THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE	)	OEA Matter No. 1601-0079-24
Employee	)	
	)	Date of Issuance: November 19, 2024
v.	)	
	)	Joseph E. Lim, Esq.
DEPARTMENT OF PUBLIC WORKS	)	Senior Administrative Judge
Agency	)	

Employee *pro se*
Timothy J. McGarry, Esq. Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On August 14, 2024, Employee filed a petition for appeal with the Office of Employee Appeals ("OEA") regarding his July 19, 2024, removal as a Sanitation Worker by the Department of Public Works ("Agency" or "DPW") for interfering with a mandatory drug test. After an August 14, 2024, OEA letter for DPW's response, DPW submitted its Answer on October 9, 2024, after being granted an extension on September 12, 2024.

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on October 10, 2024. I held a Prehearing Conference on October 23, 2024, and subsequently concluded that an Evidentiary Hearing was not warranted. I ordered the parties to submit their legal briefs on the issue of whether Agency's choice of Employee's penalty should be upheld on or before November 6, 2024. Disregarding instructions to submit his brief in hard copy, Employee submitted a brief via email on October 30, 2024. However, it was accepted so that this matter can be decided on the merits. The record was closed after the parties filed their submissions.

JURISDICTION

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

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

FINDINGS OF FACT

The following facts are undisputed:

On October 25, 2021, Agency hired Employee to a term appointment as a Sanitation Worker with the Solid Waste Management Administration (SWMA).[1] After several extensions, Employee's appointment was extended for a term not to exceed March 17, 2024.[2] On March 20, 2023, Employee acknowledged that he occupied a safety sensitive position that prohibited him from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the workplace when he acknowledged receipt of the District of Columbia Department of Human Resources (DCHR) Individual Notification of Requirements, Drug and Alcohol Testing: Safety Sensitive form.[3]

On January 11, 2024, Employee was randomly chosen to submit to drug testing and tested positive for cannabinoids. On January 18, 2024, the test results were verified, confirming the presence of cannabinoids.[4] As a result of this positive drug test, Employee was served with a Notice of Final Decision suspending him without pay for five (5) working days on February 23, 2024.[5] The Notice of Final Decision instructed that, as a requirement of returning to work, Employee needed to undergo a follow-up drug test and re-acknowledge the applicable drug and alcohol policy. Employee served his suspension from March 4, 2024, through March 11, 2024.

On March 11, 2024, Employee reported for a return-to-duty test in compliance with the terms specified in the suspension notice.[6] Employee underwent two (2) attempts for collection. After the first attempt, Collector Floyd informed Mr. Davis that Employee had attempted to use a device to alter his sample.[7] Mr. Davis accompanied Employee to Agency's Drug and Alcohol Program Manager office, where Mr. Davis asked if Employee had a device of some sort. Employee denied attempting to substitute his urine sample and then stated he is a Muslim and cannot have anyone directly observing him while he urinates.[8]

Mr. Cherry, another collector, conducted the second observation. During the second attempt, Mr. Cherry observed a bottle in Employee's undergarments.[9] As a result, the test was cancelled, and Employee's attempt to substitute his sample was ruled an interference.[10]

On May 2, 2024, Employee was served with an Advance Notice of Proposed Separation wherein Employee was charged with violating 6-B DCMR § 1607.2(h)(6) and 6-B DCMR § 428.l(b) for failing to submit to a properly ordered drug test.[11] With removal recommended for the violation, Employee was advised of the right to an administrative

1 Agency brief, Exhibit 1.
2 *Id.* Exhibit 2.
3 *Id.* Exhibit 3
4 *Id.* Exhibit 6.
5 *Id.* Exhibit 7.
6 *Id.* Exhibit 8.
7 *Id.* Exhibit 9.
8 *Id.*
9 *Id.* Exhibit 10.
10 *Id.* Exhibit 11.
11 *Id.* Exhibit 12.

review and his right to submit a written response to the designated Hearing Officer within ten workdays.[12]

On May 8, 2024, Employee sent a letter to DCHR admitting to the allegations and expressing his interest in maintaining his position with Agency.[13] On May 28, 2024, the assigned Hearing Officer found that the evidence undisputably demonstrated that Employee interfered with a mandatory return to duty drug test by attempting to alter his specimen during collection.[14] Upon receipt of the Hearing Officer's Findings and Recommendations, Agency delivered a Final Decision for Removal to Employee via FedEx to his address of record on July 10, 2024.[15] The effective date of Employee's removal was Friday, July 19, 2024.

ANALYSIS AND CONCLUSIONS OF LAW

Employee does not deny any of the charges, but at the Prehearing Conference, he argued that he should be afforded another chance as he had completed a drug treatment program and has remained drug-free. In his legal brief, Employee reiterated his remorse and asked for a second chance to prove he can be a reliable and responsible employee.

Employee's arguments fail to distinguish the fact that he was terminated because he failed an essential requirement of his position regarding drug testing policies. The District Personnel Manual in 6-B DCMR § 428.1 provides that "[a]n employee shall be deemed unsuitable and immediately subject to separation from a covered position" for "refusal to submit to a drug or alcohol test."

Because of Employee's admissions, there was never any question that Agency had met its burden of establishing cause for taking adverse action. However, Employee asserts that he should be given a second chance. The facts indicate that Agency had given Employee a second chance by suspending him when he tested positive for marijuana in January 2024. But after being given a second chance, Employee then attempted to interfere with the drug test collection.

As a result, I find that the only remaining issue is whether the discipline imposed by Agency was an abuse of discretion. Any review by this Office of the agency decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[16] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[17] When the charge is upheld, this Office

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12 *Id.*
13 *Id.* Exhibit 13.
14 *Id.* Exhibit 14.
15 *Id.* Exhibit 15.
16 *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
17 *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[18]

6-B DCMR § 428.1 is clear that the only proper penalty for an employee in a safety sensitive position who tests positive for marijuana is termination. The record shows that Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present. For the foregoing reasons, I conclude that Agency's decision to select removal as the appropriate penalty for the employee's infractions was not an abuse of discretion and should be upheld.

ORDER

It is hereby **ORDERED** that the agency action removing the Employee from service is UPHELD.

FOR THE OFFICE: /*s/Joseph Lim, Esq.*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

[18] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).