THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0235-11
ROBERT TATE,	)	
Employee	)	
	)	Date of Issuance: April 7, 2014
v.	)	
	)	
D.C DEPARTMENT OF PARKS	)	
RECREATION,	)	
Agency	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge

Frederic W. Schwartz, Jr., Esq., Employee Representative
Kevin J. Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Robert Tate ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("Office" or "OEA") on September 29, 2011, challenging the Department of Public Works' decision to terminate him. Employee was terminated from his position as a Recreation Specialist, effective September 23, 2011. This matter was assigned to me on June 26, 2013.

A Prehearing Conference was held on August 2, 2013. At the Prehearing Conference, Agency was advised that it had yet to file its Answer to Employee's Petition for Appeal. A Post Prehearing Conference Order ("PPCO") was issued on August 5, 2013, which required Agency to file its Answer to Employee's appeal. Employee was then required to submit a brief addressing the arguments set forth in Agency's Answer. Both parties responded to the PPCO. A Prehearing Conference, in anticipation of an Evidentiary Hearing, was scheduled for December 9, 2013.[1] However, pursuant to a request by the parties, a Telephone Conference was held on December 9, 2013, in lieu of the Prehearing Conference. As discussed in the Telephone Conference, Employee filed a Motion for Summary Disposition on December 23, 2013. Agency filed its opposition to Employee's Motion for Summary Disposition and a Cross Motion for Summary Disposition on February 24, 2014. Based on the record, and a Consent Motion filed on December 9, 2014, the parties elected against an Evidentiary Hearing and requested that this matter be decided on the record. The record is now closed.

[1] *See* Amended Prehearing Conference Order (November 15, 2013).

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take an adverse action (termination) against Employee.

2. If so, was the penalty of termination appropriate under the circumstances.

UNDISPUTED FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On April 13, 2004, the Council of the District of Columbia enacted the Child and Youth Safety and Heath Omnibus Amendment Act of 2004 ("CYSHA"). This legislation mandated drug and alcohol testing for District employees who interact with, or whose duties impact, children and youth as a condition of employment. *See* D.C. Code § 1-620.31 *et seq*. An employee subject to these testing who tests positive for drug or alcohol use is subject to removal. *See* D.C. Code § 1-620.35(a).

On January 9, 2009, Agency reassigned Employee to the position of Recreation Specialist.[2] Prior to his reassignment, on November 3, 2008, Employee signed an *Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth* form (Notification of Drug and Alcohol Testing), wherein he acknowledged that the position he occupied was governed by CYSHA, and that he was subject to mandatory drug and alcohol testing. At the time Employee signed this notification, he was under the strictures of CYSHA. On July 21, 2009, Agency placed Employee on paid administrative leave for approximately four (4) months. The circumstances surrounding Employee's administrative leave is unclear based on the record before this Office. After returning from administrative leave, Employee was assigned to the Theordore Hagan Senior Center and then to the For Stevens Senior Center where he remained until his termination on September 23, 2011.

On April 6, 2011, Employee was summoned to appear for a random drug test at the Department of Human Resources. Employee appeared that day and provided a urine sample as directed. This urine sample was tested by Laboratory Corporation of America (LabCorp), which used immunoassay testing. On April 9, 2011, Labcorp determined the specimen to be positive for marijuana. This positive drug result was confirmed by Labcorp using a gas chromatography/mass spectrometry test. Based on the positive test result, and upon

[2] Agency originally appointed Employee to the position of Information Technology Specialist on November 27, 2006. Employee was then separated for cause on July 12, 2007. On March 12, 2008, Employee's termination was subsequently overturned by OEA, and Agency was ordered to retroactively reinstate Employee. *See* OEA Matter No. 1601-0117-07 (March 12, 2008). Because Employee's original Information Technology position was apparently abolished, Agency reinstated employee to the position of Recreation Specialist. On January 9, 2009, Agency reinstated Employee, effective July 13, 2007.

consideration of Employee's response to the *Notice of Proposed Adverse Action*, Employee was served a Notice of Final Decision of Removal on August 23, 2011. Employee's removal was based on the positive drug test result and "receipt of derogatory information concerning an employee's suitability." *See* 6B DCMR §§ 1603.3(i), 407.1(c). Employee's termination became effective on September 23, 2011.

Employee's Notice of Final Decision of Removal was based on the following causes:

1. As outlined in 6B DCMR § 1603.3: "Cause for disciplinary action for all employees covered under this chapter is defined as follows: (i) Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result;" and as further outlined in D.C. Official Code § 1-620.35(a): "A drug and alcohol testing including the notice required by § 1-620.32(d), shall be issued at least 30 days in advance of implementing the drug and alcohol program and to inform District employees of the requirements of the program and to allow each employee one opportunity to seek treatment, if he or she has a drug or alcohol problem. Thereafter, any confirmed positive drug test result…shall be grounds for termination of employment…."

2. In accordance with 6B DCMR § 407.1(c), which states: "The D.C. Department of Human Resources (DCHR)…shall initiate, or initiate and take, suitability action against District government employees pursuant to this section and chapter when: (c) Derogatory information about an employee, of nature that will impact the employee's suitability to continue performing the duties of his or her position, is disclosed by a credible source or independently discovered."

Employee's position

Employee asserts that he should not have been subjected to drug testing under CYSHA.[3] Employee further argues that at the time of the April 6, 2011 drug test, he did not interact with children, nor did his duties impact children or youth as a condition of his employment. Additionally, Employee asserts that at the time of the drug testing, he was specifically forbidden from interacting with children.[4] Prior to being randomly drug tested, Employee was placed on administrative leave with pay on July 21, 2009, for four (4) months. Employee states that he was not provided a reason as to why he was being placed on administrative leave. After returning from administrative leave, Employee was reassigned to Theodore Hagan Senior Center in November of 2009, and was subsequently assigned to Fort Stevens Senior Center where he was assigned at the time he was required to submit a drug test.[5] Employee inquired as to why he was placed on administrative leave and reassigned and was told that there were several letters of complaints concerning his behavior with children in his file. Employee was not able to see his file that contained the letters of complaints. Based on these complaints, Employee was transferred to the senior centers since he was no longer permitted to interact with children.[6]

[3] *See* Employee's Motion for Summary Disposition (December 23, 2013).
[4] *See* Employee's Response to Agency Answer at 2 (September 16, 2013).
[5] *Id*., Affidavit of Robert Tate.
[6] *Id*.

Because Employee did not interact or have any responsibilities regarding children or youth, he argues that he should not have been subject to drug testing under CYSHA.

Secondly, Employee contends that he was tested without statutory authority, in violation of the District's Human Resource regulations. He further argues that his Constitutional Rights were violated.[7]

Thirdly, Employee argues that he did not violate any of the District's Drug-Free Workplace policies. Specifically, Employee states that his passive ingestion of marijuana does not mandate discipline under the District's laws and regulations. Because of the passive ingestion of marijuana, Employee does not believe he should have been removed from his position with Agency.[8]

Agency's position

Agency argues that Employee acknowledged being in a safety-sensitive position and was subject to random drug testing under CYSHA because he signed an *Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth* form ("Notification of Drug and Alcohol Testing Form"). Agency also asserts that Employee was terminated for cause; specifically for "use of illegal drugs, unauthorized use, or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result."[9] Agency asserts that because there is no dispute that Employee's drug test was confirmed positive for marijuana, it has established cause to remove Employee from his position with Agency.

Whether Employee was subject to the Child and Youth Safety and Health Omnibus Amendment Act of 2004 when he took his drug test.

Employee first argues that he should not have been subject to drug testing under CYSHA because he did not occupy a safety-sensitive position or interact with children or youth as a condition of his employment. *See* D.C. Official Code § 1-620.31, *et. seq.*[10] Employee acknowledges that he signed the Notification of Drug and Alcohol Testing form on November 3, 2008, when he returned to Agency as a result of the reversal of his termination in a prior OEA matter. However, Employee asserts that the mandatory drug testing requirements no longer applied to him from the time he was placed on administrative leave and then assigned to Theodore Hagan Senior Center and Fort Stevens Seniors Center. While it should be noted that the Theodore Hagan Center and the Fort Stevens Center are not exclusively for seniors, Agency does not contest that Employee was assigned to the Senior Services Division at both locations at the time he was drug tested. Employee further argues that he no longer interacted with children or youth, nor did his duties impact children and youth as a condition of his employment. Thus, Employee contends that he did not fall under the definition of a covered safety-sensitive position, and was not subject to random drug testing under CYSHA.

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[7] *See* Employee's Motion for Summary Disposition (December 23, 2013).
[8] *Id.*
[9] *See* 6B DCMR § 1603.3.
[10] *See* Employee's Response to Agency Answer at 2 (September 16, 2013).

Agency argues that because Employee signed the Notification of Drug and Alcohol Testing Form on November 3, 2008, that he acknowledged that he was subject to the CYSHA drug testing. Agency also acknowledges that after it placed Employee on administrative leave for approximately four months, that it assigned Employee to the Theodore Hagan Senior Center and then to the Fort Stevens Senior Center, where he remained until he was terminated.[11]

Here, when Employee signed the Notification of Drug and Alcohol Testing Form on November 3, 2008, he acknowledged that his position as a Recreation Specialist was a safety-sensitive position subject to random drug testing. Despite the fact that Employee was placed on Administrative Leave for approximately four (4) months, once he returned to duty, his title remained a Recreation Specialist.

Pursuant to D.C. Official Code § 1-620.32(a), an appointee to a safety-sensitive position with a District government agency shall be subject to drug and alcohol testing. 6-B DCMR § 3903, states that upon consulting with the head of a District government agency with safety-sensitive positions, the appropriate personnel authority shall identify and determine which positions in the agency shall be designated safety-sensitive positions subject to mandatory drug and alcohol testing under the Program. In identifying the safety-sensitive positions, the personnel authority shall ensure that the duties and responsibilities of each position require the provision of services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth.

6-B DCMR § 3903 also sets forth the standards for the identifying positions subject to testing. Under DCMR § 3903.2, the following pertinent standards shall be applied in designating a position as safety-sensitive:

> (a) The underlying guiding standard to be applied in identifying safety-sensitive positions shall be one of reasonableness, coupled with the standards outlined in section 3903.2 (b) through (f) of this section, as applicable.
>
> (b) A determination that a position is a safety-sensitive position shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties contains at least one (1) of the duties and responsibilities listed in section 3903.1 of this section or similar duties and responsibilities and that any incumbent of the position will perform the duties and responsibilities personally and routinely.
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> (c) Location in a District government agency with safety-sensitive positions does not automatically make a position or its incumbent subject to testing under the Program.

[11] *See* Agency's Motion for Summer Disposition at 4. (February 24, 2014).

> (d) Strictly tangential, casual, or occasional contact with children or youth does not automatically make an employee subject to testing under the Program.
>
> (f) An employee whose assignment changes from non-covered duties and responsibilities to covered duties and responsibilities shall be subject to testing under the Program while in the covered temporary assignment.

At all times relevant to the instant matter, Employee was employed as a Recreation Specialist. When Employee was reinstated with Agency, he was placed in the position of Recreation Specialist, as reflected in the Standard Form 50 ("SF-50").[12] The SF-50 is the official personnel action form used by the District Government. Employee acknowledged that he was subject to mandatory random drug testing in this position when he signed the Notification of Drug and Alcohol Testing Form on November 3, 2008. Although Employee's duties may have changed when he returned from Administrative Leave after four (4) months, his position title remained the same—Recreation Specialist. The position of a Recreation Specialist was determined by Agency to be a covered safety-sensitive position subject to mandatory random drug tests. Although Employee may have worked with seniors at the time he was drug tested, there is nothing in the record that indicates that Employee was forbade from interacting with children or youth. Furthermore, at the time Employee was removed from his position, he still occupied the position of Recreation Specialist, which is also reflected in the last SF-50 of record.[13] Thus, I find that Employee's position as a Recreation Specialist was a covered safety-sensitive position subjected to mandatory drug testing under CYSHA. Employee remained subject to CYSHA until the date of his termination.

Whether Agency established cause to remove Employee from his position.

Employee asserts that Agency did not have cause to remove him for a positive drug testing because the positive drug test was a result of second-hand exposure to marijuana. In Employee's Response to Agency's Answer, Employee states that whether or not his exposure to second hand marijuana smoke caused his positive marijuana test results would be determined by expert testimony at a hearing. Accordingly, an Amended Prehearing Conference Order was issued on November 15, 2013, which scheduled a proceeding to afford the parties an opportunity to present a list of witnesses and documents they intended to introduce at the hearing. However, on December 9, 2013, a Consent Motion to Continue the Prehearing Conference was filed by Employee. The Consent Motion was requested to allow Employee to file a Motion for Summary Disposition. The continuance request was also made because the selection and designation of expert witnesses in the Pre-Hearing statement would have involved a "significant expense to the employee and the District."[14] In lieu of the Prehearing Conference, a Telephone Conference was held on December 9, 2013. Based on the Telephone Conference, Employee filed a Motion for

[12] *See* Agency's Answer at Tab 2 (August 9, 2013).
[13] *See Id.* at Tab 14.
[14] *See* Consent Motion for Continuance of Pre-Hearing Conference (December 9, 2013).

Summary Disposition. Agency filed its opposition to Employee's motion, and a Cross-Motion for Summary Disposition.

In this case, there are no material issues of facts. There is no dispute that Employee tested positive for marijuana. The issue here is whether or not Employee's passive ingestion of marijuana is a valid defense to his positive drug test. Employee argues that his positive drug test is a result of passive and innocent ingestion of second-hand marijuana smoke.[15] In Employee's Motion for Summary Disposition, he cites *McNeil v. Department of Justice*, 117 M.S.P.R. 533, 2012 MSPB 38 (2012), which found that the employee in that case should not have been removed from his position because of passive ingestion as a result of being tricked into smoking a marijuana-laced cigar.

The instant case is distinguishable from *McNeil*. In *McNeil*, the employee's wife recanted under oath all of the allegations she had made about her husband-appellant regarding there being illegal drugs in his car and him being a drug user. The Administrative Judge in *McNeil* found the employee's wife's testimony to be credible. Here, Employee has offered no evidence to support his defense, other than a mere assertion. Credibility is not at issue in this appeal. Further, it should be noted that decisions by the Merit System Protection Board are not binding upon this Office, but rather persuasive.

In Employee's Response to Agency's Answer, he asserts that he spent approximately twelve (12) weeks in an apartment building in which marijuana smoke permeated every room.[16] Employee also asserted this argument in his Response to the Notice of Proposed Adverse Action.[17] Other than making these assertions, Employee has not provided any evidence that he was in fact exposed to second-hand marijuana smoke while living in an apartment complex with his sister. Furthermore, Employee's Motion for Summary Disposition does not provide any evidence, other than a mere assertion, to support his defense that his positive drug test was a result of passive or innocent ingestion of marijuana.

The first cause for removal in Agency's Final Notice of Removal is based on Employee's "use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or *a positive drug test result.*" (*emphasis added*). While Employee asserts that he did not violate any of the other District of Columbia Drug-Free Workplace requirement, I disagree. In Agency's Answer, it provides the LabCorp drug test result for Employee.[18] The drug test confirmed that Employee tested positive for marijuana metabolite. Employee does not challenge the accuracy of the drug test results. Rather, Employee contends that he should not have been tested because he did not fall under the CYSHA.

6-B DCMR § 1603.3(i), clearly provides that there is cause for disciplinary action when an employee of the District submits a positive drug test result. Here, there is no dispute that Employee tested positive for marijuana. Employee's defense is that the positive drug test resulted from "passive and innocent ingestion…" The burden of proof is on Agency to

[15] *See* Employee's Motion for Summary Disposition at 6 (December 23, 2013).
[16] *See* Employee's Response to Agency's Answer (September 16, 2013).
[17] *See* Agency's Answer at Tab 11(August 9, 2013).
[18] *Id*. at Tab 6 (August 9, 2013).

demonstrate that it had cause to remove Employee.[19] Based on Employee's acquiescence that he tested positive for marijuana, it has been determined that there are no material and genuine issues of fact regarding Employee's positive drug test. Thus, the burden of proof shifts to Employee to prove his affirmative defense that the positive drug test resulted from "passive and innocent ingestion" of marijuana.

In Employee's response to the Notice of Proposed Adverse Action, Employee cites to what appears to be scientific journals to support his defense.[20] However, these journals are not a part of the record before this Office. Thus, there is nothing, other than a mere assertion, to support Employee's argument that his positive drug test was a result of second-hand marijuana smoke ingestion. Accordingly, I find that Agency had cause to take adverse action against Employee as a result of his positive drug test in violation of the laws and regulations of the District.

Whether Agency's penalty was appropriate under the circumstances.

Employee argues that Agency was not required to terminate him for his positive drug test.[21] Employee also correctly asserts that discipline for a positive drug test gives Agency discretion concerning the penalty imposed on an offending employee. The Table of Appropriate Penalties, 6-B DCMR § 1619.1, provides that an appropriate penalty for a first time offense for use of "Illegal Drugs, Unauthorized use or abuse of prescription drugs; or a Positive drug test result" ranges from a 15 day suspension to removal.

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.[22] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[23] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[24]

In the instant case, when assessing the appropriate penalty for the adverse action taken against Employee, Agency relied upon the Table of Appropriate Penalties as set forth in the District Personnel Manuel ("DPM"), 6-B DCMR § 1619.1. Based on Employee's positive drug test, Agency elected to terminate Employee. Thus, I find that Agency appropriately applied its discretion in deciding to remove Employee from his position based on his positive drug test.

[19] *See* OEA Rule 628, 59 DCR 2129 (March 16, 2012).
[20] *See* Agency's Answer at Tab 11 (August 9, 2013).
[21] *See* Employee's Motion for Summary Disposition at 6 (December 23, 2013).
[22] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[23] *See Id.*
[24] *Id.*

ORDER

Based on the aforementioned, it is hereby **ORDERED** that Employee's Motion for Summary Disposition is **DENIED**, and Agency's Cross-Motion for Summary Disposition is **GRANTED**. Agency's decision to remove Employee from his position is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge