THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT F. COOPER Employee	OEA Matter No. 1601-0161-89R98
	Date of Issuance: March 6, 2006
v.	Sheryl Sears, Esq. Administrative Judge
METROPOLITAN POLICE DEPARTMENT Agency	

Johnnie Landon, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Robert F. Cooper was appointed to the position of Police Officer on November 9, 1970. On June 9, 1971, Agency served Employee with notice of separation stating that his "medical qualification [did] not meet the standards established by the Department." The removal was effective on June 25, 1971. Employee protested to various government officials and made inquiries by which he eventually discovered that Agency relied upon information in his United States Army medical records. On September 25, 1980, Employee petitioned the Army to change the records. On November 12, 1980, Colonel George R. Helsel, M.D., Chief of the Evaluation and Inquiries Branch of the United States Army Medical Corp, issued an opinion stating that Employee's records contained erroneous information. On November 28, 1981, the Army made a formal correction.

On March 12, 1981, Employee sent a copy of the corrected record to Agency officials. However, Agency did not reinstate him and Employee proceeded to litigate the matter. On January 13, 1984, the United States District Court for the District of Columbia ordered Agency to reinstate him with backpay effective on the date of his removal and expunge his records of all references to the medical condition.

On May 30, 1985, Employee started a reinstatement physical. After he completed the psychiatric portion on October 2, 1985, Agency sought a finding by the court that Employee was psychologically unfit to serve as a Police Officer. The Court again ordered Employee reinstated. Agency reinstated Employee on December 22, 1986. He reported for another physical on January 7, 1987 and, as part of the examination, he provided a urine sample. According to Agency's Drug Screening Program, the sample tested positive for the presence of cannabanoids.

Agency then issued a letter to Employee dated April 24, 1987 that notified him of a proposal to remove him upon the following charges:

> Charge No 1: Violation of General Order Series 1202, Number 1, Part I-B-3, which provides: 'The taking of any drug or substance, *on or off duty*, as described in the D.C. Uniform Controlled Substances Act of 1981, unless taken upon the prescription of a licensed physician or registered practitioner authorized to dispense a controlled substance during the course of professional practice.'; and this misconduct is an instance of cause as defined in Title I, Section 617.1 (d) (4) (5) (16) of the D.C. CODE.
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> Specification No. 1: In that on January 8, 1987, you provided the Police and Fire Clinic with a urine sample which, when tested, provided a positive reaction for cannibanoids. This urine sample was subsequently retested by a professional independent laboratory which confirmed the presence of cannibinoids in your system, thereby indicating the usage of marijuana or cannibas [sic], for which you did not have a prescription.

After a hearing on August 3 and 4, 1988, an Adverse Action Panel found Employee guilty of the charges. Agency notified Employee that he would be removed effective on February 18, 1989. Employee appealed the decision to Agency's Chief who affirmed it. The removal was effective on March 11, 1989. On March 27, 1989, Employee filed a timely petition for appeal with this Office. Judge Frankie M. Foster sustained the removal and Employee filed a petition for review with the Board of the Office. On grounds that will be enumerated below, the Board remanded the matter for further consideration.

JURISDICTION

This Office has jurisdiction over this matter pursuant to D.C. Official Code § 1-606-03 (2001).

ISSUE

> Whether Agency's decision, as based upon the findings of the Adverse Action Panel, was supported by substantial evidence.

FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

Judge Frankie M. Foster was the original presiding official in the original appeal. Employee set forth two theories in support of his assertion that the test results upon which Agency relied were incorrect. First, he alleged that Agency personnel tampered with the results in order to effect his removal. In the alternative, he posited that the testing procedures were faulty. Employee also set forth several constitutional arguments.

Agency, citing Article 12, Section 8 of the collective bargaining agreement between Agency and the Fraternal Order of Police, asked Judge Frankie Foster to render a decision based solely on the record of proceedings at the agency level. Employee requested a hearing. The Judge initially granted Employee's request for a hearing but later sanctioned Employee for the failure of his representative to act diligently by canceling it.

The Judge rejected Employee's constitutional arguments. And finding "no evidence of intentional adulteration of Employee's sample," sustained Agency's decision to rely upon the drug test and remove Employee. The Judge determined that even though one of the persons in the chain of custody created an "opportunity for tampering with the sample" by failing to make complete notes of his activities, Agency took "acceptable precautions" to "maintain the evidence in its original state." In reaching this conclusion, the Judge relied upon *United States v. Lane*, 591 F.2d 961, 962 (D.C. Cir. 1979), which provides that "[i]t is to be presumed that the integrity of evidence routinely handled by government officials was suitably preserved '(unless the accused makes) a minimal showing of ill will, bad faith, or other evil motivation, or some evidence of tampering.'" Judge Foster issued an initial decision on June 23, 1993 upholding the removal action.

Employee filed a petition for review with the Board of this Office seeking to present new evidence "that the urine specimen documentation relied on by Agency to determine that petitioner's urine sample was contaminated by illicit drugs was falsified and was otherwise not a screening test verification of contaminated urine. . ." Employee also sought to prove that the "alleged urine sample was not protected by an uninterrupted chain of custody because access to said sample was open to unidentified persons prior to said sample being forwarded to a confirmation laboratory." The Board of the Office concluded that "a valid chain of custody was not established and found the Judge's "reliance on *United States v. Lane*, 591 F.2d 961 (D.C. Cir. 1979) in support of the regularity of Agency's procedures misplaced." The Board expressed concern that by "[concluding that the "discrepancy" in the chain-of-custody record is acceptable under *Lane*, the A.J. does not address whether Employee's urine sample was "protected against risk of misidentification or adulteration," despite the irregularity which appears on the record." Employee cites the "irregularity" in claiming that there was a break in the chain of custody of his urine.

It is undisputed that Employee signed a label when he submitted his urine specimen numbered "870243." At Employee's hearing before the Adverse Action Panel on August 3 and 4, 1988, Agency presented, as Exhibit 2, a Urinalysis Transmittal Sheet initiated on January 8, 1987, the date upon which Employee and others submitted their urine samples.

That sheet is meant to document the movement of the urine samples. According to the sheet, Sergeant K.D.K. observed Employee produce the urine, collected the sample and labeled it. Officer J.E.G transported the sample, along with others to the drug testing room where Officer V.R. tested the sample. The result was positive for marijuana.

A notation dated 1/8/87 by Sgt. K.D.K. indicates "forty two (42) urine specimens taken in the men's room of the Police and Fire Clinic by Sgt. K.D.K. which have control number 870223 thru 870233, 870235 thru 870249 [including Employee's, 870243], 870251 thru 870257, 870259 thru 870260, 870262 thru 870264, 870266 thru 870267, and 870269 and 870271." He noted that "[t]he specimens were turned over to Off. J. E.G., at 945 hrs in the men's room of the Police and Fire Clinic." According to the 1/8/1987 notation of J.E.G., he "[r]eceived the above 42 samples as stated in men's room of P & F Clinic. All samples secured in drug test room at 0950 hrs." On 1/8/87 V.R. indicated that he "[r]an test # 5,6,3." On 1/9/87, Marguerite V.A.----- notes "Ran test # 4." On 1/8/87, under the signature of C.A. Hayes, is a notation that appears to be in someone else's handwriting. It reads "Sample need to go out for confirmation under air bill 475824915 packaged (illegible word) and locked in refrigerator in drug testing room." In the same handwriting is an entry dated 1/12/87 that appears under the signature of V.S.R. It reads "Sample under Air Bill 475824915 removed from locked refrigerator in drug testing room and turned over to Fed Express Employee." Employee's sample was transmitted to CompuChem Laboratories where it was tested. The finding of cannabinoids as confirmed.

Agency maintains that there is substantial evidence to support the finding that Employee ingested marijuana. Agency maintains that "in addition to the documentary evidence that clearly shows what happened to Employee's specimen, there is an unrebutted presumption- - -because Employee failed to present any evidence to the contrary- - -that the employee's [sic] in the drug testing program who handled Employee's urine specimen did so in a manner that maintained the integrity of the specimen." Employee, however, posits that the presumption of regularity is rebutted by the discrepancy in the record of the chain of custody.

Employee also notes that, while Hayes indicated that he secured Employee's urine, it was Richardson who testified that he obtained and completed the air bill for transmittal of Employee's urine sample. I find no discrepancy in this. It is entirely logical that one employee could secure the sample and another complete the air bill. That would not indicate any lapse in the chain of custody.

The other "discrepancy" that is the focus of Employee's challenge and the Board's concern is that, in the comment sections, under the names of both C.A.H. and V.R., there are notations in someone else's handwriting. The notations appear to have been made by the same person but not by C.A.H. or V.R. Employee cites this as an irregularity that counters the presumption of regularity in the chain of custody of Employee's urine. Employee challenges this record as incomplete because V.R., after testing the specimen, does not indicate in writing what he did with it. Employee has the same complaint about the entry by M.A. because her notations do not state how she received the samples before she tested them. Employee contends that "MPD has failed to produce any evidence which established then existing procedures that would permit drug screening personnel who

handled Employee's urine specimen to be relieved of the obligation under the chain of custody form to personally and completely account for the handling of Employee's urine."

In the matter of *D.C. Metropolitan Police Department v. Elton Pinkard*, 801 A.2d 86 (D.C. 2002), the D.C. Court of Appeals held that the collective bargaining agreement between Agency and Employee precluded a *de novo* hearing before this Office. In so finding the Court referred to the collective bargaining agreement which provided that "[i]n cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Departmental hearing." The Court considered that provision in concert with D.C. Code § 1-606.2(b) (1999) (now D.C. Code §1-606.02) (2001)) which provides for appeal procedures before this Office. It provides that any "adverse action. . .which has been included within a collective bargaining agreement. . .shall not be subject to the provisions of this subchapter." The Court limited the authority of this Office to a review to determine whether the "decision was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations."

This matter, as well, is governed by the ruling in *Pinkard*. However, the Board of this Office narrowed the focus of the Judge's attention even more narrowly to the evidentiary question of whether the irregularity in the notations described above constitutes a break in the chain of custody that renders the results of the drug test unreliable. Agency contends that it is Employee's burden to put forth evidence that his "specimen was mishandled, adulterated, or misidentified." In making that argument, Agency shifts the focus from its primary burden of responsibility for maintaining proper custody of the urine sample. Agency's transmittal sheet is designed for full and complete notations by each person who handles a urine sample. Those notations, in this instance, are not complete. While the omissions are not, in and of themselves, evidence of mishandling, adulteration or misidentification, they did, as Judge Foster originally noted, "create the opportunity" for those to occur. In the matter of *Rosser v. United States*, 313 A.2d 876, 880 (D.C. 1974), the Court held that "once the government has established an "unbroken chain of custody as a matter of reasonable probability," defendant must present evidence of tampering. In the instant case, the presumption of regularity of Agency's operations was rebutted by evidence of irregularity in the transmittal sheet documenting the movement of Employee's urine sample.

Once the irregularity in the transmittal sheet was identified, it was for Agency to produce evidence to explain it. Agency has not explained why entries signed by one person were made by someone else. There is no way to know if the entries were made after the activities they purport to document or concurrent with them. More important, there is no way to know if they are true. According to the format of the sheet, Agency's drug testing personnel are required to personally and completely account for all of their actions in handling a urine specimen by recording them on the chain of custody form. Agency failed to do so. Therefore, the evidence is rendered unreliable. Agency's action was not supported by substantial evidence and will be reversed.

ORDER

It is hereby ORDERED that Agency's action removing Employee from the position of Police Officer is reversed. Agency is ordered to reinstate Employee to his position of record or to a comparable position. Agency is ordered to reimburse Employee all pay and benefits lost as a result of the removal. Agency is ordered to file, with this Office, within thirty days of the date upon which this decision becomes final, documents showing compliance with this Order.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE