UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

GARY B. DE JONG,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
SF-0752-02-0460-I-2

DATE: September 9, 2003

Michael P. Baranic, Esquire, San Diego, California, for the appellant.

Kimberly Jones, Esquire, Chula Vista, California, for the agency.

BEFORE
Craig A. Berg
Administrative Judge

INTRODUCTION

On May 31, 2002, the appellant filed a petition appealing the agency's action removing him from the position of Border Patrol Agent, GS-9, with the Immigration and Naturalization Service (INS), effective May 24, 2002. Initial Appeal File (IAF), Tab 1.[1] The Board has jurisdiction over this appeal under 5

[1] On August 20, 2002, I issued an initial decision dismissing this appeal without prejudice subject to automatic refiling in order to avoid a lengthy delay in adjudication due to difficulties in setting a hearing on a date all witnesses would be available to testify. IAF, Tab 21. The appeal was automatically refiled on September 25, 2002. IAF II, Tab 1.

U.S.C. §§ 7511-7513, 7701. A hearing was held from February 5-7, 2003.[2] For the reasons discussed below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant was employed as a Border Patrol Agent at the San Diego Border Patrol Sector, Brown Field Station for approximately four years prior to the effective date of the removal action. The appellant was in a "Testing Designated Position," and was subject to random drug testing for marijuana, cocaine, opiates, amphetamines, and PCP. IAF, Tab 4, Subtab 4ii. On February 8, 2001, the appellant was instructed to provide a urine sample for a random test. He provided the sample at Health South (now U.S. Healthworks), in Chula Vista, California, and it was sent to Northwest Drug Testing laboratory (now NWT, Inc.) for testing. *Id.*, Subtabs Y & Z. On February 21, 2002, the agency was notified that the appellant's urine sample had tested positive for marijuana, and the agency's contracted Medical Review Officer notified the appellant of the positive test result. *Id.*, Subtab 4hh. The agency relieved the appellant of his service-issued firearm, badge and credentials, placed him on administrative duty, and referred him to the agency's Employee Assistance Program (EAP). *Id.*, Subtabs 4hh, 4dd, 4ee, 4ff. The appellant informed the agency that the positive result must have been caused by his consumption of supplement nutrient bars he had consumed, and further asserted that the testing facility had failed to follow proper procedures in collecting his urine sample. *Id.*, Subtab bb.

Following an agency investigation into the appellant's allegations, on June 27, 2001, the agency proposed the appellant's removal on a charge of "Testing Positive for Controlled Substance in Random Testing." IAF, Tab 4, Subtab 4x.

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[2] Because one of the agency's witnesses, Dr. Gero Leson, was unavailable during the scheduled hearing dates, his testimony was taken telephonically on January 9, 2003, by agreement of the parties. IAF II (January 9, 2003 Hearing Tapes).

The appellant obtained counsel and provided two oral responses to the charge, as well as written materials and a videotape. *Id.*, Subtabs 4d, 4m. The deciding official sustained the charge and the penalty. *Id.*, Subtab 4b.

The Charge

The agency bears the burden of proving by a preponderance of the evidence that the test on which it relied to remove the appellant was valid. 5 C.F.R. § 1201.56(a)(1)(ii); *see Boykin v. U.S. Postal Service*, 51 M.S.P.R. 56, 58 (1991). In so doing, the agency must establish the chain of custody of the sample that was tested. *Id.* at 58. In addition, where, as here, there is a claim that a positive drug test was "false" because it was the result of ingestion of a product other than the controlled substance in question, the Board will review the evidence and make a finding on that claim. *See, e.g. Vincent v. Department of Transportation*, 47 M.S.P.R. 550, 552 (1991) (administrative judge considered whether the ingestion of a natural food product could cause a "false positive" for PCP).

The agency established a proper chain of custody for the appellant's urine sample

The appellant's arguments

The appellant argues that the evidence shows that the facility employed by the agency to collect the appellant's urine sample was "lax" in its adherence to testing protocol, and that as a result, there were several breaks in the chain of custody of the sample. IAF II, Tab 36. More specifically, he argues that the collector did not open up the testing packet in front of him, that the collector directed him to use a regular restroom in which to provide the sample, rather than the controlled restroom that contains a toilet with blue dye and lacks running water, that the collector left the unsealed vial (which would ultimately contain the portion of the sample sent for testing) unattended while he escorted the appellant to the restroom, and that the collector walked out of his sight when he (the collector) made the transfer of the sample to the vial from the collection cup. *Id.*

Evidence

The record contains the Urinalysis Drug Testing Documents Package (referred to as the litigation packet) submitted to the agency by NWT, the testing laboratory. IAF, Tab 4, Subtab 4Z. The packet includes a Summary of the laboratory report showing the appellant's social security number as the "Employee/Applicant I.D. No.," the sample number as "10917634," and the Laboratory Accession Number as "708373." *Id.* at 1. The Summary states that the urine sample was tested on February 13, 2001 by use of immunoassay, that it tested positive for marijuana metabolites, that on the same date a select ion gas chromatography/mass spectrometry (GC/MS) test was performed on the sample and revealed a positive test for the drug metabolite 11-nor-9-carboxy-delta-9-tetrahydrocannabinol (THC) at a level of 57 nanograms per milliliter (ng/ml). *Id.* It further states that the metabolite identified is produced by the metabolization of marijuana, and that it was greater then 15 ng/ml, which is the minimum concentration required by the Department of Health & Human Services (DHHS) to call a specimen positive for marijuana. *Id.* The Summary is certified by Dr. David Kuntz, the Laboratory Director, and the certification also asserts the accuracy of the attached documents, which include the chain of custody documents, the testing documents, and the instrument printouts. *Id.*

The litigation packet further contains Dr. Kuntz's affidavit setting out his educational and employment background, explaining the lab's chain of custody policies, summarizing in some detail the drug testing procedures, explaining the immunoassay and GC/MS tests, and providing information regarding the tests used to detect adulterants. IAF, Tab 4, Subtab 4Z at 2-7. With regard to the chain of custody policies, the doctor explained that the specimen "will be at all times either in the possession of a member of the NDT staff or maintained in a secured storage area." *Id.* at 2. He stated that each specimen is labeled, sealed, and accompanied by a chain of custody document, that a processor assumes custody of the specimen when it arrives and checks to ensure it is sealed, that the

identifiers on the sample match those on the chain of custody form (CCF), that the form has been correctly annotated, and that there is sufficient volume for the required testing. *Id.* at 3. He further averred that the specimen identification and company account number are then placed in the computer system, an internal accession number is generated and placed on the form, on the attachments and on the tube used for screening; at that point, a portion of the specimen is placed in the pre-labeled tube, the original bottle is stored securely, and the tube is placed in a rack for testing. *Id.* Each time the specimen is tested, a CCF is generated to document transfer. *Id.* Dr. Kuntz concluded that GC/MS is widely accepted in the scientific community as the state-of-the-art technique for confirmation of drugs in a urine sample, and that a positive test is only reported if there is a valid chain of custody record and both the immunoassy and GC/MS tests detect the drug in the specimen. *Id.* at 8.

Dr. Michael Feldman, Dr. Kuntz's supervisor and the General Manager of NWT's drug testing division, testified that the employee identification number, laboratory accession number, and the chain of custody number in Dr. Kuntz's Summary are taken from the CCF, which is part of the litigation packet. Transcript (Tr.) I at 10-11; IAF, Tab 4, Subtab 4Z at 10 (CCF). He explained that the custody and control number, which is in the upper left of the CCF is pre-printed on that form before it is sent to the client (the INS in this case), and that the laboratory accession number in the upper right is used to track the sample. Tr. I at 11. Dr. Feldman reiterated that the laboratory found the presence of marijuana metabolites in the appellant's sample through immunoassay testing, and stated that the GC/MS confirmed and quantitated that there was 57 ng/ml of the metabolite produced by ingestion of THC- carboxylic acid - in the sample. *Id.* at 13.

Dr. Feldman further testified that the laboratory reported the appellant's urine sample as a "dilute specimen. Tr. I at 16; IAF, Tab 4, Subtab 4Z at 10. He explained that where, as here, the level of a substance called creatinine in the

urine measures below 20 ml/dl[3], (between 100 and 300 is normal range) the lab performs a "specific gravity" test, and when the specific gravity measurement is below 1.003, the sample is considered a dilute specimen. *Id.* In this case, the creatinine level was 11.9, and the specific gravity was 1.002. Tr. I at 17; 81-83; IAF, Tab 4, Subtab 4Z at 33. He explained that a low level of creatinine is caused by the donor drinking a large volume of fluid, and stated that one would do that to flush the system to lower the level of what is found in the urine sample. Tr. I at 18, 85. He opined that in order to have a creatinine measure below 20 ml/dl, there would have to be five to ten times normal water consumption, and that an individual who has more muscle mass would generally have a higher level of creatinine, but that the measurement would depend on a number of factors, including whether the individual has worked out recently or is relaxed from being at rest for a number of hours before the test. *Id.* at 86, 107-08. He further stated that the 57 ng/ml of THC found in the appellant's sample was a dilute result, and that if the creatinine in the appellant's urine had been at the lower end of the normal range (100 ml/dl), the sample would have had over 400 ng/ml of THC. *Id.* at 19-20.

Dr. Feldman testified that the laboratory is sent blind samples four times per year from the national organization that certifies laboratories (they do not know whether the samples are positive or negative), it also receives blind samples from the agencies for which they conduct tests, and that NWT has never been informed of a false positive on any of those samples. *Id.* at 33-36. Dr. Feldman stated that, after reviewing the litigation packet in this case, there is no evidence that NWT made any mistakes in the analysis of the specimen or in generating the data, nor is there any evidence of a false positive. *Id.* at 68-69.

Fernando Hernandez testified that he is a medical assistant at U.S. Healthworks, and has been there for five years. Tr. II at 24. As part of his

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[3] Milliliters per deciliter.

duties, he collects urine for drug testing. *Id.* He testified that he was trained when he started in his position at the company's corporate offices under Department of Transportation (DOT) regulations, and that he has collected between 1,000 and 4,000 urine samples since he has worked at the company. *Id.* at 24-25. He affirmed that the signature on the CCF in the record was his. *Id.* at 26; IAF, Tab 4, Subtab 4Z at 10. He admitted that he did not recognize the appellant at the hearing, and that he had no specific recollection of collecting his urine sample. He summarized the procedures he follows in collecting a urine sample as follows: The individual is taken back into the lab, asked for identification, asked to wash his hands, and told to grab a kit containing a cup, a tube, and a box. The individual is given the cup and asked to fill it at least halfway in a controlled restroom that has only a toilet that cannot be flushed, containing blue dye, and that does not have a sink or running water. *Id.* at 27-29. The individual is told not to flush the toilet and to walk out after he is finished, where Mr. Hernandez is waiting, and then the individual is taken to the sink nearby and told to set the specimen on the counter where Mr. Hernandez pours the urine in the vial and places the tape over it with the numbers from the CCF. Mr. Hernandez then asks the individual to verify that the numbers on the paperwork are the same as those on the tube, and to initial and date the bottle. *Id.* at 28. He fills out the CCF and puts the tube in a bag with a copy of the CCF and seals it, and then the individual fills out the donor section on the CCF. *Id.* at 28-29. Mr. Hernandez stated that, while the individual is filling out the paperwork, he flushes the remaining urine in the collection cup down the toilet, and then gives the individual a copy of the form. *Id.* at 29.

Mr. Hernandez explained that before each sample is collected, the collector checks the secured restroom to ensure that the blue dye is in the toilet and the water is shut off. *Id.* at 30. The reason he asks the individual to carry the sample over to the sink and set it down is to ensure that it does not fall in the exchange. *Id.* at 31. Mr. Hernandez testified that he has never been fired or disciplined by

U.S. Healthworks and has never had one of his tests or samples canceled. *Id.* Nor has he ever had anyone complain about his collection procedure, such as suggesting that the sample went out of their sight. *Id.* at 32.

On cross-examination Mr. Hernandez stated that he follows the same procedure every time he collects a sample. Tr. II at 33. He testified that he has never forgotten to flip the switch to turn off the toilet flush mechanism before a sample is given, nor has he ever forgotten to put the blue dye in the toilet. *Id.* at 34. He stated that he received a refresher training of collection protocol two years ago. *Id.* at 34-35. Mr. Hernandez explained that when an individual arrives to provide a sample he obtains the paperwork up front and takes him back through the door, which is closed but not locked, then he is brought to the lab, where there is a sink and a counter, and where the collection kits are kept. *Id.* at 36. Different laboratories use different kits, and here, it was a Northwest (now NWT) toxicology kit, which consists of a box that contains a sealed cup and a vial. The individual is asked to ensure that the cup is sealed and then to open it. *Id.* at 37.

The facility performs between five and twenty collections per day, and each takes five to seven minutes. Tr. II at 39. They may perform ten collections on Border Patrol agents in a given day. *Id.* at 40-41. Mr. Hernandez stated that he never opens the collection cup for the individual providing the sample, but he does open the box containing the kit. *Id.* at 43. He admitted that he does not follow the DHHS procedure requiring the collector to direct the donor to empty his pockets before providing the sample. *Id.* at 46; IAF, Tab 17, Exhibit J at 6. When he places the tape taken from the form over the vial to seal it, the employee always initials the tape after it is on the vial to verify that the numbers on the tape are the same as those on the form. Tr. II at 49-50. He further clarified that the collection cup is inside the box that contains the kit, that it is sealed with foil, and that he has the employee take the foil off; the vial is inside the cup. *Id.* at 51. After the employee seals the vial, Mr. Hernandez puts it in a bag that comes in

the kit, along with the top copy of the CCF, tapes it sealed, puts it in the box and seals the box, places it in a Federal Express bag, and puts it in the refrigerator. *Id.* at 52-53, 56-57 (redirect). That is a total of four seals. *Id.* at 56-57. Each kit comes with its own Federal Express bag inside, and the refrigerator into which it is placed is closed, but not locked. Mr. Hernandez stated that there are two other collectors at U.S. Healthworks, but that each collector completes all procedures for a given donor. *Id.* at 52.

Mr. Hernandez stated that he has never been stopped by a Border Patrol agent, that he has no problem with the Border Patrol, and he reiterated that he has never been fired or taken a leave of absence from work and has no idea why anyone would suggest that he had. *Id.* at 54-55. Mr. Hernandez stated that he did not frame the appellant, and he did not put tainted urine in his collection cup. Tr. II at 56. To his knowledge, U.S. Healthworks has never had anyone come in and break through the four seals and switch a specimen. He testified that it is not likely that somebody could substitute tainted urine for clean urine. *Id.* at 60.

Cynthia Wilds, the Center Manager for U.S. Healthworks in Chula Vista since September, 2002, testified that she supervises the medical assistants in the office, including Mr. Hernandez, and that one of his duties is collecting urine samples for drug testing. Tr. II at 4-5. She testified that Mr. Hernandez is very reliable as a urine specimen collector, that he performs the procedures the same way every time, and that she has never had a complaint against him by a patient, nor has he ever been disciplined in any way. *Id.* at 5-6. In his last rating he received a four, on a scale of one to four. She stated that employees receive training under the DOT regulations, not the DHHS standards, although the two are very similar. *Id.* at 8-9. Ms. Wilds summarized the collector's protocol consistent with Mr. Hernandez's testimony, and explained that the drug testing restroom does not have a sink in it, and that the switch that shuts off the toilet in that restroom is right around the corner from the room. *Id.* at 10-12. She stated that her staff members are the only people authorized to be back in the laboratory

area, that the door is not locked, and that they do approximately 20 collections per day. *Id.* at 13-14. She further stated that Mr. Hernandez has always worked at U.S. Healthworks since she has been there, and she has no idea why anyone there would say that he no longer worked there; she does not recall talking with anyone at a company called Pharmchem about Mr. Hernandez. *Id.* at 14-16; IAF, Tab 4, Subtab 4aa (e-mail from Pharmchem). She explained that the lab receives the CCF with the donor's social security number pre-printed on it, and that the social security number is also on the "stickie" that they receive, which is placed on the vial into which the urine sample is poured. *Id.* at 21-22.

The appellant testified that the U.S. Healthworks location at which he provided the sample was in a blue-collar part of Chula Vista. Tr. II at 72. He testified that the Border Patrol is viewed negatively in Chula Vista. *Id.* at 90. He stated that, when he arrived to provide the sample, he saw a group of people standing near the facility in a back alley that are the type he has been trained to identify as undocumented workers. *Id.* at 73. When he went inside, he felt uncomfortable initially, like a cowboy walking in a bar in a western movie, because he had his uniform and badge on and was carrying a gun. *Id.* He was asked to sign in and escorted into the back, and Mr. Hernandez met him and handed him a cup. Mr. Hernandez told him to go in the restroom in the corner, and may have told him not to flush the toilet while he was there. *Id.* at 74. After he urinated in the cup he stepped out of the restroom and Mr. Hernandez was there; he handed Mr. Hernandez the cup and Mr. Hernandez told him to go flush the toilet. *Id.* at 75. The appellant testified that it struck him funny that Mr. Hernandez did not check the toilet, and that "set off a chain reaction" that something was wrong, since there was no bluing agent in the toilet, which there normally is, and Mr. Hernandez had not initially asked him to flush the toilet. *Id.* at 75.

After he flushed the toilet, he washed his hands in the sink; he figured Mr. Hernandez had flipped the switch outside so he could use the sink, because

normally the sinks cannot be used. When he came out, Mr. Hernandez was not there, and he noticed an individual in civilian clothes sitting down almost directly in front of him. Tr. II at 75. Everyone else at the lab was wearing smocks. *Id.* at 77. A couple of minutes later Mr. Hernandez came from around the corner with a vial and they went to the counter almost directly straight from the bathroom door where the container and the strips were and the appellant compared the numbers. *Id.* at 76. The vial was already capped and sealed and then Mr. Hernandez peeled the tape off and put it on and the appellant initialed it. *Id.* at 77-78, 134-135.

The appellant stated that he was concerned that the sample had not been poured in front of him, but he thought, "it's probably no big deal." Tr. II at 76. He was hesitant to sign the form because it says something about the sample not having left his view, but he did not believe someone at a medical facility would do anything detrimental to a law enforcement officer. *Id.* Above his signature, it says, "I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the label affixed to each specimen bottle is correct." *Id.* at 79. That was all true, but the certification does not say that the specimen was in his sight at all times. *Id.* at 79-80. The appellant testified that he had no concerns that his sample would come back anything but negative. *Id.* at 80.

The appellant has been tested approximately ten times in his career, three or four of those with the Border Patrol. *Id.* at 97. The appellant testified that Mr. Hernandez's testimony regarding the procedures he always follows was incorrect in his case. Tr. II at 96. Mr. Hernandez did not put blue dye in the toilet, which struck him as odd, and did not pour the sample in his presence. *Id.* Mr. Hernandez did not have the appellant open the test kit, nor did he have the appellant open the collection cup and take off the foil seal. *Id.* at 98-99. The appellant never saw the vial that the urine was placed in before he walked out of the bathroom. *Id.* at 99.

On cross-examination, the appellant stated that the individuals he saw that he believed might be undocumented who were hanging around near the test facility were about a block away from the facility. Tr. II at 101. He reiterated that, after he handed Mr. Hernandez the cup, Mr. Hernandez apparently walked around the corner while he flushed the toilet, and that Mr. Hernandez was gone for a minute or two. *Id.* at 103. He also restated that he was able to wash his hands and flush the toilet in the restroom. *Id.* at 109. The appellant admitted that he was aware that the urine sample was never supposed to leave his sight. *Id.* at 110. He further admitted that he neglected to mention in a March 2, 2001 letter he wrote to the Patrol Agent in Charge, after he was told that he had tested positive, that there was a sink in the restroom with running water. *Id.*; IAF, Tab 4, Subtab 4bb. In the letter he stated that the toilet had running water, meaning it flushed, and he thinks he meant to write that the sink had running water. He was able to wash his hands, and believes there was a napkin dispenser there for drying; there was a receptacle either in the restroom or outside. Tr. II at 110-111.

The appellant clarified the setup of the testing facility. He stated that after walking through the reception area approximately ten or twelve feet, the restroom is directly to the left and a few feet beyond that is the area from which Mr. Hernandez emerged. Tr. II at 130. Beyond that is a wall, or counter, and that is where the appellant saw the individual in civilian clothing. *Id.* The counter where they met was basically straight across from the restroom, and Mr. Hernandez was coming from the appellant's left when he came from around the corner. *Id.* at 132.

Peter Shepard, a Border Patrol Agent at Brown Field Station since 1997, testified that he worked with the appellant, but was not friendly with him. Tr. II at 164-165. He was the lead union representative at the time the appellant's positive test result came back and he reviewed the memo the appellant wrote in response. *Id.* at 165. Mr. Shepard has had four random drug tests and had a

problem with one in approximately October, 2000. *Id.* at 166. That test was in a facility in Chula Vista. *Id.* at 167. He claimed that when he was finished providing the sample and opened the restroom door, the attendant was there, he handed her the sample and she asked him to flush the toilet; when he returned, it took him maybe thirty seconds to find her and she was sitting at her desk filling out the paperwork. *Id.* at 168. Because she had already sealed the lid, he refused to sign and they agreed that he was going to have a supervisor from Brown Field come over, but they ultimately decided that he would resubmit a sample, which he did an hour later. *Id.* at 168-169.

Mr. Shepard stated that there was no blue dye in the toilet, and they had him flush it, unlike when he had submitted a sample at a different facility downtown. Tr. II at 169. After the test he washed his hands in a sink next to the toilet. *Id.* He remembers that because he has a compulsive disorder for which he takes medication, and he has to wash his hands. *Id.* at 170. He testified that he was called to provide a sample again approximately two weeks prior to the hearing, and that the facility was the same. *Id.*; at 170, 176. He is not sure if there was a sink in the restroom, but again there was no blue dye in the toilet. This time there was no problem with someone walking away with his sample. *Id.* at 171.

On cross-examination, Mr. Shepard stated that he reported the problems he encountered giving his sample in late 2000, but did not write a memo. Tr. II at 173-174. To his knowledge, the woman who took his sample on that occasion did not tell her supervisor about his complaint. *Id.* at 175. In response to further questioning, Mr. Shepard stated that he believes the bathroom he used in his recent test was the same one he used in 2000. *Id.* at 178. He reiterated that he believes there was no sink in the restroom he used during the recent test because he remembers asking the woman to open the door for him because he had not washed his hands and she made a joke about it. *Id.* at 179. The bathroom he believes he used both times is immediately to the left as one enters the laboratory

area. *Id.* at 179-180. If there had been a sink in the restroom during the recent test he would have used it. *Id.* at 181.

During the hearing, the parties and I visited the U.S. Healthworks testing facility at which the appellant provided his urine sample. Tr. III at 3. The record contains a copy of the layout of the testing facility that both parties agreed is accurate. *Id.*; IAF II, Tab 32, Hearing Exhibit # 1. After walking through the reception area, on the left is a restroom that contains a sink and normal toilet. Upon emerging from that restroom, to one's left and set back is the laboratory area, which contains a counter. If one is facing that laboratory area, there is another restroom without a sink directly to the right, a corridor directly to the right of that, and a desk area to the rear. IAF II, Tab 32.

Findings

After reviewing all of the evidence pertaining to the chain of custody of the appellant's urine sample, for the reasons discussed below, I find that the agency has shown that the urine sample that tested positive was the appellant's. First, although Mr. Hernandez admitted that he could not remember collecting the appellant's sample, I found credible his testimony regarding the procedures he follows in collecting all samples, based both on the internal consistency of his testimony and the straightforward manner in which he testified. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Mr. Hernandez testified credibly on both direct and cross-examination that each donor is taken to a controlled restroom that has blue dye in the toilet to prevent dilution of the sample, that the restroom has no sink in it, that the toilet flush mechanism is shut off while the donor is providing the sample, and that he has never forgotten to turn off the toilet or to put the blue dye in it prior to collecting a sample. He further explained persuasively that he never takes the sample cup from the donor when the donor emerges from the restroom, as the appellant claims he did, because it could fall in the exchange; rather he asks the donor to carry it to the area by the sink and set it down. Finally, according to Mr. Hernandez's version

of events, after the donor puts the cup down, he (Mr. Hernandez) pours the sample into the vial and places the tape over the vial, at which time the donor is asked to ensure that the numbers on the tape match the number on the CCF and to initial it. In his version, which I found credible, the urine sample never leaves the sight of the donor until after it has been placed in the vial and sealed.

The appellant has produced no credible evidence to show that either Mr. Hernandez or any other employee or individual with access to U.S. Healthworks had animus toward him, or toward the Border Patrol. His initial claim that he saw an individual in civilian clothes back in the laboratory area when he provided the urine sample was contradicted by his own testimony on cross-examination that he saw more than one individual in civilian clothes in the area. In addition, his generalized assertion that people in Chula Vista dislike the Border Patrol, without more direct evidence of any animus directed toward him at the time he provided the urine sample, does not convince me that his urine sample was switched or tainted in any way.

Moreover, Mr. Hernandez's testimony that no one has ever before complained that a urine sample left their sight is unrebutted, as is Ms. Wilds' testimony that Mr. Hernandez is an excellent employee, has received the highest rating for his performance, and has never been disciplined or had any complaints lodged against him. While it is true that Mr. Hernandez received training under the DOT regulations for collecting urine samples, Ms. Wilds' testimony that those regulations are substantially similar to the DHHS regulations applicable here was also unrebutted.

In contrast to the testimony provided by Mr. Hernandez, for several reasons, I find that the appellant's testimony that there were several breaches of protocol in the collection of his urine sample lacked credibility. First, considering the layout of the laboratory area at U.S. Healthworks, I find it inherently improbable that events occurred as the appellant claims. The appellant contends he was directed to provide his urine sample in the "normal" (non-

controlled) restroom, emerged from that restroom after he had done so where Mr. Hernandez was waiting, handed him the cup, went back into the restroom to flush the toilet after Mr. Hernandez told him to, and came back out and stood there for a minute or two without knowing where Mr. Hernandez was until Mr. Hernandez came from around the corner "a few feet" away from the restroom. As the copy of the layout of the laboratory shows, however, if the appellant had provided the sample in the non-controlled restroom (the one marked as having the sink), when he emerged from that restroom after flushing the toilet, if Mr. Hernandez was around the corner in the area to the left a few feet away, as the appellant claims, Mr. Hernandez must have been in the area marked "lab" on the layout. IAF, Tab 31. As the layout shows, that area is relatively small, and is only recessed as far back as the restroom itself. *Id.* Considering the proximity of that lab area to the entrance to the restroom in which the appellant claims to have provided the sample, I find it highly unlikely that the appellant would have stood in one place, without moving at all toward his left (assuming his back was to the restroom) so that Mr. Hernandez was in his sight line, and without hearing Mr. Hernandez's movements.

In the alternative, as the layout shows, the controlled restroom is on the other side of the lab area from the normal restroom and, if one emerges from the controlled restroom, there is a relatively long corridor immediately to the left. IAF, Tab 31. Since the appellant testified that he waited for Mr. Hernandez for at least one minute after he came out of the restroom and that Mr. Hernandez came from an area to his left, from "around the corner," I find that it is more likely that it was from this corridor that Mr. Hernandez would have emerged. If that is the case, however, then there can be no dispute that the appellant provided his urine sample in the controlled restroom, and therefore his claim that the restroom in which he provided the sample had a sink is untrue. In either case, I find that the appellant's testimony that Mr. Hernandez was out of his sight with the urine sample after the appellant flushed the toilet contains inconsistencies and/or

inaccuracies, is not worthy of belief, and undercuts his overall credibility. *Hillen*, 35 M.S.P.R. at 458 (the contradiction of the witness's version of events by other evidence, inconsistencies, and the inherent improbability of the witness's version of events are factors in assessing credibility).

I also find it unlikely that the appellant would have signed the certification on the CCF if there were as many obvious breaches of protocol in the sample collection procedures as he claims. The appellant admitted that he has had approximately ten urine tests during his career, and that, although the vial was sealed in his presence, he was aware that the urine sample was not supposed to leave his sight until it was sealed. In addition, he testified that he was hesitant to sign the form but decided it was "no big deal," and also that he "saw yellow flags … but … did not feel uncomfortable signing that seal." Tr. II at 76, 129. Again, based on the appellant's experience taking drug tests, I find it inherently improbable that he would have signed the certification under the circumstances he describes, and the fact that he did so, in conjunction with my findings above, leads me to the conclusion that his testimony regarding the collection procedures followed by Mr. Hernandez is untrue.

I also find that agent Shepard's testimony was not credible, based on his uncertain demeanor while he testified, the fact that his memory of the drug test he claims to have taken only two weeks prior to the hearing was poor, the inherent improbability of some of his testimony, and certain internal inconsistencies. Agent Shepard testified that he had problems with collection procedures similar to those encountered by the appellant when he provided a urine sample at the same lab as the appellant in 2000. He further claimed that he had provided another sample at that lab two weeks prior to the hearing (approximately in January, 2003). Mr. Shepard testified that he believes the restrooms he used in both the 2000 and the 2003 tests were the same, and that he remembers washing his hands at a sink in the restroom in 2000, because he has a compulsive disorder that makes him feel a compelling need to wash his hands. He stated that during

the test he took two weeks prior to the hearing, he was not able to wash his hands because the restroom lacked a sink, and he specifically remembers the lack of a sink because he did not want to touch the door with unwashed hands and had the collector open it for him. He admitted that if there had been a sink in the restroom during the 2003 test he would have used it.

Based on the inconsistencies in Mr. Shepard's testimony, it is apparent that he did not use the same restroom during both tests he claims to have taken, and it is not clear from his testimony that he provided the sample in 2000 at the same facility as the appellant. Moreover, I find it unlikely that, if Mr. Shepard had the problems he claims he had during the 2000 test, to the point that he had to wait for an hour to provide a second sample, he would have failed to write a report on the matter for submission to agency management. Finally, I note that Mr. Shepard was the appellant's representative after the agency proposed the appellant's removal and prior to the appellant engaging current counsel, and that it is likely that his testimony was affected by his obvious bias. IAF, Tab 4, Subtab 4v; *see Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, ¶ 12 (1999) (a witness' bias is a factor to be considered in resolving credibility issues). Under the circumstances, and without any corroboration for any of Mr. Shepard's testimony, I find that his testimony merits **no** weight in this decision.

Based on all of the foregoing, I find that the urine sample the appellant provided was the sample that was in the vial he initialed. I also find that the sample the appellant initialed was the sample U.S. Healthworks sent to NWT for testing. This finding is based on Mr. Hernandez' credible testimony that, after each vial containing a urine sample is sealed, it is placed in a bag that is sealed, that bag goes in a box which is sealed, and the box is put in a Federal Express bag that is sealed and stored in the lab's refrigerator. Moreover, based on the litigation packet provided by the lab, containing the CCF showing receipt and storage of the sample, Dr. Kuntz's Summary of the lab report and his affidavit, and Dr. Feldman's credible and unrebutted testimony regarding the lab's custody

and control and testing procedures, I find that the agency has established the chain of custody of the urine sample from U.S. Healthworks through the testing process.

The agency established that the appellant's positive drug test was the result of use of marijuana - a controlled substance

Appellant's arguments

The appellant argues that there are several alternative explanations for his positive test result. First, he asserts that several months prior to the test, his sister gave him an assortment of nutritional bars for Christmas, and that some of those bars contained hemp, which in turn contains THC. He claims he ate a number of those bars in the period leading up to the test, including one on the morning of the test. The appellant further contends that a genetic abnormality altered his metabolism and that as a result, small amounts of THC contained in the nutritional bars was not metabolized as it normally would be, leading to a higher measurement of the metabolite that is excreted through urine after THC ingestion. IAF II, Tab 36.

The appellant also argues that NWT used a testing method that yields numerous false positive results, and that the testing method could not, with a reasonable degree of certainty, differentiate between the metabolite produced by THC that is ingested through marijuana use and the ingestion of THC through consumption of hemp containing THC. IAF II, Tab 15 (letter from Dr. Kent Holtorf). He asserts that both the immunoassay and the select ion GC/MS methods of testing a urine sample for the metabolite produced by THC are flawed, and that therefore it is likely that his positive result was in error. *Id.*[4]

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[4] Earlier in the proceedings, the appellant submitted a report from his expert, Dr Kent Holtorf, in which Dr. Holtorf asserted that the fact that the appellant was taking large doses of Ibuprofen around the time he gave the urine sample could have caused a false positive. IAF II, Tab 15. During the hearing, however, Dr. Holtorf testified that he was no longer saying in this case that Ibuprofen could have caused a positive result. Tr. III

Evidence

In the March 2, 2001 letter the appellant sent to the Patrol Agent in Charge after he was informed that he had tested positive for marijuana, referenced above, the appellant stated that he had been given supplemental nutrient bars for Christmas by his sister, that he had been consuming those bars for a period of a month and a half, and that following his receipt of the test results, he had reviewed the ingredients in the bars and learned that one of the ingredients was hemp seed. He asserted that he did not knowingly consume hemp, and only after learning of the positive test result did he uncover that fact. IAF, Tab 4, Subtab 4bb. In his first oral reply to the agency's proposed action, the appellant again asserted that he had received supplemental nutrient bars from his sister, that he ate one on the day of the test, and that after he learned that he tested positive he had retrieved the wrapper of the bar he ate the day of the test from the trash can and noticed that it contained "raw hemp seed." *Id.*, Subtab 4m. He claimed that he had obtained a duplicate bar at a health food store in Ocean Beach, but the wrapper of that bar stated that "hemp seed," rather than "raw hemp seed" was an ingredient. *Id.* The day after the oral reply, the appellant's attorney submitted a copy of the wrapper of the bar the appellant alleges he ate on the morning of the test showing "raw hemp seeds" as an ingredient, and a bar the attorney stated he purchased the day before (September 13, 2001) at the People's Choice Co-op in Ocean Beach showing "hemp seeds" as an ingredient. *Id.*, Subtab 4n. Both bars were made by Govinda's. *Id.*

In his second oral reply, the appellant submitted a number of articles pertaining to products containing hemp and urinalysis testing for marijuana use, information about the stance of the Drug Enforcement Agency (DEA) regarding

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at 32, 41. Accordingly, because there is no other evidence upon which to base a finding that ingestion of Ibuprofen played any role in the positive test, I will not further address that issue.

hemp, and a videotape containing a news clip about the affects of new DEA regulations on the business of Govinda's Hemp Bar Company. IAF, Tab 4, Subtab 4d. In a March 26, 2002 letter written by the appellant's sister, Autumn Anderson, Ms. Anderson states that, in mid December she had purchased a box of supplemental nutrition bars for her brother at the Ocean Beach People's Food Market, and that she gave them to him for Christmas. *Id.*, Subtab 4c. She stated that the box contained approximately seven hemp bars. *Id.* She reiterated essentially the same information in an October 22, 2002 affidavit. IAF II, Tab 5, Exhibit T.

The appellant submitted an affidavit from Dr. Mark Marvin, a Psychologist who works for the INS as a contracted EAP counselor. IAF II, Tab 5, Exhibit S. Dr. Marvin stated that the appellant was referred to him for counseling on or about March 2, 2002, that he met or spoke with the appellant five times, and that the appellant denied marijuana use and stated that he believed his positive drug test was the result of his consumption of power bars containing hemp prior to the random drug test. *Id.* A copy of the session notes attached to the affidavit supports the doctor's affidavit. *Id.*

The appellant testified that, after he was told of the positive test result in a phone conversation on February 21 or 22, 2002, with the agency's Medical Review Officer, Dr Katsuyama of Greystone Health Sciences Corporation, he looked through the supplements he had and remembered that he had been given a hemp product by his sister for Christmas that he had consumed. Tr. II at 82-84, 105; IAF, Tab 14, Subtab 7. He did not think it was of significance because, on the wrapper it said "Contains no form of marijuana." Tr. II at 83. He found the wrapper in the bedroom trashcan, which, at the time, he only emptied every few weeks. *Id.* at 84. In the March 2, 2001 memo he wrote, he requested an opportunity to take another drug test at a different facility. *Id.* at 85. The agency did not respond to that request. *Id.* at 86. He eventually took another test at his own expense. *Id.* at 85-88; IAF, Tab 17, Exhibits F & G. He admitted to having

smoked marijuana two or three times in high school in 1984 or 1985. Tr. II at 89-90. He had no idea where to obtain marijuana in 2001. *Id.* at 90.

After he was informed of the positive test, the appellant did some research on hemp via the internet, spoke with a co-worker about it, and contacted Govinda's, the manufacturer of the bars he ate. Tr. II at 94-95. He was told by an employee of Govinda's that they had not tested their product, and was told they would document that, but was later told they could not do so for legal reasons. *Id.* at 95-96. He stated that he was not aware prior to his drug test that he could "beat" the test by flushing his body with water, and he did not do so on the day of the test. *Id.* at 139. He drinks a lot of water because he has always been trained to hydrate himself, and he carries a backpack with water in it in the field. *Id.* at 140. Hydration is important, especially in the winter when they are wearing thermal underwear and a vest and sweating heavily. *Id.*

On cross-examination, the appellant clarified that, in his March 2, 2001 memo, he should have stated that he did not knowingly consume raw hemp, rather than just hemp, because he had been aware he was consuming a hemp product. Tr. II at 112. That is significant because he learned on the internet that raw hemp contains more THC than dried or cooked hemp seed. *Id.* He confirmed that the wrapper of the bar the agency submitted, and which the agency sent for a toxicology test, looks identical to the wrapper from the bar he ate. *Id.* at 113; IAF, Tab 4, Subtab h. He cannot confirm that he ate a bar on the morning of the test, but he ate several within a short period around that time. *Id.* at 114. He estimates he ate between three to five of the bars between when he received them and the day of the test. *Id.* at 115. He had one left after he found out he had tested positive, and he is not sure what he did with it. *Id.* The appellant admitted that his trash would have been picked up either once or twice between the time he took the test and the date he was informed he had tested positive. *Id.* at 120-122. The appellant further admitted that he was having marital problems in January and February, 2001, around the time of the test, that his wife was having panic

attacks, that he was under a lot of stress and they were fighting a lot. *Id.* at 125-126; IAF, Tab 4, Subtab 4gg.

The appellant further testified that his marital problems did not lead him to smoke marijuana, and that he is against drugs because they are detrimental to society. Tr. II at 140-141. He would never jeopardize his family's livelihood by smoking marijuana. *Id.* at 141. He cannot estimate how much water he drank the day of the test, but it is a constant hydrating process. *Id.* at 143-144.

Juan Angeli is a Senior Patrol agent with the Border Patrol, stationed at Brown Field since 1997. Tr. II at 188. He worked with the appellant on and off, and was working with him fairly regularly in February, 2001. *Id.* at 189. He testified that a number of the agents eat power bars and protein shakes and things like that. He remembers one night the appellant was eating a bar that looked terrible – it was greenish-yellow and looked like it had bird seed in it – and Mr. Angeli asked what is was and the appellant told him it was an energy bar. *Id.* at 190. The appellant was reading the wrapper and said that the bar contained hemp seed, and referenced the possibility of having to provide a urine sample. *Id.* at 191. Mr. Angeli worked pretty regularly with the appellant between September, 2000 and February, 2001 and he never saw a change in the appellant's performance. *Id.* at 191-192. When they were discussing an agent who had been caught smuggling drugs, the appellant commented, "why would somebody throw away a million-dollar career for that?" and stated that it makes no sense and brings shame on yourself, your family and the service. *Id.* at 192. Mr. Angeli testified that he spent time with the appellant away from work, and that the appellant has a good family life. *Id.* at 195.

On cross examination, Mr. Angeli admitted that the appellant has had some marital difficulties, but he is not sure if that was just prior to the appellant's positive drug test. Tr. II at 196. He did not remember how long prior to the appellant's drug test he saw the appellant eating the nutrition bar that contained hemp. *Id.* at 197.

The appellant's wife, Erica, testified that she has known the appellant for fourteen years, they've been married for twelve years, and they were having marital difficulties around the time the appellant took the drug test, but she has never known him to use illegal drugs. Tr. II at 52. She never suspected in February, 2001 that he was using drugs and noticed no change in his behavior that indicated that he was using marijuana. *Id.* at 53. She described the appellant as a wonderful husband and father, and stated that they are against the use of illegal drugs. *Id.* at 54-55.

Karen Carrillo, a Senior Patrol agent who has been with the Border Patrol since 1995 who worked at Brown Field Station since 2000 testified that she worked with the appellant and the appellant is a good worker and a "good all-around guy." Tr. II at 147-148. The appellant is strongly against the use of illegal drugs and she remembers a night, in approximately November, 2000 where she was out for drinks with the appellant and agent Angeli and a young patron was bragging and showing marijuana and the appellant got angry and confronted the individual about it; she had to pull the appellant back and calm him down. *Id.* at 149. Ms. Carrillo testified that she has had trouble with her teenage children with marijuana and knows how they act and look after using it, and she has never seen any of those signs in the appellant. *Id.* at 150.

Tino Farmer, has worked at the Brown Field station since 1994, and in February, 2001, he was a senior patrol agent and the appellant's acting supervisor. Tr. II at 153-155. He described the appellant as a conscientious worker. *Id.* at 155. Mr. Farmer received the drug testing packet to give the appellant, but the appellant was on leave for a day or two and Mr. Farmer gave him the packet when he returned; the appellant did not seem concerned, made no excuses, and went to take the test right away. *Id.* at 156. Mr. Farmer had not mentioned the pending drug test to anyone, including the appellant, prior to giving him the packet. *Id.* at 157-158, 161-162. He has no information that anyone else mentioned it to the appellant. *Id.* at 158.

Eduardo Gonzalez, a senior patrol agent who has been with the Border Patrol since 1996 and was assigned to Brown Field station in 2001, testified that he worked with the appellant on patrol for a month or so, and then again when they were both assigned to do maintenance on the all-terrain vehicles (after the appellant's positive test). Tr. II at 182-184. He characterized the appellant as a good worker. *Id.* at 185.

The record contains an August 3, 2002 declaration written by Nancy Casady, general Manager of Ocean Beach People Coop. in which Ms. Casady states that the coop. first purchased Govinda's hemp bars in December, 2000. IAF, Tab 17, Exhibit N. Copies of the invoices submitted by the coop. show purchases from December, 2000 through November, 2001. *Id.*, Exhibit N1. Invoices obtained from Govinda are identical, except that there is an April 24, 2000 invoice showing that one sample Ginger/Chia Hemp Bar was provided to the coop. free of charge in April, 2000. *Id.*, Exhibit O5. In a vendor spreadsheet submitted from Govinda's, purchases from a company called Nutiva were made in January, February, March, and May of 2000, and a purchase from Hemp Oil Canada was made in December, 2000. IAF, Tab 17, Exhibit O4.

Invoices from Hemp Oil Canada, Inc. show shipments of hulled hemp seeds to Govinda's (referred to by its corporate name, Fitness Foods) in 2000 and 2001. *Id.*, Subtab O2. In an affidavit submitted by Hemp Oil Canada's President, Shaun Crew, Mr. Crew stated that the company sells hulled hemp seeds, that it sold two shipments of seeds to Govinda's in late 2000, that both shipments came from the same lot, and that the lot was tested by a laboratory and the THC content of the seeds was 0.8 ppm (parts per million).[5] IAF II, Tab 4, Exhibit 16. Mr. Crew also stated that since Hemp Oil Canada incorporated in 1998, its hemp seeds have consistently tested between 0.5 ppm and 0.8 ppm, which is well under the Canadian legal limit of 10 ppm and the TestPledge limit of 1.5 ppm. *Id.* Hemp

[5] Ug/g is the equivalent of parts per million.

Oil Canada also provided laboratory results of testing for THC performed on its hemp seeds showing no concentration of THC found where the minimum limit to trigger a finding of THC was 4 ug/g. IAF, Tab 17, Exhibit O1. The document also references that the Health Canada acceptable limit is 10 ug/g. *Id.*

In an October 18, 2002 declaration, John Roulac, President of Nutiva, stated that in 2000 Nutiva was a hemp seed broker and purchased hemp seeds from Canada, several shipments of which it sold to Govinda's. IAF II, Tab 4, Exhibit 14. He further stated that, in 1999 and 2000, Nutiva purchased all of its seeds from Kenex Ltd. of Ontario, Canada. *Id.* The record shows several shipments of hulled hemp seeds from Nutiva to Govinda's in 2000. IAF, Tab 17, Exhibit O3.

In an October 22, 2002 declaration, Jean Laprise, President of Kenex Ltd. of Ontario, Canada, stated that Kenex has supplied hemp products to the United States since 1999, that every lot of hemp seeds is tested for THC content by a laboratory certified by Health Canada, and that since January, 2000, the results of those tests have shown that no THC was detected in its hemp seeds when there was a detection level of 4 ppm. *Id.*, Tab 11. He further stated that, in 2001, some lots were tested with a detection level of 1.5 ppm and no THC was detected at that level. *Id.* Finally, he averred that in 2000, Kenex sold five shipments of hemp seeds to Nutiva, that it is impossible that any of those shipments contained seeds with more than 4 ppm of THC, well below the Health Canada limit of 10 ppm, and that it is highly unlikely that Nutiva received any seeds with more than 1.5 ppm of THC. *Id.* Three laboratory reports on hemp seeds from Kenex that were tested for THC show "none detected." IAF, Tab 14, Exhibit 5. The first shows a report date of December 13, 2000 and a detection limit of 4 ug/g, the second is dated September 18, 2001 and has a detection limit of 1.5 ug/g, and the third, dated May 25, 2000, had no stated detection limit. *Id.*

In forensic testing of a Govinda's hemp bar, performed by Thomas Bosy, Ph.D of the Armed Forces Institute of Pathology, Dr. Bosy stated that the bar was

tested for THC using solid/liquid extraction and GC/MS analysis, and was found to contain 0.169 ug/g of THC. IAF, Tab 4, Subtab 4l. Dr. Bosy asserted that, given that concentration of THC, it is highly unlikely that reasonable consumption of the product would cause a positive urine test for THC. *Id.* In a January 3, 2002 letter to the agency's counsel, written by Mike Stein, General Manager of Govinda's, Mr. Stein stated that the company's Ginger-Chia Hemp Bar weighs 1.5 oz., or 43 grams, and consists of just under 26% hemp seeds. IAF, Tab 14, Subtab 9. The hemp seed weight is just over 11 grams per bar, and according to the seed supplier, the amount of THC in the hemp seeds is under 4 ppm, which in Canada is considered none since the acceptable limit is 10 ppm. He stated that, if the lab result the agency obtained of 1.6 ppm of THC in the bar is used as a basis, each bar contains approximately 17.6 millionths of a gram of THC, and that one would need to eat such a massive volume to become intoxicated it would "most likely kill you first." *Id.*

In documents submitted from the web site for TestPledge, the organization stated its purpose of ensuring that consumers eating foods containing hemp oil or hemp seeds do not test positive for marijuana. IAF, Tab 17, Exhibits M1-M2. Manufacturers of hemp products have initiated the TestPledge program and commit themselves to keeping THC levels in their products within specified levels.. For shelled hemp seeds, that limit is 1.5 ppm. *Id.* TestPledge asserts that doses of 600 ug per day of THC are found not to cause confirmed positive tests for marijuana with a wide margin of safety, and that if THC levels in shelled hemp seeds are kept at 1.5 ppm, one can consume 14 oz. per day without reaching the 600 ug dose. *Id.*, Exhibit M2. Hemp Oil Canada and Nutiva both made the TestPledge "pledge" on August 1, 2001. *Id.*, Exhibit M3.

The agency submitted an affidavit from its expert witness, Dr. Gero Leson, as well as a copy of an article written by Dr. Leson and several other doctors that was printed in the Journal of Analytical Toxicology. IAF II, Tab 4, Exhibits 12

& 13.[6] The study is entitled, "Evaluating the Impact of Hemp Food Consumption on Workplace Drug Tests." *Id.*, Exhibit 13. Dr. Leson provided testimony as well. January 9, 2003 Hearing Tapes (HT).

In his affidavit, Dr. Leson stated that, since 1999, he has co-authored and coordinated several studies evaluating the potential impact of trace residues of THC in food items containing seeds from the hemp plant and its derivatives – hemp oil and hulled hemp seeds. IAF II, Tab 4, Exhibit 12. His involvement in the studies was first-hand, and was in collaboration with scientific researchers of the toxicology and pharmacology of THC. He asserted that he has served as an expert witness in three court cases similar to the instant case, on behalf of both the prosecution and defense. *Id.*

Dr. Leson opined that, under the most conservative assumptions, the amount of THC consumed by the appellant via the Govinda's hemp bars he may have eaten was insufficient, by a factor of at least ten and likely over fifty, to cause the level of THC measured in his urine sample. IAF II, Tab 4, Exhibit 12. He based this conclusion on the appellant's statement that he consumed one hemp bar the morning he provided the urine sample, the statements provided by Govinda's, and the company's suppliers of hulled hemp seeds in 1999/2000. *Id.* Dr. Leson stated that his study was also relevant in reaching his conclusion. *Id.* He explained that the purpose of the study was to establish oral doses of trace THC which, when ingested daily over an extended period of time, will not produce a confirmed positive urine test for marijuana. *Id.*

Dr. Leson explained that, during the study, 15 volunteers consumed, over a 40-day period, 15 ml of a hemp oil blend per day. During 4 consecutive 10-day periods, the THC concentration in the oil was increased, with 90 ug per day during the first period and either 450 or 600 ug during the last period. IAF, Tab

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[6] Dr. Leson is not a medical doctor, but has an M.S. in Physics and a Doctorate in Environmental Science and Engineering. IAF II, Tab 4, Exhibit 12.

4, Exhibit 12. On days 9 and 10 of each period, each participant gave a urine sample. All samples were tested for THC using immunoassay and GC/MS screening according to the protocols followed by U.S. federal agencies, and the samples were collected 4-8 hours after the subjects ingested the hemp oil, when the THC levels would be at their highest. *Id.* The result of the study showed that, at the highest THC dose of 600 ug/day, the maximum concentration of THC in any urine sample was 5.2 ng/ml, which is considerably below the 15 ng/ml cutoff for a positive test set by the DHHS. *Id.* Dr. Leson further asserted that his study was not contradicted by the studies submitted by the appellant because in those studies the volunteers ingested hemp oil that often contained THC doses of several thousand micrograms. The reason the doses were so much higher was that, during the period in which those studies were conducted, 1995-1997, improperly cleaned hemp seeds were obtained from China, and the oil produced from them generally contained THC levels considerably higher than that now found in hemp seed from Canada. *Id.*

Dr. Leson explained that the findings of his study served as the basis for TestPledge, a voluntary program for self-regulating the THC content in hemp raw materials. IAF II, Tab 4, Exhibit 12. Signatories to the program commit to selling hemp seeds containing less than 1.5 ug/g, and at those levels, eating 13 oz. of hemp seeds per day would still result in a THC intake of less than 600 ug/day, well below that required to produce a confirmed positive test for marijuana. *Id.* He pointed out that, although TestPledge has only been in place since August, 2001, since 1998, when Canada began permitting the farming and processing of hemp, the majority of hemp seed products consumed in the U.S. have been imported from Canada, including the seeds used by Govinda's to produce the bars in question in this case. *Id.* Canadian regulations limit the THC content in hemp seeds to 10 ug/g, and since 1998, THC levels in seeds have shown by mandatory testing to be considerably lower than that limit. *Id.*

Dr. Leson pointed out that the Govinda's two suppliers of hemp seeds have both stated in writing that testing of their 2000 hemp seeds never detected THC levels in excess of 4 ug/g, and when tested with a lower limit of detection, both found levels lower than 2 ug/g. IAF II, Tab 4, Exhibit 12. He further referenced a letter from Websar Laboratories, one of several Canadian labs who are licensed by Health Canada (who administers the country's industrial hemp program) to conduct hemp testing, in which Websar states that the THC content in hemp seeds tested since 1997 has ranged from 0.1 to 5.0 ug/g, and most commonly fell between 0.5-1.5 ug/g. *Id.*; *see id.*(letter from Websar).

Dr. Leson stated that, if the hemp bar eaten by the appellant on the day he gave the urine sample weighed 43 grams and contained 26% hulled seed, it contained approximately 11 grams of hemp seed, which is common. IAF, Tab 4, Exhibit 12. Assuming THC content at 4 ug/g, the bar contained no more than 45 ug of THC, and probably less, since the suppliers of the hemp seeds indicated that THC levels in their seeds in 2000 were typically found to be below 2 ug/g. *Id.* Dr. Leson stated that, even if the appellant had eaten all seven hemp bars he received from his sister on the morning of the test, his maximum THC intake would have been 315 ug, only slightly more than half of the 600 ug administered daily for ten consecutive days during his study. *Id.* Yet, even the much higher dose in the study, administered for ten consecutive days, produced a maximum THC level in urine of 5.2 ng/ml among all 15 volunteers, significantly less than the 15 ng/ml cutoff, and much less than the 57 ng/ml detected in the appellant's urine sample. Dr. Leson restated his conclusion that the appellant's consumption of the hemp bar on the morning of the drug test can be ruled out as the cause of his positive test "by a wide margin of safety." *Id.*

Dr. Leson provided testimony that was substantially consistent with the information provided in his affidavit. HT. He explained his background researching industrial uses for hemp in Germany, and conducting research on fibers for technical uses. *Id.* He asserted that hemp seeds have health benefits

through the fatty acids they contain, and stated that he is a supporter of the use of hemp as long as it has the proper composition. He further explained the study he conducted in some detail, and explained that he relied on information about the bar provided by the manufacturer to make his calculations and to determine whether the appellant's consumption of hemp seeds could have resulted in the positive drug test. *Id.* He further referred to some of the studies cited by the appellant and reiterated that they were not inconsistent with his study because the amount of THC ingested in those studies was much higher either because the hemp product came from China or the seeds had not been hulled or cleaned, as the seeds used in the bar the appellant consumed had been. *Id.* Most of the THC is in the hull – the outside of the seed – and washing them reduces THC levels considerably. *Id.* Dr. Leson stated that he has presented evidence in three cases in which an individual has challenged a positive drug test for marijuana; in each he has collected information about the amount of THC ingested, and in two of the cases, he testified that the quantity of THC may have caused the positive test, and in one that it could not have. *Id.*

On cross-examination, Dr. Leson stated that the appellant would have had to consume 50 times the dose of THC that he did by eating the one hemp bar he claims to have eaten on the day of the test to produce a urine sample with 57 ng/ml of the metabolite. HT. He explained that he used hemp oil in his study because it is a more efficient way to get THC into the bloodstream, compared with seeds, but he conceded that it is possible that products with a higher fiber content, such as bars, might have a slower absorption rate. *Id.* Dr. Leson further admitted that he has a friendship with John Roulac, the President of Nutiva, one of the hemp suppliers in this case, and that Mr. Roulac published a book he has written, but that he has no business interest in any of Mr. Roulac's products. *Id.* He had a financial interest in a hemp organization at one time, but no longer has such an interest. *Id.* He has no financial interest in TestPledge. *Id.* He further stated that an individual's metabolism does affect the way THC is absorbed, but

asserted on re-direct that the appellant's test result of 57 ng/ml cannot be explained by his metabolic rate, since studies show differential rates at a factor of two, not a factor of 50 or one hundred. He explained that he used GC/MS testing in his study because it is commonly used in commercial workplace drug testing. *Id.* Finally, he stated that his study went through a very rigorous process even after it was sent to the journal in which it was published to ensure the quality of the publication, and that the journal frequently rejects articles submitted. *Id.*

The appellant submitted both written and verbal testimony of Dr. Kent Holtorf. Dr. Holtorf is a physician in family practice. Tr. II at 4. He is also certified as a Medical Review Officer in which capacity he is able to interpret positive drug tests for federal testing programs to determine if an alternative medical explanation exists. *Id.* at 5; IAF II, Tab 15. He has performed extensive research in the field of drug testing accuracy and has also performed experiments on GC/MS apparatus. Tr. III at 5. He has been in an anesthesia residency and has studied metabolism and the pharmokinetic breakdown of substances, and in his current practice he does genetic testing for potential problems of toxicity from medications. *Id.*

In his written testimony, Dr. Holtorf asserted that there are many sources of false positive drug tests, including foods, over-the-counter medications, prescription medications, instrumental errors, human errors, reporting errors, and mislabeling and contamination of samples. IAF II, Tab 15. In reaching most of his conclusions, Dr. Holtorf cited 19 studies and articles in various journals, which he identified at the end of his written testimony. *Id.* He stated that the accuracy of drug testing laboratories is grossly inflated, and asserted that the GC/MS testing method used here produces numerous errors. *Id.* He argued that, on average, 48% of positive tests using immunoassay testing are false positives. He further asserted that select ion mode GC/MS, which was used by NWT in this case, is significantly less accurate than full spectrum GC/MS, and is prone to false positive results. *Id.* He stated that select ion mode GC/MS should only be

used for screening, and that positive tests should be confirmed with full spectrum mode. He further stated that individual variation in metabolization of common substances can lead to false positive results, particularly with the select ion mode. *Id.* In the conclusion of his written testimony, Dr. Holtorf opines that "it is more probable than not within a reasonable degree of scientific and medical certainty that this positive urine test was due to the use of a legal nutritional hemp bar … and unlikely from illicit drug use." *Id.*

At the hearing, Dr. Holtorf testified that, after reviewing this case, a possible explanation for the increased THC level in the appellant was the possibility that the appellant had an altered metabolism and could not break down the THC as would normally be expected. Tr. III at 6-7. Dr. Holtorf referred to a genetic profile performed on the appellant on December 5, 2002, and explained that it looks for genetic mutations for a number of enzymes that break down compounds. *Id.* at 7; IAF II, Tab 27, Exhibit Z. He explained that there are two phases of detoxification involved in metabolizing substances, phase one and phase two, and that when something is ingested, if there is a mutation, the whole process is affected, and there is a build-up of the substance. Tr. III at 7-8. The doctor asserted that the test shows that the appellant has several phase one and a major phase two genetic defect, and that the phase two defect means the appellant would tend to metabolize things very slowly. *Id.* at 8. He testified that the P-450 system is highly concentrated in the liver and it is for phase one metabolization and sets the molecule up for phase two. *Id.* He stated that, although there is not a lot of human data, in a number of animal studies, it is possible that [the P450 system] is how THC is metabolized, which would explain a positive drug test when a small amount of THC was ingested. *Id.* at 8-9. He admitted that those studies do not necessarily translate to humans, and that there is "nothing on phase two metabolization in THC." *Id.* at 9. Dr. Holtorf asserted that the 57 ng/ml of THC in the appellant's urine is a low level, and that very little THC is necessary for a positive test. He stated that less than one percent of the population has the

appellant's genetic defect, and that if it is assumed he ingested approximately 300 micrograms of THC, if he has a metabolization problem, a test result of 57 ng/ml of THC is possible. *Id.* at 10.

On cross-examination, Dr. Holtorf admitted that he has never had any of his own research published, and that although he is certified as a Medical Review Officer, he has never actually done that type of work. Tr. III at 18-19. Referencing the appellant's genetic profile, he stated that, in phase one, the CYP3A4 gene affects the metabolization of THC in animal studies, and there are no human studies. *Id.* at 34; IAF, Tab 27, Exhibit Z. He admitted that there are animal genes that humans do not have, and that it is difficult to pinpoint which gene is responsible for THC breakdown. Tr. III at 34. There are no clear studies that show which genes in phase two affect THC metabolization, but the NAT2 genes, which are in the liver, are likely involved. *Id.* There are 5 NAT2 genes, and the appellant has a significant double mutation in one of those, so if they are the ones involved, there is a 20 percent chance there will be a higher drug test result with little THC ingested. *Id.* at 35, 44-45; IAF, Tab 27, Exhibit Z. There are no tests showing how those genes affect metabolization of THC. Tr. III at 35-36. Dr. Holtorf stated that select ion GC/MS testing is less accurate than full spectrum or tandem mass spectrometry. *Id.* at 41.

During his testimony, Dr. Feldman explained in detail the immunoassay test, and stated that the test kits NWT uses are FDA-approved prior to use. Tr. I at 13-15. He opined that the immunoassay is very good at identifying negative tests, and that positives must be confirmed through GC/MS. *Id.* at 15. Dr. Feldman testified, again in some detail, about the GC/MS test, and explained that it is designed to identify carboxylic acid, the major metabolite found in urine after marijuana use. Tr. I at 20-27. He further explained that, in this case, because the laboratory was looking for a specific compound, a selected ion mode, rather than a full spectrum mode, was used for the GC/MS analysis. *Id.* at 27-28.

The latter is used as a screening test - when the object of the test is to look for any known substances in the sample, such as in forensic testing. *Id.* at 28-29.

Dr. Feldman testified that he has read Dr. Holtorf's written testimony submitted into the record, and that he had reviewed the literature Dr. Holtorf cited to support his conclusions. Tr. I at 50-51. Dr. Feldman testified that most, if not all, of the articles to which Dr. Holtorf cited to support his points actually either contradict his points or do not pertain to them. *Id.* at 54-69.

For example, according to Dr. Feldman, the article Dr. Holtorf cited to support his assertion that the accuracy of drug testing laboratories is grossly inflated is a 1988 overview of a committee suggesting standardization of methods and suggesting better practices by laboratories, since laboratories were not regulated before 1988. *Id.* at 54. The article does not state that laboratories are bad. *Id.* Standards were in place in 2001. *Id.* at 56. The article in Dr. Holtorf's fifth cite does not address the statement for which it was cited at all. *Id.* In addition, the articles cited to support Dr. Holtorf's claim that only 48% of samples testing positive for marijuana using immunoassay testing simply discuss the fact that immunoassays are not perfect in determining a positive sample, which is well known and is why even the manufacturer of the immunoassay test states that a more specific method must be used to obtain a confirmed result, and recommends GC/MS. *Id.* at 57-59. Five of the seven articles Dr. Holtorf cited to support his assertion that full spectrum GC/MS is more accurate than select ion GC/MS testing do not support that view. *Id.* at 62-67. The other two articles were not available for review. *Id.* at 64. Finally, another article quoted extensively by Dr. Holtorf in support of his claim that select ion mode is less accurate than full spectrum actually just references difficulties in using the technique properly, and in fact concludes that select ion testing is an important technique that has been used successfully for years. *Id.* at 67-68.

On cross examination, Dr. Feldman admitted that THC contained in a hemp product could cause a urine sample to test positive for carboxylic acid. Tr. I at

101. He further stated that the GC/MS confirms the immunoassay screening for carboxylic acid 95 to 96 % of the time. Tr. I at 109. The instances in which it does not confirm the result occur when other metabolites in marijuana are found by GC/MS but not carboxylic acid, or when the measurement is below 15 ng/ml. *Id.* at 110.

Findings

After careful review of all of the evidence above, I find that the agency has established by preponderant evidence that the appellant's positive drug test was more likely than not the result of his use of marijuana. First, although I found above that the appellant's testimony regarding the testing procedures followed by U.S. Healthworks was not credible, I find that he was consuming nutritional bars that contained hemp around the time he submitted his urine sample for testing. The appellant has argued consistently since shortly after he received the positive drug test result that he had consumed hemp bars, and that the THC in those bars may have caused the positive result. His contention that he ate the bars is corroborated by agent Angeli, who testified credibly that he saw the appellant eating one of the bars in question, and by the affidavit provided by the appellant's sister in which she stated that she had given the appellant a box of nutrition bars for Christmas in December, 2000, and that the box contained approximately seven hemp bars. The agency has presented no evidence to rebut the appellant's assertion that he was consuming the nutrition bars containing hemp.

Nevertheless, for the reasons explained below, I also find that the agency has established that, even if the appellant ate all seven of the bars containing hemp in the period shortly before he provided his urine sample, or even on the day of the test, the amount of THC contained in those bars was substantially lower than the amount that would have been required to yield a positive drug test. First, it is undisputed, and I find, that the store at which the appellant's sister bought the Govinda's Ginger/Chia bars he claims to have eaten first purchased those bars from Govinda's in December, 2000. Moreover, I find that Govinda's

purchased all of the hemp seeds in the bars it manufactured in 2000 from Nutiva, except for one purchase from Hemp Oil Canada in December, 2000, and that because the bars the appellant ate were purchased from the retailer in December, 2000, it is highly likely that the hemp seeds in the bars the appellant ate originated from Nutiva.

Regardless of the source of the hemp seeds, however, I find reliable and unrebutted the record evidence mentioned above showing that test results for the hemp seeds sold in 2000 by both Hemp Oil Canada and Nutiva's supplier, Kenex, Ltd. showed THC levels below 4 ug/g. I also credit the only record evidence showing the contents of the Ginger/Chia Hemp Bar, provided by Govinda's. According to that evidence, the bar weighs 43 grams and contains approximately 26% hemp seeds – for a total of approximately 11 grams of seed per bar.

After considering Dr. Leson's background, education, and experience, and reviewing the study that was described in the journal article he submitted, I find that he is qualified as an expert in the area of the effects of the consumption of hemp food products on workplace drug testing. Moreover, I found Dr. Leson's written and oral testimony to be very reliable and worthy of substantial weight. As Dr. Leson explained, during the last 10-day period of the study he conducted, the 15 volunteers were given up to 600 ug of THC in hemp oil each day, the volunteers provided urine samples on the ninth and tenth days that were tested by the same methods used to test the appellant's urine sample, and the maximum concentration of THC found in any urine sample was 5.2 ng/ml, less than 10% of that found in the appellant's urine sample, and significantly below the cutoff for a positive test of 15 ng/ml. I further credit Dr. Leson's assertion that, given the amount of hemp seed in the bars the appellant ate – 11 grams – and using a maximum of 4 ug/g of THC, as reported by the suppliers of the seeds, even if the appellant ate all seven bars on the morning he provided the urine sample, his maximum THC intake would have been a one-time dose of 315 ug, barely more than half that administered to the subjects in Dr. Leson's study every day for 10

consecutive days. To the extent the appellant has attempted to cast doubt on these findings by presenting earlier studies that show hemp products that caused positive drug test results, I note that none of those studies showed positive results with such a low dose of THC administered, and all appear to have been conducted prior to the strict control of THC content in hemp seeds produced in Canada. In addition, none of the individuals who conducted those studies testified in these proceedings. Thus, I find Dr. Leson's conclusion that the appellant's consumption of the Ginger/Chia hemp bars could not have caused his positive test result constitutes very persuasive evidence.[7]

In contrast, for the reasons explained below, I find Dr. Holtorf's testimony, both written and oral, worthy of little or no weight on any of the issues in this appeal. First, I found Dr. Feldman to be a very credible witness, because his testimony was both very straightforward and consistent, and because I found his background consistent with expertise in the matters about which he testified. As stated above, Dr. Feldman testified that most of the sources Dr. Holtorf cited in his written testimony did not support the points for which he cited them. Dr. Holtorf, who testified after Dr. Feldman, did not address the numerous discrepancies between his sources and his conclusions in his written submission, and I therefore find his written testimony entirely unreliable and afford it no weight.

Second, with regard to Dr. Holtorf's testimony regarding the appellant's genetic abnormality that may cause him to metabolize certain substances slower

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[7] The evidence that the appellant's urine specimen was reported as diluted would appear to support the agency's argument that he knowingly used marijuana and was attempting to dilute his urine by drinking fluids to lower the amount of THC detected. Because there is no evidence that the appellant had advance notice that he would be tested on the day in question, however, nor is there any evidence that the appellant delayed going to the lab to provide his sample after agent Farmer notified him that he was required to do so, I do not base my finding that the appellant's positive test was the result of his marijuana use on the fact that his specimen was reported as diluted.

than normal, I find that Dr. Holtorf's expertise in this area is in doubt, since he has never had any of his own research published, he has never acted in his capacity as a Medical Review Officer, and he admitted that there are no human studies that show which gene is responsible for THC breakdown. Moreover, most importantly, even assuming the NAT2 genes are "likely involved" in THC metabolization, as the doctor surmised, there are 5 of those genes and the appellant has a mutation on only one. Thus, Dr. Holtorf admits that there is only a 20% chance that the appellant's mutation affected his metabolization of THC. Based on the extensive uncertainty inherent in Dr. Holtorf's testimony regarding the affect of the appellant's genetic makeup on his breakdown of THC, without more evidence, I find it very unlikely that the THC in the hemp bars the appellant consumed caused his positive drug test.

Finally, to the extent the appellant argues that the immunoassay and select ion GC/MS testing was unreliable and an error may have caused a false positive, the only evidence he has presented to support this claim was in the written submission by Dr. Holtorf, which I have found worthy of no weight. I find that the agency has established through the reliable and credible evidence presented by Dr. Feldman, and Dr. Kuntz's explanation in the litigation packet, the reliability of the testing method used by NWT.

While I credit the testimony of the witnesses who testified that they believe the appellant is opposed to the use of illegal drugs, and that they never had any reason to believe he used marijuana, the appellant cannot claim that those witnesses were with him at all times prior to his positive drug test and, obviously, none could state with certainty that he never used marijuana during that period. Based on the foregoing findings pertaining to the appellant's alternative explanations for his positive test result, I find that the agency has established by

preponderant evidence that the appellant's positive drug test was caused by his use of a controlled substance – marijuana.[8]

The charge is SUSTAINED.

Harmful Procedural Error

To prove harmful procedural error, the appellant must show that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or sure of the error. 5 C.F.R. § 1201.56(c)(3); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

The appellant alleges that the agency committed harmful procedural error because the deciding official considered the fact that the appellant's conduct violated an Executive Order and the agency never provided the appellant with the Order during the disciplinary process. IAF, Tab 18; IAF II, Tab 36. According to 5 C.F.R. § 752.404(b)(1), "[t]he notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice." Here, there is no reference in the letter proposing the appellant's removal to an Executive Order. IAF, Tab 17, Subtab 4x. In addition, in the decision letter, the deciding official referred to the fact that the appellant's conduct violated an Executive Order, and the deciding official admitted that he was unaware if that Order was ever provided to the appellant. *Id.*, Subtab 4b; Tr. I at 176-177. Thus, I conclude that the agency's reliance on the Executive Order without notifying the appellant that it would do so, thus depriving him of an opportunity to review the Order in responding, constituted procedural error.

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[8] I afford no weight to the negative result in the drug test the appellant took of his own volition because he did not provide the sample used in that test until March 12, 2001, the specimen was handled without a documented chain of custody, and the test results specifically state that they should not be used "for an legal or employment evaluative purposes." IAF, Tab 17, Exhibit F.

Nonetheless, there is no evidence in the record that would support a finding that the agency's procedural error was harmful, i.e., that the deciding official would have reached a different conclusion if the appellant had had an opportunity to review and respond to anything in the Executive Order. The appellant has not explained how his response to the charge would have differed had he known the deciding official would rely on the Executive Order, and there is no indication in the record that the deciding official's reliance on the Order was a determining factor in his decision to sustain the charge or the penalty of removal. Therefore, I find that the appellant has failed to prove his affirmative defense.

Nexus and Penalty

The agency must show that there is a nexus between the sustained charges and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *See Merrit v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified*, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 175 n.2 (1987). Here, it is undisputed that the San Diego Sector of the Border Patrol seized a substantial quantity of marijuana during 2001, with several seizures occurring by agents from Brown Field Station. IAF, Tab 14, Subtab 6. Therefore, there is a significant chance that an individual in the appellant's position could come into contact with the illegal drug for which he is charged with testing positive. Moreover, Border Patrol agents are cross-designated with the Drug Enforcement Agency (DEA) to enforce drug laws. *Id.* at 120-121; IAF, Tab 4, Subtab 4jj (memorandum of understanding between INS and DEA). While there is no evidence that the appellant used marijuana while on-duty, the fact that the agency is charged with interdicting marijuana supports a finding that the appellant's misconduct was inconsistent with one of the agency's law enforcement missions. *See Masino v. United States*, 580 F.2d 1048, 1055-56 (Ct. Cl. 1978). Thus, I find that the agency has established a nexus between its action and the efficiency of the service.

Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In making that determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to insure that management discretion has been properly exercised. *See, e.g., Brown v. Department of the Treasury*, 91 M.S.P.R. 60, ¶ 7 (2002).

In the decision letter, the deciding official, Paul Blocker, Jr., stated that the appellant presented no acceptable explanation or mitigating circumstances that would justify or excuse his actions. IAF, Tab 4, Subtab 4b. He further noted that the appellant's actions shed considerable negative credibility on the appellant as a law enforcement officer in a position of high visibility, trust and reliability, and that the appellant had violated an Executive Order. *Id.* Mr. Blocker further stated that, although the appellant had not previously been disciplined, had outstanding performance evaluations, and had been with the service since February 1, 1998, he could not overlook the seriousness of the misconduct and removal was in the best interest of the Service, since drug use was inconsistent with service as a law enforcement officer and could not be tolerated. *Id.* Finally, he averred that, without confidence that the appellant would obey the law he is supposed to enforce, the appellant could not be retained. *Id.*

Mr. Blocker testified that he is the Deputy Chief Patrol Agent for San Diego Sector. Tr. I at 111-112. The duties of a Border Patrol agent along the border are to answer sensor devices and work still watch positions while maintaining the integrity of the border. Agents work independently, with minimal supervision, and work in both rural and urban areas. *Id.* at 112-113. As a deciding official, he looks at everything before him, including the *Douglas*

factors and the Supervisor's Guide to Discipline for guidance. *Id.* at 113; IAF, Tab 17, Subtab P. As a law enforcement agency, the agency has core values of professionalism, human life, integrity, trust, and shared effort. They are held to a higher standard and serve the public. *Id.* Mr. Blocker testified that, considering that he found incredible the appellant's claim that the positive drug test was the result of ingesting a hemp bar, it would be difficult to rehabilitate someone who would not admit his marijuana use, and that fact played an important role in his determination. *Id.* at 119. Considering that the agency is responsible for any illegal activity at the border and points of entry, it is important to have integrity and trust. *Id.* at 120. There were three seizures of marijuana by Brown Field Station in 2001, with a total of over 100 pounds seized. Tr. I at 121-122; IAF, Tab 14, Subtab 6.

Mr. Blocker went through the *Douglas* factors set out in the Supervisor's Guide to Discipline and testified that he considered that the offense was intentional, and that integrity was violated, which is important in the appellant's position. Tr. I at 123; IAF, Tab 17, Subtab P (Appendix A). The appellant could be required to serve as a witness in court, and the fact that he tested positive could be raised, tainting his testimony. Tr. I at 123-124. He considered that, as a law enforcement officer, the appellant is held to a higher standard. *Id.* at 124. Mr. Blocker also considered that the appellant had no prior discipline and he gave the appellant's three years of service a lot of weight. *Id.* at 124-125. He further testified that he considered that the possibility the appellant could come to work under the influence and that his offense could affect a potential court case negative impacted the appellant's ability to perform his job satisfactorily. *Id.* at 125. This was the only drug use case Mr. Blocker has seen in his current capacity, so he had nothing to which to compare it, and he considered the agency's Table of Penalties in making his determination. *Id.* at 125-126.

Mr. Blocker testified that he considered the appellant's potential for rehabilitation and determined that it would be hard to rehabilitate someone who

would not admit the offense. Tr. I at 126. There were no mitigating circumstances, and Mr. Blocker considered a lesser penalty, but determined that it would not be in the interest of the service. *Id.* at 126-127.

On cross-examination, Mr. Blocker stated that he knew the appellant prior to the positive drug test result, that the appellant was an outstanding employee, and that he had had no problems with the appellant. Tr. I at 147-148. There has been no allegation that the appellant was under the influence of marijuana while at work, nor that anyone saw him use marijuana off-duty. *Id.* at 149-150. For a Border Patrol agent, any use of marijuana, either on or off-duty would be excessive. *Id.* at 150. This was the appellant's first offense. *Id.* at 153. Mr. Blocker agreed that the offense in this case fall within offense number 34 in the agency's Table of Penalties, which is entitled "Excessive use of intoxicants or drugs while off-duty with disreputable effects," and calls for an official reprimand to a 5-day suspension for a first offense. *Id.* at 156; IAF, Tab 17, Subtab P (Table of Penalties at 46). The Table of Penalties is dated March 24, 1977. Tr. I at 157; IAF, Tab 17, Subtab P. The agency has a section on penalties for misconduct in its Policy Manual on Discipline and Adverse Actions, dated April, 1999. IAF, Tab 17, Subtab Q. In the Table of Penalties attached to that document, the range of discipline for a first offense of "Excessive use of intoxicants or drugs while off-duty with disreputable effects" has not changed. *Id.*; Tr. I at 158.

Mr. Blocker also reviewed the agency's "Drug-Free Workplace Program Supervisors Guide" as part of the discipline process. Tr. I at 159; IAF, Tab 4, Subtab 4ii. That Guide states that employees who are found to use illegal drugs must be disciplined when they voluntarily admit the drug use, complete drug counseling or EAP, and thereafter refrain from drug use. Tr. I at 160; IAF, Tab 4, Subtab 4ii. The appellant did undergo EAP counseling and offered to be tested as often as the agency wanted, but he would not admit to drug use. *Id.* at 161. Mr. Blocker would not want one of his agents to lie about something to get a better

result. *Id.* The Guide states that removal is mandatory if the employee refuses counseling or EAP, and if an employee has been found not to have refrained from illegal drug use after a first finding. *Id.* at 162. The agency's Table of Penalties in the 1977 document calls for a range of penalty from a five-day suspension to a removal for a second offense of Excessive use of intoxicants or drugs while off-duty with disreputable effects. *Id.* at 163; IAF, Tab 17, Subtab P. Mr. Blocker testified that he believed the Guide and Table of Penalties are consistent. Tr. I at 164.

Mr. Blocker stated that, at the time he decided the appellant's case he had been the deciding official in approximately 30 other cases. Tr. I at 172-173. He stated that he weighed the Discipline Guide, but was not bound by it. *Id.* at 175. Although the Table of Penalties maxes out at a ten day suspension, agents are held to a higher standard and are exposed to narcotics in the line of duty; if there had been an admission the outcome may have been different. *Id.* Although the Supervisor's Guide to Discipline states that the punishment should be the minimum necessary to correct the behavior, the appellant's removal "corrected the fact that he would not smoke marijuana as a Border Patrol agent." *Id.* at 178; IAF, Tab 17, Subtab P. The Guide also refers to removal as the "capital punishment of federal discipline," and refers to certain instances in which it is appropriate, including felony criminal misconduct. Tr. I at 179; IAF, Tab 17, Subtab P. There is no allegation here that the appellant committed felony criminal misconduct. Tr. I at 179. The Guide refers to a suspension of 15 days or more as a major action appropriate for serious first offenses where there is some potential for rehabilitation, and although the appellant was willing to undergo drug testing as often as the agency wanted, to be rehabilitated an admission was necessary. *Id.* at 179-180. In considering the *Douglas* factors, Mr. Blocker considered that the appellant's ingestion of THC may have been inadvertent, and after he weighed that, he made his determination. *Id.* at 181-182.

On re-direct, Mr. Blocker clarified that, in the 1977 Table of Penalties, for the applicable offense, it states "Actions should be in conformance with prescribed programs relating to misuse of alcohol and drugs," and that the INS program referenced is the drug-free workplace. Tr. I at 182. In the Drug-Free Workplace Program Supervisors Guide, it states that disciplinary actions taken for illegal drug use must be consistent with applicable statutes and regulations and include removing the employee from the service. *Id.* at 183; IAF, Tab 4, Subtab 4ii at 7.

After careful review of the decision letter and the deciding official's testimony, I find that the deciding official gave proper consideration to all relevant *Douglas* factors in determining the appropriate penalty for the sustained misconduct. The appellant argues, essentially, that the deciding official failed to give proper consideration to the penalty suggested by the agency Table of Penalties for a first offense of the type of misconduct with which he was charged. IAF, Tab 36 at 8-9. As discussed above, the deciding official admitted that the appellant was not being charged with on-duty drug use, and further admitted that the charge here fell within the charge of "Excessive use of intoxicants or drugs while off duty with disreputable effects" listed in the Table of Penalties. Although the suggested range of penalties for a first offense under that charge is from a reprimand to a ten-day suspension, the Table of Penalties also states that any action should be taken "in conformance with prescribed programs relating to misuse of alcohol and drugs." IAF, Tab 17, Subtab P at 46. Here, there is no dispute that the agency had a program in place that addressed discipline for drug-related offenses – the Drug-Free Workplace Program Supervisor's Guide. *Id.*, Tab 4, Subtab 4ii. As the deciding official testified, that Guide includes removal as a possible sanction for illegal drug use. *Id.* at 7; Tr. I at 183. Thus, I find that removal for the sustained misconduct in this appeal was not inconsistent with the agency's Table of Penalties.

The appellant also points to statements in the agency's Supervisor's Guide to Discipline, as well as the Drug-Free Workplace Program Supervisors Guide, regarding the limited circumstances in which removal is either mandatory or appropriate, and he claims that removal for the type of misconduct at issue here is inappropriate in light of the fact that he underwent EAP counseling after the positive drug test and expressed a willingness to be drug tested as often as the agency wanted. IAF, Tab 36. It is undisputed, however, that the appellant was not willing to admit that his positive test was the result of his knowing use of marijuana. Under those circumstances, I find that the deciding official's conclusion that the appellant did not have significant potential for rehabilitation was reasonable, and that the portions of the Guides that the appellant cites are not applicable here.

The appellant has alleged that he was subjected to a disparate penalty. IAF, Tabs, 16 & 20. Such an allegation must be proven by the appellant. *See Jeffries v. Department of the Navy*, 78 M.S.P.R. 255, 261 (1998). To establish disparate penalty, an employee must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *See Rackers v. Department of Justice*, 79 M.S.P.R. 262, 283 (1998). Here, the appellant appears to be arguing that another Border Patrol agent at Brown Field Station, Brent Haywood, tested positive for THC and was given an opportunity to keep working before he was ultimately fired for testing positive a second time. Tr. II at 93, 193. The appellant also testified, however, that it was his understanding that Mr. Haywood admitted his drug use after the first positive test. *Id.* at 93.

First, other than testimony of the appellant and Mr. Angeli, which both admitted was hearsay, there is no evidence in the record to show whether Mr. Haywood was charged with the same offense as the appellant, nor is there evidence to show that he was similarly situated to the appellant. Tr. II at 193 (Angeli's testimony indicating that Mr. Haywood was working "with Welfare and RACs and around the Sector Headquarters quite a bit"). Even assuming that the

charges were the same and that all other relevant aspects of the appellant and Mr. Haywood's employment were substantially similar, I find that Mr. Haywood's admission that he had used drugs rendered the circumstances surrounding the behavior with which he was charged significantly different from the circumstances surrounding the appellant's misconduct. *Rackers*, 79 M.S.P.R. at 283-84. Accordingly, I find that the appellant has not established that he was subjected to a disparate penalty.

In conclusion, while it is clear that, considering all of the factors that bear on the penalty determination in this case, the deciding official had some basis to assess a penalty less severe than removal, because I have found that he gave all of the relevant *Douglas* factors appropriate consideration, I find that the agency's choice of penalty was within the tolerable limits of reasonableness. *See, e.g., Holland v. Department of Defense*, 83 M.S.P.R. 317, ¶ 9 (1999). I must therefore affirm the agency's action. *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

FOR THE BOARD:

_____
Craig A. Berg
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 14, 2003**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal

Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

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

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.