THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	OEA Matter No. 1601-0022-21
	)	
v.	)	Date of Issuance: July 25, 2022
	)	
DISTRICT OF COLUMBIA OFFICE OF UNIFIED COMMUNICATIONS, Agency	)	MONICA DOHNJI, Esq. Senior Administrative Judge

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 9, 2021, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Office of Unified Communications' ("OUC" or "Agency") decision to terminate her from her position as a Telephone Equipment Operator ("TEO"), effective March 12, 2021. Employee was terminated pursuant to District of Columbia Municipal Regulation ("DCMR") 6B DCMR §§ 435.6[2] and 1605.4(h).[3] On May 27, 2021, OEA issued a Request for Agency Answer to Petition for Appeal. On July 15, 2021, Agency submitted its Answer to Employee's Petition for Appeal. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned on October 1, 2021.

Thereafter, the parties were required to submit briefs. Upon review of the briefs submitted by the parties, the undersigned determined that an Evidentiary Hearing was required in

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

[2] 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.

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

this matter. Following a Prehearing Conference wherein both parties were in attendance, a virtual (via WebEx) Evidentiary Hearing was held on April 13, 2022. Both parties were present for the Evidentiary Hearing. Subsequently, 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'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

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

Justin Zimmerman – Tr. pgs. 22 – 69

Justin Zimmerman ("Zimmerman") is employed with D.C. Department of Human Resources as Associate Director for Policy and Compliance. His duties are split into two (2) parts: Policy Division and Compliance Division. The Policy Division is responsible for establishing district wide personnel management tools, such as the personnel regulations and implementing guidance. The Compliance Division is responsible for enforcing policies - human resources policies, federal law or district law. Tr. pgs. 22-23.

The Compliance Division is further broken down into a number of components. One of the components is drug and alcohol program. Zimmerman is not the immediate supervisor of the Drug and Alcohol program. He explained that there's a compliance manager who manages those functions. He affirmed that he was familiar with the District's drug and alcohol policies because the Drug and Alcohol program is part of the policy compliance administration, and he oversees the program. Zimmerman asserted that he loosely oversees the implementation of the drug and alcohol program, but the program itself is primarily managed by the compliance manager, Tamika Cambridge ("Cambridge"). Tr. pgs. 24 -25. Whenever there's a personnel action that arises because of the drug and alcohol program, the compliance manager, Cambridge, serves as the proposing official in those adverse action, and he would serve as the deciding official for most agencies, other than independent agencies. Tr. pgs. 25-26.

Zimmerman is familiar with the District's policies relating to medical marijuana and safety-sensitive employees. Tr. pgs. 26-27. When asked if since the passage of Initiative 71, a medical marijuana card has excused any employee who tested positive as a result of a reasonable suspicion test, Zimmerman said no. Tr. pg. 27. Zimmerman identified Agency's Exhibit 1 as the DCHR guidance on marijuana and the district's drug and alcohol testing, issued on July 28, 2016. Tr. pgs. 27 - 28. Zimmerman testified that under this specific policy, if you are a safety-sensitive employee and you are participating in a medical marijuana program, you can make it known that you are participating in that program. If you were selected for random drug testing and you tested positive, with no signs of impairment, then depending on the Agency, it could be treated more like a prescription. The person would be sent back to work. Tr. pgs. 28-29. He noted that the policy did not change with respect to reasonable suspicion. Zimmerman affirmed that when the above-referenced policy was in effect, safety-sensitive employees who had reasonable suspicion and tested positive for any of the drugs tested would be separated from service. Tr. pg. 29.

Zimmerman identified Agency's Exhibit 2, as the 2017 guidance for reasonable suspicion referrals to DCHR for drug and alcohol testing. Tr. pg. 30. Zimmerman explained that, generally, Management Supervisory Service ("MSS") supervisors, particularly in the agencies that have high population and safety-sensitive employees, underwent the reasonable suspicion detection training. The program is administered by DCHR or the agency's inhouse training programs. These supervisors are trained on what to look for in terms of signs of impairment. They also have to complete a form associated with their observations. Tr. pg. 31. When asked why the supervisor remains with an employee during the testing process, he stated that it was to prevent the employee from leaving. Tr. pg. 32.

Zimmerman identified Agency's Exhibit 3 as the Mayor's Order 02019081 which established the Mayor's cannabis policy with respect to District personnel. Tr. pg. 33. He stated that, generally, employees may participate in the medical marijuana program. However, there is an exception regarding safety-sensitive employees. Essentially, safety-sensitive employees are not permitted to test positive for marijuana under any circumstances. Tr. pgs. 34-35. Zimmerman further explained that the Mayor's order with respect to reasonable suspicion provides that there's a presumption of impairment – that is, an individual who has already been identified as being under suspicion, and then tests positive for marijuana, is presumed to be impaired by marijuana. Tr. pg. 35.

Zimmerman identified Agency's Exhibit 4 as the updated marijuana safety-sensitive employees' guidance that DCHR issued in 2020. Tr. pg. 35. He affirmed that this policy governed Employee's testing process in October 2020. Tr. pg. 36. He noted that the 2020 policy did not change the prior policy on reasonable suspicion testing. Tr. pg. 37. Zimmerman acknowledged that under both policies, a reasonable suspicion test created a presumption of impairment. Tr. pg. 38. He testified that under Chapter 4 of the District Personnel Manual ("DPM"), if you test positive, then you are deemed unsuitable. Tr. pg. 38. He acknowledged that an unsuitable employee cannot remain in the position and safety-sensitive employees are provided notice of this fact on a DCHR created form. Tr. pg. 38. Zimmerman identified Agency's Exhibit 5, as the DCHR notification form, informing the employee that they are subject to the drug and alcohol testing procedures for safety-sensitive position. Tr. pg. 39.

Zimmerman testified that DCHR was aware that Employee was in the medical marijuana program. Tr. pg. 40. He identified Agency's Exhibit 6 as an e-mail from the Office of Unified Communications to DCHR's employer relations team. Tr. pg. 40.

Zimmerman identified Agency's Exhibit 7 as a chain of custody form for the drug collection (the specimen sample collection) for the drug testing. Tr. pg. 42. He also identified Agency's Exhibit 8, as the final results report for Employee's drug test. Tr. pg. 43.

In explaining the drug testing process, Zimmerman testified that they contract with a vendor to manage it. The first step is for the individual to provide a urine sample to a collector. Then a chain of custody form is completed. The specimen is sent to a lab. An initial test is conducted which indicates a positive or negative test result. The result is not very precise as it only gives an indication of the result. If the test result is positive, it goes through a higher caliber testing process and they confirm the first positive with the second test. The results are all sent to a Medical Review Officer ("MRO") who then contacts the individual that provided the sample to determine if there was a medical reason for the positive test result. He affirmed that Employee's test result was positive, and this was certified by the MRO. Tr. pgs. 44 - 45.

Zimmerman identified Agency's Exhibit 9, as a standard proposed separation notice under the Drug and Alcohol program. Tr. pg. 45. He explained that the standard proposed separation notice provides employees with the opportunity to challenge the test result. He was not aware if Employee challenged her test result. When asked if he knew Employee prior to the issuance of this notice, he stated no. Tr. pg. 47.

Zimmerman identified Agency's Exhibit 10, as the Proposing Official's rationale for the penalty that was proposed. Tr. pg. 48. He also identified Agency's Exhibit 11, as the administrative review officer's report on the proposed separation. Tr. pgs. 49 -50. Additionally, Zimmerman identified Agency's Exhibit 12, as the notice of separation that was sent to Employee. Tr. pgs. 50 -51. He affirmed that he authored the notice of separation. He explained that in drafting the notice of separation, he would have reviewed the proposed removal notice, the administrative review officer's report and any attachments he received, and any other materials in the case file at that time such as the copy of Employee's medical marijuana card. Tr. pgs. 51-52. He acknowledged reviewing Employee's response to the hearing officer. Tr. pg. 52. Zimmerman testified that he was aware of Employee's claim that other factors were responsible for the observations that she was impaired, such as lack of sleep, however, he noted that it seemed more probable that the actual observations of the managers were accurate. He noted that there were signs of impairment that were consistent with drug usage, and this was confirmed with the drug test itself. Tr. pg. 52. Zimmerman affirmed that he reviewed and incorporated the Proposing Official's worksheet into the final notice. Tr. pgs. 52-53.

Zimmerman averred that, for reasonable suspicion cases, if an individual test positive for any of the panel drugs, the usual outcome is separation. He explained that the employees occupying safety sensitive position were so designated because of their duties. Thus, if impaired, they could cause great harm to themselves or others. As a result, agencies take the safety and health of the people very seriously. Tr. pgs. 53 -54. He asserted that, if a person has a lapse of judgment because of impairment by a substance that could actually lead to great physical harm

or death, they are considered safety sensitive. Tr. pg. 54. He noted that if an employee is impaired while on duty, they would not be permitted to go back to a safety-sensitive position. Tr. pg. 54.

Zimmerman testified that their policy is for a supervisory official to stay with an employee at all times if there is reasonable suspicion that the employee has been under the influence of drug or alcohol while on duty. Tr. pg. 55. He explained that from a policy standpoint, if a manager sees that an individual is impaired and goes through the reasonable observation process, and they think that the individual is impaired, the manager should not permit the individual to continue to work after those observations were completed. Tr. pg. 57.

Zimmerman stated that, they cannot test people for actual impairment of marijuana. This is the reason why there is a presumption that the employee is impaired by marijuana if they test positive following an accident, an incident, or following a reasonable suspicion observation. Zimmerman did not recall if he was provided information about Employee's brother being in cardiac arrest on the day of the current incident. Tr. pgs. 58 -59.

Laquenceyer Johnson – Tr. pgs. 64 – 100

Laquenceyer Johnson ("Johnson") has been employed with the Office of Unified Communication ("OUC") since 1997. She is currently a Watch Commander on the night team. Tr. pg. 65. Johnson noted that she was the Assistant Watch Commander in 2020, wherein, she was tasked with scheduling; ensuring employees come in; and giving them their assignments and their positions for that particular day of duty. Tr. pg. 66. She also supervised the telecommunications equipment operators ("TEO"), the police dispatchers, as well as the fire dispatchers. Tr. pgs. 66-67. She explained that the telephone/telecommunication equipment operators are the first line of contact for the citizens that are calling into the center. They gather information from the citizens calling in for services, whether it's emergency or non-emergency. They enter the information received from the caller into the tag system. Then the call is routed either to the police dispatcher, the fire dispatcher, or the EMS dispatcher. Tr. pg. 67.

Johnson affirmed that she was familiar with Employee through her employment at OUC. Tr. pg. 70. She stated that Employee was a good employee, who came in and did her job. Johnson stated that Employee was a Telephone Equipment Operator, and her relationship with Employee was professional. Tr. pg. 70. As a night shift Assistant Watch Commander, she directly supervised Employee. Tr. pgs. 70-71.

Johnson affirmed that Agency's Exhibit 13, was an accurate position description document of Employee's position as TEO. Tr. pg. 73. She affirmed that when a citizen makes a 9-1-1 call, it is answered by a TEO. Upon receiving the call, the TEO's responsibility includes gathering all pertinent information in order to classify the call, enter all pertinent information into the system, and then route it to the proper discipline such as the Fire and Police departments. Tr. pgs. 74-75. She explained that the majority of the TEO assignment is fast paced. Tr. pg. 76.

Johnson acknowledged that she has received reasonable suspicion training at least twice. She restated that she takes the test once a year, so she's taken the test more than twice. She

asserted that she has been a supervisor since 2010. Tr. pg. 77. She identified Agency's Exhibit 14, as a training transcript. She affirmed that Agency's Exhibit 14 reflects the training she has received as a supervisor. Tr. pgs. 77-78.

Johnson noted that on October 14, 2020, she had reasonable suspicion that Employee might be under the influence of drugs. Tr. pg. 78. She explained that due to the ongoing COVID-19 pandemic, employees had to report directly to the supervisor to have their temperature checked before going to their desk. On that particular day, Employee did not come to the supervisor's desk, and she was ordered to come to the desk for a temperature check. Johnson stated that she administered the check on that day. She asserted that Employee would typically go to the desk for a temperature check. Tr. pg. 79 - 81.

Johnson described that when Employee came to the desk on October 14, 2020, her eyes appeared to be red and glossy. She was kind of whispering. Tr. pg. 81. After observing Employee, Employee returned to her desk, while Johnson immediately conferred with Ms. Alfreda Miller ("Miller"), the Watch Commander at that time, and requested that Miller come witness exactly what she, Johnson had witnessed. Johnson testified that she documented her observation on a reasonable suspicion form. Tr. pg. 82. Johnson identified Agency's Exhibit 15, as the Reasonable Suspicion form she completed after observing Employee. Johnson noted that Miller did not participate in completing the form but signed the form as a witness. Tr. pgs. 82-83. Johnson affirmed that she talked to Miller about her observations before Miller signed the form. Tr. pg. 84.

Johnson averred that after her observation, Employee returned to her desk, but she ordered Employee to go sit in the Watch Commander's office while she, Johnson, contacted the proper authority to conduct testing. She affirmed that she asked Employee to go sit in Miller's office immediately after her conversation with Miller. Tr. pg. 84.

Johnson testified that for the drug test to be conducted, she called her operations manager, the individuals who administer the drug test and human resources since it was nighttime. Tr. pg. 85. She acknowledged that Employee stayed in Miller's office until the drug test was conducted. Tr. pgs. 85-86. Johnson affirmed that she informed Employee that she had reason to suspect that she was impaired by drugs and that she would be drug tested. She stated that after the drug test, Employee was sent home for the rest of the day. Tr. pg. 87. Johnson identified Agency's Exhibit 16 as Employee's timesheet. Tr. pg. 88.

Johnson acknowledged that she worked on October 15, 2020. She affirmed that Employee returned to work after October 14, 2020. Johnson also affirmed that she stayed on the night shift but could not recall the number of times Employee reported to work after October 14, 2021. Tr. pg. 91. She later stated that she did not recall if Employee reported to work after October 14, 2020. Tr. pgs. 91-92. Johnson noted that as of October 14, 2020, she had no knowledge that Employee had a medical marijuana card. Tr. pg. 92.

Johnson noted that she pulled Employee from Miller's office for the drug test. Tr.pg. 93. She affirmed that she completed the reasonable suspicion and had Miller as a witness. She

affirmed that she did not stay with Employee pending the drug test, and she does not recall advising Employee that she could return to work the next day. Tr.pg. 94.

Johnson stated that she stayed closed to Miller's office while Employee was waiting to be drug tested. She explained that she could see Miller's desk if she stood up. She affirmed that Employee stayed in Miller's office until the drug test was conducted. She reiterated that she did not recall if Employee reported to work on October 15, 2020. Tr. pg. 95.

When asked if she received any complaints from any police or medical dispatcher about Employee during the times Employee was taking calls on October 14, 2020, Johnson said no. Tr. pg. 96.

When questioned by the undersigned about the procedure for completing the reasonable suspicion form, Johnson initially testified that it was standard procedure for each observing manager to fill out the reasonable suspicion form. She noted that a supervisor is required to fill the reasonable suspicion form if they made the observation. Tr. pg. 97. She later acknowledged that both observers can sign one form. Tr. pg. 98. She also affirmed that Employee was called for a temperature check before she took any calls on October 14, 2020. She explained that the call log showed that Employee took some calls on October 14, 2020. She affirmed that after her observation Employee went back to the operating floor and took calls. But she was unsure of the number of calls Employee took on October 14, 2020. Tr. pgs. 99 -100. Johnson acknowledged that Agency kept a record of the calls Employee took on October 14, 2020. Tr. pg. 100.

Employee's Case in chief

Employee – Tr. pgs. 104-117

Employee testified that her brother was in the hospital for an overdose. She received the call at about 8:00 am on October 14, 2020. She noted that she was at the hospital the entire time, she was down, and she did not get any sleep. She picked up her mother and they drove to the Washington Hospital Center together. Employee stated that after her brother was discharged, she took her mother and brother home, before going home herself. By the time she got home, it was time for her to go back to work, and she did not get any rest the entire day. Tr. pgs. 106-107.

Employee asserted that although she possessed a medical marijuana card, she was not under the influence on that day. She explained that she did not dispute the test results because there was marijuana in her system due to her health issues. She reiterated that she was not impaired on October 14, 2020, nor did she smoke any marijuana on that day. Employee also asserted that when she was called by Johnson for the drug test, she was actually on the floor taking emergency phone calls. Tr. pg. 107.

Employee explained that she got off work at 6:00 am on October 14, 2020 and she got the call from her mother around 8:00 am. She affirmed that she was exhausted at the beginning of her shift. Tr. pg. 108. When asked if she was alert enough to begin a 12-hour shift in her condition, Employee stated that she was tired, but stable. She affirmed that she was able to perform her duties. Tr. pg. 109.

Employee could not recall the last time she took marijuana. She explained that her marijuana card was renewed a month prior, and she did not recall having any symptoms or health issues at the time that would have required her to consume any medical marijuana. Tr. pg. 109. When asked how she knew she was not impaired on October 14, 2020, Employee explained that she knew because she did not consume any medical marijuana. Tr. pgs. 109-110. She affirmed that she did not recall the last time she took marijuana but reiterated that she did not take marijuana on October 14, 2020. Employee noted that she was tired, but her eyes were not glossy red on October 14, 2020. Tr. pg. 112. She restated that her marijuana card was renewed in September and she does not remember having any health issues that required her to indulge in marijuana. Tr. pg. 112.

Employee affirmed that between the time she was called into Miller's office and the time that she was drug tested on October 14, 2020, she went back to her desk to take calls. She explained that she was not aware of the reason she was in the office. She was just sitting in the office with Miller and nothing was being discussed. So, she advised Miller that she would go back to take phone calls, and Miller did not object. Tr. pgs. 110 -111.

When questioned by the undersigned, Employee asserted that she did not recall the last time she used marijuana but noted that it would have been on a weekend that she did not work, Tr. pgs. 114-115. She asserted that she was drug tested at 8:00 pm. She noted that she returned to the floor taking calls for about an hour and a half, or an hour and forty-five minutes before she was drug tested. Tr. pg. 115. Employee averred that she returned to work the very next day after she was drug tested. Tr. pgs. 115-116. She maintained that she worked all the way until she was served paperwork on the 25th or the day before the Thanksgiving holiday, informing her of the pending termination. Tr. pg. 116. She stated that she did not get a phone call from the MRO or anyone to inquire as to why her test result was positive. She stated that she provided her medical marijuana card on the day of the testing. Tr. pg. 117.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[4]

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.

1) Whether Employee's action constituted cause for termination

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

[4] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

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 marijuana after a reasonable suspicion drug test on October 14, 2020. Furthermore, the parties have stipulated that Employee possessed a valid Medical Marijuana card at the time of the testing, and Agency was aware of Employee's participation in the Medical Marijuana program prior to the October 14, 2020, drug test. The parties also acknowledged that Employee held a safety-sensitive position at the time of the October 14, 2020 drug test. However, Employee denied being impaired prior to the reasonable suspicion drug test on October 14, 2020. Employee also asserted that she was returned to work after the alleged reasonable suspicion observation, pending the actual drug test.

Reasonable suspicion

Employee noted that while the observing supervisor noted that she appeared incoherent, she was still allowed to return to her workstation to answer emergency calls and serve the public. Employee explained that she was only pulled off her workstation hours later to go provide a sample for the drug test.[5] Johnson testified that after observing Employee, Employee returned to her desk, while she, Johnson, immediately conferred with Miller, the Watch Commander at that time, and requested that Miller come witness exactly what she had witnessed. Tr. pg. 82. She later affirmed on redirect that Employee stayed in Miller's office until the drug test was conducted (Tr. pg. 95), contradicting her previous testimony. Also, when questioned by the undersigned on this subject, Johnson stated that the call log showed that Employee took some calls on October 14, 2020. She affirmed that after her observation Employee went back to the operating floor and took calls. However, she was unsure of the number of calls Employee took on October 14, 2020. Tr. pgs. 99 -100.

Pursuant to 6B DCMR § 432.2, prior to contacting the appropriate personnel authority to make a referral under this section, the trained supervisor or manager *shall*: (a) [h]ave reasonable suspicion that the employee is under the influence of drugs, alcohol, or other substances *to the extent that the employee's ability to perform his or her job is impaired* (emphasis added).

Here, both Employee and Johnson testified that Employee returned to her workstation and answered emergency calls from the public. Specifically, Johnson testified as follow:

> Q So, when you made these observations, did you confer with anyone?
> A I confer with -- at that particular time, **she went to her desk** but then I confer with Ms. Alfreda Miller to have her to come up to witness exactly what I had witnessed.

(Emphasis added). Tr. pg. 82.

> Q And did [Employee] ever report to work after the 14th?
> A **Yes, she did**.

[5] Petition for Appeal (April 9, 2021).

…

Q Do you recall if [Employee] reported to work after the 14th?
A I can't recall.

(Emphasis added). Tr. pg. 91.

> JUDGE DOHNJI: Okay. My next question you said that [Employee] showed up for work and did not come for temperature check as required. At what point did you call her over for a temperature check? Was it, like, how many minutes after she got to work?
>
> THE WITNESS: Well, it was before she-- how many minutes? I don't know –
>
> JUDGE DOHNJI: Is it before she took any calls?
>
> THE WITNESS: **Yes, ma'am**.
>
> JUDGE DOHNJI: Okay. And did she take any calls throughout that day? Does your log show that she had any calls that day?
>
> THE WITNESS: **I believe the log did show that she had some calls that day, yes.**
>
> JUDGE DOHNJI: Okay. So, it means she had the calls after you had observed her being -- well, you had the reasonable suspicion observation. So, you're saying that after the -- you had decided that she was impaired, she might be impaired, she went back to the floor to continue working and take calls. That's what you're testifying here today?
>
> THE WITNESS: **I'm saying that she did take some calls. Yes, she did**.
>
> JUDGE DOHNJI: Okay. So, which means she went back to the floor after your observation. Is that correct?
>
> THE WITNESS: **Yes.**

(Emphasis added). Tr. pgs. 99- 100.

Moreover, Zimmerman testified that the policy is that if there is reasonable suspicion that employee has been under the influence of drug or alcohol while on duty, a supervisory official has to stay with the employee at all times. Tr. pg. 55. He reiterated that from a policy standpoint, if a manager sees that an individual is impaired and goes through the reasonable observation process, and they think that the individual is impaired, the manager should not permit the individual to continue to work after those observations were completed. Tr. pg. 57.

Agency was required to provide Employee's call log for October 14, 2020, along with its closing argument. However, Agency failed to do so. Instead, Agency noted in its closing argument that its records show that Employee answered a total of fifteen (15) calls from 6:05 p.m. to 7:27 p.m. on October 14, 2020. Based on Johnson's testimony above, Employee was pulled off the floor for a temperature test before she could take any calls.[6] Johnson observed that Employee was allegedly impaired when she pulled Employee from the floor for a temperature test. However, she testified that she let Employee return to the floor while she contacted Miller to come observe Employee.

Based on Johnson's testimony and the record, it can be reasonably assumed that Employee answered some or all of the fifteen (15) calls after Johnson's reasonable suspicion observation. The fact that Miller and Johnson allowed Employee to return to the floor and take calls prove that neither supervisor had a reasonable suspicion that Employee was impaired in a manner that she could not perform her duties on October 14, 2020. Furthermore, when asked on re-cross if she received any complaints from any police or medical dispatcher about Employee's job performance during the times Employee was taking calls on October 14, 2020, Johnson said "no". Tr. pg. 96. According to 6B DCMR § 432.2, an employee can only be referred to a reasonable suspicion testing if the supervisor/manager [h]ave reasonable suspicion that the employee is under the influence of drugs, alcohol, or other substances ***to the extent that the employee's ability to perform his or her job is impaired*** (emphasis added). Because Employee was allowed to perform her duties and did in fact adequately do so after being observed by her supervisors, I find that Johnson and Miller did not reasonably believe that Employee's ability to perform her job was impaired. As such, I further conclude that a reasonable suspicion referral was unwarranted.

Employee additionally argued that she was not impaired on October 14, 2020. She explained that she did not dispute the test results because there was marijuana in her system due to her health issues. She reiterated that she was not impaired on October 14, 2020, nor did she smoke any marijuana on that day. Tr. pg. 107. Employee explained that she got off work at 6:00 am on October 14, 2020, and she got the call about her brother around 8:00 am. She affirmed that she was exhausted at the beginning of her shift. Tr. pg. 108. When asked if she was alert enough to begin a 12-hour shift in her condition, Employee stated that she was tired, but stable. She affirmed that she was able to perform her duties. Tr. pg. 109. Employee noted that she was tired, but her eyes were not glossy red on October 14, 2020. Tr. pg. 112.

Furthermore, Zimmerman explained that the Mayor's Order with respect to reasonable suspicion provides that there's a presumption of impairment – that is, an individual who has already been identified as being under suspicion, and then tests positive for marijuana, is presumed to be impaired by marijuana. Tr. pg. 35. Zimmerman also stated that they cannot test people for actual impairment of marijuana, which is why there is a presumption that the employee is impaired by marijuana if they test positive following an accident, an incident, or following a reasonable suspicion observation. Tr. pgs. 58-59. Zimmerman acknowledged reviewing Employee's response to the hearing officer, and he testified that he was aware of Employee's claim that other factors were responsible for the observations that she was impaired,

[6] The time of observation is not listed on the Reasonable Suspicion Observation Form completed by Johnson. See Agency's Answer at Tab 3 (July 15, 2021).

such as lack of sleep. He however, noted that it seemed more probable that the actual observations of the managers were accurate and there were signs of impairment consistent with drug usage, and this was confirmed with the drug test itself. Tr. pg. 52.

Although it may have seemed more probable that Employee was impaired by drug based on Johnson's training and observation of Employee, the specific fact that Johnson and Miller allowed Employee to return to her workstation and take emergency calls from the public after the observation proves that the managers did not have reasonable suspicion that Employee was under the influence of drugs *to the extent that Employee's ability to perform her job was impaired* (emphasis added). Pursuant to 6B DCMR § 432.2, a trained supervisor or manager can *only* make a reasonable suspicion referral if the supervisor or manager has reasonable suspicion that the employee is under the influence of drugs, alcohol, or other substances *to the extent that the employee's ability to perform his or her job is impaired* (emphasis added). Moreover, Johnson admitted that she did not receive any complaints from the police, fire department or anyone regarding Employee's job performance on October 14, 2020. Furthermore, because Employee participated in the Medical Marijuana program, there was a high likelihood that Employee would test positive for marijuana due to prior marijuana consumption. Pursuant to 6B DCMR § 432.6, lawful enrollment in a medical marijuana program shall not be a basis for reasonable suspicion.

Agency argued that regardless of whether Employee's eyes were red because she was impaired by drugs or because she had not slept, Agency had reasonable suspicion to believe that Employee was impaired.[7] 6B DCMR § 432.2, applies to reasonable suspicion referral of employees that are *under the influence of drugs, alcohol, or other substances* and not for general impairment such as sleep deprivation (emphasis added). Consequently, I find this argument disturbing and without merit as Chapter 4 of the DCMR specifically applies to drug, alcohol, and unlawful controlled substances and not for sleep deprivation.

Furthermore, Employee has provided documentary evidence consistent with her assertion that her brother was admitted to the hospital for Acute Substance Intoxication on October 14, 2020, at 8:15 a.m. and was discharged at 01:41 p.m.[8] The record also confirmed that Employee worked a 12 hour shift from October 13, 2020, starting at 6:00 p.m. and ending on October 14, 2020 at 6:00 a.m., just hours before Employee's brother was admitted to the hospital. Employee explained that she had been crying because she was erroneously informed that her brother had passed away from overdose. 6B DCMR § 429.1 provide that, *"[e]mployees who test positive for cannabis following a reasonable suspicion* or post-accident or incident drug test pursuant to §§ 432 or 433 *shall be presumed impaired by cannabis, regardless of their participation in any medical marijuana program*." (Emphasis added). Nonetheless, 6B DCMR § 429.4 further provides that *"[w]hen a corrective or adverse action has been proposed due to a positive drug test result*, and except as may be required by federal or other law, *an employee may provide a written response with supporting evidence challenging that action*, consistent with § 1621. *Evidence supplied by an employee to rebut a presumption of cannabis impairment must be clear and convincing*. (Emphasis added).

[7] Agency's Closing Argument (June 17, 2022).
[8] Petition for Appeal at Attachment 3.

Employee has been consistent throughout her appeal process both at the Agency level and at OEA that her brother's hospitalization, and not drug use, was responsible for her demeanor on October 14, 2020. Employee has provided documentary evidence in support of her brother's medical condition on October 14, 2020, as well as the fact that Employee worked the night shift which ended at 6:00a.m., barely two (2) hours prior to her brother's hospitalization. Moreover, it is reasonable for an individual's demeanor to change upon receiving disturbing news about a loved one. Furthermore, it is plausible for crying/grieving, coupled with lack of sleep to cause red/glossy eyes, appearing incoherent and other changes in an individual's behavior. Therefore, I find that Employee has presented clear and convincing evidence to rebut the presumption of cannabis impairment on October 14, 2020.

Additionally, 6B DCMR § 432.3 provides that, "[a] reasonable suspicion referral *shall be confirmed through a second opinion rendered by another trained supervisor or manager, if available."* (Emphasis added). The Reasonable Suspicion Referral Drug & Alcohol Testing, District Personnel Instruction No. 4-39, effective October 6, 2017, at pg. 2, under subheading "Reasonable suspicion" provides that "[w]hen a trained manager or supervisor sees an employee exhibiting signs of impairment that may be related to the use of drugs or alcohol, the manager or supervisor must record his or her observations of the employee on a Reasonable Suspicion Observation Form. Observations that should be recorded include, but are not limited to, the employee's current appearance, behavior, speech, or smells that are usually associated with drug or alcohol use. *Whenever possible, a second trained supervisor or manager should complete a separate observation form, as well*." (Emphasis added).[9]

Here, only one reasonable suspicion form signed by both Johnson and Miller was submitted. When questioned by the undersigned about the procedure for completing the reasonable suspicion form, Johnson initially testified that it was standard procedure for each observing manager to fill out the reasonable suspicion form. She noted that a supervisor is required to fill the reasonable suspicion form if they made the observation. Tr. pg. 97. She later backtracked by acknowledging that both observers can sign one form. Tr. pg. 98. Both Johnson and Miller were trained reasonable suspicion supervisors at Agency on October 14, 2020. Therefore, Miller was required to confirm Johnson's reasonable suspicion referral through a second opinion since she was also available at work on that day. While 6B DCMR § 432.3 is not clear on whether the supervisor providing the second opinion is required to complete a separate reasonable suspicion form, District Personnel Instruction No. 4-39, specifically provides that w*henever possible, a second trained supervisor or manager should complete a separate observation form, as well*. There is no evidence in the record to excuse Miller from completing a separate reasonable suspicion form. Moreover, the reasonable suspicion form only makes provision for one (1) signature per form. Based on both Johnson's and Employee's testimonies, Miller was immediately informed of Johnson's observation and both Miller and Employee were in the same space (Miller's office) for a period of time after Johnson informed Miller of her observation of Employee.

Agency attempted to downplay Miller's failure to complete a separate reasonable suspicion form by stating that, although the policy is for a second supervisor to complete a

[9] https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_4_39_reasonable_suspicion_referral_drug_and_alcohol_testing.pdf at pg. 2. (Retrieved June 27, 2022).

separate reasonable suspicion referral form, only one supervisor "must" complete a form. Agency further noted that if it was an error for Miller to sign the form completed by Johnson, then that error was harmless error.[10] OEA Rule 631.3 provides that, "[n]otwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean: Error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." The OEA Board has previously held that, "in determining whether an agency has committed a procedural offense as to warrant the reversal of its adverse action, this Board will apply a two-prong analysis: whether Agency's error caused substantial harm or prejudice to Employee's rights *and* whether such error significantly affected Agency's final decision to suspend Employee."[11]

In applying this two-prong analysis to the current matter, the undersigned finds that Miller's failure to complete a separate reasonable suspicion referral form caused substantial harm and prejudice to Employee. As previously noted, the record is void of any evidence of Miller's observation of Employee as required. Absent a second reasonable suspicion form completed and signed by Miller, it would appear that Miller did not independently observe Employee but simply signed off on Johnson's observation. Moreover, Miller allowed Employee to return to the workstation after Johnson's observation, which is very telling. Specifically, this fact can reasonably be interpreted to imply that based on Miller's own observation, Employee's ability to complete her job was not impaired. If that were true, Employee should not have been referred for a reasonable suspicion testing. Further, Miller did not provide testimony during the Evidentiary Hearing held in this matter to apprise this Office of her observations. Accordingly, I conclude that Miller's failure to complete a separate reasonable suspicion form detailing her observations of Employee on October 14, 2020, is not harmless error. 8-A DCMR § 1803 highlights that "harmful error shall mean an error of such magnitude that in its absence the employee would not have been released..." In the instant matter, it can be reasonably assumed that Miller did not observe Employee as required, or her observation of Employee did not rise to the level of impairment, hence, her decision to allow Employee to return to work. Absent a confirmed observation, Employee would not have been subject to a reasonable suspicion testing, which eventually led to her termination. Consequently, I find that Agency's error in this instance constitutes harmful error that warrants the reversal of this adverse action.

Based on the foregoing, I conclude that Agency did not comply with the reasonable suspicion provisions as described in Chapter 4 of the DCMR. Accordingly, I further find that Agency has not met its burden of proof in this matter.

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[10] Agency's Closing Argument, *supra*.

[11] *Kyle Quamina v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0055-17, Opinion and Order on Petition for Review (April 19, 2019).

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).[12] 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.

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:

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

[12] *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).