THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GRACE SMALLS,	)	
Employee	)	OEA Matter No. 1601-0051-13
	)	
v.	)	Date of Issuance: October 13, 2015
	)	
OFFICE OF THE STATE	)	MONICA DOHNJI, Esq.
SUPERINTENDENT OF EDUCATION,	)	Administrative Judge
Agency	)	
	)	

Keith Grimes, Employee Representative
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 7, 2013, Grace Smalls ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("OSSE" or "Agency") decision to terminate her from her position as a Motor Vehicle Operator ("Driver"), effective January 22, 2013. Employee was terminated based on the following charge: any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically, use of illegal drugs unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test. On March 12, 2013, Agency filed its Answer in response to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on February 24, 2014. After several conferences and brief submissions, an Evidentiary Hearing was held on June 9, 2015. Both parties were present for the Evidentiary Hearing. Thereafter, I issued an Order dated July 31, 2015, notifying the parties that the transcript from the Evidentiary Hearing was available at OEA. The Order also provided the parties with a schedule for submitting their written closing arguments. The written closing arguments were due on or before September 8, 2015. While Agency has submitted its written closing argument, on September 15, 2015, Employee's representative submitted to the undersigned AJ via email, a Motion to extend the time in which to file Employee's written closing arguments. Employee's email stated in pertinent part that "Counsel for OSSE has consented to an extension of 7 days."[1] As of the date of this decision, Employee has not submitted her written closing argument as requested. The record is now closed.

[1] Consent Motion to Extend the Time (September 15, 2015).

JURISDICTION

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

ISSUES

1) Whether the prescription drug Amoxicillin can cause a positive drug test;
2) Whether Agency's action of terminating Employee was done for cause; and
3) If not, whether the penalty of termination is within the range allowed by law, rules, or regulations.

SUMMARY OF MATERIAL TESTIMONY

Agency's Case in Chief

1. *Kenneth Roberson* (Transcript pages 8-90).

Kenneth Roberson ("Roberson") works for OSSE. Roberson is a substance abuse specialist. He conducts drug testing. He is familiar with Agency's drug testing policy for commercial vehicle drivers. Roberson stated that motor vehicle operators are provided the drug policy and the policy is explained to them. He stated that per federal law, he is required to give them training every year. He stated that the employees are governed by District and federal law. He testified that drug testing is conducted using a certain amount of tests; for example, an individual can have a pre-employment screening test if they have been out of the random pool for over 30 days or they can be randomly summoned for testing. He explained that when one first starts their employment with Agency, they sign a Child and Youth Safety and Health Omnibus Act of Washington, D.C. ("CYSHA") form and they are aware that they are going to be placed in a drug testing pool if they are a driver or attendant.

Roberson testified that when an employee is brought in for a random drug testing, Agency sends a notification to the terminal. He stated that the terminal is offsite. He explained that the notification is through e-mail. From there, he explained that a specialist will meet with the collector, and the manager will summon the employee. Next, the notification form will tell the employee what he or she is being tested for; the type of test; and if the test is going to be drug and alcohol or whether it will be a drug test only. Roberson explained that the test is dated and signed by the individual as well as the manager. When the testing is conducted, Agency makes a copy of its Department of Transportation ("DOT") card and the employee's Commercial Driver's License ("CDL") card. Agency verifies all the information to ensure that the cards are valid. Robertson explained that because the drivers are under federal guidelines, they also have to utilize their social security numbers. Roberson stated that Agency verifies the social security number, testing location, birthday, and telephone number. Then, the control custody form and alcohol test form are provided to a collector along with the employee's credentials. The collector verifies everything and proceeds with the testing.

Roberson explained that one cannot test positive and then go to a substance abuse specialist to re-enter the pool. He further testified that anyone who works with children is not allowed to have a re-entry status. He stated that the employee must be terminated after testing positive. Roberson noted that prohibited conduct is any possession of alcohol during an employee's tour of duty and any on-call driver who has had alcohol within four hours prior to being called into their shift. Roberson explained that it is prohibited for any safety-sensitive employee to be under controlled substances or illegally using controlled substances. It is also

prohibited to fail to report any controlled substance while on duty or fail to submit to a required drug or alcohol test. He explained that prohibited conduct leads to automatic termination.

Roberson testified that Grace Smalls ("Employee") signed a sign-in sheet for Agency's drug and alcohol policy training. He explained that there is only one division at Agency that provides the training and there are about four people involved in the training. Roberson is one of the people involved in the training. He stated that at the training, they explain what a random drug testing is and what is considered prohibited conduct. He explains to the people at training what the consequence is for engaging in prohibited conduct - they will be terminated. Roberson explains what controlled substances are and the testing procedures.

Roberson is certified to provide drug testing training. He was certified in 2013. At the time that Employee was tested, Roberson was not certified. He explained that at that time, he was not employed with Agency. He testified that he is certified to engage in the collecting of urine specimens. He stated that during the certification process, there were mock urine collections. Roberson stated that he has also collected urine samples outside of the certification process. He explained that he used to work for the Department of Employment Services ("DOES"), where he worked under One Stop. This agency required employees to undergo a drug test prior to being seen for an interview. Roberson was employed by DOES from 2007 to 2013. His titles included Manpower Development Specialist, Workforce Development Specialist, and Youth Development Specialist. The position in which he collected urine was a Workforce Development Specialist. He explained that he was not trained in the collection of urine prior to this position. Roberson estimated that he conducted urine collections about 25 times a year. After certification with DATIA, he conducted urine collection about 10 times a year.

He stated that every participant is provided an employee notification drug-free work place form. He testified that all motor vehicle operators participate in the training. He explained that the form notifies the employees of the drug-free workplace at Agency. Roberson testified that the form was issued to Employee. He also testified that Jennifer Jenkins, a former employee, and Eva Laguere, his supervisor, signed the form. Roberson stated that the notification was provided to Employee at the end of training. He stated that at the end of training, everyone should understand that they will be randomly drug tested and that termination occurs if they test positive. He also admitted that a certificate of receipt saying that the driver has attended and understands the policy is provided to the employees at the end of the training. The certificate also provides that the employee was provided a drug testing handbook. He stated that Grace Smalls printed and signed the certificate.

Roberson testified that the handbook refers to the Federal Motor Carrier. They provide a handbook to very driver who receives a CDL and who is covered under the U.S. Department of Transportation. He explained that it is a green handbook containing 500 pages. He explained that a summary of the handbook is also provided and consists of 45 pages. The summary highlights key topics and instances. Roberson explained that the handbook is provided by the USDOT and the District provides the miniature handbook during training.

Roberson testified that every driver who has a CDL license and drives for Agency is placed into a random pool if they are an active employee and not on special leave, disability, worker's compensation, or leave over 30 days. The pool is sent to Florida where the random selection occurs. The random selection is conducted every quarter of the year. Roberson explained that the first quarter is January through March; the second quarter is April through June; the third quarter is July through September; and the fourth quarter is October through December. The random selection is computer generated by the employee's social security number. Roberson testified that an employee can resign prior to knowing that they have an issue in

connection with the drug policy, but other than that, Agency does not advise them to do anything in the event they have used drugs prior to being selected for the random pool. If an employee is medically prescribed a drug, Agency allows them to bring in prior to the testing, the prescription. The prescription has to be valid or current from a doctor.

Roberson testified that a Self-Identification is when someone discloses that they have an abuse problem with drugs or alcohol. However, even if they self-identify, they are still terminated because of the no tolerance policy and the CYSHA law. The CYSHA form that is provided to employees tells them about the Child and Youth, Safety and Health Omnibus Act of Washington, D.C. It explains that an employee who is covered under the act cannot test positive for alcohol or a controlled substance. The form also states that within the first 30 days of employment, the employee can self-identify. After 30 days, there is no self-identification. The form is provided to employees at the point of hire. Also, drivers who were converted from the Department of Public Works ("DPW") were provided the form when they became employees with Agency. He explained that although DPW has a re-entry program, Agency does not because it is covered under CYSHA. Roberson testified that the form was provided to Employee and she signed the document.

Roberson testified that Employee was subjected to a random drug test. He testified that she tested positive for cocaine. He testified that when a driver tests positive, Agency conducts a five-panel test. The five panel test is for amphetamine, cocaine, PCP, marijuana, meth and alcohol. The alcohol test is a breath test and the drug tests are conducted using an employee's urine specimen. The urine sample is placed in a large container or cup and then the cup is broken into 30 milliliters, or a split sample. From there, the collector has the driver verify all of the information. The collector fills out the label that comes with the control custody form. From there, the collector labels it and sends it off to a lab. The lab analyzes it and then if there is an issue, a Medical Review Officer ("MRO") contacts the employee. The MRO does not inform Agency or the testing company. Then, the MRO and employee will go back and forth. If the MRO is unable to reach the employee, they call the Agency to let it know. Once the MRO receives a response, they will post the information in their system and the Agency will be able to see whether the employee tested positive or negative. If the test is positive, the employee can contact the lab and request a re-test of the second sample (the split sample).

