UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH JOHNSON,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DE-0752-14-0091-I-2

DATE: April 2, 2015

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Wesley E. McConnell, Esquire, Palmer Lake, Colorado, for the appellant.

Erin Lai, Joint Base Andrews, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member
Member Robbins also issues a separate opinion.

FINAL ORDER

¶1 The agency has filed a petition for review of the initial decision, which reversed the agency's removal of the appellant on the charge of Use of Illegal Drug (Marijuana). Generally, we grant petitions such as this one only when: the

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

¶2 The appellant filed this appeal from the agency's decision to remove him from the position of Operations Planning Specialist, GS-0301-12, at the North American Aerospace Defense Command at Peterson Air Force Base, Colorado. MSPB Docket No. DE-0752-14-0091-I-1 (I-1), Initial Appeal File (IAF), Tab 1, Tab 4 at 10-13, Tab 5 at 4-5. The appellant's position was a testing designated position and he was thus subject to drug testing on an unannounced random basis. I-1, IAF, Tab 5 at 13, 21.

¶3 The appellant attended an acquaintance's birthday party on February 11, 2013. *Id.* at 27. On February 13, 2013, he was selected for a random drug test. *Id.* at 40; MSPB Docket No. DE-0752-14-0091-I-2 (I-2), IAF, Tab 18 at 4. His urine tested positive for tetrahydrocannabinol carboxylic acid (THCA), a metabolite of marijuana. I-1, IAF, Tab 5 at 38; I-2, IAF, Tab 18 at 4. In a sworn statement he gave shortly after receiving his test results, he explained that the majority of party guests were in the basement, which was smoke-filled. I-1, IAF, Tab 5 at 27. He stated that he left the party after 20 minutes. *Id.*

¶4 The agency removed the appellant from federal service based on the sole charge of Use of Illegal Drug (Marijuana). *Id*. at 4; I-1, IAF, Tab 4 at 10-13. He filed this appeal,[2] and, after a hearing, the administrative judge issued an initial decision reversing the agency's removal action. I-2, IAF, Tab 27, Initial Decision (ID). The administrative judge found that the charge denoted an element of scienter and thus required the agency to prove that the appellant's ingestion of marijuana was intentional. ID at 4.

¶5 At the hearing, the appellant testified that he was in the basement for about 20 minutes but left that area because it was smoky and people were smoking marijuana there. Hearing Transcript (HT) at 83-84. He testified that he did not smoke marijuana or knowingly ingest marijuana in any other form but did drink beer and ate a brownie at the party. HT at 83, 86. The party hosts testified that they did not see the appellant smoke marijuana but saw him eating and that some of the food they served contained marijuana, including brownies and rice krispies treats. I-2, IAF, Tab 19 at 22, 32, Tab 20 at 25-26, 29. These food items were for a time located upstairs, away from the area downstairs where guests were smoking marijuana. I-2, IAF, Tab 19 at 25-26. The items were not labeled, and the hosts were not sure that every guest knew they contained marijuana. *Id*. at 24, Tab 20 at 36. Relying in part on demeanor evidence, the administrative judge found credible the appellant's testimony that he was unsure as to whether he had eaten marijuana-laced food at the party. ID at 5-7. The administrative judge further found that the appellant did not intentionally ingest marijuana and, under

[2] On March 19, 2014, the administrative judge dismissed the initial appeal in this case without prejudice to refiling, and on May 14, 2014, the appeal was refiled. I-1, IAF, Tab 20; I-2, IAF, Tab 1.

the unique circumstances of the case, he could not find that the appellant engaged in the charged misconduct, or that any penalty was warranted.[3] ID at 7.

¶6 Contrasting the circumstances here to those in *McNeil v. Department of Justice*, 117 M.S.P.R. 533, ¶¶ 12-14 (2012), the agency argues that the administrative judge improperly inferred an element of scienter for the word "use" in the charge. *See* Petition for Review (PFR) File, Tab 1 at 8-12. We find, however, that the appeal was correctly decided. In *McNeil*, the appellant had inadvertently smoked a marijuana-laced cigar that his estranged and mentally-unstable wife left in his truck. *McNeil*, 117 M.S.P.R. 533, ¶¶ 6, 10. Although the appellant had provided a urine sample that tested positive for marijuana metabolites as charged, *see id.*, ¶ 2, he credibly testified that he had unwittingly ingested marijuana when he smoked the cigar, *id.*, ¶ 10. The administrative judge thus found that the maximum reasonable penalty was no penalty at all and reversed the removal, which the Board upheld. *Id.*, ¶¶ 3, 14. Here, the charge pertained not to the appellant's positive urine sample but instead to his alleged use of marijuana. *Compare id.*, ¶ 2, *with* I-1, IAF, Tab 5 at 4. *McNeil* is not directly on point but illustrates how one might ingest marijuana without "using" it and thus reasonably influenced the administrative judge's analysis. *See* ID at 7. Further, the administrative judge explained that, even if he had not construed the charge to require proof of intent, he would have reversed the action "because the maximum reasonable penalty for unknowing or unintentional ingestion is no penalty at all." ID at 7 n.2.

¶7 Citing *Scott v. Department of Transportation*, 45 M.S.P.R. 639, 642 (1990), the agency argues that even in cases of passive ingestion, intent need not be proven. PFR File, Tab 1 at 10-11. In doing so, however, the agency minimizes the facts that are controlling in *Scott*. The appellant there had failed to comply

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[3] The appellant raised a harmful procedural error issue that the administrative judge did not reach. ID at 7; *see* I-2, IAF, Tab 13 at 2.

with a series of rehabilitation agreements for alcohol abuse. *Scott*, 45 M.S.P.R. at 640. The agency proposed his removal but held the action in abeyance pending his acceptance and successful completion of another rehabilitation agreement requiring him to abstain from ingesting alcohol or "any other substance of abuse." *Id.* at 640-41. We note that these factors are not present here. Less than 3 months after accepting the agreement, the appellant tested positive for cannabinoids and was removed for violating its terms. *Id.* at 641. On appeal, he claimed that he ingested marijuana passively while attending a party where other guests were smoking the substance. *Id.* The administrative judge found that the rehabilitation agreement did not distinguish between passive and active ingestion and that the agency was not required to prove that the appellant's ingestion was active. *Id.* On review, however, the Board cited the testimony of the agency's Assistant Regional Flight Surgeon that the appellant's THCA levels, which were 12.4 to 13.7 times the minimal level for a positive drug test, resulted not from passive ingestion but instead from "illegal drug use." *Id.* at 642-43. *Scott* thus does not support the proposition that the agency seeks to advance.

¶8 Another case that the agency cites, *Cole v. Department of the Air Force*, 120 M.S.P.R. 640 (2014), is inapposite because the appellant in that case admitted that he had knowingly used marijuana.[4] *See* PFR File, Tab 1 at 8; *see*

[4] The agency cites *Cole*'s holding that an agency is required to prove only the "essence of the charge" for the proposition that a positive drug test effectively *requires* the Board to find that it proved the appellant used marijuana. PFR File, Tab 5 at 8; *see Cole*, 120 M.S.P.R. 640, ¶ 8. Without engaging in a detailed analysis of agency regulations and Executive Order No. 12564, Drug Free Work Place, we note that there have always been circumstances under which a positive drug test would not necessarily lead to a removal action. For instance, section 4(b) of the Executive Order anticipates that an employee might show a valid medical explanation for a positive drug test, and section 5(f) allows for the presentation of rebuttal evidence in the face of a positive test result. *See* Drug Free Work Place, 51 Fed. Reg. 32,889, 32,891 (Sept. 15, 1986); *see also Lazenby v. Department of the Air Force*, 66 M.S.P.R. 514, 518 (1995) (the Executive Order states that an agency must initiate a disciplinary action, though not necessarily a removal action, against an employee who is found to use drugs).

also Cole, 120 M.S.P.R. 640, ¶¶ 3-4. In contrast, the administrative judge here found that the appellant credibly testified that his use of marijuana was inadvertent and unintentional. ID at 5-6. In so finding, he relied in significant part on demeanor evidence from the hearing. ID at 6. The Board gives deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Sufficiently sound reasons for the Board to overturn demeanor-based credibility determinations include findings that are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole. *See Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004). The administrative judge considered additional factors beyond his observations of witness demeanor. These factors included the internal consistency of the appellant's testimony, the consistency of his testimony with that of other witnesses, and the inherent *probability* of his version of events. ID at 5-7; *see Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

¶9 The agency's primary reason for the Board to reject the administrative judge's credibility findings is that the appellant "changed his theory" regarding how marijuana metabolites appeared in his urine after learning that the concentration of THCA was too high to be explained by the inhalation of secondhand smoke. *See* PFR File, Tab 1 at 9-10; *see* I-2, IAF, Tab 18 at 6 (the parties stipulated that a concentration of 33 nanograms per milliliter of urine "is too high to be consistent with a theory based solely on passive inhalation"). When confronted with the information that his urine sample had tested positive for THCA, the appellant initially stated that he had been in a smoke-filled basement for several minutes, suggesting exposure to secondhand smoke. I-1, IAF, Tab 5 at 27. He later attributed the positive urinalysis to accidental ingestion of marijuana-laced snacks. I-1, IAF, Tab 4 at 44.

¶10 It is plausible, however, that the appellant did not initially realize that the food he consumed at the party might have been the source of THCA in his urine. Confusion in the face of an unexpected positive drug test, *see* I-1, IAF, Tab 4 at 44; HT at 79, hardly indicates dishonesty. The preponderance of the evidence leads us to conclude that the appellant did not know he had ingested marijuana. He testified that he did not feel any physical effects that would have suggested ingestion of marijuana after he ate the party food. I-1, IAF at 44; HT at 85. His cooperative conduct after he was selected for testing is consistent with that of a person who did not anticipate an unfavorable result. *See* I-1, IAF, Tab 4 at 44; HT at 76-77. The party hosts acknowledged that they served marijuana-laced snacks at the party; these snacks were not labeled as containing marijuana; and they did not observe the appellant smoking marijuana but did see him eating. I-2, IAF, Tab 19 at 22, 24-26, 32, Tab 20 at 25-26, 29, 36. Further, the level of THCA in the appellant's urine is consistent with his theory of inadvertent ingestion, *as the agency stipulated*.[5] *See* I-2, IAF, Tab 18 at 6.

¶11 The agency's attack on the appellant's credibility, based on his failure to realize in the first instance that he may have ingested snacks containing marijuana is insufficient reason for the Board to reassess whether his testimony was credible. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (before the Board will undertake a complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect, and

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[5] The appellant's urine contained 33 nanograms of THCA per milliliter (ng/mL), which is slightly more than twice the Department of Health and Human Services' acceptable level of 15 ng/mL. I-2, IAF, Tab 18 at 4-5; Department of Health & Human Services, Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970, 11,983 (Apr. 11, 1988). The concentration of THCA in the appellant's urine was significantly lower than the concentration in other cases that the agency cited. *See, e.g.*, *McNeil*, 117 M.S.P.R. 533, ¶ 13 (the appellant's urine samples showed marijuana metabolite levels of nearly six times the acceptable limit); *Scott*, 45 M.S.P.R. at 642 (the appellant's urine samples showed cannabinoid levels of 185.30 and 205 ng/mL).

identify the specific evidence in the record which demonstrates the error). Instead, the administrative judge's findings are fully consistent with the weight of the evidence and reflect the record as a whole. *See Faucher* 96 M.S.P.R. 203, ¶ 8; *see also Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (finding no reason to disturb the administrative judge's findings where he considered the evidence as a whole, drew appropriate references, and made reasoned conclusions). Accordingly, we affirm the initial decision.

¶12 Having discussed our decision in this case, we also wish to make clear what the Board is NOT doing in this nonprecedential final order. For instance, we are not excusing the appellant from the consequences of his having traces of a federally-controlled substance found in his system. We likewise are not holding that scienter is a necessary element in establishing violations of controlled substance prohibitions in the federal workplace, leading to discipline. And we are not loosening any longstanding Board precedent based on the changing legal status of marijuana in some jurisdictions. In this case, we are affirming the administrative judge's initial decision because the agency simply failed to meet its legal burden based on its own regulations and policies.

ORDER

¶13 We ORDER the agency to cancel the removal and to retroactively restore the appellant effective November 12, 2013. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the

Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶15 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶16 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶17 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If

you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode.htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board

Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc., with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

SEPARATE OPINION OF MEMBER MARK A. ROBBINS

in

Joseph Johnson v. Department of the Air Force

MSPB Docket No. DE-0752-14-0091-I-2

¶1 As stated above in the Final Order, the Chairman and I affirmed the initial decision because the agency did not establish its case under its own regulations and policies. We also explained in paragraph 12 what the Board was not doing. To further support our clarification of the limitations of our Final Order, I would like to point out that, in a recent Washington Post article, it noted that President Reagan signed Executive Order 12,564 on September 15, 1986, which requires the federal workplace and workforce to be drug-free. This Executive Order includes especially strict rules for personnel, such as the appellant in this case, who hold or apply for security clearances. Josh Hicks, *Pot Became Legal in D.C. Today. Does Anything Change for Federal Workers?*, WASH. POST, Feb. 26, 2015, http://www.washingtonpost.com/blogs/federal-eye/wp/2015/02/26/d-c-s-pot-law-took-effect-today-but-rules-remain-the-same-for-federal-workers/. Similarly, other newspapers have discussed this Executive Order and that it forbids Federal employees from using drugs, on or off duty, even in those jurisdictions where these once illicit drugs are now legal. *See, e.g.*, Lydia Wheeler, *Legal Pot? Not for Federal Workers*, THE HILL, Mar. 10, 2015, http://thehill.com/homenews/news/235138-legal-pot-not-for-federal-workers.

¶2 Unless and until either the President revokes this Executive Order, or Congress changes it by law, in almost all instances it is still illegal for federal employees to use or consume marijuana. It matters not the legal status of the substance in the jurisdiction in which one is presently located; whether one is at work; whether one is on or off federal property; or whether one is intending to use or consume the drug.

¶3 The practical effect of this is to place an added burden on those federal employees who live or work in jurisdictions where the legal status of marijuana has recently changed. It is now incumbent on them to affirmatively inquire when they have reason to believe a situation might present itself where marijuana is present and to avoid those situations at the risk of losing gainful employment with the federal government.

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Mark A. Robbins
Member