OPINION & AWARD

In the Matter Between

Local 1010, Council of Prison Locals
American Federation of Government Employees

and

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Complex
Beaumont, Texas

FMCS Case No. 141107-50944-3

Appearances

For the Union:	Patrick M. Flynn Patrick M. Flynn, P.C. Roger K. Hodges, Grievant Miranda Johnson, Senior Officer
For the Agency:	George Y. Cho Assistant General Counsel Norbal Vasquez, Warden Low Institution

Date of Hearing
May 21, 2015

Date of Post-Hearing Briefs
July 24, 2015

Date of Award
August 06, 2015

Issue
Removal

Summary
Grievance Sustained

BACKGROUND

Roger K. Hodges, the grievant, entered on duty with the Federal Bureau of Prisons in September 1999 following military service. As of July 2013 grievant had attained the position and grade of Senior Officer, GL-0007-07, Step 10, at the Federal Correctional Complex (FCC), Beaumont, Texas. Grievant encumbers a bargaining-unit position represented by Local 1010, American Federation of Government Employees, the Union, and subject to the terms of the Master Agreement.

FCC-Beaumont, the Agency, is comprised of a three (3) institutions: low security, medium security and high security. The Agency assigned grievant primarily to the low-security institution with some assignments at the high security U.S. Penitentiary.

On September 13, 2013, Derric Wilson, Deputy Captain, issued a written proposal to grievant to remove him from employment for "Use of an Illegal Drug, a violation of the Standards of Employee Conduct which you received a copy of on September 27, 1999."

The proposal to remove states, in part, as follows:

> **Charge:** Use of an Illegal Drug
>
> Specifically, on or shortly before July 4, 2013, you used an illegal substance and then provided a random urine sample which tested positive for marijuana. In your affidavit, dated August 26, 2013, you admit, 'I did provide a urine sample on July 4, 2013, in the medical department at FCC Beaumont Low . . . I am aware of the fact that I tested positive for the use of marijuana . . . I did smoke marijuana previously to the drug test administered on July 4, 2013.'
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> Program Statement 3420.09 states, 'the use of illegal drugs or narcotics or the abuse of any drug or narcotic is strictly prohibited at any time.' This Program Statement further states, 'Illegal activities on the part of any employee, in addition to being unlawful, reflect on the integrity of the Bureau and betray 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.'
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> Additionally, Program Statement 3735.04, Drug Free Workplace, states that the Bureau shall initiate disciplinary action against any employee determined to be using illegal drugs, and that the full of range of disciplinary actions, up to and including dismissal, are available. Your use of marijuana is not only illegal, but is egregious conduct considering you are a law enforcement officer and are held to a higher standard.
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> [Jt. Exh. 5]

On October 17, 2013, grievant and the Union submitted oral and written responses. Grievant set forth his stressful family and marital issues, but accepted responsibility for his actions, and detailed his mentoring of staff and receipt of performance awards. [Jt. Exh. 7]

In the written responses, the grievant and Union referred to Executive Order 12564 (September 15, 1986), which provides for a drug-free workplace but it does not mandate removal for use of an illegal drug as it stipulates the "circumstances of each case" are to be considered. Progressive discipline is appropriate under the Executive Order. Also, the Master Agreement mirrors the Executive Order by endorsing consideration of an employee's circumstances in the context of progressive disciplinary measures. Grievant's 14-year employment history is discipline free thereby showing potential for rehabilitation. [Jt. Exhs. 8, 9]

On November 04, 2013, deciding official Warden Vasquez notified grievant of his removal from employment with the Agency. The notice references the *Douglas* factors and concludes that grievant's acceptance of personal responsibility "does not outweigh the seriousness of your misconduct." On the same day that grievant was notified of his removal (November 04), the Union invoked arbitration and requested a make whole remedy and attorney fees. [Jt. Exhs. 2, 10]

On May 21, 2015, a hearing convened in Beaumont, Texas. Each party presented evidence, examined and cross-examined witnesses and argued its contentions. The parties submitted fourteen (14) joint exhibits and the Union offered two (2) exhibits. The evidentiary record closed on May 21, 2015, upon completion of transcribed witness testimony and admission of exhibits. This proceeding closed on July 24, 2015, with the arbitrator's receipt of post-hearing briefs.

ISSUE

Was the adverse action of grievant's removal for just and sufficient cause and to promote the efficiency of the Service?

If not, what is the remedy?

MASTER AGREEMENT

Article 5: Rights of the Employer
Article 6: Rights of the Employee
Article 7: Rights of the Union
Article 30: Disciplinary and Adverse Actions
Article 31: Grievance Procedure
Article 32: Arbitration

PROGRAM STATEMENT

3420: Standards of Employee Conduct
3735: Drug Free Workplace

SUMMARY OF THE UNION'S POSITION

The Union's arguments and position are recorded in its opening argument at the hearing, presentation of grievant's testimony under oath (as well as witness testimony), proffer of 2 exhibits along with 14 joint exhibits, cross-examination of Agency witness and submission of a post-hearing brief with attachments. In summary fashion, the Union's arguments and position follow.

There is no just and sufficient cause for grievant's removal. At the time of grievant's removal he performed duties on mobile patrol along with assignment to housing units including the Special Housing Unit. He earns outstanding and exceptional ratings in performance with recognition through awards including financial remuneration. He is recognized by superiors and co-workers as a leader and mentor, an exemplary employee. [Un. Exhs. 1, 2]

During the morning shift (12:00 midnight to 8:00 a.m.) on July 04, 2013, grievant reported, as directed, for a random drug test. He tested positive for marijuana. Notwithstanding grievant's 14-year employment record and exemplary performance, Warden Vasquez removed grievant. Under *Douglas*, the Agency bears the burden of proof to establish that discharge is appropriate in this grievance.

FCC-Beaumont failed to prove that the drug test was valid or that grievant "failed" the test; the Warden was not familiar with the test or any protocols about it such as the applicable regulations or the meaning of a "positive drug test" report. Although the Program Statement requires testing only by laboratories certified by the Substance Abuse and Mental Health Services Administration, there is no indication that the test center in this grievance (Quest Diagnostics, Inc.) was certified.

Also, there was no record of the marijuana level in grievant's system which the laboratory recorded as a positive test result. Under 49 C.F.R. Part 40, § 4087, a concentration of 50 ng/ml marijuana metabolites is positive and, the regulation states, "a laboratory . . . must use the cutoff concentrations for initial and confirmatory drug tests." In this grievance the cut off concentrations applied to grievant are unknown. The test validity is questionable and the due process repercussions on the Agency negative. Grievant's admission of marijuana use does not prove that his test exceeded a specified cut-off concentrate level to result in a positive test. A level of proof such as clear and convincing evidence is appropriate to apply in this situation since the grievant's conduct, if upheld, will subject him to long-term consequences given the social stigma attached to illegal drug use.

The Warden, moreover, applied the *Douglas* factors in a perfunctory manner and some of the factors he applied improperly. For example, the Warden considered the nature and seriousness of grievant's offense but not in relation to grievant's duties, position and responsibilities. There is no evidence that the offense affected grievant's position and performance of duties. The nature and seriousness of the offense is problematic because the validity of the test is unproven.

As for the factor job level and type of employment, the Warden failed to consider that grievant is not a supervisor, has no public role in performing his duties and nothing about this incident was disclosed to the public so notoriety and disrepute on the Agency is not present. Grievant has no disciplinary record; this is his first foray into the disciplinary forum yet the Agency proceeded directly to remove grievant notwithstanding his performance and standing among co-workers as a leader.

In this regard, the family and marital stress on grievant did not affect his job performance in carrying out duties as a law enforcement officer. The Warden acknowledged he did not know grievant and the Agency did not call to testify supervisors (Captain Wilson and Lieutenant Cramner) familiar with grievant's performance and family, marital situation. This means mitigating factors for grievant were not considered by the Agency.

Although the decision letter states grievant received equal treatment (removal) as those incurring similar infractions at FCC-Beaumont, no examples are cited in the letter and the Warden failed to testify with particulars although he claims to have consulted with Human Resources. The record shows, however, that law enforcement officers removed for illegal drug use have been reinstated with the removal reduced to a suspension. Arbitrations involving the Federal Bureau of Prisons show removal for illegal drug use or comparable infractions as a harsh penalty and reduced to a 30-day suspension. Where a removal was sustained by an arbitrator, it was subsequently set aside in Federal court and the employee reinstated. [Br. at 19-23]

The Warden testified that the offense committed by grievant was "[r]eporting for duty or being under the influence of intoxicants or other drugs; unauthorized possession of intoxicants or drugs on government or leased premises." [Jt. Exh. 12, Atch. A at 5] The Warden acknowledged that the offense is accompanied by a range of penalties from written reprimand to removal for a first time offender. In this situation, the Agency failed to prove that grievant reported for duty under the influence of drugs or was in possession of such while on government property. Grievant's honesty - - taking responsibility for his actions and conduct - - and lack of prior disciplinary infractions during a 14-year career with the Agency show rehabilitation potential.

Despite mitigating factors and the availability of a lesser penalties, the Warden discarded consideration of progressive discipline measures short of removal and applied his personal version of a "zero tolerance" policy. Program Statement 3735, Drug Free Workplace, clearly states that discipline for illegal drug use "shall depend on the circumstances of each case." Under the Master Agreement, Article 30 - Disciplinary and Adverse Actions, the parties "endorse the concept of progressive discipline primarily to correct and improve employee behavior[.]" The Agency did not follow Article 30.

At most a written warning is warranted for grievant. Reinstatement and back pay are appropriate. His removal must be expunged from all Agency records and back pay, attorney fees, legal fees and other expenses are warranted. Grievant is entitled to such an award, including recovery of reasonable attorney fees (*Local 3882, American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority*, 994 F.2d 20, 21 (D.C. Cir. 1993).

In this regard, grievant's removal constitutes an unwarranted personnel action which directly resulted in a withdrawal or reduction in his pay, allowances or differentials. Reasonable attorney fees must follow as they were incurred in conjunction with securing back pay for grievant to correct the unwarranted personnel action. Grievant is the prevailing party - - 5 U.S.C. 7701 § (g)(1) - - as he is the recipient of an enforcement award that directly benefits him. In the circumstances of this grievance, attorney fees are in the interest of justice. [Br. at 24-29]

SUMMARY OF THE AGENCY'S POSITION

The Agency's arguments and position are recorded in its opening argument at the hearing, submission of 14 joint exhibits, presentation of Warden's testimony under oath, cross-examination of grievant and witness and inclusion of a post-hearing brief with attachment. In summary fashion, the Agency's arguments and position follow.

There is just and sufficient cause to remove grievant. He does not contest any of the underlying facts giving rise to his removal. That is, he admitted illegal drug use "sometime within a month prior to his July 4, 2013 random urinalysis tests" and acknowledged such use violated the Standards of Employee Conduct and Drug Free Workplace policy. [Br. at 5] "As the deciding official (Warden Norbal Vasquez) explained, Grievant's admitted misconduct and poor judgment destroyed the confidence of his superiors and his integrity and professionalism as a law enforcement officer." [Br. at 2]

The only challenge is to the appropriateness of the penalty imposed. There is no evidence of comparable misconduct resulting in a lesser penalty at FCC-Beaumont. Similar cases at Beaumont all resulted in removal. The Standards of Employee Conduct - - received by grievant in September 1999 - - stipulate that "use of illegal drugs or narcotics or the abuse of any drug or narcotic is strictly prohibited at any time" and grievant acknowledged his receipt of the Standards in September 1999.

The full range of disciplinary actions against an employee's use of illegal drugs is available under Program Statement 3735.04, Drug Free Workplace. Disciplinary action is not initiated when an employee self-identifies as using an illegal drug prior to being identified through other means, obtains assistance and counseling and thereafter refrains from use. Instead of grievant voluntarily self-identifying to his chief executive officer as an illegal drug user on July 04, 2013, and seeking the "safe harbor" provision under the program statement, grievant decided to undergo the random drug test and tested positive.

The Standard Schedule of Disciplinary Offenses and Penalties is "intended to be used as a guide in determining the appropriate discipline to impose to the type of offense committed." Although progressive discipline is generally applied, there are "offenses so egregious as to warrant severe sanctions for the first offense up to and including removal." [Jt. Exh. 12] For a first time offense of reporting to duty under the influence of drugs, the penalty ranges from official reprimand to removal. Reoccurrence of grievant's misconduct could place security at risk and bring dishonor to the Agency.

There is just and sufficient cause to remove grievant based on his egregious admitted misconduct. The fundamental elements of just cause as articulated by Arbitrator Daugherty in *Enterprise Wire Company*, 46 LA (BNA) 360, 363-365 (1966) have been followed and met. That is, grievant knew the probable consequences of his misconduct because he received the Standards of Employee Conduct in September 1999 and testified that he knew a positive test result would lead to discipline up to removal.

The Agency's policies prohibiting illegal drug use are reasonably related to the orderly, efficient and safe operation of the institutions. Grievant testified that performing his duties require him to search and retrieve illegal drug contraband from inmates. A law enforcement officer must be free of drugs to manage the inmate population and insulate himself or herself from the vulnerability of extortion by an inmate discovering the officer's drug use. "The American people trusted Grievant to have integrity on and off the job in every activity and follow the letter of the law." [Br. at 8] Warden Vasquez testified he lost confidence and trust in grievant because of his drug use and noted that grievant works in an environment with inmates incarcerated for violating criminal laws.

The record shows that the Agency, prior to removing grievant, conducted a fair investigation to determine whether grievant committed the alleged misconduct. In this regard, grievant does not contest the fairness of the investigation. Regardless, deciding official Warden Vasquez reviewed grievant's disciplinary file, laboratory report, grievant's sworn statement and the oral and written

responses to the proposal to remove. There was a thorough and fair investigation. The results of that investigation provide substantial evidence (defined at 5 C.F.R. § 1201.56(c)(1)) to support removal.

In doing so, the Agency applied its rules and penalties in an even-handed manner. The penalty for illegal drug use by a first time offender is removal at FCC-Beaumont; grievant's removal is consistent with the handling and outcome for prior incidents of this kind. There is no evidence that removal is harsh and unreasonable for this misconduct. Illegal drug use is egregious misconduct by a Federal law enforcement officer and is not minimized by grievant's employment history. [Tr. 25-28] The grievance should be denied.

FINDINGS AND CONCLUSIONS

Article 30 - Disciplinary and Adverse Actions, Section a. states that an adverse action "will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply." An adverse action is defined in Section b. as a removal. Thus, grievant's removal will be assessed in the context of "just and sufficient cause *and* to promote the efficiency of the service, *and* nexus will apply." [Emphasis added.]

Whether grievant used marijuana a month or a day prior to the random test on July 04, 2013, is not established in this record. Nevertheless, grievant participated in the random test and the laboratory report records the grievant with a positive test for marijuana. In its post-hearing brief the Union challenges the validity of the test; this belated challenge to the test was not raised during the grievance processing or clearly articulated at hearing. The challenge is not considered.

There is no dispute that marijuana is an illegal drug and grievant's use of it "is strictly prohibited at any time" under the Standards of Employee Conduct (Program Statement 3420). The Drug Free Workplace (Program Statement 3735) states that when there is an infraction, the "full range of disciplinary actions, up to and including, dismissal are available." These provisions, considered collectively, provide discretion for calculating the penalty to fit the circumstances of the misconduct. Discretion in penalty assessment means that the Agency does not apply a zero tolerance policy or practice in these situations. Rather, the circumstances of each situation are determinative of the outcome.

The Agency states that it conducted a fair and thorough investigation wherein grievant acknowledged in a sworn statement that he (1) used an illegal drug and (2) was aware that such use violates the Standards of Employee Conduct. In the Agency's view, the only contested issue is the appropriateness of the penalty (removal). Warden Vasquez issued his decision on November 04, 2013, following the notice of proposal to remove issued on September 13, 2013.

The Warden based his decision on a review of "the evidence in the disciplinary action file, including Grievant's sworn affidavit, Grievant's oral response to the removal proposal, and the written responses to the removal proposal by both Grievant and the Union. [Br. at 10] The Warden's decision does not deviate in any material respect from the notice of proposal to remove issued by Deputy Captain Wilson. The Warden's testimony focused on the review he conducted; his review does not refer to any contact with Deputy Captain Wilson or the Chief Executive Officer (CEO). The Warden testified he consulted with Human Resources about other situations identical or similar to grievant's situation and how the penalty imposed.

Article 30, Section d.1., states:

> 1. when 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 [CEO] or designee[.]

The Deputy Captain did not testify and the CEO did not testify. Whether the CEO reviewed a completed investigation prior to the Deputy Captain issuing the notice of proposal to remove is not demonstrated. A fair and thorough investigation must comply with the Master Agreement. Since the burden of proof resides with the Agency to prove that it complied with the Master Agreement, the lack of demonstrated compliance with Section d.1. is construed unfavorably for FCC-Beaumont.

Assuming, however, that the notice of proposal to remove was issued only after the CEO reviewed the completed investigation, Warden Vasquez testified, consistent with his decision letter, that he had lost trust and confidence in grievant to perform his duties as a law enforcement officer. The notice of proposal to remove from Deputy Captain Wilson also refers to a loss of confidence and trust. According to the Warden, grievant's use of an illegal drug is egregious misconduct and that kind of misconduct warrants removal for a first time offender. The Warden found that grievant's honesty in accepting responsibility for his actions and employment history do not outweigh the seriousness of his misconduct and poor judgment. The Agency asserts that grievant's egregious misconduct places the institution's security and operations at risk and attracts notoriety to the institution.

FCC-Beaumont identifies and labels grievant with "egregious" misconduct but no definition is apparent in the Master Agreement for such misconduct. The word "egregious" - - as defined in commonly found dictionaries such as Webster - - means extraordinary in some bad way, glaring, flagrant. Synonyms for "egregious" are gross, outrageous, notorious and shocking. The "egregious' misconduct and the asserted loss of trust and confidence in grievant for his illegal drug use and the security and operational risk posed by his presence in the workplace is considered in the context of Article 30, Section g., which states as follows:

> <u>Section g.</u> 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.

Section g. clearly authorizes the Agency to act prior to the completion of the pending investigation when it has a loss of confidence and trust in an employee and the security and operation of the institution is at risk. The Agency did not exercise its authority under Section g. It did not reassign grievant and it did not remove him from duty. Grievant remained on duty and continued to perform his duties as a Federal law enforcement officer at the Low Institution. There is no indication that grievant's performance was anything other than what is repeatedly displayed in his performance appraisals. That is, exceptional and outstanding. There is no indication that the institution's security or its operations were imperiled or at risk by grievant's continuing to report for duty and perform his assignments. Grievant's poor judgment off-duty did not carry over to on-duty on July 04, 2013. Grievant's poor judgement was exorcised by his

better judgment under stress at work when he honestly admitted his drug use and accepted responsibility for it. His family and marital stress did not adversely affect his workplace judgment.

The Agency's decision not to exercise its authority under Section g. and to continue to call upon and benefit from grievant's services during a period of time he was under investigation does not align with or support its argument that grievant's illegal drug use is "egregious" misconduct causing a loss of trust and confidence in grievant and jeopardizing the security and operations of the institution. The Warden's testimony does not reconcile this disparity between the rhetoric (loss of trust, security risk) and reality (Agency continued to assign grievant duties for months after a positive test).

Grievant's positive drug test on July 04, 2013, did not impair his ability to perform his duties. Grievant contributed to the institution's mission while under the stress of a pending investigation. Grievant's continued presence in the workplace promoted the efficiency of the Service and shows there was no nexus between his misconduct and job duties. The absence of a demonstrated nexus between off-duty misconduct and on-duty assignments and performance affects the penalty imposed - - removal - - and shows progressive disciplinary measures are appropriate for consideration.

Consistent with Executive Order 12564 and Program Statement 3735, the circumstances of grievant's situation must be considered in determining the penalty to assess. Article 30, Section c. echoes the Executive Order and Program Statement:

> 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 time offense up to and including removal.

As noted in these findings and conclusions, the Agency asserted and labeled grievant with "egregious" misconduct but it did not respond in a manner supportive of its assertion and labeling. Grievant did not engage in "egregious" misconduct but he did engage in misconduct, e.g., positive test for marijuana. The Agency knew he had a positive test in July 2013 but it continued to assign grievant to his regular duties and responsibilities which involves searching for contraband. Grievant's positive test did not place the institution's security at risk or impair its operations.

The best evidence of what is likely to occur in the employment situation is what has actually occurred in the past. By that standard of evidence, grievant has, historically, performed in an exceptional and outstanding manner. His level of performance has been maintained for an extended period of time in a stressful work environment. The Agency recognized his performance in this stressful environment as shown in his appraisals. By assigning grievant duties for months after the positive test, the Agency recognized his performance would continue notwithstanding his first-time misconduct. There was no influence of an illegal drug on grievant's performance.

When considering the circumstances of grievant's situation, including family and marital stress, progressive discipline is appropriate and removal is inappropriate. Although the Warden testified that grievant was treated equally because all other first-time offenders with a positive test for illegal drugs at FCC-Beaumont have been removed, there was no testimony and \ or documents from Human Resources (the Warden's source of information for his testimony) to establish the equal treatment. The Warden's

testimony, with a reference to data support but no particulars, is insufficient evidence to sustain the Agency's position on equal treatment at FCC-Beaumont.

As the custodian of records, copies of removals for the same or similar situations as grievant's circumstances could have been retrieved, sanitized and proffered at the hearing by the Agency. The lack of comparable data to corroborate the Warden's testimony undermines the argument of equal treatment. By contrast, the arbitration awards and Federal court decision attached to the Union's post-hearing brief support its argument that discipline short of removal is present in the Federal Bureau of Prisons for the offense of illegal drug use by a first time offender. In other words, progressive disciplinary measures fit to the circumstances of this situation are an appropriate remedy under the Master Agreement, Program Statements and Executive Order.

There is just and sufficient cause to discipline, but not remove, the grievant. Discipline for grievant promotes the efficiency of the Service as it is corrective in nature and reinforces compliance with and adherence to the Standards of Employee Conduct and Drug Free Workplace Program. In the context of the findings and conclusions in this record, a thirty (30) day suspension for the grievant is an appropriate remedy for his misconduct. Thirty (30) days is consistent with the penalty imposed by arbitrators in other grievances, not all drug offenses, involving the Federal Bureau of Prisons. A lesser penalty of official reprimand (Union's request) is an insufficient corrective measure for a law enforcement position held to a higher standard of conduct.

Persuasive and influential authority for imposing a suspension, in lieu of removal, is found in *Kruger v. U.S. Department of Justice*, 32 M.S.P.R. 71 (1987), a case with similarities to this grievance. That is, *Kruger* possessed a discipline free and long-term employment history with a Federal correctional facility but was removed on the charge of possession and use of marijuana while off-duty. The Merit Systems Protection Board (Board) rescinded the removal and imposed a sixty (60) day suspension. The Board concluded, in part, as follows:

> [Kruger's] employment and disciplinary records, however, weigh in [his] favor. The agency did not cite any prior disciplinary record for [Kruger]. Appellant Kruger had approximately twelve years of service with the agency, and his last performance rating at the time of his removal shows that he was performing at an outstanding level. . . . [Kruger's] truthful admission of [his] misconduct on initial inquiry by the agency, [his] prior good performance records, and [his] lack of disciplinary records all indicate that [he] will not subsequently act in a dishonest or otherwise improper manner with the agency.
>
> There is no evidence that the public or the inmate population knew of appellants' offense. However, there is evidence that at least some of [his] co-workers knew of [his] offense, and the Federal Circuit has recognized that disciplinary proceedings are not secret. *See Stump*, 761 F.2d at 682.
>
> In view of our findings above, the Board finds that the appellants have potential for rehabilitation. *See Douglas*, *5 M.S.P.R. at 305.* The agency did not dispute appellant Kruger's sworn admission that the night in question was his first and only instance of use of marijuana. . . .

> Accordingly, we believe that the penalty of removal was an abuse of the agency's discretion.
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> [Un. Br. Atch. 6]

Since the Agency did not have just and sufficient cause to remove the grievant and failed to establish a nexus between grievant's off-duty misconduct and performance of his duties as Senior Officer, the Agency's adverse action (removal) of grievant is an abuse of its discretion and constitutes an unwarranted or unjustified personnel action in violation of the Master Agreement as it denied grievant compensation, allowances and differentials. But for the Agency's wrongful removal of grievant, he would have remained employed with FCC-Beaumont receiving compensation, allowances and differentials. Grievant is reinstated with back pay minus earned income; 5 U.S.C. § 5596 (b)(2)(A) provides that back pay amounts "shall be payable with interest" computed for the period beginning on the effective date of the "withdrawal or reduction involved" and ending on a date not more than 30 days before the date on which payment is made.

Included in this make whole remedy for grievant is restoration of seniority, retirement contributions, leave and earnings for overtime hours he would have been assigned but for his wrongful removal from duty. Health expenses incurred by grievant that would have been covered and paid for under his health insurance with the Agency will be reimbursed upon grievant's submission of receipts - - satisfactory to the Agency - - to obtain reimbursement within thirty (30) calendar days from the date of his return to duty. FCC-Beaumont will provide any training required for grievant to return to duty.

Under 5 U.S.C. § 7701(g)(1) grievant is the prevailing party because, consistent with *Local 1547, American Federation of Government Employees, AFL-CIO and U.S. Department of the Air Force*, *Luke Air Force Base, Arizona*, 58 FLRA 241, 242 (2002), this award is "an enforceable judgment or settlement which directly [benefits grievant] at the time of the judgment or settlement." In the Federal sector, failure to establish a nexus between the off-duty misconduct and job duties and a penalty imposed not commensurate with the misconduct is, in the main, detrimental to a case. This is not a novel or esoteric notion but well-established in the *Douglas* factors with consequences known to the Agency.

Pursuant to 5 U.S.C. § 5596 (b)(1)(A)(ii) reasonable attorney fees related to this grievance are recoverable. The Union has thirty (30) calendar days from the date of this Award to reach agreement with the Agency on reasonable attorney fees. Should there be no agreement at the conclusion of 30 calendar days, the matter will be presented to the arbitrator for a determination. The arbitrator retains jurisdiction over issues related to or associated with the remedy and attorney fees.

These findings and conclusions are reflected in the Award below.

AWARD

1. The grievance is sustained.
2. Grievant's removal is rescinded.
3. In lieu of removal, grievant is suspended for thirty (30) days.
4. Grievant is reinstated with a make whole remedy consistent with the terms in the text of this Opinion and Award.

Patrick Halter /s/
Patrick Halter
Arbitrator

Signed on this 6th day
of August, 2015