A-3

STATE OF NEW JERSEY

In the Matter of Anthony Caldarise
New Jersey State Prison,
Department of Corrections

CSC DKT. NO. 2016-1439
OAL DKT. NO. CSR 19304-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 28, 2016 BW

The appeal of Anthony Caldarise, Senior Correction Officer, New Jersey State Prison, Department of Corrections, removal effective November 17, 2015, on charges, was heard by Administrative Law Judge Joseph Lavery, who rendered his initial decision on October 12, 2016. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on November 23, 2016, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

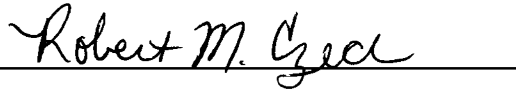
ORDER

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 Anthony Caldarise.

Re: Anthony Caldarise

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
NOVEMBER 23, 2016



Robert M. Czech
Chairperson
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 19304-15
Agency DKT NO. 2016-[illegible]

IN THE MATTER OF ANTHONY CALDERISE, NEW JERSEY STATE PRISON.

Shay S. Deshpande, Esq., for appellant (Fusco & Macaluso, attorneys)

Anthony DiLello, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: September 12, 2016 Decided: October 12, 2016

BEFORE **JOSEPH LAVERY,** ALJ t/a:

Anthony Calderise, appellant, brings this appeal from his termination as a Senior Corrections Officer.

Respondent appointing authority, New Jersey State Prison, New Jersey Department of Corrections (Department; Institution), contests the appeal. Relying on Civil Service rules and its own regulations, the Department asks that appellant's removal be upheld for the disciplinary reason charged: a positive urine test disclosing the presence of steroids.

Today's Initial Decision upholds the termination of appellant's employment.

PROCEDURAL HISTORY

This is an appeal filed in the Office of Administrative Law (OAL) on October 17, 2013, pursuant to L. 2009, c. 16, supplementing Title 40A of the New Jersey Statutes (N.J.S. 40A:14-200 through -212) and amending N.J.S. 40A:14-150 and N.J.S. 40A:14-22.

On, December 18, 2016, the case was assigned for hearing by the Acting Director and Chief Administrative Law Judge. Prehearing order issued on December 2, 2015. Adjournments for cause followed as did several written orders: Order of June 3, 2016, denying motion to suppress and directing plenary hearing; Order of September 8, 2016, directing expert testimony; and Order of September 12, 2016, granting partial summary decision.

The plenary proceedings to resolve the remaining facts at issue convened before the undersigned on September 12, 2016, and the record closed on that date.

STATEMENT OF THE CASE

Background:

Many of the material facts are not in dispute, and were summarized as such in the partial summary decision issued on September 12, 2016:

> The uncontroverted facts of record pertinent to this motion are:
>
> On July 13, 2015, appellant was involved in a domestic violence incident in the home shared by himself and his girlfriend. Appellant was found to have been the victim. The Toms River Police Department officers responded, including Officer Austin Pelka, who afterward wrote a report describing what he had seen and heard. Appellant had left the scene

beforehand. The officer reported that, with slurred words, the girlfriend had disclosed to the arriving police "containers" covered with blankets in a chest. The containers held "syringes, needles and vials of suspect steroids." The report enumerated "60 Hypos and 41 Needles" as well as "3 Bottle Suspect Steroids."[1] The girlfriend was arrested and charged with simple assault.

After the event, Miller called his shift commander at the institution. The shift commander notified the Special Investigation Division (SID), informing it of what had occurred. SID was then told by the Department Commissioner, who had formed an "individualized reasonable suspicion," to conduct a urine sampling. The sample was forwarded in the normal course of the administrative process to the State's toxicology lab, which in turn forwarded the sample to Aegis Sciences Corporation in Nashville, Tennessee. The sample tested positive for the presence of steroids. Appellant was served with charges in a preliminary notice of disciplinary action, citing the positive steroid finding of the toxicology report, in violation of department policy, which amounted to conduct unbecoming a public employee. After a departmental hearing, the charges were upheld and a final notice of disciplinary action served on November 17, 2015, levied the penalty. This appeal followed

Respondent appointing authority concedes that [he] it[2] did not consult with the "Internal Affairs Policy and Procedures" referred to by appellant, concedes it did not read Miranda warnings to him before urine sampling, and agrees that appellant also did not consult with a union representative beforehand, nor did the appointing authority obtain a search warrant to allow the test.

Arguments of the Parties:

Appellant's affirmative defense:

With questions of fact not requiring expert testimony decided through partial summary decision, appellant challenged respondent's toxicology findings through his own testimony, and through a letter (Exhibit A-3) from a family medicine physician, dated February 8, 2016, from **John A. Ricci, M.D.** whom appellant had offered as his

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[1] Exhibit 3, attached to "Certification of Anthony DiLello In Support of Respondent's Motion For Summary Decision" filed August 10, 2016.
[2] Correction added in today's initial decision of October 12, 2016.

expert witness, based on the strength of his letter. In a comment specific to the toxicology issue, the letter stated:

> It is my medical opinion that certain OTC supplements can cause elevated testosterone in particular Tribulis Terrestris, Maca, and DHEA. All have been studied and shown in sufficient dosing to raise testosterone.

. The doctor did not appear to testify at the September 12, 2016, hearing.

Appellant, however, did testify. He stated that, over an unspecified length of time extending into the present, he has used many over-the-counter OTC supplements purchased from health food stores, a use which predated the domestic violence incident triggering the urine test. None required a prescription. He observed that he relied on them daily. The reason for doing so, appellant added, was to alleviate bodily pain, which originated in early football injuries. Appellant was uncertain of the brands or doses, recalling only the names: DHEA, tribulus, LTD, Block 6 and H2O. Appellant agreed that he had not listed these items during the urine testing process on the forms provided by the appointing authority for that purpose.

Adding to this information, through cross-examination of the appointing authority's experts, appellant sought to show that the non-prescription health food substances he described had an effect on the toxicology tests undertaken by Aegis Sciences Corporation. He also objected to respondent's decision not to bring forward at hearing the technicians conducting the individual sample tests, which were only reviewed by its experts, Dr. Shelby and Ms. McCord. In addition, appellant proffered an abstract and an article from a scientific journal purporting to buttress Dr. Ricci's letter (Exhibits A-1, A-2).

It was appellant's position that the evidence provided by the institution did not preponderate. As a consequence, appellant should be reinstated to his position.

Respondent appointing authority's case in reply:

With testimony from two experts, the appointing authority sought to counter appellant's contention that OTC drugs skewed the toxicology assay of his urine sample, inaccurately raising the testosterone measurement. It argued that the State lab forwarded the sample to the Aegis Sciences Corporation (Aegis) for a toxicology test. Aegis provides comprehensive toxicology testing services to large medical examiner systems, including the State laboratory. The result of their analysis was a finding positive for steroids in the sample (Exhibit R-15).

In her testimony, **Melinda Shelby**, **Ph.D.**, **Senior Scientist** of Aegis, adopted her certification of September 2, 2016 as her direct, in-person testimony and responded to cross-examination centering on her evaluation of Dr. Ricci's letter and appellant's testimony. She contradicted Dr. Ricci's assertion.

Dr. Shelby stated that, on its face, Dr. Ricci's letter was not accompanied by scientific support. To the contrary, she stated, the scientific literature disclosed that herbal substances such as Tribulus terrestris and Maca do not significantly increase serum testosterone. If it did, the result would be endogenous (natural). Instead, petitioner's urine sample was shown to have contained exogenous (synthetic) testosterone and metabolites.

With respect to Tribulus terrestris, Dr. Shelby referenced four reported studies between 2005 and 2016 to support her opinion that Tribulus terrestris had no significant impact on endogenous testosterone metabolism.

Concerning Maca, Dr. Shelby cited a 2001 study of its effects on serum hormones, including testosterone. The study found that the hormone levels were not affected.

Discussing DHEA, a precursor of testosterone available over-the-counter, Dr. Shelby pointed to a 1998 study showing that DHEA administration had little or no effect on T/E ratio. She noted that appellant's was found to be low (10mg/mL), which is uncharacteristic of recent DHEA administration.

Ultimately, Dr. Shelby believed that the complex of testing did not reflect the results anticipated by Dr. Ricci. She also thought it relevant that appellant had not divulged any use of nutritional supplements within thirty days prior to the specimen collection.

Lora McCord, lead scientist for Aegis, recalled in live testimony and through her adopted certification, that she personally checked all results of the testing undertaken by her company and performed the analysis of the urine sample. The test performed was an Anabolic Steroid Profile. She found that appellant's urine sample tested positive for the anabolic steroid testosterone, using two different metrics. The first metric supporting this conclusion was that the "reporting threshold" for natural presence of testosterone in males is 200 ng/ml. Anything above is considered non-natural or synthetic. Appellant's urine had an elevated concentration of 256 ng/ml, thus testing positive for synthetic testosterone. The second metric, according to Ms. McCord was a measurement of the urine's "t/e ratio," or the ratio of testosterone to epitestosterone. Commonly, the ratio is 1:1 (or 1). Synthetic testosterone does not increase epitestosterone. It might decrease it. Appellant's urine disclosed a t/e ratio of 54:1, clearly indicating the presence of synthetic or "exogenous" testosterone. This metric, too, stood for a positive finding.

Ms. McCord said further that, to establish beyond doubt the presence of prohibited synthetic or exogenous testosterone, Aegis relies on isotope ratio mass spectrometry tests (IMRS). In performing this test, Ms. McCord said, Aegis found that the testosterone measured in appellant's urine sample was exogenous. The threshold "C ratio" for such a finding is 3. Appellant's urine had a C ratio of 9, thus again testing positive for the prohibited synthetic testosterone.

Respondent institution, relying on the foregoing, argued in conclusion that the sum of the record clearly supports the charges leveled.

Findings of fact:

To resolve disputes of material fact I make the following **FINDINGS:**

1. The OTC substances claimed by appellant to have been consumed by him daily were not disclosed by appellant in the appointing authority's form provided to him for that purpose after being charged.

2. These OTC substances, to the extent they might have been taken, did not affect in any way the scientifically established presence in his urine sample of prohibited, exogenous, synthetic testosterone.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Analysis:

Burden of proof:

The burden of persuasion falls on the agency in enforcement proceedings, such as those in which it is sought to prove an employee has engaged in violations susceptible to removal as a penalty, under controlling regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion,

Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, State v. Lewis, 67 N.J. 47 (1975).

The charges:

The appointing authority, in its final notice of disciplinary action (Exhibit R-2.), gives the specifics of its charges, and lists those regulations on which it justifies its disciplinary action. The specifics are:

> On 13 July 2015 you provided a urine sample to the Special Investigation Division under the Staff Urine Testing Policy due to suspicion of Steroid Abuse.
>
> On 21 August 2015, Special Investigations Division received the Toxicology Report confirming that the results of the urinalysis revealed that you tested positive for Steroids.
>
> Your actions were a violation of the Departmental policy and were also conduct unbecoming an employee
> [Exhibit R-2, Final Notice of Disciplinary Action (31-C)]

The rules and regulations charged as violated were:

> N.J.A.C. 4A:2-2.3
> (a)6. Conduct unbecoming a public employee
> (a)12. Other sufficient cause
>
> HRB 84-17, as amended
> C.11. Conduct unbecoming an employee
> C.30. Use possession or sale of any controlled dangerous substance
> E.1 Violation of rule, regulation, policy, procedure, order or administrative decision.
> [Ibid]

Applying the law and rules:

The preponderating credible evidence has been provided by respondent appointing authority. Through scientific analysis by Aegis, an accredited laboratory, the appointing authority has demonstrated that exogenous, synthetic testosterone was present in appellant's urine sample (Exhibits 13, 15, 19). This proof was supplemented by the credible live testimony of the two Aegis scientists, both qualified as experts. They were responsible for undertaking the tests involved, and described how they relied on three different scientific testing protocols.

Appellant sought to offset this evidence by recalling in testimony that he had a practice of ingesting OTC substances which would raise production of natural male testosterone. He could not name the brands. Neither could he recall the dosages. It is significant that his recollection of these OTC substances emerged first at hearing.

The letter submitted by appellant from a family practice physician (Exhibit A-3) must be given no weight. The doctor did not appear, thus avoiding voir dire and evading qualification as an expert. Consequently, his letter is unduly prejudicial and unsupported hearsay. N.J.A.C. 1:1-15.1 and N.J.A.C. 1:1-15.5. Neither appellant's testimony nor the doctor's letter would lead a reasonably cautious mind to a given conclusion that the Aegis testing was flawed or insufficient, Bornstein v. Metropolitan Bottling Co., supra, 26 N.J. at 275.

Appellant's reliance on journal articles (Exhibits A-1 and A-2) unsupported by testimony of an expert, and rebutted in full by respondent's experts, are similarly inadequate to explain away the preponderating scientific evidence supplied by Aegis, both in test results and in testimony. Since appellant raised an affirmative defense, his obligation was to provide preponderating evidence in support. He was not successful.

