THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LAUREN MANNING,	)	OEA Matter No. J-0043-18R20
Employee	)	
	)	Date of Issuance: September 3, 2020
v.	)	
	)	JOSEPH E. LIM, ESQ.
D.C. PUBLIC SCHOOLS	)	Senior Administrative Judge
Agency	)	

Lynette Collins, Esq., Agency Representative
Philip Zipin, Esq., Employee Representative

INITIAL DECISION ON REMAND[1]

PROCEDURAL HISTORY

On April 17, 2018, Lauren Manning ("Employee"), a Bilingual Guidance Counselor, filed a Petition for Appeal with the Office of Employee Appeals ("OEA") challenging the District of Columbia Public Schools' ("DCPS" or "Agency") final decision to terminate her from employment for her refusal to submit to a drug and alcohol test. The termination was effective March 12, 2018. After Employee failed to respond to an Order to address jurisdiction, I dismissed her appeal in an Initial Decision on July 3, 2018. On April 19, 2019, Employee filed a Motion to Reinstate Appeal, arguing that neither she nor her counsel received any correspondence from OEA after filing her appeal.

On January 14, 2020, the OEA Board remanded the matter to the undersigned for adjudication on its merits, holding that Employee was proactive in seeking legal representation and her counsel was diligent in pursuing her appeal.[2] Subsequently, I held a Prehearing Conference on February 10, 2020, and held an Evidentiary Hearing on July 24, 2020.[3] The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had reasonable suspicion to justify its demand that Employee submit to a drug and alcohol test as prescribed for safety-sensitive positions.

1 This decision was issued during the District of Columbia's Covid-19 State of Emergency.
2 *Manning v. D.C. Public Schools*, OEA Matter No. J-0043-18R20, *Opinion and Order on Remand* (January 14, 2020).
3 Due to the District of Columbia's Covid-19 State of Emergency, the Evidentiary Hearing was held virtually via Webex.

2. If so, whether Agency's penalty of removal should be upheld or overturned.

Positions of the Parties

Agency terminated Employee from service based on charges of "intoxication while on duty," and "violations of the rules, regulations, or lawful orders of the Board of Education." Specifically, Agency asserts that Employee violated a Mandatory Drug and Alcohol Testing Policy by refusing to take a mandated drug and alcohol test despite occupying a safety-sensitive position. Agency contends that it had ample grounds to suspect that Employee was inebriated while on duty.

Employee admits refusing the alcohol test, but she denies being drunk while on duty on February 22, 2018. She asserts that Agency had no reason to demand the alcohol test. Employee also explained that she did not want to disclose private, medical conditions for which she had legally prescribed medications.

EVIDENCE

1. Raquel Carson ("Carson") testified as follows: (Transcript pgs. 8 – 34)

Carson, Assistant Principal at Agency's Powell Elementary School, testified that Employee was a school counselor at Powell when she was still a second-grade teacher from 2012 to 2016. Because they shared an office wall, she characterized their relationship as positive. Employee would confide in her regarding personal stressors in her life. This good relationship continued even after Carson became the Assistant Principal.

On February 22, 2018, a parent approached her to convey her suspicions regarding Employee, stating that she smelled alcohol on Employee's breath the day before and that Employee was acting strange. Carson was shocked, and went immediately to O'Kiyyah Lyons-Lucas, the School Principal, as per protocol. After seeking advice, Carson approached Employee at the auditorium to speak to her. Carson testified that she, too, smelled alcohol emanating from Employee and noticed that Employee kept covering her mouth and backing away as they spoke. She then wrote a report to document her observation.[4]

Carson conceded that she did not check the box indicating that Employee appeared disoriented or unable to function and that Employee had covered her mouth and backed away in prior instances when speaking to someone. She also never witnessed Employee drinking on the job. However, Carson testified that other staff employees had expressed to her their concerns about Employee's behavior regarding alcohol.

2. O'Kiyyah Lyons-Lucas ("Lyons-Lucas") testified as follows: (Transcript pgs. 34-61, and pgs. 149-156)

Lyons-Lucas, School Principal at Powell Elementary School, testified that she was familiar with DCPS's Mandatory Drug and Alcohol Testing ("MDAT") program[5] as all DCPS employees receive training on the program. She explained the procedure Agency had to follow when an

4 School Statement from Rachel Carson dated February 22, 2018. Agency Exhibit 2.
[5] Agency Exhibit 6. Mandatory Drug and Alcohol Testing Acknowledgment from Employee (1/6/2014).

employee, especially those in safety-sensitive positions, is suspected of being under the influence of alcohol while at work. A trained individual such as Carson must approach Employee to ascertain for herself if indeed Employee smelled of alcohol. The school's Manager of Strategy and Logistics, Mr. Walters, approached Employee to confirm Carson's observations.[6] He then led Employee to a secluded area for privacy and a professional tester was summoned to test Employee for drug and/or alcohol.[7] Lyons-Lucas herself approached Employee and observed the same behavior from Employee that Carson and Walters reported. She also smelled alcohol coming from Employee. Lyons-Lucas said other employees came to her regarding their concerns about Employee's behavior.

Carson is also required to write a report regarding her interaction and suspicions about Employee.[8] Employee was also required to submit her statement.[9] All of these reports must be sent to Labor Management and Employee Relations ("LMER"). All of these procedures were done.

It took about an hour before the tester arrived, and Employee used that time to confer with Rosa, their MDAT contact person. However, when the tester arrived, Employee indicated that she did not want to be tested. Lyons-Lucas and others remonstrated with Employee about the consequences emanating from her refusal, and that it could mean an automatic job termination. Nonetheless, Employee refused the test, and the tester left.

Although Employee did confide to her in general about her medication, Lyons-Lucas did not pry for more details. Lyons-Lucas stressed that every year, she informed all employees that the District had the Employee Assistance Program ("EAP") to assist anyone with a drug or alcohol problem.

3. Employee testified as follows: (Transcript pgs. 62 – 110, and pgs. 145-148.)

Employee was a school counselor with Powell Elementary for nine years. She denied drinking on the job and asserted that she does not have a drinking problem. On February 22, 2018, Employee admitted covering her mouth and shifting her body away from Carson and Walters while speaking to them. She explained that she was always sensitive about her sour breath caused by her acid reflux. Employee testified that she's had problems with her sour breath and that people have remarked about it, but no one had ever said they smelled alcohol on her breath. She also clarified that it was not a constant problem.

Employee admitted that she refused the alcohol test despite being warned of the consequences. Even after she informed them about her medications, they informed her that she still had to take the alcohol test. She expressed regret and testified that she was not being rational at the time due to the stress she felt taking care of her amputee grandmother. Employee explained that she was also concerned about a false positive test result and was worried that people might learn about the medications she was taking for her mood disorder. After the tester left, she packed her things and confided and cried to Beth Barnes, the school librarian.

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[6] Agency Exhibit 3. Jetro Walters School Statement (2/22/2018).
[7] Agency Exhibit 4. Erwin Martin Statement (3/9/2018).
[8] Agency Exhibit 2. Raquel Carson School Statement (2/22/2018).
[9] Agency Exhibit 5. Lauren Manning Statement (2/22/2018).

4. Sylvester Barnes ("Barnes") testified as follows: (Transcript pgs. 111-119.)

Barnes, a substitute teacher at Powell Elementary School, testified that in the year and a half that he interacted regularly with Employee, he never witnessed any drunkenness or smelled alcohol on Employee. He never saw Employee cover her mouth or back away from him in conversation.

5. Beth Barnes ("Barnes") testified as follows: (Transcript pgs. 120-130.)

Barnes testified that she interacted with Employee regularly at Powell Elementary as a school librarian. On the evening of February 22, 2018, Employee approached her in tears and told her she had been terminated for refusing to take the breathalyzer test. Barnes said she never smelled any alcohol on Employee and never witnessed Employee being intoxicated. She added that Employee never covered her mouth or backed away when speaking to her.

6. Eduardo Del Valle ("Valle") testified as follows: (Transcript pgs. 131-144.)

School Psychologist Valle testified that he shared an office with Employee and regularly interacted with her. He never saw Employee intoxicated nor did he ever smell alcohol on her. When Employee was crying from stress, he would console her, and they would pray together. He never noticed any sour breath from her.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Undisputed Facts:[10]

1. Employee was hired by the Agency as a School Counselor on August 17, 2009.

2. Upon being hired by the Agency, Employee was notified that pursuant to the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA") she was deemed as a person occupying a "safety-sensitive" position.[11]

3. A "safety-sensitive" position is defined as "employment in which the District employee has certain contact with children or youth, is entrusted with the direct care and custody of children or youth; and whose performance of his/her duties in the normal course of employment may affect the health, welfare, or safety of children or youth."

4. Under CYSHA, persons occupying safety-sensitive positions shall be subject to drug and alcohol testing under certain circumstances.

5. Pursuant to CYSHA's policy the employee was required to participate in drug and/or alcohol testing upon reasonable suspicion of drug or alcohol use while on duty, before being permitted to return-to-duty after seeking drug or alcohol treatment, on a period basis as follow-up to drug or alcohol treatment, and after an accident while on duty.

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[10] Parties' Stipulation of Facts (February 18, 2020)
[11] Agency Exhibit 6. Mandatory Drug and Alcohol Testing Acknowledgment from Employee (1/6/2014).

6. Also, pursuant to the policy all employees are expected to comply with the requirements of this policy, including those who refuse to acknowledge receipt of the policy.

