In the Matter of Arbitration Between

Federal Correction Complex
BOP-DOJ
"Agency"

and

American Federation of Government Employees
Local 506
"Union"

Before: James F. Scearce, Arbitrator

FMCS Case 10-59907
Todd James
Coleman, Florida

This case involves a dispute over the discharge of Todd James (Grievant) on the charge of violation of the "Standards of Employee Conduct" and "Drug Free Workplace" program by testing positive for use of illegal drugs or narcotics in a random drug program. The hearing was held on February 7, 2011 at the Administration office of the Federal Correction Complex at Coleman, Florida. Both parties were afforded a full opportunity to present, examine and cross-examine witnesses and to submit exhibits. The proceedings were recorded by a public stenographer. A copy of the transcript was received March 5, 2011.

Both parties closed argument by briefs, which were received March 28, 2011.

APPEARANCES

For the Agency -

Presenting -

Tiffany O. Lee, Esq.	Attorney - Advisor Bureau of Prison, Washington, D.C.

Assisting -

Kevin Rison	Human Resources Officer FCC - Coleman

Witnesses -

Minerva Perez	Assistant Health Services Administrator, FCC - Coleman
Brian Brunelli*	Laboratory Director - Toxicology Department, Quest Diagnostics
Tamyra Jarvis	Warden, FCC - Coleman

For the Union -

Presenting -

Kenneth Pike	Arbitration Specialist

Assisting -

Jorge Furones	Vice President, Local 506

* Testimony taken by telephone

Witnesses –

Mark Ciavarella	Supervisor
Todd James	Grievant
Tad Schnaufer	Supervisor
Timothy Verdone	Lock/Security Specialist

BACKROUND

The Agency is a major Federal prison complex in central Florida with multiple thousands of inmates incarcerated for crimes ranging across the gamut of offenses. The Union has representation rights for "all employees employed by the Federal Bureau of Prisons, with the exception of the employees of the Central Office." (Jt.Ex1)

The Grievant was a long-service (18 ½ years) employee at the time of events germane to this dispute. He had been the "Woodworking Factory Foreman" for a number of those years; as such, he apparently instructed inmates in such craft as part of their rehabilitation. The Foreman position was eliminated in May 2010, and the Grievant was compelled to seek another job

assignment at the facility, which he did, and became a Correctional Service Officer.

On June 11, 2010 when the Grievant reported for duty, he was advised that he would be required to furnish a urine sample as part of the Agency's random test program. According to the Agency official conducting the taking of the urine sample (M. Perez), the Grievant appeared nervous and stated that he was out with old friends a few days earlier when they smoked marijuana cigarettes in an enclosed vehicle; when offered one, he refused. The urine sample was forwarded to a diagnostic laboratory for analysis. The result of the analysis was subsequently returned to the Agency on or after June 15, 2010, which showed the presence of the marijuana in the Grievant's urine at a level of 336 nanograms per milliliter. According to the Agency, this greatly exceeded the level necessary to confirm the presence of this metabolite, which was 15 nanograms per milliliter.

By letter dated June 16, 2010 the Grievant was informed by the facility Warden (T. Jarvis) that he was being issued a different tour of duty effective that date: He was to remain at his home from 8:00 a.m. to 4:00 p.m. beginning June 17, 2010 and maintain that status Monday through Friday, excluding Federal

holidays, approved vacations, sick leave, etc. This assignment was not to be considered a disciplinary or adverse action and he would receive his pay and benefits as usual, so long as he performed work properly assigned to him.

By letter dated July 30, 2010 the Grievant was informed by Complex Captain Clinton Smith that he was proposing removal of the Grievant on the charge of "Providing a Specimen Which Tested Positive for an Illegal Drug." The Grievant subsequently responded by letter dated September 2, 2010 denying ever smoking marijuana, but had been subjected to second-hand marijuana smoke and may have been given a food item tainted by marijuana. He conceded in the letter to having developed a drinking problem and had contacted the Employee Assistance Program (EAP for help.

By letter dated September 9, 2010 from Warden Jarvis, the Grievant was advised of his removal from all service effective September 10, 2010. The Union responded to the Company, invoking Article 31, Section h.1 of the Master Agreement, which would send the dispute directly to arbitration instead of proceeding through the Steps of the grievant handling process. The undersigned was selected by the Agency and Union from a

panel of arbitrators provided by the Office of Arbitration, Federal Mediation and Conciliation Service Agency.

POSITION OF THE COMPANY

The Grievant's selection for a drug test on June 11, 2010 was random in nature. The Union concedes that it was objective, properly handled and tested it, and also does not contest the results. The Agency properly placed the Grievant on "home duty status" pending further review, discussion and consideration; he was also referred to the EAP at the same time. The Agency's subsequent decision to remove him was in keeping with procedures and sound judgment. The Warden gave consideration to the Grievant's statements and the Union's arguments, as well as the "Douglas Factors" in making the decision to remove. To retain the Grievant would be inconsistent with his assigned duties as a Federal law enforcement officer: Many of the individuals for whom he would be responsible were incarcerated for the same type of offense. The Grievant conceded that he was fully aware of the Drug Free Workplace policy as well as the Standards of Employee Conduct policy. The Agency has lost confidence in the integrity of the Grievant, his willingness to comply with his obligation and his commitment to meet the requirements of a

Correction Officer. Additionally, the Warden did not consider a demotion and reassignment a reasonable alternative. And, while the Grievant contended that he did not smoke a marijuana cigarette, the toxicology expert who testified at the hearing was specific in his statement that tests have proven that passive marijuana smoke – even in large quantity – is not metabolized in the body.

The Agency's decision in this case was in keeping with proper authority and proven by the facts as presented. The decision to remove the Grievant was for sufficient and just cause; the grievance should be denied.

POSITION OF THE UNION

The Union does not dispute the findings of the test administered to the Grievant on June 11, 2010, but takes exception to the conclusion that he smoked marijuana. As the Grievant testified at the hearing, he unwisely accepted a ride to a party by strangers who did smoke the illegal drug and was exposed to extensive secondary smoke in the process. Subsequently, he consumed some food that may have been tainted.

By sworn testimony, the Grievant declared he had never smoked this substance.

The Agency cannot offer any proof that the Grievant ever reported for duty under the influence of this or any other illegal substance. Testimony adduced from his co-workers and supervisors verified that the Grievant was always fit, competent and performed his duties well above-average; his performance evaluation for past years have been excellent and he was considered a highly valued employee.

In the negotiation of the terms of the Master Agreement, both parties committed to the concept of progressive discipline and the opportunity for employees to be given the opportunity to correct and improve work and behavior. Only first time offenses considered so egregious as to warrant removal are to be imposed on employees. The Agency's reaction to receipt of an adverse drug report as occurred in this case is not warranted in this case. Not only does it result in forfeiture of the Grievant's job, it caused the loss of his health coverage as well as his ability to qualify for unemployment compensation from the State of Florida, given the nature of his dismissal. And, equally important, the Grievant's ability to obtain other employment is

limited due to his age as well as the nature of his departure from the Agency. While some discipline of the Grievant may be appropriate, dismissal is not. He should be reinstated to duty and be made whole for all lost wages with interest, have his seniority and time of service reinstated along with all rights to which he is entitled as determined by the arbitrator.

CITED/RELEVANT PROVISIONS OF THE MASTER AGREEMENT AND RELATED DOCUMENTS

MASTER AGREEMENT

Article 5 Rights of the Employee*

Article 30 Disciplinary and Adverse Actions*

Article 31 Grievance Procedure (In pertinent part)

> ...Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:
>
> 1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?". . . (Jt.Ex.18)

* Not reproduced here for sake of brevity

DRUG FREE WORKPLACE

. . .

