THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
FRANSWELLO RUSSELL	)	OEA Matter No. 1601-0030-20
Employee	)	
	)	Date of Issuance: December 3, 2020
vs.	)	
	)	JOSEPH E. LIM, ESQ.
D.C. DEPARTMENT OF PUBLIC WORKS	)	Senior Administrative Judge
Agency	)	

Theresa Cusick, Esq., Employee Representative
Bradford Seamon Jr., Esq., Agency Representative

INITIAL DECISION[1]

PROCEDURAL HISTORY

On January 27, 2020, Franswello Russell ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Department of Public Works' ("DPW" or "Agency") decision to terminate her from her position as a Parking Enforcement Officer ("PEO") effective January 3, 2020, in accordance with 6B DCMR §§ 435.6 and 1605.4(h).[2] The basis for Employee's termination is a positive drug test while occupying a safety sensitive position. On February 28, 2020, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") in June 2020. Thereafter, I issued an Order scheduling a Status Conference in this matter for July 7, 2020. Both parties were in attendance. On July 7, 2020, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

JURISDICTION

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

[1] This decision was issued during the District of Columbia's Covid-19 State of Emergency.
[2] Agency's Answer at Tab 8 (February 28, 2020).

ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was a Parking Enforcement Officer with Agency from December 17, 2001, to January 3, 2020. From August 6, 2007, to October 9, 2018, Employee signed receipts acknowledging the safety-sensitive nature of her job, along with the requirement of random, mandatory drug and alcohol testing that accompanies her position.[3] These forms notified Employee that she occupied a safety-sensitive position pursuant to Chapter 4 of the District Personnel Manual ("DPM") and consequently, she was subject to drug and alcohol testing. The forms further notified Employee that any positive test result for illicit drugs or alcohol would subject her to termination.[4]

On August 8, 2019, Employee provided a urine specimen which was delivered to Metro Lab LLC and tested by Quest Diagnostics. An analysis of the urinary specimen by the immunoassay test revealed a positive result for the drug marijuana.[5] On September 26, 2019, Agency issued a Notice of Proposed Separation to Employee.[6] Employee responded to the Notice on October 4, 2019, alleging that she obtained a medical marijuana card on August 23, 2019, and asked to remain in her Parking Enforcement Officer position.[7] On October 9, 2019, the Medical Review Officer, Dr. David Nahin, verified the positive test result.[8]

On November 15, 2019, Hearing Officer Anndreeze Williams reviewed the materials and Employee's responses and found that termination was warranted, citing that the positive drug test was a violation of 6B DCMR Sections 435.6 and 1605.4(h).[9] On December 31, 2019, Agency issued a Notice of Separation to Employee which contained the findings of the Hearing Officer's findings and recommendations. The Hearing Officer concluded that Agency had sufficient basis to terminate Employee. Employee's termination was based on the following causes as outlined in 6B District of Columbia Municipal Regulations ("DCMR") § 1605.4 which states that a cause for disciplinary action includes a positive drug or alcohol test result, and under 6B DCMR §428.1, which states that separation is an appropriate action. Employee's effective date of removal was January 3, 2020.

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[3] Agency February 28, 2020, Response to Employee's Appeal, Tab 2 (Employee Notification-Drug Free Workplace) and Tab 7 (Individual Notification of Drug and Alcohol Testing Requirements).
[4] *Id.*
[5] *Id.* at Tab 7, Attachment 3.
[6] *Id.* at Tab 12.
[7] *Id.* at Tab 15 (Employee email) and Tab 16 (Employee Medical Marijuana Card and Prudent Medical Associates letters).
[8] *Id.*
[9] *Id.* At Tab 15 ("Written Report and Recommendations of Adverse Personnel Action-Franswello Russell" to Deciding Official Justin Zimmerman.)

Whether Employee's actions constituted cause for discipline

Agency submits that Employee was terminated for cause. Agency explains that it has a zero-tolerance policy for any positive drug test, and that Employee was aware of this. As such, Employee was appropriately terminated for testing positive for marijuana. Agency further notes that in Employee's position as a Parking Enforcement Officer driving a government vehicle, the safety of the public is paramount. Thus, the zero-tolerance policy is strictly enforced. Agency maintains that Employee was in a safety-sensitive position and she had notice that she was going to be tested and could self-identify any drug problems, which she failed to do. Agency also asserts that Employee should have known that ingesting or consuming marijuana was a violation of D.C rules and regulations.[10]

Employee admitted to Agency's allegation of testing positive for marijuana, an illegal substance. Employee does not dispute that her position was designated as safety-sensitive and that random drug testing was a component of such positions. She acknowledges being informed that a positive drug test would result in termination. Employee also concedes that she failed to disclose her use of medical marijuana to Agency prior to her positive drug test. However, she points out that at the time of her positive drug test, the District of Columbia had legalized the use of marijuana for recreational and medicinal use. Employee states that she obtained a medical marijuana card after testing positive but admits that even if she had the card before the test, it would not have shielded her from termination. [11]

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Employee's removal from her position at Agency was based on 6B DCMR § 435.6 and 1605.4(h). 6B DCMR § 435.6 states: "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." Under DPM §1605.4(h), the definition of "cause" includes "[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty."

In the instant matter, Employee does not deny that she tested positive for marijuana. She simply argues that the choice of termination as her penalty was unreasonable. The District of Columbia has a drug free work policy. As an employee occupying a safety-sensitive position, Employee herein was required to submit herself to random mandatory drug and alcohol testing pursuant to D.C. Official Code §1-620.35. As a safety-sensitive employee, Employee must adhere to this mandate. Thus, Employee's positive test for marijuana on August 8, 2019, constituted a violation of this policy. Moreover, Employee was provided with a written notification on October 9, 2018, informing her that she occupied a safety-sensitive position within Agency. According to this document, Employee was informed that she was required to participate in random drug and alcohol testing, and that any confirmed positive drug test results *shall* be grounds for termination

[10]Agency's brief (August 14, 2020) and Agency's Reply Brief (November 8, 2020).
[11] Employee's Brief, (October 14, 2020).

of employment (emphasis added). Therefore, I find that Employee's positive drug test for marijuana on August 8, 2019, is sufficient cause for Agency to terminate Employee.

Next, Employee complains that the proposing official, Tamika Cambridge, was not in her chain of command and that the District of Columbia Human Resources ("DCHR") had no authority to remove her for cause. However, Proposing Official Cambridge was designated by the personnel authority, DCHR, in accordance with 6B DCMR § 100.3. The deciding official, DCHR's Justin Zimmerman was authorized by 6B DCMR § 435.9 to make the final decision regarding Employee's employment. Moreover, Agency itself served both the Notice of Proposed Removal and Notice of Separation on Employee, and therefore clearly authorized the termination. Employee's assertion that the Agency's director did not "adopt" the decision is baseless.

I further find that DCHR had sufficient cause to initiate an adverse action against Employee. According to a November 8, 2019 urine analysis conducted by Quest Diagnostics, a credible and independent laboratory, Employee tested positive for marijuana. This positive result was later verified by Dr. David Nahin. Employee's position is classified as a safety-sensitive position, and in accordance with 6B DCMR §435.6, Employee's conduct renders her unsuitable to continue performing her duties as a Parking Officer. Consequently, I conclude that DCHR was justified in instituting an adverse action against Employee in accordance with the provisions of 6B DCMR § 435.6.

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

In assessing the appropriateness of the penalty, OEA is limited to ensuring that "[m]anagerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).[12] When an Agency has proven a charge by a preponderance of the evidence, OEA has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation, or guidelines and is not a clear error in judgment.[13] The Table of Illustrative Actions contained in 6B DCMR § 1607 authorizes removal on the first occurrence of the misconduct committed by Employee, and moreover, 6B DCMR § 428.1 expressly states that an employee who renders a positive drug test in a safety sensitive position is deemed unsuitable and immediately subject to separation. This sentiment is also reiterated in 6B DCMR §§ 435.6 and 400.4. Thus, removal in this case is clearly within the range of penalties allowed by law, regulation or guidelines. Notably, this tribunal has found in favor of the agency where an employee tests positive for illegal drugs and is deemed unsuitable.[14]

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[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).

