

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

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

* * *

The respondent argues that police officers are required to possess a firearm and regularly receive ammunition as a condition of their job duties, and because of this, the federal law cited above, 18 U.S.C. § 922 and 21 U.S.C. § 812, preempts the CREAMM Act. I am not persuaded. The respondent did not offer a sufficient factual or legal basis to support this position, and I cannot conclude that "conflict preemption" exists here. Conflict preemption applies when "it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hager v. M&K Constr.*, 462 N.J. Super. 146, 153 (App. Div. 2020) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (first citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), and then quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)), *aff'd*, 246 N.J. 1 (2021). The respondent has failed to demonstrate that a "positive conflict" exists between the CREAMM Act and the federal law cited because even if marijuana consumption remains unlawful federal law, nothing in the CREAMM Act requires anyone to violate federal law, and while the CREAMM Act provides immunity from State prosecution and from adverse employment actions, it does not purport to offer any immunity from any violation of federal law – the federal government is still free to prosecute cannabis users in New Jersey even though State prosecutors and law enforcement may not.

* * *

Finally, the respondent adds that the ATF's Firearms Transaction Record, Form 4473, states that an unlawful use of marijuana is prohibited from receiving or possessing a firearm. This Form is used when a person proposes to purchase a handgun from a

Federal Firearms License Holder, and the respondent does not even assert that Lopez (sic) is required to fill out this form as part of his (sic) job duties. In fact, pursuant to *N.J.S.A. 2C:396(a)(7)(a)*, municipal police officers are exempt from the requirement to have a firearms permit to carry a firearm in any place in the State, provided they have had firearms training in the Police Academy and qualify each year pursuant to *N.J.S.A. 2C:39-6(j)*. The respondent does not provide sufficient legal support to conclude that the appellant cannot carry a weapon as a police officer because of a positive drug test for THC.

Upon its *de novo* review of the record, as indicated above, the Commission agrees with the ALJ's determinations that federal law does not preempt CREAMMA; that Mansour could carry a service weapon without violating federal law; and that the facts of this matter demonstrate that the appellant's termination violated CREAMMA.

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

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

ORDER

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

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.*

4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF AUGUST, 2023



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSR 03569-23

AGENCY DKT. NO. N/A

2023-1987

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

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

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

Record Closed: June 13, 2023,

Decided: June 21, 2023

BEFORE: KIMBERLY A. MOSS, ALJ:

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

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

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

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

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

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

LEGAL ARGUMENT AND CONCLUSION

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

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

There is no material issue of fact in this matter.

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

Preemption

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

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

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

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

5 18 U.S.C. § 922(d) provides:

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

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

18 U.S.C. § 922(g) provides:

[i]t shall be unlawful for any person –

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

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

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

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

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

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

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

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

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

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

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

[[https://www.nj.gov/cannabis/adult-personal/workplace-duilaws/.](https://www.nj.gov/cannabis/adult-personal/workplace-duilaws/)]

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

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

I am also not convinced that it is impossible to comply with the CREAMM Act, and specifically N.J.S.A. 24:6I-52, and the federal law cited. While there may be a federal prohibition against an "unlawful user" of marijuana possessing any firearm or ammunition, I am not persuaded that this law preempts the CREAMM Act, and specifically the provision of N.J.S.A. 24:6I-52(a)(1) that prohibits adverse employment action against certain employees who use or test positive for cannabis/marijuana. The respondent has failed to illustrate sufficient legal authority to support its preemption argument and to neglect its obligations under the CREAMM Act. The respondent cannot disregard State law in order to enforce federal law.

Finally, the respondent adds that the ATF's Firearms Transaction Record, Form 4473, states that an unlawful use of marijuana is prohibited from receiving or possessing a firearm. This Form is used when a person proposes to purchase a handgun from a Federal Firearms License Holder, and the respondent does not even assert that Lopez is required to fill out this form as part of his job duties. In fact, pursuant to N.J.S.A. 2C:396(a)(7)(a), municipal police officers are exempt from the requirement to have a firearms permit to carry a firearm in any place in the State, provided they have had firearms training in the Police Academy and qualify each year pursuant to N.J.S.A. 2C:39-6(j). The respondent does not provide sufficient legal support to conclude that the appellant cannot carry a weapon as a police officer because of a positive drug test for THC.

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

ORDER

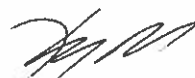
For the reasons set forth herein, it is **ORDERED** that the motion for summary decision filed on behalf of Norhan Mansour be and is hereby **GRANTED**, and that the termination of the appellant Norhan Mansour's employment be **REVERSED**. It is further **ORDERED** that the respondent's motion to for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

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

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

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

June 21, 2023



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

June 21, 2023

Date Mailed to Parties:

June 21, 2023

ljb

DOCUMENTS RELIED ON

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