UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STEPHEN M. SHELLEDY, Appellant,	DOCKET NUMBER DE07528810381
v.	
DEPARTMENT OF TRANSPORTATION, Agency.	DATE: JUN 21 1991

Thomas H. Bornholdt, Esquire, Bornholdt & Owens, Overland Park, Kansas, for the appellant.

Dwight L. Larison, Esquire, Kansas City, Missouri, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on a petition for review filed by the appellant, an Air Traffic Control Specialist (ATCS), from an initial decision that sustained the agency's action removing him, effective July 23, 1988, after random tests disclosed his involvement with illicit drugs. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the

initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the agency's removal action.

BACKGROUND

On January 28, 1988, the agency proposed the appellant's removal after a urine sample he submitted on January 20, 1988, as part of an agency-wide drug-testing program, tested positive for cocaine. However, in a letter dated May 13, 1988, the agency agreed to hold its final decision in abeyance because, inter alia: (1) The appellant admitted his cocaine use; (2) he agreed to enter a rehabilitation program; and (3) he consented to submit to random drug screening. The abeyance letter also warned that any further involvement with illegal drugs would result in the appellant's removal. *See* Initial Decision (I.D.) at 2; Initial Appeal File (IAF), Tab 4 (4e).

On July 15, 1988, the appellant provided a second urine sample in an unannounced follow-up test. The agency removed the appellant for violating the conditions of the abeyance letter when the sample tested positive for the presence of cannabinoids (marijuana metabolites). *See* I.D. at 2.

The appellant appealed the removal action to the Board's Denver Regional Office (Regional Office). Following a hearing, the administrative judge sustained the agency's action, finding that the appellant had used cocaine and had later violated the terms of the abeyance letter by his involvement with marijuana. *See* I.D. at 6.

Based upon the credited testimony of Dr. Paula S. Childs, the forensic toxicologist in charge of the laboratory where the appellant's urine samples were tested, the administrative judge rejected the appellant's challenges to the accuracy and validity of the two drug tests. While the appellant admitted that he used cocaine prior to the first test, he claimed that he did not use marijuana, and that the positive showing for marijuana in the second test resulted from his passive inhalation of side-stream smoke from persons with whom he associated and who were smoking marijuana in confined areas. *See* I.D. at 3. The administrative judge found, however, that the appellant's exposure to marijuana smoke was deliberate, and not merely inadvertent or incidental, since unrebutted evidence showed that he and another ATCS rode in an automobile for one and one-half to two hours with two women whom they met at a bar, and then went to a party, staying for about one and one-half hours in a small room where several persons were smoking marijuana. *See* I.D. at 6.

Based upon testimony from the person who collected the urine sample, that he followed the agency's testing requirement to have the specimen container within sight before and after the employee gives the urine sample, the administrative judge rejected the appellant's assertions that the agency failed to follow its own procedures for conducting drug tests. *See* I.D. at 6-7. The administrative judge also rejected the appellant's claim that the tests violated the Fourth Amendment, finding that, although the appellant did not

consent to the first test, it was reasonable, and he specifically consented to the second test. *See* I.D. at 8-10.

The administrative judge further found that the agency had established a nexus between the appellant's misconduct and the efficiency of the service, and that the penalty of removal was not unreasonable. *See* I.D. at 11-12.

In his petition for review, the appellant argues that the administrative judge erred in finding that: (1) The appellant was terminated for his "involvement" with marijuana; (2) although the appellant did not consent to the first random test, he consented to the follow-up test; (3) although the appellant did not consent to the first random test, that test was reasonable; (4) there was a nexus between the appellant's off-duty misconduct and the efficiency of the service; and (5) removal was an appropriate penalty.

ANALYSIS

The appellant argues that the term "involvement" in the abeyance letter of May 13, 1988, meant "use," and therefore, since he did not *use* marijuana, he did not violate the conditions in the letter. We agree that the parties and the administrative judge believed that the "involvement" with illegal drugs charged by the agency in this appeal was the appellant's marijuana "use." The removal proposal notice charged the appellant with "[O]ff duty use of illicit drugs when occupying a position directly related to aviation safety." *See* IAF, Tab 4 (4j). In addition, the SF-50

documenting the appellant's removal refers to his "use" of drugs. *See* IAF, Tab 4 (4a). Moreover, in two of the administrative judge's orders summarizing teleconferences, the agency is reported to have described the case as one involving the off-duty use of drugs. *See* IAF, Tabs 7 and 12. Finally, at the hearing, the administrative judge sustained an objection by ruling that the appellant was charged with consuming or smoking marijuana. *See* Transcript (Tr.) at 119.

In any event, however, we find that a preponderance of the evidence shows that the presence of cannabinoids in the appellant's system did not result from his side-stream inhalation of marijuana smoke, but from his marijuana use. Dr. Childs testified that there had been no studies showing that side-stream smoke or passive inhalation can cause levels that would trigger positive results <u>using the combination of tests</u> that were performed on the appellant's samples. Tr. at 41, 78 [Emphasis added]. She acknowledged that a study using a screening test with a lower threshold showed a positive result from passive inhalation. Tr. at 78. She explained, however, that the study was set up to be the size of a small bathroom with sixteen marijuana cigarettes being smoked simultaneously, and that the smoke was so intense that the subjects had to wear goggles to help protect their eyes. Tr. at 79-80. She further testified that the study involved giving the people multiple exposures every day and that it took the second days' worth of exposure, at the rate of one hour at a time, to generate the positive result. Tr. at 79.

Dr. Childs testified that the conclusion from the study was that they had to force the exposure situation to get a positive result and that it was highly unusual that anyone would expose themselves to the situation. Tr. at 80. She rejected the suggestion that one hour of exposure on a single occasion could generate enough side-stream smoke into the non-smoker's system to be equivalent to smoking one cigarette. She testified that it would require multiple exposures day after day, concluding: "It was a very specific, very intense exposure for a limited period of time and for several consecutive days." Tr. at 80.

The administrative judge specifically found that Dr. Childs's testimony was persuasive and convincing. I.D. at 3-4. The appellant has offered nothing that would question Dr. Childs's credibility or expertise. Thus, we find that the evidence is sufficient to support a charge of illicit drug use. *See, e.g., Scott v. Department of Transportation*, 45 M.S.P.R. 639, 642-44 (1990).

The appellant also asserts that the administrative judge erred in finding that he consented to the follow-up test. He states that he acquiesced to taking both tests because, if he refused to take either test, he would lose his job.

Mandatory urine testing, when conducted by the government, constitutes a "search and seizure" under the Fourth Amendment of the U.S. Constitution, and therefore must be reasonable. *See Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 109 S.Ct. 1402, 1411-13 (1989);

National Treasury Employees Union v. Von Raabb, 489 U.S. 656, 109 S.Ct. 1384, 1390 (1989); *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). While a search generally must be supported by a warrant issued upon probable cause, neither a warrant, probable cause, nor individualized suspicion is required in every case to prove reasonableness. *See Railway Labor Executives' Association*, 109 S.Ct. at 1413-21.

The record shows that the first random drug test was conducted as a condition of the appellant's employment. The appellant argues that his agreement to provide the urine sample to retain his job did not waive his Fourth Amendment right against an unreasonable search, and we agree. The appellant challenges the administrative judge's finding that the first test was reasonable under the Fourth Amendment. He argues that the agency failed to prove that the ATCS position was so demanding that it justified the intrusion into the appellant's privacy rights under the Fourth Amendment. In this respect, the appellant asserts that Dr. Childs conceded that the urine testing did not measure impairment. *See* Petition For Review File, Tab 1 at 4. The appellant claims that, because the agency failed to establish a connection between a positive urine sample and impairment of the appellant's job performance, there was no basis for the administrative judge's finding that the government's interests outweighed his privacy rights. We disagree.

When determining whether a search is reasonable, consideration must be given to the benefits that issue from the exercise of that search. In *Railway Labor Executives' Association*, 109 S.Ct. at 1422, the Supreme Court found that regulations requiring railway employees to submit to blood and urine testing for drugs and alcohol following major train accidents or incidents, and authorizing breath or urine tests to be administered to employees who violate certain safety rules were reasonable intrusions into the privacy rights of employees, without a warrant or showing of individualized suspicion requirements, because of: (1) The limited discretion exercised by the railroad employers under the regulations; (2) the compelling safety interests served by the toxicological tests; and (3) the diminished expectation of privacy that attached to information pertaining to the fitness of covered employees. Speaking for the Court, Justice Kennedy, noting that the regulations posed only limited threats to the privacy rights of the covered employees, in contrast to the compelling government interest in testing without individualized suspicion, observed:

> Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.

Id. at 1419.

We believe that the decrease of the potential catastrophic harm in lives lost resulting from an impaired ATCS justifies the agency's program of testing air traffic

control specialists, and therefore, compels the finding that the agency's program of random drug testing, in these circumstances, was reasonable. *See National Treasury Employees Union*, 109 S.Ct. at 1397-98 (the Custom Service's compelling interest in preventing the promotion of drug users to positions where they might endanger the integrity of United States borders or the lives of American citizens warrants the mandatory urine testing of applicants for promotion to positions directly involved in the interdiction of illegal drugs, or to positions that require the carrying of firearms, and outweighs the privacy interests of those seeking promotion to such positions). Moreover, the Court of Appeals for the District of Columbia has specifically upheld the constitutionality of the agency's drug testing program. *See American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 1960 (1990). Therefore, we find no error in the administrative judge's conclusion that the agency's drug testing was reasonable.

Unlike the first test, conducted under the agency's random testing program, the follow-up test was conducted in accordance with the terms of the abeyance letter. *See* IAF, Tab 4 (4e). Although the appellant contends that he was coerced into agreeing to the terms of the abeyance letter to retain his job, the record shows that, before he agreed to the terms of the abeyance letter, he was given sufficient time to obtain legal counsel and to weigh the options available to

him. *See* I.D. at 9. The appellant presented no evidence to demonstrate that his decision was coerced. Therefore, we find no support in the record for his argument that the administrative judge erred in finding that he consented to the follow-up test. Moreover, even if the appellant had not consented to the second test, for the reasons stated above, we would find it reasonable.

The appellant also argues that the administrative judge erred in finding that removal was a reasonable penalty. He asserts that: (1) The term "involvement" in illegal drugs is not included as an offense under the agency's table of penalties, unless it means "use"; and (2) the penalty of removal was excessive. To begin with, we have found that the appellant actually engaged in drug use, rejecting his assertion that the positive test resulted from passive inhalation. Moreover, the record shows that the appellant was initially charged with drug "use," and a decision on that charge was withheld only so long as he agreed to, and complied with, the conditions set forth in the abeyance letter, including the condition that any involvement with illegal drugs would "result in separation." *See* IAF, Tab 4 (4e). When the second drug test showed the appellant's involvement with marijuana, he demonstrated that he could not be rehabilitated, and the agency was free to impose the removal penalty in accordance with the terms of the abeyance letter.

Therefore, we find nothing in the appellant's arguments that demonstrates that the administrative judge erred in

finding that removal was an appropriate penalty. *See, e.g., Stump v. Department of Transportation*, 761 F.2d 680, 681-82 (Fed. Cir. 1985) (removal of an ATCS for off-duty possession and use of cocaine and drug paraphernalia was reasonable, considering the relation of the ATCS position to the safety and efficiency of air transportation and the detracting effect of the employee's action on the public's confidence in the agency); *Scott*, 45 M.S.P.R. at 644; *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981) (the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

for Matthew Shannon
Robert E. Taylor
Clerk of the Board

Washington, D.C.