

## ***Dep't of Correction v. Paz***

OATH Index No. 1717/18 (June 6, 2018), *rejected*, Comm'r Dec. (July 26, 2018), *reversed*,  
NYC Civ. Serv. Comm'n Case No. 2018-0825 (Nov. 29, 2018), **appended**

Correction officer charged with testing positive for morphine and codeine. Administrative law judge found evidence insufficient to establish that respondent knowingly ingested illegal drugs in that officer's evidence showed innocent ingestion. Dismissal of charges recommended.

Commissioner rejected ALJ's recommendation and sustained the drug charge and terminated respondent's employment. On appeal, the CSC reversed the Commissioner's decision and reinstated the ALJ's finding that the drug charge be dismissed and ordered that respondent be restored to his position within 30 days.

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### **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*- against -*  
**ELEAZAR PAZ**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**JOHN B. SPOONER**, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Correction, charged that respondent Eleazar Paz, a correction officer, tested positive for morphine and codeine.

A trial on the charge was conducted before me on April 6 and 23, 2018. Petitioner presented the testimony of a toxicology unit employee to support the allegation that respondent tested positive for morphine and codeine. Respondent testified on his own behalf, denying that he used illegal drugs, and also presented the results of another negative drug test and the testimony of a toxicology expert. Following the trial, both parties submitted memos of law on the issue of burden of proof and the record was left open for respondent to submit further records

as to chain of custody for the subsequent drug tests he took. Upon no further proof being submitted, the record closed as of May 21, 2018.

For the reasons provided below, I find that the evidence was insufficient to sustain the charges and recommend that the charges be dismissed.

### **FACTUAL BACKGROUND**

On January 16, 2018, respondent was randomly selected for a drug test pursuant to the Department's random testing policy for all uniformed staff. He reported to the toxicology unit and provided a urine sample, which was sealed in a container with a tamper-proof seal and assigned a unique identification number and bar code. The following day it was transported to the LabCorp laboratory in Raritan, New Jersey, and signed for by a laboratory employee. According to the lab report (Pet. Ex. 10), the sample first underwent an immunoassay test to screen for any controlled substance. After the drugs morphine and codeine were detected in the sample, the specimen was subjected to a gas chromatography/mass spectrometry test, in which it again tested positive for morphine at 522 nanograms per milliliter and for codeine at 358 nanograms per milliliter. According to the report, the legal cutoff used by the laboratory for both of these substances is 300 nanograms per milliliter.

On the questionnaire (Pet. Ex. 11) completed at the time of the drug test, respondent indicated that he had "nothing to report" for medication. For foods taken within the last 24 hours, he indicated sweet potatoes, bread, rice, meat and chicken.

On January 23, 2018, the Department received the positive drug tests results from LabCorp. Respondent was not working that day and was next scheduled to work on January 25, 2018 (Tr. 15-16). Captain McAlvin testified that, on that day, respondent was ordered to report to his office and to complete a written report as to any items ingested prior to the drug test (Tr. 32-33). On the report (Pet. Ex. 25) submitted on January 25, 2018 to Captain McAlvin, respondent wrote that he had eaten a number of things on January 15, 2018, including "eggs, poppy seed bagel, coffee and orange juice," chicken soup and vegetable for lunch, and a cheese burger with fries for dinner. Following the dinner at a restaurant, he went home and "took two advils."

According to Captain McAlvin, respondent also stated that he “might have taken” some of his mother’s prescription medication and could not get the prescription because she lived in Colombia (Tr. 42). The captain commemorated respondent’s remark in a written report of his own (Pet. Ex. 9).

Respondent testified that on both January 15 and 16, 2018, the day of his drug test, he ate a poppy seed bagel at home before leaving for work (Tr. 175). On the morning of January 16, he and a few other officers were ordered to report for the drug test and drove a van to the toxicology office (Tr. 175-76). Several days after the test, Captain McAlvin directed him back to the toxicology office, told him he was “busted for something,” and asked him to write a statement about everything he ate and any medication he might be taking. Respondent denied he was taking any medication (Tr. 177), although he did recall mentioning, “If I took anything, [it was] from my mother like two years ago” (Tr. 177). According to respondent, he took a Naprophsin or Aleve tablet some two or three years before (Tr. 177, 187). Respondent called his wife to help him recall all the foods he had eaten prior to January 15 (Tr. 199).

On January 31, 2018, respondent was suspended based upon the positive drug test results (Tr. 178).

Two days later on February 2, 2018, respondent went to a LabCorp testing center in Levittown, New York, identifying himself with his driver’s license. He submitted a hair sample for a hair follicle test (Tr. 179-80). The test results were negative for all drugs, including morphine and codeine (Resp. Ex. D). Respondent also had another urine test done which came back negative. Around March 1, respondent returned to work on modified duty (Tr. 183). He was ordered for yet another random urine test on March 8, 2018, which also was negative (Tr. 182-83, 184; Resp. Ex. E).

Respondent testified that he has worked as a correction officer for over nine years and has never been disciplined (Tr. 173). He has also been randomly tested for drugs once per year and always tested negative (Tr. 173-74). He has never taken heroin or morphine. He has taken codeine with a prescription only twice before, the last time being five years ago (Tr. 186). He also denied ever using any prescription drugs not prescribed to him, except the Naproxen supposedly prescribed to his mother (Tr. 187).

At trial, respondent contended that the positive result for morphine and codeine was caused by the poppy seed bagels he allegedly ate and not by ingestion of illegal drugs. In support of this argument, respondent called as an expert Dr. Sawyer, a toxicologist and consultant certified by the American Board of Forensic Medicine (Tr. 137). Dr. Sawyer expressed surprise that the Department of Correction continued to use the 300 nanogram instead of the federal 2,000 nanogram cutoff (Tr. 140). He indicated that the cutoff level was changed in 1997 due to unwashed poppy seeds producing levels above 300 (Tr. 143). Dr. Sawyer insisted that he had “never come across” another instance of the 300 nanogram per milliliter cutoff being used except for clinical testing for purposes of medical diagnosis (Tr. 144).

Dr. Sawyer concluded that the only “reasonable explanation” for respondent’s morphine and codeine concentrations was eating poppy seeds because he was able to eliminate all other possibilities (Tr. 145, 152). He indicated that respondent’s drug test could not have been caused by heroin, which would show traces of 3-glucuronide and no codeine (Tr. 141). Dr. Sawyer stated that the morphine/codeine ratio of 1.31 ruled out codeine abuse (Tr. 141-42). He also ruled out joint morphine and codeine abuse because of the low level of codeine, which was the equivalent of 1/8 teaspoon of cough syrup (Tr. 142). He indicated that a person who abuses morphine or codeine would “have urine values in the thousands” (Tr. 142). He contended that there was no “combination of drugs” that would produce the morphine and codeine results in respondent’s drug test (Tr. 148). Dr. Sawyer testified that hair follicle test results, showing no drug positives, was consistent with respondent eating poppy seed bagels, which would not be detectable in the hair, and inconsistent with any type of drug abuse (Tr. 149).

He stated that over 30 studies of poppy seed ingestion showed that unwashed poppy seeds will produce concentrations of morphine and lower levels of codeine (Tr. 142). Dr. Sawyer conceded that most of the poppy seed bagels sold in New York City used washed poppy seeds and show very low levels of morphine (Tr. 161).

Petitioner relied upon the expert testimony of Mr. Saini, the lab manager from LabCorp, to contend that the positive drug results were not caused by poppy seeds. While Mr. Saini conceded that consumption of certain poppy seeds would account for positive test results for both morphine and codeine, he stated that the quantities of the two substances reflected in respondent’s urine test results were inconsistent with ingestion of poppy seeds alone.

Mr. Saini further stated that the ratio of morphine and codeine in respondent's test results could not have been produced by poppy seeds. Mr. Saini referred specifically to a 1995 article (Pet. Ex. 16) written by a toxicologist named Dr. ElSohly. This article summarized the results of various studies on poppy seeds as the source of positive urine tests for morphine and codeine. The article referred to an earlier 1988 summary establishing guidelines in determining whether poppy seeds could be the sole reason for positive morphine and codeine concentrations. One guideline was where there were "high concentrations of codeine (more than 300 ng/mL) with a morphine: codeine ratio of less than 2" (Pet. Ex. 16 at 455). Based upon his interpretation of this article, Mr. Saini concluded that the most probable explanation for respondent's positive morphine and codeine drug test results was "either a prescription or an illicit source of codeine" (Tr. 84), although he offered no theory as to what specific drug or drugs might have been taken.

Mr. Saini also noted that hair follicle drug tests can be manipulated by bleaching or using special detergents on the hair, reducing the quantity of drugs in the hair (Tr. 85).

### ANALYSIS

In this case, petitioner alleges that, based upon the positive drug test for morphine and codeine, respondent took illegal drugs. To sustain its burden of proof with respect to misconduct based upon a positive drug test, petitioner must establish two elements: (1) a proper chain of custody concerning the specimen tested, *see Fire Dep't v. Coyle*, OATH Index No. 850/02 (Aug. 20, 2002), and (2) the reliability of the drug test results in demonstrating illegal drug use. *See Fire Dep't v. Walton*, OATH Index No. 553/89 (Dec. 12, 1989). Here there was no dispute as to the chain of custody. Rather, the issue contested at trial was whether the positive test results demonstrated illegal drug use, as contended by petitioner, or might be explained by the ingestion of food products containing the two drugs, as argued by respondent.

It was the initial burden of petitioner to establish that the positive drug tests for morphine and codeine reliably demonstrated illegal drug use. The positive drug test results for morphine and codeine, combined with respondent's failure to provide evidence of having prescription for these two drugs, established *prima facie* proof that respondent took the drugs illegally. *See Dep't v. Fahey*, OATH Index No. 1376/07 (Oct. 9, 2007), *modified on penalty*, Comm'r Decision (Nov. 19, 2008).

Even though petitioner's *prima facie* burden was met, the charge of using illegal drugs cannot be sustained where the employee establishes that he somehow took the drugs without knowing what they were. As to this issue, the burden was on respondent to prove innocent or unknowing ingestion of an illegal drug by a preponderance of the evidence. *See Green v. Sielaff*, 198 A.D.2d 113 (1st Dep't 1993); *Dep't of Correction v. Cosby*, OATH Index No. 890/91 at 9-10 (Mar. 29, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-107 (Sept. 24, 1992) (respondent's claim of unknowing ingestion is in the nature of an affirmative defense which he bears the burden of proving); *Fire Dep't v. Kelly*, OATH Index No. 804/06 at 10-11 (June 9, 2006), *modified on penalty*, Comm'r Dec. (Jan. 2, 2007), *aff'd*, 56 A.D.3d 475 (2d Dep't 2008) (because illegal drug use is typically viewed as an independent voluntary act, employee must prove involuntary use as an affirmative defense). This defense "is rooted . . . in due process and the general notion that misconduct requires a showing of intentional wrongdoing on the part of a charged employee," taking into account the fact that "the conduct being punished is, not the status of having an illegal drug in one's system, but the act of knowingly obtaining and ingesting the illegal drug." *Taxi & Limousine Comm'n v. Ahsan*, OATH Index No. 287/10 at 3-4 (Aug. 21, 2009), *rev'd*, Comm'r/Chair's Dec. (Oct. 22, 2009); *see Reeves v. Golar*, 45 A.D.2d 163 (1st Dep't 1974).

The resolution of the case thus rests upon assessing whether respondent met his burden of proving innocent ingestion of the drugs. The sole proof offered by respondent to establish that respondent ate poppy seed bagels consisted of the testimony of respondent himself, placing his credibility at issue. To evaluate credibility, this tribunal has looked to "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Two factors, suggested that respondent's statements might be less than completely reliable. He had a strong interest in testifying to facts which might absolve him of misconduct. He also did not mention the poppy seed bagel on his original drug test questionnaire and referred only to "bread."

Other factors, however, convinced me that his testimony was likely truthful. By demeanor, respondent seemed to be forthright and convincing. In explaining the omission of bagels from the questionnaire, respondent indicated that he initially did not remember the bagel and was only able to do so on January 25 with the assistance of his wife. The abundantly detailed list of foods given in the January 25 report is consistent with this explanation.

Respondent's statement that he ate poppy seed bagels was corroborated by his follow-up report of January 25 in which he wrote that he had a poppy seed bagel on the morning of the test. His insistence that he did not take any medication containing morphine or codeine was consistent with the hair follicle test, although, as Mr. Saini indicated, the results of hair follicle tests can be manipulated by bleaching the hair. It was likewise supported by the low levels of the test results, levels which would not have been considered positive under the federal government guidelines revised in 1997 to prevent false positives for foods containing poppy seeds.

Petitioner's counsel argued that respondent's statements to Captain McAlvin, whose testimony I found credible, about having taken his mother's prescription medication at some time in the past constituted an admission that he intentionally took the drugs. While respondent admitted making such a statement, he insisted that he told the captain that he had taken his mother's medication some two years ago and was therefore not suggesting to the captain that this could explain the positive drug results. I found it plausible that, when confronted with a positive drug test for two prescription drugs, respondent might mention past instances of taking other family members drug prescriptions without being fully aware of what they contained.

In sum, I found respondent's statements that he ate poppy seed bagels before the drug test to be credible. Having found this proof credible, the final issue is whether the drug test results were consistent with eating poppy seed bagels. As to this issue, Dr. Sawyer contended that the morphine result of 522 nanograms per milliliter and the codeine result of 358 nanograms per milliliter could only be explained by eating poppy seed bagels because the quantities of the drugs were at non-therapeutic doses and the relative proportions were inconsistent with heroin or individual morphine and codeine ingestion.

Mr. Saini disagreed with this conclusion for two reasons. First, he indicated that eating baked food products containing poppy seeds would not produce codeine levels above the legal cutoff, stating that positive codeine results would only occur after "consumption of a sufficient

amount of raw or, you know, unprocessed poppy seeds” (Tr. 80). Second, Mr. Saini relied upon a 1991 study of subjects who had eaten poppy seed baked goods and believed that this study established that, where the codeine level was greater than 300 nanograms per milliliter, “no specimen had a morphine/codeine ratio of less than 2.” Mr. Saini therefore reasoned that, since respondent tested at a morphine level of 522 and at a codeine level of 358, more one-half of the morphine level, poppy seeds could not account for the results.

I found the opinion of Dr. Sawyer more persuasive than that of Mr. Saini for a number of reasons. As this tribunal has stated, the extent of an expert’s qualifications bears directly upon “the weight to be given to the testimony by the trier of fact.” *Fire Dep’t v. A. G.*, OATH Index No. 771/12 at 6 (July 5, 2012), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 13-02-SA (Feb. 6, 2013) (citing *Adamy v. Ziriakus*, 92 N.Y.2d 396, 402 (1998); *Felt v. Olson*, 51 N.Y.2d 977, 979 (1980); *Kwansy v. Feinberg*, 157 A.D.2d 396, 400 (2d Dep’t 1990); *De Luca v. Kameros*, 130 A.D.2d 705, 705-06 (2d Dep’t 1987)).

In this case, it was apparent that Dr. Sawyer’s qualifications were superior to those of Mr. Saini. Dr. Sawyer’s credentials included a Ph.D in toxicology, certification by the American Board of Forensic Medicine, some 30 years of consulting work as a professional toxicologist, expert testimony in a number of criminal trials, 24 years of teaching toxicology and epidemiology at a medical school, and publication in a number of professional journals (Tr. 136-38). Mr. Saini’s background included a bachelor of science degree in chemistry, testimony in a number of trials in an expert in forensic toxicology, and several years’ work at LabCorp as an “extraction technologist” and as a “certifying scientist” (Tr. 48-50). Due to his more extensive expertise, I accorded the conclusions of Dr. Sawyer greater weight than those of Mr. Saini.

Furthermore, some of Mr. Saini’s statements were shown by the other proof to be mistaken. Mr. Saini’s statements as to the impossibility of poppy seed cooked food products producing codeine levels above the legal cutoffs were convincingly refuted by the toxicology articles produced at trial, as well as by Dr. Sawyer. The 1995 article (Pet. Ex. 16) relied heavily upon by Mr. Saini himself recounted a 1991 study involving consumption of poppy seeds in bagels, muffins, and other baked food products and showing codeine concentrations of as much as 4,800 nanograms per milliliter. Dr. Sawyer also indicated that cooked food products using unwashed poppy seeds will produce relatively high levels of morphine and codeine (Tr. 157).



Mr. Saini's statements that the proportion of morphine to codeine was inconsistent with poppy seed ingestion was also ultimately unpersuasive. In this case, the ratio of morphine to codeine in respondent's final results, 522:328, was relatively close to the two times guideline. In this regard, it seems pertinent to note that the concentration levels calculated in the various lab tests are more approximations than exact values, as shown by the fact that the initial GC/MS results of the respondent's specimen were 484 nanograms per milliliter for morphine and 370 nanograms per milliliter for codeine (Pet. Ex. 13 at 56).

More importantly, I credited Dr. Sawyer's rejection of Mr. Saini's interpretation as an over-simplification of the studies that he relied on. When asked about the supposed 2:1 morphine to codeine guideline in Dr. ElSohly's 1995 article, Dr. Sawyer indicated that the subjects showed a "wide variety of ratios" because all of the subjects metabolized the morphine differently (Tr. 146-47). Dr. Sawyer referred to an earlier 1988 ElSohly article (Resp. Ex. B) concerning ingestion of poppy seeds from the Netherlands, Australia, and Turkey, which at the time included 94% of poppy seeds on the American market. This article described a study done with six subjects who all ingested cake with poppy seed filling and provided multiple urine samples over the course of 10-22 hours. The results were displayed on a table denoting the concentrations of morphine and codeine. The article noted,

The data also show that, although morphine concentration was always higher than that of codeine, the morphine/codeine ratio varied from 1.20 to 19.60. There was also variation in morphine/codeine ratio within specimens from a given subject, depending upon the time of urine collection. Furthermore, there does not appear to be any correlation between any of the individual concentrations and the morphine/codeine ratios.

Resp. Ex. B at 354. He also was aware of no known medications which would produce comparable morphine and codeine results and further that the codeine result in respondent's test results was so far below a therapeutic dose that deliberate ingestion for treatment purposes seemed unlikely.

It seems doubtful that the past toxicology studies involving poppy seeds were intended to provide guidelines for determining whether poppy seed ingestion occurred based upon the ratio of morphine and codeine levels. The studies of poppy seed ingestion cited at trial were focused on collecting empirical evidence of morphine and codeine levels after poppy seed ingestion, using a very small number of subjects. For example, 1990 ElSohly findings mentioned in the

article (Pet. Ex. 16) relied upon by Mr. Saini included only four subjects. The “most comprehensive study” mentioned in this article was done in 1991 using male and female volunteers, but the “comprehensive” nature of the study seemed to be based upon the variety of food items tested rather than the quantity of the subjects. The 1988 ElSohly article (Resp. Ex. B) recounted a study using six subjects. The approximately 30 studies of poppy seed ingestion listed in a table in the 2010 article (Resp. Ex. C at 15) indicates only morphine levels and not codeine levels. The discussion of the “poppy seed defense” in this article, the most recent article provided, concludes that the defense is still valid, although, due to regulation and manufacturing controls on morphine levels for poppy seeds, the likelihood of producing false positives is lower than in the past. Notably, no conclusion is offered as to using the ratio of morphine to codeine in a drug test to eliminate poppy seeds as a possible source for these drugs.

From this, it seems clear that the studies were neither expressly nor implicitly intended to propound a rule as to the ratio of morphine to codeine which would eliminate poppy seeds as the likely source of morphine/codeine positive test results. Mr. Saini’s reliance upon these studies to prove that poppy seeds could not be responsible for respondent’s test levels seemed to be, as Dr. Sawyer suggested, a misinterpretation of the toxicology literature provided.

Based upon the evidence in this case, I conclude that the most likely source of the positive morphine and codeine test results was the ingestion of poppy seeds and not the use of medications. I therefore find that petitioner has failed to meet its overall burden of proving knowing ingestion of illegal drugs and recommend that the charges be dismissed.

John B. Spooner  
Administrative Law Judge

June 6, 2018

SUBMITTED TO:

**CYNITHIA BRANN**  
*Commissioner*

APPEARANCES:

**JUAN PUCHA, ESQ.**  
*Attorney for Petitioner*

**RHA & KIM, LLP**  
*Attorneys for Respondent*  
**BY: ANDREW GROSSMAN, ESQ.**



and morphine; and 3) Respondent proved that he unknowingly ingested codeine and morphine when he ate poppy seed bagels contaminated with codeine and morphine. ALJ Spooner dismissed all charges.


Based on my review of the record of trial and the evidence presented, I respectfully disagree with ALJ Spooner's findings that Respondent met his burden as to his affirmative defense. I have determined that there is insufficient evidence in the court record to support Respondent's position that his consumption of poppy seed bagels resulted in his positive drug test:

- 1) On January 16, 2018, Respondent failed to report in his Drug Screening Questionnaire that he ate poppy seed bagels on January 15 and 16, 2018, prior to the drug screening;
- 2) On January 25, 2018, Respondent failed to report in his AR 600 that he ate a poppy seed bagel on January 16, 2018, prior to the drug screening;
- 3) Respondent's wife purchased the alleged contaminated poppy seed bagels. Respondent did not know where his wife purchased the bagels. Notably, Respondent's wife did not testify;
- 4) Respondent's testimony was the only evidence presented that Respondent ate poppy seed bagels;
- 5) Respondent's expert witness, Dr. Sawyer, did not know where Respondent's wife purchased the bagels that Respondent ate. Therefore, he did not have an opportunity to examine the bagels sold by the store;
- 6) Respondent's expert witness, Dr. Sawyer, testified that generally poppy seeds sold in NY are washed and are safe to eat.

Moreover, I find that there is ample evidence to support Respondent's termination from the Department based on his conduct. The trial record establishes that Respondent tested positive for codeine and morphine and did not have a prescription.

Based on the record of trial and the evidence presented, I reject Judge Spooner's findings and recommendation and determine that termination is appropriate with a finding of guilty as charged.

Date: 7/26/18

Signature: 

Cynthia Bran~~A~~ Commissioner

**THE CITY OF NEW YORK  
CITY CIVIL SERVICE COMMISSION**

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*In the Matter of the Appeal of*

**ELEAZAR PAZ**

*Appellant*

*-against-*

**DEPARTMENT OF CORRECTION**

*Respondent*

*Pursuant to Section 76 of the New York  
State Civil Service Law*

CSC Index No: 2018-0825

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**DECISION**

**ELEAZAR PAZ** (“Appellant”) appeals from a determination of the Department of Correction (“DOC”) finding him guilty of testing positive for morphine and codeine and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law (“CSL”) Section 75.

Following a hearing at the Office of Administrative Trials and Hearings (“OATH”), the Administrative Law Judge (“ALJ”) recommended that all charges against Appellant, a nine-year veteran Correction Officer (“CO”), be dismissed. The ALJ credited Appellant’s testimony that he consumed poppy seeds immediately prior to the drug testing, and was persuaded by Appellant’s expert, William Sawyer, Ph.D., who determined that Appellant’s low concentration levels for morphine and codeine could only be reasonably explained by Appellant’s consumption of poppy seeds, rather than illegal or prescription drug use.

On July 26, 2018, DOC Commissioner Cynthia Brann rejected the ALJ’s findings and terminated Appellant for testing positive for morphine and codeine. Commissioner Brann

concluded that Appellant failed to establish that he unknowingly ingested codeine and morphine when he ate poppy seed bagels, and as such, he failed to meet his burden for an affirmative defense of innocent consumption.

The Civil Service Commission (“Commission”) conducted a hearing on October 25, 2018. For the reasons indicated below, the Commission reverses the DOC Commissioner’s final decision and adopts the ALJ’s findings that Appellant is not guilty of the charged misconduct.

### **Background & OATH Decision**

On January 16, 2018, Appellant, a nine-year veteran Correction Officer, was randomly selected for a drug screening and provided the required urine sample. Appellant’s sample tested positive for the presence of opiates morphine and codeine. Specifically, Appellant’s sample tested positive for morphine at 522 nanograms per milliliter and for codeine at 358 nanograms per milliliter – DOC’s legal cutoff is 300 nanograms per milliliter for both substances.<sup>1</sup>

Appellant was required to complete a “Drug Screening Questionnaire” at the time of the drug screening which asked him to report any medications he was currently taking and list the food he consumed in the previous 24 hours. Appellant indicated that he had “nothing to report” for medication and for foods taken within the last 24 hours, he indicated “sweet potatoes, bread, rice, meat and chicken.”<sup>2</sup>

After DOC received Appellant’s positive drug test results on January 23, 2018, DOC Captain McAlvin told Appellant he was “busted for something”<sup>3</sup> but did not reveal to Appellant any specific details regarding his lab results. Captain McAlvin asked Appellant “to complete a written report as to any items ingested prior to the drug test.”<sup>4</sup> Appellant “called his wife to help

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<sup>1</sup> ALJ’s Report and Recommendation (hereinafter R&R) pg. 2

<sup>2</sup> R&R pg. 2

<sup>3</sup> R&R pg. 2

<sup>4</sup> R&R pg. 2



him recall all the foods he had eaten prior to January 15”<sup>5</sup> and endorsed consuming “eggs, poppy seed bagel, coffee and orange juice, chicken soup and vegetable for lunch, and a cheeseburger with fries for dinner.”<sup>6</sup> Appellant further indicated that he took two Advil after dinner and, two years prior, had consumed a Naprophisin or Aleve tablet given to him by his mother.

On January 31, 2018, respondent was suspended based upon the positive drug test results.<sup>7</sup> Two days later, on February 2, 2018, Appellant went on his own initiative to a LabCorp testing facility and submitted a hair sample for a hair follicle test along with a urine sample and both tests came back negative for all drugs.<sup>8</sup> Appellant returned to work on March 1, 2018, and on March 8, 2018, DOC ordered Appellant to once again take a urine drug test which also came back negative.<sup>9</sup>

On April 6 and 23, 2018, an OATH trial was conducted on the charge that Appellant violated DOC rules prohibiting use of controlled substances based on the positive test for morphine and codeine. Appellant presented the testimony of his expert Dr. Sawyer – a toxicologist and consultant certified by the American Board of Forensic Medicine – and testified on his own behalf. Appellant argued that his positive test result was caused by the poppy seed bagels he had eaten prior to the administration of the drug screening and not by ingestion of illegal or prescription drugs.<sup>10</sup> Appellant testified that he had consumed a poppy seed bagel both on January 15, 2018, and on January 16, 2018, the day of the drug test. Appellant further testified

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<sup>5</sup> R&R pg. 3

<sup>6</sup> R&R pg. 2 (internal citation omitted)

<sup>7</sup> R&R pg. 3

<sup>8</sup> R&R pg. 3

<sup>9</sup> R&R pg. 3

<sup>10</sup> R&R pg. 3

that he had never taken heroin or morphine<sup>11</sup> and had been tested by DOC once per year for nine years and always tested negative.<sup>12</sup>

Appellant's expert, Dr. Sawyer, testified that the trace concentrations of morphine and codeine found in Appellant's urine could be produced by consuming unwashed poppy seeds but that illicit drug use would produce morphine and codeine concentration values "in the thousands."<sup>13</sup> Dr. Sawyer further testified that since 1997, the federal cutoff concentrations were raised to 2,000 nanograms per milliliter due to unwashed poppy seeds producing levels above 300 nanograms per milliliter, and that "he had 'never come across' another instance of the 300 nanogram per milliliter cutoff being used except for clinical testing for purposes of medical diagnosis."<sup>14</sup>

Dr. Sawyer concluded that "the only reasonable explanation for respondent's morphine and codeine concentrations was eating poppy seeds" because Appellant's low concentrations of morphine and codeine, and the specific ratio of morphine to codeine, eliminated all other possibilities."<sup>15</sup> Specifically, Dr. Sawyer contended that "there was no combination of drugs that would produce the morphine and codeine"<sup>16</sup> levels found in Appellant's blood, namely, 522 nanograms per milliliter and 358 nanograms per milliliter of morphine and codeine respectively. Dr. Sawyer ruled out joint codeine and morphine abuse because "a person who abuses morphine or codeine would have urine values in the thousands" while Appellant's low level of codeine "was the equivalent of 1/8 teaspoon of cough syrup" and therefore could not be a result of illicit prescription drug use.<sup>17</sup> Dr. Sawyer further ruled out heroin abuse as such abuse would have

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<sup>11</sup> R&R pg. 3

<sup>12</sup> R&R pg. 3

<sup>13</sup> OATH Transcript pg. 142-143

<sup>14</sup> R&R pg. 3

<sup>15</sup> R&R pg. 4 (internal citations omitted)

<sup>16</sup> R&R pg. 4 (internal citations omitted)

<sup>17</sup> R&R pg. 4

shown “traces of 3-glucuronide and no codeine.”<sup>18</sup> Finally, Dr. Sawyer indicated that the “morphine/codeine ratio of 1.31 ruled out codeine abuse.”

DOC presented the expert testimony of Mr. Saini, a lab manager for LabCorp, who conceded that “consumption of certain poppy seeds would account for positive test results for both morphine and codeine,” yet argued that the concentration levels found in Appellant’s urine were “inconsistent with ingestion of poppy seeds alone.”<sup>19</sup> DOC submitted into evidence an article by a toxicologist named Dr. ElSohly.<sup>20</sup> Mr. Saini interpreted this article to imply that the concentrations of morphine to codeine found in Appellant’s urine were more likely a result of illicit drug use rather than from poppy seed ingestion.<sup>21</sup> Mr. Saini also noted that Appellant’s clean hair follicle test result could have been a result of manipulation where the hair sample is washed using bleach or special detergents.<sup>22</sup>

The ALJ credited Appellant’s testimony that he ate poppy seed bagels prior to providing his urine sample based on Appellant’s demeanor during trial where he appeared “forthright and convincing.” The ALJ noted that Appellant provided an “abundantly detailed list of foods”<sup>23</sup> on the January 25, 2018, report which included a poppy seed bagel, which was consistent with Appellant’s explanation that he had consulted with his wife to remember the foods he consumed 24 hours prior to the drug screening. The ALJ further noted that Appellant’s testimony regarding the consumption of poppy seeds was in the context of other testimony that was empirically corroborated, i.e., Appellant denied heroin use or consuming medication containing morphine or codeine, which was consistent with the negative results on his hair follicle test.<sup>24</sup>

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<sup>18</sup> R&R pg. 4

<sup>19</sup> R&R pg. 4

<sup>20</sup> R&R pg. 4

<sup>21</sup> R&R pg. 5

<sup>22</sup> R&R pg. 5

<sup>23</sup> R&R pg. 6

<sup>24</sup> R&R pg. 6-7

The ALJ found the testimony of Appellant's expert Dr. Sawyer more persuasive than that of DOC's expert Mr. Saini. The ALJ determined that Dr. Sawyer's qualifications as an expert "were superior to those of Mr. Saini," and that "Mr. Saini's statements as to the impossibility of poppy seed cooked food producing codeine levels above the legal cutoffs were convincingly refuted by the toxicology articles produced at trial as well as by Dr. Sawyer."<sup>25</sup> Further, the 1995 article heavily relied upon by Mr. Saini itself indicated that poppy seed consumption could result in codeine concentrations of "as much as 4,800 nanograms per milliliter." Finally, the ALJ found that the proportion of morphine to codeine in Appellant's test results was 522:328, which was both "relatively close to the two times guideline" represented in the 1995 article and consistent with Dr. Sawyer's explanation that ingestion of poppy seeds could result in morphine/codeine ratios from "1.20 to 19.60."<sup>26</sup>

Based on the above, the ALJ determined that, while "the positive drug test results for morphine and codeine, combined with Appellant's failure to provide evidence of having a prescription for these two drugs, established *prima facie* proof that Appellant took the drugs illegally,"<sup>27</sup> Appellant had established an affirmative defense of an "innocent or unknowing ingestion of an illegal drug"<sup>28</sup> by demonstrating that "the most likely source of the positive morphine and codeine test results was the ingestion of poppy seeds and not the use of medication." Accordingly, the ALJ recommended dismissal of all charges.

On July 26, 2018, DOC Commissioner Cynthia Brann rejected the ALJ's recommendation and determined that Appellant had failed to meet his burden of proving an affirmative defense of innocent ingestion and terminated Appellant's employment.

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<sup>25</sup> R&R pg. 8

<sup>26</sup> R&R pg. 9

<sup>27</sup> R&R pg. 5

<sup>28</sup> R&R pg. 5

Commissioner Brann cited: 1) Appellant's initial failure to endorse consuming poppy seed bagels on the Drug Screening Questionnaire; 2) Appellant's subsequent inability to explain where his wife purchased the poppy seed bagels he allegedly ate; 3) Dr. Sawyer's inability to examine similar poppy seed bagels as those Appellant claimed to consume; and 4) Dr. Sawyer's concession that poppy seeds sold in New York are generally washed and therefore contain levels of morphine that are too low to produce false positives.

### **Appellant's Position**

At the Commission hearing, Appellant's counsel reaffirmed the facts as established at the OATH trial, and presented the same argument that had persuaded the ALJ to dismiss all the charges, namely, that the record supported a finding that although very low levels of morphine and codeine were present in Appellant's urine on January 16, 2018, these levels were not consistent with drug use but more likely than not were due to Appellant's consumption of unwashed poppy seeds.

Appellant's counsel argued that the record demonstrated that the 300 nanogram per milliliter threshold applied by DOC was consistent with poppy seed consumption and that Appellant had credibly established that he consumed poppy seeds 24 hours prior to providing his urine sample. Further, the trace amounts of morphine and codeine in Appellant's urine were inconsistent with illicit drug use. As such, Counsel argued that DOC had not established a *prima facie* case of drug use despite the presence of trace amounts of morphine and codeine detected in Appellant's urine sample. In support of the argument that Appellant had not consumed drugs, counsel explained that the negative hair follicle test administered on February 2, 2018, had a look-back period that included the days covered by Appellant's January 16, 2018 urine test.

In the alternative, counsel argued that, to the extent the trace amounts of morphine and codeine found in Appellant's urine constituted drug use and therefore DOC's *prima facie* case had been made, Appellant had satisfied his burden associated with the "innocent consumption" affirmative defense by providing sufficient evidence that the morphine and codeine were innocently and unknowingly consumed. Counsel further argued that termination was too severe a penalty for Appellant's purported misconduct, such as it was, and in light of Appellant's spotless nine-year tenure with DOC, the penalty should be mitigated.

Finally, Appellant's counsel clarified that Federal testing guidelines for morphine and codeine thresholds had been increased to 2000 nanograms per milliliter precisely because lower thresholds could be reached through the consumption of poppy seeds. Moreover, counsel stated that DOC is the only agency that he knows of still using the 300 nanogram threshold while other City agencies, and organizations across the country, have adopted higher thresholds.

### **DOC's Position**

Counsel for DOC highlighted that Appellant was not terminated for drug use but for the presence of codeine and morphine in his urine without a prescription. Further, counsel highlighted that drug absorption rates differ across individuals which could explain Appellant's low concentrations of codeine and morphine detected in his urine. Further, counsel argued that Appellant's testimony that he consumed poppy seed bagels was incredible because of Appellant's inconsistent statements, i.e., Appellant failed to list poppy seeds on his initial Drug Screening Questionnaire, but then listed a single poppy seed bagel on his January 25, 2018 report submitted to Captain McAlvin. He then testified at the OATH trial that he had consumed two poppy seed bagels, one the morning of the drug screening and one the morning prior.

## Analysis

The Commission has carefully reviewed the record and considered the arguments on appeal. The Commission affirms the ALJ's finding and recommendation that Appellant is not guilty of all charges.

Both parties agree to the underlying facts of this matter, namely, that Appellant complied with DOC's drug testing policy by providing a urine sample on January 16, 2018, and completing the required Drug Screening Questionnaire wherein he indicated that he had no medications to report, and listed the foods he had consumed 24 hours prior to the screening without referencing poppy seeds. Further, both parties agree that Appellant's urine tested positive for morphine at 522 nanograms per milliliter and for codeine at 358 nanograms per milliliter. Finally, both parties agree that Appellant subsequently reported to Captain McAlvin that he had consumed a poppy seed bagel on January 16, 2018, and then had testified at the OATH trial that he had consumed a poppy seed bagel on January 15, 2018, and January 16, 2018.

At issue is whether the record supported the ALJ's finding that Appellant consumed poppy seeds within 24 hours prior to the drug screening, and if so whether it was more likely than not that, based on the record before us, that the consumption of unwashed poppy seeds accounted for the presence of trace amounts of morphine and codeine.

The Commission finds that the record supports the ALJ's determination that Appellant credibly reported that he consumed poppy seeds 24 hours prior to the January 16, 2018 drug screening. The ALJ found Appellant's testimony credible that he initially did not remember consuming a poppy seed bagel when he completed the Drug Screening Questionnaire on January

16, 2018, and was only able to recollect this food item on January 25, 2018, after he consulted with his wife.

DOC argues that the fact that Appellant initially did not disclose consumption of poppy seed bagels on January 16, 2018, and that he only disclosed eating a poppy seed bagel after he tested positive for morphine and codeine, supports a finding that he is being untruthful regarding illicit drug use. Presumably this argument would be that once he found out that he had tested positive for these substances, he fabricated an innocent reason for the results. However, Appellant's reporting is just as consistent with being found innocent of illicit drug use. Appellant had participated in DOC's drug screening annually for nine years without incident, and his initial incomplete list of food he ingested is consistent with someone who isn't worried about the results. Moreover, on January 25, 2018, after he was on notice that there was an issue of some kind, Appellant still was not on notice that he had tested positive for morphine and codeine. It is entirely plausible that, with the help of his wife, Appellant reconstructed what he had eaten 24 hours prior to the drug screening, which included poppy seed bagels. As such, the record is consistent with the ALJ's conclusion that Appellant in fact consumed poppy seeds 24 hours prior to his January 16, 2018 drug screening, and there is nothing in the record that contradicts the ALJ's finding that Appellant was credible.

Further, the Commission finds that the levels of morphine and codeine found in Appellant's urine supports the ALJ's determination that poppy seeds likely accounted for the presence of trace concentrations of these substances. There is no dispute that Dr. Sawyer, who testified to that effect, is a nationally recognized expert in the drug testing field. Dr. Sawyer convincingly testified that the trace concentrations of morphine and codeine found in Appellant's urine, while above DOC's 300 nanogram per milliliter threshold, were consistent with eating



unwashed poppy seeds, as the concentrations were at non-therapeutic doses and inconsistent with heroin, morphine, or codeine ingestion, which would have produced much higher concentrations. Further, Mr. Saini's testimony as to the impossibility of poppy seeds producing concentrations of morphine and codeine above DOC's thresholds was inconsistent with the article (ElSholy, 1995) DOC submitted at trial. Additionally, Appellant, on his own initiative, had a hair follicle test administered on February 2, 2018, which came out negative. Since this test had a look-back period that included the days covered by Appellant's January 16, 2018 urine drug screening, it provides further support for the ALJ's determination that the trace concentrations of morphine and codeine found in Appellant's urine were not a result of illicit drug use. While DOC argued that Appellant could have bleached his hair to affect this result, there is nothing in the record to support this assertion, and nothing that contradicts the ALJ's finding that Appellant was credible.

Finally, Dr. Sawyer's expert testimony supports the conclusion that DOC's current drug testing guideline of 300 nanogram per milliliter concentration threshold for prohibited concentrations of morphine and codeine may result in inaccurate findings of drug use, or false positives.

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**Decision**

Accordingly, the Commission hereby finds Appellant not guilty and reverses the determination of DOC. Appellant is to be restored to his position within 30 days.



Nancy G. Chaffetz, Commissioner  
Chair

Rudy Washington, Commissioner  
Vice Chair



Larry Dais, Commissioner

Charles D. McFaul, Commissioner

Dated: 11/29/18