

**AMERICAN ARBITRATION ASSOCIATION**

***In the Matter of Arbitration Between:***

**FRATERNAL ORDER OF POLICE,  
LODGE #5**

**and**

**CITY OF PHILADELPHIA**

**AAA Case #01-18-0001-1583  
(Gr: P/O Allen Marsh Discharge)**

**Walt De Treux, Esq., Arbitrator**

*Hearing Date: 2/27/19*

*Decision Date: 3/11/19*

**Appearances:** For the FOP – Richard G. Poulson, Esq., *WILLIG WILLIAMS DAVIDSON*  
For the City – Lisa Swiatek, Esq., *DEPUTY CITY SOLICITOR*

**Introduction and Statement of Relevant Facts**

Allen Marsh is a 15-year veteran of the City of Philadelphia Police Department. Officer Marsh is assigned to the 6<sup>th</sup> District and works on 5 Squad, Tactical Unit, Bike Patrol. Captain J [REDACTED] O [REDACTED], the [REDACTED], and Officer Marsh's direct supervisor, Sgt. R [REDACTED] H [REDACTED], evaluated him as "an exceptional Police Officer" and "one of 5 Squad's best officers, always taking on the toughest assignments and completing them with great results."

On December 31, 2017, Officer Marsh was working the 6p-2a shift that extends into New Year's Day. His wife, T [REDACTED], attended a family New Year's Eve party at her mother's house. At the end of the night, she brought home a platter of food for her husband. The platter included rum cake baked by Officer Marsh's grandmother.

After arriving home from work, Officer Marsh ate the dinner and later ate the cake. While watching TV, he began "feeling weird" and nauseous and hearing echoes from the voices

on TV. When the feeling persisted, he woke his wife and explained his troubling condition. As they tried to determine the source of his discomfort, she called her mother to ask if anyone else from the party reported being sick. During the conversation, she learned that her husband's grandmother had made the rum cake. She contacted the grandmother, who explained that she made two rum cakes – one with marijuana and one without. The couple realized that Officer Marsh inadvertently ingested marijuana from the rum cake.

That same day, Officer Marsh contacted his sergeant and explained the situation. After making some calls, the sergeant advised Officer Marsh to write a contact memo to Capt. C [REDACTED] with all the details of the inadvertent consumption of marijuana. Officer Marsh submitted the memo on January 2, 2018, his first day back to work. Following procedure, Capt. C [REDACTED] forwarded the memo to Internal Affairs.

On January 3, 2018, Internal Affairs (IA) had Officer Marsh submit to a drug test. The officer explained to IA that his grandmother made rum cake with marijuana. Not surprisingly, the urinalysis indicated the presence of marijuana metabolite at a value of 94 ng/ml, well above the Department's cut off limit of 15 ng/ml.

After the positive result, IA conducted an investigation, which included interviews with Officer Marsh's wife, grandmother, mother-in-law, and fellow officers and a report from a forensic toxicologist. In its investigative summary, IA advised Commissioner Richard Ross that "[t]he only certainty is that marijuana was present in P/O Marsh's urine specimen at the time he submitted to testing."

Commissioner Ross terminated Officer Marsh effective March 9, 2018 for violation of Department Directive 6.5 and Section 2-§011-10 of the Disciplinary Code. Officer Marsh timely

grieved his discharge. The parties were unable to resolve the grievance through the contractual steps, and the matter was referred to arbitration. On February 27, 2019, a hearing was held at the Philadelphia offices of the American Arbitration Association, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties closed their presentations with oral argument, and the matter was submitted to the Arbitrator for a decision.

#### **Issue**

The parties stipulated to the following issue,

*Was Officer Allen Marsh discharged for just cause? If not, what shall be the remedy?*

## Relevant Department Policy and Disciplinary Code Provisions

### DIRECTIVE 6.5 IMPAIRMENT AND DRUG TESTING OF POLICE DEPARTMENT SWORN PERSONNEL

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#### 2. POLICY

- A. It is the policy of the Philadelphia Police Department that the abusive or illicit use of drugs by its members will not be tolerated...

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#### 9. DISCIPLINARY ACTION

- A. Disciplinary action of dismissal will be taken against a member of the Department under the following conditions:
  - 1. A urinalysis and/or hair test indicates a positive result as defined in Section 3-D of this directive.

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#### 13. EXPOSURE TO ILLEGAL CONTROLLED SUBSTANCE

- A. Procedure
  - 1. Officers in on-duty or off-duty status who become aware that they indirectly or accidentally have breathed, ingested, (including undercover “forced ingestions”) or otherwise internalized illegal controlled substances, will report such occurrences, take police action where appropriate, or explain why police action could not have been taken.
  - 2. The officer, whether indirectly or accidentally exposed to controlled substances, will immediately submit a memorandum detailing the incident to their Commanding Officer...

