THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
Rashad Wallace, Employee	OEA Matter No. 1601-0025-18
v.	Date of Issuance: November 16, 2018
D.C. Office of Unified Communications, Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Donna Rucker, Esq., Employee Representative
Ryan Donaldson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 24, 2018, Rashad Wallace ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Office of Unified Communications' ("OUC" or "Agency") decision to terminate him from his position as a Telecommunications Equipment Operator effective January 20, 2018. On February 22, 2018, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on May 2, 2018, after a failed mediation. Thereafter, I issued an Order Scheduling a Prehearing Conference in this matter for June 18, 2018. Both parties were in attendance. I then issued a Post Conference Order requiring the parties to submit written briefs addressing the issues raised at the Prehearing Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

JURISDICTION

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

ISSUES

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

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

FINDINGS OF FACTS[1]

1. OUC is a District of Columbia Agency responsible for emergency and non-emergency communications, handling approximately 1.8 million 911 calls in the District of Columbia each year.[2]

2. Employee Rashad Wallace was employed with OUC as a Telecommunications Equipment Operator ("TEO"), Position DS-0390-05, beginning in or about 2014.

3. As a TEO, Employee's job duties included operating telecommunications equipment "for the purpose of allocating public safety services and resources in response to requests from the general public and other public safety agencies…" as well as other duties described within the TEO job description.

4. The TEO position is designated a Safety Sensitive "Covered" Position pursuant to District Personnel Instructions No. 4-34, 4-38, and Chapters 4 and 6B of the DC Municipal Regulations.

5. On November 3, 2017, Agency notified Employee that he had been randomly selected to undergo urinalysis for the purpose of drug screening, and in response, Employee submitted a urine sample that same day.

6. On November 3, 2017, at or about the same time as he submitted a urine sample for random drug screening, Employee provided his DC Department of Health Medical Marijuana Program Card showing "09/28/2016" as the date of issuance, and "09/28/2017" as the date of expiration to the nurse who was collecting urine samples. The nurse, in turn, provided that Card to the OUC Human Resources personnel overseeing the drug screenings that day.

7. The urine sample submitted by Employee on November 3, 2017, was tested by Quest Diagnostics laboratory and confirmed positive for Marijuana.

8. On November 28, 2017, Ellen Brennan (Human Resource Specialist for DC Department of Human Resources (DCHR) issued a Memorandum to André Easley, Compliance Review Manager for DCHR, indicating that the urine sample Employee submitted had been confirmed positive for marijuana and concluded "[A]ccordingly, this employee is not suitable for his safety-sensitive position, and I recommend that he be separated from the covered position."[3]

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[1] Facts are taken from either the parties' Joint Stipulation of Facts or undisputed facts on record.
[2] https://ouc.dc.gov/page/ouc-who-we-are
[3] Agency Answer, Tab 5, p. 1.

9. On November 28, 2017, Mr. Easley issued an Advance Written Notice to Employee which stated that because Employee's urine had testified positive for the presence of marijuana, DCHR was proposing Employee's termination. Employee was informed of his right to challenge the proposed action, and that Hillary Hoffman-Peak, Assistant General Counsel for the D.C. Office of the State Superintendent of Education ("OSSE"), would serve as the designated administrative review officer to review the proposed action.

10. Mr. Easley completed a Proposing Official's Rationale Worksheet regarding the November 28, 2017 Advance Written Notice which proposed Employee's termination.

11. On or about December 15, 2017, Employee received a renewed DC Department of Health Medical Marijuana Program Card showing "12/11/2017" as the date of issuance and "12/11/2018" as the date of expiration.[4]

12. On January 17, 2018, Justin Zimmerman (Associate Director for DCHR Policy and Compliance) issued a Final Notice of Separation which adopted the Advance Written Notice as well as Ms. Hoffman-Peak's decision and terminated Employee from OUC effective January 20, 2018.

Employee's Position:[5]

Employee argues that the District Personnel Manual ("DPM") explicitly excludes from its scope "authorized prescription medications." 6-B DCMR § 499. Furthermore, Section 1605.4(h) of Chapter 16 of the District Personnel Manual ("DPM"), to which the Agency cites to support its action, only authorizes termination of employees for "testing positive for an unlawful controlled substance." In the instant matter, the cannabis that resulted in Employee's positive urinalysis was used by Employee as a medication prescribed to him by his physician and approved by DCDOH as a result of Employee's participation in the District of Columbia's medical marijuana program.

Employee asserts that his prior medical marijuana card allowed him to obtain the prescribed medical marijuana. He points out that his medical marijuana card expired September 28, 2017, and he tested positive for marijuana on November 3, 2017, thirty-six (36) days later. Employee's doctor, Dr. Bedeau, explained that Employee could obtain up to a sixty (60) day supply of the prescription. Then, after use the cannabis could still show up on a drug test thirty (30) days later. Thus, according to Employee, a positive test up until December 28, 2017, would not be evidence of illicit drug use.

Therefore, Employee insists that his urinalysis results showing the presence of cannabis did not constitute Employee testing positive for an unlawful controlled substance as Employee's cannabis was duly prescribed by Employee's medical doctor and legally acquired.

Accordingly, Employee believes that the circumstances of this case do not warrant his termination pursuant to Section 1605.4(h) of Chapter 16 of the DPM. DCHR Instruction No. 4-32 states that "the use of medical marijuana for a qualifying medical condition or to relieve side

[4] Agency Answer, Tab 8, Union Response Exhibit D.
[5] Employee's Brief (October 4, 2018).

effects of qualifying medical treatment, is to be treated as any other form of prescription medication as it relates to the District government's drug testing requirements." Employee asserts that this directive, to treat approved medicinal cannabis as any other prescription medication, extends to employees that inhabit safety sensitive positions.

Based upon this guidance, Employee should not have been terminated from his employment for testing positive for cannabis which he had been prescribed by a licensed physician just as an employee prescribed opioid pain-killers by his physician would not be terminated for testing positive for opiates.

Employee points out that DPM Instruction No. 4-34 (effective July 28, 2016) states that the employee may make known their participation in the medical marijuana program. He states that he did provide evidence to show that he was approved for the use of medical marijuana since September 28, 2016, and proof that he notified the DC Department of Health of his expired medical marijuana program registration card. Employee received his replacement card on December 11, 2017. Thus, Employee asserts that a preponderance of the evidence does not exist to support Agency's removal of Employee.

Agency's Position[6]

Agency submits that Employee occupied a safety-sensitive position and was subject to periodic random drug testing. Agency notes that Employee was provided with Agency's drug and alcohol testing policy. Agency explains that it has a zero tolerance policy for any positive urinalysis, which Employee was aware of. Agency also notes that Employee failed to follow the DPM instruction regarding medical marijuana. Agency maintains that there is no dispute that Employee tested positive for illicit drugs; he knew he was in a safety-sensitive position that was subject to random drug testing; and that a positive drug test would end in administrative action, probably termination. Agency maintains that pursuant to D.C. Official Code §1-620.32, *et seq.*, any confirmed positive drug test result is grounds for termination. Additionally, Agency asserts that Agency had considered the relevant factor and acted reasonably in choosing removal as the penalty for a positive drug test in a safety-sensitive position.

ANALYSIS AND CONCLUSION

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(i), the definition of "cause" includes [u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result. Also, Employee's removal from his position at Agency was based on 6B DCMR § 428.1(a).

[6] Agency's Answer to Employee's Petition for Appeal (December 13, 2017), and Agency's Brief in Response to Order dated Feb. 27, 2018.

In the instant matter, Agency asserts that by having a positive marijuana result during a drug test, Employee violated DPM §1603.3(i) and 6B DCMR 428.1(a). The District of Columbia has a drug free work policy and Employee was aware of this policy. Further, 6B DCMR 3907 provides for mandatory drug and alcohol testing for safety-sensitive positions. As an employee in a safety-sensitive position, Employee herein was required to submit himself to random drug and alcohol testing. As an employee in a safety-sensitive position, Employee is one of the persons that must adhere to the drug and alcohol testing policy. Thus, Employee's positive test for marijuana constituted a violation of this policy.

Employee does not deny that he was aware that he occupied a safety-sensitive position within Agency with possibilities of random testing when he accepted the job.[7] Employee was aware that a positive drug test could result in an administrative action.[8] Employee does not deny that he tested positive for marijuana; he simply argues that his use of marijuana was medicinal and sanctioned by his doctor, and hence, his marijuana was not an illegal drug.

Apart from the above cited regulations DPM §1603.3(i) and 6B DCMR 428.1(a), the District of Columbia has other regulations pertinent to drug testing as it relates to a suitability for a safety-sensitive job such as Employee's position of Telecommunications Equipment Operator. DPM Chapter 4 Suitability §410 mandates various checks and tests for safety-sensitive positions. Included among these tests is a random drug and alcohol test.

The D.C. regulation most pertinent for medical marijuana use by D.C. personnel during the relevant time period is DPM Instruction No. 4-34 (effective date July 28, 2016). This instruction discusses Initiative 71; addresses how medical marijuana is treated during the D.C. government's drug and alcohol testing process; and outlines the requirements for employees authorized, as outlined therein, to use medical marijuana.

Initiative 71 or the Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, was approved by District voters on November 4, 2014. Among other things, it allowed adults to possess and cultivate a limited amount of marijuana within their principal place of residence. Although Initiative 71 became effective on February 26, 2015, it does not apply to federal property in the District and stresses that the sale and public consumption of marijuana remains illegal anywhere in the District, whether it is on District or federal property.

Initiative 71 stresses that due to the provisions contained in D.C. Law 20-153, Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, it has no impact on the District government's current enforcement and application of employment related drug testing requirements. Among other things, the law expressly permits employers and the District government to continue to enforce and establish policies which prohibit any marijuana use by employees.

As for District government employees using medical marijuana, DPM Instruction No. 4-34 states that:

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[7] Agency Brief, Exhibit K.
[8] *Id.*

> 1. An employee of the District government who has been authorized by a licensed physician to use marijuana for medicinal purposes is permitted to do so in accordance with applicable laws, rules and regulations of their state of residence, provided such usage does not impair or otherwise impede his or her ability to safely carry out assigned duties and responsibilities.
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> 2. Employees enrolled in a medical marijuana program, and who occupy safety-sensitive positions, remain subject to random drug and alcohol screenings. In the event such an employee is randomly selected for testing, he or she must comply with the testing order. However, the employee may make known their participation in the medical marijuana program. In this regard, an employee has three options:
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> a. Immediately before or following a drug or alcohol screening, submit a copy of the drug testing order along with a copy of a valid medical marijuana program registration card to dchr.compliance@dc.gov. Follow any supplemental instructions provided by DCHR.
>
> b. If the employee tests positive for marijuana usage, he or she will be contacted by a Medical Review Officer ("MRO"). The employee must inform the MRO of his or her enrollment in a medical marijuana program and follow any additional instructions provided by the MRO.
>
> c. If notification to DCHR or the MRO does not occur, an employee may receive a notice proposing that he or she be terminated due to a positive marijuana result. In such a case, the employee should supply the named Hearing Officer with a copy of a valid medical marijuana program registration card along with a written explanation of his or her circumstances. The Hearing Officer's contact information will be included in the notice of proposed termination. The employee should follow any additional instructions that might be provided by the Hearing Officer.

Based on the provisions of DPM Instruction No. 4-34 enumerated above, District government employees who are enrolled in a medical marijuana program have three options available to them. The first option is to submit a copy of a valid medical marijuana program registration card along with a copy of the drug testing order to DCHR. The second option is for Employee to inform the MRO of his enrollment in a medical marijuana program after testing positive for marijuana. The last option is for Employee to present to the Hearing Officer, whose contact information is in the notice of proposed termination, with a copy of a valid medical marijuana program registration card along with a written explanation of his or her circumstances.

The plain language of the above regulation makes it clear that being enrolled in a medical marijuana program is a prerequisite for an employee testing positive to avail of any of the above options identified in DPM Instruction No. 4-34. Simply being prescribed marijuana by a doctor is insufficient. In the instant matter, it is undisputed that Employee was not enrolled in a medical

marijuana program at the time he had a drug test. Thus, none of these options listed in DPM Instruction No. 4-34 were available to him. Although it is true that Employee's doctor had indeed authorized him to use medical marijuana, the medical marijuana registration card that he produced was expired on the day he was tested. What is clear is that Employee had failed to obtain a renewal for his expired medical marijuana registration card at the time of the drug test.

As for Employee's argument that because his marijuana use was for a doctor authorized medical purpose, his marijuana is somehow transformed from an illegal drug to a legal one is not supported by any Federal or D.C. law or regulation.

The D.C. Medical Marijuana Program does not shield Employee from random drug testing in his covered Safety Sensitive Position, nor does it shield him from the potential for termination for a positive drug test result. Further, the timeline presented by Employee's Brief (asserting marijuana could remain in a person's system for up to 30 days) would not help Employee in this matter because his specimen was submitted 36 days after he had a Card permitting marijuana use pursuant to the D.C. Program.

Employee incorrectly argues that the D.C. Medical Marijuana Program allows participants to continue possessing and using marijuana for up to 60 days after the expiration of the participant's Card.[9] This argument is explicitly contradicted by the D.C. Program's provisions. "[U]pon expiration of a registration, a qualifying patient or caregiver **shall immediately cease** from the use or possession of medical marijuana until he or she is issued a new registration identification card from the Department." 22-C DCMR § 700.3. (emphasis added). The DCMR further provides that "[a]ny person who possesses or uses marijuana…**without a medical marijuana registration card** shall be subject to criminal prosecution and sanctions." 22-C DCMR § 100.3. (emphasis added). Thus, Employee was not permitted to use marijuana after his Card expired on September 28, 2017.

In conclusion, the fact remains that while in a safety-sensitive job position, Employee had a confirmed positive drug test and was not enrolled in a medical marijuana program at the time of testing. Two independent labs confirmed that Employee's urine sample collected on November 3, 2017, was positive for marijuana. D.C. Code §1-620.35(a) states that testing positive for marijuana still remains a valid and legal ground for Agency to remove Employee. Therefore, I find that Employee's positive drug test for marijuana is sufficient cause for Agency to terminate Employee.

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

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[10] According to the Court in

[9] Employee cites *Walker v. Dart*, 30 N.E.3d 426 (Ill. App. 2015) to support his contention that a positive drug test for prescription medication is not grounds for termination, is inapplicable here, as Illinois an entirely separate jurisdiction with different laws and unlike D.C., Illinois had no law or regulation prohibited the use of the prescription medicine.

[10] *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*

Stokes, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant matter, I find that Agency has met its burden of proof for the charges of the "[u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result," and 6B DCMR 3907.1(a) – a confirmed positive drug test. As such, Agency can rely on these charges in disciplining Employee.

The selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[11] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.

In reviewing Agency's decision to terminate Employee, OEA may look to 6B DCMR § 428.1(a) which clearly and plainly states: "An employee shall be deemed unsuitable and immediately subject to separation from a covered position as described in subsections 439.3 and 439.4 for: (a) A positive drug or alcohol test result." Therefore I find that, by terminating Employee, Agency did not abuse its discretion and acted well within its legal authority.

In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

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

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).

[11] *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011) provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge