

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL HUFF,
appellant,

v.

DEPARTMENT OF THE NAVY,
agency.

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OPINION AND ORDER

Michael Huff (appellant) was removed from his position as Boilmaker Helper by the Department of the Navy (agency) for possession of marijuana on agency premises.

On appeal to the Board's San Francisco Regional Office, after a hearing in which both parties were represented by counsel, the presiding official sustained the charge. Finding the removal penalty excessive, the presiding official reduced the removal to a thirty (30) day suspension.

The agency has filed a petition for review contending that the presiding official erred in reducing the removal penalty to a 30-day suspension. Because we agree with the agency's contention, its petition for review is GRANTED.

The record shows that the agency submitted evidence that it was the Shipyard's policy to remove employees on the first offense of possession of narcotics on government property. This policy had been adopted in response to the extreme alcohol and drug related personnel problems which had surfaced in the past few years. The removal policy for first offenses was adopted rather than a progressive table of penalties, in part, due to the safety considerations

inherent in the agency's work. Along with a stern removal policy, the agency had established an aggressive program aimed at identifying and deterring employee substance abusers. Moreover, employees, and in particular, appellant, were on notice of the agency's "get tough" policy as a result of drug abuse films and shop safety meetings in which employees were specifically warned that illegal drugs were prohibited within the shipyard and that any drug abuse including possession could result in disciplinary action up to and including removal. Finally, appellant failed to establish any factors warranting mitigation of the removal penalty under the standards set forth in Douglas v. Veterans Administration, 5 MSPB 313 (1981). Appellant's record as an employee could not be relied on to lessen the penalty as his leave record was determined to be substandard, and none of appellant's supervisors considered his work record to be good enough to warrant clemency. Cade v. United States Postal Service, 8 MSPB 362 (1981).

Under the circumstances outlined above, the penalty imposed by the agency was consistent with its table of penalties and was within the parameters of reasonableness. Davis v. Department of the Treasury, 8 MSPB 17 (1981).*/

*/ Although the agency contended that the presiding official erred by not addressing appellant's affirmative defense of discrimination on the basis of race (Black), a review of the record and appellant's petition for appeal indicates that discrimination was not raised as an affirmative defense. Rather, appellant's only reference to the issue of race involved appellant's allegation that the security officers did not believe appellant when he denied ownership or possession of the locker and continued to question him while a white employee making the same disclaimer was not questioned further. The record indicates no discrimination claim was made regarding the agency's final decision to remove.

In addition, although the presiding official made no direct findings regarding whether appellant's constitutional rights were violated in the search and seizure of the marijuana in question, the presiding official's finding that appellant was collaterally estopped from denying the charge in effect disposed of appellant's constitutional issues. The court's criminal conviction for possession presumes a proper search and seizure.

Accordingly, the initial decision is hereby AFFIRMED in its finding on the merits of the charge and REVERSED as to the penalty. Appellant's removal is hereby SUSTAINED.

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

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUL 6 1984

(Date)

Washington, D.C.

Michael H. Hoyle

for PAULA A. LATSHAW
ACTING SECRETARY