### DISCIPLINARY CODE

<u>Section</u>	<u>Charge</u>	<u>1<sup>st</sup> Offense</u>
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2-¶011-10	Any use or ingestion of any illegal substances, prohibited under 35 P.S. ¶780-101 et seq. (Controlled Substance, Drug, Device and Cosmetic Act), or any substance that constitutes the commission of an offense under Federal law or in any other jurisdiction, State or Territory, either on or off duty.	Dismissal
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## Analysis and Decision

Officer Marsh inadvertently consumed marijuana that his grandmother had baked into her rum cake. When he realized what he did, he reported to his sergeant and to his Commanding Officer in accordance with Section 13 of Department Directive 6.5. To no one's surprise, his urinalysis test came back positive for marijuana metabolite.<sup>1</sup>

The Internal Affairs investigation did not produce any reliable evidence that countered Grievant's claim that the marijuana use was accidental and unknowing. Nonetheless, his employment was terminated. The City focused on the medical report of forensic toxicologist, Dr. R. [REDACTED] C. [REDACTED] (pronounced "C. [REDACTED]"). In his report, Dr. C. [REDACTED] found "no medically documentable explanation for the marijuana metabolite findings." He concluded, "And, absent investigative findings supporting the history and chronology of the January 1, 2018 marijuana exposure, the scenario presented by the donor is insufficient to explain the analytical results."

There were investigative findings, i.e., a lack of evidence that Grievant ingested the marijuana in any other way than through the rum cake. Although Dr. C. [REDACTED] dismissed Grievant's explanation, he acknowledged in his report,

"...since there is no reference as to (a) the size/weight of the total cake, (b) the size/weight of the "piece" of rum cake consumed, or (c) the quality of the marijuana utilized to lace the cake, then there is no way to estimate the amount (*e.g.*, milligrams) of marijuana contained in the ingested piece of rum cake. On this basis alone, it is therefore not possible to completely rule out oral intake of marijuana was associated with the January 3, 2018 controlled substances test findings."

In short, Dr. C. [REDACTED] does not believe Grievant's explanation, but he recognizes that Grievant's positive test result may be due to accidental consumption through the rum cake.

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<sup>1</sup> His hair test came back negative, a result that was left unexplained by the City's medical expert.

I find Officer Marsh's explanation credible. According to his command staff, he is an "exceptional Police Officer," with an impeccable reputation and 15 years of service. There was no prior suspicion of drug use. He promptly reported his inadvertent ingestion of the drug. He credibly testified that his grandmother often baked brownies laced with marijuana, and he always passed on eating those brownies. New Year's Eve was the first time she made a rum cake with marijuana. He had no reason to expect the cake was doctored with the drug. If Grievant intentionally used marijuana, he would have no incentive to contact his command staff. He was not scheduled for a drug test until he made his report. Had he not reported it, the Department likely would not have learned of his inadvertent use. Grievant's immediate reporting of the ingestion bolsters his claim that the consumption was inadvertent.

Directive 6.5 takes a strong stand against use of illegal substances, and the parties have agreed in the Disciplinary Code that use or ingestion of illegal substances warrants discharge on the first offense. But the collective bargaining agreement also requires just cause for discharge. Commissioner Ross recognized as much in his stipulated testimony, which read in full,

"The Commissioner would testify that he terminated Mr. Marsh pursuant to 2-§011-10 based on his positive drug test. Commissioner would testify that notwithstanding the Code, he considers mitigating circumstances including whether the officer voluntarily disclosed the drug use and whether the exposure fell under Section 13 of Directive 6.5."

In the present case, Grievant voluntarily disclosed the inadvertent ingestion of the drug and its use falls under Section 13 of Directive 6.5. Officer Marsh committed no wrongdoing. To the contrary, he followed Directive 6.5 in immediately reporting the drug use. In its Policy statement, Directive 6.5 addresses "abusive and/or illicit use of drugs" by police officers. Grievant's use of the marijuana was neither abusive or illicit. He unknowingly and inadvertently ingested marijuana when eating rum cake brought home from a party by his wife. Directive 6.5


and Disciplinary Code Section 2-§011-10 were not enacted to punish a good officer who, through no fault of his own, ingested marijuana. I find no just cause for discipline, let alone discharge.

In its closing statement, the City requested that if Grievant is reinstated, his reinstatement be conditioned on random drug testing for a 2-year period. Again, Grievant committed no wrongdoing. There was no credible evidence to suggest he ever used or uses marijuana. Mere suspicion raised by Dr. C ■■■'s report is not a sufficient basis to warrant any pre-conditions on Grievant's return to work.

#### **Award and Remedy**

The grievance is sustained. As a remedy, the City is directed to nullify Officer Marsh's discharge and remove it from his record. The City is further ordered to reinstate Officer Marsh to his former position with no loss of seniority as soon as practicable after issuance of this Award. The City is further ordered to make Officer Marsh whole for any losses incurred as a result of his discharge, including but not limited to, back pay and benefits for the period from the date of his termination to the date of his reinstatement, less interim earnings.

The Arbitrator shall retain jurisdiction of the case for the sole purpose of resolving any disputes over implementation of the remedy.

  
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