FEDERAL MEDIATION & CONCILIATION SERVICE
Case No. 11-53789-3

In the Matter of the Arbitration between	*	
RODNEY WILLIAMS/ COUNCIL OF PRISONS, Local 1637 Grievant/Union	*	**Grievance No. 00747 (Removal Action)**
and	*	
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS Agency	*	

BEFORE: Edward B. Valverde, Esq. – Arbitrator

APPEARANCES:
For Agency: Whitney A Coleman, Labor Relations Specialist; Trina Wiginton, Human Resources Manager

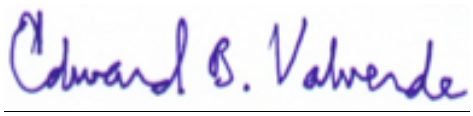
For Union: Dr. Roger D. Payne, National Secretary Treasurer of Council of Prison Locals 33; Tony Cornelius, Vice President, Local 1637; Kim Neely, President, Local 1637; Rodney Williams, Grievant

Place of Hearing:	Seagoville, Texas
Dates of Hearing:	November 15-16, 2011
Date Hearing closed:	January 26, 2012[1]
Date of Award:	February 18, 2012
Type of Grievance:	Removal

AWARD SUMMARY

Grievance is sustained in part. The Agency failed to establish by a preponderance of evidence that it was justified in removing Rodney Williams (Williams) from the position of correctional officer for violation of the Drug-Free Workplace Program. In compliance with the Agency's disciplinary schedule, Williams will be required to serve a 30-day unpaid suspension. Williams will be reinstated immediately and is to be made whole for any loss of income and benefits, less interim earnings.

[1] The record was closed upon receipt of the parties' briefs. The last brief was received on January 26, 2012.



Edward B. Valverde, Esq. – Arbitrator

DISCUSSION, OPINION and AWARD

This matter was heard on November 15 and 16, 2011 at the Agency's facility in Seagoville, Texas. All parties fully participated at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence on the issues. Based on the record evidence, my observation of witnesses, examination of all exhibits, and consideration of the arguments presented by the parties,[2] the arbitrator issues the following Discussion, Opinion and Award.

ISSUES

Was the adverse action taken for just and sufficient cause and, if not, what shall be the remedy?

BACKGROUND SUMMARY

Relationship of the Parties

The Federal Bureau of Prisons (BOP) (Agency hereinafter) is the agency designated by the federal government to operate and manage federal prison facilities in the United States. In 1968 the Council of Prison Lodges (currently known as the Council of Prison Locals (COPL)) was certified as the exclusive representative of all employees employed by the Agency with exception of the employees of the Central Office. (J-1, Art. 1, Sec. c.) Local 1637 is agent for COPL for employees employed at the BOP facility located in Seagoville, Texas, the facility involved herein.

Agency and COPL have been parties to a collective bargaining agreement that was entered into on March 9, 1990 with a termination date of March 8, 2001. Since that period the parties have been in negotiations for a new collective bargaining agreement. In the interim, that collective bargaining agreement, also known as the Master Agreement

[2] All arguments raised by the parties were considered. However, only those deemed determinative in this matter will be addressed.

(MA) has remained in effect. (J-1, Art. 42, Section b) Provisions of the MA relevant to these proceedings include the following:

> Article 3 – Governing Regulations
>
> Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations. (CBA)
>
> Article 4 – Relationship of this Agreement to bureau Policies, Regulations, and Practices [Consider inserting – will have to look at 5 USC 7106, 7114 and 7117 if included.]
>
> Article 6 – Rights of the Employee
>
> Section b.2. – [T]o 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 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.
>
> Section d.1. [W]hen an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation *will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer* or designee;
>
> Section e. When formal disciplinary or adverse actions are proposed, the proposal letter will inform the affected employee of both the charges and specifications, and rights which accrue under 5 USC or other applicable laws, rules, or regulations.
>
> Section g. The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution or remove the employee from the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.
>
> 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.

Article 34 – Employee Assistance Program

Section a. …The Employer further agrees that:

1. [E]mployees having an alcohol, drug abuse, and/or emotional problem will receive the same consideration and offer of assistance that is extended to employees having any other illness;
2. (omitted by arbitrator)
3. [S]ick leave may be granted for the purpose of treatment or rehabilitation as in any other illness;
4. [A]lcoholism and/or drug dependency may be considered under certain circumstances to be treatable illnesses and/or handicapping conditions in accordance with applicable laws, rules, regulations, and case cites….
5. [A]n employee can request protection under safe harbor provisions of the Drug-Free Workplace Program. To participate in this program, an employee must:
    a. voluntarily identify himself/herself as a user of illegal drugs prior to being identified through other means;
    b. obtain counseling or rehabilitation through an Employee Assistance Program; and
    c. thereafter refrain from using illegal drugs.

Section b. A request for counseling and/or referral services will not, in itself, jeopardize an employee's job security or promotion opportunities. However, it is understood that the presence of a treatable disorder and willingness to accept counseling does not prevent the Employer, except as limited by law, case law (firm choice), rule, or regulation. From taking appropriate administrative action on misconduct unrelated to the disorder or on misconduct which is influenced by the disorder. It is the intent of the parties to provide an opportunity for employees to resolve their personal problems. (Italics above added.)

Events resulting in Discipline

Rodney Williams (Williams) was employed as a correctional officer, a position he had held for 14 years. Throughout his employment he served without any discipline and his evaluations were in the categories of "outstanding" to "exceeds outstanding". During 2009 as a result of his outstanding rating Williams received a quality within grade increase.

Sometime during October-November 2010, Williams was off work and traveled to his hometown of Greenville, Mississippi. During his visit home, he met with an old family friend who was self-medicating her problems with depression with marijuana. Williams was also dealing with personal problems at the time and the friend invited him to self-medicate with marijuana to relieve the stress.[3] During the two days Williams was in Mississippi he smoked marijuana three separate times; twice in one day and once the other. This was the only time Williams used marijuana. Williams returned to Texas and to work thereafter without incident.

On November 13, 2010 Williams was notified that under the random testing policy he was to take a random drug test, which he took that same day. (Williams was aware that as a law enforcement officer he was subject to being tested for the use of illegal substances including marijuana).[4] Thereafter, on about November 15, 2010 Williams was contacted by the drug testing company and informed he had tested positive for marijuana. Williams was asked if he wanted the sample retested, which Williams requested. Several days later, on November 17, 2010 Williams contacted the Employee Assistance Program (EAP) Coordinator and enrolled in the EAP. He completed the program on January 7, 2011.[5] During that same period Williams also paid for and took two drug tests (on November 22, 2010 and January 18, 2011) from an outside drug-testing provider. On both occasions, the results were negative. (J-15) Williams later provided copies of these results to the Agency.

On January 4, 2011 Williams' department head, Captain Mariano Perez issued

[3] Williams' personal problems will be discussed in further detail below.
[4] At the time of employment with the Agency (September 22, 1997) Williams signed an "Acknowledgement of Receipt of Notice to Employee Whose Position Has Been Determined Subject to Random Drug Testing." (A-1) This notice, in relevant part informs employees of the Drug-Free Workplace Program; that any illegal drug use is incompatible with the mission of the Agency; that a positive test result may result in disciplinary action up to and including dismissal; and that an employee who informs his CEO prior to suspicion or investigation of a drug problem may qualify for protection from disciplinary action. Williams' signature was an acknowledgement of these facts.
[5] In the summary report issued by the Clinician, she stated: "Client is able to accept personal responsibility for his action. Was compliant with the EAP episode of cure. Did present a negative drug test report during the treatment process…Successfully completed the six session psychotherapy process." (J-14)

Williams a notice of proposal to remove him from his position for the charge of *"Providing a Specimen Which Tested Positive for an Illegal Drug."* (J-5) In the notice Perez stated Williams' conduct was egregious because he was a law enforcement officer and as such was held to a higher standard; that his conduct was in direct violation of the Standards of Employee Conduct that identifies the use of illegal drugs or narcotics is strictly prohibited at any time. The letter further stated in relevant part:

> As a Correctional Officer you are responsible for the care, custody and correction of individuals convicted or awaiting trial for violations of United States government criminal laws, many of these laws pertain to selling, purchasing and use of illegal drugs. Many of the offenders that you have daily contact with in performance of your duties are incarcerated for drug related offenses and/or have a substance abuse problem. As a Correctional Officer you are also a Federal Law Enforcement Officer and *your testing positive for an illegal drug reflects on the integrity of the Bureau and betrays the trust and confidence placed in it by the public*. It is expected that employees shall obey, not only the letter of the law, but also the spirit of the law while engaged in personal or official activities. You have been made aware of the potential ramifications for illegal drug usage as you have acknowledged receipt of Program 3420.09, Standards of Employee Conduct and Program Statement 3735.04, Drug Free Workplace. Additionally, the fact that you have tested positive for marijuana, an illegal drug, while employed as a Federal Law Enforcement Officer, *causes me to question your ability to exercise correct and sound judgment when carrying out the duties expected of you in the completion of your day to day assignments*. *Your actions in this matter have destroyed your credibility and have demonstrated that you are not one to whom the care, custody, and correction of federal criminal offenders may be entrusted*. If this proposal is sustained, your removal would be fully warranted and in the interest of the efficiency of the service. (Italics added.)

The letter further informed Williams that the Warden would make the final decision on the proposal and of his right to representation. (Joint Ex. 5)

On January 25, 2011 Williams and his representative Tony Cornelius met with Warden Maureen Cruz. At that meeting Williams provided a written response to the proposal of removal where he admitted to the use of marijuana during a two-day visit to his hometown, that he was ashamed for this breach of trust and that he would never violate that trust again. (Joint Ex. 6, Tr. V-II, p. 26-28)

Cruz issued her decision letter sustaining the proposal to remove Williams on February 7, 2011. In that letter Cruz stated that her decision to remove Williams was made after consideration of Perez's recommendation, Williams written and oral

responses of January 25, 2011 the Union's response, and to the evidence contained in the adverse action file. Cruz further stated:

> "…I find the charge sustained and fully supported by the evidence in the adverse action file. As a Federal Law Enforcement Officer, you are responsible for the care, custody, and correction of individuals convicted or awaiting trial for violations of United States government criminal laws. Indeed, many of the offenders you have daily contract with in the performance of your duties are incarcerated for drug related offenses, such as selling and purchasing illegal drugs, and /or many have a substance abuse problem. The fact that you have tested positive for marijuana, an illegal drug, while employed as a Federal Law Enforcement Officer, *has destroyed my confidence in your judgment and ability to exercise sound correctional judgment when carrying out the duties you are expected to perform in your day to day assignments*.
>
> It is employee's responsibility to comply with the Drug Free Workplace policy. Given the agency's law enforcement mission, the Bureau of Prisons has reason to operated a comprehensive drug testing program…You are aware of the policy as we train, and annually reinforce the Standards of Employee Conduct to all staff immediately upon entrance on duty and annually thereafter. Furthermore, you acknowledged your position would be subject to random drug testing on September 22, 1997.
>
> When considering what penalty is appropriate, I considered, among other factors the charge of providing a specimen which tested positive for an illegal drug is a very serious charge in light of your position as a Federal Law Enforcement Officer, and the fact that you were fully aware that using illegal drugs while employed with this agency is prohibited. I considered that during your oral response, you accepted full responsibility for your mistake and stated, "It will never happen again;" and, in your written response you stated, "for this breach of trust, I am deeply ashamed and I wholeheartedly apologize for my actions." I also considered you attended counseling sessions through the Employee Assistance Program. Although you have accepted full responsibility and are deeply ashamed for your actions, it does not outweigh the seriousness of your misconduct.
>
> Your position as a Federal Law Enforcement Officer requires that you avoid situations which involve illegal drug use and conduct. You are expected to conduct yourself, both on and off duty, in a manner that maintains respect for the Bureau of Prisons. *While your work record has been acceptable*, it does not shield your very serious actions of using an illegal drug. I have also taken into account that you do not have any prior discipline. I considered that the penalty of removal is consistent with the agency's table of penalties, and that *your superiors have completely lost confidence in your judgment and credibility*.
>
> *There were no mitigating factors sufficient to overcome your removal in this case*; and, although alternative sanctions were considered, I concluded that they would not have the desired corrective effect. Specifically, I considered a demotion. However, I concluded that a demotion would not be effective because

> *Correctional Officers, as well as any other position within the institution at any grade level, have the same level of responsibility to address, correct, and report inmate infractions and conduct, including the use of illegal drugs*. Moreover, *because you did not voluntarily present yourself as an illegal drug user prior to being identified through the Agency's Random Drug Testing, your credibility as a law enforcement official will always be subject to question and impeachment*.
>
> Because of this misconduct, I, and your supervisors, have lost confidence in your ability to uphold the standards expected of a federal correctional worker. As you know, Program Statement 3735.04, the Drug Free Workplace, establishes that Bureau of Prisons' employees will not use drugs illegally. Any illegal drug use is contrary to the Bureau's law enforcement mission. *Your actions in this matter have destroyed your credibility and effectiveness as a correctional worker*. It is therefor, my decision, that you be removed from your position effective midnight, February 7, 2011." (Italics added.)

Thereafter, the Union, on behalf of Williams timely filed a grievance. The matter is now properly before the arbitrator for decision.[6]

Additional Facts Developed at Hearing[7]

Testimony of Laine Jaffe

Laine Jaffe is the Chief of Psychology at the Seagoville facility. He also serves as the EAP Coordinator. Jaffe testified his duties as Coordinator are to inform employees of the services provided by EAP, e.g., how to receive free mental health counseling. This is done through Institutional and Familiarization Training for new employees and through Annual Refresher Training for current employees. Employees who participate in EAP can receive up to six free counseling sessions per calendar year. During cross-examination Jaffe admitted that individuals with drug abuse issues, regardless of the drug, can and do become drug free. He admitted that marijuana is the least physically addictive of illegal substances – "You don't become dependent on the drug." (Tr. V-I, p.32). However whether one is able to become drug free is not dependent on what drug he/she was addicted to but whether the individual wants to become drug free.

Jaffe also testified about the "safe harbor" provisions of the Drug Free Workplace policy. If employees self report (admit to using illegal drugs) and take the EAP training to become drug free, they will not be disciplined. However, if they relapse, they will be

[6] No issue regarding the arbitrator's authority to hear and decide this grievance was made.

[7] This is a summary of relevant portions of witness testimony.

held accountable. Jaffe testified that EAP have successfully helped staff with substance problems (Tr. 23) and that Williams successfully completed the EAP program. (J-14, Tr. V-I, p. 33)

Testimony of Captain Mariano Perez

Perez testified that lieutenants supervised Williams but he was the department head. Prior to this incident, he had never been involved in any disciplinary action during his 13 years as a supervisor. (Tr., V-I, p. 71) In his capacity as department head Human Resources (HR) notified him that Williams had tested positive for marijuana. Perez did not engage in any independent review of Williams' employment history. He did not review Williams' personnel file. (Tr., V-I, p. 63) He was not aware of Williams' length of service with the Agency. Perez stated the notice of proposed removal was prepared by HR, that he reviewed and concurred with the contents and signed the letter. Perez admitted he did not consider any mitigating circumstances that Williams may have had, that he only relied upon the "Standards of Employee Conduct" in support of his recommendation to discharge Williams. (Tr.,V-I, p. 58) He further admitted that he did not review Williams' performance evaluations nor did he know if Williams' had received any awards. (Tr. V-I, p. 64) Perez admitted there was no evidence that Williams had worked under the influence of any illegal substances. Perez could not recall what he specifically relied upon in making his recommendation to discharge Williams. While he remembered that he used the Standards of Employee Conduct Program Statement to decide what penalty to recommend, he could not recall on what penalty category he based his recommendation. Perez defined "egregious action as "something that is not proper, something that's not authorized." (Tr. V-I, p. 61) Perez could not recall whether he considered the factor of notoriety, i.e., whether there was any public notice of Williams' misconduct. When asked on cross-examination whether Williams had any potential for rehabilitation, Perez stated he did not know. (Tr., V-I, P. 75)

Testimony of Warden Maureen S. Cruz

Cruz testified she has worked at the Seagoville FCI since April 2001. Cruz stated she relied on Perez' letter of proposal as well as the documents and oral responses that Williams and his Union representative provided. She also considered the January 7, 2001

document from the social worker regarding Williams' completion of the six-session psychotherapy session[8]; and the Federal Manager's guide to discipline. Cruz admitted that Williams admitted his transgression and that he was very sincere in his apology and embarrassment and hoped that everything would be taken into consideration. However, she considered the offense an egregious violation that undermined credibility and integrity. Cruz stated she considered the mitigating factors that were brought to her attention but, "I didn't feel that there was anything that would – any mitigating factor that was strong enough to – to maintain Mr. Williams' employment." (Tr. V-I, p. 86) Cruz further stated, "In a nutshell, we are federal law enforcement officers. Lines cannot be crossed….Forty percent of our population are here because of illegal drugs use. We are the keeper of the keys. We are the ones that watch over them, guard them, are looked to to uphold the law. We're held to a higher standard than any other law enforcement agency…" (Tr. V-I, p. 88)

Cruz testified that she considered the "Douglas Factors" in evaluating the facts before her, however, "Using illegal drugs is breaking the law with law enforcement…that just goes right to the heart of it all." (Tr. V-I, p. 91) She stated the factor of notoriety was not considered because it was not applicable; and considered his potential for rehabilitation, but provided no explanation as to why it was rejected. (Tr. V-I, p. 95) Cruz later explained during cross examination that that Williams' time for rehabilitation had passed since he already had the training as a law enforcement officer and knew that it was illegal to use drugs; and refused to speculate whether additional training would rehabilitate him. (Tr. V-I, 125) However, she did admit to viewing the negative drug tests results that Williams provided. (Tr. V-I, p. 136)[9]

With regard to an alternative sanction, e.g., demotion, Cruz stated she considered it but rejected it as all positions require contact/supervision of inmates – that guards are required to function at 100 percent. Further, the facility has two residential therapeutic communities for drug treatment – "[I]f our employees are using illegal drugs, how can – how can we be the – gatekeepers?" (Tr. V-I, p. 96) Thus, she found a demotion

[8] See fn. 5.
[9] There was no challenge to the accuracy and validity of the two negative drug tests that Williams provided.

inapplicable. Cruz also admitted that she did not prepare the dismissal letter – that it was prepared by HR. However, she reviewed and edited the letter, making changes to several drafts before signing and issuing the letter.

During cross-examination Cruz admitted Williams' performance evaluations were around "exceeds", higher that acceptable. Cruz stated that not all the Douglas Factors need to be considered and that the ones she considered were referenced in her dismissal letter. (Tr. V-I, p. 112-13) Further, she distinguished the situation where an employee voluntarily came forward to admit a drug problem versus an employee who is found to use illegal drugs: "We're sworn law enforcement, and breaking the law and then after the fact coming forward and saying I'm sorry is not the same as admitting up front and seeking help." (Tr. V-II, p. 9) Finally, after Union counsel listed a number of mitigating factors that it asserts should have been considered, he asked Cruz if they could mitigate the discharge, Cruz responded, "I don't know of anything." (Tr. V-II, p. 8)

Testimony of Rodney Williams

Williams testified he was a fourteen-year employee of the Agency. At the time of initial employment he was given a drug test that returned negative. Before working for the Agency he worked four years in the Texas Department of Criminal Justice and had served three and a half years in the Army – part of which was service in the Gulf War. Before leaving the service Williams was diagnosed with PTSD. Throughout these prior periods he had been randomly drug tested with the results negative. During his employment with the Agency Williams received outstanding annual ratings, "On the Spot" awards and received a quality step increase in 2009.

At the time of the events herein (2010) Williams was having problems at home with his 14 –year marriage. Divorce was being contemplated and discussed. His son had recently gone off to college, but quit and was just lying around the house. This was upsetting to him, and he was not getting any support from his wife on this issue. Williams' uncle who had mentored him as a child had recently passed away. It was his uncle that Williams followed into the military and then into work in the corrections field. Williams took two days off and went to his hometown in Greenville, Mississippi. While there he visited a family friend who was self medicating for depression with marijuana.

It was during this visit that he too smoked marijuana. Williams testified this was the only time he used illegal drugs. Upon his return to work he was called upon to take a random drug test that came back positive (on November 16, 2010).

Once he was notified of the positive drug test he decided to contact EAP and go through the program. (Williams received the Agency's letter of referral to the EAP on December 3, 2010, but he actually enrolled on November 17, 2010.) Thereafter, Williams paid for and took two drug tests (November 2010 and January 2011), both of which were negative. He provided those results to the Agency before notice of removal had issued.

Williams admitted to Cruz, both in his written statement and his oral discussions with her, that he had made a mistake. He told her that he was remorseful, and had breached the Agency's trust in him. However, he committed himself to never breach that trust again.

DISCUSSION and OPINION

The arbitrator finds that Agency has failed to establish, by a preponderance of evidence that removal of Williams should be sustained. In order to sustain the discipline issued to Williams, Agency must prove by a preponderance of the evidence that (1) the charged conduct occurred, (2) a nexus existed between the conduct and the efficiency of the service, and (3) the penalty imposed was reasonable. *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997) "Agency action must be sustained, if at all, on the actual grounds relied on by the agency." *Lizzio v. Dep't of Army*, 534 F.3d 1384 (Fed. Cir. 2008) (quoting *Gose v. U.S. Postal Service*, 451 F. 3d 831, 839 n.4 (Fed. Cir. 2006)) Nexus cannot be found based on some other charge.

The first two elements identified above are undisputed. Williams took a random drug test that was positive for marijuana. Thus, Williams was found to have used an illegal drug. Regarding the second element, the Merit Systems Protection Board (MSPB) has determined that use of illegal drugs by a law enforcement officer is contrary to the position that he holds. A law enforcement officer, which a correctional officer undisputedly is, is held to a higher standard than other employees. *Hickman v. Department of Justice*, (10 MSPB 132, 82 FMSR 5185) Thus, there exists a nexus

between the conduct and the efficiency of the service. However, it is the third element – the reasonableness of the penalty – where the Agency fails to meet its burden.

Failure to Investigate Results in Unsustainable Recommendation

Perez, the proposing official, failed to conduct any kind of substantive investigation of the matter. Perez made no effort to determine how long Williams had been employed by the Agency, what kind of performance evaluations Williams received, did not interview Williams to find out his explanation for the misconduct and failed to consider any mitigating factors that might affect the reasonableness of any discipline recommended. Further, Perez did not investigate whether the level of cannabis affected Williams' job performance or whether the test results reflected more than a one-time use of the illegal drug. While Perez was not the deciding official, his recommendation and the content of his notice of proposal had a substantial impact on the deciding official. Because of the range of discipline that was available for this offense (from reprimand to removal), it was incumbent upon Perez to engage in some significant level of investigation of Williams before recommending the ultimate penalty.

Additionally, the failure of Perez to conduct any substantive investigation results in a violation of the DFWP. Section 9 of the DFWP specifically states the severity of discipline to be issued an employee shall be dependent on the *circumstances* of each case and shall be consistent with the Executive Order (EO). Due to the absence of any substantive investigation Perez could not and did not consider the circumstances that caused this previously outstanding employee to engage in this misconduct.

Further, the arbitrator finds that Perez' proposed recommendation to remove Williams was not supported by the charge against him. Specifically, Williams was charged with providing a positive drug test. No evidence was presented either during an investigation or at hearing that the positive drug test was or had affected Williams' job performance. Perez asserted in his recommendation that Williams' actions destroyed his credibility and demonstrated he was not to be entrusted with the care, custody and correction of federal criminal offenders. *Black's Law Dictionary* defines "credible" as worthy of belief; entitled to credit and defines "credibility" as worthiness of belief; that quality in a witness which renders his/her evidence worthy of belief. Because of Perez

failure to conduct any substantive investigation, he did not provide any linkage between Williams' positive drug test and the conclusion that Williams was no longer credible. There was nothing in Williams' statements that was not worthy of belief. And the only evidence regarding Williams' ability to perform his job was limited to evidence that he was an outstanding employee.

Thus, the failure of Perez to conduct any substantive investigation into Williams' conduct or background results in a violation of the DFWP policy; and to the extent that Perez inflated the degree of Williams' misconduct by asserting a breach in credibility results in an inability to sustain the recommendation to remove Williams.

Failure to Investigate and Consider Mitigating Factors results in Unsustainable Discipline

Cruz, the deciding official failed to conduct a substantive investigation and failed to consider all relevant factors necessary to sustain the removal.[10] The lack of substantive investigation is revealed by the fact that Cruz stated in her decision letter that Williams' work record "has been acceptable" when the record reveals his performance was in the outstanding/exceeds range. Cruz stated she relied on the contents of Perez's proposing letter, which fails to meet a reasonable standard of accuracy for the reasons stated above.

Cruz also sought to inflate the level of William's misconduct by asserting his misconduct had caused her to loose confidence in his ability to use "correctional judgment" when carrying out his duties and daily assignments. However, the record is devoid of any evidence Williams used illegal drugs on the job, worked under the influence of them ro otherwise adversely affected his ability to do his job. What the record does establish is that Williams used marijuana on two days while off duty out of state and that this was the only occasion that he did so. The record also reveals that by the time Cruz issued her decision letter (February 4, 2011), Williams had already

[10] The arbitrator does not find Cruz's testimony that she reviewed the file as credible. (Tr. V-I, p. 100) In order for the investigative file to be complete it should have included Williams' employment and employee performance history. Full consideration of the *Douglas Factors* could not take place unless this information was contained in the investigative file and reviewed in order for it to be considered.

successfully completed EAP and had voluntarily provided Cruz with two drug tests that showed he was drug free.

Cruz also sought to justify the discharge by inflating the level of misconduct Williams engaged in by providing a positive drug test. The failed drug test and the surrounding facts establish that Williams showed poor judgment on one occasion while off duty and out of state. No evidence was presented that Williams was impaired on the job and/or otherwise failed to perform his job in an above average manner. Yet, Cruz asserted that his off-duty conduct resulted in a complete loss of confidence on his ability to do his job and that his credibility was destroyed, even though there was no evidence that Williams lied, was under the influence of illegal drugs on the job or was derelict in his duties.

In the discharge letter Cruz stated there were no mitigating factors sufficient to overcome his removal. Cruz testified she considered Williams' length of employment, but rejected this factor because he had received training throughout his employment that use of illegal drugs was contrary to the code of conduct. She did not consider his discipline-free employment record for she made no mention of this factor, ostensibly because she did not review his personnel file to make that determination. Consequently, she did not consider the commendations that he had received. Cruz asserted in the decision letter that Williams' testing positive for use of illegal drugs reflected on the integrity of the Agency and betrayed the trust and confidence placed in it by the public. However, when questioned about the factor of notoriety, Cruz stated it had no applicability for Williams' actions were not public. Thus, in the decision letter Cruz charged him with violating the public's trust when in fact Williams' misconduct did not have any public notoriety.

Williams received Disparate Treatment

Where an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. See, *Lewis v. Dep't of Veterans Affairs*, 111 MSPR 388 (2009) Here, the arbitrator finds the record establishes Williams was disparately treated when he was removed for his

misconduct while another employee was retained for similar misconduct. Cruz admitted during cross-examination that she had disciplined, but retained an employee who was arrested for DWI. (Tr. V-I, p. 115) Cruz essentially distinguished the two situations by the fact that Williams, had used illegal drugs. This is a distinction without substance for in both instances, the employees violated laws while engaged in off duty misconduct. While the employee driving was intoxicated by a legal substance (presumably alcohol), it was consumed to a level that caused the employee to commit an unlawful act (e.g., driving erratically). That misconduct was open to the public and resulted in an arrest that was public and generated negative publicity for the Agency. Williams' misconduct was revealed through a random drug test; he exhibited no outward or public conduct – thus, no public notoriety. Both employees' off-duty misconduct should have resulted in a loss of confidence by Agency management.

Cruz did not further explain why the two situations were handled differently. Both incidents involved employees using addictive drugs. Both addictions can be treated through the EAP and in both situations, as stated by Jaffe, the employees involved can overcome their addiction if one existed. As a result of the Agency's failure to explain the difference in treatment of two similar cases, the arbitrator finds that Williams was disparately treated. Accordingly, the arbitrator finds Agency's decision to remove Williams was arbitrary, capricious, or an abuse of discretion.

Agency did not Fully Consider the Douglas Factors

The Douglas Factors is the standard by which all federal agency disciplinary action is evaluated. In *Douglas*,[11] the MSPB (or Board) enumerated 12 factors that should be considered in deciding the level of discipline that should be issued in any particular case. The 12 factors were not meant to be an exhaustive list of potential factors, but all applicable factors should be considered.

At hearing Cruz testified about the Douglas Factors she considered and stated that those she considered were referenced in her decision letter. (Tr.V-I, p. 113) She further testified that all Douglas Factors did not need to be considered (T-V1, p. 114). The

[11] *Curtis Douglas, et al. v Veterans Administration, et al (Douglas),* 5 MSPR 280 (April 10, 1981).

arbitrator finds that Cruz did not consider all applicable factors and dismissed other factors without reasonable justification.

The *first factor* is identified as "The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated." Although Williams committed a serious offense that had a relationship to his duties and responsibilities, Cruz had notice that his misconduct happened when Williams was away from work and home. The *second factor* involves, "the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position." On this factor, Williams, as a correctional officer, is a law enforcement officer, but maintained no supervisory status and had no public contact, but apparently was viewed as a mentor by fellow employees. Regarding the *third factor*, ("the employee's past disciplinary record,") it is apparent Cruz gave no consideration of this factor for she did not investigate his employment history. Had she done so, it would have revealed that Williams had no history of prior discipline – a favorable mitigating factor. She also would have found that Williams was an above average employee – another mitigating factor. Cruz's consideration of the *fourth factor* ("the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability") could not have been seriously considered. For example, Perez made no investigation of Williams' employment history before recommending discharge. Cruz, who relied on Perez's recommendation, did not make an independent investigation of his employment history, for she did not know the level of his performance as an employee, but apparently did know his fellow employees respected him – another mitigating factor.

Regarding *factor number five*, ("the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties") no evidence was presented that demonstrated Williams' positive drug test otherwise affected his ability to perform at a satisfactory level. And while a lose of confidence in Williams off-duty behavior would rationally occur, there was no linkage by the Agency of this off-duty conduct with Williams' ability to perform his assigned duties. *Factor number six*, ("consistency of the

penalty with those imposed upon other employees for the same or similar offenses") the arbitrator finds the Agency failed to consider this factor in light of the evidence of disparate treatment. (See above.) Regarding *factor number seven*, ("consistency of the penalty with any applicable agency table of penalties") the arbitrator finds that this factor was considered and met simply by the fact that table of penalties allows for the entire range of discipline, from reprimand to discharge. But the record reveals the deciding official (Cruz) failed to consider relevant circumstances, including mitigating and aggravating factors (when determining the appropriate penalty) as required by the Standard Scheduled of Disciplinary Offenses and Penalties. (J-2, Attachment A, p. 1) *Factor number eight* ("the notoriety of the offense or its impact upon the reputation of the agency") the arbitrator finds that Cruz summarily rejected this factor because she found it inapplicable. However, a reasonable consideration of this factor would weigh in favor of Williams because his misconduct was more personal in nature and had no impact on the reputation of the Agency. *Factor number nine*, ("the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question") was clearly considered by Cruz, for there was testimony regarding the annual training the Agency provides.

Cruz stated she considered *factor number 10* ("potential for the employee's rehabilitation") but rejected it essentially because of factor number nine. However, the arbitrator finds Cruz did not reasonably consider this factor, for had she done so, she would have to consider that: (1) Williams admitted his misconduct and exhibited genuine remorse for his behavior; (2) fully explained the circumstances he was under at the time; (3) promised to never commit this error in judgment again; (4) voluntarily entered the EAP program and (5) presented two separate drug tests months apart that corroborated his assertion that he was drug free and that the incident was an aberration. A reasonable consideration by Cruz of the facts on hand would have lead to the opposite conclusion, that Williams was a good candidate for rehabilitation.[12] *Factor number 11* ("mitigating circumstances surrounding the offense such as unusual job tensions, personality

[12] Furthermore, under the DFWP policy, there are no second chances for an illegal drug user. (See, Section 9, DFWP) Thus, Williams is on notice that another positive drug test will result in removal.

problems, mental impairment, harassment, or bad faith, malice or provocation of the part of other involved in the matter") was apparently not considered at all for no reference to such was made in the decision letter. However, Williams clearly provided Cruz with the details of his misconduct, so she was aware of what the circumstances were. Regarding *factor number 12* ("the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others"), Cruz stated she considered the possibility of demotion, but that any position at the FCI would have still involved contact with prisoners. However, her consideration was limited to isolating Williams from prisoners. While the Agency is allowed wide discretion in the determination of discipline, that decision must be reasonably based. Considering that Williams' misconduct had no relationship to his performance, no evidence was presented as to the need to isolate Williams from his duties as a correctional officer.

As a result of the Agency's failure to fully and reasonably consider all relevant Douglas factors the arbitrator finds the removal action was arbitrary, capricious or an abuse of discretion and cannot be sustained.

Application of the Drug Free Workplace Program (J-3)

The arbitrator finds the Agency did not conduct a full investigation of the facts relevant to determine the circumstances surrounding Williams' misconduct. Thus, it failed to properly follow the provisions of the DFWP to Williams' case.

Agency's Drug Free Workplace program has been in place since 1997. (J-3) Under "Purpose and Scope" the DFWP instructs employees that any illegal drug use or abuse of legal drugs has an adverse impact on the accomplishment of the Bureau's law enforcement mission and will not be tolerated; that use of a Federal Controlled Substances Act, Schedule I drug violates federal and the DFWP and inconsistent with security-sensitive positions; and that given the Agency's law enforcement mission there exists a drug testing program applicable to new and incumbent employees.

Under "Program Objective" it states that employees who voluntarily identify themselves as using illegal drugs prior to being identified as such by other means (e.g., random drug testing) will be given an opportunity for treatment and protection from disciplinary action. However, those found to be using illegal drugs would be disciplined.

Section 8 of the DFWP informs employees that voluntary admission of illegal use of drugs can result in protection from discipline if they voluntarily identify themselves, if they obtain counseling and if they thereafter refrain from use of illegal drugs.

Section 9 of the DFWP identifies what will happen when an employee is found to be using illegal drugs. When it is determined that an employee has used an illegal drug he/she is to be referred to the EAP and if the employee occupies a Test Designated Position the CEO shall immediately remove the employee from the position and place the employee in a non-sensitive position until appropriate action is taken by the Agency. The severity of the discipline to be issued the employee shall be dependent on the *circumstances* of each case and shall be consistent with the Executive Order, and the full range of disciplinary action will be available. Section 9.c. identifies the only limitation on the kind of discipline that can be issued -- that it be consistent with the requirements of the Discipline and Adverse Action Article of the MA and existing disciplinary and adverse action regulations and procedures. (J-3, p. 7 (DFWP Section 9.c.)) Section 9.d. identifies when the removal of an employee is mandatory. Specifically, it states the Agency can remove an employee who is found to use illegal drugs: (1) when the employee refuses to obtain counseling or rehabilitation through the EAP or (2) when the employee has not "…refrained from illegal drug use after a first finding or admission of illegal drug use."

Agency Exhibit No. 1 is an acknowledgement signed by Williams stating that he was subject to random drug testing. The acknowledgement states that illegal drug use is incompatible with the mission of the Agency and that a positive test result *"**may** result in disciplinary action up to, and including dismissal."* (Bold and italics added.) The acknowledgement also provides employees using illegal drugs assistance through use of the Employee Assistance Program (EAP), and provides some protection from disciplinary action if the employee voluntarily reports his/her drug problem to the Chief Executive Officer (CEO): *"An employee who makes his or her drug problem known to his or her Chief Executive Officer prior to suspicion or investigation **may** qualify for protection from disciplinary action."* Both sections of the acknowledgement noted above use the term "may", which make the provisions permissive and/or discretionary as opposed to mandatory. The arbitrator finds a plain reading of the acknowledgement

establishes that an employee's positive drug test will result in discipline of an unspecified amount (from reprimand to discharge), presumably based on the circumstances of the case; and that an employee who reports his/her drug problem to the CEO prior to suspicion or investigation may be insulated from discipline, again, presumably based on the circumstances.[13]

Issuing the ultimate penalty for a first offense without consideration of all the relevant circumstances ignores the CBA provision regarding recognition of a progressive disciplinary policy and the Agency's own Standard Schedule of Disciplinary Offenses and Penalties provisions that recognize that different levels of punishment (discipline) can be issued for offenses – depending on the circumstances. Note that CBA has precedence over conflicting rules. Further, DFWP recognizes that any discipline taken must be consistent with the requirements of the CBA and adverse action regulations and procedures.

DFWP Sec. 9 also contemplates penalties/discipline less than discharge for first offenders, as is the case with Williams. Specifically, DFWP Sec. 9.d. provides for mandatory removal for employees who refuse counseling or rehabilitation or for employees who have not refrained from illegal drug use after a first offense.[14] A plain reading of this provision reveals that in general, some discipline short of removal is contemplated for a first offense.[15] Thereafter, if the first offender refuses counseling or rehabilitation, or the employee fails to refrain from illegal drug use, removal is mandatory.

Thus, based on the record, as reflected by the summary of testimony above,

[13] The MA defines "disciplinary action" as a written reprimand or suspension of 14 days or less. An "adverse action" is defined as a removal, suspension greater than 14 days, reduction in grade or pay, or furlough of 30 days or less. (Article 30, Sec. b.)

[14] Sec. 9.d. reads: "The Bureau may initiate action to remove an employee for:
(1) Refusing to obtain counseling or rehabilitation through an EAP after having been determined to use illegal drugs; or
(2) Having been determined not to have refrained from illegal drug use after a first finding or admission of illegal drug use. Disciplinary action may or may not have been taken on the first determination of illegal drug use in order to propose and sustain a removal."

[15] See Agency citations for examples of exceptions to the general rule.

including the failure to make a full investigation and the failure to reasonably consider all the relevant facts, the Agency decision to remove Williams was based on an erroneous application of the DFWP and thus, was arbitrary, capricious or an abuse of discretion.

Agency's Citations Rejected

Agency argues that Williams' misconduct is comparable to the employee in *Zazueta vv. Department of Justice*, 103 LPR 46095, 94 MSPR 493 (MSPB 2003). In that case, Manuel B. Zazueta, a border patrol agent was removed from his position after a random drug test revealed his use of amphetamines and methamphetamine. His duties directly included the interdiction of drugs across border. The facts established that Zazueta frequently worked without supervision and was privy to sensitive intelligence and information impacting the agency's mission and national security such as the location of border motion detectors and surveillance cameras. The Board in reversing an Administrative Judge (AJ) and sustaining the removal distinguished Zazueta from *Kruger v. Department of Justice*, 32 MSPR 71, 75-77 (1987) where a removal action was reduced to a sixty-day suspension. The arbitrator finds the present facts distinguishable from *Zazueta*.

Kruger, which the arbitrator finds is more factually parallel to the present case involved three correctional officers who were removed based on a charge of possession and use of marijuana outside a local public tavern while off duty. A co-worker who reported their misconduct to the agency observed their activities. All three officers admitted their off-duty conduct. Kruger testified that he smoked marijuana with the other two and that it was his first and only instance of use of marijuana while the other two employees admitted to previously using marijuana during their employment and one of these two admitted supplying the marijuana. Both of these employees enrolled in an extensive program of substance control; apparently Kruger did not. However, all three employees had good performance records (Kruger's was outstanding) and none had any prior disciplinary record. The Board found their truthful admissions along with their prior good performance records, and their lack of disciplinary records all indicated that they would not subsequently act in a dishonest or otherwise improper manner with the agency. Further, there was no evidence that the public or inmate population knew of

these employees' misconduct. Because of their potential for rehabilitation, their admission of wrongdoing and their enrollment in a substance control program the Board found the penalty of removal was an abuse of the agency's discretion. The Board also considered the application of the Executive Order No. 12,564 (EO), 51 Fed. Reg. 32, 889 (1986) to the facts of the case as well and concluded that the EO and legislation emphasizing rehabilitation (the Federal Employee Substance Abuse Education and Treatment act of 1986, H.R. 5484, 99th Cong., 2d Sess., 132 Cong. Rec. H9534-35 (1986), reinforced the conclusion that removal was inappropriate. Thus, the Board ordered the agency to issue a sixty-day suspension to the employees, that their employment be restored thereafter, and that they enroll in the EAP.

As stated above, the arbitrator finds the present case to be more factually similar to the *Kruger* case than to *Zazueta*. Here, the Agency provided no evidence that Williams' duties were any more security sensitive as in *Kruger*. Further, the facts in the present matter make a stronger case for mitigation than in Kruger, for here, Williams voluntarily enrolled in the EAP (albeit post a positive drug test), successfully completed the EAP and provided Cruz with two separate negative drug tests that were taken months apart. These additional facts buttress the conclusion that Williams is a good candidate for rehabilitation. Finally, the DFWP policy that is modeled after the EO, as stated above, also encourages rehabilitation. Thus, the arbitrator finds *Kruger* the appropriate case to apply here.

The *Thomas* case[16], also cited by the Agency involved an employee whose drug use was revealed by a random drug test. In Thomas, the employee was employed as an Aircraft Mechanic. The employee submitted evidence that he had voluntarily entered a treatment facility and was participating in rehabilitation. The agency countered this with evidence the employee regularly used marijuana and was not a good candidate for rehabilitation. In support of this position it provided conclusions from a forensic toxicologist who certified the results of the employee's drug test and concluded that those results were consistent with the employee's recreational use of the drug two or three times a week. The AJ noted that the deciding official considered the potential harmful

[16] *Thomas v. Department of the Air Force*, 95 FMSR 5137, 67 MSPR 90 (MSPB 1995)

consequences if the employee's judgment were impaired by drug use, especially since the employee self-certified his work, but decided to reduce the removal to a 90-day suspension. The Board, however, sustained the removal action finding that while strict, the agency's action was not out of line in view of the employee's position of journeyman Aircraft Mechanic, "where the consequences of a mistake could result in the loss of not just a C-130 aircraft but of the crew as well." (Agency attachment 3 to brief, p.3) Thus, the Board found that with the nature of the employee's work rendered the sustained misconduct even more serious, plus a finding that the relevant mitigating factors were considered, the agency's removal penalty was found to be proper exercise of managerial judgment and did not exceed the limits of reasonableness.

In this case, no evidence was presented establishing that Williams held a job that was comparable to the safety sensitive position of the journeyman Aircraft Mechanic or that he was a frequent user of marijuana. Further, the arbitrator finds the Agency failed to properly investigate this matter and failed to fully consider all of the applicable *Douglas* factors. As the Board states in *Thomas*, review of an agency-imposed penalty is limited to determining if the agency conscientiously considered all relevant factors and exercised management discretion within tolerable limits of reasonableness. In making such determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency and to insure that managerial discretion has been properly exercised. Here, the lack of investigation plus a failure to consider all of the relevant mitigating factors causes the arbitrator to find the Agency's decision in this matter to be arbitrary, capricious, or an abuse of discretion.

Agency cites *Schulmeister v. Department of Navy*, 90 FMSR 5436, 46 MSPR 13 (MSPB 1990) in support of the penalty of removal in this matter. In *Schulmeister*, the employee was convicted of felony possession of, and used illegal drugs during his employment with the Navy. His job involved the inspection and repair of tooling used in handling ordnance and in the refueling of nuclear-powered warships where safety is of paramount importance. The Board found that Schulmeister's job was one where a mistake could potentially result in serious risk of death or injury, i.e., a nuclear accident. The Board also found the existence of mitigating factors (first offense, a commitment to avoid future involvement with drugs, eight years of service, a good work record and

support from 12 former supervisors). With these factors, the Board found the agency could have decided on a lesser penalty than removal, but concluded the penalty was reasonable. For reasons previously cited above, including lack of evidence that Williams' job was as security-sensitive as *Schulmeister* and that all the mitigating facts here (e.g., two negative drug tests), the arbitrator finds this case distinguishable.

Agency also cites *Savage v. Department of the Air Force*, 91 FMSR 5374, 49 MSPR 77 (MSPB 1991) in support of its actions herein. In *Savage*, the agency removed the employee, a WG-10 Pneudraulic Systems Mechanic on charges of possession, use and transfer of illegal drugs on and off government premises during work hours, and disregard of agency directives. At hearing the evidence revealed the employee had provided cocaine to and used cocaine with two of his coworkers on and off base. The AJ rejected the employee's argument that he had "voluntarily" admitted his involvement with illegal drugs for he had been identified as a drug user prior to self-reporting. He found that the deciding official had (1) given adequate and reasonable consideration to all of the pertinent facts under Douglas before deciding on the penalty of removal, (2) the penalty imposed was consistent with agency guidelines and policies, and (3) the penalty was appropriate in light of the employee's disregard for the possible harmful effects of his recreational on-duty drug use on the critically important work he performed.[17]

The facts in *Savage* are readily distinguishable from those here. In *Savage*, the employee engaged in a number of violations on and off premises and was found to be in a job that involved an extreme level of safety. Here, Williams' misconduct was not as severe nor does his job maintain the extreme level of safety or security as was the case in the other cases where the removal action has been sustained.

Accordingly, the arbitrator finds the cases cited by the Agency to be distinguishable from the facts in this case.

[17] The arbitrator agrees that Williams did not "voluntarily" report his illegal drug use or that the "safe harbor" provisions in the DFWP policy are applicable here. The arbitrator also notes that Williams nor the Union argued there was no connection between his offenses and the efficiency of the service.

No Adverse Inference Finding

At hearing Union requested that an adverse inference finding be made based on Agency's failure to comply with a subpoena request. The arbitrator did not issue a subpoena. However, there is no dispute that a subpoena for documents was issued by the Union. Union argued that Agency failed to provide the investigative file. Agency response was that the file was in possession of the Internal Affairs office in Washington, D.C. Union argued that Internal Affairs is not separate from the Agency; however no evidence on this argument was presented. During testimony by Cruz, it was revealed that Agency was in possession of the Adverse Action File (AAF), which was maintained in the HRM office. The arbitrator notes that the decision letter issued to Williams references the AAF, stating that it was made available to Williams.

The arbitrator does not know whether the AAF and the investigative file are one and the same and/or that the contents of the AAF are similar to the investigative file. However, if Williams had access to the AAF, presumably, so did the Union. Absent the subpoena issued by the Union to the Agency, it is unclear what all was requested. Accordingly, the arbitrator finds the evidence is lacking to make an adverse interest finding in this matter.

Appropriate Penalty

An Agency's penalty may be modified or reduced if it is determined that the penalty imposed is found to be arbitrary, capricious or an abuse of discretion. (See, *Douglas*, supra.) Here, the arbitrator finds the Agency failed to fully investigate the Williams' incident before deciding on the discipline issued (a breach of substantive due process) and failed to reasonably consider all of the *Douglas* factors relevant to this case.

The Board has stated that law enforcement status does not preclude mitigation of the penalty. *James Larry, II v. Dep't of Justice*, 76 MSPR 348 (1997); *Crouse v. Dep't of the Treasury*, 96 FMSR 5219 Thus, the ultimate penalty (removal) for a breach of misconduct is not required; each case is dependent on the factual circumstances.

In considering the level of penalty in this matter the arbitrator finds two cases that are factually parallel. Both the Arley Garrison award issued by Arbitrator David W.

Stiteler in *AFGE, Local 1302 and US Dep't of Justice, FBOP*, FMCS Case No. 04-22268 (Nov. 2004) and the case of James Collins, (*AFGE, Council of Prison Locals 33, Local 0922 and U.S. Dep't of Justice, FBP, FCI Forest City, AR*, 101 FLRR 2-1043 (Sept. 2000)) involve correctional officers who committed first-time offenses for off-duty misconduct involving the use of marijuana. In both cases a 30-day suspension was found appropriate. Based on a review of the entire record, guidance from these cases, and the desire to maintain a level of consistency for similar offenses, the arbitrator finds that a 30-day suspension is appropriate in this case.

Accordingly, the grievance is sustained in part.

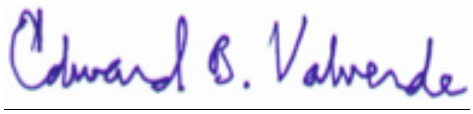
Award

The arbitrator finds the Agency has failed to establish by a preponderance of evidence that removal of Williams does promote the efficiency of the service. However, misconduct has been found (positive drug test). Consequently, the arbitrator finds under the circumstances of this case that discipline in the form of a 30-day unpaid suspension does promote the efficiency of the service.

Williams is to be reinstated immediately. He is to receive full back-pay and benefits less any interim earnings and he should provide interim earnings information to the Agency within 60 days of receipt of the award in order for back-pay to be determined. The provisions of the DFWP, Section 15.e (J-3, p. 14) will apply.

The arbitrator retains jurisdiction to consider any issue pertaining to remedy.

Dated: February 18, 2012.



Edward B. Valverde, Esq. – Arbitrator