9. DETERMINATION OF DRUG USE AND DISCIPLINARY CONSEQUENCES

a. Determination of Drug Use. An employee may be determined to be using illegal drugs on the basis of any appropriate evidence including, but not limited to:

(1) Direct observation of illegal drug use,
(2) Evidence obtained from an arrest or criminal conviction,
(3) A verified positive test result, or
(4) An employee's voluntary admission.

b. Mandatory Administrative Action. An employee determined to be using illegal drugs shall be referred to the EAP by the appropriate Medical Review Officer (MRO), CEO, or by the National Coordinator. If the employee occupies a Test Designated Position (TDP) (see Section 11) or other sensitive position, the CEO shall immediately remove the employee from that position, and place him or her in a nonsensitive position until appropriate action is taken by the Agency.

At the joint discretion of the Warden, the Regional Director, or Assistant Director, an employee may return to duty in a test-designated or sensitive position if the employee's return will not endanger national security, public safety, or institution security.

c. Range of Consequences. 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.

. . .

(Jt.Ex.16)

STANDARDS OF CONDUCT

(Not reproduced here for sake of brevity)
(Jt.Ex.17)

THE ISSUE

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

DISCUSSION AND FINDINGS

The Union doses not dispute the result of the drug screen of the Grievant - neither the presence of the metabolite of marijuana in the Grievant's urine nor the extent of it - 336 nanograms per milliliter. It contends that such finding, however, does not prove that he smoked marijuana. The presence of such substance indicates that it was inhaled or ingested, or both. The record presented does not indicate whether the Grievant previously had been tested for drug use; presumably, a record would exist had he been. The Grievant contended he had been served several foodstuffs at the party he attended, which he described as including cookies and cake. It is noted that no questions were raised by the Agency in its telephone interview

of the Quest Diagnostics' Toxicology expert concerning the effect or potential effect on a drug screen resulting from the intake of marijuana-laced foodstuffs. (The Union opted not to cross-examine such official at all.)

It is a reasonable conclusion that the Grievant either smoked or ate food with marijuana, or both. The question at this point is whether such activity warrants removal. Having no record presented to indicate that the Grievant had been subject to prior drug screens, the Agency is obliged to base its actions on the one cited. The Agency cites the provisions of the Drug Free Workplace and the Standards of Employee conduct as basis for his removal and the bar to his return to duty. It is not readily apparent that his return would somehow either endanger national security, public safety or institution security. The Agency presented nothing in the record to indicate that prior or similar discipline has been imposed at this facility for the same offense, suggesting that this is a case of first impression. It is noted that the "Workplace" provision in the "Range of Consequences" contemplates consideration of the "circumstances of each case" and the availability of "The full range of disciplinary actions," including dismissal. (Jt.Ex.16)

The Grievant had given service for over 18 years with no blemish on his record; in fact, his reviews are well above standards. Testimony by a contemporary employee and two (2) supervisors could not have been more positive about the quality of his work and his commitment. The Grievant was candid about an alcohol problem which he contends he is dealing with.

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 an 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 in this case was just and sufficient. I find that it is excessive.

I am mindful of the important task that the Agency has and the need for its employees to be exceptional. I find that the Grievant's record of service entitles him to an opportunity to demonstrate that he is deserving of an opportunity to continue his employment in some capacity. The Agency is entitled to invoke random drug screens as it sees fit, within reason, and

the Grievant is to demonstrate to the Agency that he is actively and continuously participating in Alcoholics Anonymous, since he identified himself as a recovering alcoholic. His healthcare and other benefits are to be restored as well as his time in service. The time from the date of his dismissal to the date of issuance of the Opinion/Award is to be considered suspension without pay. His return to duty should follow the findings of an acceptable drug screen.

The Grievant would do well to recognize this as an opportunity to be an exemplary employee for the remainder of his work career with the Agency.

AWARD

The Agency's decision to dismiss the Grievant was not demonstrated to be just and sufficient. The actions set out in the Discussion and Findings applicable to the Grievant are to be put into effect without delay.

James F. Scearce
Arbitrator

April 30, 2011
Date of submission of this Opinion/Finding/Award