BEFORE IRA S. EPSTEIN, ARBITRATOR

In the Matter of the Arbitration Between FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL COMPLEX BEAUMONT, TEXAS Agency AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1010 FEDERAL CORRECTIONAL COMPLEX BEAUMONT, TEXAS Union	DECISION AND AWARD OF THE ARBITRATOR FMCS No. 170929-55341 Removal of Jose Contreras Consolidated with FMCS No. 170929-55338 Removal of Charles Guidry

APPEARANCES:

For the Agency: Mr. Steven R. Simon
Senior Labor Law Attorney
FEDERAL BUREAU OF PRISONS
Labor Law Branch, West
230 N. First Avenue, Suite 201
Phoenix, Arizona 85003

For the Union: Mr. Jack K. Whitehead, Jr.
WHITEHEAD LAW FIRM
11909 Bricksome Avenue, Suite W-3
Baton Rouge, Louisiana 70816

I. BACKGROUND

The American Federation of Government Employees, Local 1010 (the Union) and the Federal Bureau of Prisons, Federal Correctional Complex Beaumont, Texas (FCC Beaumont or the Agency) were, and are, at all times material herein, parties to a Collective Bargaining Agreement providing for final and binding arbitration (Jt. Exh. 1)[1]. The Arbitrator was

[1] Citations in this Award will be as follows: "Tr. __" to indicate the hearing transcript's page and line numbers respectively; "Jt. Exh. __" to indicate a Joint Exhibit; "Ag. Exh. __" to indicate an Agency Exhibit; "Un. Exh. __" to indicate a Union Exhibit; Ag. Exh. C to indicate Agency Exhibits pertaining to Officer

selected by the parties from a panel submitted to them by the Federal Mediation and Conciliation Service. On August 16, 2017, Officer Contreras elected to appeal the deciding official's decision to remove him to arbitration. On October 16, 2017, Officer Guidry elected to appeal the deciding official's decision to remove him to arbitration (Jt. Exh. 2).. The parties stipulated that the appeals (herein referred to as grievances) were to be consolidated for hearing. On April 19 and April 20, 2018, an arbitration hearing was conducted on the removals at the FCC Beaumont Central Administrative Center in Beaumont, Texas. A transcript of the hearing was made. The parties were given full opportunity to present evidence, testimony, and arguments as deemed relevant.

The parties stipulated that the grievances protesting the removals were timely; there were no issues of procedural arbitrability concerning the grievance; the grievance was properly before me, as sole Arbitrator, for the issuance of an award, subject to the right of the Agency or the Union to appeal to the Federal Labor Relations Authority.

Following submission of evidence and testimony at the hearing, the parties requested and were given the opportunity to submit post-hearing briefs. The hearing was held open for the submission of briefs. The briefs were received by August 8, 2018, at which time the matter became ready for the issuance of an award.

On the basis of the testimony at the hearing, exhibits received into evidence, the arguments of both counsel, the briefs, and personal observations, the Arbitrator makes and issues the instant award.

II. ISSUES

The parties stipulated the issues as follows.

> Was the termination of Senior Officer Guidry and Cook Supervisor Contreras for just and sufficient cause? If not, what is the remedy?

Contreras; and Ag. Exh. G to indicate Agency Exhibits pertaining to Officer Guidry.

III. PERTINENT CONTRACT PROVISIONS AND PROGRAM STATEMENTS

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

. . .

Section 1.

. . .

2. to be treated fairly and equitably in all aspects of personnel management;

. . .

ARTICLE 30 – DISCIPLINARY AND ADVERSE ACTIONS

. . .

Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.

Section b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less.

Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reduction in grade or pay, or furloughs of thirty (30) days or less.

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

ARTICLE 31 – GRIEVANCE PROCEDURE

. . .

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is: "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"; or

2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.

ARTICLE 32 – ARBITRATION

. . .

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or

2. published Federal Bureau of Prisons policies and regulations.

IV. STATEMENT OF FACTS

FCC Beaumont is a federal prison complex composed of three facilities: (1) the Penitentiary (high security); (2) Medium Security; and (3) the Prison Camp (low security). The Agency employs 830 employees at its Beaumont facility (Tr. 22, 126). A large population of inmates housed and secured at the Beaumont facility has been convicted of violations of federal drug and narcotics laws (Tr. 87-88, 111, 176).

Cook Supervisor Jose Contreras has been employed at FCC Beaumont for approximately 20 years. He originally received training as a cook while serving in the Marines. During his 20 years of service, Officer Contreras has maintained a blemish-free disciplinary record. Rather, throughout his entire term at FCC Beaumont, Officer Contreras received ratings of "exceeds" to "outstanding" for his annual evaluations. He also has received many awards based on his excellent performance, including "supervisor of the quarter at the institution," and has been selected twice to represent the food department for Special Operations Response for Team at maneuver trainings which took place in other Agency facilities. He was also responsible for developing and implementing several programs regarding the logistics of preparing and delivering various special meals (Tr. 202-208).

Senior Officer Specialist Charles Guidry was employed at Beaumont FCC for approximately 11 years at the time of his termination. During his employment, Officer Guidry received awards in the nature of "time off" as special recognition for performing his duties. According to Officer Guidry's unrebutted testimony, he received ratings of either "satisfactory or exceeds" for his annual evaluations. Officer Guidry did not have any prior disciplinary actions taken against him within the reckoning period (Tr. 185-186; Ag. Exh. G 1).

