**BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO**

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| **IN THE MATTER OF CHARGES FILED AGAINST POLICE OFFICER ANTHONY A. NOWAKOWSKI, STAR No. 15267, DEPARTMENT OF POLICE, CITY OF CHICAGO,** | ) | **No. 12 PB 2787** |
| | ) | **(CR No. 1023258)** |
| **RESPONDENT.** | ) | |

## FINDINGS AND DECISION

On January 19, 2012, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Police Officer Anthony A. Nowakowski, Star No. 15267 (hereinafter sometimes referred to as "Respondent"), recommending that the Respondent be discharged from the Chicago Police Department for violating the following Rules of Conduct:

Rule 1: Violation of any law or ordinance.

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department.

Rule 6: Disobedience of an order or directive, whether written or oral.

The Police Board caused a hearing on these charges against the Respondent to be had before Jacqueline A. Walker, Hearing Officer of the Police Board, on June 25, June 27, and July 1, 2013.

Following the hearing, the members of the Police Board read and reviewed the record of the proceedings and viewed the video-recording of the testimony of the witnesses. Hearing Officer Walker made an oral report to and conferred with the Police Board before it rendered its findings and decision.

## POLICE BOARD FINDINGS

The Police Board of the City of Chicago, as a result of its hearing on the charges, finds and determines that:

1. The Respondent was at all times mentioned herein employed as a police officer by the Department of Police of the City of Chicago.

2. The written charges, and a Notice stating when and where a hearing on the charges was to be held, were served upon the Respondent more than five (5) days prior to the hearing on the charges.

3. Throughout the hearing on the charges the Respondent appeared in person and was represented by legal counsel.

### Motion to Suppress and Dismiss Charges

4. The Respondent is charged with violating Rule 1, Rule 2, and Rule 6, in that on or about January 21, 2009, he rendered a urine specimen that contained Drostanolone and/or its metabolites, Nandrolone metabolites, and/or Trenbolone metabolites, and thus he possessed an illegal anabolic steroid on or before January 21, 2009.

The Respondent filed a Motion to Suppress and Dismiss Charges and filed a Brief in support of his motion, arguing for the suppression of all evidence from the urine specimen and for the dismissal of all charges based on the Department's violation of his Fourth, Fifth, and Fourteenth Amendment rights under the United States Constitution, and the violation of the Agreement between the Fraternal Order of Police Lodge No. 7 and the City of Chicago ("Collective Bargaining Agreement") and Chicago Police Department Employee Resource E01-09.

The Respondent's Motion to Suppress and Dismiss is **granted in part and denied in part**. For the reasons set forth below, the motion to suppress all evidence from the urine specimen is granted, and the motion to dismiss all charges is denied.

It is well established that a urinalysis drug test required by a government employer for the purpose of detecting illegal drug use is a search subject to the Fourth Amendment, and therefore must be reasonable. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 678-79 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617-18 (1989); *Hillard v. Bagnola*, 297 Ill. App. 3d 906, 919 (1st Dist. 1998). It is equally well settled that in the government employment context (as opposed to the criminal law context), a warrant will not be required where the governmental employer has reasonable suspicion of employee drug use or involvement, or when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Skinner*, 489 U.S. at 619 (quotation omitted). This "special needs" exception permits drug testing of employees in safety-sensitive positions, pursuant to a random or uniform selection process, and such random or uniform testing does not require probable cause or even reasonable suspicion that the employee might be impaired. *See Von Raab*, 489 U.S. at 679; *Skinner*, 489 U.S. at 633-34.

However, where, as here, the drug testing is not done pursuant to a random or uniform selection process, the "special needs" exceptions, permitting suspicionless drug testing, do *not* apply, and the government employer must have a "reasonable suspicion" of employee drug use or involvement. *See Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996) (explaining that "[w]arrantless drug urinalysis testing of employees in safety-sensitive jobs may be consonant with the Fourth Amendment where part of a systematic, uniformly applied testing program (such as random testing), or where based on the employer's individualized 'reasonable

suspicion' of drug use by the employee," but that "in the absence of a 'special needs' random or uniform selection process, drug testing of a government employee … must be based on individualized suspicion, i.e., a reasonable suspicion that the employee was engaging in unlawful activity involving controlled substances"); *Jackson v. Gates*, 975 F.2d 648, 652-53 (9th Cir. 1992) (explaining that the "special needs" exceptions in *Van Raab* and *Skinner* did not apply -- and that individualized suspicion is required -- where the police officer "was not ordered to submit to urinalysis as part of a random drug testing program targeted at the entire police force," but "was singled out for testing"); *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74, 77 (3d Cir. 1989) (the "reasonable suspicion" standard applies in instances where the urinalysis was not conducted pursuant to a random drug urinalysis program).

Turning to the "reasonable suspicion" standard, reasonable suspicion depends both upon the content of information possessed and its degree of reliability. *Alabama v. White*, 496 U.S. 325, 330 (1990). Factors affecting the reasonableness of the suspicion may include "the nature of the information received, the reliability of the source, and the degree of corroboration." *Kramer v. City of Jersey City*, 455 F. App'x 204, 208 (3d Cir. 2011) (citing *Copeland v. Philadelphia Police Department*, 840 F.2d 1139, 1144 (3d Cir. 1988)). Courts have approved as constitutional the criteria used by the Department of Labor to justify reasonable suspicion. *See American Federation of Government Employees, AFL-CIO v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993). These criteria include "information provided either by reliable and credible sources or independently corroborated." *Id.* Based on these measures, an uncorroborated anonymous tip of a general nature would not appear to constitute or give rise to "reasonable suspicion." More is required. *Compare Roberts v. City of Newport News*, 36 F.3d 1093, *3 (4th Cir. 1994) (unpublished disposition) (finding that City did not have reasonable suspicion to compel Roberts

to provide a urine sample, where the only basis for believing that Roberts was using drugs were anonymous phone calls), *with Hillard,* 297 Ill. App. 3d at 919-20 (1998) (finding Department had reasonable suspicion to order police officer to take drug test where officer's wife and officer's sister had told the Department of officer's use of cocaine, and Department had also been aware of officer's prior participation in drug rehabilitation program for cocaine usage).

Illinois case law supports the conclusion that an anonymous tip of a general nature, without more, does not give rise to "reasonable suspicion." In *People v. Kline*, 355 Ill. App. 3d 770 (2005), the Illinois Supreme Court, discussing the "reasonable suspicion" standard in the context of a school dean's removal of a student from a class room for questioning, concluded that information in an anonymous tip did not give rise to reasonable suspicion necessary to justify student's seizure. *Id.* at 776-77.

There are a few cases addressing the "reasonable suspicion" required for a non-random drug test of a police officer accused of using anabolic steroids, with mixed results. *Compare Richard v. LaFayette Fire and Police Civil Service Bd.*, 8 So.3d 509 (S. Ct. La. 2009) (the mere fact that the police officer received a telephone call from a person who was involved with illegal drugs while that person's apartment was being raided, did not establish reasonable suspicion that the police officer was involved in illegal drugs); *with Green v. City of North Little Rock*, 388 S.W.3d 85 (Ark. App. 2012) (reasonable suspicion existed where officer's ex-wife reported that the officer was using steroids, that she discovered a large bag of syringes in her home, and bank statements showing payments to overseas company for suspected steroids, and police chief was aware of two recent hostile encounters between the officer and other police officers and observed that officer had "become swollen and bloated"); *Kramer*, 455 Fed. App'x. at 208 (reasonable suspicion existed where police chief received verifiable information from a reliable source that

specific officers were filling steroid prescriptions at a pharmacy in another city). These cases, too, bolster the conclusion that something more than an uncorroborated anonymous tip is required to establish "reasonable suspicion."

Turning to the issue of admissibility of evidence, the case law supports the conclusion that absent the reasonable suspicion necessary to justify a non-random urinalysis drug test, the positive results of that drug test should be excluded as evidence. *See Richard*, 8 So.3d at 513, 522 (affirming reversal of Board decision to terminate police officer where chief of police failed to establish in the record that he had reasonable suspicion to order a non-random drug test of an officer at the time the test was ordered); *Kline*, 355 Ill. App. 3d at 777 (affirming order granting motion to suppress evidence obtained as result of a seizure made without reasonable suspicion to justify seizure); *see also Jackson*, 975 F.2d at (affirming jury award of damages in §1983 action against city and police chief brought by police officer who was discharged for refusing to comply with order to provide a urine sample for drug testing, where there was no reasonable suspicion to justify the order for a non-random drug test). Based on this authority, evidence obtained from a non-random drug test ordered without reasonable suspicion should be excluded.

The Police Board finds and determines, based on the evidence presented at the hearing, that the Department did not have the reasonable suspicion necessary to justify a non-random urinalysis drug test of Officer Nowakowski. Then-Lieutenant Barbara West, who was at the time a supervisor in the Internal Affairs Division, initiated the complaint against Officer Nowakowski based on an anonymous tip. According to her written report (in evidence as Superintendent Ex. No. 1), the anonymous information received was that Officer Nowakowski's "behavior was indicative of a person using steroids" and that "he had grown extremely large in size and statute [*sic*]." Lieutenant West's written report contains no further information regarding Officer

Nowakowski's behavior or appearance. Lieutenant West testified that she did not herself receive this tip. She did not note in her written report who did receive the tip, and she testified that she did not recall who did. Lieutenant West also testified that she had no personal knowledge nor did she make any personal observation of Officer Nowakowski's behavior or appearance.

Tyrone Jordan, who at the time was a sergeant in the Internal Affairs Division, testified that he did not receive the anonymous tip. He further testified that he was ordered to write an initiation report to register the anonymous complaint, and that he then sought out Officer Nowakowski to serve him with the allegations and have him come in to submit to a urine test. (Sergeant Jordan testified that it was other officers who ultimately located and served Officer Nowakowski.) Sergeant Jordan testified that he did not conduct any investigation of the anonymous information about Officer Nowakowski's behavior or appearance prior to ordering Nowakowski to submit to a non-random drug test.

In an Order communicated by the hearing officer to the parties at the April 23, 2013, status hearing, the Police Board directed counsel for the Superintendent to present at the hearing evidence regarding the Department's receipt of the anonymous tip and its investigation of the tip prior to ordering Respondent to submit to drug testing. Nevertheless, there was no evidence presented at the hearing to show that the Department obtained any independent corroboration of the anonymous tip. The evidence presented at the hearing indicates that the Department merely received an anonymous tip of a general nature—there is no evidence in the record of the specifics of Nowakowski's alleged behavior (for example, how he was behaving, or when, or where, or whether he was off-duty or on-duty) and there is no evidence of the specifics of his change in appearance. The Department then, without conducting any further investigation of the anonymous tip, ordered Officer Nowakowski to submit to a non-random drug test. The Board

finds that this order, based on a general anonymous tip and nothing more, violates Officer Nowakowski's constitutional rights, for the Department did not have a reasonable suspicion that Nowakowski was using illegal drugs. Therefore, the results of the non-random drug test must be excluded as evidence in this case, and Officer Nowakowski's motion to suppress this evidence is granted.[1]

The Board declines to dismiss the charges against Officer Nowakowski, as there is other evidence in the record that the Board must consider in deciding this case. Officer Nowakowski's motion to dismiss all charges is therefore denied.

**Charges Against the Respondent**

5. The Respondent, Police Officer Anthony A. Nowakowski, Star No. 15267, charged herein, is **not guilty** of violating, to wit:

Rule 1: Violation of any law or ordinance,

in that the Superintendent did not prove by a preponderance of the evidence the following charge:

> On or about January 21, 2009, Police Officer Anthony A. Nowakowski rendered a urine specimen that contained Drostanolone and/or its metabolites, Nandrolone metabolites, and/or Trenbolone metabolites, and thus he possessed an anabolic steroid on or before January 21, 2009, in violation of Chapter 720 of the Illinois Compiled Statutes, Section 570/402(d).

With the exclusion of the Department's urine sample results obtained for Officer Nowakowski, as is further delineated herein above, there is a lack of evidence presented by the

[1] The Board finds that the Department also did not follow its own procedures after receiving the anonymous tip. Special Order S08-01-03 states in relevant part: "…upon completion of the initial stages of an administrative investigation which indicates reasonable grounds to believe that the accused member is personally using illicit drugs or is personally misusing legally prescribed or dispensed medications, the accused member will be required to submit a urine specimen…." The evidence in the record in this case indicates that prior to requiring Officer Nowakowski to submit a urine specimen the Department did not conduct any investigation that indicated reasonable grounds to believe that Officer Nowakowski was using steroids.

Department to meet its burden that Officer Nowakowski violated Chapter 720 of the Illinois Compiled Statutes, Section 570/402(d).

6. The Respondent, Police Officer Anthony A. Nowakowski, Star No. 15267, charged herein, is **not guilty** of violating, to wit:

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department,

in that the Superintendent did not prove by a preponderance of the evidence the following charge:

On or about January 21, 2009, Police Officer Anthony A. Nowakowski rendered a urine specimen that contained Drostanolone and/or its metabolites, Nandrolone metabolites, and/or Trenbolone metabolites, thereby impeding the Department's efforts to achieve its policy and goals and/or bringing discredit upon the Department.

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference.

7. The Respondent, Police Officer Anthony A. Nowakowski, Star No. 15267, charged herein, is **not guilty** of violating, to wit:

Rule 6: Disobedience of an order or directive, whether written or oral,

in that the Superintendent did not prove by a preponderance of the evidence the following charge:

On or about January 21, 2009, Police Officer Anthony A. Nowakowski rendered a urine specimen that contained Drostanolone and/or its metabolites, Nandrolone metabolites, and/or Trenbolone metabolites, thereby violating Employee Resource E01-09 (formerly known as Administrative Special Order 05-01, Article III, Section B).

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference. Additionally, based on a lack of evidence, a violation of Employee Resource E01-09 (formerly known as Administrative Special Order 05-01, Article III, Section B) was not proven.

## POLICE BOARD DECISION

The Police Board of the City of Chicago, having read and reviewed the record of proceedings in this case, having viewed the video-recording of the testimony of the witnesses, having received the oral report of the Hearing Officer, and having conferred with the Hearing Officer on the credibility of the witnesses and the evidence, hereby adopts the findings set forth herein by the following votes:

By a vote of 6 (Ballate, Conlon, Fry, McKeever, Miller, Rodriguez) in favor to 2 opposed (Carney, Foreman), the Board **grants** the Respondent's motion to suppress all evidence from the urine specimen.

By a vote of 8 (Carney, Ballate, Conlon, Foreman, Fry, McKeever, Miller, Rodriguez) in favor to 0 opposed, the Board **denies** the Respondent's motion to dismiss all charges.

By a vote of 5 (Ballate, Fry, McKeever, Miller, Rodriguez) in favor to 3 opposed (Carney, Conlon, Foreman), the Board finds the Respondent **not guilty** of violating Rule 1, Rule 2, and Rule 6.

As a result of the foregoing, the Police Board, by a vote of 5 (Ballate, Fry, McKeever, Miller, Rodriguez) in favor to 3 opposed (Carney, Conlon, Foreman), hereby determines that cause exists for **restoring** the Respondent to his position as a police officer with the Department of Police, and to the services of the City of Chicago, with all rights and benefits, effective February 10, 2012.

**NOW THEREFORE, IT IS HEREBY ORDERED** that the Respondent, Police Officer Anthony A. Nowakowski, Star No. 15267, as a result of having been found **not guilty** of the charges in Police Board Case No. 12 PB 2787, be and hereby is **restored** to his position as a police officer with the Department of Police, and to the services of the City of Chicago, with all rights and benefits, effective February 10, 2012.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 15th DAY OF AUGUST, 2013.

/s/ Melissa M. Ballate
/s/ Rita A. Fry
/s/ Susan L. McKeever
/s/ Johnny L. Miller
/s/ Elisa Rodriguez

Attested by:

/s/ Max A. Caproni
Executive Director
Police Board

**DISSENT**

**Demetrius E. Carney and Ghian Foreman**

We dissent from the Findings and Decision of the majority of the Board. We find that, based on the information the Department received from the anonymous tip regarding Officer Nowakowski's behavior and appearance, the Department did have the reasonable suspicion necessary to justify a non-random urinalysis drug test of Officer Nowakowski, and therefore the results of the non-random drug test should not be excluded as evidence in this case, and Officer Nowakowski's motion to suppress this evidence should be denied.

Based on the results of the urine specimen, we vote to find the Respondent guilty of all charges and vote to discharge him from the Chicago Police Department.

/s/ Demetrius E. Carney

/s/ Ghian Foreman

**DISSENT**

**William F. Conlon**

I concur with the majority that the evidence from the urine specimen should be excluded. However, I dissent from the majority's findings that the Respondent is not guilty of the Rule 2 charge, which I read as separate and distinct from the other charges; those other charges are dependent on the result of the urinalysis. Despite the suppression of the results of the urinalysis, I believe it is uncontroverted that Office Nowakowski took performance-enhancing drugs that contained anabolic steroids.

The Rule 2 charge is not, as I read it, dependent on the urinalysis. As described by counsel for the Respondent:

> This matter was evaluated and investigated with Officer Nowakowski's cooperation. He [Respondent] brought in the supplements themselves to the Department so that the Department could analyze those particular supplements. Tr. 353, Line 5-11.

Dr. Shirley Conibear then took the list of ingredients shown on each supplement container and researched whether any contained anabolic steroids which would make the supplements illegal and the use of those supplements likewise illegal under Illinois law.[1] Independent of any urinalysis, Dr. Conibear found that several of the supplements Respondent admitted to using did contain anabolic steroids. A violation of the Illinois Criminal Code by a police officer qualifies as:

> [An] action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit to the Department.

[1] The Respondent does not contest the presence of anabolic steroids in the supplements he was using. Indeed, when he went to Google to research his supplements he found, similar to Dr. Conibear, that the supplements "contain anabolic substances." Tr. 280

The question, of course, remains as to whether the voluntary submission of the supplements as part of the Respondent's defense is "the fruit of the poisonous tree" and ought to also be excluded. I think not and therefore believe that there is sufficient independent evidence to find the Respondent guilty of the Rule 2 charge.

/s/ William F. Conlon

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THESE FINDINGS AND DECISION

THIS _____ DAY OF _____, 2013.

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SUPERINTENDENT OF POLICE