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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
ISHEL BLALOCK,	)	
Employee	)	OEA Matter No. J-0045-15
	)	
v.	)	Date of Issuance: September 28, 2016
	)	
OFFICE OF THE STATE	)	Monica Dohnji, Esq.
SUPERINTENDENT OF EDUCATION,	)	Senior Administrative Judge
Agency	)	
_____	)	
Neil B. Katz, Esq., Employee's Representative	)	
Hillary Hoffman-Peak, Esq., Agency's Representative	)	

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 24, 2015, Ishel Blalock (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Office of the State Superintendent of Education’s (“OSSE” or “Agency”) decision to terminate her from her position as a Bus Attendant, effective January 23, 2015. Employee was charged with refusal to submit to a drug test or breathalyzer (penalty of termination,<sup>1</sup>) and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious.<sup>2</sup> Agency filed its Answer in response to Employee’s Petition for Appeal on March 30, 2015.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on March 3, 2015. After several conferences and brief submissions, an Evidentiary Hearing was held on April 13, 2016. Both parties were present for the Evidentiary Hearing. Thereafter, I issued an Order dated May 10, 2016, notifying the parties that the transcript from the Evidentiary Hearing was available at OEA. The Order also provided the parties with a schedule for submitting their written closing arguments. Both parties have submitted their written closing argument. The record is now closed.

<sup>1</sup> 6B District of Columbia Municipal Regulations (“DCMR”) § 3907.1.

<sup>2</sup> 6B DCMR 1603.3(g). Employee received a penalty of fifteen (15) days suspension. She is not appealing this charge. Accordingly, this charge will not be addressed in this Initial Decision.

## 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 against Employee was done for cause; and
- 2) If so, whether the penalty of termination is within the range allowed by law, rules, or regulations.

## SUMMARY OF MATERIAL TESTIMONY

### *Agency's Case in Chief*

#### **1. Antaeus Hayes (Transcript pages 7-38; 54-55)**

Antaeus Hayes ("Mr. Hayes") worked for the Office of the State Superintendent of Education. He oversaw the buses transporting special needs children in the District. He explained that Employee was one of his bus attendants stationed at the Southwest location and that the role of a bus attendant was to ride on the bus to ensure the safety of the children. *Tr. 6-9*. Mr. Hayes testified that he suspected that Employee was under the influence or inebriated on October 23, 2014. He stated that drivers and attendants work shifts. They have a morning tour, take a break, and then come back in the afternoon to work and transport the children home from school. Mr. Hayes attested that Employee worked a morning and an afternoon shift. The shifts were separated by four hours. *Tr.25-27*. He explained that Employee's scheduled tour of duty in the afternoon was from 2 p.m. to 5:30 p.m. *Tr. 28-30*.

He stated Employee reported back to work at 2 p.m. Mr. Hayes explained that he received a call from his operations assistant who stated that Employee's behavior was erratic and that she displayed behaviors that showed signs of inebriation. Mr. Hayes recalled going to observe Employee's behavior and described her actions as elusive. He contended that her words were slurred; she was unable to stand; and she displayed aggressive behavior. *Tr. 9-11*.

Mr. Hayes called Kenneth Roberson who was in the Audit and Compliance Department. He instructed Mr. Hayes to observe Employee and to fill out a reasonable suspicion form. Mr. Roberson informed him that a collector would be sent to do a random spot test. Mr. Roberson provided instructions for Employee to be held so that the collector could perform the test. Mr. Hayes stated that he received a call that the collector could not come to the terminal. Therefore, Mr. Roberson requested that Employee be transported to the 441 building facility. *Tr. 12*. Mr. Hayes admitted that he did have concerns of Employee's behavior because she was attending to special needs children, but he still allowed Employee to continue on her route. *Tr. 54-55*.

When Employee returned from her route, Mr. Hayes explained that they had to go to the 441 location. Mr. Hayes took government issued car and was not asked many questions by Employee. Mr. Hayes asserted that when they arrived at the 441 building, Employee claimed that she had to pick up her children and wanted to know how long it would take. Mr. Hayes testified that he was unaware that Employee had children or that she had a special needs child. *Tr. 28-30.* Mr. Hayes testified that special accommodations and tours of duty were not changed for childcare needs. *Tr. 35-56.* They entered the building and the security asked them for ID. Employee claimed that she did not have her ID so they asked her to remove her belongings from her person and place it on the conveyer belt. According to Mr. Hayes, Employee questioned why she had to do that and stated that it was not as if she would use a machine gun to blow up the place. *Tr. 12-13.* Mr. Hayes testified that Employee was searched and then preceded to the testing room where she was given a breathalyzer test. During that time Mr. Hayes explained that Employee was in the break room and he could hear the tester, Ramia Heard, become frustrated because Employee did not comply with the breathalyzer test. *Tr. 14.*

After the test was administered, Employee washed her hands. Employee produced a urine sample, but Ms. Heard stated that it was not enough urine and that she would have to provide another sample. *Tr. 15-16.* Thereafter, Mr. Hayes asked Employee to sit down and relax. Employee got water, and Ms. Heard informed her that she could not leave. Employee drank the water and was asked if she could produce another sample. Employee got upset and said, "I've already produced a sample. I've already pissed. I've already pissed. Why should I have to do it again?" Employee banged on the desk hard, and Ms. Heard asked her to calm down. Employee then smacked a plastic cup into Ms. Heard's direction. Mr. Hayes was unsure if the cup struck Ms. Heard in the face. *Tr. 16.*

When Ms. Heard concluded the testing, Employee walked out of the testing room and Employee spoke with a man Mr. Hayes could not identify. Mr. Hayes stated that Employee yelled at the unidentified man who ran to the elevator; Mr. Hayes believed to get security. Mr. Hayes stated that he went to stop Employee and told her to calm down. Employee turned around and tried to swing, but Mr. Hayes moved back so he would not get hit. Mr. Hayes explained that he and Employee grabbed each other, as he attempted to calm Employee down. A security guard got between them both and restrained Mr. Hayes. At that point, Employee and Mr. Hayes walked back into the testing room. Mr. Hayes contended that Employee walked over to Ms. Heard's bag and threw Ms. Heard's belongings out of her bag. Ms. Heard walked over to restrain Employee, and security came and grabbed Employee. Mr. Hayes and Employee were escorted outside by security. Mr. Hayes and Employee got into the car and he told her to put her belongings in the front seat stating that she had to sit in the back seat while being transported back to the terminal. *Tr. 17-18.*

Mr. Hayes stated that he completed a drug and alcohol policy training. He testified that to obtain a certificate of completion, he had to attend an all-day mandatory training in which he was instructed on how to identify signs of suspicion, various types of drug and alcohol abuse, and the steps that are taken to detect things of that nature. He attested that Employee showed keen signs of substance abuse. *Tr. 19-22.* Mr. Hayes explained that COPE is an organization that is offered to employees who have personal issues or struggles. He stated that it could vary from abuse, drug abuse, alcohol abuse, or something going on in the employee's personal life that

prevented them from functioning well mentally. Mr. Hayes offered Employee help through COPE, but she declined the offer. He stated that prior to Employee working in the Southwest terminal, her behavior was drastically different. He recalled that when he first met Employee, she was reserved and quiet. *Tr. 31-34.*

## **2. Ramia Heard (Transcript pages 38-53)**

Ramia Heard worked for the Office of the State Superintendent of Education as a Substance Abuse Specialist. She oversaw the drug testing and made sure the Department of Transportation (“DOT”) drivers had up-to-date credentials. She explained that if she received a call about reasonable suspicion, she would have the manager compose a formal write up. Ms. Heard stated that an employee would be tested onsite (the collector would go to the location of the employee) or transported to another testing location. *Tr. 38-39.*

Ms. Heard testified that she was called to test Employee in 2014 for reasonable suspicion. Mr. Hayes e-mailed her the requested documents and she contacted Pembroke, the testing agency they used at that time. Ms. Heard was informed that the collector, Ms. Cherry, was at the 441 location so Ms. Heard contacted Mr. Hayes and asked him to escort Employee to that facility. *Tr. 39.*

Ms. Heard stated when Employee arrived she signed in but refused to provide her ID. Ms. Heard asked Mr. Hayes to identify Employee which he did. Thereafter, Employee proceeded to use the hand sanitizer after Ms. Cherry asked Employee not to do so because it could have interfered with the specimen results. She stated that Employee was called to the back to start the breathalyzer test. *Tr. 39-40.* Employee proceeded to the controlled substance area where she was instructed to wash her hands but not dry them. Ms. Heard explained the testing process to Employee and stated that if she did not follow Ms. Cherry’s instructions, her test would be considered a refusal. Employee completed the test, but she did not provide enough specimen for the urine sample. Because she did not produce enough urine, Employee was informed that she would have to start the shy bladder process. This process is done when an individual is unable to provide enough specimen or any specimen at all. They are provided forty (40) ounces of liquids to consume over a three-hour period. *Tr.41-42.*

Employee explained to Ms. Heard that she could not continue with the process because she needed to pick up her children. Ms. Heard explained to Employee that she understood her dilemma, but Employee had to make alternative arrangements in order to complete the test. Ms. Heard testified that she provided Employee’s first sixteen (16) ounces of water. Employee told Ms. Cherry that she was ready to provide another urine sample, but Ms. Cherry wanted Employee to wait longer and asked Employee to sit in the waiting area. *Tr.42-43.*