Violations and penalty:

Appellant's earlier arguments raised on the material facts not in contention were resolved in the earlier orders of this tribunal: Order of June 3, 2016, denying motion to suppress and directing plenary hearing; Order of September 8, 2016, directing expert testimony; and Order of September 12, 2016, granting partial summary decision. These orders are herewith incorporated in this initial decision, by reference.

The sum total of the factual record fits within the charges and rule and regulation violations cited in the final notice of disciplinary action dated November 17, 2015 (Exhibit R-2). The Aegis test results, authenticated by the scientists conducting them, are dispositive and, as such, they fall within the language of the final notice's citations.[3]

As a consequence, the penalty in this matter is virtually ineluctable, as it would be for any officer engaged in law enforcement, particularly within the confines of a prison. These officers must be held to a higher standard. Their status was noted in the case of In the Matter of Lillian Childs, Mountainview Correctional Facility, OAL Dkt. Nos. CSR 7679-15 & 7681-15 (deemed adopted April 26, 2016):

> Law enforcement officers have a special status in public service. The absolute bedrock of a paramilitary law enforcement agency is professional discipline. This concept has been upheld in a long line of cases:
>
> > A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public.
> > [Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966)]
>
> Removal in circumstances comparable in seriousness to the instant matter is not unusual. In the case of In re Carter, 191 N.J. 474, 485-486

[3] See, page 8, supra.

(2007), affirming removal of a police officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

In view of the above case law, and recognizing the higher standard imposed on sworn law enforcement personnel, appellant's behavior, on its face, must be held as consistent with the appointing authority's charges.

This above reasoning in Childs fits the present circumstances.

Conclusions of Law:

I CONCLUDE, THEREFORE, (a) that appellant has violated the rules and regulations as charged, and (b) that removal from his employment is the appropriate penalty.

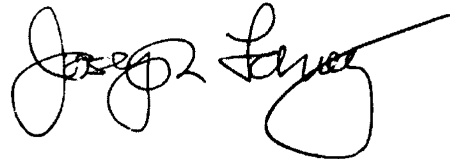
ORDER

I ORDER, THEREFORE, that the **removal** of appellant from his position of Senior Correction Officer, be, and hereby is, **AFFIRMED**.

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.



October 12, 2016
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 10/12/16

Date Mailed to Parties: 10/12/16

mph

LIST OF WITNESSES:

For appellant:

Anthony Calderise

For respondent:

Melinda Shelby, Ph.D.

Lora McCord

LIST OF EXHIBITS:

For appellant:

A-1 Abstract: J Anal. Toxicol 1998 (Oct; 22(6): 455-9. The effect of Oral dehydroepiandrosterone (DHEA) . . .

A-2 Full article: J Anal. Toxicol 1998 (Oct; 22(6): 455-9. The effect of Oral dehydroepiandrosterone (DHEA) . . .

A-3 Letter from John A. Ricci, M.D., dated 2-08-2016

A-4 Internal Affairs Policies and Procedures (Rev. 7-2014)

For respondent:

R-1 Preliminary Notice of Disciplinary Action, dated 25 August 2015

R-2 Final Notice of Disciplinary Action, dated 11/17/15

R-3 Police Report by Officer Austin Pelka of the Toms River Police Department, dated 7/13/15

R-4 Domestic Violence: Reasonable Suspicion Report by Investigator Dolce Raphael, dated 7/14/15

R-5 Drug Screening Authorization: Anthony Calderise, dated 7/13/15

R-6 Drug Screening Monitor (Notice and Forms – Anthony Calderise)

R-7 Toxicology Report: New Jersey State Laboratory, dated 8/21/15

R-8 New Jersey Drug Law Enforcement Training Manual

R-9 Drug Testing Policy HRB 99-01, Department of Corrections

R-10 Law Enforcement Personnel Rules and Regulations, Department of Corrections

R-11 New Jersey Department of Corrections HRB 84-17

R-12 Curriculum Vitae: Lora McCord

R-13 Aegis Crimes Custody and Control Form, date-stamped Aug 09, 2015

R-14 Workorder: Administrative Review dated August 13, 2015

R-15 Laboratory Report: Aegis Crimes, dated Aug. 21, 2015

R-16 Aegis Crime Litigation Support Packet: Urine Specimen ID# 4567831

R-17 Not marked for ID or introduced in evidence

R-18 Curriculum Vitae: Robert Havier

R-19 Law Enforcement Testing – Chain of Custody

R-20 Curriculum Vitae: Melinda K. Shelby