STATE OF NEW JERSEY

In the Matter of Eric Beagin City of Paterson, Fire Department	FINAL ADMINISTRATION ACTION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NO. 2016-1336 OAL DKT. NO. CSR 16140-15	

ISSUED: DECEMBER 19, 2019 (SLK)

The appeal of Eric Beagin, Fire Fighter, City of Paterson, Fire Department, removal effective September 18, 2015, on charges, was heard by Administrative Law Judge Leslie Z. Celentano (ALJ), who rendered her initial decision on October 24, 2019. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the hearing testimony[1], exceptions and reply, the Civil Service Commission (Commission), at its meeting on December 4, 2019, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission ordered that the removal of the appellant be upheld.

DISCUSSION

The appellant was terminated on September 18, 2015 on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority alleged that the appellant failed a drug test by testing positive for oxycodone. Upon the appellant's appeal to the Commission, the matter was

[1] It is noted that the summary of the witness testimony presented later in this decision is based on the Commission's own review of the testimony presented at the hearing. While this summary may have a somewhat different focus, it is substantially consistent with the ALJ's recitation of the testimony in the initial decision.

transmitted to the Office of the Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ noted that the parties entered into a stipulation that the appellant would not contest the random drug testing process or the chain of custody of the sample. Accordingly, the only issue the appellant contested was the reliability and trustworthiness of the drug-testing process at the State Laboratory (Lab). Counsel for the appellant also stipulated on the record that if the testing was found to have been reliable the termination would be upheld, but if not, then the termination would be reversed. The ALJ found that it was undisputed that the appellant, as a Firefighter, was subject to the appointing authority's random drug testing policy. The appellant's urine sample was submitted on July 17, 2015 to the State Lab, and on July 21, 2015, the test results provided by the Lab indicated that the appellant tested positive for oxycodone.

The appointing authority's expert witness, Dr. Robert Havier, the Acting Director of the Lab, testified that samples that test above 100 nanograms per milliliter (ng/mL) for oxycodone are considered positive and the appellant's sample tested 114 ng/mL. Concerning the testing process, Havier explained that when a urine sample is brought to the Lab, the urine sample is initially screened by an immunoassay, which determines whether the sample is positive for any of the drugs that the Lab is testing for. Then, if a sample tests positive, it must be confirmed by a more defined technique, gas chromatography, mass spectrometry (GC/MS), utilizing a separate machine. To ensure that the instruments are accurate, the Lab calibrates the instrument using calibrators. Calibrators are negative urine specimens prepared by the analyst, which are put into calibrator solutions, which are known concentrations of the drug that the Lab is looking for. The Lab looks to establish a linear relationship between the instrument's response to each of those calibrators. The Lab analyzes the specimen and gets a response by the instrument. This allows the Lab to translate the instrument's response to a concentration based on that linear relationship. Only one instrument is used and there are five or six calibrator solutions of different concentrations utilized to establish the linear relationship. The analyst has the option of eliminating as many as two out of five calibrators, which means that the Lab needs at least three points to establish a linear relationship.

Havier indicated that in this case five calibrators were used. Since the Lab used five calibrators, it needed at least three out of the five calibrators to generate a linear relationship and three calibrators did come back accurate. Further, the other calibrators came back within 20 percent of the expected variation from the expected concentration, which is the industry standard for acceptability of an equipment calibration analysis. Havier confirmed that he has been working in the Lab for 40 years and the cutoffs and procedures are well established based on the federal government's urine testing program for the military. Havier explained that the

acceptability of the control sample is based on the instrument response and the concentration that is determined from the linear relationship. However, the analysis of an individual's actual sample is based solely on the value that is obtained after the accuracy of the machine is determined. Havier emphasized that the analysis of the calibrations was accurate since the analysis returned three accurate results and the other two values were within a 20 percent variation for those samples with known concentrations. However, he explained that once the machine is determined to be accurate, since the Lab does not know what the concentration is of the donor sample, the value that is obtained is relied upon. Concerning another individual's sample that was tested just prior to the appellant's sample being tested, Havier confirmed that it was 12,119 ng/mL, which is an unusually high result. However, he noted that there was an indication that said, "Blank review passed," which meant that a blank sample was run before the appellant's test to show that the machine was cleaned before the appellant's test. Havier stated that a blank sample is run before and after each test, and if there is no presence of any drug, the analyst would circle the review as passed indicating no carryover from any previous sample into that blank. In this case, all the blanks passed the test as there was no presence of any drug in any of the blank samples.

The appointing authority's expert witness, Dr. Lyle Hayes, testified that the labs he directs are certified by New York State and the College of American Pathologists (CAP). He believed that the New Jersey State Lab was in the process of applying for CAP certification in 2016. However, at the time of the appellant's test in 2015, the Lab was not CAP certified. Hayes stated that the calibrators that were 100 ng/mL tested higher than the expected value in the State Lab. Therefore, he concluded that the machines were biased high. Further, since the appellant's sample tested lower than the calibrators or controls, he opined that the appellant's sample should be considered below the cutoff for a positive test.

Additionally, Hayes reviewed the Lab's 2016 CAP certification and during the certification process, there were concerns about interference with other similar drugs and cross-contamination. In this case, given that there was a very high specimen that was tested before the appellant's sample, he was concerned that the high results in the appellant's matter were caused by carry over from the prior specimen. Hayes' overall conclusion was that the appellant's results should have been reported as negative because the control samples with a known concentration of 100 ng/mL when calibrating the GC/MS equipment were biased higher than the appellant's sample, notwithstanding that his sample was higher than 100 ng/mL (which is the cutoff for a positive test). He also stated that, since the Lab was not CAP certified at the time of the test, he had an overall lack of confidence in the complete evaluation of the Lab since there were no outside checks and there was no check on the interference or possible interference. He stated that this is general forensic practice for a certification.

In response, Havier testified that the Lab became CAP certified in 2016 and the Lab addressed the concerns that were indicated during the certification process and no deficiencies were actually found. He indicated that the Lab used the same procedures that it used to test the appellant's sample that were used after the Lab received CAP certification.

The ALJ indicated that significant confusion existed between the documents submitted into evidence and Havier's testimony, his assertion as to the acceptable variation or deviation application to the GC/MS test, and the notion of an accepted degree of error for control samples. The ALJ stated that no explanation was offered as to why the 20 percent error margin is applicable to the samples in the GC/MS procedure, but not to the appellant's specimen and there was only vague reference to an "industry standard." She presented that if the 20 percent error margin were applied to the appellant's specimen, that would bring his result below the cutoff of 100. The ALJ concluded, with no justification for the acceptability of a 20 percent variation only for control samples with a known concentration, there was no reason and no support for not applying the same error margin to the appellant's specimen. Therefore, the ALJ found that that the appointing authority did not meet its burden of proof and recommended that the removal be reversed.

In the appointing authority's exceptions, it argued that it had proven by a preponderance of the evidence that the appellant's specimen was positive for oxycodone. It argued that Havier testified how the equipment used to test the appellant's sample was verified as being accurate based on the 20 percent variation standard, which is an industry standard for the acceptability of an analysis that is established by the federal government's urine testing program for the military. Further, the blank samples produced a negative sample, as they should. Additionally, Havier testified that at least three of the five calibrators must establish a linear relationship (*i.e.*, almost identical readings to those of the known concentrations) and that the reading from the other calibrators not used must be within 20 percent of the cutoff for the equipment so as not to invalidate the equipment as inaccurate. However, the ALJ ignored Havier's testimony because no additional testimony or documents were provided. Instead, the ALJ accepted the appellant's argument, which was a simplistic and incorrect mathematical "theory" that since the appellant's sample tested below some of the calibrators or controls, then his sample should have been deemed as being below the cutoff. However, there was no testimony or documentary evidence to support this theory. It notes that Hayes did not testify that the application of the "20% variation" to the validation of the testing equipment is inappropriate and is not the process used by testing facilities. The appointing authority argues that if the "20% variation" was not considered the "industry standard," Hayes would have testified as such. However, no such testimony was elicited. Therefore, unless the ALJ found that Havier's testimony was not credible, the appointing authority met its burden of proof as Havier was the only witness who addressed the "20% variation" standard.

Havier consistently testified that if three out of the five calibrators were almost identical to the control standards and the remaining tests were within the allowable "20% variation," then the donor's sample result is deemed accurate without adjusting for any variation. He reiterated that the calibrators are to establish the reliability of the instrument and not the validity of the urine sample being tested. However, Hayes never testified that the standards that Havier described are not the industry standard. Instead, the ALJ substituted her own opinion as to how the drug testing process should operate in place of the expert testimony and the process that has been in place for 40 years.

In the appellant's reply to the exceptions, the appellant highlights that the machine used to test his sample indicated a higher amount of the defending metabolite in a control sample than in the appellant's sample. He asserts that the appointing authority had multiple opportunities to explain why carefully measured urine brought into the Lab as a control sample came in higher than the appellant's sample, but it failed to do so. Further, the appellant argues that the State Lab failed to follow its own requirements concerning cleaning the equipment, flushing the equipment, and running test samples. He believes that according to the Lab's requirements, his sample came up negative. The appellant highlights that on all occasions, the Lab's purchased urine that was supposed to have 100 nanograms per milliliter, the cutoff for a positive and negative result, was testing higher than his sample. Therefore, the appellant's expert testified that the machines were biased high. The appellant argues that there is nothing in the record to support the idea that human urine, certified to come out at 100 ng/mL, which comes out at higher numbers than human urine from the appellant, should be given some different standard of review. He asserts that there is no document or protocol that exists that human urine tests samples should have different treatment from the appellant's sample. The appellant argues that Havier's testimony that the test urine gets the benefit of 20 percent variation, but the sample urine does not is an argument that does not make sense and the ALJ correctly decided the matter.

Upon its *de novo* review of the record, including an extensive review of the testimony provided at the hearing, the Commission does not agree with the ALJ's recommendation to reverse the removal. Rather, for the reasons stated below, the Commission finds that the appointing authority sustained all of the charges and upholds the appellant's removal.

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 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 the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). However, this standard for rejecting a lay witness credibility determination does not apply in the instant matter since the credibility determinations are based on the opinions of expert witnesses. Thus, such deference need not be afforded. Regardless, for the reasons set forth below, the Commission disagrees with the ALJ's conclusions regarding the expert testimony.

In this matter, the ALJ concluded that, without further testimony or documentary evidence concerning the "industry standards," the appointing authority had not met its burden of proof. Specifically, the ALJ wanted further support to explain the acceptability of a 20 percent variation for control samples with a known concentration, but that the 20 percent variation was not applied to the appellant's sample. However, the Commission has reviewed the testimony from the hearing and does not have such concerns. Havier testified that the cutoffs and procedures that the Lab used in calibrating the equipment in this matter were industry standards that are well established based on the federal government's urine testing program for the military.[2] A review of testimony does not indicate that at any point did the appellant's attorney ask Hayes if the industry standards that Havier describes were, in fact, the industry standards. At no point during Hayes' testimony did Hayes offer that the standards that Havier describes were not the industry standards. A review of Hayes' report that was submitted into evidence does not question the standards that Havier describes. Further, Hayes' testimony concerning his "theory" did not cite any industry standards as to the basis for his conclusion. While Hayes testified regarding his "opinion" about the appellant's test result, he did not refute that the industry standard exists or that the State Lab inappropriately followed the standard. As such, the Commission finds that Havier's testimony regarding the industry standards was credible and persuasive. Additionally, while Hayes suggested that there *may* have been carry over from an extremely high specimen that was tested just before the appellant's specimen was tested, Havier testified that there was an indication that said, "Blank review passed," which meant that a blank sample was run before the appellant's test to show that the machine was cleaned before the appellant's test. Therefore, there is no evidence that there was carry over. Moreover, Hayes' attempts to discredit the Lab's processes based on its lack of a CAP certification as that time was successfully rebutted by Havier's subsequent testimony. In other words, there is no reason to

[2] The Commission's research did find some references to the industry standards that Havier presented in military drug testing and other types of testing. However, it is noted that the Commission is not relying on this research. Instead, it is relying on Havier's expert testimony on industry standards, which was not disputed by the appellant's expert.

find that the appellant's positive result for oxycodone, which resulted from a process that followed the undisputed industry standards that the State Lab has used for 40 years, was not accurate. Thus, the Commission finds that the appointing authority has sustained its burden of proof demonstrating by a preponderance of the evidence that the appellant was guilty of the charged levied against him.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a removal was justified. Therefore, the Commission affirms that action and dismisses the appeal of Eric Beagin.

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 4th DAY OF DECEMBER, 2019

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 16140-15

IN THE MATTER OF ERIC BEAGIN
CITY OF PATERSON (FIRE DEPARTMENT).

Charles J. Sciarra, Esq., for appellant Eric Beagin (Sciarra & Catrambone, LLC, attorneys)

Steven S. Glickman, Esq., for respondent City of Paterson

Record Closed: September 9, 2019 Decided: October 24, 2019

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Eric Beagin (Beagin or appellant) was removed from his position as a firefighter with the City of Paterson because he failed a random drug test. Beagin asserts that the test conducted at the New Jersey State Toxicology Lab (Lab) was flawed and that the corresponding results are not reliable. On August 13, 2015, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) seeking a temporary suspension pending removal effective September 18, 2015. (J-1.)

By Preliminary Notice of Disciplinary Action (PNDA) dated August 13, 2015, respondent advised appellant of the charges and specifications as follows:

Charges:

> For his misconduct as outlined in the Specification below, Eric Beagin is hereby charged with violating the following provisions of the New Jersey Administrative Code, N.J.A.C. 4:2-2.3(a) as follows:
>
> (6) Conduct unbecoming a public employee; and
>
> . . . .
>
> (11) Other sufficient cause
>
> For his misconduct as outlined in the Specifications below, Eric Beagin is also hereby charged with violating N.J.A.C. 4A:2-2.5(a)1: Eric Beagin is unfit for duty and an immediate suspension is necessary to maintain safety, health, order and/or effective direction of public services.

Specifications:

> On July 17, 2015, Eric Beagin submitted to a drug test. The results of that test indicated that Eric Beagin tested positive for Oxycodone.

By Final Notice of Disciplinary Action (FNDA) dated September 18, 2015, appellant was removed effective September 18, 2015.

The incident that gave rise to the removal was appellant's positive random drug test administered July 17, 2015, the results of which were reported by the Lab on July 21, 2015.

The matter was transmitted to the Office of Administrative Law (OAL) on September 29, 2015, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for hearing on December 30, 2015, based on the availability of the parties. That date was adjourned at the request of counsel for appellant due to a scheduling conflict with a matter in Superior Court. The initial waiver of the 180-

day rule was received. The matter was then rescheduled for June 13, 2016; however, that date was adjourned at the request of counsel for appellant, who had a conflict with a criminal trial in Essex County. The matter was rescheduled for September 21, 2016. A telephone conference was held on August 23, 2016, and that hearing was adjourned, as the parties indicated more time was needed for discovery, for the issuance of subpoenas, and for witness availability. The hearing was then rescheduled for December 30, 2016; however, that date was adjourned at the parties' request, as discovery issues remained. The hearing was then scheduled for March 24, 2017, and adjourned at the parties' request pending receipt of the State Lab toxicology test results and outstanding discovery. A telephone conference was held on May 11, 2017, and the parties commenced preparation of a discovery confidentiality order, which was entered into in August 2017. The waiver of back pay remained in place throughout, pending receipt of documentation from the State Lab and all outstanding discovery. Once received, the hearing was scheduled, based upon the needs of the parties and witnesses, for March 11, and 15, 2019, and was held on those dates. Following the hearing the record remained open pending receipt of the transcripts and post-hearing briefs. Upon receipt of the final submission, the record closed; however, the record was reopened on June 11, 2019, to offer the parties an opportunity to provide additional testimony or certifications regarding authority for, or to refute, the claim that a 20 percent variation applies only to control samples in the drug-testing process. The opportunity to provide additional expert testimony or certifications was declined. Supplemental correspondence was received from the parties, and thereafter the record was closed.

FACTUAL DISCUSSION

Stipulations

On March 11, 2019, the parties entered into a stipulation that appellant would not be contesting the random-drug-testing process or the chain of custody of the sample. Accordingly, the only issue remaining that appellant contested was the reliability and trustworthiness of the drug-testing process at the Lab.

Counsel for appellant also stipulated on the record that if the testing is found to have been reliable the termination is upheld, but that if it is not then the termination is reversed.

UNDISPUTED FACTS

The following **FACTS** are undisputed, therefore I **FIND** them to be the facts of this case.

Appellant was employed as a firefighter for the City of Paterson and was subjected to a random drug test based upon the random-drug-testing policy. Appellant's urine sample submitted on July 17, 2015, was provided to the Lab, and on July 21, 2015, the test results provided by the Lab indicated that Beagin tested positive for oxycodone.

SUMMARY OF TESTIMONY

The only witnesses presented were Dr. Robert Havier, Ph.D., on behalf of the State Toxicology Lab, and Dr. Lyle Hayes on behalf of appellant. The parties agreed that both witnesses were qualified as experts. Dr. Havier is a forensic toxicologist and acting director of the Lab. He testified as an expert in toxicology.

Dr. Havier testified that he has been with the Lab for forty years, and has been acting director for eight years. The Lab screens samples by immunoassay to determine if they contain any substances similar to the antibody of a particular drug, even if it may not be a drug. They use the benchmark procedure for determining the identity and concentration of a drug. In this case it was oxycodone. The process involves a container with a sample of urine, a portion of which is put into a reaction vessel and tested. A second test takes part of a sample used for the initial testing to test for the presence of specific drugs, utilizing gas chromatographic mass spectrometry, or GC/MS testing. If there is a positive result in the second test, then a sample is taken again for purposes of confirmation. The confirmation test is a chemical extraction and analysis performed using GC/MS. The process indicates what drug is present and provides the amount of the drug present based upon the principal of mass fragmentation. To confirm the identity of the

drug, the instruments are calibrated with known concentrations of the drugs they are looking for. Negative urine is prepared with a known concentration of a drug and put into the calibrating instrument to verify a linear relationship. The testing is determined to be accurate by the GC/MS procedure being properly calibrated. Calibrators that are not producing a linear relationship are eliminated. When they analyze the specimen and get a response, the calibration curve enables establishment of a linear relationship between the response of the instrument and the concentration of a drug in a sample. One instrument is used with five or six calibrators to determine instrument accuracy. In this case, the testing was negative with the exception of a positive test for oxycodone above the 100 ng/ml cutoff.

On cross-examination Dr. Havier indicated that his staff did the testing, and also that the Lab report (P-24) confirmed the level of oxycodone present in the sample. He also indicated that anything below the 100 ng/ml would be considered a negative result, and that the cutoff number is set by the Lab. He testified that the second, confirming test, the GC/MS, is a more refined test. The first test uses a small portion of the sample and that portion is not reused, and the second test is done with another portion of the sample. Samples that come up negative are discarded and samples that are positive have the GC/MS testing done.

Dr. Havier also testified that urine is purchased from known vendors and referred to as "controls" or control samples. Some have a known concentration of a drug so that when they test the machine, it gives a reading with the amount of the concentration of the drug present, and if these amounts match they know the machine is working properly and is properly calibrated. He stated that when a machine is tested with the control samples, it should accurately report the controlled amount. The machine is tested with the controls before a sample is tested, and if the results are as expected, then the machine is working properly.

The initial screening for respondent's sample came back as positive for oxycodone with a 108 ng/ml reading. The sample was then tested a second time for confirmation with GC/MS, and the reading detected at that time was 114 ng/ml. If the reading had been a 99 ng/ml this would have been a negative result, under the cutoff of 100 ng/ml.

Dr. Havier testified that three out of five calibrations must return an accurate result to correctly present a linear relationship. Calibrations are used to establish reliability of the instrument. The readings from the calibrations must be within 20 percent of the cutoff for the equipment to be considered accurate. One of the concentration control items that was expected to come back 125 ng/ml actually revealed a result of 130 for oxycodone and 132.1 for oxycodone metabolite. Another concentration control that was purportedly at 100 ng/ml returned a reading of 116.4 ng/ml. Other readings were similarly higher than anticipated. In some, Havier confirmed that the instrument picked up more oxycodone in the control samples than in appellant's sample at 114.5. He agreed that even though the control readings exceed the result for appellant's sample, if his result had been 101 that would be considered a positive result, and within the 20 percent variation that is acceptable industry standard.[1] Thus, although the Lab's machine was calibrating biased high, and reading up to 20 percent over the cutoff of 100 ng/ml, this "acceptable variation of 20 percent" did not apply to appellant's sample. The 20 percent variation is applicable only to the control samples, not to the donor specimen. This is the case even where the control samples that they add a known quantity of drugs to reveal higher readings than what was added. At the time of testing of appellant's sample, the Lab's machine was reading well over the 100 ng/ml cutoff for control samples; nevertheless, appellant's results were deemed accurate.

Dr. Havier testified that the control tests were done right before appellant's sample was tested and a blank sample was tested between each other sample tested.[2] The sample tested before appellant's had too large a quantity of oxycodone to even attach a number to it—indeed it was over 100 times the cutoff, and was described as out of the ordinary—yet there is no indication on the form that a blank sample was run before respondent's test. Dr. Havier indicated, however, that a blank is always done between each test, even though it may not be so indicated on the chronology. Standard procedure is to run a test on blank urine before testing an actual sample, so that any residual from the previous donor sample is cleared out. He testified that this process was followed when appellant's sample was tested.

[1] No testimonial or documentary evidence or any other authority was provided for this assertion.
[2] The chronology sheets do not reflect this.

Dr. Havier also indicated that oxycodone turns to oxymorphone when it metabolizes in the system, and that someone who has taken oxycodone will have oxymorphone in their system. When appellant's sample was diluted 1:10 there was no quantity of ng/ml listed of either oxycodone or its metabolite, oxymorphone. At the 1:10 dilution, 520.9 ng/ml of morphine was detected; however, with no dilution, 483.8 was detected, which is a decrease, and which Havier confirmed is therefore not an accurate number.

On redirect examination, Dr. Havier testified that the sequence of analysis prepared by the analyst (NJL 18) confirms that a blank test was run before and after each specimen. Five calibrations were prepared (NJL 14) and three of them came back very close. If three are accurate the linear relationship can be developed. Then when they do the test, a 20 percent variation from the expected concentration is the industry standard for acceptability of an analysis. He described this standard as "well established," and based upon the "federal government drug-testing programs for the military" in terms of acceptability of variance for control samples.[3] The accuracy of the calibration curve (linear line) is established by control samples. If a control sample is within 20 percent of the known concentration, Dr Havier indicated that he can then assume those samples contained 100 ng/ml of the drug. No explanation was offered as to why, if the machine read the drug at 116 and 115 ng/ml for control samples, appellant's sample would not benefit from the same assumption. He also indicated that his assumption is that the blank samples had a reading of zero, but conceded he did not know for sure, as there is no documentation as to blanks tested.

Lyle Hayes

Dr. Lyle Hayes has been directing two drug-testing labs in New York for fifteen years and is a New York State certified forensic toxicologist. The labs he directs are certified in New York State and by the College of American Pathologists. Dr. Hayes was accepted as an expert in the field of drug testing.

[3] No documentary or other evidence was offered in support of this assertion.

Dr. Hayes reviewed the documents related to this matter and prepared a report (P-1). In reviewing the results reported with regard to appellant, he noted that appellant's sample produced a result of 114 ng/ml. The calibrator results from the testing of the 100 ng/ml sample revealed in one case 123.5 ng/ml and in another 118.58 ng/ml, well over the cutoffs that the machine was supposed to be reading of 100 ng/ml (NJL 50). He noted that appellant's reading was lower than any of the calibration controls, and testified that there was a "bias for inaccuracy." Appellant's reading is consistent with the results of the control samples. Other samples came back at 116.4 ng/ml (NJL 85), and another came back at 115.34 ng/ml (NJL 14). Based upon his review of the documentation, Dr. Hayes testified that he concluded that the concentration in appellant's sample was less than those of the calibrators and controls at the ng/ml cutoff. His reading was consistent with the result of the controls and the immunoassay results are less accurate than the GC/MS. Dr. Hayes indicated that if 115 or 116 were really a level of 100 according to the controls, then appellant's sample is 98 or 99, and therefore less than the 100 ng/ml cutoff. He also testified that interfering studies were not done, nor was an analysis of carryovers (from one specimen to the next). He also had concerns regarding his observation of a technologist passing a sample over the open tubes of other specimens and a drip occurring. This leads to the risk of cross-contamination. Dr. Hayes was also concerned because the two tests done before appellant's produced very high results, which he termed a "red flag in forensics," and he asserted that great care needs to be taken to not have carryover contamination. Dr. Hayes indicated he would have liked to have seen testing results for the blanks, which were not available, to see if there had been any carryover.

Ultimately, he concluded that appellant's results should have been reported as negative because the calibrations were biased more than his reading was over the limit. Technical issues lead him to a lack of confidence in the results; specifically, he stated that forensic practice requires an interference study.

On recall examination, Dr. Havier testified that the Lab was certified in 2016 and that inspectors check all documentation, analytical procedures, methods and analysis, and safety standards, and that there is a long list of other requirements. He also indicated

that an interference study was completed prior to certification and the item referenced that had leaked "pipetting" was removed from use. He agreed on cross-examination that the calibrators for oxycodone (NJL 49) returned a result not at 100 as expected, but at 118.58, and the calibrator for oxymorphone (NJL 50) returned a result of 123 rather than the 100 expected. Dr. Havier also agreed that in appellant's sample oxymorphone does not even show up, and that the controls for both oxycodone and oxymorphone all came up with higher concentrations then appellant's.

Dr. Havier testified that the calibration tests are routinely performed to ensure that the machine is functioning correctly. It is common for residual substances to be present in the machine from the previous tests. The standard procedure to remediate this issue is to run a test on blank urine prior to testing an actual sample. The blank urine then clears out any residual substances from the prior sample tested and insures that the next test will not have any residual present. Dr. Havier testified that this procedure was followed when testing appellant's sample, and that therefore there were no residual substances present in the testing column of the machine when appellant's sample was tested.

LEGAL ANALYSIS AND DISCUSSION

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined are whether the employee is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). Among the causes for major discipline are conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(6); N.J.A.C. 4A:2-2.3(a)(12). Appellant was also charged with violating N.J.S.A. 40A:14-17, standards of firefighters.

"Conduct unbecoming" a public employee is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In this matter respondent bears the burden of proving the charges against appellant by a preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Respondent terminated petitioner's employment predicated on the allegation that he had a positive test result, following the July 17, 2015, random drug testing.

On March 11, 2019, the parties entered into a stipulation that appellant would not contest the random-drug-testing process or the chain of custody of the sample; rather, the only issue would be the reliability and trustworthiness of the drug testing conducted at the New Jersey State Toxicology Laboratory.

Respondent's only witness in this matter, Dr. Havier, explained that the purpose of the controls in the urine-testing procedure is to establish a linear relationship between the concentration of the drug in a sample and the response of the instrument. The controls are established by using five calibrators which have varying concentrations of the drug being tested. They are prepared from sample urine obtained commercially, to which a known concentration of the drug being analyzed is added. Proper calibration determines that the testing is accurate.

Dr. Havier described the testing process, indicating that the first test is an initial screening to determine the presence of a drug or a drug class. To confirm a positive screening result, GC/MS testing is performed. This process involves obtaining the original sample and preparing calibrators, control samples, and blanks.

The initial testing of appellant's sample came back as positive for OXY 100 with a reading of 108 ng/ml. This is a level of drug above which the Lab considers the testing to have revealed a positive result. The sample was then subject to the GC/MS confirmation testing, and the report prepared by the analyst indicated a reading of oxycodone at 114 ng/ml. Dr. Havier also indicated that if the reading had been 99 ng/ml, that would have been a negative test result, as it would have been below the cutoff of 100 ng/ml.

Significant confusion exists from both the documents submitted into evidence and the testimony of Dr. Havier, his assertions as to the acceptable variation or deviation application to the GC/MS test, and the notion of an accepted degree of error for control samples. No explanation was offered as to why the 20 percent error margin is applicable to the samples in the GC/MS procedure but not to appellant's specimen. If the 20 percent error margin were applied to appellant's specimen, that would bring his result below the cutoff of 100.

Respondent's reliance on In re Fuller, Department of Corrections, CSV 10292-07, Initial Decision (April 7, 2008), adopted, Merit System Board (May 22, 2008), https://njlaw.rutgers.edu/collections/oal/, remand of In re Fuller, Department of Corrections, CSV 00439-06, Initial Decision (March 7, 2007), remanded, Merit System Board (November 26, 2007), https://njlaw.rutgers.edu/collections/oal/, is misplaced. In that matter, Fuller was removed from his position as a senior correction officer after a random drug test determined he had ingested cannabinoids, the metabolite of marijuana. The two test control samples in that case had concentrations of 50 ng/ml and 10 ng/ml, respectively. The 50 ng/ml sample returned a 58 ng/ml result, and the 10 ng/ml sample returned a 10 ng/ml result. Dr. Havier testified in that case that the variation in the 50

ng/ml sample was within the Lab's acceptable limit of a 20 percent deviation.[4] Fuller's sample had indicated a concentration of 18 percent THC, over the 15 percent threshold for a positive finding. Additional testing revealed that Fuller's result was within the range where passive inhalation could be the cause of his reading, and he had recently attended two concerts. The removal was reversed (CSV 00439-06).

Fuller was remanded by the Merit System Board because of conflicting interpretations of Dr. Havier's testimony, specifically, that he had stated that there was a permissible 20 percent variation for control samples but that the same margin of error did not apply to Fuller's sample. There was no transcript of Dr. Havier's testimony to assist with clarity.

On remand, inexplicably, testimony was not elicited from Dr. Havier to even address the purported 20 percent variation used with control samples, and why that did not apply to Fuller's. Instead, Dr. Havier testified for the first time in that case that the expected concentration of the 50 ng/ml sample was appropriate for post-mortem cases only, and not for any other type of testing. No explanation was offered as to why that limitation was not explained in the prior hearing. He added that the deviation in the 50 ng/ml sample to 58 ng/ml was not relevant, again, without explanation as to why this opinion was only offered on remand.

The ALJ found that the issue of deviation, which he now termed "irrelevant," was pivotal in reversing the termination after the initial hearing; however, on remand, he reversed his prior decision and upheld the termination. There was no discussion of a 20 percent deviation in the remand decision (upholding the termination), indeed it was not mentioned at all, and no documentary or other evidence offering any support for the existence of an accepted 20 percent variation in control samples was provided.

In the within matter, there are no conflicting interpretations of Dr. Havier's testimony; rather, there is unexplained and unsupported testimony, and vague references to an "industry standard." Respondent's assertion that its expert's testimony was

[4] No support was provided for this proposition in this case either.

consistent regarding the process for establishing the liability of the testing equipment is not evidence of its reliability. The multiple references to the 20 percent variation being an industry standard does not make it an industry standard. No authority of any kind was offered in support of the existence of such an industry standard.

With no justification for the acceptability of a 20 percent variation only for control samples with a known concentration, there is no reason and no support for not applying the same error margin to appellant's specimen.

The burden of proof rests with respondent in this case, and the lack of any support in the record for what is being advanced as the support for a finding of a controlled-dangerous-substance violation, resulting in termination, cannot stand.

Thus, I **CONCLUDE** that respondent has not proven by a preponderance of the credible evidence that appellant's specimen was beyond the margin of error for testing of oxycodone, and further **CONCLUDE** that his removal is unsupported and cannot stand.

ORDER

It is **ORDERED** that the decision of respondent City of Paterson Fire Department dismissing appellant from his position as a firefighter is hereby **REVERSED**. It is **FURTHER ORDERED** that he be reinstated to his position and that any applicable back pay and benefits be issued to appellant.

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 24, 2019
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: October 24, 2019

Date Mailed to Parties: October 24, 2019

dr

APPENDIX

Witnesses

For Appellant:

Dr. Lyle Hayes

For Respondent:

Dr. Robert Havier, Ph.D.

Exhibits

Joint:

J-1	Appeal Form

For Appellant:

P-1	Report prepared by Lyle Hayes, Ph.D., dated April 24, 2018
P-2	Confidential Laboratory Testing Results of the respondent's laboratory, State of New Jersey Toxicology Laboratory, Bates Stamped NJ1-1988. (These documents are provided in two separate binders identified as confidential)

For Respondent:

R-1	Final Notice of Disciplinary Action dated September 18, 2015
R-2	Preliminary Notice of Disciplinary Action dated August 13, 2015
R-3–R-20	Not in Evidence
R-21	Memorandum from D/Sgt. Manuel Hernandez to Commanding Officer dated July 17, 2015
R-22	Attachment B "Drug Testing Medication Information" dated July 17, 2015
R-23	"Drug Testing—Custody Submission" Form dated July 17, 2015

R-24	Toxicology Report dated July 31, 2015
R-25	Memorandum from D/Sgt. Manuel Hernandez to Commanding Officer dated August 10, 2015