UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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| FRANKLIN L. SCHAFFER,<br>Appellant,<br><br>v.<br><br>UNITED STATES POSTAL SERVICE,<br>Agency, and<br><br>OFFICE OF PERSONNEL MANAGEMENT,<br>Intervenor. | DOCKET NUMBER<br>PH07528610414<br><br>DATE: NOV 16 1988 |

James J. Nolan, Jr., Esquire, Baltimore, Maryland, for the appellant.

George H. Butler, Washington, D.C., for the agency.

Hugh Hewitt, Esquire, Washington, D.C., for the intervenor.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

**OPINION AND ORDER**

The agency has petitioned for review of an initial decision issued on August 20, 1986, which did not sustain the appellant's removal. The appellant has submitted a cross petition for review, and the Office of Personnel Management (OPM) has intervened pursuant to 5 U.S.C. § 7701(d)(1) on the issue of handicap discrimination. All submissions meet the filing requirements of 5 C.F.R.

§ 1201.114 and have been considered by the Board in its adjudication of this appeal.[1]

For the reasons detailed below, we GRANT the agency's petition for review and the appellant's cross petition for review with respect to the issue of the penalty, AFFIRM the initial decision with regard to its findings on the charges, and the appellant's affirmative defenses of entrapment, reprisal and harmful procedural error, REVERSE the initial decision with regard to its findings on the handicap discrimination issue, and MITIGATE the removal to a 120-day suspension. See 5 C.F.R. § 1201.113(c).

BACKGROUND

The appellant was removed based on charges that: (1) He engaged in activity to distribute illegal drugs while on agency premises; (2) he engaged in misconduct during the scheduled lunch break when he smoked marijuana; and (3) he left the agency premises for approximately one-half hour while "on the clock."

In the first charge, the appellant was specifically charged with approaching another employee in the Main Post Office cafeteria on January 23, 1986, offering to supply one ounce of marijuana for a price of $120.00 (the appellant did not supply the marijuana) and again approaching this

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[1] In his cross petition, the appellant objects to the Board's consideration of OPM's submission in intervention. However, pursuant to 5 U.S.C. § 7701(d)(1), OPM may intervene as a "matter of right" when the Director deems it appropriate to do so under the statutory standards set forth therein. *See generally, York v. U.S. Postal Service*, 18 M.S.P.R. 505 (1983).

employee on February 6, 1986, offering to procure one-half ounce for a total of $80.00. In connection with the second charge, the agency alleged that on two occasions the appellant and another employee smoked marijuana in the appellant's private vehicle off agency premises, and that the appellant was present when a drug transaction took place off agency premises.[2] In connection with the third charge, the agency alleged that on one occasion, although the appellant had already taken his scheduled one-half hour lunch break, he left agency premises for one-half hour to smoke marijuana in his private vehicle. (This was one of the incidents referred to in the second charge).

On appeal to the Board's Philadelphia Regional Office, the administrative judge sustained the charges. He considered and rejected the appellant's affirmative defenses of: (1) Alleged entrapment based on the agency's use of a confidential informant; (2) harmful procedural error in invoking the shortened notice provision of 5 U.S.C. § 7513(b)(1) in issuing the notice of proposed removal; and (3) reprisal. The administrative judge found, however, that the appellant's alleged substance abuse problem constituted a handicapping condition which was not accommodated. He found that it should have been clear that the offenses arose out of a substance abuse problem and,

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[2] The record shows that the appellant was present when an acquaintance of his sold the one-half ounce of marijuana to the confidential informant for $80.00. *See* Hearing Tape two, Side 1.

therefore, that the agency's failure to offer the appellant rehabilitative assistance constituted handicap discrimination warranting reversal of the removal action.

The agency's petition for review contends that it had no knowledge of the appellant's substance abuse problem, but that, in any event, to have accommodated appellant would have impaired its ability to provide a safe, injury-free workplace. OPM contends in its submission that the evidence does not establish that the appellant suffers from a handicapping condition, that there is no evidence that the agency knew or should have known that the appellant was a handicapped person, and that there is no causal connection between the appellant's alleged handicapping condition and his unlawful activities.

In his cross petition, the appellant responds to these contentions and alleges that the administrative judge erred in failing to find entrapment, reprisal, or harmful procedural error in connection with the notice of proposed removal. In addition, he contends that the penalty of removal is too harsh.

## ANALYSIS

The appellant's cross petition sets forth no basis for disturbing the administrative judge's findings of fact and legal conclusions on his affirmative defenses of entrapment, reprisal, and harmful procedural error in connection with the notice of proposed removal. His cross petition merely reiterates the contentions raised below, and fails to

present any new and material evidence on any of these issues. We, therefore, will not review these matters. *See Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982).

For the reasons detailed below, we find that the agency was not required to offer the appellant reasonable accommodation. We conclude, however, that the penalty of removal was not reasonable under the circumstances of this case.

1. The agency was not obligated to accommodate appellant's alleged handicap.

To establish an affirmative defense of handicap discrimination, because of drug addiction, an appellant must first establish that he or she is a drug addict, as distinguished from merely being a drug user. *See McCaffrey v. United States Postal Service*, 36 M.S.P.R. 224, 229 (1988). In addition, an appellant must establish a causal connection between such drug addiction and the misconduct committed. He or she must prove that the misconduct for which the agency's discipline was imposed occurred while he or she was under the influence of a controlled substance. *See Brinkley v. Veterans Administration*, MSPB Docket No. SL07528610181, slip op. at 5 (Sept. 6, 1988).

The appellant did not have the benefit of the Board's guidance in *McCaffrey* in preparing his case. Even if we assume, however, that he would be able to prove by competent

medical and expert evidence that he was a drug addict at the time of his removal, he has failed to present sufficient evidence to establish a causal connection between his alleged handicap and his misconduct. *See Campbell v. Defense Logistics Agency*, MSPB Docket No. PH07528510377, slip op. at 5 (Sept. 6, 1988).

The appellant was not discharged because of his alleged drug addiction, but primarily because of his misconduct in aiding marijuana distribution. The proposing and deciding officials both testified at the hearing that they made the decision to remove the appellant based on the nature and gravity of the distribution charges. *See* Hearing Tape One, Side 1. The administrative judge erred in assuming that, because the appellant's distribution offenses involved marijuana, they necessarily resulted from a handicapping condition. While the appellant may have been immersed in the drug milieu, as the administrative judge found, and may have used marijuana, this does not itself establish a causal relationship between his alleged handicapping condition and the specific distribution misconduct. There is no evidence in the record that the appellant was under the debilitating influence of marijuana at work or at the time he offered to help his fellow employee secure marijuana. The appellant does not claim, and the record evidence does not indicate, that his analytical judgment or free will was impaired by controlled substances at the time he committed the sustained

misconduct. Thus, the acts of misconduct were not the result of the appellant's handicapping condition.

The agency, therefore, did not have a duty to offer rehabilitative assistance to the appellant prior to its taking a disciplinary action for his drug distribution activities. *See Brinkley* at 10; *Campbell* at 7.

2. The penalty of removal was unreasonable.

The administrative judge did not reach this issue in the initial decision because he reversed the action based on handicap discrimination. We, therefore, will address it here.

In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303-06 (1981), the Board held that the purpose of its review of the agency's selection of the penalty is to assure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within tolerable limits of reasonableness. The Board also set forth a partial list of factors relevant to its determination of the appropriateness of a penalty. *Douglas* at 305-6. Most germane in the instant case are the nature and seriousness of the offense, and the appellant's potential for rehabilitation.

The sole evidence of record concerning the penalty in this case is the testimony of the proposing and deciding officials. Both indicated that they considered the nature and seriousness of the offense, and the fact that they had lost trust in the appellant when they determined to remove

him. Neither indicated that he had considered any other factor or any penalty other than removal.

While the appellant's offense is serious, the record shows that the appellant engaged in this activity solely to help his friend (the confidential informant) and did not attempt to procure marijuana for other employees. On one occasion, he offered to attempt to procure, for this individual, one ounce of marijuana worth approximately $120.00 but he did not procure it. On the other occasion, he put the confidential informant in touch with another Postal employee who sold one-half ounce of marijuana to the confidential informant. The appellant never actually engaged in the distribution or sale of marijuana; he received no money; and no transactions in which he was involved ever occurred on the agency premises. Only two conversations pertaining to the arrangements for the transactions ever occurred on the agency premises. The appellant's motive, however misguided, was friendship, not monetary gain. There is no showing in the record that the appellant ever intended to arrange for the sale of drugs to any person, other than the informant, who, the appellant testified at the hearing, was his friend and who kept "bugging" him. Hearing Tape, Seven, Side 1. The informant testified at the hearing that the appellant "was no big deal," that "he was caught in the middle," and "was just being a friend." Hearing Tape Three, Side 1.

In addition, although the proposing and deciding officials stated that they had lost trust in the appellant, we note that, as a mailhandler, he was not in a position requiring a special degree of trust. Moreover, the agency considered using him as an informant which shows that some degree of trust remained.[3] *Cf. Hickman v. Department of Justice*, 11 M.S.P.R. 153, 156 (1982) (law enforcement officials occupy positions of trust and confidence which require a higher standard of conduct than for those employees not involved in that activity).

Finally, with regard to the nature and seriousness of the offense, we note that the agency neither asserted nor showed that it had a serious drug problem in the Baltimore Post Office where the appellant worked or that the platform where he worked was the scene of drug activity. Rather, the agency undertook an investigation to determine whether there were any problems. There is no evidence in the record suggesting that the appellant was a target of the investigation, and there is no evidence that he ever attempted to distribute marijuana to anyone other than the informant. He, therefore, does not appear to be a continuing threat to the maintenance of a safe, injury-free workplace.

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[3] Postal Inspector Calvin testified that he asked the appellant if he would be willing to cooperate in a drug investigation, but that the appellant declined to do so because he did not wish to become an informant. See Testimony of Postal Inspector Calvin, Hearing Tape 5, Side One.

The appellant stated at the hearing that he has enrolled in a rehabilitation program on his own initiative and that he has been clear of drugs since his removal. He showed deep remorse for his actions, and a genuine desire to return to work. He stated that he was young, only 27 years, and did not want this to ruin his life. *See* Hearing Tape Seven, Side One. Moreover, before the agency, and throughout these proceedings, the appellant has acknowledged his misconduct and has not denied the charges involving drug distribution activities. At the hearing, he also asserted that he has had a difficult life, living in foster homes and knowing the wrong people. He indicated that his future behavior would be different. *See* Hearing Tape Seven, Side One. Under these circumstances, it appears that his potential for rehabilitation is good, and that he would continue to be a satisfactory worker, if returned to duty. Other sanctions, therefore, would serve to deter any similar future conduct.

We therefore find that a suspension of 120-days is the maximum reasonable penalty, under all of these facts and circumstances. *See Kruger v. Department of Justice*, 32 M.S.P.R. 71, 76-77 (1987) (60-day suspension maximum reasonable penalty for Correctional Officers's off-duty possession and use of marijuana where there was no prior disciplinary record, the employees admitted their offense, and they showed good potential for rehabilitation); *Anderson v. Department of Transportation*, 27 M.S.P.R. 654, 656-57

(1985) (60-day suspension maximum reasonable penalty for Air Traffic Controller's occasional off-duty use of marijuana over a 2-year period where he was not in a position actually controlling aircraft and he had rehabilitated himself prior to the removal action); *Swann v. Tennessee Valley Authority*, 18 M.S.P.R. 290, 292 (1983) (60-day suspension maximum reasonable penalty for possession of three marijuana cigarettes at work location, for which the employee received a 10-day suspended sentence, and where there was no past disciplinary record.)[4]

ORDER

This is the Board's final order in this appeal. See 5 C.F.R. § 1201.113 (c).

The agency is ORDERED to cancel the appellant's removal and to replace it with a suspension of 120-days. retroactive to the date of the improper removal. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir.

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[4] *Cf. Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) (penalty of removal warranted for aiding and abetting in the sale of $2,500.00 worth of cocaine, where agency proved that it had a serious drug problem.); *Campbell v. Defense Logistics Agency*, PH07528510377 (Sept. 6, 1988) (removal penalty warranted for Head Accounting Technician, who had duties of a fiduciary nature, for unauthorized possession of marijuana with intent to distribute, and criminal conviction for intent to distribute a quantity of marijuana that became a matter of public knowledge); *Mutch v. United States Postal Service*, 26 M.S.P.R. 224 (1985) (removal penalty warranted for possession of drugs on agency premises and employee's admission that he planned to distribute them to fellow employees that day).

1984). This action must be accomplished within twenty days of the date of this decision.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits in accordance with the United States Postal Service's regulations no later than 60 calendar days after the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

If there is a dispute about the amount of back pay and/or interest due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision. The appellant may then file a petition for enforcement with the regional office within 30 days of the agency's notification of compliance to resolve the disputed amount. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and include the dates and results of any communications with the agency about compliance.

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, VA 22041

You should submit your request to the EEOC 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. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court 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)(2). If the action involves a claim of

discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

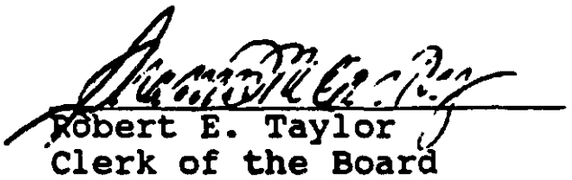
Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(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:



Robert E. Taylor
Clerk of the Board

Washington, D.C.