7. Under the policy, employees who test positive for drugs or alcohol, without a legitimate medical reason, or who refuse to submit to testing when so instructed, shall be terminated from DCPS.[12]

8. On January 6, 2014, Employee provided her electronic signature acknowledging that she received and reviewed the CYSHA policy.

9. On February 22, 2018, an Administrator from Powell Elementary School requested onsite alcohol testing of Employee.

10. A tester from D.C. Human Resources was sent to the school in order to collect a sample from Employee.

11. Once the tester was on the scene, Employee refused to provide a sample.

12. Based on Employee's refusal to provide a sample, on February 23, 2008, the Agency issued a Notice of Termination.

13. The Notice of Termination outlined, among other things, that Employee was being terminated based on her refusal to submit to alcohol testing. According to the Notice, Employee's termination became effective March 9, 2018.

Whether Agency had reasonable suspicion to justify its demand that Employee submit to a drug and alcohol test as prescribed for safety-sensitive positions.

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. This Office's Rules and Regulations provide that an agency's action must be supported by a preponderance of the evidence, which is defined as "that degree of relevant evidence which a reasonable mind, considering the matter as a whole, would accept as sufficient to find a contested fact more probably true than untrue."[13] Further, DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1605.4(d), the definition of "cause" includes "Failure or refusal to follow instructions."

Employee's removal from her position at Agency was based on Title 5-E, Chapter 14 of the District of Columbia Municipal Regulations ("DCMR") as well as relevant provisions of the Collective Bargaining Agreement between the Washington Teachers' Union ("WTU") and DCPS, which mandates ten (10) school days' notice to Employee for an adverse action. As grounds for removal, Agency cites 5E DCMR Section 1401.2 (g) Intoxication while on duty; (t) Violation of the rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education. In its

[12] Agency Exhibit 7. Employee Mandatory Drug and Alcohol Testing Policy.
[13] OEA Rule 628.1, 59 D.C. Reg. 2129 (2012).

specification, Agency does not allege that Employee was intoxicated while on duty on February 22, 2018. Rather, Agency alleges that Employee disobeyed its MDAT policy whereby employees occupying safety-sensitive positions must submit to a drug and alcohol test upon reasonable suspicion of drug or alcohol use while on duty. MDAT also provides that employees refusing a drug or alcohol test are subject to termination of employment.

In the instant matter, Employee does not deny that she disobeyed the MDAT policy when she refused to submit to an alcohol test. Rather, Employee's defense is that Agency did not have reasonable grounds for such a test, as Employee insists that she was not intoxicated and that the smell of her breath was due to acid reflux, not alcohol. Employee asserts that Agency did not identify or produce the parent who alerted Agency of the suspicion that Employee was intoxicated on the job. She also produced a witness, Beth Barnes, who testified that she herself did not smell any alcohol on Employee. However, the evidence of reasonable suspicion of intoxication rests on the firm and credible eyewitness testimonies of Assistant Principal Carson and School Principal Lyons-Lucas. They testified consistently that they smelled alcohol emanating directly from Employee and witnessed her strange evasive behavior on February 22, 2018. Considering that young children were under Employee's charge, their suspicion that Employee may be under the influence of alcohol is not only reasonable, it was prudent for them to ask that Employee submit to an alcohol test.

As a person occupying a safety-sensitive position, Employee was fully aware of the MDAT policy and the consequences of her refusal to submit to an alcohol test. She did not dispute that she was reminded and warned about the consequence of such refusal. Having been so warned, she still refused. Employee testified that after the tester left, she felt that her refusal may result in her losing her job and she confided as much to her friend Beth Barnes. Yet at no time did she attempt to inform Lyons-Lucas or anyone else that she changed her mind and would now take the test. I therefore find that Agency met its burden of proof by a preponderance of the evidence that it had reasonable suspicion that Employee may have used alcohol while on the job. Because of my finding, I conclude that Agency's action against Employee was taken for cause

Whether the penalty of removal is within the range allowed by law, rules, or regulations.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[14] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant matter, I find that Agency has met its burden of proof for the charge of insubordination in that Employee knowingly and willfully refused to comply with MDAT.

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14 *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Illustrative Actions. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees.[15] The penalties for "[d]elibrate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions" is found in DPM § 6-B DCMR § 1607.2 (d)(2). The penalty for a first offense for § 1607.2(d)(2) is a three (3) days suspension to removal. Employee was aware of the District's drug free policy and Agency's zero tolerance policy. Employee's penalty is consistent with the language of CYSHA, which specifies termination as a penalty. Therefore, I find that Agency did not abuse its discretion in terminating Employee.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[16] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law. Accordingly, I conclude that Agency was within its authority to remove Employee pursuant to policies outlined in the CYSHA and MDAT.

ORDER

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

FOR THE OFFICE: Joseph E. Lim, Esq.
Senior Administrative Judge

[15] 6-B DCMR § 1607 (February 5, 2016) Table of Illustrative Actions.

[16] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).