BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO

IN THE MATTER OF CHARGES FILED AGAINST POLICE OFFICER ADIS KLINCEVIC, STAR No. 18392, DEPARTMENT OF POLICE, CITY OF CHICAGO,	)	**No. 13 PB 2846**
	)	**(CR No. 1057923)**
RESPONDENT.	)	

FINDINGS AND DECISION

On December 4, 2013, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Police Officer Adis Klincevic, Star No. 18392 (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 August 12, August 26, and October 1, 2014.

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: (1) on or about October 22, 2012, he rendered a urine specimen that contained nandrolone metabolites, fluoxymesterone metabolites, boldenone metabolites, trenbolone metabolites, drostanolone metabolites, and/or stanozolol metabolites, and thus he possessed one or more anabolic steroids on or before October 22, 2012; and (2) in or around 2012, he ingested and/or used or otherwise absorbed into his body supplements and/or veterinary pharmaceuticals containing metabolic precursors to anabolic steroids and/or anabolic steroids.

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 do *not* apply, and the government employer must have a "reasonable suspicion" of employee drug use or involvement. *Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996); *Jackson v. Gates*, 975 F.2d 648, 652-53 (9th

Cir. 1992); and *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74, 77 (3d Cir. 1989). 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."

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 Klincevic. On October 22, 2012, the Police Department's Bureau of Internal Affairs received an anonymous letter alleging that Officer Klincevic was in possession of and using anabolic and androgenic steroids and human growth hormone. On that same day, the Department, without any further investigation of this anonymous allegation and

without obtaining any independent corroboration of this anonymous tip, ordered Officer Klincevic to submit to a non-random drug test by providing a urine specimen. Officer Klincevic complied with this order and provided a urine specimen on October 22, 2012.

The Board finds that this order, based on a general anonymous tip, without any investigation or effort to corroborate the information contained in the anonymous tip, violates Officer Klincevic's constitutional rights, for the Department did not have a reasonable suspicion that Klincevic was using illegal drugs.

Having found that the Department's drug test violated Officer Klincevic's constitutional rights, the Board turns to the issue of whether the results of the drug test must be excluded. Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. 338, 347 (1974). The Board recognizes that the exclusionary rule is not necessarily applied in all non-criminal proceedings, but that it should be applied where its remedial objective of deterring unlawful police conduct is best served. *Calandra*, 414 U.S. at 348; *See also, U.S. Residential Management and Development, LLC v. Head*, 397 Ill. App.3d 156, 161-164 (1st Dist. 2009); *Grames v. Illinois State Police*, 254 Ill. App.3d 191, 199-201 (4th Dist. 1993). The Police Board finds that the exclusionary rule should apply to proceedings like these in which the Superintendent seeks the severe penalty of depriving a police officer of his job based solely on the results of an unconstitutional search. Applying the exclusionary rule here will serve to deter efforts to discharge police officers solely on the basis of unlawful searches, and ensure that in future cases some minimal effort will be made to corroborate anonymous tips before non-random drug tests are ordered. The opposite conclusion would open the gates to discharge cases based on unlawful drug testing, which the Police Board cannot condone.

Therefore, the results of the non-random drug test must be excluded as evidence in this case, and Officer Klincevic's motion to suppress this evidence is granted.[1]

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

Charges Against the Respondent

5. The Respondent, Police Officer Adis Klincevic, Star No. 18392, 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 October 22, 2012, Police Officer Adis Klincevic rendered a urine specimen that contained one or more of the following: nandrolone metabolites, fluoxymesterone metabolites, boldenone metabolites, trenbolone metabolites, drostanolone metabolites, and/or stanozolol metabolites; thus he possessed one or more anabolic steroids on or before October 22, 2012, in violation of Chapter 720 of the Illinois Compiled Statutes, Section 570/402(d).

With the exclusion of the results of the urine specimen obtained for Officer Klincevic (see paragraph no. 4 above), there is insufficient evidence presented by the Superintendent to prove that Officer Klincevic ingested or used or otherwise absorbed into his body any of the substances specified in this charge.

[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 Klincevic to submit a urine specimen the Department did not conduct any investigation that indicated reasonable grounds to believe that Officer Klincevic was using steroids.

Officer Klincevic testified that he only ingested the supplements that were on the list he gave to Dr. Shirley Conibear, the medical review officer for the Department. Furthermore, Dr. Conibear testified that she had no evidence that the supplements taken by Officer Klincevic contained the steroids that showed a positive result during the lab testing. Additionally, Dr. Conibear testified that she never analyzed or tested the supplements taken by Officer Klincevic to determine if they contained the targeted steroids that appeared in the test results.

Similarly, in the testimony of Dr. Mark Levy, the treating physician for Officer Klincevic, Dr. Levy stated that he did not obtain any independent information from Officer Klincevic as to whether Officer Klincevic was ingesting or taking any illegal anabolic steroids. Dr. Levy further testified that if he had any information that Officer Klincevic was taking supplements that contained steroids, he would have advised Officer Klincevic to stop doing so.

The Superintendent failed to present sufficient evidence, outside of the excluded lab test results, that Officer Klincevic ingested, or used, or otherwise absorbed into his body any of the substances specified in the charges against him.

6. The Respondent, Police Officer Adis Klincevic, Star No. 18392, 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:

Count I: On or about October 22, 2012, Police Officer Adis Klincevic rendered a urine specimen that contained one or more of the following: nandrolone metabolites, fluoxymesterone metabolites, boldenone metabolites, trenbolone metabolites, drostanolone metabolites, and/or stanozolol 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 Adis Klincevic, Star No. 18392, 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:

Count II: In or around 2012, Police Officer Adis Klincevic ingested and/or used or otherwise absorbed into his body supplements and/or veterinary pharmaceuticals containing metabolic precursors to anabolic steroids and/or anabolic steroids, and/or he ingested and/or used or otherwise absorbed into his body anabolic steroids, 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. With the exclusion of the results of the urine specimen obtained for Officer Klincevic (see paragraph no. 4 above), there is insufficient evidence presented by the Superintendent to prove that Officer Klincevic ingested or used or otherwise absorbed into his body any of the substances specified in this charge.

8. The Respondent, Police Officer Adis Klincevic, Star No. 18392, 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:

Count I: On or about October 22, 2012, Police Officer Adis Klincevic rendered a urine specimen that contained one or more of the following: nandrolone metabolites, fluoxymesterone metabolites, boldenone metabolites, trenbolone metabolites, drostanolone metabolites, and/or stanozolol metabolites, thereby violating Employee Resource E01-09, Section II(B).

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

9. The Respondent, Police Officer Adis Klincevic, Star No. 18392, 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:

Count II: In or around 2012, Police Officer Adis Klincevic ingested and/or used or otherwise absorbed into his body supplements and/or veterinary pharmaceuticals containing metabolic precursors to anabolic steroids and/or anabolic steroids, and/or he ingested and/or used or otherwise absorbed into his body anabolic steroids, thereby violating Employee Resource E01-09, Section II(B).

See the findings set forth in paragraph no. 7 above, which are incorporated here by reference.

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 in favor (Demetrius E. Carney, Michael Eaddy, Rita A. Fry, Susan L. McKeever, Elisa Rodriguez, and Rhoda D. Sweeney) to 2 opposed (Ghian Foreman and William F. Conlon), the Board **grants** the Respondent's motion to suppress all evidence from the urine specimen.

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

By votes of 6 in favor (Carney, Eaddy, Fry, McKeever, Rodriguez, and Sweeney) to 2 opposed (Foreman and Conlon), the Board finds the Respondent **not guilty** of violating Rule 1, Rule 2, and Rule 6.

As a result of the foregoing, the Board, by a vote of 6 in favor (Carney, Eaddy, Fry, McKeever, Rodriguez, and Sweeney) to 2 opposed (Foreman and Conlon), 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 December 12, 2013.

NOW THEREFORE, IT IS HEREBY ORDERED that the Respondent, Police Officer Adis Klincevic, Star No. 18392, as a result of having been found **not guilty** of the charges in Police Board Case No. 13 PB 2846, 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 December 12, 2013.

This disciplinary action is adopted and entered by a majority of the members of the Police Board: Demetrius E. Carney, Michael Eaddy, Rita A. Fry, Susan L. McKeever, Elisa Rodriguez, and Rhoda D. Sweeney.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 11th DAY OF DECEMBER, 2014.

Attested by:

/s/ DEMETRIUS E. CARNEY
President

/s/ MAX A. CAPRONI
Executive Director

DISSENT

The undersigned members of the Police Board dissent from the granting of the Motion to Suppress, would find the Respondent guilty of the charges, and vote to discharge the Respondent from the Chicago Police Department.

The charges are clear and straightforward: the Respondent ingested and/or used one or more non-prescribed anabolic steroids in violation of Illinois law and specified Rules and Regulations of the Chicago Police Department. Part of the evidence consists of the laboratory analysis of an October 22, 2012, urine sample taken from the Respondent based on an anonymous note. The Superintendent admits that based upon receipt of that anonymous note alone, which was detailed (in some cases with incorrect detail), the Chicago Police Department ordered that a urine specimen be immediately secured from Respondent. Representatives of the CPD secured the admittedly non-random urine sample.

The Respondent raises several grounds for exclusion of the evidence. Among them is that the taking of the non-random urine sample based on an anonymous complaint without corroboration violates (a) the Collective Bargaining Agreement and related rules and laws, and (b) the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution.[1]

The question posed by these drug-tests-based-on-an-anonymous-complaint cases, where there is no corroborative evidence prior to the search, is: must the evidence be suppressed or is another sanction more appropriate?

Unlike in criminal matters, suppression or exclusion of evidence improperly secured by law enforcement personnel in a non-criminal matter is not constitutionally required. *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479

[1] The Respondent also cites the Police Board's earlier decision *In the Matter of Anthony A. Nowakowki, 12PB2787*, in which evidence illegally seized was excluded.

(1984). (Suppression of illegally seized evidence not required in a deportation proceeding.) Nor do we believe that it is required in a matter involving an alleged violation of a Collective Bargaining Agreement, in essence a breach of contract case (more discussion on that later).

In *Fedango v. City of Chicago*, 333 Ill. App. 3d 339, 775 N.E.2d 26 (2002), the Illinois Appellate Court, First District, found that suppression of statements by a city employee improperly secured was not required. The court noted that:

> "[T]he exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings against all persons " citing McCullough v. Knights, 293 Ill. App .3d 591, 596, 688 N.E.2d 1186 (1977), quoting United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613 (1974).

In 1993, the Illinois Appellate Court, Fourth District, in *Grames v. Illinois State Police*, 254 Ill. App. 3d 191, 625 N.E.2d 945 (1993) addressed the exclusionary rule in the context of an administrative discharge case involving a law enforcement officer.

In *Grames*, the State Police Merit Board adopted the findings of a hearing officer that the Respondent, a State Police Officer, should be discharged for violating various State Police Department rules. The Respondent State Police Officer sought to suppress the contents of a plastic bag (which contained cocaine) found in her bathroom on the grounds that the discovery of the plastic bag was the product of an illegal search. The court engaged in a careful review of the applicability of the exclusionary rule to non-criminal proceedings, found it inapplicable in an administrative proceeding seeking discharge of a police officer, and affirmed the discharge.

Citing *Calandra*, supra, the court in *Grames* recognized that the exclusionary rule is applicable to criminal proceedings and "has never been interpreted to 'proscribe the use of illegally seized evidence in all proceedings or against all persons.'" Citing *Brown v. Illinois*, 422, U.S 590, 600, 95 S. Ct. 2254, 2260 (1975). Rather, the *Grames* court found that guidance

from the U.S. Supreme Court requires that a "balancing test be employed to determine whether an extension [of the exclusionary rule] is warranted" (bracketed materials added).

The test is straightforward.

> The likely social benefits of excluding unlawfully seized evidenced are weighed against the likely costs; where the costs exceed the benefits, the exclusionary rule may not be applied.

Citing *Immigration and Naturalization v. Lopez-Mendoza*, 468 U.S. at 1041, 104 S. Ct. at 3484-85; and *U.S. v. James*, 428 U.S. 433, 446, 96 S. Ct. 3021, 3028 (1976).

The court went on to acknowledge that it could find no Illinois court which has addressed the exclusionary rule application in a matter involving an administrative discharge proceeding. Nonetheless, the court affirmed the discharge, did not apply the exclusionary rule, and held:

> … we agree with the Hearing Officer's conclusion that the exclusionary rule should not be extended to encompass the present situation. The damage to the operation of an effective State police force would far outweigh any benefit which would result from the exclusionary rule . . . .The instant proceeding did not determine guilt or innocence of plaintiff as in a criminal proceeding, it was an administrative proceeding evaluating whether her conduct amounted to a violation of department rules.

So, where does the balancing test leave us here? Does the public – and, indeed, the Respondent's fellow officers – deserve better than an impaired officer serving and protecting it?

To sharpen the focus, what do we do in future cases if a respondent is found, through non-random, anonymous complaint-based and non-corroborated testing, to have non-prescribed anabolic steroids and/or cocaine or heroin in his or her system; is the proper course to suppress that evidence and put that officer back on the street in service of the people of Chicago? In both cases, we believe, the balancing moves distinctly in favor of protecting the public from an impaired officer. The costs of exclusion to the public are too high and the benefits are too minimal. See, *Fedango*, supra. We believe the same is true here.

The dissent is not saying the failure to corroborate should go unaddressed. We believe the proper approach as a matter of the responsible application of the law and public policy is to implement a process of discipline for members of the Chicago Police Department who fail to corroborate anonymous complaints. For example here, the ranking officer handling the complaint should have required corroborating evidence to support the allegations of the anonymous complaint before ordering the taking of the urine sample. It is not asking too much to impose that obligation on the ranking officer in that position and discipline, in some appropriate fashion, his failure to do so.

/s/ GHIAN FOREMAN
Vice President

/s/ WILLIAM F. CONLON

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THESE FINDINGS AND DECISION

THIS _____ DAY OF _____, 2014.

_____
GARRY F. McCARTHY
Superintendent of Police