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Police Commissioner Jessica S. Tisch
Police Department City of New York
One Police Plaza, 14th Floor
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In the Matter of the Disciplinary Proceedings against Police Officer Frankie F. Palaguachi, Tax Registry No.: 957932, Shield No.: 27476, Case Nos.: 2024-30166

Re: Comments on Draft Report and Recommendation

Dear Commissioner Tisch:

Introduction

The Draft Report and Recommendation ("Draft") in the matter of Police Officer Frankie F. Palaguachi is fundamentally defective. It presents itself as a legal analysis of scientific evidence, but in reality, it offers no legal reasoning at all. Instead, it substitutes circular logic and institutional habit for the careful application of binding law. Where *Frye*, Rule 7.01, and the Uniform Guidelines on Employee Selection Procedures (UGESP) impose strict standards on the admissibility of scientific evidence, the Draft recites accreditation, licensure, FDA clearance, and the Department's prior use of Psychemedics' testing as if those factors alone could establish validity. They cannot. Under New York law, the proponent of novel scientific evidence bears the burden of demonstrating that the methodology enjoys general acceptance in the relevant scientific community. Here, the Department failed to carry that burden. The record in fact shows the opposite: the Department's own witness admitted that no such general acceptance exists. That admission should have ended the inquiry. Instead, the Draft ignores it and presses forward with conclusions untethered from law or evidence.

The flaws in the Draft are not peripheral. They go to the heart of due process and the credibility of the NYPD's disciplinary system. To begin with, the Draft relies heavily on the testimony of Dr. Ryan B. Paulsen, Psychemedics' own laboratory director. By definition, Dr. Paulsen is not an expert under Frye. The Frye standard demands evidence of consensus in the independent scientific community, not assurances from the very vendor whose methodology is in dispute. Dr. Paulsen's livelihood and professional standing are tied to defending Psychemedics' proprietary process; his testimony cannot be treated as evidence of independent acceptance. Indeed, his most critical admissions — that no federal agency, professional body, or peer-reviewed authority has validated marijuana hair testing — establish precisely the opposite: there

is no general acceptance. The Draft's reliance on his conflicted testimony illustrates its fundamental circularity: Psychemedics' test is valid because Psychemedics says it is valid.

The Draft's refusal to grapple with controlling authority compounds this error. It ignores the Massachusetts Civil Service Commission's 2013 determination that Psychemedics' hair testing was a "work in progress" incapable of reliably distinguishing ingestion from contamination. It disregards the First Circuit's holdings in Jones v. City of Boston (2014 and 2016), which applied UGESP and found Psychemedics' testing produced a racially disparate impact that rendered it unlawful absent validation or less discriminatory alternatives. It makes no mention of Boston's eventual $2.6 million settlement, which resolved nearly two decades of litigation without indemnification from Psychemedics, underscoring that liability rests with the employer that adopts the flawed methodology. Nor does it confront Supreme Court precedent — Medtronic v. Lohr (1996), Riegel v. Medtronic (2008), and Buckman v. Plaintiffs' Legal Comm. (2001) — all of which make clear that FDA 510(k) clearance does not constitute scientific validation. By refusing to address these authorities, the Draft acts not within the scope of law but outside it.

The Draft also misapplies Rule 7.01. That rule requires the proponent to prove that the underlying theory is generally accepted, that the procedure is generally accepted as reliable, and that the test in the specific case was conducted in a way that yields accurate results. The Department satisfied none of these prongs. Instead, the Draft conflates laboratory accreditation with methodological validation and disregards evidence of flawed collection procedures. Sergeant Tse admitted he allowed Officer Palaguachi to choose body-hair collection sites; he was unfamiliar with UGESP; he could not confirm compliance with Psychemedics' own protocols; and he pointed to no audits of his collection process. These admissions go directly to Rule 7.01(2)(c), which requires reliability of the test "as conducted." The Draft does not explain them away; it simply ignores them.

Equally problematic is the Draft's complete abdication of UGESP. The Department bears a non-delegable duty under federal law to validate any selection procedure it uses. That is the holding of Griggs v. Duke Power Co. (1971) and Albemarle Paper Co. v. Moody (1975). The Department presented no validation studies; Dr. Paulsen admitted Psychemedics has never conducted UGESP-compliant validation; Sergeant Tse admitted unfamiliarity with UGESP altogether. Instead of holding the Department to its legal obligation, the Draft shifts the burden to the Respondent, suggesting that the absence of racial information in the record excuses the Department's failure. That is contrary to law. UGESP applies whether or not an individual respondent is Black, Latino, or white. Compliance is not optional, and it cannot be excused by the Department's own evidentiary gaps.

The failures of the Medical Review Officer (MRO) further illustrate the absence of meaningful safeguards. The MRO did not reconcile the Department's upward-trending positive results with Respondent's multiple negative results. The MRO did not consider environmental contamination as a plausible explanation. The MRO did not assess the scientific validity of Psychemedics' cutoffs. In short, the MRO acted as a rubber stamp rather than as an independent check. The Draft does not address these failings at all, leaving unexamined a central weakness in the Department's case.

Finally, the Draft adopts an unprofessional tone in dismissing counsel's arguments as "uncorroborated." That characterization is false. Counsel relied on controlling precedent: Wesley and Parker for Frye; Lohr, Riegel, and Buckman for FDA clearance; Griggs and Albemarle for UGESP; and Jones v. Boston and the Massachusetts Civil Service Commission for the unreliability of Psychemedics' methodology. To label these authorities "uncorroborated" is not only inaccurate but reveals the Draft's unwillingness to engage with binding law. It is an evasion, not an analysis.

Taken together, these defects demonstrate that the Draft is ultra vires. It does not apply law to fact; it avoids the law altogether. It treats vendor assurances as if they were scientific consensus, substitutes institutional repetition for general acceptance, disregards federal obligations under UGESP, ignores glaring deficiencies in collection and review, and disparages counsel instead of addressing precedent. This is not impartial adjudication. It is a predetermined conclusion dressed up in legal form. For all of these reasons, the Draft cannot stand.

Standard of Review (Fogel / Administrative Law Framework)

Under Fogel v. Board of Education, 48 A.D.2d 925 (2d Dep't 1975), the purpose of "Fogel comments" is to afford the parties a meaningful opportunity to submit written exceptions to a draft report before the deciding authority issues a final determination. The comments must be confined to the record and directed to the findings and conclusions actually made; conversely, the deciding authority must consider and address the material objections raised. A failure to grapple with substantial, record-based exceptions—particularly those asserting errors of law—renders the ultimate determination arbitrary and capricious.

Two related principles follow.

First, questions of law are reviewed de novo. Whether the Draft applied the correct legal standards (e.g., *Frye*, Rule 7.01, and UGESP) is a pure question of law. If the governing standards were misstated or ignored, the error is not cured by reciting accreditation, licensure, or "prior practice." Errors of law require annulment because an agency "may not make regulations or determinations out of harmony with or which contravene the policies of the statute." See, e.g., CPLR 7803(3) (arbitrary and capricious/affected by error of law).

Second, factual findings must be supported by substantial evidence in the record considered as a whole. "Substantial evidence" means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion," not conjecture or circular reliance on a party's own assurances. 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 (1978). In the disciplinary context, the deciding authority may make independent findings and is not bound by a hearing officer's credibility assessments, but it must ground departures in the record and supply a rational explanation. Berenhaus v. Ward, 70 N.Y.2d 436, 443–44 (1987). Where the "scientific" proof fails *Frye*/Rule 7.01 or rests on conflicted vendor testimony, there is no substantial evidence.

These standards intersect with due process. Administering discipline based on novel scientific evidence requires: (1) application of the correct admissibility standards (*Frye* and Rule

7.01); (2) compliance with federal validation duties (UGESP); and (3) a reasoned, record-based analysis of objections. An agency that ignores controlling precedent, substitutes accreditation or FDA 510(k) clearance for scientific validation, or refuses to address material exceptions (e.g., the Boston decisions; UGESP's binding requirements; MRO deficiencies) acts ultra vires. Such a determination is arbitrary and capricious and cannot withstand review under CPLR article 78.

I. The Draft's Frye Analysis Is Legally Defective

The Draft's application of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), as adopted by the Court of Appeals in People v. Wesley, 83 N.Y.2d 417 (1994), is not an application of law at all. Frye requires that novel scientific evidence be admitted only if the principle and methodology have gained "general acceptance in the particular field in which [they] belong." That standard is designed to prevent precisely what has occurred here: the admission of a proprietary technique defended only by its own inventor or vendor, without independent validation.

The record demonstrates beyond dispute that marijuana hair testing by Psychemedics has not achieved general acceptance. The Department's own witness, Dr. Ryan B. Paulsen, conceded under oath that no federal or professional body has validated Psychemedics' methodology. SAMHSA has promulgated no guidelines for marijuana hair testing. NIDA has not approved or recommended the practice. ISO and SOFT have not recognized Psychemedics' cutoff levels as reliable. Indeed, Dr. Paulsen acknowledged that those cutoffs were established internally by Psychemedics itself, without the involvement of any independent authority. These admissions, from the Department's sole witness, are fatal under Frye. If no standard exists, then "general acceptance" by definition cannot exist.

The Draft does not confront this problem. Instead, it substitutes circular reasoning for legal analysis. It asserts that Frye is satisfied because Psychemedics is accredited, because it is licensed, and because it has been used by the Department in past cases. None of these considerations addresses the governing legal test. Accreditation regulates laboratories, not methodologies. Licensure authorizes an entity to operate, not to create scientific consensus out of whole cloth. Prior Department usage proves only bureaucratic repetition — that the Department has chosen to use Psychemedics before and therefore uses it again. This is not evidence of general acceptance in the scientific community; it is institutional self-validation.

Compounding this error is the Draft's reliance on Dr. Paulsen himself. By definition, Dr. Paulsen is not an expert under Frye. He is Psychemedics' own laboratory director, whose financial and professional interests are tied to the defense of his employer's proprietary methodology. Frye does not permit a laboratory to establish "general acceptance" by putting forward its own employee to testify to its reliability. General acceptance must be established by reference to the views of the relevant independent scientific community — toxicologists, forensic scientists, and professional bodies with no financial stake in the methodology's success. Where the only testimony comes from a conflicted vendor-employee, and where that testimony includes admissions that no consensus exists, Frye is not satisfied.

New York courts have made clear that Frye is not a perfunctory requirement but a substantive safeguard. In Wesley, the Court of Appeals emphasized that novel scientific techniques must be scrutinized to ensure they are not simply the product of a single laboratory's claim to authority. The Draft, however, reduces Frye to a meaningless formality, satisfied by accreditation and past practice rather than by genuine scientific consensus. That is not a misapplication of Frye — it is a complete abandonment of it.

For these reasons, the Draft's Frye analysis is legally defective and ultra vires. It finds "general acceptance" where even the Department's own witness admitted none exists, and it treats vendor assurances as equivalent to independent consensus. This error alone is sufficient to invalidate the Draft's conclusions.

II. The Draft Misapplies Rule 7.01

The Draft's treatment of Rule 7.01 is equally defective. Rule 7.01 sets forth three distinct requirements for the admissibility of scientific evidence: first, that the underlying theory is generally accepted in the scientific community; second, that the procedure is generally accepted as reliable and accurate; and third, that the test in the particular case was conducted in such a way as to yield an accurate result. Each of these prongs is essential. Failure to meet any one of them renders the evidence inadmissible.

On this record, the Department satisfied none.

As to the first prong, there is no dispute that the theory underlying Psychemedics' marijuana hair testing lacks general acceptance. Dr. Paulsen himself admitted that no federal or professional body has promulgated standards for marijuana hair testing. SAMHSA, NIDA, ISO, and SOFT have never validated Psychemedics' methodology. Psychemedics' cutoff levels were invented internally and have not been peer reviewed or endorsed by any external authority. These admissions alone defeat prong one.

As to the second prong, the Department likewise failed to show that the procedure itself has been accepted as reliable and accurate. Psychemedics' methodology remains proprietary, unreplicated, and unvalidated by the independent scientific community. Far from being generally accepted, the method has been rejected by the Massachusetts Civil Service Commission, criticized in peer-reviewed literature for its inability to distinguish ingestion from contamination, and found by the First Circuit in Jones v. City of Boston to have a disparate racial impact inconsistent with federal law. The Draft ignores these authorities entirely and instead recites that Psychemedics is accredited and licensed. But accreditation and licensure regulate the operation of laboratories, not the validity of specific testing methodologies. They are not evidence of acceptance, much less proof of reliability and accuracy.

As to the third prong, the Department utterly failed to establish that the test in this particular case was conducted properly. Sergeant Tse, the Department's witness responsible for collection, admitted that he allowed Officer Palaguachi to choose the hair collection site, resulting in the use of arm and leg hair rather than head hair. This deviation significantly altered the detection window and introduced variables that Psychemedics' own protocols do not control.

Tse further admitted that he was unfamiliar with UGESP, that he did not know whether his collection complied with Psychemedics' own guidelines, and that no audits of his collection procedures were conducted. These admissions show that the test in this case was not conducted under conditions that could yield accurate results.

The Draft acknowledges some of these facts but fails to engage with their consequences. Instead, it asserts that accreditation and licensure suffice to demonstrate compliance with Rule 7.01 in its entirety. That is legally indefensible. Rule 7.01 requires distinct showings on each prong; the Department offered none. The Draft collapses all three into a single question — whether Psychemedics holds accreditation — and treats that as dispositive. That approach not only misapplies Rule 7.01 but renders it meaningless.