Ms. Heard explained that Employee was not allowed to provide a sample until fifteen to twenty minutes passed to ensure that enough specimen would be produced for the second test. She established that an adequate sample size was forty-five (45) milliliters (“mL”) and did not recall how much was produced in the first test. *Tr. 48-51.*

Ms. Heard further testified that Employee rose from her seat and yelled that she could not wait because she had to pick up her children. Ms. Heard explained to Employee that she could not leave the test site until she provided the sample. Employee proceeded towards the door, and Ms. Heard informed her that if she were to leave, her test would be considered a refusal test and a refusal to test was grounds for termination. Ms. Heard attested that Employee walked to the door but never opened it. Employee cursed and told Ms. Heard that she could not stay because she had to pick up her children. Employee then slammed a cup in front of Ms. Heard. Ms. Heard told Employee to have a seat, but Employee got up and walked to the door. Mr. Hayes intervened and explained to her that if she left, she could be terminated. Employee cursed, yelled, and stated she did not care about her job; she had to pick up her children. *Tr. 44-45.*

Ms. Heard attested that Employee left the room. She informed Ms. Cherry of what transpired and attempted to contact her supervisor, Ms. Eva Laguerre. Employee re-entered the room and went into Ms. Heard's bag to grab paperwork. Employee forcibly tried to snatch the paperwork from Ms. Heard, and she stated that security was called. Ms. Heard testified that she contacted her supervisor and informed her of what happened. *Tr. 45-46.*

### **3. Ann Cherry (Transcript pages 55-84)**

Ann Green Cherry ("Ms. Cherry") is a self-employed subcontractor with Cherry Mobile Collections. They administered collections for drug, urine, and breath alcohol. She was required to have certification through the Drug and Alcohol Technology Association ("DATIA"). Ms. Cherry has been a drug tester for eight years. *Tr. 56-57.*

Ms. Cherry testified that she did not have a contract with the District of Columbia because she was subcontracting under Cherry Mobile Collections and stated that Mr. Cherry had a contract with the government. She explained that most of the tests were conducted at 441 Fourth Street in Northwest, Washington, D.C. *Tr. 57-58.* Ms. Cherry recalled when Employee came into the office to receive a breathalyzer test. She initially asked Employee if she had used gum or cigarettes within the last 15 minutes because it could alter the breathalyzer results. Ms. Cherry stated that Employee read and signed the statement agreeing to do the breathalyzer test. She showed Employee how to correctly blow into the breathalyzer. At first, Employee did not comply with blowing into the mouthpiece. After a few tries, Employee cooperated and blew into the breathalyzer and her results came out to .000. *Tr. 59-62.*

Ms. Cherry attested that Employee washed her hands but was uncooperative with drying them. Instead, Employee flung water all over Ms. Cherry's face. Ms. Cherry explained that they proceeded to the bathroom, and she told Employee to urinate to where the mark was. When Ms. Cherry saw the urine sample she knew it was only 15 mL and the requirement was to obtain a 45 mL, 30 mL in one vile and 15 mL in another. She explained to Employee that they would have to discard the urine sample because there was not enough urine and that Employee would have to go through the shy bladder process and would have to remain on site.

Ms. Cherry further testified that Employee left the test site and she decided to write Employee up as a refusal to test because the test was incomplete. As she was cleaning, Employee

appeared behind her and took her papers. Ms. Cherry stated that as a collector, her goal was to maintain composure and to retrieve the papers. *Tr. 62-64.*

Ms. Cherry identified the test form providing Employee's name, ID number, and her organization. The form also showed the reason why there was a reasonable suspicion. The other report she described was the lab results that showed that Employee was negative for breath alcohol. *Tr. 65-68.* Ms. Cherry identified the Chain of Custody, ("COC") a form used by the government. *Tr. 72-73.*

Ms. Cherry explained the shy bladder process. She stated that Employee had three hours and up to forty ounces of liquid in order to produce a specimen. After the three hours passed, she would inform the individual their time was up. Employee went into the bathroom and when she came out she did not have an adequate amount of sample. Ms. Cherry indicated that Employee came out at 6:15 p.m. so her window would have been from 6:15 p.m. to 9:15 p.m. and would have been allotted up to forty ounces of liquid to produce the specimen. *Tr. 74-79.* Ms. Cherry further explained that if someone with a shy bladder is given a cup of water and they immediately request to use the bathroom, she tries her best to deter them from going, but she cannot stop an employee from saying they want to go to the bathroom. She further testified that if the employee presses the issue of going to the bathroom immediately, she takes them to the bathroom. And if they are short again, she documents it. *Tr. 76.*

#### **4. Herbert Casey (Transcript pages 84-98)**

Herbert Casey ("Mr. Casey") works for the District Department of Human Resources as a Management Analyst for the Center for Learning and Development. In 2014, he was the Management Analyst for the Policy and Compliance Administration. He was a coordinator for the mandatory drug and alcohol-testing program for the District of Columbia, and he assisted with criminal background checks. He recalled the events that took place with Employee and stated that he typically worked from 9 a.m. to 3 p.m., but on that particular day, he worked from 2 p.m. to 5 p.m. He stated that a collector approached him and stated that there was a reasonable suspicion case. *Tr. 84-87.* Mr. Casey stated that Employee was a little aggressive and used profanity. He stated that Employee used hand sanitizer, and they did not want Employee to have gum in her mouth or to use the hand sanitizer because the alcohol content could disrupt the breathalyzer results. *Tr. 88-89.*

Mr. Casey further testified that when Employee drank the water she paced around the Center and went back to the collection area and attempted to grab the COC form. He stated that Employee was removed from the collection and testing facility. He went to get security because when Employee left the Center she was disruptive in the hallway and used profanity. He testified that he completed the advance written notice of proposed removal and the final decision, notice of separation. *Tr. 90-94.*

Mr. Casey asserted that he saw Employee grabbed the COC document off Ms. Cherry's desk. He stated that the only time he left the waiting room was to call security. He noted Mr. Hayes' arrival with Employee around 5:45 p.m. *Tr. 96-98.*

### **5. Eva Laguerre (Transcript pages 99 – 123)**

Eva Laguerre (“Ms. Laguerre”) is employed with the Office of the State of Superintendent of Education as Human Resources (“HR”) Compliance Manager. Previously, she was the Director of Licensing and Compliance. She explained that as an HR compliance manager she oversaw all functions of the drug and alcohol-testing program as well as payroll, audits, and compliance issues that came into the Agency. She oversaw the program for about four years and was a Certified Professional Collector Trainer (CPCT). She also had a MRO certification, the program manager certification for drug and alcohol testing programs, and she had a regular CPC certification. She attested that she no longer had her breath alcohol technician certification. *Tr. 99-100.*

Ms. Laguerre further testified that employees were randomly drug tested before, during or after their tour of duty. She explained an employee could be tested randomly, for pre-employment, random, post-accident, reasonable suspicion, return to duty, and follow-up testing. She explained that during a reasonable suspicion test, a manager would contact their office and state that they had a reasonable suspicion. The collector would arrive at the testing site and commence the test. The collector would also administer urine and drug test and a breath alcohol test. She explained that if an individual were unable to produce a urine sample, the person would have to remain at the testing site. They would allow the individual to drink up to forty (40) ounces and have up to three hours to provide a sample. If the individual left the test site for any reason, the test would be considered a refusal test. Individuals were provided a CYSHA form where they were given notification that they were subject to drug and alcohol testing. *Tr. 102-105.*

Ms. Laguerre posited that only bus attendants were under authority from DCHR to receive drug and alcohol testing. She stated that she did not personally know Employee but was aware that she was at the test site for a reasonable suspicion. She further testified that Mr. Hayes contacted her via e-mail and stated that he needed to do a reasonable suspicion. She explained that if someone had a reasonable suspicion they would conduct the test no matter the time and that the individual would not be allowed to leave until the test was completed. If an individual received a refusal, that would be considered grounds for termination of employment. *Tr. 106-113.*

Ms. Laguerre attested that bus attendants and drivers were covered under the union agreement AFSCME. She provided that the union recognized that Agency was a drug-free workplace. She stated that if a manager was concerned about the behavior on the terminal, they would contact Human Resources Department and state that they had a reasonable suspicion and would wait for a collector to go to a testing site. She attested that if a person was suspected of being under the influence of an illegal substance, the individual was removed from duty immediately. She posited that she was not immediately aware that Employee returned to her route after her suspicious behavior. *Tr.114-123.*

## **6. Kenneth Roberson (Transcript pages 123-128)**

Kenneth Roberson worked as a Management Liaison for the Office of the State Superintendent of Education. He stated that he worked with the Compliance Unit that dealt with the drug testing or substance abuse testing, as well as compliance issues of the office. He received a call from Mr. Hayes who stated that Employee was erratic and that he wanted to do a reasonable suspicion test. He said to Mr. Hayes “Go, ahead. Send her on the route and by the time everything comes up, we’ll test her right then...” He further testified that once they received the documentation they would review and test Employee. *Tr. 124-127.*

### **Employee’s Case in Chief**

#### **1. Ishel Blalock (Transcript pages 131-172)**

Ishel Blalock (“Employee”) was employed with the Office of the State Superintendent of Education as a Bus Attendant for nine and a half years. Employee testified that her duty as a bus attendant was to assist children with special needs to and from school. She explained that she did some fill-in work as a dispatcher for about nine months, and if they were short of people at Southwestern Terminal, she would fill-in as a dispatcher there. *Tr. 145-146.* She stated that she spent the majority of her time working at the Fifth Street Terminal located in Northeast, D.C. Thereafter, she transferred to the Southwest terminal after the birth of her son because it allowed her to be closer to his daycare and to provide him with his after-hours needs. She explained that she had two managers—Sergio Martinez and Antaeus Hayes. *Tr. 133-135.*

She further testified that her son was diagnosed with a rare disease. She stated that when he was four months old, all his fluids had to be thickened and the doctors informed her that he had to be on breathing treatments, a nebulizer, and an asthma pump during a certain time of day. She explained that the doctors allowed the daycare to give him medication, and she would give him medication after she got off of work between 5:00 and 5:15 p.m. She stated that her tour of duty would be over at 5:30 but she would leave early. She attested that she informed Human Resources (“HR”) of her circumstances upon her return to work after maternity leave. Employee applied for and was granted Family Medical Leave Act (“FMLA”). In addition to FMLA she applied for another type of leave but never received a response for that leave. *Tr. 135- 140.*

Employee stated that on Thursday, October 23, 2014, she was informed by a co-worker that management was looking for her. She immediately reported to Ms. Fuel who informed her that Mr. Hayes was looking for her. Mr. Hayes found her around 5 p.m. and told her that she needed to come with him. Employee said that Mr. Hayes stated, “Ms. Blalock, I told you that this day was coming.” She told Mr. Hayes that her truck was by the gas pump with all of her personal belongings. He told her that he would have Ms. Fuel inform security that her car was unattended. She testified that they walked over to the government issued, and she asked Mr. Hayes several times where they were going. He told her that he was unable to provide that information. She attested that Mr. Hayes took her to the 441 4<sup>th</sup> Street NW, Washington, DC, D.C. Human Resources main location. She stated that during the drive, she told him about her children and the entire time Mr. Hayes texted and spoke on his cell phone. *Tr. 147-152.*



Employee further testified that when she entered the building she was asked by security for her ID. She explained to them that her ID was in her truck at the Southwest terminal. They asked Mr. Hayes for his ID, and he was able to vouch for Employee. After they were cleared, they went upstairs and entered a room. She stated that the room was empty because it was after hours and no one was there. As they walked down the hallway Employee claimed that Mr. Hayes was texting and talking on the phone. *Tr. 152-153.*

As they entered the waiting area, Employee identified a woman sitting at a desk and a gentlemen standing with a clipboard beside her, but did not know their names. Employee stated that the gentleman instructed her to sign in. After she signed in, she went to get hand sanitizer. Employee stated that a nurse came in and informed her that she could not use the hand sanitizer. The nurse told her that the hand sanitizer was not for Employee's use and told her to breathe into the breathalyzer. She asked the nurse why she had to take the breathalyzer test, as she never had to take the test and she was not a bus driver. *Tr. 153-155.*

Employee stated that the test was negative. After the breathalyzer, Employee was instructed to remove her jacket and to empty her pockets. The nurse provided her instructions on how to take the urinalysis. Employee was instructed not to flush the toilet or wash her hands. Employee attested that she was familiar with the urinalysis because they did random checks on her job site. *Tr. 155-157.*

When the nurse examined the specimen, she told Employee the sample was not enough to test. Employee then told the nurse that she had to get back to her children. The nurse told her she would have to use the bathroom again, and Employee asked her for something to drink. Employee was escorted down the hall to a water fountain. Employee stated that she did not want to drink from the fountain because of its filthy appearance but was informed that she would have to get her water from there. Employee asked Mr. Hayes if she was really supposed to drink from there and he told her that she had to drink from the fountain or it would cost her job. Employee got the water from the fountain and proceeded back to the testing area. *Tr. 157-159.*

Employee testified that after she consumed the liquids, she had to immediately use the bathroom but was informed that she could not because not enough time had elapsed. At that point, Employee stated that she was concerned about her children as she watched the time pass. She asked Mr. Hayes if he was aware of the time and explained that she had to get her children, but he told her she would have to make alternative arrangements. Employee stated that she told him she did not have cell phone service in the building and was unable to contact anyone. Moreover, her children would not be able to contact her. Employee asserted that she was upset because she would be charged \$2.00 per minute for picking up her son late. She also explained that her son was overdue for his breathing treatment. Employee said that she was upset but did not use profanity because she knew she was in a government office, and she did not usually use foul language at work. *Tr. 159-161.*

As Employee left the testing site, a security guard approached her and Mr. Hayes and asked if she was causing problems. She told the guard she was not, that she was angry, upset, and ready to leave. Employee and the security guard continued to talk while Mr. Hayes was a couple

feet behind. The security guard said that she was ok. Employee asked Mr. Hayes if he would take her to her girls' school because they were standing outside, but he declined.

Employee provided that the only time she became physical with Mr. Hayes was when she grabbed his arm to apologize for her actions. She stated that he was not used to seeing her behave in that manner. When they arrived at the site, Employee got into her car and picked up her children around seven or eight o'clock. They were standing outside on a busy street on Pennsylvania Avenue near their school. *Tr. 141-143*. She attested that she was unable to report to work the following day because her son's daycare had a no return policy. Thus, she had to call out. When she returned to work on the following Monday, she was stopped by a security guard and was not allowed to enter the job site. *Tr. 163-165*.

### FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issues of whether Agency's action of terminating Employee for refusal to submit to a drug test or breathalyzer was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

#### ***Findings of Facts***

Employee was employed as a Bus Attendant with Agency. As a Bus Attendant, her position was classified as a safety-sensitive position under the Child and Youth and Health Omnibus Act of 2004 ("CYSHA"). Because Employee encumbered a safety-sensitive position, she was subject to random drug and alcohol testing. Employee was aware of this requirement per her signature on July 26, 2010, on the Individual Notification of Requirements for Drug and Alcohol testing for the protection of children and youth form.<sup>3</sup> This CYSHA Act became effective on April 13, 2005. Employee's duties as a Bus Attendant were to monitor students, and ensure their safety during the trip to and from school. Employee worked a morning and an afternoon shift. The shifts were separated by four hours. Her scheduled tour of duty in the afternoon was from 2 p.m. to 5:30 p.m.

On October 23, 2014, after observing Employee when she returned for her afternoon shift, Mr. Hayes called the Audit and Compliance Department to inform them of his observation of Employee. He was advised by Mr. Roberson to fill out a reasonable suspicion form stating what he observed.<sup>4</sup> The reasonable suspicion recording form was completed by Mr. Hayes, and signed by a Ms. Alisa Fuels.<sup>5</sup> Mr. Hayes was also notified by the Audit and Compliance Department that a collector would be sent to do a random test on Employee. Mr. Hayes was later notified that the collector could not come to the terminal and he was asked to transport Employee to the testing location at 441 4<sup>th</sup> Street NW, Washington, DC ("441"). After Mr. Hayes observed

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<sup>3</sup> Agency's Brief in Support of Termination at Exhibit A (October 23, 2015).

<sup>4</sup> *Id.* at Exhibit B.

<sup>5</sup> *Id.*

Employee's behavior, Employee was allowed to continue on her afternoon route. When Employee reported back to the terminal from her afternoon route, Mr. Hayes transported her to building 441 for drug and alcohol testing. Employee did not have her identification card or her identification badge on her.

When they arrived at the testing site, Employee was administered the breathalyzer test by the collector, Ms. Cherry, which came back with a negative result for alcohol. Ms. Heard, Agency's Substance Abuse Specialist was also present at the testing site during Employee's testing. Employee was then instructed to provide urine sample for testing. Ms. Heard explained the process to Employee prior to her providing the urine sample. After Employee provided a sample, she was notified that the sample she provided was insufficient for proper testing. At this point, Employee was also informed that she will commence the "shy bladder" procedure. The "shy bladder" procedure was explained to Employee by Ms. Cherry. She informed Employee that Employee would have to stay on site and drink up to 40 ounces of water. Employee was also informed that the "shy bladder" process could take up to three (3) hours; starting at 6:15 p.m. Ms. Heard also explained the "shy bladder" process to Employee. However, Employee noted that she could not stay because she had to pick up her kids. Employee was asked to make arrangements for her children because she had to remain at the testing facility until the testing was completed.

Ms. Heard accompanied Employee to the hallway where she got water from the water fountain and consumed her first 16 ounces of water. Employee then returned to the testing site and informed Ms. Cherry that she was ready to provide another urine sample, but Ms. Cherry wanted Employee to wait longer and asked Employee to sit in the waiting area. Ms. Heard informed Employee that she was not allowed to provide a sample until fifteen to twenty minutes passed to ensure that sufficient urine sample would be produced for the second test.

Employee became disruptive. She was informed by Ms. Heard that if she left the testing site, it would be considered a refusal to test and therefore, grounds for termination. Employee was continuously disruptive. Mr. Casey, who was also present at the testing site, obtained security, and Employee was escorted by security out of the building. Ms. Cherry noted on the chain of command form that "testing not completed, donor left site, refusal to test."<sup>6</sup> Employee was transported back to the terminal by Mr. Hayes.

On November 6, 2014, Agency issued to Employee, an Advance Written Notice of Proposed Removal from her position as Bus Attendant.<sup>7</sup> On January 21, 2015, Agency issued its Final Decision – Notice of Separation, removing Employee from her position as Bus Attendant effective January 23, 2015.<sup>8</sup>

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<sup>6</sup> *Id.* at Exhibit D.

<sup>7</sup> Agency's Answer to Employee's Petition for Appeal at Exhibit A (March 30, 2015). Employee signed the notice on December 1, 2014.

<sup>8</sup> *Id.* at Exhibit B. Employee received this notice on January 26, 2015.

### Analysis

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. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause.

#### *1) Whether Employee's action constituted cause for termination*

Pursuant to 6B DCMR § 3907.1, the following shall be grounds for termination of employment, provided that the notification requirements in section 3904 of this chapter have been met:

- (a) A confirmed positive drug test result;
- (b) A positive breathalyzer test;
- (c) *Refusal to submit to a drug test or breathalyzer* (emphasis added); or
- (d) In the case of an employee who acknowledged a drug and alcohol problem as specified in section 3904.4 of this chapter, failure to complete the counseling and rehabilitation program, or a confirmed positive drug test result for the test conducted upon completion of the counseling and rehabilitation program pursuant to section 3905.5 of this chapter.

According to the record, Agency's decision to terminate Employee was based on this cause of action.

#### **Refusal to submit to a drug test or breathalyzer<sup>9</sup>**

In this matter Agency alleges that, on October 23, 2014, upon suspicion by management that Employee was under the influence of drug and/or alcohol, a reasonable suspicion form was completed by Mr. Hayes and Ms. Fuels, both managers. Employee was taken to location 441 for a drug and alcohol test by Mr. Hayes. Upon completion of the alcohol test, Employee was instructed to provide a urine sample. The sample she provided was inadequate for proper drug testing. Employee was instructed to drink up to 40 ounces of water within a three (3) hour period or until she had provided a sufficient urine sample. Employee became difficult after consuming 16 ounces of water and could not give a second urine sample. Agency concluded that because Employee left the collection site before the collection process was completed, her action constitutes a refusal to test.

#### **A. Reasonable suspicion**

Employee argues that Agency did not meet the reasonable suspicion test. She explains that a referral for a drug test based on reasonable suspicion requires the concurrence of two (2)

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<sup>9</sup> 6B DCMR § 3907(c).

trained and certified officials. Employee further asserts that while there is evidence of Mr. Hayes' training and certification related to drug training; there is no evidence that Ms. Fuel's had any training and certificate related to drug testing recognition. Furthermore, Ms. Fuel was not present at the Evidentiary Hearing. Agency on the other hand argues that Ms. Fuel provided a second opinion as another trained supervisor in substance abuse recognition. Agency's witness Mr. Roberson testified that Ms. Fuel was certified in the required substance abuse training.

According to 6B DCMR § 3908, the immediate supervisor or manager of an employee occupying a safety-sensitive position shall make a reasonable suspicion referral for testing of an employee in a safety-sensitive position *when there is a reasonable suspicion that the employee is under the influence of illegal drugs or alcohol to the extent that the employee is too impaired to perform his or her duties* (emphasis added). Section 3908.2 further states that, Prior to contacting the appropriate personnel authority to make a referral under this section, the supervisor or manager shall:

- (a) Have probable cause or reasonable suspicion that the employee is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired;
- (b) Gather all information and facts to support this suspicion; and
- (d) Receive a second opinion from another supervisor or manager.

Here, the parties agree that Employee occupied a safety-sensitive position at the time of the incident. Mr. Hayes testified that Ms. Fuel served as a manager on the date of the incident, and had served as one for a significant period. Mr. Hayes also testified that on the October 23, 2014, both he and Ms. Fuel observed Employee's physical symptoms and it appeared that she was under the influence or intoxicated. Mr. Hayes and all of Agency's other witnesses testified that after Mr. Hayes' and Ms. Fuel's observation of Employee, Employee was still allowed to go on her afternoon tour. She was only taken to the testing site at the end of her tour of duty. To begin with, I find this judgment call by Agency's management staff especially troubling. If both Mr. Hayes and Ms. Fuel believed that Employee was under the influence of illegal drugs or alcohol to the extent that she was too impaired to perform her duties, sending her out on her afternoon route to take care of children raises a red flag with regards to Agency's management decisions.

Moreover, 6B DCMR § 3908 specifically highlights that a referral for reasonable suspicion can only be made *when there is a reasonable suspicion that the employee is under the influence of illegal drugs or alcohol to the extent that the employee is too impaired to perform his or her duties* (emphasis added). The fact that Mr. Hayes was comfortable sending Employee out on her afternoon route proves that neither he nor Ms. Fuel had a reasonable suspicion that Employee was impaired enough to perform her duties on October 23, 2014. Therefore, I conclude that because Employee was allowed to perform her duties, and did in fact adequately do so after being observed by Ms. Fuel and Mr. Hayes, a reasonable suspicion referral was not warranted.

Additionally, Agency's Policy for mandatory drug and alcohol testing of employees who serve children or youth<sup>10</sup> provides in pertinent parts under the Reasonable Suspicion section that, a trained supervisor will make the initial observation necessary to require the [reasonable suspicion] test... The initial observation shall be substantiated by the observation by a second (2<sup>nd</sup>) trained supervisor before a test referral is made."

On October 23, 2014, Employee was observed by both Mr. Hayes and Ms. Fuels, two supervisors. While there is testimony from Mr. Hayes and Mr. Roberson that Ms. Fuel was certified in the required substance abuse training, I do not find these testimonies convincing.<sup>11</sup> Agency's own policy emphasizes that both supervisors involved in the reasonable suspicion referral must be trained. Throughout the appeal process at OEA, Agency has had the opportunity to present either documentary evidence such as a certificate of completion or make Ms. Fuel available to testify at the Evidentiary Hearing to the issues of her drug and alcohol recognition training, but it failed to do so. Further, it can be reasonably assumed that since Ms. Fuel's official title was Operations Assistant and she was just filling in as a supervisor because of a vacancy, it is highly unlikely that she received all the trainings and certifications as the actual supervisors. Accordingly, I find that Agency has not met its burden of proof in this instance.

### **B. Refusal to test**

Agency contends that, Employee's failure to provide another sample for testing and her departure from the testing site constitutes a refusal to test. Agency stated in its Advance Written Notice of Proposed Removal that Employee's termination was based on her "... refusal to complete a reasonable suspicion drug test ... by not providing a sample large enough for testing." Employee on the other hand states that she did not refuse to test, but rather was prevented from completing the test by Agency. She explains that, after the shy bladder process began, she took the water from the tester and then announced that she was ready to give another sample, but her request was declined by the tester, making it obvious that she would be late to retrieve her children from the daycare.

Pursuant to 6B DCMR § 3907.1(c) supra, *refusal to submit to a drug test or breathalyzer* is grounds for termination. In the instant matter, Employee did not refuse to submit to a drug test. She provided a urine sample for the drug test which the collector deemed inadequate. Because she was unable to provide a sufficient amount of urine sample during her first attempt, she was considered to have a "shy bladder," and as such was required to undergo the "shy bladder process." According to the record, the "shy bladder" process encompasses the following: the employee has to stay on site, and drink up to 40 ounces of liquid within a three (3) hours period in order to produce a specimen. After the three hours passed, the employee would be informed their time was up. Ms. Cherry testified that if someone with a "shy bladder" is given a cup of water and they immediately request to use the bathroom, she tries her best to deter them from going, but she cannot stop an employee from saying they want to go to the bathroom. She further testified that if the employee presses the issue of going to the bathroom immediately, she takes

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<sup>10</sup> Agency's Exhibit 12, at XII B 3b.

<sup>11</sup> It should be noted that Agency submitted Mr. Hayes' Reasonable Suspicion Supervisor Training Certificate of Completion as evidence of his training, but failed to submit any such document for Ms. Fuel. See Agency's Brief in support of Termination at Exhibit B (October 25, 2016).

them to the bathroom. And if they are short again, she documents it. In any event, she tries to encourage the employee to wait. *Tr. 76.*

Ms. Heard testified that after she provided Employee's first sixteen (16) ounces of water, Employee told Ms. Cherry that she was ready to provide another urine sample, but Ms. Cherry wanted Employee to wait longer and asked Employee to sit in the waiting area. *Tr.42-43.* Agency has not provided this Office with any documentation or policy stating that an employee with a "shy bladder" cannot provide a urine sample immediately after drinking any liquid. When Employee stated that she was ready to provide another urine sample, Agency should have allowed her to do so. And if at that point she was unable to provide a sufficient amount of urine sample at this time, then they could have documented it as Ms. Cherry stated. Because Employee asked to provide another urine sample during the "shy bladder" window and Ms. Cherry did not allow her to do so; Agency cannot now charge Employee with refusal to submit to a drug test or breathalyzer. Consequently, I find that Agency has not met its burden of proof with regards to this cause of action, and as such, cannot use it as a basis to discipline Employee.

**2) *Whether the penalty of termination 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).<sup>12</sup> 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 Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In this matter, I find that Agency has not met its burden of proof for the above-referenced charge, and as such, Agency cannot rely on this charge in disciplining Employee.

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<sup>12</sup> 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).

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse her all back-pay, and benefits lost as a result of her removal; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Senior Administrative Judge