

In the Matter of Michael Brown, Monmouth County
DOP Docket 2005-1147
(Merit System Board, decided May 7, 2008)

The appeal of Michael Brown, a County Correction Officer with Monmouth County, of his removal, effective July 22, 2004, on charges, was heard by Administrative Law Judge (ALJ) Joseph F. Martone, who rendered his initial decision on March 31, 2008. Exceptions were filed on behalf of the appellant.

It is noted that the ALJ originally rendered an initial decision on October 20, 2006, upholding the appellant's removal. However, at its meeting on December 6, 2006, the Merit System Board (Board) remanded the matter to the Office of Administrative Law (OAL) for the presentation of available testimony regarding the drug testing process. It is also noted that the Board denied the appellant's petition to reconsider its decision to remand the matter. *See In the Matter of Michael Brown* (MSB, decided April 25, 2007). Having considered the record and the ALJ's initial decisions, and having made an independent evaluation of the record, the Board, at its meeting on May 7, 2008, accepted and adopted the Findings of Fact and Conclusions as contained in the attached March 31, 2008 initial decision and the recommendation to uphold the removal.

DISCUSSION

The appellant was charged with violations of the appointing authority's rules regarding substance abuse (County policy) and conduct unbecoming a public employee, based on his positive test for marijuana use. In his October 20, 2006 initial decision, the ALJ found that the appellant was randomly selected for and administered a drug test on July 13, 2004, which proved positive for the presence of marijuana. With regard to the testing procedure, the ALJ noted that the appointing authority presented only two witnesses, Thomas Philburn, a Correction Captain with the County, and Ronald Raslowsky, the President of National Safety Compliance, an outside vendor that administers the County's drug tests. While both witnesses testified generally regarding the drug testing procedures employed by the County, they admittedly were not direct witnesses to the appellant's test in this case and were not involved in the transport of the appellant's specimen to the testing site.

In response to the appellant's argument that the appointing authority's case was predicated entirely on documentary hearsay evidence, the ALJ noted that *N.J.R.E.* 803(c)6 (business records exception) provides

that hearsay statements included in records of regularly conducted activities are admissible, where:

[a] statement [is] contained in a writing or other record of acts, events, conditions, . . . opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

Emphasizing Raslowsky's testimony that the chain of custody and other forms in the record were utilized in the regular course of his company's business, the ALJ determined that the information contained in these documents fell within the business records exception and constituted legally competent evidence from which the ALJ could derive his findings of fact. Accordingly, the ALJ concluded that the disciplinary charges and the removal should be upheld.

Upon its *de novo* review of the record, including the appellant's exceptions to the ALJ's initial decision, the Board remanded the matter to the OAL for further proceedings. However, the Board held that some of the appellant's arguments were without merit. As to the appellant's contention that the drug testing procedures violated the Attorney General's Law Enforcement Drug Testing Policy (AG Guidelines), the Board noted that it was well established that the AG Guidelines do not apply to County Correction Officers. See *N.J.S.A. 52:17B-98*; *N.J.S.A. 52:17B-112*; *N.J.S.A. 52:17B-113*; *Rawlings v. Police Dept. of Jersey City*, 133 *N.J.* 182, 192 (1993); *In the Matter of Ronald W. Cooks*, Docket No. A-2077-01T1 (App. Div. April 17, 2003). Moreover, the Board found that, even if the County deviated from its own drug testing policy, such violations do not necessarily amount to violations of the petitioner's right to due process or call into question the validity of the positive test result. Further, the Board upheld the ALJ's determination that the documentary evidence relating to the appellant's drug test was admissible in accordance with *N.J.R.E.* 803(c)6. Nevertheless, the Board expressed its hesitancy to uphold the appellant's removal based solely on the documentary evidence in the record, some of which was unclear or illegible. Thus, the Board remanded the matter to the OAL in order to ascertain whether additional testimony was available to authenticate the validity of the documentary evidence. Additionally, in denying the appellant's petition for reconsideration of its remand order, it was noted:

Although the Board found the documentary evidence in the record to be admissible, it was hesitant to render a decision with such far-reaching consequences when it was unclear whether the best available evidence had been presented. The purpose of the Board's remand was to ensure that *all* available evidence had been presented before it rendered a final decision that would affect the petitioner's livelihood. (Emphasis in original).

Finally, the Board indicated that, if the appellant's claim that a remand would prove "futile" because of the unavailability of witnesses, the Board stated that it "will then render its determination on the current record."

In his March 31, 2008 initial decision, the ALJ set forth that, following the collection of the appellant's urine sample, it was transported to a testing facility, LabOne, Inc., in Kansas via courier service. Based on this information and the documentation in the record, the ALJ requested that the appointing authority determine the whereabouts of Marvin Turner, who collected the appellant's urine specimen; determine the identity of the courier service that transported the specimen; positively determine the identity and whereabouts of the individual who signed for receipt of the urine specimen at LabOne, Inc.; determine the whereabouts of Jyotsna Garg, the laboratory technician who completed the testing and recorded a positive test result; and determine the whereabouts of Dr. Neil J. Dash, the Medical Review Officer. As discussed in detail in the ALJ's initial decision, the witnesses sought were either deceased, unable to be located, or otherwise unavailable to testify. However, the appointing authority produced a "testing documentation packet" from LabOne, Inc., which contained more legible copies of previously submitted documentation in the record. This packet included the "Forensic Drug Testing Custody and Control Form" related to the appellant's urine specimen, and it indicates that the appellant's specimen (identification #34521231) was collected by Marvin Turner (now deceased) on July 13, 2004 and released to a delivery service. The name of the delivery service remains illegible. On July 15, 2004, Cordelia Billingsley reported that she received the specimen bottle at LabOne, Inc., and the specimen bottle seal remained intact. Jyotsna Garg, who is identified as the Certifying Scientist, then indicated that her laboratory completed testing on the appellant's specimen, and it proved positive for the presence of the marijuana metabolite. Finally, Dr. Neil J. Dash, the Medical Review Officer, confirmed the positive result, noting that the appellant's specimen contained 214 nanograms/milliliter (ng/ml) of the marijuana metabolite, which fell above the 50 ng/ml cutoff level. Bolstered by the clearer copies of the documentary evidence, the ALJ found that the appointing authority had established "a reasonable probability that the integrity of the urine sample taken from the appellant and delivered to the laboratory had been maintained, and of the validity of the laboratory