New York courts have consistently required strict compliance with Rule 7.01. The rule was designed to prevent exactly what has occurred here: the admission of evidence from an unvalidated procedure, applied under flawed conditions, based solely on the assurances of the party that benefits from its use. By conflating laboratory licensure with methodological reliability and ignoring evidence of flawed collection, the Draft abandons Rule 7.01 altogether.

The Department bore the burden of proving that its theory is accepted, that its procedure is reliable, and that its test in this case was properly conducted. On this record, it proved none. The Draft's contrary conclusion is without basis in law or fact and is therefore ultra vires.

III. The Draft Mischaracterizes FDA Clearance as Scientific Validation

The Department also relies on Dr. Paulsen's testimony that Psychemedics' hair testing kits are "validated" because the FDA granted 510(k) clearance. This is a misrepresentation of both law and science. The legislative history of the Medical Device Amendments of 1976 ("MDA") and controlling Supreme Court precedent make clear that 510(k) clearance is not proof of validity, safety, or effectiveness.

As the Supreme Court explained in Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), Congress created the 510(k) pathway not to certify scientific reliability but merely to allow manufacturers of "substantially equivalent" devices to compete in the marketplace pending rigorous premarket approval (PMA). The Court held that "[t]he § 510(k) process is focused on equivalence, not safety" and that "[s]ubstantial equivalence determinations provide little protection to the public." Id. at 493–94. The FDA itself emphasized in Lohr that 510(k) clearance "does not in any way denote official FDA approval" and that any representation to the contrary is "misleading and constitutes misbranding." Id. (citing FDA Substantial Equivalence Letter). This follows directly from the legislative record: Congress added 510(k) to preserve the status quo while avoiding disruption of pre-1976 devices, not to establish scientific validation. See H.R. Rep. No. 94-853, at 12 (1976). Congress never intended the provision to serve as a substantive guarantee of accuracy, reliability, or fitness for forensic use. Later courts have consistently agreed. See In re Zimmer NexGen Knee Implant Prods. Liab. Litig., 218 F. Supp. 3d 700, 718–19 (N.D. Ill. 2016) (510(k) evidence inadmissible to prove safety).

The Supreme Court has repeatedly reaffirmed this point. In Riegel v. Medtronic, Inc., 552 U.S. 312 (2008), the Court distinguished the rigorous PMA process — which evaluates safety and effectiveness — from the 510(k) process, which merely determines whether a new device is "substantially equivalent" to one already marketed. And in Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), the Court underscored that FDA clearance processes cannot substitute for judicial scrutiny or be treated as substantive validation of safety or reliability.

Against this backdrop, Dr. Paulsen's testimony that 510(k) clearance equates to validation of Psychemedics' EIA hair testing is not only scientifically incorrect but legally misleading. He admitted he lacked firsthand knowledge of Psychemedics' 510(k) submissions or the FDA's review process. His statements simply echo marketing representations that the FDA itself has warned against. Moreover, Psychemedics' clearances from the 1990s covered only limited drug classes (cocaine, PCP, opiates, and amphetamines) and solely for laboratory screening purposes. They never addressed marijuana detection, proprietary THC-COOH thresholds, ingestion-versus-contamination issues, or employment/disciplinary uses. These remain wholly unvalidated under both UGESP and Frye.

Despite this, the Draft embraces FDA clearance as if it were dispositive. It cites Dr. Paulsen's assurances, ignores binding Supreme Court precedent, and concludes that clearance is tantamount to validation. That conclusion is not only legally incorrect; it is ultra vires. It replaces the judicial role of gatekeeping under Frye and Rule 7.01 with an administrative shortcut that the Supreme Court has expressly rejected.

The reliance on FDA clearance also underscores the Draft's broader pattern: avoiding the hard questions of law and science by substituting superficial markers of legitimacy. Accreditation, licensure, and prior usage are offered in place of Frye's requirement of general acceptance. FDA clearance is offered in place of Rule 7.01's demand for methodological reliability. Each substitution is a departure from the law, and taken together, they confirm that the Draft is not an application of legal standards at all.

For these reasons, the Draft's reliance on FDA clearance as validation is legally erroneous, inconsistent with Supreme Court precedent, contrary to congressional intent, and further evidence that the Report operates outside the scope of its lawful authority.

IV. The Draft Unlawfully Ignores the Boston Litigation

The Draft Report's most glaring omission is its refusal to address the Boston litigation, which dealt directly with Psychemedics' drug hair testing methodology. For nearly two decades, Boston defended its reliance on Psychemedics' Radioimmunoassay of Hair (RIAH) test. That method is the direct predecessor to Psychemedics' current Enzyme Immunoassay (EIA) test. While Psychemedics now invokes "EIA" to suggest novelty, the diagnostic paradigm is the same: an immunoassay-based screen of hair samples, followed by mass spectrometry confirmation, with internally devised cutoff levels. The scientific defects identified in Boston — inability to distinguish ingestion from contamination, racially disparate impact, and absence of professional consensus — remain equally present in the EIA methodology.

In 2013, the Massachusetts Civil Service Commission concluded that Psychemedics' RIAH method was a "work in progress" incapable of reliably distinguishing ingestion from external exposure. It held that the test could not serve as a valid basis for disciplinary action. That finding is directly relevant to the present case, yet the Draft does not mention it.

The federal courts likewise rejected Boston's reliance on Psychemedics. In Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014), the First Circuit held that Psychemedics' methodology had a disparate racial impact and required validation under UGESP. The court emphasized that once disparate impact is shown, the employer bears the burden of proving the test is job-related and consistent with business necessity — a burden Boston failed to meet. The holding was reaffirmed in Jones v. City of Boston, 845 F.3d 28 (1st Cir. 2016). These cases are directly on point. They confirm that immunoassay-based hair testing by Psychemedics does not meet federal standards and cannot be used to discipline officers without rigorous validation. Yet the Draft ignores them altogether.

The significance of the Boston litigation lies not only in its findings but in its procedural posture. These were not isolated expert opinions or policy papers; they were binding adjudications, affirmed on appeal, that squarely addressed Psychemedics' methodology. The Draft Report's silence on those holdings deprives the Commissioner of the most relevant precedent available. Unlike UGESP, which imposes prospective duties on all employers, the Boston rulings establish how courts and commissions have already applied those principles to Psychemedics itself.

The litigation concluded in 2023 when Boston paid $2.6 million to settle with disciplined officers. In fact, Boston pursued defense and indemnification from Psychemedics under its contracts; in 2021 the Massachusetts Supreme Judicial Court vacated summary judgment for Psychemedics and held that Boston's notice could be sufficient to trigger Psychemedics' duty to assume the defense, remanding for further proceedings. Either way, Boston's indemnity litigation underscores—not negates—that liability exposure under Title VII/UGESP attaches to the employer that adopts and uses the test; any vendor indemnity is a separate contractual question and cannot substitute for validation. The NYPD is no different. By ignoring this litigation, the Draft denies the Department and the Police Commissioner the benefit of persuasive precedent demonstrating the risks and liabilities inherent in Psychemedics' testing.

The Draft attempts to distinguish Boston by pointing out that those cases involved cocaine rather than marijuana. That distinction is illusory. The methodology — immunoassay screening plus mass spectrometry confirmation — is identical in both contexts. The problems are the same: contamination, unvalidated cutoffs, lack of peer-reviewed consensus, and disparate impact. Whether the analyte is cocaine or THC, the methodological defects remain.

Boston stands as the most comprehensive body of adjudicated evidence on Psychemedics' methodology. Its administrative decisions, federal appellate rulings, and eventual settlement provide persuasive authority that the NYPD cannot lawfully ignore. The Draft's silence in the face of this precedent is not merely careless; it is an ultra vires refusal to grapple with the very body of law most relevant to the case at hand.

V. The Draft Abdicates UGESP Compliance and Misallocates the Burden of Proof

The Draft Report also fails to address the Department's obligations under the Uniform Guidelines on Employee Selection Procedures ("UGESP"), 29 C.F.R. Part 1607. Those Guidelines, adopted in 1978 and reaffirmed repeatedly by the Equal Employment Opportunity Commission, are not optional suggestions. They carry the force of law and codify the principle that employers bear a non-delegable duty to validate any selection procedure that may impact employment decisions.

This principle is firmly rooted in Supreme Court precedent. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court held that selection devices must be shown to be job-related and consistent with business necessity, and that the burden of proof rests squarely on the employer. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court reiterated that employers are responsible for validating the selection procedures they adopt, even if those procedures are developed by third parties. The burden cannot be shifted to employees or applicants to prove the absence of validation. The duty belongs to the employer, and it is absolute.

UGESP operationalizes that principle by requiring that records be kept on the racial, ethnic, and gender impact of any test (§1607.4); that validation studies be conducted under accepted professional standards to establish a demonstrable relationship between the test and job performance (§§1607.5, 1607.6, 1607.14); and that such studies be properly documented and retained (§1607.15). Critically, UGESP prohibits presuming a test valid without proof (§1607.9) and mandates discontinuance of any procedure that produces adverse impact without supporting validity evidence (§1607.6(B)). These requirements are binding, not aspirational.

On this record, the Department made no effort to satisfy that duty. Dr. Paulsen admitted that Psychemedics has never conducted validation studies consistent with UGESP requirements. He acknowledged that no professional body, no federal agency, and no peer-reviewed authority has validated marijuana hair testing for employment or forensic purposes. Sergeant Tse, the Department's own witness, admitted that he was unfamiliar with UGESP entirely. The Department produced no evidence of validation studies, no job-relatedness analysis, and no assessment of less discriminatory alternatives. In other words, the Department failed to meet its burden in every respect.

Yet the Draft Report excuses this failure by pointing to the record's omission of Respondent's race or ethnicity. That reasoning is fundamentally flawed. UGESP does not turn on the race of the individual officer in a single case. UGESP imposes a structural obligation on the employer to ensure that any test it uses is valid, reliable, job-related, and consistent with business necessity. That duty exists regardless of whether a particular respondent is Black, Latino, white, or otherwise. By treating the absence of racial data as an excuse for noncompliance, the Draft misallocates the burden of proof, shifting it improperly onto the Respondent. That is precisely what Griggs and Albemarle forbid.

The risks of ignoring UGESP's safeguards are not theoretical—they have already been documented in the Boston Police litigation. In the *Boston Police Drug Testing Appeals*

(Massachusetts Civil Service Commission, 2013, pp. 105–114), the Commission rejected Psychemedics' radioimmunoassay of hair (RIAH) for cocaine as proof of ingestion. It found the method plagued by environmental contamination, inconsistent laboratory cutoffs, and a lack of uniform standards. Importantly, the Commission concluded that "a positive hair test, standing alone, cannot establish ingestion," declaring the method "a work in progress" unfit to support discipline without corroboration. That finding applied to cocaine—a metabolite that is chemically more stable in hair than THC. If Psychemedics' immunoassay could not reliably distinguish ingestion from contamination for cocaine, it is even less reliable for marijuana, where THC-COOH is notoriously unstable and highly susceptible to external contamination.

The Draft's treatment of UGESP also ignores the persuasive authority of Jones v. City of Boston. In those decisions, the First Circuit made clear that Psychemedics' methodology caused a disparate racial impact and that the City of Boston, as the employer, bore the burden of validating the test. Boston failed, and the consequences were severe: nearly two decades of litigation and a $2.6 million settlement. The NYPD's position is indistinguishable. Its reliance on Psychemedics without validation exposes it to the same legal liability. To ignore that precedent is to invite the same outcome.

The Department cannot escape its duty by pointing to Psychemedics' licensure or accreditation. Those are not substitutes for UGESP compliance. Nor can it outsource responsibility to Psychemedics. The law is explicit: validation is the employer's duty, and it cannot be delegated. The Draft's silence on this point, and its effort to excuse the Department's failure by reference to Respondent's personal characteristics, represents not merely a misapplication of law but a refusal to apply it at all.

For these reasons, the Draft's approach to UGESP is ultra vires. It abdicates the Department's non-delegable duty, misallocates the burden of proof, ignores binding Supreme Court precedent, and disregards persuasive authority from Boston. This defect alone requires rejection of the Draft's conclusions.

VI. The Draft Ignores the Failures of the Medical Review Officer

The Draft Report also disregards the profound deficiencies in the role and performance of the Medical Review Officer ("MRO"). The MRO is supposed to serve as a safeguard: an independent physician who critically reviews positive test results, reconciles inconsistencies, considers alternative explanations such as environmental contamination, ensures protocols are followed, and protects the due process rights of the tested employee. Without meaningful oversight, the MRO process is an empty formality that adds no legitimacy to the underlying testing.

In this case, the MRO's qualifications and performance demonstrate why the safeguard failed. Although he held a medical degree, that credential alone rendered him no more competent than a general practitioner in the context of forensic drug testing. He was not a forensic toxicologist. He was not a forensic scientist. He had no specialized training in immunoassay screening, hair testing protocols, or contamination control. Nor did he demonstrate any familiarity with the governing legal standards under Frye or Rule 7.01. His medical degree,

without more, gave him no particular expertise to judge whether Psychemedics' proprietary methodology was scientifically valid. The Draft's uncritical acceptance of his role confuses general medical training with specialized forensic expertise — a confusion that fatally undermines the credibility of the review.

The MRO's actual performance only confirmed his lack of qualifications. He failed to reconcile Officer Palaguachi's subsequent negative drug tests with the Department's contested positives. He ignored unexplained variability in the Department's own results, which shifted from 5.4 to 5.1 to 6.6 pg/10 mg without any explanation. He did not consider environmental contamination — a flaw that had already been central to the Boston litigation. He did not evaluate whether Psychemedics' cutoff levels were validated by independent scientific authorities. At every turn, he deferred to the laboratory's results rather than exercising independent medical or scientific judgment.

Even more troubling, the MRO could not identify any rights that Officer Palaguachi had to challenge a positive result. He could not cite any Department policy affording the officer an opportunity to contest the findings, seek independent retesting, or present rebuttal evidence. In effect, he admitted that the officer had no procedural recourse — that the positive result was dispositive once Psychemedics reported it. Such an admission undermines the very premise of the MRO's role, which is to protect against unjustified discipline by providing a fair and independent review.

By presenting a general physician as if he were a forensic expert, by disregarding contradictory and inconsistent evidence, and by acknowledging that the officer had no right to challenge the result, the MRO rendered his role meaningless. Rule 7.01(2)(c) requires the Department to prove that the specific test was conducted in a way likely to yield accurate results. That burden cannot be met when the so-called safeguard is reduced to a rubber stamp wielded by a doctor with no forensic qualifications.

The Draft Report compounds this failure by ignoring it altogether. It cites the existence of an MRO as if that alone validated the process, while remaining silent on his lack of expertise, his inattentiveness to glaring inconsistencies, and his admission that the officer had no right to contest the findings. In doing so, the Draft once again substitutes form for substance, bureaucracy for law.

For all these reasons, the MRO's deficiencies — both in qualification and performance — render the Department's evidence unreliable under Rule 7.01. By disregarding them, the Draft acts ultra vires and fails its obligation to provide a lawful adjudication.

VII. The Draft Relies on Conflicted Vendor Testimony Rather Than Independent Expertise

The Draft Report compounds the failures of the MRO by relying almost exclusively on the testimony of Psychemedics' own laboratory director, Dr. Ryan B. Paulsen. This reliance is fatal. By definition, a vendor's employee cannot provide the kind of independent expert testimony required under Frye. The purpose of Frye is to ensure that novel scientific evidence

reflects general acceptance in the independent scientific community, not self-validation by the very company that stands to profit from its use.

Dr. Paulsen is not a neutral expert. His financial and professional livelihood is directly tied to the continued acceptance of Psychemedics' methodology. His role is to defend the laboratory's proprietary processes, not to evaluate them objectively. His testimony is advocacy for a product, not evidence of scientific consensus. Treating him as if he were a neutral scientific authority collapses Frye into absurdity. It is equivalent to allowing a drug manufacturer's in-house scientist to declare its product safe and calling that "general acceptance." Courts in New York have consistently rejected such self-referential reasoning, and the Draft's acceptance of it here is ultra vires.

Even putting aside his conflict, Dr. Paulsen's own admissions undermine the Department's case. He conceded that no professional or federal body has validated marijuana hair testing. He admitted that SAMHSA has not promulgated standards, NIDA has not endorsed the method, and ISO and SOFT have not recognized Psychemedics' cutoffs. He acknowledged that Psychemedics itself created its THC cutoffs internally, without peer review or external validation. These are not minor details. They are concessions that the methodology lacks general acceptance — the very test Frye requires. When the Department's only scientific witness admits the absence of consensus, the evidence fails as a matter of law.

The Draft, however, does not treat these admissions as dispositive. Instead, it recites Dr. Paulsen's assurances that Psychemedics' accreditation, licensure, and FDA clearance are sufficient. As shown above, those factors prove nothing about general acceptance, reliability, or job-relatedness. What the Draft does, in effect, is accept Psychemedics' word for Psychemedics' validity. That is precisely the kind of circular reasoning Frye exists to prevent.

The parallels to the MRO are telling. Just as the Department presented a physician with no forensic expertise to serve as an MRO, it presented a vendor-employee with an obvious conflict of interest to serve as its scientific expert. Neither was qualified to meet the Department's burden. The MRO lacked the training to evaluate forensic methodology, and Dr. Paulsen lacked the independence to establish scientific consensus. The result is the same: the Department failed to produce competent, independent evidence to support its case.

By crediting Dr. Paulsen's testimony as if it reflected independent expertise, the Draft abdicates its responsibility under Frye and Rule 7.01. It replaces the views of the relevant scientific community with the opinions of a single conflicted vendor-employee. That approach is not just legally inadequate; it is ultra vires. It transforms the legal requirement of "general acceptance" into the commercial claim of a private corporation.

For these reasons, the Draft's reliance on Dr. Paulsen is improper and cannot support the conclusions it reaches. Without independent expert testimony demonstrating consensus in the relevant field — testimony that is conspicuously absent here — the Department cannot meet its burden, and the charges against Officer Palaguachi cannot lawfully be sustained.

VIII. The Draft Improperly Dismisses Counsel's Legal Arguments as "Uncorroborated"

Perhaps the clearest signal that the Draft Report is not a genuine legal analysis is its treatment of Respondent's counsel's arguments. Instead of addressing them on the merits, the Draft dismisses them as "uncorroborated." That characterization is not only inaccurate but unprofessional. It substitutes disparagement for reasoning and underscores the Draft's unwillingness to grapple with binding law.

Counsel's submissions were not speculative or unsupported. They relied on controlling and persuasive authorities. On Frye, counsel cited People v. Wesley, 83 N.Y.2d 417 (1994), and Parker v. Mobil Oil Corp., 7 N.Y.3d 434 (2006), which require proof of general acceptance in the independent scientific community. On federal obligations, counsel cited Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), which hold that validation duties under Title VII and UGESP are non-delegable. On the misuse of FDA clearance, counsel cited Medtronic v. Lohr, 518 U.S. 470 (1996), Riegel v. Medtronic, 552 U.S. 312 (2008), and Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), which collectively establish that 510(k) clearance does not equate to scientific validation. On the practical consequences of relying on Psychemedics, counsel cited the Massachusetts Civil Service Commission's rejection of the methodology and the First Circuit's holdings in Jones v. City of Boston (2014, 2016), both of which found the method unreliable and discriminatory, culminating in a $2.6 million settlement.

These are not "uncorroborated" arguments. They are supported by judicial authority at the state, federal, and appellate levels. The Draft did not cite contrary authority, nor did it attempt to distinguish the cases on their facts or holdings. Instead, it evaded them entirely by mischaracterizing counsel's reliance as "uncorroborated." That rhetorical jab is no substitute for analysis.

The effect of this dismissal is twofold. First, it deprives the Commissioner of a reasoned assessment of the controlling authorities that should govern this case. Second, it signals that the Draft was not written in the spirit of impartial adjudication but as an instrument of institutional defense. An adjudicator committed to applying the law would have engaged with the cases, explained why they did or did not apply, and reached a conclusion supported by reasoning. By contrast, the Draft sidestepped the cases altogether and denigrated counsel for raising them. That is not adjudication; it is advocacy under the guise of adjudication.

In professional practice, courts and tribunals may reject arguments, but they do so by explaining why the law does not support them. They do not dismiss binding precedent as "uncorroborated." The Draft's failure to engage with the authorities cited — and its resort to disparagement instead — confirms that it is not a lawful analysis but an ultra vires exercise of power designed to reach a predetermined result.

For these reasons, the Draft's treatment of counsel's arguments should be rejected. A lawful decision must address the precedent cited, apply it to the facts, and explain its conclusions. Anything less is not adjudication but evasion.

IX. Remedy and Conclusion

The Draft cannot stand. It misstates the governing standards; declares Frye satisfied despite Dr. Paulsen's concession that no general acceptance exists; collapses Rule 7.01 into laboratory licensure while ignoring collection defects; treats FDA 510(k) as validation contrary to Lohr, Riegel, and Buckman; disregards the Boston rulings; abdicates UGESP's non-delegable employer duty; and overlooks the MRO's lack of forensic qualifications and failure to reconcile contradictory results or identify any process right to challenge. Worse, it dismisses counsel's authority-based arguments as "uncorroborated," an improper and unprofessional evasion that substitutes disparagement for legal analysis. An adjudicator must meet authority with reasoning, not rhetoric.

Taken together, these defects show the Draft is not adjudication but an ultra vires exercise of institutional self-validation. Due process and CPLR 7803(3) require more: correct legal standards, substantial evidence, and reasoned engagement with material objections.

Accordingly, exclusion is required. Psychemedics' marijuana hair-test evidence is inadmissible under Frye, Rule 7.01, and UGESP. Because the Department's own witness conceded the absence of general acceptance, no further Frye proceeding is warranted. Without that evidence, the Department cannot meet its burden; dismissal is the only lawful outcome.

In addition, Respondent respectfully requests that the Commissioner strike the Draft's "uncorroborated" characterization and expressly address the controlling authorities cited herein.

For these reasons, the Draft Report and Recommendation should be rejected, all Psychemedics-derived evidence excluded, and the charges against Officer Frankie F. Palaguachi dismissed in their entirety.

Respectfully submitted,

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