Not Yet Scheduled For Oral Argument

United States Court of Appeals for the Federal Circuit

No. 2017-2584

JEFF A. HANSEN,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Appellee.

APPEAL FROM THE U.S. MERIT SYSTEMS PROTECTION BOARD

Corrected Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant

---

Debra A. D'Agostino
The Federal Practice Group
1750 K Street, N.W., Suite 900
Washington, D.C. 20006
Tel: (202) 862-4360
ddagostino@fedpractice.com

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JEFF A. HANSEN **v.** DEPARTMENT OF HOMELAND SECURITY

Case No. 2017-2584

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

DEBRA D. A'GOSTINO

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Metropolitan Washington Employment Lawyers Association	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Debra A. D'Agostino, Founding Partner
The Federal Practice Group

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

2/5/2018
Date


Signature of counsel

Please Note: All questions must be answered

Debra A. D'Agostino
Printed name of counsel

cc: _____

Reset Fields

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association ("MWELA"), a professional association of over 330 attorneys, is the local affiliate of the National Employment Lawyers Association ("NELA"), the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes.

MWELA respectfully submits this amicus brief to aid this Court in addressing whether to remove a federal employee for the charge of testing positive for marijuana, a federal agency must show by preponderant evidence that the employee intended to use marijuana, or otherwise committed misconduct. The broader issue this case presents is whether the Board should create a class of drug offenses where a federal agency's sole burden would be to produce a positive test result to satisfy its burdens, thus allowing agencies to escape their established burdens under the Civil Service Reform Act.

For these important reasons, MWELA respectfully submits this amicus brief. Per Rule 29(a), Fed. R. App. P., all parties have consented to the filing of this brief.

Statement Pursuant to Rule 29(c), Fed. R. App. P.

Pursuant to Rule 29(c), Fed .R. App. P., *amicus* states that:

(A) *Amicus* alone authored the entire brief, and no attorney for a party authored any part of the brief;

(B) Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting the brief, exclusive of the dues counsel on appellant's side have paid for their membership in *amicus* MWELA; and

(C) No person, other than the *amicus curiae*, their members and cooperating attorneys, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

The issue addressed in this amicus brief is whether the U.S. Merit Systems Protection Board ("MSPB" or "Board") erred in affirming the decision of the Department of Homeland Security ("Agency"), U.S. Customs and Border Protection ("CBP"), to remove Appellant Jeff A. Hansen from federal service for a charge of testing positive for marijuana, by holding that the charge did not require the Agency to prove the element of intent, and that Mr. Hansen, not the Agency, had to prove he lacked intent to commit misconduct to establish the removal was not in the efficiency of the service, and that the Agency's penalty was not reasonable?

SUMMARY OF FACTS RELEVANT TO *AMICUS* BRIEF[1]

In 2002, CBP issued a revised Drug-Free Federal Workplace Program pursuant to Executive Order 12564, signed by President Ronald Reagan on September 15, 1986. Appx28-29. This program provides:

> Confirmed positive test results demonstrate use of illegal drugs; therefore, consistent with the U.S. Customs Service Table of Offenses and Penalties and applicable laws and regulations, employees who use illegal drugs are subject to disciplinary action up to and including removal from the Service.

Appx43-44. The program also provides, "[a]ll disciplinary/adverse actions shall be progressive in nature and must comply with applicable laws, rules, and regulations, including 5 U.S.C. 7511 *et seq."* Appx50.

[1] This is a highly distilled factual summary taken from the record below.

On May 16, 2016, the Agency proposed removing Mr. Hansen from federal service based on the charge "Positive Test for Illegal Drug Use-Marijuana." Appx25-27. The proposing official cited the Agency's Standards of Conduct, section 6.6, which states, "CBP is charged with the responsibility for interdicting illegal drugs that are being brought into the United States. Therefore, CBP employees are prohibited from using . . . illegal drugs. . . [R]emoval action will be initiated with respect to any CBP employee who is found to use, possess, sell, or distribute illegal drugs." Appx25. The proposing official also noted marijuana "is an illegal drug under the federal law that this Agency enforces. Therefore, I find a nexus between your conduct and your employment with CBP." *Id*.

In response, Mr. Hansen asserted that he should not be removed because the positive test result was caused by his unknowingly having eaten marijuana-laced brownies. Appx19-20.

On October 19, 2016, the Agency removed Mr. Hansen based on the positive test result, citing the Agency's Standards of Conduct. Appx19-23. The deciding official rejected Mr. Hansen's contention that he did not intentionally ingest marijuana, and with regard to the penalty, stated, *inter alia*, "[f]irst, and foremost, this is a serious offense." Appx20.

Mr. Hansen appealed his removal to the MSPB, which affirmed the Agency's decision. The Administrative Judge determined the Agency met its burden to sustain

the charge of testing positive for marijuana by demonstrating the positive result, without regard to any other factors, such as whether Mr. Hansen intended to ingest marijuana. Appx7. Additionally, the Administrative Judge held the removal was in the efficiency of the service, and the penalty of removal was reasonable. Appx7-8. The Administrative Judge explained in the Initial Decision:

> Of primary importance to both findings is my determination that ***the appellant has not shown that the deciding official erred in not accepting his explanation that he unknowingly ate marijuana-laced brownies at a barbeque two days prior to the positive test.*** Absent such a showing, I find that there is a clear nexus between the positive test and discipline to promote the efficiency of the service given "the vital importance of agency drug-testing programs, given that the use of illegal drugs, on or off duty, by federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public." *McNeil*, 117 M.S.P.R. at ¶ 18; ***cf. Torres v. Department of Justice***, 343 Fed. Appx. 610, 613 (Fed. Cir. 2009)(nonprecedential) ("It does not promote the efficiency of the service to remove an employee for using an 'illegal substance'…when the employee could not be guilty of criminal conduct because he did not know the substance with which he was being injected was a controlled substance."); and *McNeil*, 117 M.S.P.R. at ¶ 14 (assuming, without finding, that such a nexus existed, the Board went on to hold that where the use of marijuana was unintentional, "the penalty of removal is unreasonable and that the maximum reasonable penalty is no penalty at all.").
>
> Moreover, absent acceptance of the appellant's explanation that he unknowingly ate marijuana-laced brownies, the penalty of removal is likewise appropriate.

Id. (Emphasis added). Finally, the Administrative Judge stated:

> As a starting point in the determining whether the appellant tested positive because of inadvertent ingestion of marijuana-lace brownies,

> ***I have placed the burden of showing such inadvertent ingestion on the appellant*** for two reasons. First, as Federal Circuit Judge Dyk noted in his partial dissent in *Torres*, 343 Fed. Appx. at 614, it is well known that employees that test positive of illegal drug use "frequently claim" unknowing use and it is difficult (and I find unfair) for the agency to have the burden of disproving the employees' allegations, especially where the facts related to the off-duty conduct that led to the positive test are uniquely within the appellant's knowledge and would require an extensive investigation to accept or rebut. Second, although not clearly stating who had the burden of proving inadvertent ingestion, the Board in *Johnson* and *McNeil* found no penalty appropriate based on deference to the credibility determinations made by the administrative judges, who in turn, relied on the factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (listing the factors to be considered in making and explaining credibility determinations). Thus, in both cases, the Board, in essence, found that the appellant had shown inadvertent ingestion.

Appx9-10. (Emphasis added). The Initial Decision issued by the Administrative Judge became the final Decision by the Board.

SUMMARY OF ARGUMENT

The three-pronged burden of proof in cases where a federal agency removes an employee for misconduct is well established, and there is no basis to disturb that burden in cases where the charge is a positive test result for marijuana. In the Board's decision, the Administrative Judge held that the Agency could meet its burden where the charge was a positive test for marijuana by producing the result, without any further showing of intent or wrongdoing on Mr. Hansen's part. The Administrative Judge then erroneously put the burden on Mr. Hansen to prove his lack of intent to demonstrate his removal was not in the efficiency of the service and that removal was

not a reasonable penalty.

The result is that the Board has allowed a federal agency to remove an employee without ever having to prove the employee committed any wrongdoing, which violates the Civil Service Reform Act.

ARGUMENT

I. The Board Must Require Agencies to Prove Intent or Wrongdoing by the Employee to Remove an Employee for a Positive Drug Test.

The Civil Service Reform Act protects federal employees from adverse actions based on mere suspicion or allegations of misconduct by mandating that adverse actions may only be taken for "cause," and by requiring an agency to prove the specific alleged "cause" by a preponderance of the evidence when an employee seeks review of the action by the Board. *See* 5 U.S.C. §§ 7513(a), 7701(c)(1)(B); *Gonzalez v. Dep't of Homeland Sec.*, 114 M.S.P.R. 318, 333 (2010). The fundamental question raised in this case is whether the existence of a positive test for marijuana alone is sufficient cause to remove a federal employee, or whether agencies should be required to establish some evidence of intent to use a drug, or at least some evidence of wrongdoing by the employee.

A. The Administrative Judge Erred by Failing to Apply the Established Burden of Proof.

As the Administrative Judge set forth at the outset of the Initial Decision, it is well established that in an appeal of adverse action under 5 U.S.C. Chapter 75,

the Agency bears the burden to:

> . . . prove, by a preponderance of the evidence, the factual basis for the misconduct charged and establish that disciplinary action, based on the proven misconduct, promotes the efficiency of the service. *See* 5 U.S.C. §§ 7513(a) and 7701(c)(1)(B). The "efficiency of the service" requirement includes a showing that some disciplinary action is warranted (the "nexus" requirement) and that the particular penalty is within the tolerable limits of reasonableness. Thus, three distinct elements must be proven in any adverse action. *See, e.g.*, *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981).

Appx4. The applicability of these burdens has been without regard to the particular charge of misconduct raised against the employee. Nevertheless, in affirming the Agency's removal of Mr. Hansen, the Administrative Judge placed the burden on Mr. Hansen to disprove that he committed any wrongdoing or had any intent to use drugs, despite not requiring the Agency to prove that Mr. Hansen had this intent to sustain its charge against him. This is a clear error. The Agency should have borne the burden of proving intent to meet its burden to show removing Mr. Hansen was in the efficiency of the service and with regard to whether removal was an appropriate penalty, as for any other proceeding under Chapter 75. Otherwise, the Agency would be impermissibly able to remove Mr. Hansen without cause to do so.

The applicability of the usual three-pronged burden of proof for the Agency here, where the charge is testing positive for marijuana, is reflected in CBP's Drug-Free Federal Workplace Program, which specifically provides that "[a]ll

disciplinary/adverse actions . . . must comply with applicable laws, rules, and regulations, including 5 U.S.C. 7511 *et seq."* Appx50. The language in Executive Order 12564 mirrors this, stating at Section 5, *Personnel Actions*, (g), that "Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act."

Moreover, this Agency unambiguously asserted it removed Mr. Hansen for his misconduct.[2] The proposal and decision cited Mr. Hansen's violation of the Agency's Standards of Conduct, and the deciding official stated Mr. Hansen committed "a serious offense." Appx25; Appx20. Thus, there should be no reason for the Board to not require the Agency to prove Mr. Hansen engaged in some wrongdoing to remove him, not the other way around.

B. Unless the Agency Proves Mr. Hansen Intended to Use Marijuana, His Removal Cannot be in the Efficiency of the Service.

[2] While the MSPB generally sustains removals of appellants who fail to maintain a condition of employment regardless of intent, *see, e.g., Gallegos v. Dep't of Air Force*, 121 M.S.P.R. 349 (2014), the Agency did not frame the charge against Mr. Hansen in this manner, nor would it have been appropriate. CBP's Drug-Free Federal Workplace Program demonstrates that testing negative for marijuana is not a condition of employment, as instead of requiring removal for a positive test, it states, "employees who use illegal drugs are subject to disciplinary action up to and including removal from the Service," and notes, "[a]ll disciplinary/adverse actions shall be progressive in nature. . . ." Appx43-44; Appx50.

The Administrative Judge held that the positive marijuana test result itself was sufficient evidence to sustain the Agency's charge and to show the removal was in the efficiency of the service, without regard to whether that test result meant Mr. Hansen committed misconduct. Appx7. In doing so, the Administrative Judge, citing *McNeil v. Department of Justice*, 117 M.S.P.R. 533 (2012), rejected Mr. Hansen's assertion that the Agency had to show that he intentionally ingested marijuana to meet its burdens.

In *McNeil*, the appellant, like Mr. Hansen, was charged with testing positive for marijuana, and, also like Mr. Hansen, asserted that his ingestion of marijuana was unintentional. The administrative judge in *McNeil* reversed the removal, holding "the agency was required to prove that the appellant's ingestion of marijuana was intentional to satisfy the efficiency of the service standard." *McNeil*, 117 M.S.P.R. at 534. On appeal, the Board affirmed the reversal of the removal, noted that the administrative judge did not find intent to be an element of the charge, and explained:

> We recognize that this case appears to involve a novel legal question regarding whether the agency met its burden of proving nexus. Nevertheless, under the particular circumstances of this appeal, we need not resolve the question of whether the agency proved a nexus between the grounds for its action and the efficiency of the service. Even assuming that such a nexus exists, we find that the penalty of removal is unreasonable and that the maximum reasonable penalty is no penalty at all. *See Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 302 (1981) (the appropriateness of a particular penalty is a separate and distinct question from that of whether there is

> an adequate relationship or nexus between the grounds for an adverse action and the efficiency of the service).

Id. at 540. The Board further explained that, "the agency did not charge the appellant with "use" of illegal drugs; rather, it charged him with providing a specimen that tested positive for an illegal drug." *Id*.

The other decision from the Board on this direct issue is *Johnson v. Department of the Air Force*, 122 M.S.P.R. 333 (2015), a non-precedential decision, where an employee was charged with drug "use," and the administrative judge "found that the charge denoted an element of scienter and thus required the agency to prove that the appellant's ingestion of marijuana was intentional." The Board while affirming the Administrative Judge's decision, nevertheless explained it was "not holding that scienter is a necessary element in establishing violations of controlled substance prohibitions in the federal workplace, leading to discipline." *Id.*

This Court should not permit the Board to allow different burdens of proof for charges of use of illegal drugs as opposed to testing positive for illegal drugs. In both cases, the ultimate question is whether the employee committed misconduct warranting discipline – a determination that requires the Agency to prove intent on the employee's part. The existence of the positive test result, separate and apart from any action on the part of the employee to cause the positive

test result, cannot be misconduct by the employee, just as unintentional use of a drug is not misconduct warranting discipline.

There is no legitimate basis to allow agencies to remove an employee not culpable of misconduct, solely because the charge at issue is a drug offense. This is contrary to extensive precedent and practice under Chapter 75 across the entire spectrum of federal civil service employment.

C. It Must be the Agency's Burden, not the Employee's Burden, to Prove Intent.

The Administrative Judge plainly stated that he placed the burden of proof on Mr. Hansen to show incidental ingestion, *i.e.*, lack of intent, which was relevant to both whether his removal was in the efficiency of the service and whether removal was a reasonable penalty. Appx7-9. This is an especially egregious error given the Administrative Judge's determination that the Agency did not need to prove intent to sustain its charge. Under this scheme, the sole burden on an agency in a case concerning a positive test for marijuana is to produce the test result, and not to prove any wrongdoing by the employee.

While, as the Administrative Judge pointed out, it may be difficult for an agency to prove intent, that is true in all cases where intent is an element. Again, there is no basis for treating a drug related offense any differently than any other offense. There is no precedent for carving out a "marijuana exception" to Chapter 75's burden of proof standard, or exceptions for any other charges, despite the

various charges having different elements. If the Board permits this exception to the usual burdens, agencies will surely seek other exceptions to Chapter 75, but only Congress has the authority to do that.

CONCLUSION

The Board erred in affirming the Agency's removal of Mr. Hansen without holding the Agency to its burden to prove that Mr. Hansen acted with intent to ingest marijuana or otherwise committed wrongdoing warranting discipline. It was error for the Administrative Judge to shift the burden of proof to Mr. Hansen to establish he lacked intent, and the Agency's decision to remove him must be reversed.

Respectfully submitted,

/s/ Debra D'Agostino

_____

The Federal Practice Group
1750 K Street, N.W., Suite 900
Washington, D.C. 20006
Tel: 202-862-4360
ddagostino@fedpractice.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:
   [X] this brief contains 3, 026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
   [X] this brief has been prepared in a proportionally spaced typeface using *Microsoft Word 2010* in *14pt Times New Roman*; *or*
   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: 02/05/2018

/s/ Debra D'Agostino
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February 2018, I caused the foregoing brief to be served by this Court's electronic case filing system on the following:

Counsel for Plaintiff-Appellant Michael J. Kator Jeremy D. Wright Daniel Clark Kator, Parks, Weiser & Harris, P.L.L.C. 1200 18th Street, N.W., Suite 1000 Washington, DC 20036 (202) 898-4800	*Counsel for Defendant-Appellee* Douglas G. Edelschick U.S. Department of Justice, Commercial Litigation Branch P.O. Box 480, Ben Franklin Station Washington, DC 20044 (202) 353-9303 Fax: (202) 305-7643

I further certify that I caused the required bound copies of the foregoing brief to be filed with the Clerk of the Court by placing them in a postage pre-paid envelope addressed to the clerk and depositing that into a U.S. Postal Service mailbox.

/s/ Debra D'Agostino

_____

Debra D'Agostino
The Federal Practice Group
1750 K Street, N.W., Suite 900
Washington, D.C. 20006
Attorney for Amici Curiae