

B-21



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of John Irby,  
Burlington County

CSC Docket No. 2016-1066

Request for a Stay

ISSUED: **NOV 19 2015** (SLD)

Burlington County (Burlington), represented by Carmen Saginario, Jr., Esq., petitions the Civil Service Commission (Commission) for a stay of the attached final decision rendered on July 29, 2015, which reversed John Irby's removal and ordered his immediate reinstatement, and payment of mitigated back pay and counsel fees, pending the outcome of its appeal to the Superior Court, Appellate Division.

As background, Irby was removed from employment effective January 10, 2014, on the charge of conduct unbecoming a public employee, other sufficient cause and a violation of departmental policies and procedures. Burlington asserted that on October 3, 2014 Irby submitted a routine urine sample as part of the random drug screening policy and that on December 3, 2014, it was notified that the sample tested positive for marijuana. Upon his appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. Following a hearing and the Commission's *de novo* review, Irby's removal was reversed. Specifically, the Commission found that those charges arose out of the same conduct as alleged in a November 19, 2014 Final Notice of Disciplinary Action, for which Irby had received a 60-day suspension. In so finding, the Commission noted that it was well established in administrative disciplinary proceedings that an employee cannot be punished for the same conduct twice and that it has previously rejected attempts to impose double punishment for the same offense. The Commission noted that the record established that at the departmental hearing on the first set of charges, Burlington was offered an opportunity to adjourn the hearing, but it declined and it did not attempt to reserve any right to amend the charges. The Commission determined that due to Burlington's mishandling of this matter, and the fact that

Irby had already received a 60-day suspension for the underlying conduct, Burlington could not now remove Irby, and thus it dismissed the charges and ordered his immediate reinstatement. Thereafter, Burlington filed an appeal with the Appellate Division.

In the instant matter, Burlington requests a "limited" stay of the Commission's decision pending the outcome of the appeal to the Appellate Division. Specifically, it asserts that it requests a stay of Irby returning to the workplace. However, it notes that it was not requesting a stay of Irby's return to full pay status. In support of its request for a stay, Burlington argues that the Commission's decision to reinstate Irby was arbitrary and capricious since it erred in dismissing the charges, thereby rendering meaningless the edicts of the Attorney General guidelines which mandate that a law enforcement officer who tests positive must be terminated. It also maintains that if the removal had been upheld, Irby would have been no worse off than if he had not disciplined originally, but for the 60-day suspension. Burlington contends that allowing Irby to escape removal, a result he was well aware of when he admitted to the drug use, will have the effect of rendering the Attorney General Guidelines meaningless. Burlington also argues that the Commission erred in relying on *In the Matter of Ricky Porter* (MSB, decided February 28, 2007); *In the Matter of Stuart Range* (MSB, decided May 27, 1997); and *In the Matter of Christopher Eutsey* (MSB, decided February 14, 2001) since it did not attempt to revive a "stale charge in an attempt to impose a greater penalty" nor did it attempt to punish Irby twice for the same conduct. Rather, it notes that it charged Irby with a new set of "incidents" and "charges" which were solely limited to the positive drug test. Specifically, it notes that there is nothing in the record that establishes that Irby's admitted drug use, for which he received a 60-day suspension, was the cause of the positive test result, for which it sought removal. Moreover, Burlington argues that the Commission improperly relied on the principles of double jeopardy, since the positive drug test was not actionable until 60 days after the first charges. It also asserts that the Commission ignored the fact that even if the first disciplinary proceeding was delayed, Irby would have been in the same position that he was after the second disciplinary proceeding.

Additionally, Burlington argues that there is a danger of immediate and irreparable harm and the public interest is harmed if its request is not granted. Specifically, it asserts that a positive test for drug use as a County Correction Officer poses a significant risk to the public, co-workers and inmates. The appointing authority maintains that:

. . . placing a known and admitted drug user, with a weapon (or access to one), among dangerous criminal themselves and in direct contravention of Department Policy and the Attorney General Guidelines . . . clearly and unequivocally presents a danger of

immediate and irreparable harm that cannot, in any way, be redressed by money.

The appointing authority maintains that “nothing good” can come of returning Irby to work prior to its appeal being adjudicated, and thus, the Commission should stay its order reinstating Irby.

Furthermore, Burlington argues that there is an absence of injury to other parties if the request is granted, since Irby was placed on full pay status and was provided with back pay, benefits and seniority, pursuant to *N.J.A.C. 4A:2-2.10*. Moreover, it notes that Irby remains on full pay status, with all of the benefits of employment, including seniority, and therefore, he will suffer no substantial injury.

In response, Irby, represented by Mark W. Catanzaro, Esq., argues that Burlington has not met the standard for a stay. In this regard, he notes that all of Burlington’s arguments for a stay are merely “repacking of the identical arguments” it made during the hearing at the OAL and in its exceptions to the ALJ’s initial decision, which the Commission already addressed.

Additionally, Irby argues that there is no danger of immediate or irreparable harm if he does return to work, since the very policy Burlington relied upon to remove him, gives it the right to conduct reasonable suspicion testing. Moreover, it made no suggestion that he did not perform his duties. On the contrary, Irby asserts that he competently and capably performed his duties up until his removal, and thus Burlington is in no worse position than it was immediately prior to the drug test. Further, Irby contends that although Burlington argues some “mythical injury” to others, it has failed to present any actual injury to others.

Finally, with regard to Burlington’s argument that the public is entitled to law abiding County Correction Officers, Irby notes that Burlington’s actions in this matter have caused it to forfeit the ability to make that argument. In this regard, he notes that Burlington had complete control of the disciplinary process, and it elected to first suspend him and then remove him for the same conduct. Moreover, he argues that the only harm Burlington presents that may befall the public is a purely theoretical one based upon principle.

## CONCLUSION

*N.J.A.C. 4A:2-1.2(c)* provides the following factors for consideration in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and

4. The public interest.

Also, *N.J.A.C.* 4A:2-1.2(f) allows a party, after receiving a final administrative decision by the Commission and upon filing an appeal to the Appellate Division, to petition the Commission for a stay pending the decision of the Appellate Division. *See also, N.J. Court Rules* 2:9-7.

Initially, there does not appear to be a clear likelihood of success on the merits of the appeal before the Superior Court, Appellate Division. It is well settled that an appellate court will reverse the final decision of an administrative agency only if it is arbitrary, capricious or unreasonable or if it is not supported by substantial credible evidence in the record as a whole, or if it violates legislative policy expressed or fairly to be implied in the statutory scheme administered by the agency. *See Karins v. City of Atlantic City*, 152 *N.J.* 532, 540 (1998); *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980); *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85, 92-93 (1973); *Campbell v. Civil Service Department*, 39 *N.J.* 556, 562 (1963).

In the present matter, Burlington argues that the Commission's decision in reinstating Irby was arbitrary and capricious since it erred in reversing the removal. Specifically, it reiterates that by doing so, the Commission failed to follow the Attorney General guidelines which require that law enforcement personnel who test positive for an illegal substance be removed. Moreover, it reiterates that it did not punish Irby for the same conduct twice since the charges and specifications were different, and that regardless, Irby was no worse off than if it had not originally suspended him. However, the Commission does not agree that the foregoing establishes that there is clear likelihood that Burlington will be successful in its appeal. In this regard, all of Burlington's arguments were addressed in its prior decision. Additionally, although Burlington argues that it did not attempt to revive a stale charge and thus the cases cited by the Commission were inapplicable, it must be noted that regardless of whether the charges encompassed in the second disciplinary action were "new" as argued by Burlington, Irby had already been punished for the underlying conduct and it is well established in administrative disciplinary proceedings that an employee cannot be punished for the same conduct twice. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560, 567 (App. Div. 1965).

Furthermore, Burlington has not shown that it is in danger of immediate or irreparable harm if this request is not granted. In this regard, Burlington argues that it will be harmed if its petition is not granted as "nothing good" can come of returning Irby to work prior to its appeal being adjudicated as he was a "known and admitted drug user." However, as noted by Irby, Burlington has the right to conduct reasonable suspicion testing on him. Moreover, other than Burlington's vague claims of harm, it has not provided any evidence that Irby is unable to perform his duties, or that the performance of his duties has or will cause harm to

others. Accordingly, Burlington has failed to demonstrate any basis for a stay of the Commission's decision.

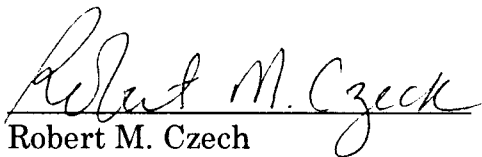
The Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service laws or rules or any order of the Commission. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2. See In the Matter of Fiscal Analyst (M1351H), Burlington, Docket No. A-4347-87T3 (App. Div. 1989).* Therefore, Burlington is ordered to immediately reinstate Irby. If Burlington does not so, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

### ORDER

Therefore, it is ordered that this request for a stay be denied. The Commission also orders that Burlington immediately reinstate John Irby. If, Burlington does not do so, it shall be assessed fines of \$100 per day for each day of continued violation up to a maximum of \$10,000.