analyses that appellant's sample tested positive for marijuana." Thus, the ALJ recommended upholding the charges and the removal.

In his exceptions to the ALJ's initial decision, the appellant reiterates that the appointing authority has not met its burden, since its entire presentation consisted of unreliable hearsay evidence, and he repeats his prior arguments that the appointing authority failed to follow the AG Guidelines and its own policy regarding drug testing. However, as noted above, the Board previously addressed and dismissed the appellant's arguments regarding the AG Guidelines and County policy in its prior decision in this matter, and a repeated discussion of those issues is not necessary here.

In addition, the appellant asserts that the Board previously remanded this matter to the OAL in order for the appointing authority to call witnesses to testify regarding the drug testing procedure. Since no additional testimony was presented, the appellant contends that it has not been established that the chain of custody was maintained throughout the process. The appellant urges the Board not to accept the evidence in the current record as sufficient proof of the appellant's positive drug test. The appellant also claims that several of the documents contained in Exhibit R-28 indicate that the appellant's sample did not test positive for marijuana. For example, he refers to one document, which reports the result of the appellant's test as "P," and he suggests that this notation means that he passed the drug test. However, this suggestion ignores the fact that the same document reports that the GC/MS test performed on the appellant's sample yielded 214 ng/ml of the marijuana metabolite, well above the 50 ng/ml cutoff level employed. The appellant also contends that the documentation establishes that the testing was not reliable, based on the calibration reports contained in the record. However, he has provided no support for his interpretation of the data contained in those reports, other than his attorney's "expertise from having litigated numerous drug test cases as well as the Jesuits at [his attorney's] high school in Jersey City."

Upon its *de novo* review of the record, the Board agrees with the ALJ's findings and his recommendation to uphold the appellant's removal. As an initial matter, the appellant argues that his removal should not be upheld because the appointing authority did not comply with the Board's remand and present witnesses with knowledge of the drug testing procedures utilized in the appellant's case. However, as the Board made clear in its decision on the appellant's petition for reconsideration, it remanded this matter in recognition of the far reaching consequences of any decision in this matter and in order to confirm that it had all available evidence before it before rendering a decision. Moreover, although the ALJ did not strictly follow the

Board's instructions on remand by ensuring that available testimony was presented, the Board recognizes that the few witnesses who were available had no specific recollection of the appellant's drug test and would likely have had little of substance to add to the record. Like the ALJ, the Board is now satisfied that all available evidence has been presented. With regard to the merits of the charges, the appointing authority must demonstrate by a preponderance of the evidence that the appellant tested positive for marijuana use, and that such a positive result warrants his removal from employment as a County Correction Officer. In addition to the evidence previously presented, the appointing authority has now supplied clear and legible copies of pertinent documents. These documents establish that the appellant was randomly selected for a drug test, and his urine specimen was collected by Turner, who sealed the bottle containing the specimen and shipped it to a laboratory in Kansas for testing. Upon arrival at the laboratory, Billingsley reported that it arrived with the seal intact. Garg tested the sample and reported it was positive for the marijuana metabolite, and this conclusion was confirmed by Dr. Dash, the Medical Review Officer. These entries establish, by preponderating evidence, that the urine specimen taken from the appellant tested positive. There is nothing in the record to dispute the accuracy of any of the entries set forth above. In this regard, the appellant presented no testimony in this matter to contest the positive test results. Further, even if the appellant could pinpoint specific issues regarding the chain of custody, a drug test is still valid, despite flaws in the chain of custody, where the record showed a "reasonable probability" that the integrity of the sample was maintained. *See In the Matter of Mario Lalama*, 343 *N.J. Super.* 560 (App. Div. 2001). In the absence of any specific challenge to any of the links in the chain of custody or to the validity of the test itself, the Board finds that the ALJ appropriately recommended upholding the charges in the instant matter.

With regard to the penalty in the instant matter, the ALJ recommended upholding the removal. The Board agrees. In determining the proper penalty, the Board's review is *de novo*. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R.* 2d (CSV) 463. However, 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 theory 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). Even when a Correction Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *Henry v. Rahway State Prison, supra*, 81 N.J. at 579-80. Further, the Board notes that an unrefuted positive test result for drug use has uniformly been held by the Board to warrant removal from employment for law enforcement employees. *See e.g., In the Matter of Bruce Norman*, Docket No. A-5633-03T1 (App. Div. January 26, 2006), *cert. denied*, 186 N.J. 603 (2006); *In the Matter of Alfred Keaton* (MSB, decided November 8, 2007). In the instant matter, the appellant's offense is sufficiently egregious to warrant his removal. Accordingly, the Board concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Merit System Board finds that the action of the appointing authority in imposing a removal was justified. Therefore, the Board affirms that action and dismisses the appeal of Michael Brown.

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