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

In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup>	)	OEA Matter No. 1601-0038-20R21
	)	
v.	)	Date of Issuance: March 8, 2022
	)	
DISTRICT OF COLUMBIA	)	MONICA DOHNJI, ESQ.
DEPARTMENT OF PUBLIC WORKS,	)	Senior Administrative Judge
Agency	)	
	)	

Employee *Pro Se*  
Connor Finch, Esq., Agency Representative

**INITIAL DECISION ON REMAND**

**INTRODUCTION AND PROCEDURAL HISTORY**

On March 19, 2020, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Public Works’ (“DPW” or “Agency”) decision to terminate him from his position as a Parking Enforcement Office (“PEO”), effective February 22, 2020. Employee was terminated pursuant to District of Columbia Municipal Regulation Personnel Manual (“DCMR”) 6B DCMR §§ 435.6<sup>2</sup> and 1605.4(h).<sup>3</sup> OEA issued a Request for Agency Answer to Petition for Appeal on June 16, 2020. On July 7, 2020, Agency submitted its Answer to Employee’s Petition for Appeal. This matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on December 17, 2020. The undersigned issued an Initial Decision (“ID”) in this matter on March 18, 2021, reversing Agency’s decision to terminate Employee.<sup>4</sup> Agency filed a Petition for Review appealing the ID to the OEA Board on April 22, 2021. The OEA Board issued its Opinion and

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> 6B DCMR § 435.6: In accordance with Section 428, a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations.

Pursuant to 6B DCMR § 428.1, Unless otherwise required by law, and notwithstanding Subsection 400.4, an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in Subsections 435.9 and 439.3 for: (1) A positive drug or alcohol test result.

<sup>3</sup> 6B DCMR §1605.4(h): Unlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty.

<sup>4</sup> See *Employee v. D.C. Department of Public Works*, OEA Matter No. 1601-0038-20 (March 18, 2021).

Order in this matter on August 26, 2021, granting Agency's Petition for Review and remanding the matter to the undersigned for further consideration.<sup>5</sup> The OEA Board in its O&O stated that: "... this matter must be remanded to the AJ for further consideration of actual evidence to support her conclusion that there were mitigating factors."<sup>6</sup> The OEA Board also remanded the matter to the AJ "to consider the progressive discipline arguments on its merits."<sup>7</sup>

Subsequently, a virtual (via WebEx) Evidentiary Hearing was held on November 17, 2021. Both parties were present for the Evidentiary Hearing. Later, the undersigned issued an Order requiring the parties to submit written closing arguments. Both parties have filed their respective closing arguments. The record is now closed.

### **JURISDICTION**

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

### **ISSUES**

- 1) Whether Agency considered mitigating factors in its decision to terminate Employee; and
- 2) Whether Agency complied with Article 10, Section C of the Collective Bargaining Agreement between Agency and Employee's Union.

### **SUMMARY OF MATERIAL TESTIMONY**

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

#### **Agency's Case in Chief**

Tamika Cambridge – Tr. pgs. 10-30

Tamika Cambridge ("Cambridge") works for the D.C. Department of Human Resources ("DCHR") as a Compliance Review Manager at the Policy and Compliance unit. She has been in this position for approximately two (2) years. She has worked for the District Government for about six (6) years. Cambridge testified that as a Compliance Review Manager, she oversees the enhanced suitability process which includes the District's Drug and Alcohol program. Tr. pg. 13. She has about eleven (11) direct reports. Cambridge explained that she and her direct reports manage all the enhanced suitability for pre-employment, volunteers, appointees, executives and excepted service for about thirty-two (32) agencies. Cambridge asserted that she has a team of

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<sup>5</sup> See *Employee v. Department of Public Works*, OEA Matter No. 1601-0038-20, Opinion and Order on Petition for Review (August 26, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

specialists in different units, such as the Mandatory Drug and Alcohol Testing Unit that manages pre-employment and random testing. Tr. pgs. 13-14. Cambridge noted that her program coordinator managed the random program for all safety-sensitive designation. She stated that Employees that hold such designations are part of the random program. Tr. Pg. 14.

Cambridge testified that safety-sensitive designations are those employees who occupy positions that could cause imminent permanent danger to them if they are under the influence of drug or alcohol. Tr. pg. 14. She noted that safety-sensitive positions include, but not limited to motor vehicle operators, or anyone dealing with heavy equipment. She also explained that the position designation was based on the individual agency and the position and the roles and responsibilities of the employee. Tr. pg. 15.

Cambridge testified that with the random program, she has a team of specialists who work with a vendor who does the randomizations and provide Cambridge's team with a list of who have been selected to do random testing for the month. Her program coordinator coordinates with the agencies' Designated Employee Representatives, ("DERs"), to notify the employees who have been selected. However, she is not familiar with the process at the agency level. She stated that after the selected employees get tested, the results are sent back to her unit. Tr. Pg. 15. Her specialists prepare a package for those that come back with a positive result. The package and any evidence are submitted to her for review the evidence. Thereafter, she follows the process to propose whatever action is appropriate, be it termination or a suspension. Tr. pg. 16. When asked when a suspension would be appropriate instead of a removal, Cambridge stated that the rules have changed for Chapter 4 of the District Personnel Manual ("DPM"). So it would depend on the timeframe. If an employee has a positive result, regardless of the circumstances, at her level, she would propose removal if it is appropriate. She also asserted that the Collective Bargaining Agreement ("CBA") is considered in making this decision. Tr. pgs. 16-17. Cambridge acknowledged that there was a change to the DPM in 2020, specifically relating to marijuana. Tr. pg. 17.

Cambridge recalled reviewing Employee's case, but she does not recall the specifics of the case due to the passage of time. Tr. pgs. 17 -18. Cambridge identified Employee's Proposed Separation document, which was drafted by her office, and marked as Agency's Exhibit 1 at the hearing. Tr. pgs. 20-21. She explained that Employee's drug test results from his random testing was positive, and this was a notice to Employee to inform him that a proposed separation was being imposed on him because of the positive drug test result, pursuant to Chapter 4 of the DPM. She also noted that the proposed document gave Employee some instructions about why he can no longer occupy that position - being safety-sensitive. Tr. pg. 21.

Cambridge affirmed that there was a review process for when an employee tested positive. She explained that an employee provides a sample. When the results come back, the Medical Review Officer("MRO") reviews the cases and validates the results. If there's a positive result, the MRO goes through the result with the donor and explain the results to them. The MRO also inquires as to whether there is any cause for the positive result. If the donor is able to provide some type of reason, Cambridge believed that the MRO will work with that person, go through their validation process to verify if the use of a prescription was involved. Subsequently, the MRO would make the determination if the result will stand as a positive. Cambridge noted

however that she was not very familiar with the specifics of the discussion between the MRO and the donor, as well as the verification process at the MRO level. Tr. pg. 23. Cambridge reiterated that the donor, in this instance, Employee, would speak with the MRO before the results are issued to DCHR. Tr. pg. 24.

Cambridge acknowledged that she recommended removal for Employee because his drug test result came back positive. She explained that Employee was selected for random testing. He went and provided a sample. The sample came back from the MRO with a positive, result. She followed the established procedure and the process as outlined in Chapter 4 of the DPM. Tr. pg. 25. Cambridge also affirmed that she prepared the Douglas Factor Worksheet but does not recall what was in the Douglas Factor Worksheet. Tr. pg. 25. Cambridge asserted that she found Employee's conduct to be aggravating as noted in the Douglas Factor Worksheet because, Employee had a safety-sensitive position and his conduct violated the policy and conduct that he would have acknowledged being in this designation at the start of his employment with the District. Tr. pg. 26. Cambridge averred that the District government as a whole has a zero-tolerance drug use policy. And Employee would have signed that at the start of his employment to acknowledge that he understood the requirements for holding this position and what the District's policies were. She does not recall recommending any penalty other than termination for safety-sensitive employees who tested positive for opiate. Tr. pg. 27. On cross, Cambridge testified that she was not involved in the medical review process, but typically, the MRO would validate the results. Tr. pg. 28.

#### Justin Zimmerman – Tr. pgs. 30 – 53

Justin Zimmerman (“Zimmerman”) has been employed with DCHR since 2013. He is currently the Associate Director over the Policy and Compliance Administration and has been in this role since 2014. Zimmerman explained that the Policy and Compliance Administration is broken into two components - the Policy Development Team and the Compliance Team. He oversees the operations for the entire Administration and Policy Development Team. On the Policy side, they develop all the District's Human Resources (“HR”) management rules and regulations and guidance materials such as the electronic District Personnel Manual. They manage and maintain that manual for the city and propose regulatory amendments to implement the Comprehensive Merit Personnel Act. On the compliance side, they ensure that HR personnel regulations, laws and guidance are adhered to across the city. There's a team that manages the drug and alcohol testing requirements. Tr. pgs. 32-33. Cambridge is one of his direct reports. She is a Compliance Review Manager and she oversees the day-to-day operations of the Drug and Alcohol Program. Tr. pg. 33.

Zimmerman stated that, for current employees who test positive for a controlled substance, he serves as the deciding official and Cambridge serves as the proposing official. Tr. pgs. 33-34. Zimmerman testified that the city-wide policy that falls under the Mayor's authority requires that they test for certain controlled substances, such as opiates. An employee who tests positive for these controlled substances is deemed unsuitable to stay in a safety-sensitive position. Tr. pg. 34. He defined safety-sensitive positions as positions that when performed while impaired have the reasonable, foreseeable outcome of significant injury or loss of life. Tr. pg. 35.

Zimmerman noted that he signed off on Employee's notice of final removal. He identified Agency's Exhibit 2, the separation notice in this case. Tr. pg. 37. Zimmerman explained that the removal actions go through a process – there's a proposed removal action, which is usually signed off by Cambridge, then it goes to a hearing officer who issues a report of recommendations and findings. Based on Zimmerman's review of those documents and the other details that may have been put into the record by the employee at the time – such as a response to the proposed action, he determines whether it is appropriate to move forward with the removal action. Zimmerman averred that except in marijuana cases, employees are not suspended for positive test results. They are separated when they test positive. When asked if he recalled any instance in which an employee tested positive for opiates and was not separated from a safety-sensitive role, he stated no. Tr. pgs. 39 -41.

Zimmerman also asserted that in Employee's case, the proposed action was for a positive test result for opiates. The hearing officer agreed with their conclusions that the employee was not suitable for the position any longer because he tested positive for a controlled substance and therefore, could no longer stay in the safety-sensitive position. Zimmerman stated that he reviewed a proposed separation proposed separation notice, along with the Douglas Factors that were evaluated by the proposing official. He also reviewed the report and recommendation issued by the Administrative Officer, which includes any arguments that the employee would have made in their defense at the administrative hearing level. Tr. pgs. 39-41. He affirmed that he concurred with the Douglas factors analysis as presented by the proposing official in Employee's matter. Tr. pg. 42.

On cross-examination, when asked if Zimmerman had earlier testified that the hearing officer agreed with the termination/separation, he responded that "That is what I said" Tr. pg. 42. When asked if he recalled receiving a document from the Hearing Officer stating that as a result of the facts and the recommendation for the cause of action is a 15-day suspension and retraining, on agency drug-related policies, Zimmerman stated that he could not recall specifically what the recommendation was. Tr. pg. 43. When asked why he did not consider the hearing officer's fifteen (15) days suspension recommendation, Zimmerman explained that they considered the recommendations, however, they operate the Drug and Alcohol Program at the city-wide level, and they have never not removed a person for a positive opiate test, and they were not willing to start a precedent by imposing a suspension in this case. Tr. pgs. 48 -49. Zimmerman explained that the city has a "no tolerance" policy for positive drug test results for the panel that was used. While the hearing officer suggested something in otherwise in Employee's case, it didn't change their "no tolerance" policy. Tr. pg. 49. He affirmed that he has never seen a positive drug screening result in anything but termination. Tr. pg. 50.

On redirect, Zimmerman stated that pursuant to the regulations, if you test positive you are no longer suitable for the position. Tr. pg. 50. When asked if a fifteen (15) days suspension and retraining in lieu of termination was consistent with the regulation, Zimmerman said no. Tr. pgs. 50 -51.

On recross, Zimmerman stated that Chapter 4 of the DPM addresses the issue at hand. He also testified that he has a general knowledge of the progressive disciplinary language that is in

the Collective Bargaining Agreement (“CBA”) between Agency and the American Federation of Government Employees, Local 1975. Tr. pg. 53.

**Employee’s Case in chief**

Lindsey Parker – Tr. pgs. 55 – 63

Lindsey Parker (“Parker”) is Employee’s girlfriend and they have known each other for about eight (8) years. Parker affirmed that on November 4, she had an appointment with Dr. Vinu Ganti. She was examined by Dr. Merab Okeyo (“Dr. Okeyo”) because Dr. Vinu Ganti was busy with other patients at the time. Tr. pg. 55. Parker stated that she went to see the doctor to get checked out because she had not been feeling well. She had a really bad cough, body aches, chills, and a hard time breathing. Tr. pg. 56. Dr. Okeyo examined and diagnosed her with an upper respiratory infection. Tr. pg. 57. Parker testified that around the same time, Employee was not feeling well. He was experiencing the same symptoms as Parker, and they scheduled an appointment for Employee to go to the doctor. Tr. pg. 58. Parker stated that she was present with Employee at the doctor's appointment. The doctor diagnosed Employee with an upper respiratory infection as well. Tr. pg. 59.

Parker averred that before Employee’s appointment, she gave Employee some of her medication. She testified that the medication that she gave Employee was for the cough that Employee was having a hard time with. When asked if for all the years she had known Employee, did she know of any time that Employee ever used drugs for recreational use, Parker said “no.” Tr. pg. 60.

On cross-examination, when asked if she recalled the circumstances under which Employee took Parker’s medication, she answered in the affirmative. When asked if she offered the medication to Employee, Parker again answered in the affirmative. When asked if Employee asked Parker what the medication was for, Parker said Employee did not ask. When asked if Employee looked at the medication prior to taking it, she said he did not. Tr. pg. 61. Parker stated that she was prescribed Promethazine-codeine. Tr. pg. 61. Parker highlighted that the doctor did not mention any side effects but directed her to take the medication at nighttime for her cough. Tr. pg. 61-62. Parker noted that she handed the medication over to Employee and she stood right next to Employee when he took the medication. She gave Employee the same dosage that was prescribed to her, which was about a tablespoon. Tr. pg. 62.

Employee – Tr. pgs. 64 -77

Employee testified that he was inappropriately terminated from the Department of Public Works on February 22, 2020, for a failed drug urine test taken on November 7, 2019. Tr. pg. 65. Employee stated that he had not been feeling well for a few days, so he took some medication the night before with the hope of feeling well enough to report to work and perform his duties in the morning. Unbeknownst to him, the medication contained components which triggered the failed drug test. Tr. pgs. 65-66. He explained that later that day at his scheduled doctor's appointment, he informed his doctor of the medication taken and the drug test. His doctor, Dr. Okeyo, explained to him that the medication contained ingredients that would in fact cause a

failed drug test. Dr. Okeyo issued a letter, explaining his health problems, identifying the prescribed medication and its impact on the drug test, which he presented to Agency. Tr. pg. 66.

On November 15th, 2019, Employee was called into his acting supervisor's office and was told to turn in his badge and work ID. When he asked why, he was told to make calls. He interpreted this to mean he should call Human Resources. No additional information was provided to him at the time. He was unaware of his employment status, and he was later placed on administrative leave and eventually terminated for failing the drug test. Tr. pg. 66. At the time, he did not receive much assistance from then Union President, Gina Walton ("Walton"). However, when Walton was replaced as the Union President, his case was turned over to Clifford Lowery ("Lowery"), the new Union President who provided Employee with some help gathering information to appeal the termination on March 19th, 2020. Tr. pg. 67.

Employee asserted that he has suffered emotionally and financially because of his termination. He averred that, he has never been, a recreational drug user. He noted that he is even reluctant to take prescription drugs when non-drug options are available. Employee testified that, during his five-year tenure with DPW, he worked extremely hard to create and maintain an impeccable work ethic and record, and his performance record demonstrated such. He stated that destroying his record in this manner is unacceptable. Tr. pg. 67. Employee stated that he has never had a positive drug test since being employed by Agency. He explained that prior to the last drug test, he was tested once a month and the test results were negative. He was also drug tested when he was hired by Agency, and the drug test result was negative. Tr. pg. 68.

On cross, when asked if he was prescribed cough syrup prior to taking the drug test that you on November 7, 2019, Employee said no. He explained that Parker gave him her cough medication because he had a severe cough and trouble breathing. Tr. pg. 69. Employee affirmed that he was aware that Parker had recently gone to the doctor at the time that she gave him her cough medication. When questioned if he was aware that Parker received a prescription drug as a result of going to the doctor, Employee stated that all he knew was that the doctor had told Parker to get medicine. He did not know if the medication was prescription or over-the-counter medication, and he did not ask Parker whether it was prescription medication before taking the medication. Tr. pg. 70. Employee noted that he did not look at the medication bottle and he did not ask if the medication was prescription or not because he was trying to get well, and he trusted Parker. He stated that all Parker told him was that it was cough syrup. Tr. pgs. 70-71.

Employee affirmed that he was aware that he was subject to random drug tests in his position. When asked why he did not take any steps to ensure that the drug that Parker was giving him was not one of the prohibited drugs that Agency tested for, Employee stated that he wasn't feeling well, and he didn't think about it at that time. Tr. pg. 71. Employee stated that he took the cough medication around 9:30p.m. – 10:00 p.m. the night before he was drug tested, and that was the only time he took the medication prior to the drug test. He only asked Parker the type of medication after he received a positive drug test. Tr. pg. 72.

When asked by the undersigned if he got a call from the MRO after the test results were out inquiring about the reasons for the positive test, Employee said no. Tr. pg. 73. He acknowledged that someone from the drug testing company called to inform him that he had a

positive drug test. He explained that he believed they called him after he was called into the office in November of 2019. He also stated that they only asked questions to verify his identity and to inform him that he had a positive drug test. Tr. pgs. 74 -75. Employee stated that he does not recall whether anyone called him about the prescription medication he took prior to the issuance of the termination notice. Tr. pg. 76.

***1) Whether Agency considered mitigating factors in its decision to terminate Employee***

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. Furthermore, the District Personnel Manual (“DPM”) regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency terminated Employee for violating 6B DCMR §§ 435.6 and 1605.4(h) – “...a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations” and “[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty” respectively.

In the instant matter, there is no dispute that Employee tested positive for codeine after a random drug test on November 7, 2019. As an employee in a safety-sensitive position, Employee was aware of the random testing policy. He was also aware that he must adhere to the random drug and alcohol testing policy. Employee provided a urine sample on November 7, 2019, after he was randomly selected for a drug and alcohol test. Employee was informed on December 16, 2019, that his urine sample tested positive for codeine, a controlled substance. Employee’s positive test for codeine after the random drug test on November 7, 2019, constituted a violation of 6B DCMR § 1605.4(h). Consequently, I find that Agency has cause to institute adverse action against Employee for his positive drug test.

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>8</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; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. Here, I find that Agency has met its burden of proof for 6B DCMR §§ 435.6 and 1605.4(h) – “...a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations” and “[u]nlawful possession of a controlled

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<sup>8</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).

substance or paraphernalia or testing positive for an unlawful controlled substance while on duty.” As such, Agency can rely on these charges in disciplining 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.<sup>9</sup> 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.

However, in the instant matter, I find that, by terminating Employee, Agency abused its discretion. Based on the record, I find that Agency did not consider relevant mitigating circumstances. Employee had a scheduled doctor's appointment with his doctor for November 7, 2019, because he was not feeling well. Although the scheduled appointment was after Employee had provided the sample for the drug test, there is evidence in the record to support Employee's assertion that he unknowingly took Codeine to alleviate his symptoms prior to the random drug test. Parker testified that Employee was not feeling well, and he was experiencing the same symptoms as Parker. Tr. pg. 58. Parker also stated that she gave Employee some of her medication. She testified that the medication that she gave Employee was for a cough because Employee was having a hard time with coughing. Tr. pg. 60. When asked if she offered the medication to Employee, Parker answered in the affirmative. When asked if Employee asked Parker what the medication was for, Parker said Employee did not ask. When asked if Employee looked at the medication prior to taking it, she said he did not. Tr. pg. 61. Parker stated that she was prescribed Promethazine-codeine. Tr. pg. 61. Parker highlighted that the doctor did not mention any side effects but directed her to take the medication at nighttime for her cough. Tr. pg. 61-62. Parker noted that she handed the medication over to Employee and she stood right next to Employee when he took the medication. She gave Employee the same dosage that was prescribed to her, which was about a tablespoon. Tr. pg. 62.

During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee's. I found Parker's testimony in this matter to be very compelling. The record also supports Parker's testimony that she was prescribed Promethazine-codeine on November 4, 2019, a few days before Employee tested positive for codeine.<sup>10</sup>

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<sup>9</sup> *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).

<sup>10</sup> Employee attached a picture of Parker's prescription for Promethazine-codeine to his submission to this Office. The picture clearly showed on the top right-hand side of the label that the prescription was filled on November 4, 2019.

I also found Employee's testimony to be credible. Employee stated that he had not been feeling well for a few days, so he took some medication the night before with the hope of feeling well enough to report to work and perform his duties in the morning. Unbeknownst to him, the medication contained components (codeine) which triggered the failed drug test. Tr. pgs. 65-66.

Furthermore, although Employee was prescribed Promethazine with codeine after he had submitted a sample for the failed drug test, the healthcare professional (CRNP Okeyo)<sup>11</sup> who attended to him on November 7, 2019, informed Agency on November 18, 2019, almost a month prior to Agency's issuance of the Notice of Proposed Separation explaining Employee's health condition. CRNP Okeyo, confirmed in the note that she saw Employee in her office on November 7, 2019. She explained that Employee was suffering from an acute upper respiratory infection on the November 7, 2019, and he informed her that he had taken his significant other's cough syrup which contained codeine, the night before, but he did not know that it had codeine in it. The CRNP also stated that she gave Employee a prescription for Promethazine with codeine during the November 7, 2019, visit, to help manage Employee's cough symptoms. The CRNP's note corroborated Employee's assertion that he was not feeling well and that he was not aware that the cough syrup Parker gave him contained codeine.

Moreover, Cambridge testified that the procedure is for the MRO to review the results and contact the employees with a positive drug result to validate the results. The MRO would determine if there existed a valid reason for the positive result, such as the use of prescription drugs. Tr. pgs. 23-24, & 28. Employee unknowingly took a prescription drug that caused a positive drug test. Employee does not recall receiving a call from the MRO inquiring into the reason for the positive result. Agency also did not present any evidence regarding whether an MRO made contact with Employee to discuss the reasons for his positive drug test. I find that this constitutes a procedural error and should have been considered a mitigating factor. Accordingly, I further find that given the totality of the circumstances, Agency did not consider the above mitigating factors as well as the following: (1) this was Employee's first offense; (2) the availability of a lesser action; (3) Employee's years of service with Agency; (4) his past disciplinary history, his work record and (5) his health condition/mindset at the time he took his girlfriend's medication which caused his drug test to be positive.

**2) *Whether Agency complied with Article 10, section C of the Collective Bargaining Agreement ("CBA") between Agency and Employee's Union.***

Article 10, Section C of the CBA between Agency and Employee's Union provides that "[i]n imposing disciplinary actions, the Department *shall apply progressive discipline and shall consider the mitigating factors against the alleged offense*, in accordance with D.C. Official Code, §1-616.51 et. seq. (2001 Ed.) (emphasis added)." Furthermore, in reviewing Agency's decision to terminate Employee, OEA may look to the Table of Illustrative Penalties. Chapter 16 of the DPM outlines the Table of Illustrative Penalties for various causes of adverse actions taken against District government employees. The penalties for "[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance

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<sup>11</sup> Although Okeyo is a Certified Registered Nurse Practitioner (CRNP), she was the healthcare professional who consulted with Employee on November 7, 2019.

while on duty” is found in DPM § 1607.2 (h)(3).<sup>12</sup> The penalty for a first offense for § 1607.2(h)(3) ranges from suspension to removal. Accordingly, I find that the penalty of termination was excessive and violated the CBA, especially given that this was Employee’s first offense and the CBA mandated the use of progressive discipline.

### Penalty Based on Consideration of Relevant Factors

An Agency’s decision will not be reversed unless it failed to *consider relevant factors*, or the *imposed penalty constitutes an abuse of discretion* (emphasis added).<sup>13</sup> Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to terminate Employee.<sup>14</sup> However, I find that Agency’s imposed penalty constitutes an abuse of discretion as it clearly exceeds the limits of reasonableness and it violates the terms of the CBA mandating the use of progressive discipline. I also find that Agency did not consider all the relevant mitigating factors in this matter. Moreover, despite the District government’s zero tolerance drug use policy, the Table of Illustrative Penalties clearly provides for a penalty range of suspension to removal for a first offense under this cause of action, which is in line with the CBA progressive discipline requirement. While Agency has the discretion to impose penalties, given the mitigating factors and the CBA mandate for progressive discipline, I conclude that Agency abused its discretion in terminating Employee.<sup>15</sup> In its *Douglas* factors analysis, Agency acknowledged that a *lesser*

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<sup>12</sup> Reporting to or being on duty while under the influence of or testing positive for an illegal drug or unauthorized controlled substance.

<sup>13</sup> *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

<sup>14</sup> The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the 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;
- 2) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee’s past disciplinary record;
- 4) the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in employee’s ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 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;
- 10) potential for the employee’s rehabilitation;
- 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; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

<sup>15</sup> DPM § 1610 provides for progressive discipline when appropriate. Agency itself admits that a lesser penalty would be appropriate in this instance when it stated that a less penalty could deter repeated violation of the drug policy by Employee

*action could deter repeated violation of the drug policy by Employee* (emphasis added). Despite the TIA's provision of suspension as a lesser action, Agency noted that it was not aware of an alternate sanction to deter such conduct in the future. Additionally, the Hearing Officer in this matter recommended that Employee be suspended for fifteen (15) days and retrained on Agency's drug related policies.<sup>16</sup> Therefore, I conclude that Agency abused its discretion as it failed to consider progressive discipline or mitigating factors to include: Employee's health/mental state at the time he consumed the medication that contained codeine; Agency's own assertion that a lesser action than termination could deter Employee from violating Agency's drug policies; and the actual availability of a lesser action (suspension) as provided in the Table of Illustrative Penalties. I further find that Agency's decision to not consider the above referenced mitigating circumstances and progressive discipline clearly exceeded the limits of reasonableness; thus, I conclude that Agency's adverse action of termination must be reversed.

### **ORDER**

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of terminating Employee for testing positive for an unlawful controlled substance (codeine) while on duty is **REVERSED**;
2. Agency shall reinstate Employee to his previous position of record or a comparable position;
3. Agency shall **suspend Employee for Fifteen (15) days** for testing positive for an unlawful controlled substance (codeine) while on duty;
4. Agency shall reimburse Employee all back-pay and benefits lost as a result of the adverse action; and
5. 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:

/s/ Monica N. Dohnji  
MONICA DOHNJI, Esq.  
Senior Administrative Judge

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<sup>16</sup> Agency's Answer at Tab 10, *supra*.