decision in this matter by the Civil Service Commission.

August 18, 2023

Date

A handwritten signature in cursive script, reading "Joann Lasala Candido".

JOANN LASALA CANDIDO, ALAJ



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 01695-23
(Remand CSR 08567-22)

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

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

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

Record Closed: February 9, 2024

Decided: April 1, 2024

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Richie Lopez (Lopez) had filed an appeal at the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 40A:14-202(d), that was perfected on September 28, 2022 under OAL Dkt. No. CSR 08567-22. The respondent had served the appellant with a Preliminary Notice of Disciplinary Action (PNDA) dated November 20, 2021, and a Final Notice of Disciplinary Action (FNDA) dated August 23, 2022, sustaining all charges set forth in the PNDA, and terminating him,

effective August 23, 2022, from his position as a police officer in Jersey City because of a positive drug test.

The appellant filed a motion for summary decision, which the respondent opposed, asserting that Lopez was entitled to summary decision because the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) expressly prohibits the firing of an employee solely for testing positive for marijuana. I issued an Initial Decision Summary Decision on January 19, 2023 granting the motion for summary decision, and recommended the reversal of Lopez's removal.

On February 27, 2023, the Civil Service Commission did not adopt the Conclusions reached in the Initial Decision and the recommendation to reverse the removal, but remanded the matter, which was now filed under OAL Dkt. No. CSR 01695-23, to the OAL. The Commission's Decision states that since Lopez's drug screening took place prior to the Cannabis Regulatory Commission's opening of regulated recreational cannabis market in New Jersey, regulated cannabis was not available in the State at that time, and because the Acting Attorney General had declared a zero tolerance for unregulated marijuana consumption by officers just a week before, the appointing authority here was not precluded from taking adverse employment action against Lopez based on the positive test result. The Commission therefore remanded the matter "to develop a factual record as to how the marijuana/cannabis was obtained and ingested," "whether Lopez's use was unregulated or not," and to address whether any mitigating facts, such as accidental exposure, exist.

Telephone prehearing conferences were held on March 8, 2023, March 23, 2023, and May 26, 2023. The hearing was scheduled for May 31, 2023, but adjourned at the request of counsel for appellant. The hearing was rescheduled to July 21, 2023, which was also adjourned at the request of counsel for appellant. The hearing was ultimately held on November 1, 2023, and the parties requested an opportunity to request a transcript of the hearing and to file post-hearing briefs. Post-hearing briefs were received on or around January 30, 2024, and the record closed on February 9, 2024, upon receipt of replies to the post-hearing briefs.

FACTUAL DISCUSSION

The underlying facts are largely undisputed, and I **FIND**:

Lopez, a Jersey City police officer, was selected for random drug testing on September 14, 2021, pursuant to Jersey City Police Department (JCPD) General Order 12-18 and the New Jersey Attorney General's Law Enforcement Drug Testing Policy. At the time, the New Jersey Attorney General's Law Enforcement Drug Testing Policy required municipal police departments to conduct random drug tests, which included screening for marijuana use by police officers.

Prior to undergoing the drug test in September 2021, Lopez signed an acknowledgement of receipt of JCPD General Order 12-18, and acknowledged the requirement that he "become aware thoroughly with this policy." Section 5.1.4 of General Order 12-18 put JCPD officers, including Lopez, on notice that the drug test would analyze his specimen for various substances, including marijuana. Section 7.3 of the General Order put JCPD officers, including Lopez, on notice that if an officer tested positive for illegal drug use, they would be terminated. JCPD Rules also provided that: "A member will not use narcotics, hallucinating, stimulating or dangerous drugs while on duty or off duty unless prescribed by a physician for illness."

Lopez provided a urine sample as part of a random drug test on September 14, 2021, which was assigned Donor #611841727. Prior to testing, Lopez completed a Drug Testing Medication Information form in which he listed medications, including unprescribed medication, that he had taken during the fourteen days prior to the random drug test. Lopez did not report using any prescribed or unprescribed marijuana or any medication that would contain THC.

The New Jersey State Toxicology Laboratory completed a mass spectrometer drug test of the urine sample submitted by Lopez, and confirmed a positive result for cannabinoids (THC) which exceeded the 15 nl/mL cutoff. The Laboratory determined that the concentration of THC in Lopez's urine sample was 101.2470 nl/mL.

Internal Affairs interviewed Lopez regarding the test result on or about October 20, 2021. During his interview with Internal Affairs, he was asked if he had consumed marijuana while employed by the Jersey City Police Department, and Lopez replied: “No, I did not.” During the interview, the investigators also inquired as to whether Lopez had any explanation as to why THC was in his system, and he stated that he did not.

Charges

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

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

The respondent does not assert, and there is no evidence to suggest, that Lopez used marijuana or cannabis while on duty, nor that he was in any way intoxicated or impaired while on the job at or around the time he submitted to the random drug test in September 2021.

Testimony

Lieutenant Anthony Makofka (Lt. Makofka) was the sergeant assigned to the Internal Affairs Unit that tested Lopez, and prepared the FNDA. Lt. Makofka testified concerning the handling of the urine sample and the investigation. He testified that Lopez denied having a prescription for marijuana and that he did not identify any medication taken on the medication sheet prior to testing. As part of the investigation, Lopez was interviewed by Sergeant Barone and another lieutenant, with his union representative

present, and Lt. Makofka testified that Lopez denied having any explanation as to why there was marijuana in his system. He also testified concerning the Attorney General's guidance to departments concerning cannabis use, as well as JCPD Rules and Regulations, and General Order 12-18.

Richie Lopez testified on his own behalf. He denied ever using marijuana prior to this incident. He testified that after being informed that he tested positive for THC, he thought about how that could have happened. He testified that the day before the drug test, he was at a friend's house watching a game and that he ate some chocolate and gummy candy that he found in a Ziploc bag in his friend's kitchen. Lopez testified that he later learned from his friend that the candy and chocolate contained cannabis, although he denied feeling any effect from his consumption. He testified that he never informed Internal Affairs of this because his attorney advised him not to. On cross-examination Lopez did not recall telling anyone, other than his attorney, prior to December 21, 2022, that his positive test result was from an accidental ingestion, but in his answers to interrogatories, he identified his friend Azam as having knowledge.

Lt. Makofka testified in a straightforward manner, and I have no reason to discount his testimony. On the other hand, Lopez was not a credible witness, and I afford his testimony no weight. His testimony concerning his "accidental" and "unknowing" ingestion of cannabis at his friend's house was entirely unconvincing. It is difficult to believe that any reasonable officer would consume gummies and chocolate found in an unlabeled Ziploc bag in someone else's home and not, at a minimum, question the friend about it or suspect that it may contain cannabis. Notably, Lopez's friend did not testify at the hearing to corroborate Lopez's account. Moreover, I was not persuaded by Lopez's unconvincing explanation as to why he never informed the JCPD that he may have accidentally ingested cannabis. While he testified that he was advised by counsel not to inform the JCPD that his ingestion of cannabis was accidental, this alleged advice constitutes uncorroborated hearsay. Lopez's former counsel could have testified at the hearing to corroborate his testimony, but did not.

Given my consideration of the record, including the documentary evidence, testimony presented at the hearing, and my assessment of its credibility, I **FIND** that

Lopez has failed to demonstrate by a preponderance of the credible evidence that his ingestion of cannabis/marijuana was unintentional or accidental. I further **FIND** that Lopez presented no evidence to demonstrate that the cannabis/marijuana he ingested prior to the random drug test on September 14, 2021 was regulated. Since there was no regulated market for recreational cannabis in New Jersey prior to April 21, 2022,¹ Lopez had no prescription for cannabis, and the record is bereft of any evidence that the marijuana/cannabis consumed was regulated, I also **FIND** that the cannabis/marijuana used by Lopez prior to testing was unregulated.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 10-3.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules, and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12).

In disciplinary cases, the appointing authority has the burden of both persuasion and production and must demonstrate by a preponderance of the competent, relevant, and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

Lopez concedes that he ingested cannabis/marijuana prior to the testing positive on September 14, 2021, but asserts that the ingestion was accidental. The Civil Service

¹ The Cannabis Regulatory Commission opened New Jersey's regulated recreational cannabis market on April 21, 2022. No regulated recreational cannabis market existed in New Jersey prior to this date.

Commission remanded this matter to “develop a factual record as to how the marijuana/cannabis was obtained and ingested,” and it wrote that since “the regulated recreational market had not yet opened [when Lopez was tested], Lopez could have only ingested unregulated marijuana (which he could be terminated for), or regulated medical cannabis (for which he would have protections.”) The Commission remanded for a factual finding “as to whether Lopez’s use was unregulated or not,” and to possibly develop any additional mitigating facts.

Lopez asserts in his post-hearing brief that it is the respondent’s burden to prove that the cannabis ingested was unregulated, and that since there was no testimony as to how the cannabis was obtained, the respondent failed to meet its burden of proof to establish that it was unregulated. I disagree. While it is the respondent’s burden to prove the charges and the appropriateness of the discipline imposed, if the appellant presents an affirmative defense or mitigating circumstance, such as accidental ingestion, the burden shifts to the appellant. When Lopez was tested, there was no regulated recreational cannabis market in New Jersey, Lopez did not have a prescription for medical cannabis at the time, and no evidence was presented to suggest that the marijuana consumed was obtained through any regulated market. While it is Jersey City’s burden to prove the charges in the FNDA, it does not bear the burden of also proving that the marijuana/cannabis consumed by Lopez was unregulated. If Lopez makes this assertion as an affirmative defense or mitigating factor, it is his burden to prove.

In Lopez’s post-hearing brief, he also argues that he cannot be terminated under the protections of CREAMMA. This was previously argued in a motion for summary decision and the Civil Service Commission disagreed with my prior ruling granting summary decision on this basis. The appellant did not appeal the Civil Service Commission’s decision rejecting that argument, and the Commission’s February 22, 2023 Decision bars relitigating that issue at the OAL.

With regarding to the charges filed against Lopez, the FNDA charges him with violating JCPD Rule 3:164, Narcotics Use²; JCPD Rule 3:108, Conduct Unbecoming³; and N.J.A.C. 4A:2-2.4(A)6, Conduct Unbecoming a Public Employee when the agency “was made aware a urine sample submitted by Police Officer Richie Lopez on September 14, 2021, [pursuant to random drug testing] tested positive for the use of Cannabinoids (THC).”

It is undisputed that Lopez’s drug test on September 14, 2021 was positive, and that the screening took place prior to the Cannabis Regulatory Commission’s opening of New Jersey’s regulated recreational cannabis market, which began on April 21, 2022. In its Remand Order, the Commission also noted that “pursuant to an April 13, 2022, memorandum from the Acting Attorney General to all law enforcement chief executives regarding compliance with the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), ‘there should be zero tolerance for unregulated marijuana consumption by officers at any time, on or off duty, while employed in the State.’” Given the undisputed fact that Lopez tested positive for THC/Cannabinoids after ingesting marijuana/cannabis that was not prescribed by a physician, and my findings that the ingestion was not accidental, unintentional, or regulated, I must **CONCLUDE** that Lopez violated the NJPD Rule 3:164 for using a narcotic that was not prescribed by a physician. I also **CONCLUDE** that Lopez’s conduct in consuming marijuana/cannabis prior to testing on September 14, 2021 constituted conduct unbecoming a police officer, in violation of JCPD Rule 3:108, and N.J.A.C. 4A:2-2.4(A)6. Police officers are held to a higher standard than other public employees, and they must conduct themselves with integrity, dependability, and in compliance with the laws they are often tasked with enforcing. A preponderance of the evidence shows that Lopez intentionally consumed unprescribed and unregulated marijuana/cannabis prior to September 14, 2021, when both the JCPD and Attorney General’s Law Enforcement Drug Testing Policy expressly prohibited this conduct.

² This provides: “A member will not use narcotics, hallucinating, stimulating or dangerous drugs while on duty or off duty, unless prescribed by a physician for illness.”

³ This provides: “Members will not engage in any conduct which constitutes conduct unbecoming an officer or neglect of duty. They will conduct their private and professional lives in such a manner as to be a credit to the department.”

The AG Policy specifically provides that when a law enforcement officer tests positive for illegal drug use, including marijuana/cannabis, the officer “shall be immediately suspended from all duties,” “administratively charged and, upon final disciplinary action, terminated from employment as a law enforcement officer.” (R-5 at 11 and 13.) The JCPD’s Drug Testing Policy also expressly provides that the officer who tests positive for illegal drug use “shall be terminated from employment as a law enforcement officer.” (R-4, at 10.) Moreover, the Attorney General’s guidance to law enforcement officers in place at the time of Lopez’s positive drug test made clear that: “Until the Cannabis Regulatory Commission promulgates and implements regulations [which it had not by the time of testing], there is no regulated, legal cannabis in New Jersey. Therefore, any marijuana consumed by a law enforcement officer . . . will be a controlled dangerous substance and illegal” (R-15.) Lopez knew that he had to pass random drug tests that tested for marijuana/cannabis as a condition of his continued employment, but he intentionally consumed “candy” that contained an unlawful controlled dangerous substance. His positive drug test and use of cannabis products were contrary to JCPD Rules and AG Policy, both of which require termination. I am sympathetic that the outcome here may have been different had Lopez tested positive for cannabinoids only a few months later. However, given the underlying facts, and pursuant to AG Policy and JCPD Policy, I must **CONCLUDE** that termination from employment is the appropriate penalty.

ORDER

I hereby **ORDER** that the charges against the appellant be and hereby are **SUSTAINED**, and that he be terminated from his employment as a police officer.

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.

April 1, 2024
DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

Witnesses

For Appellant:

Richie Lopez

For Respondent:

Lieutenant Anthony Makofka

Exhibits

For Appellant:

None

For Respondent:

R-1	Preliminary Notice of Disciplinary Action
R-2	Final Notice of Disciplinary Action
R-3	Excerpt from the JCPD Rules and Regulations
R-4	General Order 12-18
R-5	Document Offering General Order 12-18 to Officer Lopez
R-6	Attorney General Guidelines
R-7	Closeout Report
R-8	Toxicology Report for Officer Lopez
R-9	Memo by Lieutenant Anthony Makofka
R-10 to R12	No exhibit admitted
R-13	Medication Form for Officer Lopez
R-14	Drug Testing Officer Notice and Acknowledgment Form dated September 14, 2021
R-15	Marijuana Decriminalization of Legalized Cannabis from The Attorney General

R-16	Letter from Attorney General regarding Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act
R-17 to R-19	No exhibit admitted
R-20	IA Report
R-A	West New York Decision
R-B1	Interrogatories
R-B2	Answers to Interrogatories