FMCS ARBITRATION PANEL

In the Matter of the Arbitration

GRIEVANT: Cornelius Jones

Between
BUREAU OF PRISONS,
Tallahassee FCI
and

FMCS No. 17-54964-3

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1570

BEFORE: **Stephen D. Owens**, Arbitrator

APPEARANCES:

For the Agency: **Merrill E. Ward, Esquire**

For the Union: **Ken Pike, Esquire**

Place of Hearing: **Tallahassee, FL**

Date of Hearing: **October 25, 2017 (Briefs available by December 20, 2017)**

Date of Award: **January 16 2018**

AWARD: The grievance is denied in part, and sustained in part consistent with the award and remedy set forth herein.

Stephen D. Owens, Arbitrator

INTRODUCTION

The Union filed this grievance on behalf of Cornelius D. Jones (Jones) when the Agency terminated him after he had tested positive for cocaine metabolites based on a random urinalysis drug test. The arbitration was held at the Federal Correctional Institution (FCI) at Tallahassee, Florida on October 24, 2017, at which time the parties presented argument, documentary evidence, examined and cross-examined witnesses. A transcript was made of the proceedings. Post-hearing briefs were submitted and available by December 20, 2017, and the record was closed on that date.

BACKGROUND OF THE CASE

The grievance was filed following the Agency's decision action to remove the Grievant, Cornelius Jones. Randall Cunningham, Supervisor of Recreation, signed the proposed notice on March 17, 2017 and was signed by Jones the same day. The proposal states, in pertinent part, that:

> This is notice that I propose you be removed from your position of Sports Specialist, GL-0030-09, no sooner than thirty (30) days from the date you receive this letter for Providing a Specimen Which Tested Positive for Cocaine Metabolites (sic).
>
> Specifically, on December 5, 2016, you provided a urine sample that tested positive for cocaine metabolites. The second half of the sample you provided was tested at your request and, on or around December 19, 2016, that sample also tested positive for cocaine metabolites.
>
> Your actions, as outline above, are egregious considering you are a law enforcement officer held to a higher standard of conduct. Program Statement 3735.04, *Drug Free Workplace* and Program Statement 3420.11, *Standards of Employee Conduct*, provide that the use of illegal drugs or narcotics is strictly prohibited at any time. You acknowledged receipt of the *Notice to Employee Whose Position Has Been Determined Subject to Random Drug Testing* on March 21, 1998. Likewise, you acknowledged receipt of the *Standards of Employee Conduct* on January 9, 2014.
>
> As a Sports Specialist, and a law enforcement officer, you are responsible for the care, custody, and correction of individuals convicted of or awaiting trial for violations of United States government laws, and many of these laws pertain to selling, purchasing, and use of illegal drugs. Subsequently, 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. The fact that you have tested positive for cocaine metabolites, an illegal drug, while employed as a Federal Law Enforcement Officer, causes me to question your ability to exercise correct and sound judgement when carrying out the duties expected of you in the completion of your day to day assignments.

Furthermore, as a Federal Law Enforcement Officer, your testing positive for an illegal drug, in addition to being unlawful, 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 Statement 3735.04, *Drug Free Workplace.* If this proposal is sustained, your removal would be fully warranted and in the interest of efficiency of the service.

The Warden will make the final decision of this proposal. You may reply to the Warden orally, in writing, or both orally and in writing. Your reply may include affidavits or other supporting documents. . .

Mr. Jones's written response to the Proposed Notice of Removal dated April 20, 2017 and sent to Warden Craig Coil, states, in pertinent part, as follows:

After pondering over what has transpired over the post several months, I have been overwhelmed with all that has happened. Let me first start by stating that I take full responsibility for my actions and producing a positive Urinalysis. One of the most demoralizing and humiliating thing that I had to do was inform my wife and family that I tested positive for Cocaine Metabolites. I have since been more cognizant and selective in my day to day vocations, the people I associate with and the activities in which I participate in. Since December 12, 2016, I have taken several Drug Test, which I provided, that have all come back negative. I enrolled in a Drug Treatment Program and completed the course. Through the course I was able to realize that I had a drinking problem and I have completely stopped drinking as of December 12, 2017 (sic).

What I can attest to and assure you is that this was an isolated incident and had and will have no bearing on my job performance. I have been employed her at FCI Tallahassee for over 25 years total, four (4) of those years being a contract worker in the Recreation Department. Over the past 25 years, I have never so much been pulled over or got in any trouble regarding drugs. Here at FCI Tallahassee, I have excellent evaluations, have over 800 hours of sick leave, and carry the maximum number of annual leave hours every year. This does not reflect the work ethic of a drug user. I understand and take ver seriously and acknowledge the fact that the BOP is a drug free workplace, but more importantly appreciate and value being hired as a contract worker in

1991 and a full time employer (sic) in 1995 here at FCI Tallahassee. Even during that time it was and I am certain it will always be a drug free workplace. Once again I take full responsibility for my actions, but deserve a second chance.

Please note that I am a stand up citizen in the community and represent the Bureau of Prisons well. I have had several newspaper articles written about me over the past 20 years in the Tallahassee Democrat. I know that cases of this magnitude typically end up in termination. I understand that you have a unique responsibility deciding matters that can potentially affect not only individuals involved, but their families and livelihoods, all while taking into consideration the agency as well. However, I have to put my faith in you to make a sound decision not based on what other wardens have done but based on my merit, work history, my potential and my accepting of responsibility of my action. I am truly remorseful to have put myself, my family and you in this unfortunate position. I am willing to take urinalysis monthly, weekly or however often you may seem fit at my own expense. Being only 2 years away from retirement, I have a family to support and I desperately need my government job. Please take all this into consideration as you make your final decision. I thank you for taking the time to read this correspondence.

Warden Coil's Decision Letter is dated May 2, 2017; he writes:

On March 17, 2017, you were issued a notice which proposed that you be removed from your position of Sports Specialist, GL-0030-09, no sooner than thirty days from the date you received the letter for the charge of Providing a Specimen Which Tested Positive for Cocaine Metabolites. In making my decision, I have given full consideration to the proposal letter, your written response dated April 20, 2017, and to the evidence contained in the adverse action file, which has been made available to you.

In your written and oral response, you took responsibility for your actions, but you stated that you never knowingly used cocaine metabolites. Additionally, you stated that you are now more cognizant of the people you associate with and the activities in which you participate. Furthermore, in your written response, you acknowledged that the Bureau of Prisons is a drug-free workplace. Nonetheless, the fact that your specimen tested positive for cocaine metabolites, while employed as a federal law enforcement officer, causes me to question your ability to exercise correct and sound judgement when carrying out your daily duties and assignments.

As a law enforcement officer, you are expected to uphold both the spirit and the letter of the law. As a correctional worker, you are responsible for the care, custody, and correction of individuals convicted of or awaiting trial for violations of U.S. government criminal laws, many pertaining to the selling, purchasing and use of illegal drugs. Many of the offenders with whom you have daily contact in the performance of your duties are incarcerated for drug

related offenses and/or have a substance abuse problem. Your position as a federal law enforcement officer in the correctional environment mandates that your actions be above reproach and in compliance with law, rules and regulations.

After careful consideration, I find the charge fully supported by the evidence in the adverse action file. When determining the appropriate penalty, I considered, among other factors, that you have over twenty-one years of Agency service, and you work performance has been at an acceptable level. Additionally, I considered that you have no previous discipline within the reckoning period. However, these factors, even when considered in combination with other mitigating factors, are not sufficient to outweigh the seriousness of your actions in light of your position in the correctional environment as a law enforcement officer.

Although I considered alternative sanctions, I concluded this misconduct, under the circumstances, was sufficiently egregious to warrant removal. In determining that removal was warranted, I considered that the charges against you are extremely serious in the light of your position as a law enforcement officer. Additionally, I considered that you were well aware of the Bureau's Drug Free Workplace policy. It is imperative that employees of the Federal Bureau of Prisons possess the highest degree of responsibility and professionalism, and that they conduct themselves in such a manner that their activities, both on and off duty, will not discredit themselves or the agency. You have failed to exhibit the type of conduct we expect of our law enforcement officers. Your actions in this matter have diminished your credibility and effectiveness and demonstrate that you are not one to whom the care, custody, and correction of federal offenders can be entrusted.

Therefore, it is my decision that you be removed from your position effective midnight May 3, 2017. Your removal is warranted and in the interest of the efficiency of the service.

The Union invoked arbitration over the Agency's decision to remove the Grievant. Its letter is dated May 2, 2017, and states its position, in pertinent part as follows:

In a memorandum to Warden Coil dated April 20, 2017, AFGE Local 1570 notified the Agency that the proposed termination of (Cornelius) Jones was in violation of the Collective Bargaining Agreement. The Agency violated Article 6 (b) (2) which states the "employees are to be treated fairly and equitable in all aspects of personal (sic) practice." Furthermore, Article 30 (d) states, "Recognizing the circumstances and complexities of individual cases will vary. . .the Union and the Agency endorse the concept and recognize that the employees are the most valuable resource of the Agency, and are encouraged, and shall be reasonable assisted, to the development of their potential as Bureau of Prisons employees to the fullest extent

practicable." An investigation and final disposition of an adverse action of termination was not for Just and Sufficient cause, not in the best interest of the employee, and not in the efficiency of the service. Furthermore, the Union believed the action would serve no purpose other than to hinder this employee's opportunity for advancement and is not corrective in nature, but rather excessively punitive.

On May 2, 2017, Warden Coil provided a signed memorandum of the decision to terminate Mr. Jones. This disciplinary/adverse action by Warden Coil was not for just and sufficient cause and was unfair and inequitable. . . .

As a remedy in this case, the Union requests that the Agency reimburse the Local for all expenses incurred while processing this case to arbitration. The Agency will also pay all attorney fees (market rate), legal fees, and expenses incurred in processing this case. Grievant will be made whole, to include any lost wages, overtime and shift differential. The grievant will have this termination permanently removed from his official personnel file. The grievant will suffer no reprisal, harassment or intimidation as a result of filing this case. . .

The grievance heard at arbitration on October 25, 2017 at FCI Tallahassee, Florida. At the hearing the parties were afforded full opportunity to present their respective cases. A transcript was taken of the proceedings. The parties opted to submit post-hearing briefs which were available by December 20, 2017, at which time the record was closed.

PROVISIONS OF THE AGREEMENT CITED IN THE GRIEVANCE

Article 6 - Rights of the Employee

Article 30 - Disciplinary and Adverse Actions

Article 31 – Grievance Procedure

ISSUE

The parties agreed that the issue to be decided is: Was the disciplinary/adverse action taken for just and sufficient cause? If not, what shall the remedy be?

STIPULATIONS

The parties agreed to the following stipulations:

1. The Union does not contest that the Grievant tested positive for cocaine metabolites on December 5, 2016 and for the re-test of the same sample on December 19, 2016.

2. The Union does not contest the procedures used in the initial taking of the sample nor the individual from the Agency that took the sample. The sample taken by the Agency properly and done within policy.

3. The Union does not contest the procedures used by the lab in testing the sample nor the individual(s) testing the sample. This testing was done properly.

4. The Union does not contest the findings of the lab. It is a fact that both tests returned positive for cocaine metabolites.

5. The Union does not contest the Chain of Custody for the specimen.

POSITION OF THE PARTIES

The Agency

Based on the reasons set forth in its Brief and summarized below, the Agency contends that the decision to remove the Grievant was taken for just and sufficient cause:

1. The Agency has met the standard of review required to support the decision to remove the Grievant. That is, the Agency has proven by the preponderant evidence that (1) the Grievant committed the conduct charged; (2) there is a nexus between the proven conduct and the efficiency of the service; and (3) the penalty of removal is reasonable in light of the serious nature of the Grievant's conduct.

2. The Union has stipulated that Jones committed the misconduct and only challenges the level of discipline imposed by the Agency. The evidence shows the Agency conscientiously considered and weighed all the relevant *Douglas* factors and exercised managerial discretion "within the limits of reasonableness" when it took the action.

3. Substantial weight should be given to the Warden's objective of maintaining discipline and efficiency and his prerogative to exercise his managerial judgement. The decision to remove Jones was appropriate for the efficiency of the service, and it was within the bounds of reasonableness.

4. As a law enforcement officer responsible for the custody of inmates, Jones is held to a higher standard of conduct. Moreover, many of those inmates for which he is responsible are serving sentences for cocaine-related offenses. To retain Jones

would not be consistent with his assigned duties as a law enforcement officer which also include keeping the facility safe and secure, responding to emergencies and accounting for inmates. Thus, Jones's removal is necessary for the efficiency of the service.

5. When Jones provided the sample on December 5, 2016, he had a level of 262 ng/mg of cocaine metabolites in his system or 162 ng/mg over the 100 ng/mg confirmation level for a positive showing of cocaine metabolites. Thus, the test shows Jones had cocaine in his system while at work on December 5.

6. While Jones took responsibility for his actions, he also gave explanations as to how he could have ingested cocaine; all of his reasons were shown to be invalid. Jones was apprised of the Drug Free Workplace (DFW) policy and was informed as well of his obligation to the Standards of Employee Conduct policy.

7. Given the serious nature of Jones's conduct, the Warden had lost confidence in his integrity and commitment to the high standards required of a law enforcement officer. Accordingly, progressive discipline was unwarranted due to the egregious nature of Jones's offense. Thus, the severe sanction of removal is justified. Moreover, removal in this case is within the range of penalties set forth in the Table of Penalties for similar drug-related offenses.

8. The grievance should be denied because the substantial evidence shows that: (1) Jones admitted to the misconduct; (2) the Warden considered all the relevant *Douglas* factors; (3) the penalty of removal was for the efficiency of the service and within the bounds of reasonableness; and (4) the removal was for "just and sufficient cause."

The Agency submitted a number of MSPB and arbitration cases in support of its position. All have been examined; the most relevant are discussed below.

The Union

Based on its contentions set forth as follows, the Union argues that the Agency violated the Master Agreement when it removed Jones. Thus, the grievance should be sustained and the requested remedy granted:

1. In accordance with Article 30 (a) of the Master Agreement, the Agency must prove that its decision to remove Guerrero was "taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply." The Agency must also show that removal was appropriate and commensurate with the nature of the offense; that is, the degree of penalty should be in keeping with the seriousness of the offense.

2. Article 30 (c) of the Master Agreement endorses the use of progressive discipline which is "designed primarily to correct and improve employee behavior" except the offense is shown to be so egregious as to warrant removal for a first offense.

3. The penalty of removal was harsh and unreasonable under the circumstances; the Agency failed to fully consider the use of other alternative actions.

4. While Jones is charged with providing a urine sample that tested positive for cocaine, the Agency failed in its attempt to show that he was a user/abuser of cocaine.

5. Warden Coil states in his decision letter that Jones's positive test for cocaine caused him "to question your ability to exercise correct and sound judgment when carrying out your daily assignments." However, the Agency showed no evidence that it had had concerns about Jones abilities at any time during his over two decades of employment.

6. Warden Coil's testimony shows that he "simply could not justify his decision to terminate Jones when he, in fact, knew he had other options available to him. Further, and by way of justifying his decision, he enumerated over and over again that he felt a positive (sic) for cocaine, as opposed to any other drug i.e., marijuana, was somehow more serious in nature and that alone justified termination." (Brief, p. 10)

7. Warden Coil did not seriously consider the *Douglas* factors for possible mitigation of the penalty. For example, he noted Jones's 21 years of service and work performance as being "acceptable" despite an above average performance history. "He considered nothing, other than, Jones tested positive for cocaine, and which, Coil believed to be a worse drug than other illegal substances. This appears to be his only consideration in this case." (Brief, pp. 12-13)

8. Regarding the Warden's view of Jones's potential for rehabilitation, the Union states: "It appears that Coil's consideration regarding whether Grievant had the potential for rehabilitation laid solely on his presumption that Grievant was a drug user and that considering his potential for rehabilitation 'would have been prior to if there were issues going on.' He did not consider a potential for rehabilitation based on a positive urine test, but rather on his personal belief that Grievant must be a drug user and on his belief that cocaine was a much more serious drug than, say, marijuana. This is what determined his decision to terminate Grievant." (Brief, p. 13)

9. Based on Warden Coil's testimony, the Union concludes that he felt removal was his only option. However, had Coil seriously considered *Douglas* factors 10 and 12; he would have decided differently. Coil "dismissed the possibility of rehabilitation outright and without any clear justification to support his conclusion, other than, the seriousness of the charge." (Brief, p. 20) The DFW

(Program Statement 3735.04) policy, the Employee Code of Conduct, Executive Order 12546 and the Master Agreement all provide for a range of penalties for testing positive for an illegal drug. Section 9 or Program Statement 3735.04 states:

> 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, are available.

The Program Statement (Section 9.d.) also calls for mandatory removal under two conditions: (1) when an employee refuses to seek counseling or go to EAP and (2) when an employee continues to use illegal drugs after a first finding or admission of illegal drug use.

10. Only Offense #11 in the Table of Penalties deals with drug use when an employee reports for duty under the influence of intoxicants or other drugs. Violation of #11 allows for a range of disciplinary action, not mandatory or automatic removal for a positive urinalysis. While Coil was aware of the range of discipline available to him, he did not consider an alternative action because of the seriousness of the charge.

11. The Union requests the grievance be sustained and seeks as a remedy that which is outlined in its Brief. (p. 26)

The Union submitted two cases in support of its case both of which were reviewed and are discussed below.

FINDINGS AND OPINION

Introduction

Normally in adverse action cases such as the instant matter involving application of the language in Article 30, Section a., the Agency must prove by a preponderance of the evidence the following "just and sufficient cause" questions:[1]

1. Did the charged conduct occur?
2. Did a nexus exist between the conduct and the efficiency of the service?
3. Was the penalty of removal reasonable under all the circumstances?

[1] The preponderance of evidence standard, as a quantum of proof, is defined as: "The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 U.S.C. Sec. 1201.56(c)2.

Here, there is no dispute that Jones provided a urine sample on December 5, 2016 that tested positive for cocaine metabolites. A retest of the same sample ten days later also produced a positive result for cocaine. The tests show that Jones used cocaine while off-duty in violation of Agency policy. Also Jones not only had sufficient notice of the policy, but also was well aware that a violation of that policy could lead to discipline. The Agency argues that the only proper level of discipline in this matter is removal in order to promote the efficiency of the service.

After examining the record, the parties' Briefs and their submitted cases, I find that the evidence does not support the Agency's decision to remove Jones. It did not have just and sufficient cause to remove Jones. Removal, under the circumstances, would not serve to promote the efficiency of the service.

In its decision in *Douglas v. Veterans Admin.,* the Merit Systems Protection Board determined that it had the authority to mitigate agency-imposed penalties when the facts of a case show that such penalty was clearly excessive, disproportionate to the sustained charges or arbitrary, capricious, or unreasonable.[2] The Board in *Douglas* stated that:

> Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency to the individual case.

In *Douglas,* the Board established 12 criteria or factors which the Agency must consider when determining an appropriate penalty to impose for an act of misconduct by a federal employee. The factors are to be taken into account by the Agency when determining the reasonableness of a penalty. The Board explains:

> Not all of the factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while other may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's

[2] *Douglas,* 5 MSPR 280 (1981)

> review of an agency-imposed penalty is essentially to assure that an agency did conscientiously consider the relevant factors and did strike a reasonable balance within the tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (*Douglas,* p. 322-323; added emphasis)

The Relevant *Douglas* Factors and the Reasonableness of Removal

As noted in *Douglas*, the Board, determined that it was incumbent on the Agency (Warden Coil) to conscientiously consider and apply all the relevant factors in order to show there existed sufficient cause to impose the penalty of removal on Jones.

Coils's analysis of the relevant *Douglas* factors as shown in his Decision Letter and in his testimony (Transcript, pp. 152-162) is reviewed as follows:

Factor 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 repeated.

Warden Coil emphasized that Jones's positive test for cocaine was a very serious offense—even more severe than a positive marijuana test. The Grievant, as a Sports Specialist, supervised inmates many of whom had been convicted of drug-related offenses. He was also responsible for the safety, security and accountability of inmates.

Factor 2: Jones's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of his position.

As noted, Jones, as a law enforcement officer, is held to a higher standard; he supervises inmates, but not employees. He should be a role model for the inmates. His contact with the public is minimal.

Factors 3 and 4: Jones's past disciplinary record and his work record, including length of service, performance on the job, ability to get along with others and dependability.

Coil said he looked at Jones's work record, length of service and disciplinary record and considered each. While he considered each aspect, removal was the most appropriate penalty due to the seriousness of the offense.

Factor 5: The effect of the offense on the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's work ability to perform assigned duties.

Coil noted that Jones's offense probably gave his supervisor some reservations about supervising him due to the seriousness of cocaine use. The offense also caused him, as the CEO, to lose confidence in Jones's ability to perform his job because of the serious nature of the offense and the fact that Jones serves as a role model.

Factor 6: Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Coil noted there was no evidence provided by HRM or other offices to show that removal was inconsistent with the treatment received by other employees in BOP.

Factor 7: Consistency of the penalty with any applicable agency table of penalties.

Coil could still impose removal for the offense even though the Table of Penalties does not specifically state a penalty for cocaine use; that is because the Table is not all inclusive and does not contain every possible offense.

Factor 8: Notoriety of the Offense and Its Impact on the Reputation of the Agency

Coil was unaware of any notoriety of the offense.

Factor 9: Clarity of Notice

Coil noted that Jones was on notice due to his annual training and the DFW policy and its Program Statement.

Factor 10: Potential for the Employee's Rehabilitation

As to this factor, Coil noted that "the time for rehabilitation would have been prior to having the urinalysis test if there were issues going on then claiming safe harbor or getting help prior to." He did not consider giving a lesser sanction because of the seriousness of the offense. The offense is serious because, as Coil states: . . .it's against federal law. I can't have law enforcement officers going around using cocaine."

Factor 11: Mitigating Circumstances

Coil said he considered Jones's work performance, oral response and written response in mitigation. Jones took responsibility for his actions but also stated he never knowingly used cocaine.

Factor 12: Availability of Alternative Sanctions to Deter Such Conduct in the Future

Coil noted that he did not consider an alternative sanction because of extreme seriousness of the misconduct.

The Arbitrator recognizes that his role, like that of the Board, in reviewing disciplinary decisions by an Agency is to assure that managerial discretion has been legitimately invoke and properly exercised. Further, the Board has stated that "In determining the appropriate penalty for misconduct, arbitrators are required to apply the same rules that the Board applies."[3] Accordingly, the relevant *Douglas* factors are reviewed in light of the record and the scope of Warden Coil's consideration of each factor.

Nature and seriousness of the offense. Jones provided a specimen that tested positive for cocaine on one occasion. There is no question that the use of cocaine is a serious offense in light of Jones's responsibilities as a law enforcement officer.

The job level. Jones, a Recreational Specialist, served as a law enforcement officer and is held to a higher standard of conduct than other federal employees. He did not supervise other employees at the time of the offense. There is no evidence that his job required him to interact with the public.

The disciplinary record. Jones's had no discipline in his record during the reckoning period; there is evidence of a Letter of Reprimand issued during his tenure of employment.

The past work record. Jones has 25 years of service—four years of which was as a contract employee. His performance throughout the period was acceptable; he has received positive evaluations and awards.

The effect of the offense on Jones's ability. There is no credible evidence to suggest that Jones's would not continue to perform at a satisfactory level as he had for over the past 25 years.

Consistency of the penalty. There is no evidence the Agency imposed a different penalty to other employees who tested positive for cocaine.

---

[3] *Taylor v. Dept. of the Army,* 107 MSPR 638 (2008) as referenced in *Adams v. DOL,* 112 MSPR 288 (2009)

Consistency with the Table of Penalties. There is no specific offense for testing positive for an illegal drug in the Table of Penalties. However, Offense No. 11 in the Standards of Employee Conduct (Attachment A/Table of Penalties) shows a range of penalties with removal listed as an option for a first, second and third offense. An offense can be so "egregious" as to warrant removal for a first offense.

Notoriety of the offense. This factor is not applicable because there is no evidence of any negative news accounts of the conduct.

Clarity of notice. Jones was on notice that use of an illegal drug would result in discipline up to an including removal. However, it is not likely that he was on notice that removal would occur after a one-time instance. Further, Program Statement 3735.04 of the DFW polity, states that "the severity of the disciplinary action taken against an employee (who uses) illegal drugs shall depend on the circumstances of each case. . ." Removal is not mandated; however, it is required in two situations. Neither situation is applicable to the instant case.

Potential for rehabilitation. The Warden emphasized Jones's cocaine use had eroded his trust in him. Coil states that he took into consideration all the factors and circumstances as well as Jones's oral and written responses. However, because of the serious nature of the offense, removal was the most appropriate penalty for Jones. Jones was a 25-year employee with above average performance reviews; he has received Sustained Superior Performance awards. He had received one element of discipline, a letter of reprimand, over his employment tenure. He also admitted his actions and took responsibility for them, albeit after the Agency had completed its investigation.

Mitigating circumstances. There is no evidence of emotional or personal issues that may have affected Jones.

Alternative sanctions. According to Coil, there were no alternative sanctions to removal given the quite serious nature of Jones's offense. However, the Agency gives the CEO the option of considering the "full range" of penalties in cases where illegal drug use has been determined. Also there is scant evidence that Coil "conscientiously considered the relevant (*Douglas)* factors (in order to) strike a reasonable balance within the tolerable limits of reasonableness" before he decided to remove Jones.

Progressive Discipline

It is well-established in disciplinary matters that the level of the penalty should correspond to the proven misconduct. Moreover, unless contractually prohibited, penalties can be modified when they are not reasonably related to the offense. Further, a key principle in the administration of discipline is that it should be should be corrective in nature, not punitive. This means that for most offenses progressive discipline should be followed. Only those offenses determined to be so egregious would normally warrant removal for a first offense.

The parties recognize this principle include it in Article 30, Section c of the Master Agreement which states:

> 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.

Review of Relevant Cases

Arbitrator Valverde in *Council of Prisons, Local 1637 and BOP (*FMCS # 11-53789-3) is on point here; he explains (p.20):

> Section 9 of the DFWP identifies what will happen when an employee is found to be **using illegal drugs.** When an employee has used an illegal drug he/she is to 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 shall be available.** Section 9c identifies the only limitation on the kind of discipline that can be issued—that it be consistent with the requirements of the (Article 30 of the Master Agreement) and existing disciplinary and adverse actin regulations and procedures. Section 9d 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 EAP or (2) when the employee has not "refrained from illegal drug use after first finding or admission of illegal drug use." (Added bold)

In light of the language of Article 30 and the DFWP, it is reasonable to conclude that Jones have access to the full "range of disciplinary actions up to and including removal" under the circumstances.

Arbitrator Searce's decision (*FCI and AFGE, Local 506,* FMCS N. 10-5997 (2011)) to reduce the removal of a correctional officer with 18 years of without any discipline who tested positive for using marijuana is pertinent; he writes:

> Taking note again of the intent to apply the full range of disciplinary actions as set out in the "Workplace" provisions, if an eighteen-plus year employee with an unblemished and exemplary record of service who failed a single random screen does not qualify for consideration of discipline less than dismissal, then the intent of the "Range of Consequences" is raised to doubt. The burden rests with the Agency to demonstrate that the discipline imposed was just and sufficient. I find that it is excessive. (Arbitrator Searce reduced the removal to a time-served suspension).

In addition, Arbitrator Riker (*AFGE, 1112 and BOP,* FMCS No. 16-54069-3 (2016) reduced the removal of a 23-year Recreation Specialist writing that:

> The application of progressive discipline was available to the Employer. The evidence indicates that there is not a requirement to immediately move to termination for a first offense. Clearly that end of the discipline spectrum exists in order to enable management to take prompt action to prevent disruptive behavior or poor performance from damaging the work environment. The arbitrator also fully recognizes the Agency's need to prevent the perceived tolerance of substance abuse. However, the record indicates that there is a means to recognize that such abuses can occur as demonstrated by a rehabilitation program being available to employees to overcome such issues. A progressive discipline strategy would take advantage of this corrective action mechanism and provide management with the means to implement full compliance. (p. 13)
>
> In considering the application of progressive discipline, it is also appropriate to examine the severity of the offending employee's risk to the workplace. In the matter at hand, (the grievant) had a long and unblemished record of performance in which there was nothing on the record to suggest his recent use of marijuana had in some way presented a behavior or performance risk. (p. 14)

In the two most relevant cases submitted by the Agency, the first involved a 3-year employee who was removed for testing positive for off-duty marijuana use (*AFGE, Local*

1013 and BOP, Yazoo City FMCS No. 11-54650 (2012)). Arbitrator Yancy's decision includes the following statement:

> A positive drug test for an employee managing inmates is a serious offense. The record shows that the Warden did consider the Douglas factors, there was knowledge of his work history, length of service as well as his ability to get along with his colleagues and his value to the service. The one item that makes the grievant's case different from all the ones cited to show that the punishment does not fit the penalty, is the veracity of the grievant. The grievants in the comparative cases admitted to their misconduct and the hearing officers felt that they could be rehabilitated. The Arbitrator in the instant case, took into account the fact that the grievant took several negative drug test (sic), had a polygraph several days before the hearing, and sought letters from his colleagues regarding his character several days before the hearing. Yet the Arbitrator notes that the grievant never assumed any responsibility for his negative actions confirmed by scientific evidence despite the fact that he is a college graduate. . .The grievant is simply not credible.

Arbitrator Mason denied a grievance in *BOP, FCI Bennettville, SC and AFGE, Local 2585; FMCS No. 12-03026-8* (2014) where a short-term (3-year) case manager tested positive for cocaine use and failed to acknowledge her mistake and take responsibility for it. The employee had been removed a few years earlier for the same misconduct; however, the Agency rescinded the action when procedural irregularities were uncovered. The case involved a second termination for the employee. The two removals and two positive tests clearly differentiate the case from the case at bar.

Conclusion

In light of the foregoing discussion and analysis, the Arbitrator concludes that there is just and sufficient cause to discipline Jones. However; under the circumstances of the case, removal was not the appropriate penalty for Jones's proven misconduct. That is, the record shows that the Agency's decision to remove Jones was too harsh. Further, the Agency's choice of removal as the penalty exceeded the bounds of reasonableness and was an abuse of its managerial discretion. The Agency did not engage in a careful, responsible and thorough consideration of the relevant *Douglas* factors as is required by the MSPB in such cases. Instead, the Agency justified its decision to remove Jones on one overriding factor: the serious nature of the offense. It abused its discretion when it

removed Jones, a first-time offender with over 25 years of good performance. Removal Jones under the factual circumstance of this case would not promote the efficiency of the service.

Accordingly, the penalty shall be modified to a long-term suspension. That result is more consistent with the concept that discipline should be corrective in nature, not punitive.

AWARD

The grievance is sustained, in part. Mr. Jones shall be reinstated as soon as practicable to his former position or a comparable position at FCI Tallahassee to be determined by the Agency. Such reinstatement will only occur upon Mr. Jones's acceptable completion of a drug screen. The removal shall be reduced to a 60-day suspension. He shall be made whole for all losses consistent with the suspension.

Those losses shall include back pay with applicable interest, restoration of seniority, payment of applicable overtime earnings, adjustment of leave balance, retirement contributions, and applicable, verifiable medical expenses. The Agency shall be credited with any interim earnings and unemployment compensation, if applicable, received by the Grievant.

The Arbitrator shall retain jurisdiction in this matter for sixty (60) days from the date of this award for the sole purpose of resolving any questions related to remedy.

Date: January 16, 2018

Stephen D. Owens, Arbitrator