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 18TH DAY OF NOVEMBER , 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
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Attachment

c: John Irby  
Mark Castanzaro, Esq.  
Mildred Scholtz  
Carmen Saginario, Jr., Esq.  
Todd Wigder, DAG  
Clerk, Superior Court, Appellate Division  
Joseph Gambino



In her initial decision, the ALJ noted that the only issue in this matter was whether the appointing authority was precluded from bringing the charges in this matter, due to prior charges brought against the appellant for his admission to smoking marijuana and the resultant 60 day suspension. The appellant argues that he is now being disciplined again for the same conduct for which he had already served a 60 day suspension. However, the appointing authority contends that the two matters are separate, as the instant charges arise out of a positive toxicology test. Therefore, since none of the facts of this matter were in dispute, the parties agreed to a joint stipulation of facts. Specifically, the parties stipulated that on October 15, 2012<sup>1</sup> the appellant had signed an Acknowledgement that he had received a copy of the Standard Operating Policies and Procedures Manual (Policies), which included the policy concerning random drug screening that provided, in part, that any employee who tests positive shall be dismissed from employment. On October 3, 2014, the appellant was advised that he had been selected for a random drug screening, at which time the appellant stated that he had smoked marijuana a few weeks earlier. The appellant's sample was taken and sent for processing. On October 3, 2014, the appellant was served with a Preliminary Notice of Disciplinary Action (PNDA), charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and violations of departmental policies. Specifically, the appointing authority asserted that the appellant had reported that he had smoked marijuana on or about September 23, 2014, and that his conduct was unbecoming a public employee. The appointing authority indicated on the PNDA that it was scheduling a Loudermill hearing on October 7, 2014. The appellant did not attend, and a second PNDA was issued on October 7, 2014, with the same charges and specifications, and setting a departmental hearing date. At the departmental hearing on October 29, 2014, the appointing authority was offered the opportunity to adjourn the hearing, but declined. Thereafter, an FNDA dated November 19, 2014 was issued to the appellant, upholding the charges and suspending him for 60 days. The ALJ noted that the appellant served the 60 day suspension.

On December 3, 2014, the appointing authority received the toxicology report, indicating that the appellant's October 3, 2014 sample was positive for 11-Carboxy-THC (marijuana). Also on December 3, 2014, the appointing authority issued the appellant a PNDA, charging him with conduct unbecoming a public employee; and a violation of departmental policy. Specifically, the appointing authority asserted that on October 3, 2014 the appellant submitted a routine urine sample as part of the random drug screening policy and that on December 3, 2014, it was notified that the sample tested positive for marijuana. The appointing authority indicated on the PNDA that it was scheduling a Loudermill hearing on December 9, 2014. The appellant did not attend, and an FNDA was issued on December 9, 2014,

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<sup>1</sup> The ALJ incorrectly noted the date as October 15, 2015. However, the document referenced was dated October 15, 2012.



suspending the appellant, effective December 28, 2014, the last day of his 60-day suspension, pending the outcome of the disciplinary hearing.<sup>2</sup> A second FNDA was also issued on December 9, 2014, with the same charges and specifications, and setting a departmental hearing date. Finally, on January 12, 2015 the FNDA that this appeal stems from was issued to the appellant.

Based on the foregoing, the ALJ concluded that the second set of charges, listed on the January 12, 2015 FNDA arose out of the same conduct as alleged in the November 19, 2014 FNDA. In this regard, the ALJ stated that although the charge of a violation of the drug screen policy on the January 12, 2015 FNDA was technically a different charge, the underlying conduct for which the appellant had already received a 60 day suspension was the same, namely, the appellant's use of marijuana. Accordingly, the ALJ concluded that, under the concepts of "double jeopardy" and *res judicata*, the appointing authority could not discipline the appellant for the same conduct he was previously charged with and served a 60 day suspension. In this regard, the ALJ noted that the Appellate Division found in *Moorestown v. Armstrong*, 89 N.J. Super. 560, 567 (App. Div. 1965), that a police officer could not be disciplined twice for the same conduct. Consequently, the ALJ recommended that the charges be dismissed and the removal reversed.

In its exceptions, the appointing authority argues that the ALJ incorrectly found that "double jeopardy" applied in this matter. In this regard, it notes that a strict application of "double jeopardy" requires criminal charges to be at issue, which is not the case in this matter. Moreover, even if the concept applied to administrative proceedings, it would not apply in the instant matter since the two disciplines were not in response to the same conduct. It maintains that the courts apply a "two-pronged approach" to determining whether double jeopardy would apply. For example, it asserts that in *State v. DeLuca*, 108 N.J. 98 at 106 (1987), the New Jersey Supreme Court noted that the first prong focuses on the elements of the offenses, and the "inquiry is whether each offense requires proof of an additional fact not necessary for the other offense." Under the second prong, the inquiry is "whether the evidence actually used to establish guilt in the first prosecution is identical to that which will be used in the second prosecution." *Id* at 107 (citing *State v. Dively* 92 N.J. 573 at 581 (1983) ). The appointing authority argues that applying this test to the instant matter establishes that he was charged with violating different departmental policies and that the charge of conduct unbecoming had no relationship to and did not require a showing that he tested positive or otherwise violated the drug screening policy. Specifically, it argues that the prior charges required a showing that the appellant did not conduct himself in an utmost professional manner, violated the law, did not observe or strictly comply with department rules and regulations, used an illegal drug while on or off duty, and

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<sup>2</sup> In Finding of Fact number 25, the ALJ incorrectly referenced the document (J-13) as removing the appellant effective January 12, 2015. Rather, J-13 was the December 9, 2014 FNDA suspending the appellant, effective December 28, 2014, pending a departmental hearing.

behaved to discredit the officer or the department. However, it maintains that in the instant matter, it was only required to establish that the appellant violated the drug use policy by testing positive. The appointing authority argues that since it was under no obligation to establish the appellant tested positive for drug use in the first matter, then it cannot be found that he was punished twice for the same conduct. Moreover, it maintains that under the second prong, it is clear that the evidence used in the first matter, his statement that he smoked marijuana, was not used in the second matter, and thus the ALJ's decision that the instant matter was "double punishment" must be rejected.

Additionally, the appointing authority maintains that pursuant to its drug screen policy, any employee who fails a drug test must be removed from employment. The appointing authority also argues that it could not have prosecuted the instant charges at the time of the first matter since the test results had not yet been released. Further, the appointing authority asserts that dismissing the instant charges would render its drug screen policy meaningless, and would allow the appellant to avoid the consequences of the positive test. The appointing authority maintains that to do so would send a message to all law enforcement personnel that they could avoid removal from employment, by admitting to having used a drug prior to taking the test, "demanding" a departmental hearing prior to receipt of the test results, then arguing that the self-report and prior good conduct mandates a penalty less than termination, and rely on the hearing officer's discretion not to remove them. Accordingly, the appointing authority contends that the appellant's removal must be upheld.

In his reply to the exceptions, the appellant asserts that the facts in this matter are not in dispute. Moreover, despite an opportunity to adjourn the departmental hearing on the prior matter, the appointing authority demanded to move forward. It was only after the initial charges were upheld and he was serving his suspension that the appointing authority served him a new PNDA based upon a positive test result. The appellant maintains that it is incomprehensible that the appointing authority is arguing that he is not being punished for the same thing. The appellant argues that it is not the Commission's job to "bail" the appointing authority out for its own actions and conduct. Rather, the Commission is obligated to follow the law, which prohibits a public employee from being punished twice for the same conduct.

Upon its *de novo* review of the record, the Commission is not persuaded by the appointing authority's exceptions. Rather, the Commission agrees with the ALJ's assessment of the record and her recommendation to dismiss the charges and reinstate the appellant as he had already received discipline for the underlying conduct. Although the appointing authority correctly notes that the concept of double jeopardy applies in criminal proceedings, it is well established in administrative disciplinary proceedings that an employee cannot be punished for

the same conduct twice. In *Moorestown, supra* at 567, the court dismissed one of ten charges against a Police Officer, stating:

As to charge no. 4 dealing with another family altercation, the decision notes that Armstrong was previously suspended for five days without pay for his conduct, so that this incident should not be considered in determining the final penalty under the present charges. **Of course, Armstrong cannot be punished twice for the same offense.** (emphasis added)

Moreover, the Commission has previously rejected attempts to impose double punishment for the same offense and found that it was improper to revive a stale charge in an attempt to impose a greater penalty at a later date. *See In the Matter of Ricky Porter* (MSB, decided February 28, 2007) (Removal of an employee reversed, finding that he had previously been disciplined for the incidents at issue, via official written reprimands, and thus the appointing authority's attempt to impose double punishment for the same offense was rejected); *In the Matter of Victor Onwuzuruike* (MSB, decided August 9, 2006) (Removal of an employee reversed, finding that he had previously been disciplined for the incidents at issue, via official written reprimands that were placed in his personnel file by his supervisor. Thus, the appointing authority's attempt to impose double punishment for the same offense and its attempt to revive a stale charge to impose a greater penalty was rejected.); *In the Matter of Stuart Range* (MSB, decided May 27, 1997) (Removal of an employee reversed, finding that he had already received letters of warnings for each of the incidents, which were the equivalent of written reprimands). *See also In the Matter of Christopher Eutsey* (MSB, decided February 14, 2001). In the instant matter, although the appellant was charged with violations of different departmental policies in the two matters, the underlying conduct was the same, i.e., his use of marijuana. The Commission notes that the appointing authority was under no obligation to establish that the appellant tested positive for drug use in the first matter because the appellant did not dispute the charges. In this regard, the appointing authority notes that in the first matter, those charges required, in part, a showing that the appellant violated the law, did not observe or strictly comply with department rules and regulations and used an illegal drug while on or off duty. If the appellant had disputed the charges, then the appointing authority would have been required to establish the appellant's actual use of marijuana and one of the ways to do so would have been a positive drug test.

Moreover, the record establishes that at the departmental hearing on the October 2014 charges, the appointing authority was offered an opportunity to adjourn the hearing, but it declined and it did not attempt to reserve any right to amend the charges. Although the appointing authority claimed in its exceptions that it was the appellant who demanded the departmental hearing proceed, the ALJ found that the appointing authority was offered an opportunity to adjourn the

departmental hearing. Additionally, the Commission is concerned by the appointing authority's mishandling of this matter. The appropriate disciplinary steps would have been to immediately suspend the appellant, after his statement that he used marijuana, pending the results of the drug screening. Once the results were received, then the appointing authority could have gone forward with the disciplinary process, with the positive drug test as evidence to support all of the charges listed in both disciplinary notices. However, since the appointing authority already penalized the appellant for his drug use with the 60 day suspension, it may not now remove him for the same conduct. Accordingly, based on the facts of this matter, the Commission agrees that the charges should be dismissed and the appellant immediately reinstated.

Since the penalty has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits and seniority. See *N.J.A.C. 4A:2-2.10*. Moreover, *N.J.A.C. 4A:2-2.12* provides for the award of counsel fees where an employee has prevailed on all or substantially all of the primary issues in an appeal. Therefore, since the charges have been dismissed, the appellant is entitled to counsel fees.

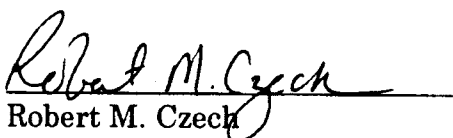
This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and/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 his permanent position.

#### ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission reverses the removal and upholds the appeal of the appellant. The Commission further orders that the appellant be granted back pay, benefits and seniority from the date of his separation from employment to the date of actual 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*. The Commission further orders that the appellant be awarded counsel fees. Proof of income earned and 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:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay and/or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and/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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 29TH DAY OF JULY, 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

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and  
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**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSR 01662-15

AGENCY DKT. NO. N/A

**IN THE MATTER OF JOHN W.  
IRBY, BURLINGTON COUNTY  
DEPARTMENT OF CORRECTIONS.**

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**Mark W. Catanzaro, Esq.,** for appellant John W. Irby

**Carmen Saginario, Jr., Esq.** for respondent Burlington County – Department of  
Correction (Capehart Scatchard, P.A., attorneys)

Record Closed: June 17, 2015

Decided: June 29, 2015

**BEFORE SARAH G. CROWLEY, ALJ:**

**PROCEDURAL HISTORY AND SUMMARY**

On December 3, 2014, the respondent served a Preliminary Notice of Disciplinary Action on appellant seeking his removal. A Loudermill hearing was scheduled for December 9, 2014, charging appellant with a violation of N.J.A.C. 4A:2-2.3(a) (6) and (12), which includes conduct unbecoming a public employee and violation of policy and procedures section 1145 (Drug Screen Policy). Appellant did not attend the Loudermill hearing and a Final Notice of Disciplinary Action, dated January 12, 2015

was issued. The appellant requested a hearing and the matter was filed at the Office of Administrative Law (OAL), on January 26, 2015, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was scheduled to be heard on June 1, 2015. The parties appeared on June 1, 2015, and after a discussion on the record regarding the issues in the case, the parties agreed to submit a joint stipulation of facts on June 15, 2015, and written submissions on June 17, 2015. The record was closed after written submissions of the parties were filed on June 17, 2015.

### **STATEMENT OF FACTS**

Appellant, John Irby was employed as a correction officer with the Burlington County Department of Correction. He has been employed in that capacity since January 25, 2010. On October 1, 2014, appellant was selected for a random drug test. When appellant arrived for his random test, he advised his Lieutenant that he had smoked marijuana and would test positive. In accordance with the random test policy, he provided a random urine sample on October 3, 2015. Following the random drug test, he was served with a Preliminary Notice of Discipline charging with a violation of Department Policy and Procedures and Conduct Unbecoming an employee in connection with his admission to smoking marijuana before the drug screen results were secured.

On October 7, 2014, a Loudermill hearing was conducted and Mr. Irby was suspended pending the outcome of a hearing. On October 29, 2014, a departmental hearing was conducted. The results of the drug screen were not yet available, and the County was given the opportunity to adjourn the hearing and declined. After the departmental hearing, the appellant was given a sixty day suspension. A Final Notice of Disciplinary Action dated November 19, 2014, was issued sustaining the sixty day suspension and set the suspension dates from October 8, 2014 to December 28, 2014. Appellant did not appeal the Final Notice of Discipline and served the sixty day suspension.

On December 3, 2014, the Department received the toxicology report with the results of the October 3, 2014, random drug screen of appellant. The report indicated a positive result for marijuana. On December 3, 2014, the Department served a Notice of Disciplinary Action, and advised appellant that a Loudermill hearing would be conducted on December 9, 2014. The Notice of Disciplinary Action charged appellant with a violation of N.J.A.C. 4A:2-2.3(a) (6) and (12), which includes conduct unbecoming a public employee, and violation of the Policy and Procedures Section 1145 (Drug Screen Policy). The incidents giving rise to the charges indicated that "On October 3, 2014, you submitted a routine urine sample to Administration as part of the Staff Random Drug Screening Policy. On December 3, 2014, New Jersey State Toxicology Laboratory results confirmed a positive result for Carboxy -THC (marijuana)." The appellant did not attend the Loudermill hearing. As a result of the Notice, Appellant was served with a Final Notice of Discipline seeking his removal. The appellant challenges this discipline on the grounds that he already served a sixty day suspension for this offense. The respondent argues that the first disciplinary proceeding and penalty was for smoking marijuana and the second charge was for testing positive on the drug screen.

The following Joint Stipulations were submitted by the parties:

1. Beginning on January 25, 2010, John W. Irby ("Irby") commenced employment with the Burlington County Department of Corrections ("Department") as a correction officer
2. The Department has rules, regulations, policies and procedures ("Policies") which, among other things, set forth the policies of the Department and govern the conduct of its correction officers.
3. The Policies were distributed to Irby, who signed an Acknowledgement that he received the Policies on October 15, 2015. J-1
4. Among the Policies received by Irby was a policy entitled Staff Random Drug Screening, Sections 1145 ("Drug Screen Policy"). The Drug Screen Policy provides, among other things, that an employee whose drug test



results are positive for the presence of illegal drugs/substances shall (a) be dismissed from the Department; and (b) be included in the central registry maintained by the New Jersey State Police; and (c) be reported to the County Prosecutor; and (d) be permanently barred from law enforcement employment in New Jersey. J-2

5. Other Policies received by Irby include those numbered sections 1012 through 1074 and, relevant here, Policies 1021, 1022, 1023, 1033, and 1038. J-3
6. In accordance with the Drug Screen Policy, on October 1, 2014, Lieutenant Jose Finklea, in the presence of Officer Robert Swenson (PBA 249 President), drew numbers to ascertain which corrections officers would be tested. Officer Irby's number was in the batch of officers chosen to undergo urinalysis.
7. On October 3, 2014, Officer Irby arrived in the administrative office area of the Department of Corrections and was advised that his number was chosen for urinalysis under the Drug Screen Policy.
8. Upon being advised of the foregoing, Irby indicated to Lieutenant Finklea, "Lieutenant I fucked up." Irby then stated "I smoked a few hits of marijuana a few weeks ago to calm me down after that incident." Irby was ordered to submit an incident report based upon what he said.
9. Lieutenant Finklea drafted a report regarding the October 1 drawing of names and his October 3, interaction with Irby. J-4
10. Irby proceeded to produce a urine specimen pursuant to the Drug Screen Policy.
11. Irby then drafted and submitted an incident report. J-5
12. On October 3, 2014, the Department served a Preliminary Notice of Disciplinary Action on Irby notifying him that a Loudermill hearing would be conducted on October 7, 2014, and charging him with violations of N.J.A.C. 4A:2-2.3 a (1), (6), (7) and (12), which includes incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and violation of Department policies and

procedures sections 1021, 1022, 1023, 1033, and 1038. The incidents giving rise to the charges indicated that: "On October 3, 2014, at approximately 1130 hours you reported that you smoked Marijuana on or about September 23, 2014. This Conduct Unbecoming a Public Employee." J-6

13. Irby did not attend the Loudermill hearing.
14. On October 7, 2014, Irby was served with a Preliminary Notice of Disciplinary Action charging him with the violations indicated in paragraph 12, above, and setting a departmental hearing date of October 30, 2014. J-7
15. As of October 7, 2014, the Department did not have the toxicology report indicating the results of the drug test which was administered to Irby on October 3, 2014
16. On October 29, 2014, a departmental hearing was conducted before Hearing Officer Frederick Green. The County was offered the opportunity to adjourn the hearing and declined. The conclusions of Frederick Green are contained in his report. Green determined that Irby be suspended for sixty days. J-8
17. By Final Notice of Disciplinary Action dated November 19, 2014, Irby was notified that beginning on October 8, 2014, and ending December 28, 2014, his employment with the Department was suspended. J-9
18. Irby did not appeal the suspension.
19. On December 3, 2014, the Department received the toxicology report resulting from the October 3, 2014, drug screen. The report indicated a positive result for "11-Carboxy-THC" (marijuana). J-10
20. On December 3, 2014, the Department served a Notice of Disciplinary Action notifying Irby that a Loudermill hearing would be conducted on December 9, 2014, and charging Irby with violations of N.J.A.C. 4A: 2-2.3 (a) (6) and (12), which includes conduct unbecoming a public employee, and violations of policy and procedure section 1145 (Drug Screen Policy). The incidents giving rise to the charges indicate that "On October 3, 2014,

you submitted a routine urine sample to Administration as part of the Staff Random Drug Screening Policy. On December 3, 2014, New Jersey State Toxicology Laboratory results confirmed a positive result for Carboxy-THC (Marijuana). This conduct is unbecoming a public employee." J-11

21. Irby did not attend the Loudermill hearing.
22. As a result of the Notice referenced in Paragraph 19, above, Irby was suspended beginning on December 28, 2014, which was the last day of his scheduled sixty day suspension.
23. On December 9, 2014, Irby was served with a Preliminary Notice of Disciplinary Action charging him with the violations included in the Preliminary Notice of Disciplinary Action indicated in paragraph 19, above. J-12
24. Irby was served with a Final Notice of Disciplinary Action (31-B) dated January 12, 2015, which indicated, among other things, that as of that date, his employment with the Department was terminated. J-13
25. Irby was served with a Final Notice of Disciplinary Action (31-C) dated January 12, 2015, which indicated, among other things, that as of that date, his employment with the Department was terminated. J-14
26. The within appeal proceeds from J-14

The foregoing facts are not in dispute and are found as **FACT**.

### **LEGAL DISCUSSION AND CONCLUSION**

The Civil Service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park

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

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21; N.J.A.C. 4A:2-14 (a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14; N.J.S.A. 11A:2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk Licence Revocation, 90 N.J. 550 (1980). This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking his removal. Specifically, appellant is charged with a violation of N.J.A.C. 4A:2-2.3 (a)(6) and (12), which includes conduct unbecoming a public employee, and violation of Policy and Procedures Section 1145 (Drug Screen Policy).

The issue in this case is whether the respondent is precluded from bringing subsequent charges for a violation of the Drug Screen Policy due to prior charges what were brought against appellant for his admission to smoking marijuana. There is no dispute that the appellant served a sixty day suspension for his admission to smoking marijuana the day he gave the random samples which ultimately lead to the instant charges. The appellant offered to adjourn the prior hearing until the results of the drug screen came back and the respondent declined. Respondent did not reserve any rights to charge again when the results of the toxicology screen were received, or note that the first charge was without prejudice to their rights to bring subsequent charges.

The initial disciplinary action against the appellant in October of 2014, for which the appellant served a sixty day suspension, charged a violation of the following:

- N.J.A.C. 4A:2-2.3(a) 1      Incompetency, inefficiency or failure 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: Violation of Policies and Procedures Sections:

1021 Officer shall conduct themselves in the utmost professional matter at all times.

1022 No officer shall violate any laws.

1023 All officers shall be responsible and observe all rules and regulations.

1033 No officer shall bring in, permit others to bring in, use, possess or sell any illegal drug or controlled substance while on or off duty.

1038 No officer shall act or behave, either in an official or private capacity to the officers discredit, or to the discredit of the department.

The appellant was served with a Preliminary Notice of Discipline in connection with the foregoing charges on October 7, 2014. After a departmental hearing, a Final Notice of Discipline imposing a sixty day suspension was issued on November 19, 2014. The appellant did not appeal the Final Notice and served the sixty day suspension. The subsequent charges which were brought against appellant also charge a violation of N.J.A.C. 4A:2-2.3(a) (6) and (12). The only distinction between the two sets of charges is that the December of 2014, charges allege a violation of Policy and Procedures Section 1145 (Drug Screen Policy), which was not cited in the original disciplinary action. The respondent alleges that the subsequent charges are different because they arise out of the positive toxicology test and not the conduct of smoking marijuana and the appellant's admission to same. The appellant argues he is being disciplined twice for the same conduct for which he has already served a sixty day suspension.

There is little case law in New Jersey on this issues. However, the Appellat Division found in Moorestown v. Armstrong, 89 N.J. Super. 560, 567 (App. Div. 1965), that a police officer could not be disciplined twice for the same conduct. The decision in Armstrong was later relied upon by the Civil Service Commission in refusing to allow an employee to be disciplined twice for the same action. Range v. Newark Board of Education, 97 N.J.A.R. 2d (CSV) 700 (1997). This issue has been addressed in several other jurisdictions, which have refused to permit the imposition of a subsequent penalty for the same conduct, analogizing to the concept of double jeopardy in a civil context or utilizing the concept of *res judicata*. In Branza v. Marin, 570 N.E. 2d 411 (Ill. App. 1991), the Court held that a police department could not re-discipline an officer who resigned over drug charges, when he was later reappointed as a probation officer. The appointing authority was precluded from disciplining the officer again for the same misconduct.

In In re Officer J.L. Mitchell, 364 S.E. 2d 177 (Ct. App. 1987), the North Carolina Court of Appeals refused to allow a police department to impose an additional punishment on an officer after he had been disciplined for the same conduct earlier. In Mitchell, the town has suspended a police officer for violating the residency rules. After the Civil Service Board decision imposing a suspension on the officer became final, and the officer had served the suspension, the police chief sought to discipline the officer again under a much stricter internal department policy. The Superior Court vacated the second suspension, and the Appellate Court affirmed the decision applying the concept of *res judicata*. See also Dept. of Env't. Prot. v. Baker, 654 So. 2d 594 (Ct. App. Fla 1995) (declining to permit a subsequent demotion of an employee after he had been reprimanded for the same conduct).

In the instant matter, the appellant argues that respondent is disciplining him for the exact same conduct for which he was disciplined for, and served a sixty day suspension. Although the respondent did not charge a violation of the drug screen policy because they did not have the results, the respondent was given the opportunity

to adjourn the hearing to await the results and they declined. I **CONCLUDE** that the second set of charges arises out of the same conduct, which was smoking marijuana. Although a violation of the drug screen policy is technically a different charge, it is the exact same underlying conduct, for which appellant was disciplined and served a sixty day suspension. Based upon the undisputed facts and application of the law in this case, I **CONCLUDE** that the respondent has not satisfied its burden of proving that appellant can be disciplined again for the conduct which he was previously charged and served a sixty day suspension.


Since the penalty has been reversed, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 29, 2015  
DATE

  
\_\_\_\_\_  
SARAH G. CROWLEY, ALJ

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

SGC/mel



**APPENDIX**

**WITNESSES**

None

**EXHIBITS**

Joint Exhibits:

- J-1 Signed Acknowledgment of Policies and Procedures by John Irby
- J-2 Policy and Procedures Section 1145, Title Staff Random Screening
- J-3 Policy and Procedures Section 1012-1074, Title Agency Rules and Regulations
- J-4 Lieutenant Finklea Draft Report Regarding the October 1, 2014 drawing of names and October 3, 2014 interaction with Irby.
- J-5 Burlington County Detention Center Incident Report Submitted by Irby
- J-6 Preliminary Notice of Disciplinary Action on Irby notifying him of Hearing on October 7, 2014
- J-7 Preliminary Notice of Disciplinary Action on Irby charging him of violation of N.J.A.C. 4A:2-2.3 a (1), (6), (7), and (12)
- J-8 Frederick S. Green, Hearing Officer's conclusion of hearing held on October 29, 2014
- J-9 Final Notice of Disciplinary Action dated November 19, 2014
- J-10 Toxicology Report Results from the October 3, 2014 Drug Screen
- J-12 December 9, 2014 Preliminary Notice of Disciplinary Action charging Irby with N.J.A.C. 4A: 2-2.3 (a) (6) and (12) including the Preliminary Notice of Disciplinary Action
- J-13 Final Notice of Disciplinary Action (31-B) dated January 12, 2015
- J-14 Final Notice of Disciplinary Action (31-C) dated January 12, 2015

