THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0059-22
EMPLOYEE[1],	)	
Employee	)	
	)	Date of Issuance: April 17, 2024
v.	)	
	)	
D.C. DEPARTMENT OF GENERAL SERVICES,	)	MICHELLE R. HARRIS, ESQ.
Agency	)	Senior Administrative Judge
	)	

Vanessa Dixon-Briggs, Employee Representative
Kevin Poge, Employee Representative
C. Vaughn Adams, Esq., Agency Representative
Erin A. Meadors, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On June 21, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Department of General Services' ("Agency" or "DGS") decision to terminate him from service effective, May 21, 2022. Employee was terminated for testing positive for marijuana following a reasonable suspicion drug test. Following a request dated June 22, 2022, from OEA for Agency to submit an Answer, Agency submitted a Motion to Dismiss on July 21, 2022. This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on August 2, 2022. On August 3, 2022, I issued an Order convening a Prehearing Conference for September 15, 2022. Both parties appeared for the conference as required.

Following the Prehearing Conference, I issued a Post Prehearing Conference Order on September 15, 2022, requiring the parties to submit briefs addressing whether there was cause for the adverse action and whether the penalty of termination was appropriate under the circumstances. Further, the parties were required to address the status of the training of the employees who initiated and performed the reasonable suspicion observation of Employee in this matter. Agency's brief was due on or before October 21, 2022, Employee's brief was due on or before November 28, 2022, and Agency had the option to submit a Sur-Reply brief on or before December 9, 2022. Further, a Status Conference was scheduled for December 15, 2022. The parties submitted their briefs as required. On Tuesday, December 13, 2022, Employee's representative emailed the undersigned and the other parties requesting that the December 15, 2022, Status Conference be rescheduled due to illness. Due to the circumstances regarding the representative's illness, the undersigned accepted the email correspondence as Employee's Motion to Continue for the record. On December 13, 2022, I issued an Order Granting Employee's Motion and rescheduled the Status Conference for January 19, 2023.

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

All parties appeared for the Status Conference on January 19, 2023, as required. That same day, I issued a Post Status Conference Order requiring Agency to submit a supplemental brief regarding the Safety-Sensitive Designation noted in Section 2 of the Medical Marijuana Program Patient Employment Protection Amendment Act of 2020, which became effective April 21, 2021. Agency's supplemental brief was due by February 15, 2023, and Employee's response was due by February 28, 2023. Both parties submitted the briefs as required. Upon review of the record, the undersigned determined that the parties had not addressed the processes and procedures that were conducted in the administration of the Reasonable Suspicion testing which led to the instant adverse action. Accordingly, on March 8, 2023, the undersigned issued an Order requiring both parties to submit briefs regarding all the actions that occurred on February 3, 2022, related to the reasonable suspicion testing, including addressing whether Employee was released from work and permitted to drive his own personal vehicle or if Agency provided transportation. The briefs were due on or before March 17, 2023.

Following the receipt of the briefs submitted in accordance with the March 7, 2023, Order, the undersigned made the determination that an Evidentiary Hearing was warranted in this matter. Accordingly, on March 23, 2023, I issued an Order scheduling a Status Conference for April 5, 2023, for the purposes of identifying witnesses and setting a date for the Evidentiary Hearing. Both parties appeared on April 5, 2023, as required. That same day, I issued an Order Convening an Evidentiary Hearing for Thursday, May 4, 2023. On April 28, 2023, Agency filed a Motion to Continue the Evidentiary Hearing, citing therein that a key witness, Justin Zimmerman, was no longer available to appear and that his replacement, Tamika Cambridge was not available on May 4, 2023. Agency further cited that the parties had agreed upon a date of May 23, 2023, to reschedule the matter. Accordingly, I issued an Order on May 2, 2023, rescheduling the matter to May 23, 2023.

On May 17, 2023,[2] Employee filed a Motion to Continue the Evidentiary Hearing. Employee's representative cited therein that while she had agreed to the May 23, 2023, date, she had not realized that she had been booked for travel by her employer for that day. Employee cited that the parties agreed to reschedule the matter to June 15, 2023. On May 17, 2023, I issued an Order granting Employee's Motion and rescheduled the Evidentiary Hearing to June 15, 2023. Through email correspondence that occurred on June 12, 2023, Agency advised that it had learned that a key witness was not available for the hearings scheduled on June 15, 2023. Due to the timing of this communication, the undersigned required the parties to ascertain available dates before issuing an Order to reschedule the Evidentiary Hearing. Following a determination of a date that was amenable to all parties and witnesses, on June 26, 2023, I issued an Order Rescheduling the Evidentiary Hearing to August 23, 2023.

The Evidentiary Hearing proceeded as scheduled on August 23, 2023. Following the receipt of the hearing transcript, I issued an Order on September 12, 2023, requiring that closing arguments be submitted on or before October 23, 2023. Further, that Order required that Agency provide copies of the Reasonable Suspicion training materials utilized by the District Government. Agency was required to submit that information to the undersigned and Employee by September 21, 2023. On October 2, 2023, Agency filed a Motion for a Protective Order regarding the Reasonable Suspicion training materials. Agency asserted therein that the materials were not the property of DGS and are produced and maintained by the D.C. Department of Human Resources (DCHR). Agency cited that these materials are proprietary in nature and not meant for those not involved in the training. Wherefore, Agency requested that a protective order be issued to prevent the disclosure or use of the

[2] Employee's representative first sent email correspondence on May 10, 2023.

DCHR reasonable suspicion training materials outside the scope of the instant matter. On October 3, 2023, I issued an Order for a Protective Order for the Reasonable Suspicion Training Materials.

On October 26, 2023[3], Agency filed a Motion for an Extension of Time to File Closing arguments, citing that more time was needed. On October 26, 2023, I issued an Order granting Agency's Motion. Agency's closing argument was received at OEA on November 1, 2023, and Employee's was received on November 7, 2023. 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 had cause to take adverse action against Employee; and
2. Whether Agency followed all applicable laws, rules, and regulations in the administration of the adverse action; and
3. If so, whether the penalty of termination was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 631.2 *id.* states:

For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

On August 23, 2023, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions.

Agency's Case-in-Chief

Charles Artis (Artis) Tr. Pg 11 – 40

Artis testified that his position title at Agency is facility maintenance manager. He is located at the Adams play shop which is the maintenance department for DGS. Artis asserted that his responsibilities include the supervision of plumbers, electricians, painters, and the warehouse. Artis

[3] Agency emailed the undersigned on October 20, 2023, and sent a courtesy copy. I advised the parties that the Motion would be granted, and an Order issued following the receipt of the hard copy at OEA.

testified that reasonable suspicion testing is initiated when there are concerns about a person's behavior, attitude, or personality changes and if an employee is suspected of being under the influence of alcohol or drugs. Artis recalled the last time he had reasonable suspicion testing was a couple of years ago, which he recalled upon review of Agency's Exhibit 5.

Artis testified that he has conducted reasonable suspicion observations in the past. He asserted that he attended reasonable suspicion training in 2016, and again on September 27, 2021. Tr. 14. Artis could not recall what other training he had participated in but noted that he had periodically taken training. Artis testified that he had conducted three (3) reasonable suspicion observations during his tenure at the Agency. He explained that generally, he takes "good notice" if something odd about an employee catches his attention Tr. 16. Next Artis explained that if he suspects that an employee is under the influence, he is required to get a second opinion which means he must get a supervisor to observe the employee. Artis and the supervisor will sit down and talk to the employee and if the supervisor's opinion is the same as Artis', he will make a call to Agency human resources. Following the call to Agency human resources, a tester is sent out and the supervisor must stay with the employee until the tester arrives. Tr. 16.

Artis also cited that he must do an incident write-up when this occurs. He testified that he knows Employee and that Employee was a part of the plumbing shop. Employee's position was a maintenance worker and he had been working with Employee since he was hired. Artis explained that on February 3, 2022, he had reasonable suspicion of Employee. Artis cited that Employee was on the evening shift which started at 3:30 p.m. and went to midnight. Artis explained that he always made contact with people on that shift and so there was a gap between the time people reported and when he would start so he would make contact to make sure that employees understood their responsibilities. Artis explained that on that day, he had a mandatory phone call that he could not leave and so he asked Employee to open a van for a mechanic from the Department of Public Works (DPW) who was coming to check the truck. He gave Employee the key and went back to his office. Tr. 17-18. Artis asserts that when he got off the phone call he happened to go outside and that the mechanic from DPW was driving off in the truck. Tr. 19. Artis cited that he had somebody catch him to bring the truck back because they were going to put the truck in the shop. Artis explained that he went to Employee and asked him why he gave the mechanic the key and based on Employee's response and demeanor, he thought there was reasonable suspicion. Tr. 19-20.

Artis testified that he believed there was reasonable suspicion because Employee said it was a mistake, but he did not understand how Employee made a mistake because his instructions to him were clear. Tr. 20. Artis also cited that Employee's eyes, and his attitude were unusual, specifically his attitude because Employee told him that he should've handled it himself. Artis said that was unusual for Employee. Tr. 20. Artis further testified that he then went to get Mr. Washington and had Employee go into one of the rooms to sit and talk with him. Artis testified that Employee started work at 3:30 PM so he brought him into the room around 4:00 PM or a little after. Tr. 21. Artis testified upon review of agency's Exhibit 2 that that was the document that he was required to fill out when there was reasonable suspicion. Artis cited that this document indicated a time of 5:15 PM. Artis also noted that this document indicated that he said that Employee had red eyes, mannerisms that changed from being excited to low-key and laughed during his responses. Tr 22. Artis testified that he also checked off boxes citing to excessive unauthorized absences in the last 12 months and excessive use of sick leave in the last 12 months' as well as lax appropriate caution and topics of discussion. Artis also checked off unpredictable response to supervision. He explained that he checked this off because of the way Employee came off and how he told him that he should have done it himself. Tr. 23.

Artis further testified that he provided a write up of the incident to Ms. Brown in Agency HR. Artis read the document and cited what he wrote in the document including that when he asked Employee why he would give someone outside of DGS the keys to a DGS vehicle without checking to ensure that this was a valid request, Employee's response was many rumors are passed around the shop and he does not know if they are true or not. Artis also put in this notice to Ms. Brown that Employee was irritated and spoke in a defiant tone stating that he made a mistake and that everyone makes mistakes and that it would not happen again. Artis maintained that Employee repeated that statement and also during this encounter his eyes looked glossy, and his demeanor was aggressive. Tr. 23-24. Artis explained that he did not have any other conversations with Employee after that as there was nothing to say. Artis said that Ms. Brown eventually showed up to Adams place and at that time, a urine sample was taken from Employee. Artis confirmed that the other person who made a reasonable suspicion observation that day was Cameron Washington who is a manager in ground steam and housekeeping. Artis did not know how long it took Ms. Brown to show up after he emailed her. Tr. 25-26. Artis cited that Employee left the job site after everything occurred, but he was not sure whether he was offered a ride home or if he drove because it was then being handled by Human Resources. Tr. 26.

When asked by the Administrative Judge ("AJ") why Artis checked off for excessive absences and use of sick leave, Artis cited that he did this because Employee would "call in sometimes and that's not authorized or it's unscheduled." When asked what made it excessive, Artis answered that he thought it was the amount of times Employee had done it. Artis cited that he could not provide an exact number but asserted that it was "quite a few." Tr. 28. The AJ inquired further, asking whether it was three, four or more times, to which Artis answered that it was where Employee had used all his sick leave. Tr. 28. The AJ inquired whether unauthorized was the same as sick leave. Artis testified that he said it was unauthorized because the reasonable suspicion form "doesn't have where it would be unscheduled sick leave on the form." Tr. 29. The AJ also inquired about Artis' testimony regarding "excessive mistakes and errors in spite of increased guidance." Artis testified that he did this because there were times Employee "would make mistakes and [he] would make [Employee] aware of them. There were times when [he] would talk a lot with Employee. It wasn't that we were strangers. And [he] was constantly talking to Employee. So, if he made errors or made a misjudgment, it was brought to his attention." Tr. 29. The AJ also asked why Artis marked on the form that Employee's speech was normal, balance was normal and that he was walking normal, but then cited that Employee's demeanor was aggressive. Tr. 29. Artis testified that he indicated that because Employee told him that he should have done it [provided the keys to DPW mechanic] himself." Tr. 30.

On cross-examination, Artis testified that the mistakes that he referred to were "mistakes, a lot of it had to do with work he might have performed", but also noted that Employee did not make any mistakes on this particular workday. Tr. 30. Artis explained that he noted this on the reasonable suspicion form and that form did not ask for an actual date. He said that he cited Employee for this because usually when he told him to do something, he did it. Artis iterated that he answered that question related to mistakes in general, not just about the day of the current incident. Tr. 31. Artis also explained that this also applied to the unauthorized absences he put on the form.

Artis went on to explain that he and Employee had talked about "possible suspicion". When asked whether he was aware that Employee had a medical marijuana card, Artis said that he didn't think that safety sensitive employees were allowed to have medical marijuana cards but could not recall if Employee told him he had one. Tr. 32. Artis said that Employee laughed during the time that he was questioning him in the conference room and that this was uncharacteristic for Employee. Tr. 33. He

cited that he did not know if it was due to nervousness, but that any other time he had a serious talk with Employee, he did not laugh. Tr. 33.

Artis testified that the 7:43pm time on the statement he made to Ms. Brown reflected the time he wrote the statement. Tr. 33. Artis affirmed that the process started with Employee at 5:15pm. Tr. 34. Regarding the reasonable suspicion training, Artis testified that once it's completed, the certification gets sent to HR. Tr. 34-35. When asked about the other form completed which reflected a time of 7:23pm, Artis testified that Employee was still getting paid and was still working. He cited that Employee was unloading and taking equipment off a truck. Tr. 35. Artis noted that the reasonable suspicion process started when he made a call and then they had to wait for a tester to arrive and for HR to come to the stie. Tr. 35. He noted that he completed the reasonable suspicion form towards the end of the process. Tr. 36. Artis did not know the time that Employee provided the sample. When asked what happened during the time frame, Artis testified that he asked Employee about the keys prior to 5:15pm. He filled out the form at 5:15pm. Artis further cited that Employee and co-worker M.M. were taking equipment off the truck and that he didn't work the whole day because he was sent home. Tr. 37. When asked why, if he felt Employee was impaired he continued working; Artis cited that Employee "did that part until we took him in the conference room." Tr. 37. Artis noted that Employee may have gone back to help M.M. take stuff out of the truck, but that he wasn't physically working, but was still being paid. Tr. 38. Artis explained that he was being paid on site and did some labor because he was unloading the truck but did not do it for his whole shift.

On redirect, Artis cited that Employee probably continued to work about (one and a half) 1.5 hours to possibly two (2) hours after going to the room for observation. Tr. 39. When questioned by the AJ whether Artis stopped Employee from working, Artis said he did not because Employee was on one side, and he was back in the office. Tr. 39.

Cameron Washington (Washington)- Tr. Pages 40 – 53

Washington is the operations manager for grounds and janitorial team at DGS. He is located at 2200 Adams Place Northeast and holds an MSS level position. Washington has been with Agency since 2018 in this same position. Tr. 41. Washington stated that he has subordinates that includes 100 employees, six supervisors and one manager. Tr. 42. Washington testified that he has had reasonable suspicion training. Tr. 42. Washington cited that he has had it at least two times, and that he knows it has to be renewed every two years and that he was within that time frame. Tr. 42. In identifying Agency's Exhibit 6, Washington cited that this was his training summary which showed he had completed reasonable suspicion training on September 23, 2020.

Washington testified that he was familiar with Employee as he was an employee under Charles Artis. Tr. 44. Washington stated that he was involved with a reasonable suspicion observation of Employee. He did not know the exact date, but stated he was called by Artis on the day to participate in the observation of Employee. Tr. 45. Washington testified that they met with Employee in a conference room, wherein he noticed that Employee's eyes were red, he was talking slow and that he wasn't answering the questions – which appeared to him that Employee was under the influence of some sort of substance. Tr. 45.

Washington identified Agency's Exhibit 2 as the reasonable suspicion document that he filled out after observing Employee. Tr. 46. Washington said that the form was printed out or sent to him by Tenika Brown who was the HR specialist at that time. Tr. 46. Washington noted upon review of Exhibit 2 that he filled out this form around 5:20pm. Washington cited that the form reflected that he checked

off that Employee's speech was normal, and balance was normal, but that Employee looked sleepy. Tr. 46. Washington testified that he made comments noting that Employee's eyes were red and that he was laughing at responses and talking slow and low. Tr. 47. Washington also noted that he observed and marked "no" on some of the observations.

Washington identified page 25 of this document as the email he sent to Tenika Brown (Washington cited February 8, 2022, then in looking at page 24, noted it was February 3rd). Tr 47. Washington explained that his email to Brown was a follow up and that he sent it because the document he filled out didn't explain everything. Tr. 48. Washington read the document aloud before the hearing. Tr. 48. When asked why the date of his email was February 8, 2022, Washington testified that "it might have been a few days later, not the same day which is why [he] referenced February 3, 2022, the day of the observation. Tr. 49. Washington further testified that he was motivated to send an email because "the majority of the time, even when you're doing an observation, it's just a form. We normally follow up with a conclusion of what actually happened in an email." Tr. 49. Washington explained that based on his observation of Employee, he believed Employee was impaired on February 3, 2022. Washington did not know what happened after Tenika Brown arrived on the site. Washington testified that he has conducted a total of three (3) reasonable suspicion observations, with two completed at DGS. Tr. 50.

When asked by the Administrative Judge why Washington had checked "no" for certain sections, Washington cited that Employee was not exhibiting any of those actions. Tr. 50. He testified that he did not notice any excessive fatigue or memory problems exhibited by Employee. Washington affirmed that he checked those as "no" to make note that he did not see any of those issues exhibited by Employee.

On cross-examination, Washington cited that Agency's Exhibit 6 noted that he received reasonable suspicion training in September 2020. He could not recall whether he received a physical certification of completion but noted that he completed the course. Tr. 51. Washington testified that he thought Employee was speaking low and slow. He also noted that Employee's eyes were red but was not aware that Employee wore contacts. Washington testified that he worked with Employee a few times in passing, but that Employee does not report to him. When questioned by the AJ regarding Washington's notation on the form (Agency's Exhibit 6 page 24), that Employee's speech was regular, but he testified during the hearing that Employee's speech was slow; Washington cited that it was now his testimony that Employee's speech was slow during the observation. Tr. 53. On redirect, Washington did not know if someone's contact lenses affected their speech Tr. 53.

Tenika Brown (Brown) Tr. Pages 54 – 89.

Brown testified that she currently serves as the Human Capital Administrator for the D.C. Department of Public Works. Prior to this position, she worked at DGS as an Employee Relations and Labor Relations Specialist. She began her tenure with DGS in August 2021, and left in February 2023. Tr. 56. Brown testified through her position she was familiar with the DGS and DCHR drug policies. She cited that DGS is a subordinate agency to the DCHR, which is the authority that governs the entire drug and alcohol testing program and policies. Brown further explained that there are several types of drug tests conducted in the District, including pre-employment, random (for positions that are safety sensitive) and reasonable suspicion testing for all District employees. Brown noted that random drug tests and testing for safety-sensitive positions are conducted by DHCR Policy and Compliance administration which puts together a random pool. They then notify the drug and alcohol program coordinators, also known as the designated employee representative ("DER") with that list. Then the agency carries out the tests for those identified. Tr. 58.

Brown testified that all District employees are subject to reasonable suspicion tests. She explained that that test is not subject to a specific position designation. Tr. 59. Brown further testified that she was a part of a reasonable suspicion testing for Employee in February 2022. Brown stated that she received a phone call from Artis who called with concerns regarding Employee's behavior and that he needed to be tested for reasonable suspicion. She said Artis noted that the suspicion was for "visibility of the body movement, physical appearance of his eyes and how Employee was speaking." Tr. 60. Brown testified that she told Artist that the "policy identifies a reasonable suspicion observation must take place for a minimum of 20 minutes with a document being completed before we can even reach out to the mobile collector to actually initiate the reasonable suspicion process." Tr. 60. Brown sent documents to Artis via email which included the updated policy regarding facts of reasonable suspicion and the update form. Tr. 60-61. She also told Artis that his "buddy within his yard is Cameron Washington" Tr. 61. Brown explained that she was responsible for the "buddy system" while at DGS. She stated that the buddy system is where she partnered trained managers that have taken reasonable suspicion together "because the law and policy require two trained managers complete the forms as well as observation to be in compliance." Tr. 61. Brown iterated that it was her understanding that both Washington and Artis had the training.

Brown stated that Artis called her again around 5:30pm letting her know that the process had taken place and noted that they had observed Employee and where the observation took place. Tr. 61. Brown explained that she was on telework that day, so she had to come into Adams Place. Tr. 61-62. Brown testified that Artis told her that Employee had redness in his eyes and slow speaking, which he told her before the documents were submitted. Brown thought that the observation occurred in either Ms. Turner's conference room or Mr. Artis' office. Brown said based on this, she contacted the District contracted lab and reported onsite with the collector – Mr. Cherry. Tr. 62.

When she arrived onsite, Brown testified that she conducted a canvas of the work environment to ensure no other employees were around for confidentiality. Tr. 63. Brown explained that Adams Place has a conference room that has a full restroom, so she and the mobile collector went there to set up. She then notified Artis to get Employee. Brown testified that she did not see Employee when she initially arrived. She explained that Artis let her in the side door because the front door was pulled down because it was late. Tr. 63. Brown testified that she and Mr. Cherry sanitized everything and checked the restroom to make sure everything was in order for the reasonable suspicion process.

Brown cited that once Artis brought Employee in, Employee was eating chips and told her that he did not know why he was there. Brown stated that she told Employee that he had been identified for reasonable suspicion. Tr. 64. She said that Mr. Cherry asked Employee to stop eating and there was a 15-minute delay before beginning the process. Brown testified that before she administered the test, she advised Employee that as a AFSCME Local 20-91 member, he had the right to representation, which he declined. Brown stated that she informed Torey Draughn[4] at DCHR about the declination of union representation. Tr. 65. Brown reiterated that there was a 15-minute delay to testing. Tr. 65. Once the testing began, Employee first underwent an alcohol test. Then Employee along with the collector picked out a cup for the urine sample. The collector filled out the forms and then Employee went into the restroom. Employee was not under direct observation for the urine collection. Tr. 65. Upon review of a document, Brown identified the chain of custody form that was completed by the mobile collector. Despite the copy being hard to read, Brown cited that she could tell this was for Employee and that the

[4] The court reporter misspelled this name as Tori Dron. However, the record reflects that the person's name is Torey Draughn.

time she could see for the test was 7:13pm. Tr. 66. Brown noted that only the collector is authorized to complete this form, but she was present when the collector filled out the form. Tr. 67.

Brown testified that after the administration of the test, she advised Employee that there were two options that could take place. She stated that normally the Agency would prefer to put him in an Uber/Lyft or have someone pick him up. Brown testified that Employee was "very adamant that he was capacitated enough where he could drive home." Tr. 67. Brown stated that she notified Torey Draughn of DCHR via Microsoft Teams that she "had reservations about [Employee] driving, but he was adamant enough that he could drive himself home." Tr. 67. Brown explained that she then told Employee that she would escort him to the plumbing shop to get his belongings and that she would watch him on the loading dock as he left. Tr. 67. Brown also noted that when they got into the plumbing shop for Employee to get his backpack, another employee – M.M., was standing there as they left out the door. She stated that she witnessed Employee get into his black Cadillac and he pulled off. Tr. 68. Brown testified that before Employee got into his car, she asked if he would text her work phone to let her know he made it home, and that Employee did so. Tr. 68.

When asked whether she was familiar with the District's medical marijuana policy, Brown testified that the "District government does not permit medical marijuana cards. They are not accepted." Brown explained that Chapter 4 is clear on the drug policy and there is not a specific medical marijuana policy. Tr. 69. Brown maintained that the policy cites that marijuana is prohibited regardless of participation in medical marijuana program. Brown iterated that if a person who holds a medical marijuana card is subject to a reasonable suspicion test, that the card is inapplicable. Tr. 69. Brown further noted that it's against District policy to be at work under the influence of marijuana or intoxicated. Tr. 69. Brown reiterated that if someone who holds a medical marijuana card is subject to reasonable suspicion and tests positive that the card does not serve as an excuse. Tr. 70. Brown testified that she received two emails from Artis and Washington where they provided statements about the reasonable suspicion process and what they witnessed. Brown stated that those emails were sent to her to "tie up loose ends about the process for reasonable suspicion." Tr. 70. She cited that managers would normally submit emails to provide statements. Brown maintained that this was consistent with the District's reasonable suspicion training. Tr. 71.

On cross-examination, Brown was asked to read Exhibit 5, Page 12, 429.2. The AJ asked Brown to explain her testimony regarding what she meant about medical marijuana cards not being accepted in the District. Tr. 74. Brown testified that what she meant by that was "when we look at the types of testing and medical marijuana cards, the medical marijuana card does not exclude any disciplinary actions happening and/or employment conditions not being lost." Tr. 75.

Brown iterated that the two managers noted that Employee had red eyes and was speaking slow. She cited that she was not physically present during the observation and that the two managers reported to her as the DER. When asked whether redness of eyes could be caused by contacts, Brown explained that there are many things that may cause redness in eyes. Brown also explained that because Employee was eating chips when she and the tester arrived, it resulted in a 15-minute delay before testing could commence. Brown further noted that if an employee has consumed any food or drink, in order to avoid a false positive in some way, there is a certain time frame between testing that they must wait. Tr. 77. Brown stated that even if an employee had consumed water, there is still a 15-minute wait period. Tr. 77. Brown testified that this applied to all tests, including the breathalyzer. Tr. 77.

Brown testified that she was not aware that Employee held a medical marijuana card. In identifying Exhibits 5 and 6, the reasonable suspicion training dates for Washington and Artis; Brown

noted that Washington's last reasonable suspicion training was September 23, 2020. Tr. 79. Brown explained that there is no certificate of completion once it's complete. Trainees will complete a survey once they've done the training. She noted that the completion process is managed by DCHR because they facilitate reasonable suspicion training and are the gatekeepers of the drug and alcohol program across the District. Tr. 79. Brown stated that she believed DCHR maintained records of the completed survey.

When asked whether an employee who is believed to be impaired should continue working, Brown testified that the protocol is that if an employee is impaired, they must be sent home. Tr. 80. She noted that the employee is still paid for the full eight-hour day, and the next day it becomes administrative leave with pay. She further explained that an employee remains in paid status during the duration of the investigative process and iterated there is no hardship incurred by an employee if they are sent home. Tr. 80-81. Brown testified that from the time that the manager observes what they believe to be impaired behavior, they should get the test and go home if it gets to the reasonable suspicion process. Tr. 81. Brown reiterated that if it gets to the reasonable suspicion process, that is when the employee is sent home and is subsequently placed on administrative leave. Brown further testified that it would not be appropriate for an employee to keep working in a safety sensitive position. Tr. 81. Brown further noted that the position designation for safety sensitive is "labor forward." She noted that employees are dealing with "drills, tools, moving sinks." Brown stated that by that designation, "it isn't safe for the employee and/or anyone around to be at work in that condition." Tr. 82.

When asked by the Administrative Judge what the 20-minute observation should entail, Brown testified that what is supposed to happen is that the "two buddies, the trained managers, get together. Whether they're going outside, they at least go into the same area as the employee. They have the employee come into a confidential area to have a general conversation with them." Tr. 85. Brown noted that communications between the managers and employee would include questions like "is everything going okay, how was your commute in, is there anything that you need, I noticed you're looking a little different today, is there something that we can help you with..." Tr. 85. Brown noted that the 20-minute observation is a "full-on I need to see exactly what I'm thinking up against the actual reasonable suspicion form itself." Tr. 86. She further explained that it's a "compare and contrast between a reasonable suspicion form versus what you're actually witnessing in real time to see if in fact this what is you're dealing with." Tr. 86.

When asked by the AJ what happens at the end of the 20 minutes and whether an employee is supposed to go back to their duties or stay in the conference room; Brown explained that depending on what is witnessed that the employee may be asked to "hang tight" or may be asked to go to a break room and the managers note they'll be back, but that it all depends on what is witnessed. Tr. 86. When asked whether the employee should be returned to duties, Brown testified that "they should not leave the work yard or work site. No ma'am they should not pick up any work, any routes or leave to do anything." Tr. 87. When asked by the AJ what the policy is regarding transportation for someone believed to be impaired (having noted that her testimony cited to offer an Uber or Lyft to Employee); Brown testified that they contacted DCHR to inform them that the employee did not accept the offer of Uber or Lyft etc., and then that releases the agency from all liabilities. Tr. 88. Brown testified that "we can't make someone get in an Uber or Lyft, but we have to do our due diligence in offering." Tr. 88. Brown further explained that she "wanted to let DCHR know that we crossed our Ts in that area…and because it was declined and [her] verbalizing [her] level of reservation of [Employee] saying that he could drive, that is why [she] asked him to text [her] and let [her] know he made it home." Tr. 88. When asked whether this declination was written or verbal, she noted that there was no written

declination provided/received from Employee. Tr. 88. On re-cross examination, Brown testified that she was not aware of Employee's random drug test during his tenure. Tr. 89.

Shawn Winslow (Winslow) Tr. Pages 90 – 121

Winslow is the Human Capital Administrator at DGS. Winslow's job responsibilities include overseeing all the human resources functions at Agency. Winslow has been with Agency for approximately three (3) years. Winslow explained that in his position, he serves as the liaison between Agency and DCHR for human resources related processes including hiring, terminations, random and reasonable suspicion drug testing. Tr. 93. Winslow further noted that they have a Memorandum of Understanding(MOU)with DCHR regarding the process. Winslow identified Agency's Exhibit 3 as the MOU for Fiscal Year 2022 with Agency and DCHR. Tr. 94.

Winslow testified that he was familiar with the District's drug policies and procedures. Regarding reasonable suspicion for safety-sensitive employees, Winslow first noted that reasonable suspicion training is applicable to all employees, not just safety-sensitive employees. Tr. 95. Winslow went on to explain that reasonable suspicion testing was based on the DC Drug Act of 1988, where employees can not show up to work under the influence of drugs or alcohol or have any drug paraphernalia. Tr. 96. Winslow further noted that for reasonable suspicion, there must be two trained persons to observe the person believed to be under the influence of drugs or alcohol. Tr. 96.

Winslow further testified that once those two people are viewing the person, they will then call for a tester if they believe the person is under the influence. Tr. 97. Winslow also noted that when reasonable suspicion happens, the test should occur within four hours, somewhere between two to four hours. Tr. 97. Winslow also explained that there are two different stances on violations of drug use. There is a random drug test policy for safety-sensitive employees who are tested in a random pool. If someone tests positive for marijuana in that pool, Winslow cited that there is a new policy under the random drug testing where the employee could be suspended for five (5) days for a first offense. Tr. 97-98. Following a first offense, the employee is out for five days and then would have to retest clean to return. Winslow further testified that under reasonable suspicion testing, if the test is positive, that results in automatic separation which DCHR handles. Tr. 98.

Winslow testified that he was familiar with Employee and that he worked with Agency at the Adams Place location. Winslow noted that the decision to separate Employe would have been at the DCHR level because of reasonable suspicion. Tr. 99. Winslow iterated that DCHR makes that determination and then sends it to Agency to administer the action to the employee. Tr. 99. Winslow reviewed [exhibit 5/] page 1 and noted the date of May 16, 2022, and that it was a part of the MOU with DCHR. He cited that with this, they had to act in accordance with DCHR regarding reasonable suspicion guidelines. Tr. 100-101. Winslow said they he could not refute or dispute a letter regarding the consequence of a positive drug test result. Tr. 101. Winslow explained that DCHR may reach out to them for random testing, but with reasonable suspicion tests and a positive test result, there is no "wiggle room" for the penalty of termination. Winslow noted that he and Tenika Brown were involved in the administration of the DCHR paperwork to Employee. Tr. 103. Winslow cited that someone in DGS HR would have been onsite for the testing process. He cited that with any random or reasonable suspicion testing, they must ensure the testing is based on the identification of the employee. Tr. 104.

Winslow identified Agency's Exhibit 5 as the training summary of Charles Artis. Tr. 104. Winslow noted that Artis's record included the date of September 27, 2021, and September 20, 2016. He noted that there were three in total, 9/20/2016; 9/27/2016; and 9/27/2021. Winslow testified that

because Artis last received training in September 2021, it was sufficient for the incident that took place in February 2022. Tr. 106. Winslow noted that training must occur every two years. Winslow identified Agency's Exhibit 6 as the training summary for Cameron Washington. He cited that Washington showed reasonable suspicion training dated of September 23, 2020. Winslow asserted that this date was within the appropriate time period for this incident. Tr. 105-106. The next status for Washington identified an "enrolled" status was for February 14, 2022. Winslow cited that an uncompleted training would not be listed as a completed training in the summary. Tr. 106.

Winslow affirmed that Employee was designated as a safety-sensitive employee. When asked whether he should have appealed that designation, Winslow testified that it would have depended on what was available at that time. Winslow explained that he would have had to look at his "PD" and his resume to ascertain if there were other positions that were not safety sensitive for Employee to do. Tr.107. He explained that he would have had to remain in a safety sensitive position if there were no other available positions. Winslow also noted that Agency's Exhibit 1 would have been mailed to Employee since he was already on administrative leave. Tr.108.

Winslow testified that Agency's posture with respect to the consequences for medical marijuana participants who test positive following reasonable suspicion is that they follow the DCHR guidelines which means separation for a positive test following reasonable suspicion. Winslow also identified Agency's Exhibit 4 as the District's Cannabis Policy Guidance and Procedures (page 66). Tr. 110. Winslow cited that he believed this was the current policy for the District and that it was an administrative issuance dated September 13, 2019. Tr. 110. Winslow affirmed that this was the applicable policy at the time of Employee's termination. Tr. 111. When asked whether there was a medical marijuana policy or procedure for the District, Winslow answered, "yes and no." Tr. 111. He went on to explain that there was an updated policy for medical marijuana in terms of regular testing, but that it was only for the random testing of safety-sensitive employees, not for reasonable suspicion testing. Tr. 111.

Winslow testified that all safety sensitive employees are subject to random pool drug testing. Tr. 111. In 2021, there was a new issuance whereby anyone who had tested positive and it was their first offense, would receive a five-day suspension. He noted that prior to that 2021 issuance, anyone who tested positive was terminated. Tr.112. He cited that under the 2021 policy, if you test positive, you receive a five-day suspension and then must retest and be clear. DCHR allows employees to take leave on their own to test negative. He further explained that it's usually three or four weeks after the positive test that you retest. Tr. 112. Winslow testified that there is no variance for reasonable suspicion tests. If the test is positive, then an employee is subject to termination whether they have a medical marijuana card or not. Tr. 113.

The AJ inquired regarding Winslow's testimony about safety-sensitive appeal designation. The AJ asked whether Winslow knew if Employee had information or notice about the ability to appeal the safety-sensitive designation. Tr. 114. Winslow testified that he did not know whether Employee had this notice. He cited that everyone had to sign off on being safety-sensitive, so he believed Employee would have known. Tr. 114.

On cross-examination, Winslow testified that there should be records to reflect if Employee had signed off on a form and was informed about a safety-sensitive appeal. Winslow cited that there should have been, but he would have to look at Employee's folder to confirm. He further explained that Employee should have signed off on a form in the past four years about being safety-sensitive. Tr. 115. When asked what happens if the reasonable suspicion observers' observations are contradictory,

Winslow averred that he would rely on what those observers saw and noted in their forms since they witnessed it. Tr. 117. Winslow testified that he did have one situation where he served as an observer, and his colleague who served as the second observer thought that the employee was under the influence, but in review of the checklist, Winslow did not agree. Tr. 118. He cited that during the observation the observers can say "I'm not seeing the same thing, or I'm seeing the same thing". He further explained that in that situation, a colleague called him to observe an employee they believed was drunk or under the influence. Winslow cited that he went down and had a conversation with the person, and smelled Listerine. But after an in-depth conversation, he learned that the employee in question was a diabetic. He then inquired as to whether the person had eaten that day, and the person said they had not, so he told them to go and eat. Winslow noted that a person could seem under the influence, but instead be dealing with a medical issue or emergency. Tr. 119. He explained that this is why there are two trained observers required for reasonable suspicion. Winslow noted that there can be differences in opinion, but that the two people should agree with what they saw. Tr. 121.

Tamikia Cambridge (Cambridge) Tr. Pages 122 – 168

Cambridge works for the DC Department of Human Resources as the Compliance Review Manager. Her responsibilities include oversight of all of the compliance related activities, including the District's mandatory drug/and alcohol polices. Tr. 124. She has been with DCHR for nine (9) years. Cambridge explained that DCHR is the personnel authority for DGS, specifically as it relates to suitability through an MOU with the agency to provide compliance services. Tr. 125. Cambridge testified that she is familiar with reasonable suspicion training and the drug policy. She noted that she facilitates reasonable suspicion training monthly and conducts trainings about twice a month. Tr. 125.

Cambridge testified that she was familiar with Employee based on a Mandatory Drug and Alcohol Case (MDAC) created for him. She was involved in the personnel matter involving Employee. Tr. 125. She stated that she sees hundreds of cases but recalled that this case happened sometime in 2022. She identified page 14 of Agency's Exhibit 2 as the proposed separation for Employee dated March 7, 2022. Tr. 127. Cambridge testified that in drafting this letter, her team received notification from DGS that there was a reasonable suspicion initiated on Employee and based on the information provided she agreed, and proposed action against Employee. Tr. 129. She cited that page 20 of Exhibit 2 was the typical way notifications were received. She explained that once a notification like that is received, her team will receive evidence from the agency. Once an employee has gone through the screenings, DCHR will receive the results. Tr. 130. Cambridge affirmed that this was representative of the typical procedure for these matters. Tr. 131. She also attested that she executed the letter in the memo dated March 7, 2022.

Cambridge explained that this process requires this letter to be reviewed by a third party – a hearing officer. Tr. 132. She cited that DCHR, through the mayor's office of legal counsel (MOLC) will assign a hearing officer to review the case. In this matter, the hearing office was Mr. Thomas. Tr. 132. Cambridge noted that she was not familiar with the hearing officer's report. She said it generally goes directly to the deciding official as instructed in the proposed package. She testified that she instructed Shawn Winslow to serve Employee the notice of proposed termination. Tr. 134. She reviewed Agency's Exhibit 2 and noted that it included the processes for termination and that the drug test was positive. Cambridge further testified that the deciding official took all these things into consideration, including the hearing officer's report and made a final decision. Tr. 136. Cambridge affirmed that the *Douglas* factors were included in the package.

Cambridge testified that the District maintains a drug free workplace and zero tolerance so removal is the action that would typically take place in reasonable suspicion cases. Tr. 137. Cambridge explained that the Mayor's Order/Cannabis Policy outlines the District's position as it relates to cannabis. Tr. 138. Cambridge noted that this document is given consideration in terms of the application to procedures for the mandatory drug and alcohol program. Tr. 139. Cambridge testified that Employee's status as a medical marijuana card holder did not factor into his termination. She iterated that no employee can be perceived as impaired on the job Tr. 139. Cambridge reiterated that she was the proposing official and that Justin Zimmerman was the deciding official in Employee's matter. Tr. 140.

The AJ asked Cambridge what processes are in place to ensure that reasonable suspicion testing will be conducted appropriately and in accordance with all applicable regulations. Tr. 141. Cambridge testified that DCHR provides training and education awareness through reasonable suspicion training. TR. 141. Cambridge further explained that the training is required of managers, supervisors, and the HR community. It must be taken within 60 days of their appointment and every two years thereafter. Cambridge also asserted that agencies identify designated employee representatives (DER) and that those individuals maintain and manage the program at the agency level. Tr. 141. Cambridge also noted that DCHR consults with them and provides them with assistance to maintain their drug and alcohol program. Tr. 141. The AJ inquired as to whether Cambridge's office had oversight of the actual procedure for the observation during reasonable suspicion. Cambridge testified that if an agency has an MOU with DCHR, then when DCHR gets the report back, they will send an administrative notice to agency requesting additional information which typically includes an incident report. Tr. 142. Cambridge noted that in review of the incident report, DCHR reviews a checklist to see if everything with the process went as it should have. Tr. 143. Cambridge asserted that they mainly rely upon the results of the drug test. Tr. 144. The Administrative Judge further inquired whether DCHR had oversight in a process wherein an employee was deemed to be under reasonable suspicion but was put back to work and allowed to continue their duties at a certain time. Tr. 144. Cambridge testified that that would be at the agency level. Tr. 144

On cross-examination, Cambridge was asked whether DCHR would be made aware if the report (Employee's exhibit 8 – Hearing Officer's Report) differed in opinion as to whether there was an impairment based on the information gathered by the two observers. Cambridge noted that a hearing officer reviews all information in the package submitted to them and that they provided a recommendation to the deciding official, which in this case, was Justin Zimmerman. Tr. 150.

Cambridge was asked to review Employee's Exhibit 9, which is the Mayor's Cannabis policy and she read aloud Section 403 of that. Tr. 157. Cambridge further testified that if an employee has a medical marijuana card, that it is not on file at DCHR and that DCHR does not accept medical marijuana cards, and thus keeps no records. Tr. 162. Cambridge asserted that random testing is different than reasonable suspicion testing and that she would have to examine the situation where an employee had tested positive for marijuana without incident. Tr. 163.

Cambridge testified that policies have changed, but there was a time when medical marijuana cards were accepted, but now they do not. Tr. 166. Cambridge explained that if an employee presents one, it would be to a medical review officer (MRO), and the MRO will make a note in the record. Tr. 166-167. Cambridge reiterated that there were no records of medical marijuana cards of District employees to her knowledge. Tr. 167. On redirect, Cambridge testified that medical marijuana cards are only contemplated in other policies and procedures. Tr. 167.

Employee's Case-in-Chief

M.M[5]. Tr. Pages 173 – 192.

M.M. testified that he is a licensed plumber with DGS. On February 3, 2022, he was a maintenance mechanic with Agency. Tr. 174. M.M. began work with the District government in 2010 and has been with DGS for that time (he noted that the Agency was formerly called DRES). Tr. 174. M.M. testified that he has known Employee as a co-worker for several years. Tr. 176. M. M. explained that he liked working with Employee and that Employee was a good worker/did a good job. Tr. 178.

M.M. testified that during a period of time on February 3, 2022, he and Employee worked together. Tr. 179. M.M. explained that vehicles had to be unloaded and he and Employee were working on that. The materials to be unloaded included tools, materials, scrap, and other items. Tr. 180. M.M. further explained that the tools were in the truck in a gang box, and that it was full of power tools, hand tools and other materials. He said his truck has one gang box and described all the contents, which they had to work to empty. Tr. 182. M.M. testified that they were unloading and putting the tools on the loading dock and that he had a cage inside the shop where he would eventually put them in. Tr. 182. M.M. testified that with some of the items, they both had to work together to unload. Tr. 183.

M.M. further testified that they started working together that day around 3:00pm or so, and that he believed that they stopped sometime around 7pm or 8pm that night, as it was getting dark. M.M. stated that after four or five hours they would be tired but would take a break and then get back to work. Tr. 184. M.M. cited that he worked with Employee every day and that this was regular for them. Tr. 184. M.M. testified that he didn't notice anything wrong with Employee that day. He cited that Employee did not appear to be tired or sleepy. M.M. noted that they had to clear the truck, so he believed Employee was doing his job. Tr. 185-186. M.M. affirmed that it was his opinion that Employee was able to perform his job duties that day. Tr. 187.

M.M. stated that he was not a crew leader, but that he held a plumbing license, so he would help the leader out. M.M. testified that he was present when Employee got called away from his job. M.M explained that he had extra faucets on his truck that he didn't need so he asked Employee to take them upstairs. Then someone called for Employee, and he told them Employee went upstairs to take the faucets. Tr. 189. M.M. recalled that Employee was gone for approximately one (1) hour. Tr. 189. When Employee came back down he left. On cross-examination, M.M testified that he had not had reasonable suspicion training but would be willing to do so if it allotted for more pay. Tr. 190. When asked by the Administrative Judge when the unloading was complete, M.M. said that they did not resume work following the time Employee went upstairs with the faucets.

Employee Tr. Pages 193 – 222

Employee testified that he had been with Agency since 2017 as a maintenance worker, until he left in 2022. Tr. 194. As a maintenance worker he was assigned to the plumbing shop and was responsible for plumbing maintenance in DC Government buildings. Employee affirmed that when he was hired at Agency, he had a medical marijuana card. Tr. 194. Employee testified that he was subject

[5] For the purposes of this Initial Decision and its subsequent publication to the OEA website and D.C. Register; the names of all other employees who testified (employees who are not supervisors or agency leadership) and/or were included as a part of the parties' submissions to this Office or who provided testimony during the Evidentiary Hearing, have been redacted to only reflect the initials of their first and last names.

to a pre-employment drug test on his first day of orientation, and at that time asked the person who was over the department if his medical marijuana card was okay. Tr. 195. Employee cited that this person told him it should be okay and that he should just present it. Employee could not remember his name but cited that it was the person who administered the pre-employment test at "441."[6] Employee asserted that he took the test and presented his card and noted that this is what he has done for every subsequent drug test he has taken. Tr. 196. Employee testified that his card was valid and was not expired.

Employee further testified that his manager, Charles Artis, had witnessed him presenting his card at drug testing sites, as Artis informed Employee he had to take a random test. Tr. 196. Employee explained that Artis would often escort him to the test and recalled specifically one time where Artis was sitting right beside him as he presented his card. Tr. 197. Employe still retains a medical marijuana card, but noted despite the need for it, he would look for an alternative to maintain employment. Tr. 198. Employee affirmed that the card was prescribed by a physician.

On February 3, 2022, Employee testified that he arrived to work around 3:30pm, maybe a little earlier because his shift started at 3:30pm. Tr. 199. Employee explained that the Department of Public Works (DPW) was coming to pick up a truck for maintenance. A few minutes later, the tow truck arrived. Employee noted the tag and handed him the key and then went into the shop. Tr. 199. Employee cited that he always had the key. Employee asserted that this was standard procedure, because sometimes they don't know where the truck is going and if it would be an extensive stay. Tr. 200. Employee testified that as he went into the shop, Artis stormed in and asked why he had given the DPW person the key. Employee stated that he apologized and said he didn't know, and that it was a mistake and that it wouldn't happen again, and that he would call Artis next time. Tr. 200. Employee noted that while he can be sarcastic at times, he apologized in this situation. Tr. 201.

Employee asserted that after this exchange with Artis, Artis walked off and that he proceeded to go out to the loading dock. He said that after about 30 minutes or so, Artis came to the loading dock accompanied by Mr. Washington. Tr. 202. Employee explained that when he saw them there, he didn't think much of it, despite it being strange that they were standing there looking at them. Tr. 202. After this, Artis came down again and called him to Ms. Turner's office. Tr. 203. Employee testified that Artis and Washington questioned him again about what happened with the keys, and that this is where he laughed because he didn't know why it was being discussed again. Employee maintained that he apologized again during this meeting and said it wouldn't happen again. Employee asserts that after this meeting, he went back to the truck and continued taking materials off the truck with M.M. Tr. 204. Employee recalled that this was probably around 7pm or 7:30pm because it was dark when he took faucets up to the warehouse for overstock. Tr. 204. Employee noted that during all these interactions, he wasn't thinking of it, because he was just working.

Employee testified that when he went to take the faucets upstairs from the truck, he was told to come into the conference room and that Ms. Tenika Brown was there and a testing officer. Tr. 204-205. Employee noted that he didn't know what was going on, because no one had told him prior that he was under suspicion. Tr. 205. Employee further testified that when he told that he was going to take a breathalyzer and urinalysis, he asked Ms. Brown if he was to submit his medical marijuana card to her. Tr. 205. Employee stated that Ms. Brown told him something to the effect that he would need to wait for the results to come back and submit it to the test administrator. Tr. 205. Following this, Brown

[6] This reference to 441 is likely the building address to the DC Government Administrative building located at 441 6th Street, NW.

offered Employee a ride home, in which he told her he was fine and that she asked him to text her when he got home. Tr. 205. Employee stated that he texted Ms. Brown when he got home.

Employee explained that once he saw Ms. Brown sitting in the conference room he put "two and two together" regarding what was happening. Tr. 206. Employe explained that Artis was upset about the key and that sometimes the shop could be "unconventional" in interactions. Employee further explained that with the key incident, Artis approached him in an aggressive manner. Tr. 207. Employee noted that this put him on a defensive, but that that was why he responded by apologizing and taking accountability. Tr. 207. Employee stated that he felt Artis was chastising him and that he continued to apologize and say he wouldn't do it again. Tr. 208. Employee also explained that he and Artis sometimes differed on opinions, as Artis had a "elder standpoint." Tr. 208-209. Employee testified that even with that, Artis' actions for this incident were different than previous time he made mistakes at work. Tr. 210.

Employee testified that in the four (4) years he has been with Agency, he has been the subject of at least three (3) or more random drug tests. Employee further testified that each time, he presented his medical marijuana card and that at least on one (1) occasion, his supervisor witnessed his presentation of his card. Employee also explained that he was never made aware of his right to appeal his safety sensitive position. Tr. 212. Employee asserted that he believed he was in compliance based on the previous random tests and his submission of his medical marijuana card. Tr. 212. Employee also noted that he was not impaired the day of the incident, and that marijuana can stay in the system for 30 days, so he was confused as to how it was determined he was impaired in this situation. Tr. 213. Employee iterated that on the day of the incident, he was lifting heavy items out of a gang box that required two people. Tr. 213.

When asked by the Administrative Judge whether his random tests were positive and who he presented his medical marijuana card to, Employee affirmed that the tests were positive and that he gave it to whoever it was in HR. He recalled someone by the name of Brittany Wright who was over the testing, and he maintained that Artis was present. Tr. 213. Employee also noted that he had a minimum of three, if not four random tests and all were positive and that he never received any other notice. Employee iterated that this began on his orientation day in September 2017. Tr. 214- 215.

On cross-examination, Employee testified that he used medical marijuana and that he normally ingested it via food/edible. Tr. 216. Employee did not know whether edibles affected differently than smoking. Tr. 217. Employee testified that on the previous times he had tested, that he could not recall whether he had used marijuana a day or two before. Employee noted that he typically did not use marijuana during the week and was most reserved for time off. When asked why he believed he was tested on the day of the incident, Employee explained that he believed it was because of his initial interaction with Artis and his response and how Artis walked off. Employee asserted that he was not disrespectful, did not curse or do anything of that nature. Tr. 218. Employee affirmed that he knew that he was not to be impaired while on the job and that it was a part of his safety-sensitive designation. Tr. 218.

On redirect, Employee testified that a coworker, not Artis, was the one who advised about a truck coming and the key. Employee explained that because of the usual process, it was his assumption that the tow truck was a part of another District agency they corresponded with all the time. Employee asserted that they drop their trucks off all the time. Tr. 221. Employee said it wasn't until Artis came and told him that he was wrong, that he realized and immediately apologized. Tr. 222. The tow truck driver left with the truck. Tr. 222.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed at Agency as a Maintenance Worker. This position was classified as "safety-sensitive." Following a Reasonable Suspicion test conducted on February 3, 2022, Employee tested positive for cannabis (marijuana). In a Final Notice dated May16, 2022, Employee was notified that he was being terminated effective May 21, 2022, pursuant to 6B DCMR §§435.6 and 1605.4(h). Specifically, that Notice cited that "pursuant to 6-BDCMR S 429.1, "employees who test positive for cannabis following a reasonable suspicion…drug test…shall be presumed impaired by cannabis."

Brief Summary of Agency's Position

Agency avers that it had cause to terminate Employee from service following the determination that he had tested positive for marijuana during a reasonable suspicion drug screening. Agency avers that in accordance with the D.C. Department of Human Resources (DCHR), the entity that ultimately imposed the termination, that there is a "zero tolerance" policy for drug impairment. Agency also asserts that its reasonable suspicion testing and observations were completed in accordance with all applicable District regulations. Agency avers that Employee held a safety-sensitive positive and that testing positive for marijuana is prohibited. Agency also avers that Employee's Medical Marijuana Card status is of no relevance given that he tested positive following a Reasonable Suspicion Observation/Test. Further, Agency asserts that the penalty range for a positive drug test in a safety-sensitive position is removal and that the decision for termination was in accordance with those provisions and that the termination should be upheld.

Brief Summary of Employee's Position

Employee asserts that the termination was unlawful and that the reasonable suspicion testing was "pretext for claiming impairment and the subsequent adverse action imposed." Employee asserts that his supervisor knew of Employee's Medical Marijuana Card and "laid in wait for Employee to present to work and claimed Reasonable Suspicion…to administer a drug test that was certain to be positive given Employee's self-identified use of Medical Marijuana." Employee avers that he was not impaired at the time of the testing. Employee asserts that he has a Medical Marijuana Card and had presented it at all his drug tests during his tenure with Agency. Further, Employee asserts that following the conversation he had with Charles Artis and Cameron Washington, that he continued working with a co-worker until after the test was completed and he was sent home. Employee further asserts that he drove his own car home. Further, Employee avers that there is evidence against the claim of impairment. Employee cites that the Hearing Officer's Report and Recommendation indicated that there was no impairment, and that the Hearing Officer did not recommend termination under the circumstances. Additionally, Employee argues that his co-worker also testified that he didn't observe Employee's behavior to be impaired.[7] As a result, Employee asserts that "there was no basis for a Reasonable Suspicion test and therefore no basis for Agency to invoke the associated "zero tolerance policy." Employee maintains that he was not impaired at the time of the testing, and that he was wrongfully terminated.

[7] Employee's Closing Argument (November 7, 2023).

ANALYSIS[8]

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee's removal was levied for the aforementioned causes of actions stemming out of a reasonable suspicion drug test, where Employee tested positive for marijuana.

In the instant matter, there is no dispute that Employee tested positive for marijuana after a reasonable suspicion drug test performed on February 3, 2022. It is also uncontested that Employee's position was categorized as "safety-sensitive." Employee also asserts that he held a valid Medical Marijuana card throughout his tenure with Agency, including at the time of the reasonable suspicion test. Employee has asserted that Agency was aware, as he had presented the card upon hire, and at all random tests that he had been subjected to while employed. Agency has not stipulated to knowledge of Employee's Medical Marijuana card, and also asserts that Medical Marijuana cards are not accepted for District Government employees.[9] Employee avers that he was not impaired at the time of the drug test. He also avers that he continued to work in the timespan between the initial observation and the administration of the test, working alongside another employee (M.M.), and that he drove his own vehicle home once he was told he was dismissed from work that day.

Reasonable Suspicion Observation/Test

The policy and procedures for Reasonable Suspicion drug testing for District employees applicable at the time in which the instant adverse action was administered is outlined in DPM§ 432. Further, in accordance with that provision, District Personnel Instruction No. 4-39 (effective October

[8] 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").

[9] Evidentiary Hearing Transcript at Pages 72-76; and 162-167. The testimonies of Tenika Brown and Tamika Cambridge, respectively. Cambridge testified that at "one point [DCHR] accepted medical marijuana cards…. [b]ut the agencies, the regulations changed and when those changed [DCHR] no longer accepted medical marijuana cards…[i]f an employee presents one, they would present it to the medical review officer. The medical review officer will make note in the record. Tr. 166-167. Cambridge further noted that to her knowledge there is no longer any record keeping of employees who have medical marijuana cards in the District. Tr. 167.

6, 2017), highlights all the steps required for administering Reasonable Suspicion testing.[10] DPM §432.1 provides that all District employees, including employees in independent agencies, are subject to, and shall be referred by a trained supervisor or manager for, drug and alcohol testing when there is a reasonable suspicion that the employee, while on duty, is impaired or otherwise under the influence of a drug or alcohol. Further, DPM §432.2 cites that "prior to contacting the appropriate personnel authority to make a referral under this section, the trained supervisor or manager shall: (a) Have reasonable suspicion that the employe is under the influence of drugs, alcohol or other substances to **the extent that the employee's ability to perform his or job is impaired**; and (b) Gather all information and facts to support this reasonable suspicion." (Emphasis added.) Additionally, §432.3 provides that a "reasonable suspicion referral shall be confirmed through a second opinion rendered by another trained supervisor or manager, if available." Additionally, District Personnel Instruction No. I-4-39 (No. 4-39), provides under the heading "Reasonable Suspicion, that the trained manager or supervisor must record their observations of the employee in question on a Reasonable Suspicion Observation Form. That section also provides that the "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."

Further, in No. 4-39, under the heading for the Process for Making Referrals, "the supervisor or manager should meet with the employee privately to discuss his or her suspicion and the next steps. During this meeting, the supervisor or manager will inform the employee that he or she will be receiving a drug and alcohol test. **The reporting supervisor or manager <u>must</u> remain with the employee until completion of the testing process**. Union employees are entitled to representation from the first available union representative if requested." (Emphasis added). That section also provides that "after the employee completes the required tests, he or she shall be relieved from his or her duties for the day and placed on administrative leave." Additionally, it provides that "**no supervisor or manager shall permit an employee who he or she suspects of being under the influence to drive home. Instead, managers must take all necessary steps to ensure the employee is transported home safely.** The employee should remain on administrative leave until the testing results are received." (Emphasis added).

In the instant matter, on February 3, 2022, Employee was the subject of a reasonable suspicion drug test. Employee worked at Agency as a Maintenance Worker in the Plumbing Shop under the supervision of Charles Artis, Jr ("Artis"). During this time, Employee was on an evening shift that began at 3:30pm and ended at midnight.[11] The incident leading to the reasonable suspicion observation occurred not long after Employee arrived for work on February 3, 2022. That day, Artis instructed Employee to provide keys to a mechanic from the D.C. Department of Public Works (DPW), as one of the vans utilized by their team needed repair. Artis testified that he was on a mandatory call, so he asked Employee to open the van for the DPW mechanic.[12] The mechanic arrived, and Employee provided him with the keys. Artis testified that he happened to get off the call just in time to see the mechanic driving off in the van and was able to get someone to catch him to tell him to come back, because they were going to put the van in the shop and the tools needed to be removed. Artis explained that he asked Employee why he gave the mechanic the key. Artis testified that Employee's "response

[10] It should be noted that there was an update to the Reasonable Suspicion as noted in DPM I-2022-19, which became effective, November 3, 2022, and superseded the issuance of 1-4-39, which was effective October 6, 2017. However, because this incident and the subsequent adverse action were administered prior to November 3, 2022, the undersigned finds that the prior instruction would inform the instant matter.
[11] Evidentiary Hearing Transcript at Page 18. (August 23, 2023).
[12] *Id.*

and demeanor" made him come up with a reasonable suspicion.[13] Specifically, Artis testified that Employee told him it was mistake. Artis cited that he didn't understand how Employee could get confused because his instructions were clear. Artis also said Employee's attitude was an issue. Artis noted that Employee's shift started around 3:30pm, so this all happened around 4:00pm.

Thereafter, Artis went back to his office and called Cameron Washington ("Washington") for a second opinion, and they took Employee into a conference room. Artis and Washington both completed Reasonable Suspicion Observations forms. Artis testified that he completed the Reasonable Suspicion Observation Form (Agency's Exhibit 2) at 5:15pm as noted in that form.[14] Artis noted that Washington was also a manager at Agency. Artis also noted that he contacted Tenika Brown ("Brown") from Agency Human Resources regarding the reasonable suspicion. Brown testified that she received a call from Artis at approximately 5:30pm on February 3, 2022, regarding the Reasonable Suspicion for Employee. Brown testified that after the call from Artis, she called the laboratory for testing and later arrived at the DGS site with Mr. Cherry, the tester. Brown testified that Employee's test was conducted at approximately 7:13pm. Brown noted that following the test, she offered Employee to do a ride-share service or taxi, but that Employee "adamantly refused."[15] Brown cited that she called Torey Draughn of DCHR of Employee's position, noting that this "verbal declination" released DCHR from liabilities. As a result, Employee left in his own vehicle. Brown testified that she asked Employee to text her when he arrived home, and that he did so. [16]

Employee asserts that after the conference with Artis and Washington, he returned to work alongside his coworker M.M. Employee cited that he and M.M. worked unloading and moving heavy equipment from one vehicle to another that day. M.M. testified that he and Employee worked to unload a vehicle that had to go to the shop. M.M. testified that the materials were in a large 'gang box'.[17] M.M. described that the gang box held all the tools, power tools, materials, saws etc., that were used for their work. M.M. also noted that the materials were heavy, some requiring both of them to move together.[18] M.M. recalled that he and Employee started working around "3:00ish" that day and stopped sometime around 7pm or 8pm that evening, working together for approximately four or five hours.[19] M.M. said that he did not notice anything out of the ordinary about Employee that day. M.M. was present when Employee was called away from work. He testified that he had asked Employee to take some faucets upstairs, and then someone called him from that time. He noted that Employee was gone about an hour.[20] M.M. said when Employee came back, he left the facility. M.M. said he asked Employee where he was going, and Employee told him that he was going home.

Employee also asserted that he was not aware that he was under reasonable suspicion. He stated that he was never told that.[21] Employee said that after he talked to Artis and Washington, he was called again while he was taking faucets from a truck to go upstairs, and that he was called into a conference room where Ms. Brown and the testing officer were. Employee thought that this was sometime between 7pm to 7:30pm that evening.[22] Employee said he didn't think anything was an issue, and he took the urinalysis test and the breathalyzer. He testified that he asked Ms. Brown whether he was to

[13] *Id* at Page 19 -20.
[14] *Id.* at Page 22.
[15] *Id*. at Page 65-66.
[16] *Id*. at Pages 66-67. See also. Pages 87-88.
[17] Evidentiary Hearing Transcript at Page 180 (August 23, 2024).
[18] *Id*. at Page 183.
[19] *Id*. at Page 184.
[20] *Id*. at Pages 188-189.
[21] Evidentiary Hearing Transcript at Page 205.
[22] *Id.*

provide her with his Medical Marijuana card, but that she told him something to the effect to wait until the results came back and to submit it to the test administrator.[23] He said that Brown offered him a ride home, but he told her he was "okay I'm good, you know I can drive" and that she said okay and to text her when he got home, which he did. Employee avers that he was not impaired at the time he was tested and that he was wrongfully terminated.

As previously noted, the DCHR guidelines, as prescribed in Chapter 4 of the DCMR for the administration of a Reasonable Suspicion Drug test required observation made by supervisors or managers trained in reasonable observation, evaluation and testing. Here, Artis and Washington were both supervisors who had received reasonable suspicion training within two (2) years of the date of the incident.[24] They had a conference with Employee, though based upon the testimony of Artis, they did not engage in the typical type of inquiries suggested by the Reasonable Suspicion training guidelines. Instead, Artis continued to inquire about the incident with the keys. Both Artis and Washington completed the Reasonable Suspicion Observations forms. It is of particular note here, that both Artis and Washington cited on the forms that Employee's speech, balance, walking and talking were all normal. Both only noted on the form under "awareness" that Employee was sleepy. Artis also noted in comments that Employee's eyes were red and that Employee's "mannerisms changed from being excited to low key, laughed during response."[25] Washington's comments highlighted that Artis "called [Employee] in for questions about key incident." Washington also noted in his comments that he observed "Eyes red, laughing at response, talking slow, talking low." Washington's form also had several options checked as "no" under the observations section. The Hearing Officer made specific reference in his April 30, 2022, Report and Recommendation on the observations of Artis and Washington. The Hearing Officer cited the following:

> "When considering allegations related to positive drug tests, evidence may include a completed Reasonable Suspicion Observation Form or any other reliable evidence indicating that the employee was not impaired. Deciding officials and hearing officers may consider this evidence as a mitigating factor." Here, the Reasonable Suspicion [sic] Observation From as completed by the agency, noted that the employee's speech, balance, walking and talking were all noted as normal. It further notes that the only detriment to the awareness factor is that the employee is sleepy." [26]

Ultimately, the Hearing Officer concluded that based upon the consideration of the evidence and mitigating factors that the recommended penalty was that (1) Employee should be offered a "Last Chance Agreement" and (2) that Employee have a penalty equal to a fourteen (14) day suspension." As was previously cited to, the Reasonable Suspicion Testing as guided by DPM §432, is a measure of assessing an employee's impairment from the influence of drugs or alcohol such that it comprises their ability to perform their job. The undersigned finds that the forms completed by Artis and Washington are contradictory and not consistent with a finding of impairment. Further, I find that the observation was not conducted in a manner consistent with the guidelines as it is clear that Employee was released and returned to work following the meeting with Artis and Washington. Agency asserts that "[Employee] was not allowed to leave Adams Place or instructed to engage in any work in the

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[23] *Id.*
[24] The undersigned would note that the records of their training do not reflect Artis and Washington received the reasonable suspicion training every two (2) years as required, but that their most recent training records reflect that they had completed training in the allotted two-year time frame of this incident.
[25] Evidentiary Hearing Exhibit 5 (August 23, 2023).
[26] Agency's Exhibit 2 at Hearing Officers Report. (August 23, 2023).

Facility between the time he was first approached by Mr. Artis and the time that he was tested."[27] The undersigned finds that the testimony contradicts this assertion. In particular, Artis testified that the reasonable observation started around 5:15pm, as documented in his Reasonable Observation Form.[28]

Further, Artis testified that Employee worked until he took him into the conference room.[29] Additionally, Artis testified that "then he had to wait on HR. Artist also testified that while he was waiting on HR, [Employee] might have gone back and helped [M.M.] take the stuff off the truck." Artis iterated that Employee couldn't leave and was still being paid for work. Artis further testified that Employee "did do some work because he was unloading the truck, but he didn't do it for this whole shift."[30] When asked on redirect examination "how long did [Employee] work after you asked him to go back to the room for observation", Artis testified that "if [Employee] continued to help unload the truck, that might have been at most an hour and half. Maybe two hours at most." Artis testified that he did not tell Employee to do that. When asked by the AJ whether he stopped Employee from working, Artis testified that "No ma'am, because he was on one side, and I was back in the office."

Agency asserts that "there is no policy or communication indicated to [Employee] that he was to disregard an instruction from his supervisor to be in the conference room."[31] The undersigned finds Agency's assertions in this regard to be contradictory. Here, it is clear that Artis never specifically instructed Employee to stay in the conference room and wait for HR, nor did he remain with Employee until the completion of the testing process as prescribed by No. 4-39. While Artis noted that there was a wait, Artis also testified when asked by the AJ, that he was in his own office and Employee was on another side of the facility. The undersigned finds that these actions are not in alignment with the prescribed processes and procedures that are to be followed for reasonable suspicion. Wherefore, I find that that Agency failed to appropriately administer and conduct the Reasonable Suspicion testing in accordance with all applicable laws, rules, and regulations.

Rebuttal of Impairment for Reasonable Suspicion

The District of Columbia Superior Court (D.C. Super. Ct.) has held that pursuant to DCMR §1621, an employee subject to discipline for a positive drug test may submit a response "challenging that action."[32] Further, the D.C. Super. Ct. has noted that "[e]vidence supplied by an employee to rebut a presumption of cannabis impairment must be clear and convincing" in accordance with 6B DCMR §429.4. "The D.C. Court of Appeals defines clear and convincing evidence as "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." Here, Employee was terminated following the positive test for marijuana. The Deciding Official[33] (DO) did not accept the Hearing Officer's recommendation for the "last chance agreement or a 14 day suspension", citing that "[p]ursuant to 6-B DCMR, §429.1, "employees who test positive [for cannabis] following at reasonable suspicion…drug test…shall be presumed impaired by

[27] Agency's Closing Argument at Page 3 (November 1, 2023).
[28] Evidentiary Hearing at Page 34.
[29] Evidentiary Hearing at Page 37, line 21-22.
[30] Id. at Page 38 Lines 7 – 18.
[31] Agency's Closing Argument at Page 3 (November 1, 2023).
[32] *District of Columbia Office of Unified Communications v District of Columbia Office of Employee Appeals*, 2022-CAB-006055 (October 30, 2023). This decision upheld the both the Initial Decision – *Employee v. D.C. Office of Unified Communications*, OEA Matter No. 1601-0022-21 (July 25, 2022) and *Employee v. Office of Unified Communications*, Opinion and Order, OEA Matter No. 1601-0022-21 (November 17, 2022). In the Initial Decision, the AJ reversed Agency's termination of Employee following a determination that Employee had rebutted the presumption of impairment.
[33] The Deciding Official was Justin Zimmerman. He was not available to testify at the Evidentiary Hearing held in this matter. Instead, testimony was provided by Tamika Cambridge.

cannabis."[34] The DO also noted that "based on the evidence, supervisory employees reasonably suspected you of being under the influence of a drug and had you tested for drug use." Here, Employee provided a written response to the Hearing Officer, wherein the Hearing Officer noted Employee's assertions that he was not impaired, and Employee believed that he was "reasonably suspected" due to a "disagreement." Further, the Hearing Officer noted that Employee's response also included information that Employee retained a medical marijuana card and had had one since the commencement of his tenure with Agency. Employee asserted that he had presented the card during orientation and also at every random drug test he was subject to, as Employee conceded that he was safety-sensitive. Employee attested to the same during his testimony at the Evidentiary Hearing held before this Office in this matter. Further, Employee testified that he was not impaired on the day he was subject to the reasonable suspicion test. Employee also testified that he mostly reserved using marijuana for his time off.[35]

In the instant matter, Agency avers that following the reasonable suspicion and positive drug test for marijuana, there is a presumption of impairment, and thus avers that its action of separating Employee from service should be upheld. The undersigned disagrees. Consistent with the D.C. Super. Ct.'s holding in *Employee vs Office of Unified Communications*[36], I find that the documentary and testamentary evidence in the record reflect 'clear and convincing' evidence to rebut that presumption. Moreover, I find that Agency failed to follow and appropriately administer the Reasonable Suspicion process as required by the DPM. The Reasonable Suspicion guidelines specifically require the reporting supervisors who believe an employee is impaired by drugs or alcohol and is subsequently subjected to a reasonable suspicion observation, must not allow that suspected employee to continue their work duties. Specifically, No. 4-39 provides that **reporting supervisor or manager must remain with the employee until completion of the testing process** (Emphasis added.) Ms. Brown, the DER for Agency, also asserted this during her testimony. When asked by the AJ whether an employee should be returned to work following an observation, Ms. Brown noted that employees should not leave the work yard or site, and should not pick up any work or leave to do anything.[37] I further find that Agency's assertion that they did not specifically instruct Employee not to work or that Employee may have disregarded an instruction to remain in the conference room does not align with the evidence presented in the record.

Here, I find that the evidence clearly demonstrates that Employee was not monitored by his supervisor as required following the observation conference. Further, Employee returned to work and continued to work lifting heavy equipment and machinery until Ms. Brown, the DER, and the testing administrator, Mr. Cherry, arrived on site to conduct the test. This is corroborated by the testimonies of Artis, Employee and Employee's coworker, M.M. Further, Artis testified that he didn't know what Employee was doing following their observation conference, but that maybe Employee worked for only about two hours. Additionally, the timeline of the events that occurred also support the assertion that Employee went back to work for at least an hour and a half (1.5) up to two (2) hours following the observation. The forms completed by Artis and Washington were noted as time frames of 5:15pm and 5:20pm, respectively. The testing records as documented in the Chain of Custody Form reflect that the time of the administration of the drug test (urinalysis and breathalyzer) occurred at approximately

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[34] Agency Exhibit 1- May 16, 2022, Notice of Separation.
[35] Evidentiary Hearing Transcript at Page 217 (August 23, 2023).
[36] *See. District of Columbia Office of Unified Communications v District of Columbia Office of Employee Appeals*, 2022-CAB-006055 (October 30, 2023). This decision upheld the both the Initial Decision – *Employee v. D.C. Office of Unified Communications*, OEA Matter No. 1601-0022-21 (July 25, 2022) and *Employee v. Office of Unified Communications*, Opinion and Order, OEA Matter No. 1601-0022-21 (November 17, 2022).
[37] Evidentiary Hearing Transcript at Page 85. (August 23, 2023).

7:13pm. Further, I find that this is also corroborated by the fact that upon her arrival to the facility, Ms. Brown did not see Employee and he was not present in the conference room. In the *District of Columbia Office of Unified Communications v District of Columbia Office of Employee Appeals*[38], like here, an employee was allowed to return to work and perform job duties following a reasonable suspicion observation. I find that these actions, coupled with the documentary evidence provided in the record; to include the Hearing Officer's findings, which included a review of Employee's written response to the proposed separation, along with Employee's testimony during the Evidentiary Hearing noting he was not impaired, all represent clear and convincing evidence to rebut the presumption of impairment.

I also find that the observations noted by Artis and Washington on the Reasonable Suspicion observations forms were inconsistent and contradictory, further evincing clear and convincing evidence to rebut the presumption of impairment. The undersigned finds that both observers documented Employee's speech and otherwise as normal, but still went ahead with the reasonable suspicion testing. Further, I do not find it credible that either observer believed that Employee was "sleepy". Of particular note, Artis testified that Employee's demeanor was "aggressive" at some point during the observation, which does not align with a person being sleepy. I also find that because Employee has a valid Medical Marijuana Card (notwithstanding the safety-sensitive designation) that he would have inevitably tested positive for marijuana due to prior legal consumption. This noted, I also find that while Artis claimed he could not recall whether Employee had a Medical Marijuana Card, his own testimony contradicts this assertion, as he noted that this was not the first time he had a discussion with Employee in this regard.[39]

Lastly, the undersigned finds that Agency's action of letting an employee suspected of being impaired by drugs or alcohol to drive their own vehicle once they are dismissed from work to also be representative of evidence of a rebuttal of impairment. The Reasonable Suspicion protocols clearly state that ***"no supervisor or manager shall permit an employee who he or she suspects of being under the influence to drive home. Instead, managers must take all necessary steps to ensure the employee is transported home safely."***[40] (Emphasis added). When asked by the AJ about the Agency's policies regarding transportation of an employee subject to reasonable suspicion specifically if that employee refused a taxi, UBER or Lyft, Ms. Brown, the DER, testified that "we notify DCHR, let them know the employee said no. And then it releases the agency from liabilities. We can't make someone get into an Uber or Lyft, but we have to do our due diligence in offering…[a]nd because it was declined and me verbalizing my level reservation of [Employee] saying that he could drive, that's why I asked him to text me and let me know he made it home."[41] The undersigned will not address the Agency's policies (or lack thereof) regarding transportation for an employee who has been subject to reasonable suspicion

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[38] *See. District of Columbia Office of Unified Communications v District of Columbia Office of Employee Appeals*, 2022-CAB-006055 (October 30, 2023). This decision upheld the both the Initial Decision – *Employee v. D.C. Office of Unified Communications*, OEA Matter No. 1601-0022-21 (July 25, 2022) and *Employee v. Office of Unified Communications*, Opinion and Order, OEA Matter No. 1601-0022-21 (November 17, 2022). In this case, an Employee who worked as a Telecommunications Equipment Officer for the 911 system was allowed to return to the floor to work answering calls following a reasonable suspicion observation. That employee also held a medical marijuana card but disputed that she was impaired on the day she was subject to the reasonable suspicion observation and test. The AJ in the Initial Decision held that Employee had rebutted the presumption of impairment based on clear and convincing evidence. The agency in that case averred that the AJ "improperly came to this determination by solely relying on Employee's testimony and documentary evidence" The D.C. Super. Ct. held that if there is substantial evidence to support the administrative findings, then the Court must "accept them even if there is substantial evidence in the record to support contrary findings." The Court went further to cited that in that matter "Employee presented documentary evidence supporting her rebuttal of the presumption of impairment throughout the administrative proceedings."

[39] Evidentiary Hearing Transcript at Page 31, Line 3.

[40] No. 4-39 Issuance- Reasonable Suspicion (effective October 6, 2017, until superseded November 2, 2022).

[41] Evidentiary Hearing Transcript at Page 88. (August 23, 2023).

testing/presumed impaired; however it is concerning that an employee who is presumed to be impaired such that they have to leave work, would then be allowed to operate a personal vehicle. The Agency's policies (or lack thereof) in this regard notwithstanding, I find that this action also provides clear and convincing evidence to rebut the presumption of impairment.

Wherefore, based on the foregoing documentary and testamentary evidence presented in this matter, I find that there is clear and convincing evidence that Employee has rebutted the presumption of impairment on the date of the incident, February 3, 2022. I also find that Agency failed to appropriately administer and follow the guidelines for Reasonable Suspicion testing as outlined in Chapter 4 of the DCMR. I find that Agency's actions of allowing Employee to return to work, coupled with Agency's failure to have the supervisor maintain the observation status as required, prove that the managers did not have reasonable suspicion to believe Employee was "under the influence of drugs to the extent that Employee's ability to perform his job was impaired," thus rebutting the presumption of impairment. Accordingly, I find that Agency did not meet its burden of proof for cause in this matter.

Whether the Penalty was Appropriate

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).[42] 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 Illustrative Actions ("TIA"); 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, because I find that Agency has not met its burden of proof for the above-referenced charges, Agency cannot rely on these charges in disciplining Employee. As a result, I find that the adverse action in this matter cannot be sustained and must be reversed.

ORDER

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

1. Agency's action of terminating Employee from service is hereby **REVERSED.**
2. Agency shall reinstate Employee to his position of record, and Agency shall reimburse employee all pay and benefits lost as a result of his removal.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/Michelle R. Harris
Michelle R. Harris, Esq.
Senior Administrative Judge

[42] *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).