UPDATE
DRUGS DON'T WORK IN NJ!
Partnership for a Drug-Free New Jersey

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A CASE STUDY IN HOW *NOT* TO TERMINATE AN EMPLOYEE WHO FAILED A DRUG TEST

Sometimes a court decision can be instructive not because of the law it promulgates, but because of the object lesson it provides. Such a case is the Matter of Michael Brown, an unpublished decision recently decided by the Superior Court of New Jersey, Appellate Division. Unpublished decisions have no precedential value, so you will not see the Brown decision cited as legal authority by any other court. However, the case provides an object lesson in how **not** to proceed when terminating an employee for a failed drug test.

Brown was employed as a Corrections Officer for approximately seventeen years. He was described as a *"very low-keyed, soft-spoken individual"* who *"did his job and had no prior disciplinary problems"* other than minor attendance issues of no great note. However, one day, Brown was randomly selected for a drug test under the employer's random testing policy. The test was reported as positive for marijuana use. Brown was thereupon terminated following an internal hearing. As a civil service employee, Brown exercised his right to appeal his termination for hearing before an Administrative Law Judge. This is where matters get interesting.

An independent contractor had performed the random drug test. That contractor, in turn, retained a laboratory located in Kansas to perform the actual laboratory test on the sample.

At the hearing before the Administrative Law Judge, the employer introduced two witnesses: the Corrections Captain in charge of personnel, and the president of the drug testing contractor. As the court described it, *"Neither of the witnesses had any personal knowledge of the procedures used for the testing, nor could they establish a chain of custody from the time the sample was taken to the time it was purportedly tested at the laboratory in Kansas."*

The company president *"believed"* that the Attorney General Guidelines for Law Enforcement Officer Testing had been followed, *"but had no personal knowledge as to whether they actually were."* He also had no knowledge of who was present when Brown was tested, who witnessed the test, whether the sample had been properly labeled, packaged and shipped, or who had participated in the shipping of the sample. However, the company president was able to testify *"that the proper interview form was not used."*

The employer apparently intended to rely on drug test result documents themselves. However, these were apparently *"illegible and incomplete."* Nonetheless, the Administrative Law Judge somehow sustained the charges. However, due to the *"illegible and incomplete"* nature of the documents presented, the matter was remanded to allow the employer the opportunity *"to call additional witnesses to authenticate the validity of the documents or provide additional testimony."* Despite this pointed hint, the employer merely provided *"more legible copies of the same documents previously submitted."* Apparently, the medical officer who had reviewed the laboratory reports had been reassigned to China at

the time of the hearing, and all of his records had already been disposed of. The Kansas laboratory had also been unable to locate any of the individuals who had personal knowledge of Brown's test. Thus, no one could verify that the test was conducted in accordance with required guidelines, or that the sample had been properly collected, properly labeled, properly shipped, and properly tested.

The Administrative Law Judge acknowledged that the laboratory evidence from Brown's sample had been *"inadequately presented."* Nonetheless, the Administrative Law Judge again upheld the termination, and the Civil Service Commission accepted the Administrative Law Judge's determination. Unfortunately, the appeals court did not. The court's criticism of the case below was blunt:

> *"Our difficulty in reviewing this record is the lack of competent evidence. There were no witnesses who testified to first-hand knowledge of the procedures employed, and no witnesses who could verify that any of the essential elements of a fair and reliable testing procedure were followed."*

The court also rejected the Administrative Law Judge's apparent finding that the employer's documents were reliable business records, finding *"insufficient evidence"* to support such a conclusion. *"The documents are entirely hearsay and there was no competent testimony from anyone with first-hand knowledge as to the preparation of those records or even to ascertain that they were made in the regular course of business."* The company President was *"not the custodian or the preparer of [the] records, and he could not even verify that the Attorney General's guidelines [for drug testing] were followed."* The court thereupon reversed the termination and ordered the employee reinstated to duty.

Notably, Brown appears to have presented no evidence that the test itself had been conducted improperly, that the test results were unreliable, that the Kansas laboratory was

not properly qualified to analyze urine samples, or that there was a legitimate explanation for the apparent positive test result. The case turned solely on the employer's failure to provide competent evidence. This gives rise to the disturbing possibility that a drug user was returned to a safety-sensitive position due simply to his employer's failure to properly present its case.

What lessons can we take from the Brown case?

First and foremost is: the importance of complete and accurate recordkeeping. Illegible and incomplete records, and the use of the wrong form, played a substantial role in the employer's downfall in Brown. Yet one sees this occur time and again. The use of an incorrect or an outdated form; the omission of information; the misplacing of a key document - - all these can return to haunt an employer. In any workplace in which *"cause"* must be proven to remove an employee, even for a positive drug test, (such as a Civil Service municipality or a unionized private sector employer), accurate and complete recordkeeping is a must. But even an at-will employer, who is free to fire employees without needing to prove "cause," needs to keep complete and accurate records as well - - for example, to defend against potential discrimination law suits, or to demonstrate full compliance with U.S. Department of Transportation drug testing mandates.

The second lesson is: retain drug-testing professionals who are familiar with litigation and are prepared to fully assist. Again, this is absolutely critical for civil service municipalities and unionized employers. A company president's willingness to stand by his/her product is admirable. But as Brown demonstrates, it is of little use of the company president cannot testify to how the test was conducted or whether required procedures were followed. Your service providers should be willing to produce the individuals with

first-hand knowledge who can certify that all appropriate testing procedures were followed, that chain of custody was maintained, and can assure the court, administrative agency or arbitrator that an accurate, reliable positive test result was produced. A company representative who can discuss services provided in only a general way is not sufficient.

The third lesson is: short-cuts backfire. The employer in Brown may have thought that it was saving money by presenting a "bare-bones" case. It may have believed that the mere production of a positive test result was all that would be needed. It may also have had no choice but to proceed as it did due to the unavailability of necessary witnesses. Indeed, the employer *would* have prevailed had Mr. Brown not decided to appeal the matter further. But as the appellate decision demonstrates, a "bare-bones" approach - - whether motivated by a desire to save money or some other reason - - is all too often a recipe for disaster.

This applies to drug testing specialists as well as the employer. I have seen far too many cases in which a technician's or nurse's seemingly minor deviation from technical requirements has harmed an otherwise solid case. In one example, a unionized employer was forced to negotiate a settlement with an employee who had failed a drug test in violation of his Last Chance agreement with the employer. It was learned that the technicians responsible for securing the employee's urine sample had not assured that 15 milliliters of the sample had been preserved for testing as a *"split specimen*" to confirm a positive result. The technician in charge unilaterally decided that the approximately 7 milliliters she had collected for split specimen testing was *"good enough*" (and had failed to share this detail with the employer). Although there was no evidence that the insufficient

split specimen in any way affected the validity of the testing, it proved to be serious enough a deviation from procedure to call the entire process into question, and to force the employer to accept a compromise result.

Corrective disciplinary action, including termination where necessary, is the critical *"follow through"* to a successful drug-free workplace policy. The most vigorous drug screening program can be undermined if it cannot be enforced. As Brown demonstrates, accurate record keeping and vigorous defense against appeals are critical. Your drug testing professionals should be willing and able to assist you properly in this endeavor. The Partnership for a Drug-Free New Jersey / Drugs Don't Work in NJ! initiative is a useful resource to assist you in finding the professionals you need.

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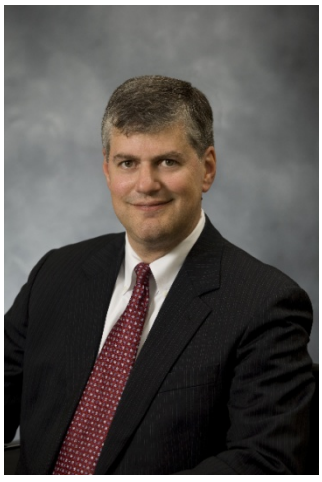

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