**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| FRANSWELLO RUSSELL, | ) | |
| Employee | ) | OEA Matter No. 1601-0030-20 |
| | ) | |
| v. | ) | |
| | ) | Date of Issuance: April 22, 2021 |
| D.C. DEPARTMENT OF PUBLIC WORKS, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Franswello Russell ("Employee") worked as Parking Enforcement Officer with the Department of Public Works ("Agency or DPW"). On December 31, 2019, Employee received a Notice of Separation from Agency. The notice provided that on August 8, 2019, Employee submitted a urine sample which tested positive for the presence of marijuana, in violation of 6B District of Columbia Municipal Regulations ("DCMR") §§ 435.6 and 1605.4(h). Consequently, she was terminated from employment effective January 3, 2020.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 27, 2020. She asserted that although she was employed by DPW, she was terminated by the District of Columbia Human Resources ("DCHR"). Additionally, she contended that Agency

[1] *Petition for Appeal*, p. 5-6 (January 27, 2020).

did not properly consider the mitigating factors provided in *Douglas v. Veterans Administration*, 5 MPSR 280 (1981).[2] Furthermore, Employee argued that according to the Table of Illustrative Actions, the range of penalties for a positive drug test was a thirty-day suspension to removal. Thus, she posited that the lesser penalty of suspension was possible. Employee also raised the issue of disparate treatment. She explained that another DPW employee was offered reassignment to a non-safety sensitive position with Agency after a positive drug test. Therefore, she requested that the adverse action be reversed; that Agency reassign her to a non-safety sensitive position; and that she be awarded back pay and attorney's fees.[3]

Agency filed an Answer to the Petition for Appeal on February 28, 2020. It asserted that pursuant to Chapter 4 of the DCMR, Employee was not suitable for employment in a safety-sensitive position. Agency contended that Employee's marijuana use violated 6B DCMR § 1605.4, which provides that a positive drug or alcohol test is cause for disciplinary action, and 6B

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[2] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

> 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> 3) the employee's past disciplinary record;
> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> 7) consistency of the penalty with any applicable agency table of penalties;
> 8) the notoriety of the offense or its impact upon the reputation of the agency;
> 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
> 10) potential for the employee's rehabilitation;
> 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
> 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[3] *Petition for Appeal*, p. 2 (January 27, 2020).

DCMR § 428.1, which provides that separation is an appropriate action for a positive drug test. As for Employee's argument regarding reassignment, Agency explained that she would have had to apply for a non-safety-sensitive position; it could not simply reassign an employee unless they qualified for the position. Finally, Agency argued that it considered the *Douglas* factors when determining the appropriate discipline. As a result, it requested that Employee's removal action be upheld.[4]

In a Post-Conference Order, the OEA Administrative Judge ("AJ") explained that Employee admitted to testing positive for marijuana. However, it was Employee's position that removal was too severe of a penalty and that the process was flawed. As a result, the AJ ordered both parties to submit briefs addressing whether the penalty should be upheld under District law.[5]

In its brief, Agency responded to an argument Employee raised in her Pre-hearing Statement. Employee opined that DCHR officials could not be substituted for Agency officials in the disciplinary process. However, Agency explained that 6B DCMR § 435.9 expressly provided that the personnel authority may terminate employment of an individual who submits a positive drug test. Agency contends that because DCHR has personnel authority over DPW, it was authorized to terminate employment under Chapter 4 of the DCMR. It also provided that 6B DCMR § 439 designated the Director of DCHR as the program administrator for subordinate agencies, and when the program administrator deems an employee unsuitable, the removal action shall be carried out by the personnel authority. Thus, Agency argued that the regulations made clear that DCHR was well within its authority to remove Employee following her positive drug test.[6]

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[4] *Agency's Answer*, p. 5-9 (February 28, 2020).
[5] *Post-Conference Order* (July 7, 2020).
[6] *Agency's Brief in Support of Employee's Termination*, p. 5-6 (August 14, 2020).

