

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
Gregory Butler	)	OEA Matter No. 1601-0417-10
Employee	)	
	)	Date of Issuance: June 25, 2013
v.	)	
	)	Senior Administrative Judge
Department of Public Works	)	Joseph E. Lim, Esq.
Agency	)	
	)	

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Gregory Butler, Employee *pro se*  
Frank McDougald, Esq., Agency Representative

**INITIAL DECISION**

**PROCEDURAL BACKGROUND**

On September 23, 2010, Employee filed a Petition for Appeal with the Office of Employee Appeals (OEA) regarding his July 13, 2010, removal by the Agency for testing positive for a controlled substance. This matter was assigned to the Undersigned on July 18, 2012. After a September 14, 2012, Prehearing Conference, the parties submitted legal briefs. After ascertaining that no relevant facts were in dispute, an evidentiary hearing was not warranted. The record is closed.

**JURISDICTION**

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

**ISSUES**

1. Whether Agency’s adverse action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

**FINDINGS OF FACT, ANALYSIS AND CONCLUSION**

Undisputed Facts:

1. On October 3, 2005, Employee was hired as a Motor Vehicle Operator, WS-5703, Grade 7, with Agency’s Solid Waste Management Administration. (Agency Answer, Tab 1, Personnel Form 1.)
2. That day, Employee signed an “Employee Notification Drug Free Workplace” statement, which informs employees of Agency’s drug free policy as well as encourages those with substance abuse problems to seek counseling and rehabilitation. The statement warns of

- the work performance problems and legal problems that come with drug use and informs employees of disciplinary actions that may be taken, up to and including removal, regarding such. (See Agency Answer, Tab 2, Drug Free Workplace Notification and Employee Acknowledgement of Receipt.)
3. On March 21, 2007, Employee attended Agency's Drug and Alcohol Testing Policy training program. (See Agency Answer, Tab 7, Certificate of Completion.)
  4. As a Motor Vehicle Operator, Employee operated commercial motor vehicles and was required to maintain a Commercial Driver's License (CDL). (See Agency Answer, Tab 10, Motor Vehicle Operator Position Description.)
  5. On September 28, 2008, Employee tested positive for alcohol and was issued a warning. (See Agency Answer, Tab 8, 10/1/2008 Warning Letter.)
  6. On April 30, 2009, Employee again tested positive for alcohol and was issued another warning. (See Agency Answer, Tab 9, 5/1/2009 Warning Letter.)
  7. On April 6, 2010, Employee tested positive for cocaine, a controlled substance under Federal law 49 CFR § 40.85(b). (See Agency Answer, Tab 11, 4/6/2010 Medical Review Officer report.)
  8. In lieu of termination, Agency entered into a "Last Chance Agreement" with Employee. In that document, Employee agreed that he "must comply with the conditions specified in this agreement in order to be considered eligible for continued employment with the Department of Public Works." Employee agreed to "unannounced, direct observation, controlled substance and/or alcohol testing," that the "test result(s) must be negative," and that he understood that he would "be terminated if any test, [which he was] required to take, is positive." (See Agency Answer, Tab 12, 4/9/2010 Last Chance Agreement.)
  9. On July 5, 2010, Employee again tested positive for cocaine. (See Agency Answer, Tab 13, 7/12/2010 Medical Review Officer report.) His urine sample was sent to Florida Drug Screening ("FDS"), a private contractor that serves as the third party administrator for Agency's drug and alcohol testing program. Federal law required that the specimen be split into two sample specimens. 40 CFR § 40.71.
  10. Employee was notified of the results on July 9, 2010. (Agency Answer, Tab 17. Statement of P. Gulla.) Under Federal law, Employee had 72 hours in which to request a test on the untested specimen. 40 CFR § 40.153(b).
  11. Employee was later contacted by FDS and asked whether he wanted his second sample tested and he responded that he did. When asked whether he wanted FDS or another drug testing facility to perform the test, Employee stated that "[r]ight now I am in the middle of something; I will have to call you back." (Agency Answer, Tab 18. Statement of Jacqueline Wilson.) Employee never contacted FDS.

12. Effective July 13, 2010, Employee was summarily removed from his position under the provisions of §1617 of the District Personnel Regulations (DPR) and Section X-A1, 2, & 3 title “Disciplinary Action: Consequences of Policy Violations” of the DPW policy, titled “Testing of Drivers of Commercial Motor Vehicles for the Presence of Controlled Substances and Alcohol.” (See Agency Answer, Tab 14, 7/13/2010 Letter to Employee.)
13. On August 26, 2010, his termination was reviewed by Administrative Hearing Officer Theresa Cusick, who found that the Agency had met its burden of proving that its actions had been taken for cause and recommended that the penalty of summary removal be upheld. (See Agency Answer, Tab 15, Report of Hearing Officer.)
14. On August 27, 2010, Agency Director Howland issued a final notice sustaining his earlier decision to summarily remove Employee. (See Agency Answer, Tab 16, Notice of Final Removal.)
15. Employee filed a Petition for Appeal with OEA on September 23, 2010.

Whether Agency’s adverse action was taken for cause.

Federal law subjects commercial motor vehicle operators to a wide ranging drug testing program. 49 CFR § 382.103 and § 383.3 (establishing who is covered by drug testing requirement) and 49 CFR § 382, Subpart C, subsections 383.301 through 383.311.305 (requiring drug testing).

A positive test for a controlled substance is cause for adverse action under the District Personnel Manual (DPM) Ch. 16, Pt. 1 §1603.3 (i) Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result. I therefore find that Agency had cause to take adverse action against him.

In his brief opposing Agency’s adverse action, Employee did not deny any of Agency’s factual allegations. Employee never denies that he had tested positive several times in the past for illegal drugs and alcohol, given numerous chances and warnings, and that he signed a “Last Chance Agreement” which clearly states that should he test positive again for a forbidden substance, he would lose his job. Indeed, Employee admits that he tested positive again for cocaine but simply asserts that because a second confirmation test was never performed, his termination should be reversed and he should be reinstated in his prior job. Tellingly, to support his contention, Employee cites D.C. Law 2-1399, a law that does not exist.

In his brief, Employee omits his prior claim that he tested positive for cocaine due to prescription painkiller. I note that he never presented or proffered any evidence such as a doctor’s note or prescription that would lend some credence to his claim. Nor has Employee identified any evidence supporting the notion that this unidentified medication would somehow cause him to test positive for cocaine.

Employee’s sole remaining argument is that the mere lack of a second test of his urine sample should invalidate his disciplinary action. Not only does Employee fail to cite any authority for this claim apart from a non-existent law as noted above, he neglects to make any

mention of the fact that after his positive test for cocaine, he was notified of his right to request another test on the second split portion of his specimen not once, but twice. On October 22, 2010, well after the legally required period for second testing and even after Agency was under no legal obligation to do so, Agency again notified Employee that he could have his second split specimen sample tested. The only thing Employee had to do was state whether he wanted the sampled tested at the original laboratory or identify another licensed, certified laboratory for the test. Employee responded that he would call back with his decision, but never did.

An employee who (i) operated commercial motor vehicles, (ii) as a consequence of testing positive for cocaine is employed under a “last change” agreement, and (ii) again tests positive for cocaine, cannot indefinitely suspend any employer’s authority to take disciplinary action while the employee thinks about how to proceed. Employee admits testing positive for cocaine. I therefore find that Agency had cause to take adverse action against Employee.

Whether the penalty was appropriate under the circumstances.

In its brief, Agency sets out the Douglas factors it considered in choosing its penalty for Employee below:<sup>1</sup>

1. The nature and seriousness of the offense and its relation to employee’s duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated

Employee’s drug use was illegal and threatened his ability to conduct his job duties (including driving a large truck and checking the truck for equipment malfunctions) [and] put anyone who could be affected by his unsafe driving, including his coworkers, members of the public, and himself, at risk. His offense was neither technical nor inadvertent and it was his second offense in less than six weeks.

2. Employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position

The type of employment required Employee to operate a large motor vehicle in a safe manner, to adhere to safety protocols, and to comply with the law. The other items are not relevant.

3. Employee’s past disciplinary record

Employee has been disciplined in the past for unsafe behavior. In 2008 and 2009 Employee tested positive for alcohol and was, in each case, given a warning letter. More important, on April 6, 2010, after Employee tested positive for cocaine, he was suspended from his regular duties and ordered not to return to work until he was cleared to do so by a Substance Abuse Professional.

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<sup>1</sup> For a discussion of the Douglas factors, see *Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

4. The employee's past work record, including length of service, performance on the job, ability to get along well with fellow workers, dependability

Where, as here, the offense was serious, Agency asserts that Employee's length of service and ability to get along with his co-workers is not relevant or sufficient to mitigate the severity of his offense. See *Taggart v. Metropolitan Police Department*, OEA Matter 161-0114-95, Feb. 27, 1997, 47 DCR 1714 (“[n]ot all of [the Douglas] factors are relevant in every case”). Employee was not dependable in the area of workplace safety. He tested positive for alcohol in 2008 and 2009, and positive for cocaine in April, 2010.

5. The effect of the offense on the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties

The offense interfered with employee's ability to perform assigned duties – he could not perform his duties (operating commercial vehicles) at all while under the influence of cocaine. Given this, along with Employee's failure to satisfy the terms of his Last Chance Agreement, his supervisor could not reasonably have any confidence in Employee's ability to perform his assigned duties.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offense

The penalty is consistently applied; Employee was not singled out for excessively harsh discipline.

7. Consistency of the penalty with any applicable agency table of penalties

This penalty is within the table of penalties set forth in the District Personnel Manual, 6 DCMR § 1619.1. Employee tested positive for cocaine on April 6, 2010 and again on July 5, 2010. The Table of Penalties, section 9, provides that the *only* [penalty for a second] positive test for illegal drugs [is removal].

8. The notoriety of the offense or its impact upon the reputation of the agency

It is important that the public, including but not limited to District taxpayers, [has] confidence that the District's operations are being conducted in a safe and lawful manner. It is also important that the district government, which has a responsibility for enforcing drug laws and which bears a huge responsibility (through its schools, social service agencies, and correctional system) for mitigating the effects of illegal drug use on its residents, not be seen as condoning illegal drug use by its CDL operators. It would have a serious adverse impact on the reputation of the Agency, and the District government as a whole, if it became known that a District government employee responsible for operating a commercial vehicle and for complying with the laws governing CDL drivers, could appear for work under the influence of cocaine twice in less than two months and remain on the government payroll.

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question

It is common knowledge that cocaine use is illegal and that operating any motor vehicle while under the influence is illegal. Employee was specifically put on notice of this when he attended Agency's Drug and Alcohol training program. Employee was again put on even more specific notice when he signed the Last Chance Agreement, which stated that if he tested positive for drugs again he would be terminated.

10. Potential for employee's rehabilitation

Employee had already been given an opportunity for rehabilitation under the terms of the Last Chance Agreement. Employee failed to take advantage of that opportunity. But even if Employee has some potential for rehabilitation, the severity of his offense and his history of offenses outweighs whatever modest minor mitigating effect results from this factor.

11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter

Irrelevant; furthermore, Agency sees no possible set of mitigating circumstances that would warrant Employee's action.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by employee or others

As noted in response to item *ix* above, Agency already tried another method – allowing Employee to seek help under the Last Chance Agreement. This alternative approach failed. With respect to other employees, it is important that Agency demonstrates to them that repeatedly testing positive for cocaine is unacceptable.

If so, whether the penalty was appropriate under the circumstances.

The only remaining issue is whether the discipline imposed by the agency was an abuse of discretion. Any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."<sup>2</sup> When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the

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2. *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."<sup>3</sup>

In determining the appropriate penalty, Agency took into consideration the Douglas factors and determined that the nature and seriousness of the offense, and its relation to Employee's duties, including the substantial danger to the safety and lives of others arising from a vehicle operator driving under the deleterious influence of illegal substances. I also note that Employee was on notice that the ingestion of illegal drugs violated the law and Agency's regulations.

Here, DPM Ch. 16, Pt. 1 §1616.1 authorizes an agency head to remove an employee summarily when the employee's conduct: (a) Threatens the integrity of government operations; b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or (c) Is detrimental to public health, safety, or welfare of others. In this instance, Employee, a CDL driver, was responsible for driving very large vehicles, the negligent operation of which poses a serious threat to health and safety. Agency was authorized to summarily remove Employee because he tested positive for an illegal controlled substance, cocaine, in violation of the law, personnel regulations, and his Last Chance Agreement.

Employee's expression of interest in having a second drug test performed on his original sample did not extinguish Agency's right to terminate Employee. Employee could have taken the steps needed to request a second test, but he failed to do so.

Accordingly, removal was reasonable in light of the seriousness of the offense, and its relation to Employee's "duties, position and responsibilities."<sup>4</sup> Employee's offense threatened the safety of himself, his coworkers and the public. Removal is the only penalty included in the table of penalties for a second offense of use of illegal drugs. Employee has not identified any mitigating factors, but even if he does, the aggravating factors, notably Employee's violation of his Last Chance Agreement, his history, the notoriety of the offense, and the need to send a clear signal of the importance of coming to work free from the influence of any illegal, mind-altering substance, outweigh any mitigating effect that he may claim.

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."<sup>5</sup> In the instant matter, the Agency acted reasonably, and well within the parameters established in the Table of Penalties found in § 1619 of the DPM.

For the foregoing reasons, I conclude that Agency's decision to select removal as the appropriate penalty for the employee's infractions was not an abuse of discretion and should be upheld.

#### ORDER

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3. *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

4. *Jones v. Department of the Interior*, 97 M.S.P.R. 282, 288 (2004).

5. *See Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

It is hereby ORDERED that Agency's action removing Employee is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.  
Senior Administrative Judge