[13] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

[14] *Donaldson v. D.C. Department of Transportation*, OEA Matter No. 1601-0013-18 (June 12, 2018).

Furthermore, Agency submits that Employee's removal was not an error in judgment and therefore must be left undisturbed by this tribunal.

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. In the instant matter, I find that Agency has met its burden of proof for the charges of "[a]ny act that constitutes a criminal offense whether or not the act results in a conviction" and "[u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result," and as such, Agency can rely on these charges in disciplining Employee.

Despite termination clearly being an allowable penalty for Employee's positive drug test under District regulations, Employee argues that the penalty should be rescinded because DCHR did not consider lesser available sanctions such as suspension or reassignment to a non-covered position. Although the general Table of Illustrative Actions authorizes a suspension on the first occurrence of a positive drug test result, this table notably does not account for employees in safety-sensitive positions, but rather is applicable to employees in non- safety sensitive positions. 6B DCMR § 1607. This is evidenced by the fact that 6B DCMR § 435, which does specifically address safety-sensitive positions, only allows for removal or reassignment to a non-covered position following a positive drug test. In other words, a mere suspension and then subsequent continuation in a safety-sensitive position after a failed drug test is not permitted under Chapter 4 of the District regulations. Whereas a non- safety sensitive employee under the same circumstances may be suspended and then allowed to resume work in the same position; in the instant matter, I find that Agency did not have the option to merely suspend Employee and continue to employ her as a PEO.

Furthermore, although reassignment to a non-covered position is permissible in this instance under Chapter 4 of Title 6-B, it is totally discretionary on the part of the agency. See 6B DCMR § 400.4. Agency was under no obligation to offer reassignment to Employee. Additionally, reassignment to a non-covered position is not always an available remedy because such a position must be available at the time, and the employee must be qualified to perform the duties of that particular non-covered position. Hence, Employee's suggestion of reassignment as an appropriate and/or available sanction is misguided.

Agency asserts that removal is the penalty set forth in the Table of Illustrative Actions for a positive drug test in a safety-sensitive position, and it was reasonable in this circumstance. Employee complains that her depression stemming from financial hardship and domestic abuse were not considered as mitigating factors in choosing her penalty. However, she does not say whether Agency was aware of her depression or that she ever reported any domestic abuse, whether before or even after Agency proposed her termination. In her responses to the proposed separation, Employee did not raise those issues.

Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[15] Employee argues that by removing her, Agency abused its discretion. The evidence does not establish that the penalty of removal constituted an abuse of discretion. 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 remove Employee.[16] While Employee disagrees with the way Agency analyzed the Douglas Factors, there is no requirement that it performs its analysis to the disciplined employee's satisfaction.[17]

Disparate Treatment

Employee also raised an issue regarding disparate treatment. Employe asserts that another employee, Mr. Larry Mhoon, occupied a safety sensitive position. Following a positive drug test, he was first terminated, but subsequently rehired as a parking officer on a walking route. An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.[18] In proving a claim for disparate treatment, an agency must apply practical realism to each disciplinary situation to ensure that employees receive equitable treatment when genuinely similar cases are

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[15] *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).

[16] 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.

[17] Agency Answer Tab 13, DCHR Notice of Separation-Franswello Russell Proposing Official's Rationale Worksheet Douglas Factor.

[18] *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, *Opinion and Order on Petition for Review* (July 22, 1994).

presented.[19] To establish disparate penalties, an employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently.[20] If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[21]

In this matter, Employee failed to provide any details that would amount to satisfying her burden prerequisites for a disparate treatment claim. Employee conclusively refers to Mr. Mhoon as a similarly positioned employee, but she does not provide any details about his employment other than that he was returned to the agency as a parking officer. Thus, she fails to meet the first prong, supra. Moreover, Employee does not provide any details concerning the officials who disciplined Mr. Mhoon or the time period and as a result, she clearly fails to meet the second prong. Lastly, Employee contradicts her own claim by acknowledging that she and Mr. Mhoon actually received the same penalty of termination, and so the third prong is not even applicable in this instance. Although Employee claims that Mr. Mhoon was later returned to the agency, she has failed to present any information surrounding the circumstances of his return and how those circumstances are of a comparable nature to the instant matter. I find that Employee failed to establish a prima facie claim of disparate treatment.

Mayor's Order 2019-081

In addition, Employee submits that the penalty was not appropriate because she should have first been subjected to progressive discipline instead of termination. Employee posits that she should have been assigned to a walking route. She points out that the Mayor's Order 2019-081, "Cannabis Policy and Guidance" issued on September 13, 2019, recommended progressive discipline and that she should have been allowed to undergo drug treatment with leave as an option to termination for a first offense. Employee also disagrees with Agency's contention that termination for a first drug offense is mandated for safety sensitive positions, pointing out that the Mayor's Order allows for a five-day suspension for a first-time offender.

However, Employee fails to identify any part of the order that undermines Agency's decision to terminate her. While the Order does promote progressive discipline, it simply advises agencies to adhere to the principles of progressive discipline as provided in Title 6-B of the DCMR, unless as otherwise provided in Title 6-B.[22] Thus, the Mayor's Order does not amend or bolster the progressive discipline policy discussed in reference to 6B DCMR § 1610.2, but simply restates it. Significantly, this same section also restates that an employee is subject to removal for a first offense of testing positive for marijuana.

Employee also asserts that she should have been given leave to obtain treatment for marijuana use. Although the Mayor's Order provides that a safety-sensitive employee may be authorized to use leave to seek assistance or undergo treatment for marijuana dependency, the

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[19] *See Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995) and *Lewis v. Department of Veterans Affairs*, 2010 M.S.P.B 98.
[20] *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012).
[21] *Id*.
[22] Agency Brief, Attachment 1, p. 7.

Order certainly does not make such authorization mandatory.[23] In fact, the very same section makes it clear that the use of cannabis still subjects a safety-sensitive employee to separation from employment. Furthermore, there is no evidence that Employee ever requested this sort of assistance even following her positive drug test. According to Employee, she first sought and was referred for a medical marijuana prescription as early as January 2019. By that time, she had signed the Individual Notification of Drug and Alcohol Testing Requirements a few months prior in October 2018 and had been duly notified of the consequences of a positive drug test for a position deemed safety-sensitive.

The Individual Notification of Drug and Alcohol Testing Requirements explicitly states that "an employee who fails to disclose a drug or alcohol problem during the 30-day notification period, and thereafter tests positive for drugs and alcohol will be subject to termination of employment."[24] Employee failed to make any disclosures at any time. Rather than notifying the Agency and explaining any potential medical needs or seeking guidance, Employee concealed her intention to use marijuana. Although she did not officially get approved for a medical marijuana card until months later, Employee had clearly been using marijuana prior to obtaining a card, as evidenced by her positive August 8, 2019 urine sample and a letter dated August 16, 2019 (but only provided subsequent to the Notice of Proposed Separation as part of Employee's response to the adverse action) from Dr. Deborah Okonofua stating that Employee had been using cannabis.[25]

The evidence showed that Employee did not responsibly seek any such treatment despite her intent to use marijuana. Instead, Employee willingly jeopardized both the Agency and the public's trust by using marijuana without making any disclosures. As the holder of a safety-sensitive position, Employee showed that she was willing to compromise the safe and efficient delivery of her PEO services by working while impaired.[26]

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.[27] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law.

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[23] *Id*. at 8.
[24] Agency Brief, Tab 7, p. 19.
[25] *Id*. Tab 7; Tab 16.
[26] See also *Rashad v. OEA, et. al*, Case No. 20-CV-12 (D.C. Court of Appeals Dec. 2, 2020) where the Court upheld the termination of an employee in a safety sensitive position after a positive marijuana test in a case involving medical marijuana.
[27] *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).

Accordingly, Agency was within its authority to remove Employee given the Table of Illustrative Actions.

In this case, the penalty for a first offense of a positive drug test in a safety-sensitive position is removal. In reaching the decision to remove Employee, Agency gave credence to the aforementioned *Douglas* factors. Agency explained that Employee's conduct in the instant matter presents too grave of a risk to public safety to be allowed to maintain her position. In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld. Employee's termination was properly effectuated and was allowable under the law.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is UPHELD.

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