**FEDERAL MEDIATION AND CONCILIATION SERVICE**

**In the Matter of the Arbitration Between**

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| **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Local 1034** Union | ) | |
| **and** | ) | **FMCS Case: 15-55772-7**<br>**Grievant: Crystal Doucet** |
| **U.S. DEPARTMENT OF JUSTICE Federal Bureau of Prisons FCC, Pollock, Louisiana** Agency | ) | |

## OPINION AND AWARD

This arbitration was presented on September 16 and 17, 2015 at the Bureau of Prisons Federal Correctional Complex, in Pollock, Louisiana. Representing the Agency (or BOP) was attorney Darrel C. Waugh, Assistant General Counsel, Employment Law Branch. Representing the Union and grievant Crystal Doucet (Grievant) was attorney Patrick M. Flynn. Both days of hearing were transcribed and all witnesses were sworn.[1] At the conclusion of the hearing the parties agreed to submit post-hearing briefs which were received December 24, 2015. Following receipt of post-hearing briefs, the hearing was closed.

### Procedural Background

The Agency and the Union are parties to a collective bargaining Master Agreement effective July 21, 2014 to July 20, 2017 (JX-1). The Master Agreement provides procedures for disciplinary and adverse actions at Article 30, the handling of grievances at Article 31, and appeals to Arbitration under Article 32.

This arbitration arises from a letter of proposed termination issued February 18, 2015 by the Associate Warden, FCC Pollock, to Crystal Doucet, grievant (JX-2). The proposed removal of grievant from the federal service was due to the fact that, on November 4, 2014, as part of the agency's random drug testing program, she had provided a urine sample that tested positive for marijuana. In addition to that, the notice further alleged that grievant failed to follow policy in

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[1] Transcript citations herein to the first day of hearing are noted as Tr-I and to the second day as Tr-II.

apparently not properly documenting an inmate's telephone use and on two instances provided inaccurate information on official documents to other institutions with the Bureau of Prisons, to wit, identifying two inmates as common law spouses – one at Pollock the other at another facility – and requesting correspondence privileges, and in signing her name above the line for the Complex Warden without first removing his name. On April 14, 2015 a written response was filed by the union pursuant to the Master Agreement 2015 (JX-3). On May 1, 2015, grievant was notified of the decision to remove her (JX-4) and the matter was appealed to arbitration on May 19, 2015 (JX-5).

## Agreed Issue

At hearing the parties agreed to the following statement of the issue presented:

> Was there just and sufficient cause to justify the discipline
> and, if not, what shall be the remedy?

## Background of the Grievant

The parties agree that this case does not present a dispute as to the facts at issue. Thus, they can be simply stated.

Grievant began her employment with the Agency in Pollock in 2008, initially as Captain's secretary (Tr-I, 13). Sometime in 2011, the grievant was promoted to the position of case manager, the position she held when terminated (Tr-I, 14). As a case manager (what Warden Werlich referred to as the "policy wonks" of Unit Management (Tr-II, 76)), grievant was part of a unit team which generally consisted of a unit manager, three case managers, three counselors and a secretary. The case manager oversees the daily routine of a unit of inmates – movement of inmates, documentation, legal and family interactions, maintaining files, observation of behavior and conduct. At the time of her promotion, grievant testified, her caseload was 193 inmates.

In the approximately seven years of her employment, grievant had no disciplinary actions and her performance appraisals were consistently satisfactory or excellent, with her appraisal most recent to the termination rating her overall performance as excellent. She has received performance awards and a quality step increase (JX-3). In addition, sometime in June 2013, grievant was on duty during an incident in which an Officer Raffray was stabbed by an inmate. Grievant was able to take the weapon from the inmate, preventing further injury, and call for medical assistance for the Officer. For her involvement, grievant was awarded a "challenge coin" (Tr-II, 151-154).

## Undisputed Facts

In addition to the above, review of the transcript of testimony and of all exhibits admitted during two days of hearing, shows the following facts relevant to determination of the issue presented to be undisputed.

In 2014 grievant was diagnosed with several bulging disks in her back. Because of the medication used in her pain management treatment, it was undisputed that grievant was given multiple drug tests. These occurred on September 22 and October 16, 2014, before the November 4 random screening which is the basis of her removal, and again on November 18, 2014, January 12, 2015, February 6 and 11 and March 12, 2015, after the screening at issue. All tests were returned negative for marijuana (Tr-II, 156-158) (attachments to JX-3).

The Agency's Standards of Employee Conduct (AX-2) provides at Section 9 (Personal Conduct) Subsection a (Alcohol/Narcotics) that "the use of illegal drugs or narcotics or the abuse of any drug or narcotic is strictly prohibited at any time." Attachment A to the Standards of Employee Conduct provides a Standard Schedule of Disciplinary Offenses and Penalties. Number 10 addresses "reporting for duty or being under the influence of intoxicants or other drugs; unauthorized possession of intoxicants or drugs on government or leased premises." While the schedule allows for management flexibility to address the severity of a given offense, it should be noted that the presumption for offenses involving intoxicants or drugs is that the penalty imposed will follow a schedule of progressive discipline.

Indeed, the Agency's Drug Free Workplace program (AX-4) provides the following:

> c. <u>Range of Consequences</u>. 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 Order. The full range of disciplinary actions, up to and including dismissal, are available. . .
>
> d. <u>Initiation of Mandatory Removal From Service</u>. 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 sustain a removal.

The Executive Order (12564) issued by President Reagan in September 1986 was addressed by Cdr. Thomas Ellis, the BOP Drug-free Workplace Coordinator. The Executive Order provides at Section 5 (Personnel Actions):

> (d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:
> (1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or
> (2) Does not thereafter refrain from using illegal drugs.

The Agency case, as presented through the testimony of Warden Werlich, the deciding official, relies on the Executive Order language in support of its decision to terminate grievant.

Grievant acknowledges that she was aware of the Agency's Standards of Employee Conduct and its Drug-Free Workplace program (AX-1) and knew that her position was subject to random drug testing (AX-4). Grievant provided the required urine sample which, under the Agency's program, was sent to a lab approved by the Substance Abuse and Mental Health Services Administration (SAMHSA) – in this case Quest Diagnostics – for analysis. (See Tr-I, 127, 218)

When the sample from her November 4 drug test was returned positive for marijuana, grievant's removal was proposed.[2]

**Analysis and Discussion**

The Agency primarily rests its case on the validity of grievant's drug test and its determination that her explanation for the positive test lacked credibility. It asserts that all elements of the just cause analysis have been satisfied. In *Enterprise Wire Company*[3] the arbitrator set out seven elements or tests which have become the standard criteria for assessing just cause in disciplinary cases. Descriptions can vary, but the elements or tests may fairly be summarized as in following questions:

1. Was the employee given advance warning that the behavior could result in discipline?
2. Was the rule or order reasonably related to the efficient and safe operation of the employer?
3. Did the employer try to determine whether the employee did, in fact, violate a rule or order of management?

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[2] There is no dispute regarding the collection and analysis of grievant's urine sample. There was some dispute, which I find not relevant to a determination of the issue presented here, regarding whether grievant had been properly notified of her right to have a retest of the original sample at a SAMSHA-approved lab of her choice.

[3] 46 LA 360 (1966)

4. Was the employer's investigation conducted fairly and objectively?
5. Did the investigation produce substantial evidence that the employee actually broke the rule?
6. Has the company applied its rules, orders, and penalties without discrimination?
7. Was the degree of discipline given in the particular case related to a) the seriousness of the offense, and b) the employee's service record?

The Agency argues that grievant's testimony clearly establishes that she knew the consequences of her use of marijuana, the alleged behavior which broke the rule. (See also, AX-3) The Drug-free Workplace policy is unquestionable related to the orderly and safe operation of the correctional facility. Further, its investigation was fairly conducted and the evidence collected deemed clear and substantial. The Agency notes in this regard that the November 4, 2014 urine sample was collected and tested according to Agency policy and in accordance with SAMHSA procedures. Neither the collection process, the testing, nor the positive result was disputed by grievant. The documentation package was the subject of lengthy testimony from the Quest Diagnostics Laboratory Director Dawn Hahn without challenge (Tr-I, 138-192).

While this was the first case of its kind at the Pollock facility, the Agency argues, its response at other facilities has been consistent. Cdr. Ellis, as the Agency coordinator, testified that occurrences at other correctional facilities have been dealt with and disciplined similarly. Finally, the Agency notes, grievant's discipline was reasonably related to the seriousness of her offense and her service record.

Against this, the Agency asserts, grievant's only explanation was that she might have unknowingly ingested/inhaled marijuana at a party or bonfire from the pipe of someone she did not know. Moreover, none of grievant's testimony, it notes, was corroborated. In the absence of such corroboration the Agency argues that its conclusion to remove grievant was justified.

Warden Thomas Werlich testified without contradiction that, as law enforcement officials, BOP staff members are and should be role models for inmates and should exhibit "behaviors that are accepted in society" and "to perform in such a way that the inmates don't question (staff) integrity." (Tr-II, 67) With this in mind, the warden testified, he viewed the positive urine sample as the most serious of the three charges against grievant. But in assessing the range of possible penalties, Warden Werlich testified, he considered all three charges; specifically, "the nature of the charges and the seriousness of the first charge, providing a positive urine sample, and in addition

the two other charges, which were serious as well." (Tr-II, 76) The warden looked at grievant's job and her employment history – which was "satisfactory" since her initial employment in 2008. He also considered, the warden testified, what the charges had done to her supervisor's confidence in her – as, he testified, was reflected in the proposal letter, the notoriety of the charges and their possible effect on the Bureau of Prisons. This latter point, he testified, was in reference to the two additional charges inasmuch as they potentially impacted the Pollock facility's reputation among other BOP facilities.

Grievant, on the other hand, in arguing that her removal should be reversed, argues that the decision to terminate her employment was defective because factors enumerated by the Merit Systems Protection Board (MSPB) in analyses of disciplinary cases were either not followed or given short shrift.

In *Douglas, vs. Veterans Administration*[4], the MSPB set out twelve factors it would rely upon when asked to decide the appropriateness of a penalty for misconduct or other agency actions and to be considered when determining the severity of discipline. These factors, which have become known as the Douglas factors, may be summarized as follows:

1. 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;
2. the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. the employee's past disciplinary record;
4. the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. 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 work ability to perform assigned duties;
6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. consistency of the penalty with any applicable agency table of penalties;
8. the notoriety of the offense or its impact upon the reputation of the agency;

[4] 5 M.S.P.R. 280 (1981)

9. 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;

10. the potential for the employee's rehabilitation;

11. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Applying these factors to her case, grievant argues first that the Agency carries the burden of proof here which it has not met. On or about November 1, 2014, grievant testified, she and her husband attended a party and bonfire some distance from Pollock. At the party, grievant testified, she was offered a pipe of what smelled and tasted like "vanilla tobacco." She did not know the person who offered the pipe but took "a couple of puffs" (Tr-I, 48-49). Three days later, on November 4, grievant was informed that she had been designated for a random urine sample as part of the Agency's random drug testing program.

Grievant maintains that she has never knowingly used marijuana since her employment with the Agency. In her December 15, 2014 statement grievant stated:

> On November 1, 2014, my husband and I went to a bonfire. There was a guy who was smoking vanilla tobacco. When we commented on the smell of tobacco, he offered me and my husband to try it. I took a couple of puffs of the pipe and it tasted and smelled like vanilla tobacco. I didn't think anything more about it because I didn't have any side effects which would have led me to believe it was anything but vanilla tobacco. (AX-5, ¶10)

Grievant has consistently maintained that she did not knowingly use marijuana even though certain details of her alleged unintended exposure to marijuana at the November 1 party have varied somewhat.

With respect to the two additional charges, grievant essentially admitted her errors in all three specifications. In her April 14, 2015 union response to the proposed letter of termination she stated with respect to the charge of failure to follow policy that she followed a previous supervisor's instructions on logging telephone use, as did others in the unit, and that procedure was followed until corrected by Deputy CMC Argersinger (JX-3). She accepted responsibility on

both specifications of providing inaccurate information.

Second, grievant argues that there is nothing to suggest that Warden Werlich, as the deciding official, or any other Agency official for that matter, gave any thought to or seriously applied a *Douglas* analysis in determining the discipline to be imposed. The Warden had little knowledge of grievant, did not question grievant, did not discuss the discipline with the associate warden who proposed the discipline, or with grievant's immediate supervisor.

Third, moreover, there was no attempt to consider or apply progressive discipline as required under the collective bargaining agreement and permitted under the Agency's Standards of Conduct or Drug-free Workplace policy. This failure, grievant argues, effectively renders the Agency's drug policy a zero-tolerance policy despite the language and intent of the written policy.

In order to sustain the discipline imposed, the Agency must establish that the alleged conduct occurred, that the alleged conduct affects the operation of its mission, and that the penalty imposed is reasonable under the circumstances. Much of the just cause analysis, as well as the factors set out in *Douglas*, are clearly beyond dispute.

Grievant tested for marijuana on November 4, 2014. Grievant does not challenge that result, but rather argues that there were mitigating factors. Further, there is also no question that drug use, in itself a serious offense, is contrary to grievant's job duties and responsibilities as a corrections officer and harms the Agency's mission. The issue here involves the appropriateness or reasonableness of the penalty and it is here that the Agency, in this arbitrator's opinion, has failed to carry its burden.

The central principle of just cause is the idea of progressive or corrective discipline. While not mandated, the Master Agreement (JX-1) between the Agency and Union endorses the "concept of progressive discipline," stating at Article 30, 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." While the language allows the Agency to impose the severest penalty in the first instance, it is not without qualification. Had the parties' agreement gone on to identify drug abuse as one of those "offenses so egregious" the Agency's argument here might be stronger. However, the agreement does not do so; and neither does the Agency's Drug-free Workplace policy nor the Executive Order on which the policy rests.

As the grievant argues, then, in her post-hearing brief, the Agency's position effectively

turns the Drug-free Workplace policy into a zero-tolerance policy not encompassed in the Agency documents. It follows, moreover, that if this were the case, grievant could not be said to have had sufficient or proper warning as to the disciplinary consequences of drug use.

This is not to suggest that grievant's description of the bonfire or party and how she might have been inadvertently exposed to marijuana is inherently believable. However, I do not find her depictions as shifting and contradictory as the Agency suggests. Rather, given the negative results of grievant's other tests around the same three or four month period, I believe that, while the November 1 event may not have been so unintentional or inadvertent as claimed, neither does it show a pattern of addiction or habitual use.

Clearly grievant had reason to prevaricate. But the exposure or use occurred off duty. There was no suggestion that grievant ever appeared at work under the influence or that her case became the subject of complex-wide rumor or knowledge, let alone scandal; nor was it shown that her performance suffered as a result. Nevertheless, whether the exposure was unintended, as she suggests, or intentional, as the Agency argues, she faced some discipline. In neither event, however, does the drug finding overcome the fact that, on the day she stood accused, grievant had a clean disciplinary record and some seven years of satisfactory performance or higher.

I find the latter point significant in view of the unrebutted testimony, as noted above, that around this time grievant had undergone several other drug tests because of her back medication, all of which were negative for marijuana use. Despite the fact that these results were attached to grievant's April 14 response to the proposed termination, the Agency either overlooked these or did not regard them as significant factors in determining the penalty to impose. Moreover, there was no evidence that it had inquired about the prior tests in any manner. Inasmuch as the flexibility that the Drug-free Workplace policy affords management, these circumstances should have suggested the possibility that given grievant's record and performance, she should have been afforded a rehabilitation opportunity under the policy.

Whether similar cases in other Agency facilities were dispatched with the same penalty severity, I do not find conclusive as to the Agency's consistency in these cases. I note that termination or removal in some of these other cases was sustained, while in others the penalty was overturned for reasons very similar to those I find here.

Regarding the two additional charges, Warden Werlich's testimony makes clear that he considered them only to the extent that they buttressed the more serious drug charge. Clearly,

they would be grounds for discipline, but given the circumstances presented in this case, they certainly would not be cause for termination.

## Opinion

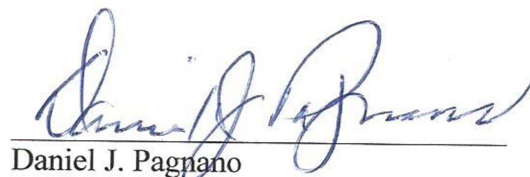
For all the foregoing reasons I find that, while grievant tested positive for drug use on November 4, 2014, and admitted error on the other procedural charges, given the totality of the circumstances, the Agency lacked just and sufficient cause to terminate her.

The positive drug test results and the admissions of error are cause for discipline. Based upon my review of the Agency's Standards of Employee Conduct and Attachment A thereto, and the Agency's Drug Free Workplace program statement, as well as other arbitration and MSPB cases presented, I conclude that grievant's termination should be reduced to a suspension without pay for thirty (30) days.

Grievant should be reinstated and made whole with full back-pay and benefits, less the thirty-day suspension and the amount of any interim earnings. I will retain jurisdiction to address any issues which arise pertaining to the remedy ordered.

## AWARD

The Agency lacked just and sufficient cause to terminate grievant. The discipline is reduced to a thirty (30) day suspension and grievant shall be reinstated with back-pay and benefits consistent with this award.



January 30, 2016
Houston, TX

Daniel J. Pagnano