As for the penalty, Agency asserted that both 6B DCMR §§ 1607 and 428.1 authorize removal on the first occurrence of the misconduct committed by Employee. Agency also addressed Employee's claim that it should have considered suspension instead of termination. It provided that although the Table of Illustrative Actions in Chapter 16 of the DCMR offers suspension within the range of penalty for the first occurrence of a positive drug test, the table is applicable to ordinary employees and not those employed in safety-sensitive positions. Agency claimed that this is evidenced by the fact that 6B DCMR § 435 specifically addressed safety-sensitive positions and only allowed for removal or reassignment. Therefore, DCHR did not have the option to suspend Employee. Finally, it asserted that it considered the *Douglas* factors. Thus, Agency requested that its termination action be upheld.[7]

In her brief, Employee asserted that when she was hired as a Parking Enforcement Officer, there were no provisions for drug or alcohol testing. Employee contended that the suitability regulations,[8] which were amended in 2018, subjected Parking Enforcement Officers to random drug testing for the first time because they were designated as safety-sensitive employees. Employee conceded that she was informed of the drug-testing requirement and the consequences of a positive test. She further admitted that she did not disclose her cannabis use prior to her positive drug test. However, she argued that prior to her termination, a similarly positioned employee was also terminated for a positive marijuana test; however, he was subsequently assigned to a walking route as a parking officer. She, again, argued that Agency failed to consider progressive discipline as directed in Mayor's Order 2019-081,[9] and it failed to comply with DCMR

[7] *Id.,* 7-15.
[8] As provided in Chapter 4 of the DCMR.
[9] It should be noted that Employee acknowledged that the Mayor's Order was issued one month after her positive test result, and the Mayor's Order was not "negotiated with the American Federation of Government Employees (AFGA), the union that represented [her], and therefore management was not required to follow it."

Chapters 4 and 16. According to Employee, Chapter 4 of the DCMR did subject an employee to termination; however, it was her position that merely because she was subject to termination, did not mean that the regulation required that she be terminated.[10] Moreover, she posited that pursuant to Section 1607 of the Table of Illustrative Actions, the penalty for a first occurrence of a positive drug test result was suspension through removal. As for Agency's argument that the Chapter 16 Table of Illustrative Actions only applied to ordinary employees, Employee countered by asserting that ordinary employees could not be randomly drug tested, and therefore, could not be subjected to disciplinary action based on a positive test result. Hence, she requested that she be reinstated to her position and that she be awarded full back pay.[11]

Agency filed a Response to Employee's Opposition Brief on November 8, 2020. It noted that Employee's drug test occurred in August of 2019; therefore, Employee's claims regarding Agency's pre-2018 drug testing policy is irrelevant. As for Employee's claims regarding a similarly situated employee, Agency opined that she failed to make a *prima facie* case regarding disparate treatment. Agency also noted that the Mayor's Order 2019-081 was issued over one month after Employee's positive drug test.[12] However, Agency explained that the Mayor's Order did not alter the rules for progressive discipline provided in the DCMR, which allowed it to deviate from progressive discipline where it deemed appropriate. It also asserted that it had no obligation to reassign Employee. Finally, Agency contended that DCMR § 1607 does not reference random drug testing; it only addressed positive drug testing generally. Therefore, it reiterated its position

[10] Additionally, she claimed that DCMR § 429.2 was amended on September 11, 2020, and it resolved the perceived conflict between the Suitability regulations and the Table of Illustrative Actions. According to Employee, a safety-sensitive employee who tests positive would be suspended for five days and offered rehabilitation for the first offense under the amended regulation.
[11] *Employee's Opposition to Agency's Brief in Support of Termination* (October 14, 2020).
[12] Agency also highlighted that the September 11, 2020 amendment to DCMR Chapter 4 went into effect eight months after Employee was terminated. It argued that the amendments were not retroactive and have no bearing on Employee's case.

that the Table of Illustrative Actions does not account for safety-sensitive employees. Thus, Agency requested that its termination action be upheld.[13]

On December 3, 2020, the AJ issued his Initial Decision. He first noted that from August 6, 2007 through October 9, 2018, Employee signed documents acknowledging that she held a safety-sensitive position which required random, mandatory drug and alcohol testing. He further held that Employee admitted to testing positive for marijuana and that she failed to disclose her use of medicinal marijuana prior to testing positive. The AJ found that in accordance to 6B DCMR §§ 435.6 and 1605.4(h), Agency had sufficient cause to terminate Employee. As for Employee's argument regarding DCHR officials who were substituted for Agency officials, the AJ reasoned that the proposing and deciding officials were authorized to make employment decisions pursuant to 6B DCMR §§ 100.3 and 435.9. Moreover, he explained that Agency served Employee's Notice of Proposed Removal and Notice of Separation, not DCHR.[14]

With respect to Employee's contention that a lesser penalty was not considered, the AJ found that 6B DCMR § 1607 was applicable to non-safety sensitive employees, but it also authorized removal for a first offense of a positive drug test. He further explained that 6B DCMR § 428.1 expressly provided that an employee who is in a safety-sensitive position and tests positive for drugs is subject to separation.[15] Thus, he held that removal was within the range of penalties and that Agency properly considered the *Douglas* factors. Regarding Employee's disparate treatment argument, the AJ concluded that she failed to meet the burden of a *prima facie* claim. He opined that Employee did not offer enough information about the alleged similarly positioned

[13] *Agency's Reply to Employee's Opposition Brief*, p. 2-8 (November 8, 2020).
[14] *Initial Decision*, p. 3-4 (December 3, 2020).
[15] Additionally, the AJ cited to 6B DCMR § 435 which specifically addressed safety-sensitive positions and only allowed for removal or reassignment following a positive drug test. He was also careful to note that under 6B DCMR § 400.4, Agency was under no obligation to offer reassignment to Employee.

employee to substantiate her claim. Finally, regarding Mayor's Order 2019-081, the AJ reasoned that while the Mayor's Order promotes progressive discipline, it does not amend or bolster the progressive discipline policy discussed in 6B DCMR Chapter 16. Consequently, he ordered that Agency's termination action be upheld.[16]

On January 11, 2021, Employee filed a Petition for Review with the OEA Board. Employee argues that D.C. Code § 1-620.31, known as the Child and Youth Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"), mandated random drug tests for employees holding safety-sensitive positions. Employee provides that the statute defined a safety-sensitive position as employment with direct contact, care, health, welfare, or safety of children or youth. She contends that the statutory definition of safety-sensitive positions has not been amended since CYSHA went into effect in 2005. Therefore, Employee argues that the subsequent DCMR Chapter 4 regulations went beyond its legal authority because the statutory definition of safety-sensitive has not been expanded.[17]

She also claims that pursuant to Chapter 16 of the DCMR, the proposing official is required to be a management official within the chain of command of the employee or a management official designated by the personnel authority. Additionally, she alleges that the deciding official is required to be the agency head or a designee. It is Employee's position that the deciding official in this case, Justin Zimmerman, was not the head of DPW, and he was not designated by the DPW director to perform that function. Thus, Employee contends that although the disciplinary process must be instituted by DCHR through the appointment of an appropriate proposing official, the Agency head must make the final decision to terminate an employee. Consequently, Employee argues that the deciding official had no authority to make decisions related to her continued

[16] *Id.*, 4-9.
[17] *Employee's Petition for Review of Initial Decision*, p. 2-7 (January 11, 2021).

employment. Therefore, she believes that her removal action should be nullified and reversed. Finally, Employee reiterates her arguments regarding progressive discipline and consideration of the *Douglas* factors. She requests that she be reinstated with back pay.[18]

On March 3, 2021, Employee filed an addendum to the Petition for Review. She explained that a Memorandum of Understanding ("MOU") between the Department of Public Works and the Department of Human Resources for Fiscal Year 2021, provides that the Director of Department of Human Resources or her designee, shall serve as the final deciding official for any corrective or adverse actions related to suitability screenings. Employee contends that pursuant to the MOU, Agency did not delegate its decision-making authority in this case during the time of her termination. Therefore, she requests that the MOU be included as part of the record.[19]

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decision is not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[20]

Cause

Pursuant to 6B DCMR § 409.2(a), "the types of positions that are subject to enhanced suitability screenings for . . . employees . . . with duties and responsibilities that shall be . . . safety

[18] *Id.*, 7-13.
[19] *Employee's Addendum to Petition for Review of Initial Decision*, p. 1-2 (March 3, 2021).
[20] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

sensitive, which are positions with duties or responsibilities if performed while under the influence of drugs or alcohol could lead to a lapse of attention that could cause actual, immediate and permanent physical injury or loss of life to self or others."[21] Additionally, § 410.1(f) provides that "in addition to the general suitability screening, individuals . . . occupying safety sensitive positions are subject to . . . random drug and alcohol test." Agency established, and Employee conceded that, as a Parking Enforcement Officer, she held a safety-sensitive position.[22] Therefore, Chapter 4 of the DCMR is applicable to Employee.

As it relates to cause, 6B DCMR § 428.1(a) provides that ". . . an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in §§ 435.9 and 439.3 for a positive drug or alcohol test result."[23] Similarly, 6B DCMR § 435.6 provides that "in accordance with Section 428, a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations."[24] Again, Agency proved, and Employee admitted, that she tested positive for

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[21] This regulation was effective as of November 9, 2018; therefore, it was in effect at the time of Employee's positive drug test.

[22] *Agency's Answer*, p. 3 and Tab 7 (February 28, 2020) and *Employee's Opposition to Agency's Brief in Support of Termination*, p. 2 (October 14, 2020).

[23] 6B DCMR § 435.9 provides the following:

> If an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement. Instead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable.

6B DCMR § 439.3 provides the following:

> If the program administrator or employing agency determines that an existing employee is unsuitable to continue serving in a covered position, and that he or she should be separated from employment, the removal action shall be carried out by the personnel authority in accordance with the employee's type of appointment (i.e., probationary, term or permanent, etc.) and service (i.e., Career, Legal, Excepted, Management Supervisory Service, etc.), and the applicable legal and regulatory provisions governing adverse actions, including but not limited to Chapter 16 and applicable collective bargaining agreement provisions.

[24] This regulation was effective as of November 9, 2018; therefore, it was in effect at the time of Employee's positive drug test.

marijuana use.[25] A positive drug test is all that was needed to establish cause. Therefore, in accordance with 6B DCMR §§ 428.1(a) and 435.6, Agency had cause to remove Employee.

Although Agency contends that Chapter 16 of the DCMR pertains to "ordinary employees" and not those who hold safety-sensitive positions, the chapter is referenced in 6B DCMR § 435.6 related to cause. Therefore, this Board will also analyze if Agency established cause under Chapter 16. Pursuant to 6B DCMR § 1600.2, Chapter 16 applies to all District government employees except the following:

> (a) Employees serving in a probationary period;
> (b) Employees serving in a temporary appointment in the Career Service;
> (c) Employees organized under the Office of the Chief Financial Officer;
> (d) Employees of the Board of Trustees of the University of the District of Columbia;
> (e) Attorneys in the Legal or Senior Executive Attorney Service;
> (f) Employees in the Excepted and Executive Services;
> (g) Sworn members of the Metropolitan Police Department; and
> (h) Except as provided in § 1600.3, employees in the Management Supervisory Service.

As a Career Service, permanent employee, none of the above-mentioned exceptions are applicable. Therefore, 6B DCMR Chapter 16 could be used to determine cause in this case.

In accordance with 6B DCMR § 1605.4(h), testing positive for an unlawful controlled substance while on duty constitutes cause for an adverse action. Similar to 6B DCMR §§ 428.1(a) and 435.6, a positive drug test is all that was needed to establish cause. As outlined above, Employee conceded that she tested positive for marijuana use. Therefore, cause also exists under Chapter 16 of the DCMR.

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[25] *Agency's Answer,* Tabs 7 and 8 (February 28, 2020); *Post Conference Order* (July 7, 2020); *Employee's Pre-hearing Conference Statement*, p. 1 (August 6, 2020); *Employee's Opposition to Agency's Brief in Support of Termination*, p. 2 (October 14, 2020) and *Petition for Review of Initial Decision,* p. 2 (January 11, 2021).

Penalty Within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

Employee argues that Agency should have imposed the lesser penalty of suspension, instead of removal. 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).[26] According to the Court in *Stokes,* OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.

6B DCMR § 428.1(a) offers separation as the only penalty for a positive drug test result. 6B DCMR § 435.9 provides that "if an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action . . ." However, the section also provides that "instead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable." Therefore, in accordance with Chapter 4, Agency had the choice to terminate Employee or reassign her.[27] Alternatively, 6B DCMR § 1607.2(g)(2) provides that the penalty can range from suspension to removal for testing positive for intoxicants when reporting for duty or anytime while on duty. Thus, pursuant to Chapter 16, Agency had the ability to impose a penalty from suspension to removal.

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[26] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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).

[27] This Board agrees with the AJ's determination that "although reassignment . . . is permissible in this instance under Chapter 4 of Title 6-B, it is totally discretionary on the part of Agency." Given the language in 6B DCMR § 435.9 that the personnel authority *may* reassign the employee (emphasis added), Agency had no obligation to do so. Therefore, Employee's argument lacks merit on this issue.

The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[28] Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[29] The AJ correctly held that removal was within the range of penalty for the first occurrence of a positive drug test under 6B DCMR § 1607 and 6B DCMR §§ 400.4, 428.1, and 435.9. Thus, because removal was within the range of permissible penalties, there is substantial evidence to uphold the AJ's decision not to disturb Agency's penalty determination.

The AJ also held that Agency did not abuse its discretion by removing Employee, as evidenced in its consideration of the *Douglas* factors. The record is replete with documents which show that the *Douglas* factors were weighed by Agency before imposing its penalty of removal.[30]

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[28] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[29] *Love* also provided the following:

> [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, it is 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)).

[30] Consideration of the *Douglas* factors was evidenced in the Hearing Officer's Report and the Proposing Official's Rationale Worksheet outlined in *Agency Answer,* p. 8-10 and Tab 8 (February 28, 2020) and also in *Agency's Brief in*

Agency went through each factor and determined if it was aggravating, neutral, or mitigating, and it also provided its rationale for its decision. Furthermore, this Board agrees with the AJ's suggestion that Employee's mere disagreement in how Agency analyzed the *Douglas* factors, does not negate that it adequately considered the factors prior to imposing its penalty.

D.C. Code and Safety-Sensitive Positions

D.C. Code Section XX is divided into multiple subchapters related to drug and alcohol testing. Employee argues that D.C. Code § 1-620.31 (subchapter XX-C) defined a safety-sensitive position as employment with direct contact, care, health, welfare, or safety of children or youth. She contends that because the statutory definition of safety-sensitive positions has not been amended since the CYSHA went into effect, the subsequent DCMR regulations went beyond its legal authority. This Board disagrees.

D.C. Code § 1-620.31 *et seq.* (subchapter XX-C) provides that it specifically relates to mandatory drug and alcohol testing for *certain employees who serve children* (emphasis added).[31] Thus, the legislature clearly provided that this subchapter was related to employees who serve children. Conversely, the subchapter does not purport to apply to positions outside of those that require interaction with children. In her position as a Parking Enforcement Officer, Employee's position description did not provide that she had direct contact with children; that she was entrusted with the direct care of children; or that her employment affected the health, welfare, or safety of children. Therefore, this subchapter is not applicable to Employee.

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*Support of Employee's Termination,* p. 13-15 (August 14, 2020).

[31] Employee correctly contends that within this section of the Code pertaining to employees who serve children, section 1-620.31(10) provides the following safety-sensitive definition:

> "Safety-sensitive position" means:
> (A) Employment in which the District employee has direct contact with children or youth;
> (B) Is entrusted with the direct care and custody of children or youth; and
> (C) Whose performance of his or her duties in the normal course of employment may affect the health, welfare, or safety of children or youth.

The Council's intent that D.C. Code § 1-620.31 *et seq.* (subchapter XX-C) only apply to those who serve children is evidenced by the designations made in other subsections related to drug and alcohol testing. For example, D.C. Code § 1-620.11 (subchapter XX-A) applies to testing of employees who are employed as drivers of commercial motor vehicles. Pursuant to D.C. Code § 1-620.21 *et seq.* (subchapter XX-B), testing is outlined for those employed by the Department of Human Services and the Department of Mental Health. Finally, protections for employees who are enrolled in the medicinal marijuana program is provided in D.C. Code § 1-620.51 *et seq.* (subchapter XX-E).[32]

In addition to the inapplicability of D.C. Code § 1-620.31 *et seq.* (subchapter XX-C) to Employee, this Board also fails to see how the DCMR conflicts with any of the statutory language outlined, or how the regulation extends beyond its legal authority, as Employee contends. Chapter 4 of the DCMR simply provides regulatory language for testing safety-sensitive employees. 6B DCMR § 409.2(a) explains the types of positions that are subject to enhanced suitability screenings for safety sensitive employees, and § 410.1(f) provides that those occupying safety-sensitive positions are subject to random drug and alcohol testing. Neither of these subchapters conflict with any language found in the D.C. Code. Agency established, and Employee conceded that, as a Parking Enforcement Officer, she held a safety-sensitive position.[33] Therefore, Chapter 4 of the DCMR is appropriate and applicable to Employee.

DCHR Substitution

In her Petition for Review, Employee argues that pursuant to Chapter 16, the proposing

[32] It should be noted that subchapter XX-E also provides a definition of safety-sensitive, as it relates to the medicinal marijuana program. D.C. Code § 1-620.51(4) provides that for this section, safety sensitive position means a position with duties that, if performed while under the influence of drugs or alcohol could lead to a lapse of attention that could cause actual, immediate, and permanent physical injury or loss of life to self or others.
[33] *Agency's Answer*, p. 3 and Tab 7 (February 28, 2020) and *Employee's Opposition to Agency's Brief in Support of Termination*, p. 2 (October 14, 2020).

official is required to be a management official within the chain of command of the employee or a management official designated by the personnel authority. Additionally, she alleges that the deciding official is required to be the agency head or a designee. It is Employee's position that the deciding official in this case, Justin Zimmerman, was not the head of DPW, and he was not designated by the DPW director to perform that function. Consequently, Employee argues that because the deciding official lacked authority, her removal action should be nullified and reversed.[34]

As the AJ provided in his Initial Decision, 6B DCMR § 100.3 explains that the Mayor has "personnel authority" over District government subordinate agencies under his or her direct administrative control, and may delegate that personnel authority, in whole or in part, to the Director of the DCHR. Additionally, 6B DCMR § 425.3 provides that "the Director of the DCHR shall develop operating policies and procedures for implementing the drug and alcohol program (Program) under this chapter for agencies subordinate to the Mayor that have safety, protection, or security sensitive positions." Furthermore, 6B DCMR § 439.2 offers that "the Mayor's authority to make suitability determinations under this chapter is delegated to the Director of the DCHR who shall also serve as the program administrator for agencies under the personnel authority of the Mayor." Moreover, 6B DCMR § 439.3 provides that "if the program administrator or employing agency determines that an existing employee is unsuitable to continue serving in a covered position, and that he or she should be separated from employment, the removal action shall be carried out by the personnel authority . . . ." Finally, 6B DCMR § 439.4 explains that "if an employing agency fails or refuses to remove an employee based on a finding that its employee is unsuitable to continue his or her employment, the program administrator may carry out the adverse

[34] *Employee's Petition for Review of Initial Decision*, p. 7-13 (January 11, 2021).

action in accordance with the procedures applicable to the employee." Therefore, because Agency is a subordinate agency to the Mayor, the Director of DCHR had personnel authority over DPW and could develop drug policies and procedures for its safety-sensitive positions. Additionally, the Director was authorized to serve as the program administrator and to carry out the adverse action if Agency failed to remove Employee.

As a result, the regulations require that subordinate agencies and DCHR work in concert to ensure that the drug and alcohol program's procedures are followed. This concerted effort is evidenced in numerous email exchanges between Gail Heath, Agency's Employee and Labor Relations Advisor; Tamika Cambridge, the DCHR Compliance Review Manager, who oversaw the drug-testing program; Torey Draughn, DCHR's Compliance Specialist; Fredline Lebrun, Agency's Human Resources Manager; Anndreeze Williams, Agency's Assistant General Counsel; and Justin Zimmerman, the DCHR Deciding Official.[35]

[35] In a September 10, 2019 email, Ms. Heath emailed DCHR to inquire about the status of Employee's proposal for violating the Chapter 4 Suitability requirements. Ms. Heath indicated that the proposal was submitted to DCHR on August 16, 2019. She requested that she receive a copy because she was responsible for providing the necessary documentation to DCHR to be submitted to the hearing officer. *Agency's Answer,* Tab 5 (February 28, 2020). Additionally, Ms. Heath provided a signed affidavit. It provided that as Agency's Employee and Labor Relations Advisor, she emailed DCHR to provide it with documentation of Employee's positive drug test. She tracked Employee's proposed removal and ensured that a final decision was completed. Heath submitted the proposal via certified mail to DCHR so that it could provide it to the Hearing Officer. Finally, Ms. Heath explained that upon receipt of the final decision, she mailed it to Employee and sent documentation to DCHR via certified mail. *Id.,* Tab 10.

Moreover, in a September 25, 2019, Torey Draughn emailed Agency informing it that Employee tested positive for marijuana. As a result, DCHR was proceeding with separating Employee from her position. The email went on to provide that Agency must serve the proposed separation notice to Employee and place her on administrative leave or detail her to a non-covered position. *Id.,* Tab 7.

Furthermore, in a letter from Justin Zimmerman to Fredline Lebrun, Zimmerman instructed Lebrun that Agency serve the notice of separation on Employee. The letter also provided that a copy should be submitted to DCHR's Policy and Compliance Administration within twenty-four hours of serving Employee. *Id.,* Tab 8.

Additionally, in a letter from Tamika Cambridge to Anndreeze Williams, Cambridge thanked Williams for assisting DCHR and provided that she was designated as the hearing officer for review of the proposed separation. *Id*. Finally, in a November 15, 2019 document, Anndreeze Williams provided a Written Report and Recommendation of Adverse Personnel Action to Justin Zimmerman. *Id.*, Tab 14.

As Agency provided in its Answer, 6B DCMR § 435.9 provides that the personnel authority may terminate employment of an individual who submits a positive drug test. Thus, DCHR, which has personnel authority over Agency, was authorized to take such action against Employee. Furthermore, 6B DCMR § 439 clearly designates the Director of DCHR as the program administrator for subordinate agencies, and it also provides that when the program administrator or employing agency deems an employee unsuitable, the removal action shall be carried out by the personnel authority. Hence, the DCMR established that DCHR was well within its authority to remove Employee following her positive drug test. Moreover, the record also supports the AJ's finding that although DCHR initiated the termination on behalf of Agency, both the Notice of Proposed Removal and the Notice of Separation were actually served on Employee by DPW — not DCHR. Given the language in the regulation; the documentation of Agency and DCHR's concerted efforts to perform the requirements of the drug and alcohol program; and because Agency served Employee's final notice of termination, we will not disturb the AJ's finding on this issue.

Conclusion

There is substantial evidence in the record to uphold the AJ's ruling that Agency had cause to remove Employee. Termination was within the range of penalties under Chapters 4 and 16 of the DCMR. Additionally, the penalties were based on relevant factors, and there was no clear error of judgment by Agency. Employee's argument that a conflict exists between the D.C. Code and DCMR lacks merit. Finally, because Agency is a subordinate agency to the Mayor, the Director of DCHR had personnel authority over Agency and could develop drug policies and procedures for its safety-sensitive positions. Accordingly, we must deny Employee's Petition for Review.

**ORDER**

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

**FOR THE BOARD:**

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

_____
Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.