In June of 1997, the Bureau of Prisons issued Program Statement 3735.04 entitled Drug Free Work Place (DFWP). This program is intended to provide "a mechanism for employee assessments and employee education regarding the dangers of drug abuse." Sections 8 and 9 of the DFWP provide for random testing to determine if employees are using illegal drugs (Un. Exh. 3). Among the prohibited drugs tested for are amphetamines, barbiturates, cocaine, marijuana, and opioids (Ag. Exh. G2).

Kevin Hood is the National Coordinator for the DFWP. In his role of National Coordinator, Mr. Hood testified that he interprets the results for pre-employment and for random and reasonable suspicion drug tests. He also coordinates annual training for all Bureau Prison employees on Drug Free Work Place policies (Tr. 110-111). Mr. Hood stated that he is in charge of the DFWP for the entire Bureau of Prisons which encompasses 120 facilities, including all 3600 supervisory and bargaining unit employees (Tr. 116, 134).

According to Mr. Hood, 20% of all Bureau Prison employees are subject to yearly random drug testing. Each institution will have a different number of random selections, based on the number of employees at that local institution. Testing is done on a quarterly basis which results in 5% of the employees tested per quarter. Thus, approximately 40 employees at the Beaumont facility would be randomly tested for prohibited drug use per year (Tr. 124-126). The Agency contracts with Quest Diagnostics to perform urinalysis tests (Tr. 117-118). If the results of the urinalysis are positive, they are reported to the Agency by

a Medical Review Officer. The notification form also informs the Agency whether there is any medical excuse for a positive result (Tr. 113-114).

Health Care Specialist Clint Sonnier testified that, as part of his responsibilities with the Drug Free Work Place program, he is charged with the collection of specimens for drug testing. He explained that non-suspicious drug testing is performed at the Beaumont facility on a quarterly basis. The randomly selected individuals to be tested are obtained from a list kept in the Warden's office (Tr. 25-26).

Mr. Sonnier described the collection process as follows: 1) the individual is identified by a picture ID; 2) the urine is collected and transferred to two small specimen bottles labeled A and B; 3) a chain of custody form is filled out; and 4) the specimens are sent to Quest Diagnostics for drug testing (Tr. 28-31). There is also drug testing performed for suspicious behavior which follows the same procedural steps for those staff members randomly selected for testing. However, Mr. Sonnier stated that he has never been called on at the Beaumont facility to perform a test on an employee suspected of illicit drug use (Tr. 41-42). John Tarver, Laboratory Manager for Quest Diagnostics, testified that after receiving the urine samples, the laboratory performs two tests on bottle A for illicit drugs. The initial screening is done by an immunoassay test. If this test is positive, a gas chromatography/mass spectrometry test is performed. This test identifies a particular drug and the concentration level (Tr. 62-63).

Officer Contreras was randomly selected for a drug screening and willingly gave a urine sample on August 24, 2016 (Ag. Exh. C 7). The sample was collected by Frank Molina, who, at the time, was a Health Care Specialist at FCC Beaumont.[2] On September 6, 2016, Dr. Jerome Cooper, the Medical Review Officer of Mr. Contreras's urinalysis, notified Officer Contreras that he had tested positive for amphetamines (Tr. 130; Ag. Exh. C 11). The

[2] The account of Officer Contreras' testing and follow-up interview by Dr. Jerome Cooper, the Medical Review Officer for Mr. Contreras' urinalysis, was given by Medical Review Officer Dr. Robert Fierro, custodian of both Officer Contreras and Officer Guidry's medical records.

quantitative result for amphetamines on the drug screening was a concentration of 1,406 mg/mL (Ag. Exh. C 13, p. 186).

Mr. Hood testified that after the Medical Review Officer interviews the donor and attests to the positive test results, the Medical Review Officer advises the Agency. The file is then referred to the Office of Internal Affairs (OIA) to conduct an investigation.

Medical Review Officer Dr. Fierro testified that, prior to referring the file to the Agency, one of his responsibilities is to assist the donor in finding a legitimate medical reason for being positive for illicit drugs (Tr. 128). In Officer Contreras' case, Dr. Cooper, who is no longer employed by the Bureau of Prisons, interviewed Officer Contreras. Officer Contreras denied using any amphetamines. In an effort to find the cause of the positive test for amphetamines, Dr. Cooper questioned Officer Contreras about the medications he was taking. Officer Contreras listed approximately 12 medications. In the opinion of Dr. Cooper, none of the medications listed by Officer Contreras would account for a positive test for amphetamines. Dr. Fierro testified that the Medical Review Officer generally will ask if someone else in the household has medications and whether there could have been a potential mix up of the medications. However, Dr. Fierro admitted that there were no notes in Dr. Cooper's file stating whether Officer Contreras was asked or told to produce the medications of other people in the household (Tr. 130, 132, 133, 143; Ag. Exh. C 7, 13).

On September 12, 2016, a complaint regarding Officer Contreras was referred to OIA and on September 12, 2016, OIA was authorized to conduct a local investigation concerning Mr. Contreras' positive test results for amphetamines. Special Investigative Officer James Dern was assigned to conduct the investigation. On February 13, 2017, Officer Contreras was placed on administrative leave with pay. On February 17, 2017, Officer Dern conducted an interview with Officer Contreras. Based on Officer Contreras' affidavit, on February 22, 2017, Officer Dern concluded his investigation and sustained the allegation of Use/Abuse of Illegal Drugs/Alcohol against Officer Contreras (Ag. Exh. C 4, 9, 17).

On March 21, 2017, Officer Contreras was issued a proposal letter from Food Service Administrator D. Santiago. The letter notified him that Administrator Santiago was proposing to have Officer Contreras removed from duty. Officer Contreras orally responded to the proposed removal on June 9, 2017. In the oral response, Officer Contreras stated that he had paid for additional tests, and the additional tests were negative. Officer Contreras also submitted a written response to the allegations on June 9, 2017, where he mostly reiterated what was discussed during the meeting with Warden Chapa (Ag. Exh. C 3).

Officer Contreras submitted an additional oral and written response to Warden Jones on August 2, 2017. During the meeting with Warden Jones, Officer Contreras explained the situation and also noted that he took an additional hair follicle test on July 14, 2017, which produced negative results. Throughout the entire proceedings, Officer Contreras maintained that he did not take amphetamines and did not know how the amphetamines were present in his urine sample. A written response also discussed the *Douglas* factors and how it applies to his situation. In addition, Toruna Davila, the Union Vice President, issued a written response to Warden Jones explaining how and why the removal of Mr. Contreras was inappropriate. The letter pointed out:

> In addition, under Article 30, the parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior. The ultimate punishment of removal is unjust and not warranted in this case when the sole evidence against Cook Supervisor Jose Contreras is one lab test that resulted in a positive urinalysis. His work record has remained unblemished for over 30 years. (Ag. Exh. C 2, 3)

Warden Jones issued his decision letter on August 11, 2017 which sustained the charge and removed Officer Contreras from his position effective August 15, 2017. Among the reasons for the removal of Officer Contreras, Warden Jones stated that he had considered the facts that Officer Contreras did not have any prior discipline and that his performance was above average. According to Warden Jones, these factors did not outweigh the seriousness of the offense. The basis for the removal, as stated in the letter, is as follows:

> Furthermore, as a Correctional Worker, your integrity should be above reproach. Your use of amphetamines is illegal, but is egregious conduct considering you are a law enforcement officer and held to a higher standard.

Warden Jones' letter went on to state that he had lost confidence in Officer Contreras' ability to discharge his position and lacked belief that Officer Contreras could be rehabilitated. Moreover, Warden Jones came to the conclusion that a lesser penalty would not have sufficient corrective effect on Officer Contreras and removal for use of illegal drugs was consistent with the Table of Penalties imposed on other employees who had engaged in similar conduct (Ag. Exh. C 1-3).

At the hearing, Officer Contreras explained the conditions under which he might have mistakenly taken his wife's medication, Adderall, which is an amphetamine (Tr. 227, 264, 265). Mr. Contreras described his living situation as very stressful. His family, including his wife, daughter, son, and his wife's grandparents, lives in a 1,800 square foot, 3-bedroom house. His wife's grandparents, who are 90 years old and suffer from dementia, live in the dining room. Officer Contreras' wife suffers from bipolar disorder, anxiety, and depression. His daughter recently attempted suicide (Tr. 209, 211, 212). In addition to the many medications that Officer Contreras takes, his wife takes numerous prescription medications including Adderall (Tr. 209, 210, 214, 223; Un. Exh. 14).

Officer Contreras testified that approximately two weeks before he participated in the initial drug screening, there was a power surge that caused an electrical fire which resulted in his house being without any power or electricity. Furthermore, the house lost natural gas service due to a tree branch breaking off and crashing into the gas line. According to Officer Contreras, during the time he submitted to the drug test, his house was without electricity or gas, and battery operated "push lights" were installed to provide some lighting (Tr. 215, 224).

Officer Contreras stated that on the morning of August 24, 2016, he was randomly selected for a drug screening. He woke up at approximately 2:30 a.m. for his normal shift at

FCC Beaumont which started about 4 or 4:30 a.m. At this time, he would take his medication and pills from the same drawer in which all the family medications were kept. During this time, the house was without power or gas. Officer Contreras testified that because of the confusing situation, he must have inadvertently taken his wife's Adderall (Tr. 213, 214, 263, 264). The prescription script for the vial containing Mrs. Contreras' Adderall bears the number 2124123 and is dated 9-15-17 (Tr. 263, 264; Un. Exh. 14).

Warden Jones testified that in arriving at the decision to remove Officer Contreras, he took into consideration the following factors: the seriousness of the offense; the lack of confidence in supervision of the employee; the Table of Penalties; and mitigating circumstances. In Warden Jones' opinion, the use of drugs by an officer presents the ultimate safety hazard for the staff and the inmates. The law enforcement position Officer Contreras occupied, required him to maintain a certain level of conduct. The use and possession of illegal drugs is one which totally conflicts with the ability to meet the needs of the position. In view of the serious nature of such conduct, Warden Jones reasoned that removal is consistent with the Bureau of Prisons Table of Penalties (Tr. 87-89). Warden Jones reasoned that although Officer Contreras served as a cook, he was still a law enforcement officer, as well. He stated his long years of service were taken into consideration, but the nature and seriousness of the offense led him to the conclusion that removal was the appropriate penalty (Tr. 93, 94, 99).

In early 2017, Senior Officer Charles Guidry was randomly selected for drug screening. On March 24, 2017, he provided a urine sample to the Health Services Department (Ag. Exh. G 5, p. 31-34). On March 29, 2017, Officer Guidry was contacted by Dr. Robert Fierro, the Medical Review Officer assigned to Officer Guidry's urinalysis. Dr. Fierro informed Officer Guidry that he had tested positive for amphetamines. The quantitative result for amphetamines on the drug screening was a concentration of 5,268 mg/ mL (Tr. 62, 128; Ag. Exh. G 7, p. 82). According to Dr. Fierro, he advised Officer Guidry

that he was positive for amphetamines. Officer Guidry denied taking any amphetamines. Dr. Fierro then told Officer Guidry that unless he came up with a valid prescription, he (Dr. Fierro) was going to have to report him as positive for the presence of an illegal drug. Dr. Fierro stated that Officer Guidry informed him that he had taken Sudafed. Although Dr. Fierro testified that it was his normal practice to ask about dietary or nutritional supplements that Officer Guidry may have taken, this question was not noted on the MRO detailed report (Tr. 129, 142; Ag. Exh. G 6).

On March 30, 2017, Officer Guidry was notified by the Agency that he was being placed on home duty for testing positive for amphetamines during drug screening. In an effort to elucidate what caused this positive result, Officer Guidry requested a test of the urine sample that was placed in bottle B. As well as requesting a second test of his urine sample, Officer Guidry requested a hair follicle test. On April 3, 2017, Officer Guidry provided another urine sample at Advantage Drug Testing. On April 5, 2017, Officer Guidry returned to Advantage Drug Testing to provide a hair follicle drug test. He requested the additional hair follicle test because he believed that this test was more sensitive and able to detect the presence of drugs going further back in time then a urinalysis. The results of both tests came back negative (Tr. 193-196; Un. Exh. 6, Ag. Exh. G 5).

On March 31, 2017, a complaint was referred to OIA, and Special Investigative Agent James Dern was assigned to conduct the investigation regarding Officer Guidry's positive drug test. Mr. Dern conducted an interview with Officer Guidry on April 19, 2017. Officer Guidry explained to Mr. Dern that he had tested positive for amphetamines on his initial random drug screening and tested negative on the second results. At that interview, Officer Guidry also explained that he did not have any prescription for narcotic drugs and did not take any amphetamines. Officer Guidry added that he did not know why he had tested positive. His statements were recorded in Officer Guidry's affidavit, submitted with Mr. Dern's investigative report. At the hearing, Mr. Dern testified he had not asked Officer

Guidry about any over-the-counter medications or nutritional supplements (Tr. 53-55; Ag. Exh. G 5, 31-34, 12 p. 51-56).

Mr. Dern concluded his investigation on April 20, 2017 and sustained the allegation of Use/Abuse of Illegal Drugs against Officer Guidry. A proposal letter was issued by Captain Gonzalez to Officer Guidry which advised him that Captain Gonzalez was proposing that Officer Guidry be removed from his employment. Officer Guidry orally responded to this proposal to Warden Dallas Jones on July 17, 2017. In a meeting with Warden Jones, Officer Guidry reiterated that he did not know why the test was positive. Officer Guidry pointed out that he had negative results for his second screening and did not consume any drugs. On August 1, 2017, Officer Guidry provided Warden Jones with a written response to the proposal for removal. In addition, Christopher Bijou, on behalf of the Union, submitted a written response to Warden Jones explaining how and why removal of Officer Guidry was inappropriate. In the Union's response to the proposed disciplinary action, it made reference to two arbitration cases: AFG Local 1035 vs. Bureau of Prisons FCC Pollock, Louisiana, FMCS No. 15-55772-7, and AFGE Local 1010 vs. Bureau of Prisons FCC Beaumont, FMCS No. 141107-50944-3. The Union pointed out that these decisions involved similar conduct to the instant case, and the arbitrators found that removal was not commensurate with the infraction (Tr. 46; Ag. Exh. G 2, 4).

Warden Jones issued a decision sustaining the charge removing Officer Guidry from his position. At the hearing and in the decision letter, Warden Jones stated that he considered the following factors in mitigation: Officer Guidry did not have any prior discipline within the reckoning period and that his performance was above average. However, Warden Jones interpreted the Drug Free Work Place Program as establishing no tolerance for illicit drug use among staff and considered that behavior to be an egregious offense. According to Warden Jones, illicit drug use totally conflicts with the ability to meet the needs of a law enforcement position. Therefore, he concluded that he had lost confidence in Officer Guidry, and a lesser

penalty would not have the sufficient corrective effect on Officer Guidry. Removal for the use of illegal drugs was consistent with the Table of Penalties imposed on other employees who engaged in similar conduct (Tr. 86-89; Ag. Exh. G 1).

Officer Guidry testified that he was unaware of the cause for the positive test for amphetamines until he discussed his intake of a nutritional supplement known as Jack3d with Dr. Gerald Hecht, a biochemist and a neuropharmacologist who was retained by the Union's attorney. According to Officer Guidry, he had been taking this dietary supplement for approximately two months prior to his initial drug screening and at the time of the drug screening as part of a physical fitness regimen. He stated that he had obtained the Jack3d supplement from a military base in San Antonio.[3] Officer Guidry explained that he did not tell Dr. Fierro, Mr. Dern, or Warden Jones that he was taking Jack3d because he was not aware that the nutritional supplement could cause a positive test result on drug screening. He also added that during his discussion with Dr. Fierro, he was not asked whether he had been taking dietary supplements (Tr. 187-200).

Dr. Gerald Hecht has earned three Master degrees and a Ph.D. in Neuropharmacology. He also pursued a post-doctoral fellowship at the National Institute of Drug Abuse. In addition, he is a member of a federal agency group that decides which drugs are to be classified illegal substances. In view of his training and experience, I find him to be an expert in pharmacology and drug abuse.

Dr. Hecht testified that Jack3d contained an ingredient called 1,3-Dimethylamyamine (DMAA) which is an amphetamine. According to Dr. Hecht, if a person ingests an

[3] In its brief, the Agency submitted articles from the New York Times and the Military Times regarding the availability of Jack3d. The Union moved to strike the Agency's submission on the grounds that the hearing was concluded on April 20, 2018 and the Agency submitted their closing briefs on August 7, 2018. The Union argues that it would be unfairly prejudiced by the introduction of new evidence because it had no opportunity to cross-examine any witnesses on the merits of these articles. It is an accepted principle in labor arbitration that post-hearing briefs should be confined to the evidence introduced at the hearing. The rationale for this principle is as stated in the Union's Motion to Strike. The opposing side is entitled to challenge the evidence and to submit responsive evidence as to the merits of these articles. Therefore, the Union's Motion to Strike is granted and the Agency's exhibits attached to its brief will not be considered (Marvin Hill, Jr. and Anthony Sinicropi, The Bureau of National Affairs, Inc., *Evidence in Arbitration* (1981) at pp. 116-117).

amphetamine, it will usually be detectable in a person's system in a urine test for approximately two to five days. For hair follicle tests, the amphetamine may be detectable in a person's system for up to 90 days or several months. In Dr. Hecht's professional opinion, Officer Guidry's concentration level of 5,268 mg/mL is consistent with properties of this 1,3-Dimethylamyamine spiking to a very high level. On April 3, 2017, approximately 10 days after Officer Guidry submitted a urine sample, he had a hair follicle sample and a urine sample tested by Advantage Drug Testing. Both samples were found to be negative for amphetamines or any illegal drugs. According to Dr. Hecht, the negative hair follicle results, taken shortly after the urine test, are consistent with the properties of DMAA leaving the body very quickly. Dr. Hecht explained that most amphetamines are detectable in hair follicles for several months while DMAA will leave the body very quickly (Tr. 240-248; Un. Exh. 17; Ag. Exh. G 12, p. 241-246).

V. POSITIONS OF THE PARITES

A. THE AGENCY

The Agency argues that the Grievants were law enforcement officers and correctional workers at FCC Beaumont. A majority of the individuals incarcerated at this facility have been convicted of violations of federal drug and narcotics laws. The Employer has a very strict requirement that employees not engage in the use of illegal drugs, and if they do so, they will be terminated.

The Agency maintains that the evidence shows that both Grievants tested positive for amphetamines in random drug testing. The explanations offered by the Grievants are not credible. Officer Guidry failed to mention any dietary supplements or over-the-counter medications to the Medical Review Officer. Officer Contreras failed to mention his wife's medications to the Medical Review Officer. Neither of the Grievants offered these explanations for positive urine tests during the investigatory stage of the disciplinary process.

The Agency reasons that Grievant Guidry's supposed hair follicle test, taken within days of his urine sample, coupled with his 5,268 mg/mL urinalysis results, together with the known retention of amphetamines for months in hair samples, as opposed to a few days in urine samples necessarily shows that his negative hair sample was not his hair. Moreover, the speed in which Officer Guidry sought to obtain a hair follicle test expressed guilty knowledge.

Officer Contreras claimed that his wife had supposedly been taking Adderall for the past 10 years but was only able to produce a 2017 prescription bottle dated one year after his August 24, 2016 urinalysis collection. The Agency opines that if Officer Contreras's wife had really been taking Adderall for 10 years, he would certainly have produced evidence of an active 2016 prescription.

As federal law enforcement officers, the Grievants were responsible for the care, custody, correction, and supervision of federal criminal offenders, including drug offenses. They were held to a higher standard of conduct. If the Grievants had a drug problem, they could have come forward to be identified and seek what is called safe harbor. They could have received help through the Employees Assistance Program. Their refusal to accept responsibility and seek treatment underscores the importance of their removal from enforcement correction work.

The Agency asserts that the Grievants received their full due process rights during the investigative stages and when they appeared before the deciding officer, Warden Dallas Jones. Warden Jones came to the conclusion that termination for both employees was necessary in order to preserve the integrity of the federal prison work force.

The Agency cites two arbitration cases where removal was the appropriate penalty for law enforcement officers who had refused to accept responsibility for drug usage and had refused to seek treatment. In *Smith v. USAF*, 2008 WL2572479 (Ben-Am, 2008), an Air Force Mechanic with a positive urinalysis denied drug use, and the deciding official believed

that the Mechanic had no rehabilitation potential. In re *Portal, New Jersey Department of Transportation*, 2008 WL4760979 (2008), an Agency truck driver with positive urinalysis who denied drug use and failed to seek treatment was removed from employment. In conclusion, the Agency contends that Grievants knew the employer did not tolerate drug use. The Grievants used drugs anyway and concocted stories to cover their misconduct and avoid treatment for their drug problems. Under these circumstances, removal is the only appropriate remedy.

B. THE UNION

The Union asserts that there is ample arbitration precedent involving the Bureau of Prisons which establishes that termination is unjust and grossly inappropriate for Officers Guidry and Contreras in summarily terminating these two employees. The Agency failed to establish "just and sufficient cause" or evaluate the punishment in light of the factors set out in *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306-307 (1981).

In support of this proposition, the Union cites numerous cases in which the arbitrators held that grievants removal for testing positive in the first instance for illegal drugs lacked just and sufficient cause. Among the cases cited by the Union was *AFGE, Local 1010 & FCC Beaumont Tx.*, FMCS No. 141107-50944-3 (Halter, 2015). Arbitrator Halter found that there was just and sufficient cause to discipline the grievant, and a 30-day suspension was an appropriate remedy for the misconduct. Another case cited by the Union was *AFGE, Local 1034 & Federal Bureau of Prisons, Pollock La.,* FMCS No. 15-5572-7 (Pagnano, 2016). In that case, the arbitrator found that the principle of just cause and progressive discipline did not constitute an "offense so egregious" as to require removal for the first offense. The only case cited by the Union where a grievant was summarily terminated for testing positive for a steroid was *Council of Prisons, Local 1218 & Federal Detention Center, Honolulu, Hawaii,* FMCS No. 08-56247 (Shapiro, 2008). However, Arbitrator Shapiro's decision was

overturned in 2009 by the Court of Appeals for the Federal Circuit (*Torres v. Department of Justice*, No. 2009-3443) (Fed. Cir. 2009). The court found in that case that the agency's "zero tolerance policy" was inconsistent with the Bureau of Prison's Drug Free Work Place Policy which indicates that disciplinary action will depend upon the circumstances of each case, and the full range of disciplinary actions are available.

The Union contends that the Agency committed an unjustified and unwarranted action by removing Officer Contreras from his position without just and sufficient cause. In Officer Contreras' case, he accidentally consumed some of his wife's Adderall medicine which resulted in a positive drug test. At the time, Officer Contreras did not have any gas, power, or electricity in his home. Considering the fact that he woke up for work at 2:30 a.m., when it was dark and difficult to see anything in his house, and all of the medications and pills were kept in the same dresser drawer as the entire family's medication, including his wife's Adderall, it is a perfectly reasonable explanation that he mistakenly consumed her medication. There is no evidence to show that Officer Contreras had a pattern of habitual use. Officer Contreras' mistake is certainly not just and sufficient cause for removal, but rather a mitigating circumstance in determining the appropriate remedy.

The Union reasons that the Agency failed to show a sufficient nexus between Officer Contreras' conduct and the efficiency of the service or that removal was a reasonable action. It offered no proof that Mr. Contreras was ever under the influence of drugs while working or that his work performance suffered as a result of using drugs, or that he used drugs more than one time.

The Union maintains that in Officer Guidry's case, the Agency failed to support its burden of proof because the charged conduct did not occur. Officer Guidry's positive test for amphetamines was caused by the ingestion of the over-the-counter nutritional supplement, Jack3d. However, the Agency failed to show that Officer Guidry took an illegal drug. The

Union was able to show that the reason for the positive result of the amphetamines was caused by a legal substance, Jack3d.

According to the Union, the main ingredient of Jack3d is DMAA which is an amphetamine. Based on Dr. Hecht's testimony, amphetamine is normally detected in a person's system for approximately two to four days for urine tests and up to 90 days or several months for a hair follicle test. Considering Officer Guidry tested positive for amphetamines on March 24, 2017, but tested negative for amphetamines during a hair follicle test on April 5, 2017, the results are consistent with the properties of DMAA. According to Dr. Hecht, this substance causes a high concentration of amphetamine shortly after ingestion and leaves a person's system within a very short period of time. Considering that Jack3d was a legal substance, bought over the counter by Officer Guidry, his test was false positive, meaning there was an explanation for the presence of amphetamines. The Union maintains that since Jack3d is a legal substance, Officer Guidry's charge of using an illegal substance was improper because he did not ingest an illegal substance.

In the alternative, the Union avers that the Agency has not sufficiently shown the nexus between the conduct and the efficiency of the service nor was removal a reasonable action. The Agency failed to show that the drug affected Officer Guidry's job performance or that he used the drug more than once.

In conclusion, the Union asserts that Warden Jones did not consider the *Douglas* factors in arriving at the decision to remove both Grievants. While stating in his decision letter and on the stand that he considered the Grievants' length of service, rehabilitation potential, and the Table of Penalties, the seriousness of the offense mandated removal. In addition, Warden Jones was aware of and failed to consider other arbitration decisions which set aside the decision of removal and reduced the penalty to a suspension for a single instance of positive drug tests. The Union argues that the *Beaumont* arbitration award, cited in Officer Guidry's written response to the proposal letter, is on point to the instant situation. In this

decision, Arbitrator Halter considered the long service of the grievant in arriving at the conclusion that a suspension was the appropriate penalty. Moreover, Section 9(d) of the Program Statement provides for two different circumstances for mandatory removal, neither of which is applicable to the Grievants' cases (Un. Exh. 3). Taken together, the Master Agreement and the Drug Free Work Place Program endorse progressive discipline as a method to correct and improve employee behaviors except in situations where the offense is "so egregious" that an employee's first offense could be subject to removal. A single positive test for amphetamines is not specified as being "so egregious" by the Master Agreement, the Drug Free Work Place Program, or the Table of Penalties as to warrant summary discharge. For these reasons, the Union contends that both Officers Guidry and Contreras should be reinstated to their previously held positions at FCC Beaumont and made whole for any wages or benefits lost.

VI. DISCUSSION

Article 30 defines a "disciplinary action" as a suspension of 14 days or less. Any suspension over 14 days constitutes an "adverse action." Any employee who is dissatisfied with the decision on any disciplinary or adverse action may either file a grievance or appeal such action to the Merit Systems Protection Board (Board). When, as here, the employee elects to use the negotiated grievance procedure, an arbitrator must apply the same criteria found in the Civil Service Reform Act in deciding the case as would be applied by a Board Administrative Law Judge (see *Cornelius v. Nutt*, 472 US 648).

Arbitrators have treated the term "just cause" as found in collective bargaining agreements as synonymous with the terms, "cause" or "just and sufficient cause." It is a well settled arbitration principle that there are no significant differences between these various

phrases (*How Arbitration Works*, Elkouri & Elkouri, 5th ed., p. 930-931). Simply stated, the traditional definition of "just cause," as applied by arbitrators to disciplinary action, is that it "entitled an employee to due process, equal protection, and individualized consideration of specific mitigating and aggravating factors" (Theodore J. St. Antoine, Ed., National Academy of Arbitrators, *The Common Law of the Workplace*, 2nd Ed. (2005) at 171).

These tenets are reflected in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-307 (1981). In that case, the Board set forth the criteria that are relevant for consideration in determining an appropriate remedy for an act of employee misconduct. The factors, set out in *Douglas*, and having the most bearing on the issue of discipline, are the following: 1) whether the misconduct occurred; 2) whether a nexus exists between the misconduct and the efficiency of the service; 3) whether the penalty imposed was reasonable.

The primary question is whether the misconduct forming the basis of the Grievants' discharge was proven by the Agency. The generally accepted arbitrable Board standard is that, in discharge cases, the Agency must prove by a "preponderance of evidence" that the grievant was responsible for the misconduct. A "preponderance of evidence" is defined as substantial evidence that it is more likely than not that the event occurred, and the grievant was guilty of the wrongdoing (Marvin Hill, Jr. and Anthony Sinicropi, the Bureau of National Affairs, Inc., *Evidence in Arbitration, supra*, at pp. 10-14). Also see 5 CFR § 1201.56.

On August 24, 2016, Officer Contreras was randomly selected for a drug screening. The quantitative result for amphetamines on the drug screening was a concentration of 1,406 mg/mL. On March 24, 2017, Officer Guidry was randomly selected for a drug screening. The quantitative result for amphetamines on the drug screening was a concentration of 5,268 mg/ mL. The Union did not challenge the chain of custody for the urine samples or the accuracy

of the tests. Therefore, the evidence shows that the Grievants were found to be positive for amphetamines.

I find Officer Contreras' explanation of his positive test for amphetamines to be credible. At the time he took the drug test, his living situation was in turmoil. There was a power shortage and electrical fire which caused his house to be without any power or electricity. All the medications were kept in one cabinet, and it is entirely possible that he inadvertently took his wife's Adderall.

Officer Guidry's explanation of how he ingested amphetamines is also credible. He stated that he had taken the nutritional supplement Jack3d for about two months prior to his initial drug screening and at the time of the drug screening. Jack3d contains the active ingredient DMAA which is an amphetamine. There is no evidence that he knew about the ingredients in Jack3d or purposely ingested the nutritional supplement for its amphetamine induced effect.

Dr. Hecht also provided his professional opinion on why Jack3d resulted in a high concentration level of amphetamines. According to Dr. Hecht, the negative hair follicle result taken shortly after was consistent with the properties of the drug found in Jack3d leaving the body very quickly. Most amphetamines are detected in hair follicles for months after ingestion.

The assertion that Officer Guidry substituted another hair sample rather than his own is without support. On April 3 and 5, 2017, Officer Guidry went to Advantage Drug Testing and had both a urine test and hair follicle test performed. Advantage Drug Testing is the same contractor which performed the original urinalysis on Officer Guidry's specimen. It follows, then, that Advantage Drug Testing would have taken its own hair sample from Officer Guidry. The result of the hair sample was negative which would support Dr. Hecht's opinion that the amphetamine properties found in Jack3d leave the body very quickly.

The assertion that the Grievants inadvertently ingested amphetamines is supported by the fact that this was a single instance of a positive drug test for the Grievants. There is no evidence that the Grievants were habitual drug users. Given the Grievants' long work history, it stands to reason that they would have been randomly tested for drug use at some point in their career. The record does not indicate any previously positive drug tests for the Grievants.

Nevertheless, even though the ingestion of amphetamines might have been inadvertent, positive drug test results in a prison environment are cause for some discipline. In assessing the appropriate penalty to impose for the Grievants' misconduct, the Board established in *Douglas* certain factors to be considered in determining the severity of the discipline. The relevant *Douglas* factors to be considered for both Grievants in the instant matter are as follows:

1. Seriousness of the Offense 3.Nexus

It is a well-recognized principle that employees who hold law enforcement or security positions are held to higher ethical standards because they occupy a position of trust and responsibility. Any violation of a law by a law enforcement officer is both embarrassing personally and for the agency. The Grievants provided specimens that tested positive for amphetamines on one occasion.

3. Clarity of Notice

The Grievants were on notice concerning the use of illegal drugs due to annual training and the Drug Free Work Place Policy and the Agency's Program Statement. However, they were not on notice that removal would occur after a one-time positive drug test. The Program Statement 3735.04 of the Drug Free Work Place Policy states "the severity of the disciplinary action taken against an employee (who uses illegal drugs) shall depend on the circumstances of each case …."

4. Past Work and Disciplinary Record

Both Grievants have a long history of at least satisfactory work performance. Officer Contreras received positive evaluations and awards throughout his tenure. There is no discipline in the record during the reckoning period for both Grievants.

5. Notoriety of the Offense

There is no evidence of any negative news accounts of the Grievants' conduct.

6. Grouping Consistency of the Penalty 7.Mitigating Circumstances

8. Potential for Rehabilitation 9.Alternative Sanctions

The guiding principles for assessing the penalties for drug use are to be found in Section 9(c) of the DFWP which states:

> The severity of the discipline to be issued an employee shall depend on the circumstances of each case and shall be consistent with the Executive Order and the full range of disciplinary action shall be available.
>
> The Bureau shall initiate disciplinary action against any employee determined to be using illegal drugs, but may not discipline an employee who voluntarily admits to illegal drug use in accordance with Section 8 of the Program Statement. Such disciplinary action shall be consistent with the requirements of the Discipline and Adverse Action article of the Master Agreement and existing disciplinary and adverse actions, regulations and procedures.

Article 30, Section C of the Master Agreement states:

> The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except as the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal. Thus the DFWP incorporates the concept of progressive discipline and the severity of the discipline is dependent on the circumstances of each case.

As Eric Young, the National President of the Council of Prison Locals, pointed out, Article 34 of the Master Agreement states that the parties recognize that alcohol, drug abuse, and emotional problems are treatable illnesses. Any claim of a zero tolerance policy for drug abuse is misguided because the Drug Free Work Place policies call for rehabilitation rather than summary removal from the workplace. However, Section 9(d) identifies when the removal of an employee is mandatory. Specifically, it states that the Agency can remove an

employee: (1) when the employee refuses to obtain counseling or rehabilitation through EAP; (2) when the employee has not "refrained from illegal drug use after first finding or admission of illegal drug use."

Program Statement No. 3420.11 (Standards of Employee Conduct) specifies only certain offenses which require the penalty of removal for the first offense. Among these offenses are the following: refusal to cooperate in a U.S. government inquiry or investigation; refusal to undergo a search of person or property; conversion of government funds or funds in government custody to personal use. Article 30, Section C of the Master Agreement additionally acknowledges there are "offenses so egregious as to warrant severe sanctions for the first offense up to and including removal."

The Standard Schedule of Disciplinary Offenses and Penalties does not specifically identify a penalty for the first offense of a positive test for illegal drugs. However, for a first-time offense of reporting to duty under the influence of intoxicants or drugs, the Standard Schedule of Disciplinary Offenses and Penalties range from a 5-day suspension to removal. A violation of this offense allows for a range of disciplinary action, not mandatory or automatic removal for a positive urinalysis. As stated in Program Statement 3735.04, "the severity of the disciplinary action taken against an employee determined to be using illegal drugs shall depend on the circumstances of each case and shall be consistent with the Executive Award." Therefore, the assessment of an appropriate penalty for a positive drug test requires consideration of the *Douglas* factors and the application of the progressive discipline standard.

In arriving at the decision to remove the Grievants, Warden Jones testified that he had considered the *Douglas* factors. Nevertheless, the evidence shows that Warden Jones paid mere lip service to the *Douglas* factors. Warden Jones testified that a single positive test for illegal drugs in and of itself is so egregious an offense that it warrants mandatory removal. Warden Jones testified , "Based upon the federal requirements for a drug free

workplace by executive order, the Bureau of Prisons many many many years ago established a drug free workplace. In that drug free workplace illicit drug use was – no tolerance was established for illicit drug use among staff" (Tr. 87).

The *Douglas* factors provide definite procedures for assessing disciplinary penalties. Where, as here, the Agency is bound by the *Douglas* considerations, due process, an essential element of just cause, requires that those procedural restrictions must be scrupulously observed. In addition, the Warden ignored the Union's written response to the proposal to remove the Grievants. The Union's written response points out many arbitration decisions, including *Beaumont,* where the arbitrators held that a single instance of a positive urinalysis does not require termination. Consequently, the Grievants' removal is inconsistent with the penalty imposed upon other employees with the same or similar offenses. A zero tolerance policy, as applied by Warden Jones, is in conflict with the Master Agreement, Agency Policy, and the Drug Free Work Place Program.

The Board, in reviewing instances where the Agency has failed to give proper consideration of the *Douglas* factors, has held that the Agency's choice of penalty is no longer entitled to deference, and the Board (or in this case, the Arbitrator) is free to re-evaluate and give proper consideration to the *Douglas* factors without regard to the Agency's choice of penalty (*Wynne v. Department of Veterans Affairs,* 75 MSRP 127 (1997)).

In view of their position as law enforcement officers, the Grievants were negligent in their ingestion of amphetamines. While there is just and sufficient cause to discipline the Grievants, under the circumstances of the cases, removal was not the appropriate penalty. Lack of due process may not negate the penalty for an offense, but it certainly affects the extent of the discipline. Accordingly, the penalty shall be modified to a five-day suspension.

VII. AWARD

The grievance is sustained in part. The Agency did not remove the Grievant Jose Contreras effective August 11, 2017 and Grievant Charles Guidry, effective August 26, 2017, for just and sufficient cause and only for reasons that would promote the efficiency of the service. The Agency violated Articles 30 and 6, thereby, depriving the Grievants of due process. However, there is just and sufficient cause for suspending the Grievants for testing positive for illegal drugs. The Agency is directed to reinstate Grievants Contreras and Guidry and make them whole with full back pay, benefits, and statutory interests lost beyond the five (5) day suspension. The Agency is further directed to expunge the records of the Grievants' discharge.

The Grievan/ts and the Union are entitled, per 5 U.S.C. 5596, to reasonable attorney's fees related to the personnel action, which shall be awarded according to the standards under Section 7701(g). The Union has thirty (30) calendar days from the date of this Award to reach agreement with the Agency on reasonable attorney's fees. Should there be no agreement at the conclusion of thirty (30) calendar days, the matter will be presented to the Arbitrator for determination. The undersigned Arbitrator shall retain jurisdiction for the sole purpose of resolving any dispute that may arise over the implementation of this Award. The parties shall be invoiced for any post-hearing matters.

Dated this 11th day of September, 2018.

Ira S. Epstein/S/_____
Ira S. Epstein, Arbitrator