Additionally, Roberson testified that there are certain cutoff levels that employees can test for because there are certain foods that have drugs in them. Roberson stated that his certification does not train on what foods can induce a false positive. The second testing does not contain the cutoff levels. Once the lab makes a determination of whether the split sample is actually positive, Agency receives the notification and sends it to the employee relations team. During this process, the employee is taken off of their route and they are removed from their functions. Then, the employee is asked to come to the main office so that Agency can explain why they are being removed.

Roberson testified that Employee was issued a 15-Day advanced notice stating that she would be removed. The notice was provided to Employee on the day that Agency found out that Employee tested positive. He testified that RaeShawn Crosson-Settles signed the document and Employee signed page three of the document. Employee signed the acknowledgment of receipt. Roberson testified that a final decision was issued to Employee and she was provided her appeal rights. He explained that the former Director of Agency signed the final decision.

Roberson testified that he has reviewed the contract between Agency and the lab that conducts drug and alcohol testing. He stated that although he was not employed with Agency during the time that Employee was tested, he had personal knowledge of the testing because Agency keeps files holding the information and

every driver has a file. Roberson stated that he interacts with the lab. He explained that he will contact them if something is misspelled or if a result does not come within a three-day period. Roberson explained that he also informs his manager of how the lab is performing and conducting business. He explained that the lab's performance is based on their performance, getting timely results, the cost, getting the information that is needed, and the result posting. The contract with the lab is through a third party administrator who oversees the pool. He explained that there is no separation between the third party administrator and the lab. The contract is between Agency and the lab.

Roberson testified that currently, the drug and alcohol training that Agency provides includes sign-in sheets. The sign-in sheets are used to track the attendance of employees who have received training. During the training, the employees are also provided a drug-free workplace document and a certificate of receipt. The signed documents are kept on file for each employee, per federal mandate. The files are kept in a locked cabinet by alphabetical order using the employee's last name. Roberson did not review Employee's file. Further, he did not review any documents prior to his testimony.

2. *Robert J. Fierro* (Transcript pages 91-125).

Robert Fierro ("Fierro") went to medical school and has practiced as a doctor for 40 years. He is retired, but in June of 2008, he was certified as a Medical Review Officer ("MRO") and has worked part time as an MRO since then. He reviews roughly ten drug samples per day, five days a week. He reviews 200 samples per year.

Fierro explained that in order to become a MRO, one has to take a course and an examination. At the end of five years, another exam has to be taken. Further, one has to do 20 hours of continuing medical education so that he or she can take the exam. Fierro testified that he passed all of his exams.

Fierro testified that when a lab realized that there is a positive drug test, there are two stages to the lab return. A screening test is an immunoassay. If the immunoassay is positive, then it goes to the confirmatory test, or a MS/GC test. Then, when the lab is satisfied with the result and confirms the result is above the cutoff level, the lab informs the MRO that the test is positive. He explained that the lab reports to the MRO a copy of the COC form. Upon notification from the lab, the MRO tries to contact the donor. The MRO looks for a medical explanation as to why the donor tested positive and determine if there was a legitimate reason for the positive test. If there is not a legitimate reason, the MRO fills out a positive test report.

Fierro testified that initially, Dr. Chavan attempted to contact Employee, but the number on file was disconnected. He found another number, but that was a wrong number. Eventually, the case was reported out as noncontact with the donor and positive for cocaine. Then, contact was made with the donor. Fierro testified that Employee spoke with Dr. Cooper, who explained that she tested positive for cocaine. Fierro stated that Employee denied the use of cocaine and wondered if her amoxicillin caused the positive result. She explained that she had a root canal one week prior to the test. Employee was advised to send in the appropriate records. Then, Fierro stated that the notes indicated that Employee became argumentative and they did not receive the medical records. He stated that Employee did not stay on the phone long enough to receive the fax number for the records to be sent.

Fierro testified that for each case, the MROs keep a running log. The log contains who the information is filed by, the COC number, and the donor's name. The notes are entered electronically. The notes are then added to the MRO detail report, which includes the COC form and MRO Review Sheet.

Fierro testified that cocaine in one's system does not last long. He explained that a number of tests occur to ensure that the urine is truly urine, and to try and protect whether anything was put in there to adulterate the sample. After these tests are passed, the sample goes through amino acid, which is an antigen antibody reaction. Then, the sample is sent to find all the positives. The negatives are also included. He explained that if there is a negative, it is 100 percent negative and the donor is immediately notified. The positive results go to a gas chromatographer. The amount of drug is measured and given a number, as well as finds all of the negatives. The positive tests go through MRO procedures.

Fierro testified that the procedures are 100 percent accurate in determining drugs in one's system. He explained that mass spectrometry separates the molecules by their mass. Then, the results are put against the standard curve and matched. He testified that every substance has a unique molecule and each molecule has a unique weight. Fierro stated that the cutoff number is 150; meaning, anything with a result higher than 150 on the immunoassay is considered positive. During the confirmatory test, the accuracy is such that it will reduce the cutoff to 100. Therefore, during the confirmatory test, anything above 100 is considered positive.

Fierro reviewed Employee's test results prior to his testimony before OEA. He testified that in his experience, there is nothing that could cause a false positive in a drug test with a result of above 3000. Further, he stated that amoxicillin cannot cause a false positive because it doesn't get broken down into BE. He explained that BE is the target for measuring cocaine. He explained that amoxicillin is an antibiotic with a different size and shape.

Fierro testified that he works with the donor to try to find a reason the donor tested positive for a drug. He explains to the donor that lidocaine is not cocaine. He stated that he does not perform any test. He stated that most of the time he is working as the donor's advocate; he helps them through the process to try and find some reason to make the test negative. If he can find evidence that can prove that there is a prescription or the donor was eating food containing the drug, then he reports the test as negative. With regard to Employee's matter, Fierro stated that he is the custodian of records for the case. He stated that he did not speak with Employee.

Fierro testified that if Employee's dentist represented that amoxicillin can cause a false positive for cocaine, he would ask the dentist where he found that information. He would also ask if he is talking about just the immunoassay test and not the whole range of testing. He explained that there are a lot of substances that mess up immunoassay testing, and that is why it is not relied on to give a final report. He explained that it is excellent for finding negatives, but not all that good for finding positives. Fierro stated that he would have allowed the dentist to talk to him and hear him out to carefully consider whatever evidence he offered.

Fierro testified that Dr. Cooper finished the notes on Employee's case. He testified that Dr. Cooper and he are employed by PemBrooke Occupational Health, Escreen. At the time of Employee's testing, the company was located in Michigan and Florida. Fierro stated that after LabCorp is finished testing a specimen, nothing can cause a false positive test result. However, he stated that if a dentist used cocaine in the preextraction process, it is possible that the donor could test positive for cocaine.

Employee's Case in Chief

1. ***Grace Smalls*** **(Transcript pages 140-156).**

Employee was employed by D.C. Public Schools as a driver. When she first started with D.C. Public Schools, she was provided training on how to be a school bus driver. Employee testified that she did not

receive a handbook on alcohol and drug testing information. She stated that there was a training session where everyone was briefed, but she did not receive any other information. Employee also holds a tractor-trailer, class A license; a B class license for transit bus; and a S class for the school bus. She has held these licenses since 2008.

From 2008 up until the time Employee was drug tested, she did not have any difficulties with her driving record or certification. She stated that she tested positive after a random drug test. She explained that after she tested positive, she contacted the number at the bottom of the sheet and spoke to a gentleman who was really nasty to her. She tried to explain to him that she was not on any drug and was under doctor's care. She stated that the gentleman hung up on her. Employee stated that she did not receive a call from the lab. She explained that she received a paper indicating that she tested positive. At the time of the test, Employee was employed by D.C. Public Schools.

Employee testified that the lab did not provide her any information or indicate whether she could appeal her test result. After Employee was terminated from Agency, she went to work for International. At her new place of employment, she had to undergo a drug test. She received a negative result for the drug test. Employee worked for International for nine months.

When Employee took the drug test for Agency, no one asked her if she had consumed any particular food or was on medication. Employee spoke to her doctor, Dr. Baptiste, about the positive test. She testified that her doctor did not suggest that she had used cocaine. She testified that the doctor told her that the Amoxicillin could possibly cause a false positive test result. Employee stated that no one at Agency or the lab informed her of where to send her medical records. She testified that from the time she took the drug test to the time that she was terminated, no one inquired as to whether she was on prescriptions or to provide medical records.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issues of whether the prescription drug Amoxicillin can cause a positive drug test and whether Agency's action of terminating Employee was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

Employee was employed with Agency as a Motor Vehicle Operator. Employee's position is covered under the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"). Positions covered under CYSHA are subject to random drug and alcohol testing. Following a random drug and alcohol test on December 18, 2012, Employee's urine sample tested positive for cocaine. The positive drug test was confirmed by a Medical Review Officer ("MRO"). The MRO attempted to contact Employee, but Employee's number on file was either disconnected or a wrong number. Consequently, the MRO reported the case to Agency as noncontact and also provided Agency with the results of Employee's drug test. On January 7, 2013, Agency issued a fifteen-day (15) advance written notice on a proposal to remove Employee.[2] On January 22, 2013, Agency issued a letter to Employee informing her that she would be removed from her position as a Motor Vehicle Operator based on the charge of any on-duty or employment-

[2] Agency's Exhibit 1.

related act or omission that interferes with the efficiency and integrity of government operations, specifically, use of illegal drugs unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or appositive drug test. This letter also provided Employee with her appeal rights.[3] On March 29, 2014, the MRO spoke with Employee, wherein, she denied the use of cocaine, and stated that she had a root canal one (1) week before the drug test, and was given Amoxicillin. The MRO requested that Employee submit her Dentist records, however, the line was disconnected prior to Employee receiving the fax number for her Dentist to send in her dental record. Employee did not call back.[4]

Analysis

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 any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically, use of illegal drugs unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or appositive drug test.

1) Whether the prescription drug Amoxicillin can cause a positive drug test

In the current matter, Employee does not dispute that her position was covered under CYSHA or that she was subject to random drug and alcohol test. Employee's argument is that the prescription drug Amoxicillin was the cause of her positive drug test. Employee provided this court with links from websites stating that Amoxicillin has been reported to cause a false-positive test for cocaine metabolites by immunoassay drug testing method. Employee also provided a note from her Dentist stating that Employee was prescribed "amoxicillin 500 mg on December 6, 2012, to help fight an infection. Research indicates that amoxicillin may trigger a false positive in testing for cocaine…."[5]Employee's Dentist was not present on the date of the Evidentiary Hearing to testify to this regard. While there is some research that suggests that Amoxicillin may cause a false positive for cocaine, this same research suggests that the false positive is only seen with the immunoassay drug testing method.[6] Fierro, Agency's expert witness testified during the Evidentiary Hearing that Employee's urine was tested using two different drug testing methods – immunoassay and the mass spectrometry/gas chromatography ("MS/GC") test. Fierro also noted that there are a lot of substances that mess up immunoassay testing, and that is why it is not relied on to give a final report.

Fierro explained that generally, if the immunoassay is positive, then the sample goes to the confirmatory test, or MS/GC test. He explained that the MS/GC tests are 100 percent accurate in determining drugs in one's system. Fierro further explained that mass spectrometry separates the molecules by their mass. Then, the results are put against the standard curve and matched. He testified that every substance has a unique molecule and each molecule has a unique weight. The cutoff number is 150; meaning, anything with a result higher than 150 on the immunoassay is considered positive. And during the confirmatory test, the accuracy is such that it will reduce the cutoff to 100. Therefore, during the confirmatory test, anything above 100 is considered positive.

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[3] Agency's Exhibit 2.
[4] Agency's Exhibit 12.
[5] *See* email attachment from Employee to the undersigned AJ dated October 5, 2014.
[6] *See* http://dig.pharm.uic.edu/faq/2011/Feb/faq1.aspx retrieved October 7, 2015. This article also notes that positive results seen on immunoassay need to be confirmed using the more accurate GC-MS, the forensic standard.

Fierro also testified that in his experience, there is nothing that could cause a false positive in a drug test with a result of above 3000, like in the current case. Further, he stated that amoxicillin cannot cause a false positive because it doesn't get broken down into BE. He explained that BE is the target for measuring cocaine. He noted that amoxicillin is an antibiotic with a different size and shape. He however noted that if a dentist used cocaine in the pre-extraction process, it is possible that the donor could test positive for cocaine.

Based on Fierro's testimony, I conclude that the Amoxicillin prescribed by Employee's dentist did not interfere with the accuracy of the drug test. Although there is controversy as to the accuracy of the immunoassay test, Employee's urine sample was tested with both the immunoassay test and the MS/GC test which is considered extremely accurate, and she tested positive for cocaine with both test methods. Additionally, Employee's Dentist did not mention in his letter to this Office that he used cocaine in treating Employee, nor was he present at the Evidentiary Hearing to testify.

2) Whether Agency's action of terminating Employee was done for cause

In the instant matter, Employee does not deny that she tested positive for cocaine, she simply argues that the reason for the positive drug test was because she was taking prescription medication Amoxicillin. Based on the evidence presented above, this argument is not plausible. The District of Columbia has a drug free work policy. As an employee in a safety-sensitive position, Employee herein was required to submit herself to random mandatory drug and alcohol testing pursuant to D.C. Official Code §1-620.35, and she was aware of this requirement. As an employee in a safety-sensitive position, Employee is one of the persons that must adhere to this mandate. Thus, Employee's positive test for cocaine constituted a violation of this policy.

Moreover, Employee was provided with a written notification on September 28, 2010, informing her that she occupied a safety-sensitive position within Agency. Employee acknowledged during the Evidentiary Hearing that she knew she would be randomly drug tested. Further, this document highlights that Employee was informed that she was required to participate in random drug and alcohol testing, unless she self-identified that he/she had a drug problem within thirty (30) days of receiving the written notification. Also, Employee was made aware in the September 28, 2010 notification that if an employee did not self-identify within thirty (30) days, any confirmed positive drug test results *shall* be grounds for termination of employment (emphasis added). Therefore, I find that Employee's positive drug test for cocaine is sufficient cause for Agency to terminate Employee.

According to the record, the urine analysis conducted by LapCorp, revealed that Employee's urine sample collected on December 12, 2012, tested positive for cocaine. This positive result was later verified by an MRO. Employee's position is classified as a safety-sensitive position under CYSHA, and Employee's conduct renders her unsuitable to continue performing her duties as a Motor Vehicle Operator. Consequently, I conclude that Agency was justified in instituting an adverse action against Employee.

Given the record, and the totality of the circumstances, I conclude that (1) Employee was aware that her position was classified as a safety-sensitive position under the Act; (2) she signed the Notification form in September of 2010; (3) she was aware that she was subject to random drug and alcohol testing; 4) she was tested in December of 2012, more than thirty (30) days from the time she signed the Notification form; (4) her urine analysis conducted by LapCorp, a credible and independent laboratory, was positive for cocaine, an illegal drug; (5) her urine was analyzed by both the immunoassay and the more accurate MS/GC testing methods; and 6) there is testimony and documentary evidence that the prescription drug amoxicillin does not cause a false positive for cocaine with the MS/GC. Consequently, I further find that her conduct renders her

unsuitable to continue performing her duties as a Motor Vehicle Operator and as such, Agency was justified in instituting an adverse action against Employee.

3) Whether the penalty of termination 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).[7] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant matter, I find that Agency has met its burden of proof for the charges of "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically, use of illegal drugs unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or appositive drug test" and as such, Agency can rely on this charge in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties ("TAP"). Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically, use of illegal drugs unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test." is found in DPM § 1619.1(9). The penalty for a first offense for § 1619.1(9) is a fifteen (15) days suspension to removal. Employee was aware of the District's drug free policy and Agency's zero tolerance policy. Employee was also provided with the opportunity to self-identify, within thirty (30) days if she had a drug problem, but she failed to do so. Employee's conduct is consistent with the language of § 1619.1(9) of the DPM. Therefore I find that, by terminating Employee, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[8] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty

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[7] *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).

[8] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

of removal was within the range allowed by law. Accordingly, Agency was within its authority to remove Employee given the TAP.

Penalty was based on consideration of relevant factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[9] The evidence does not establish that the penalty of removal constituted an abuse of discretion. Moreover, this Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors[10] does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.[11] In this case, I find that there is substantial evidence in the record to support a finding that Agency had cause to terminate employee.

In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency explained that Employee held a safety-sensitive position and Agency has a zero tolerance drug policy. 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.

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[9] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) *citing Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

[10] *Douglas v. Veterans Administration,* 5 M.S.P.R. 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 it's 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.

[11] *See Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).

ORDER

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

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge