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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
[REDACTED])	OEA Matter No. 1601-0019-21
Employee)	
)	Date of Issuance: February 25, 2022
v.)	
)	JOSEPH E. LIM, Esq.
DEPARTMENT OF PUBLIC WORKS)	Senior Administrative Judge
<u>Agency</u>)	
Employee <i>pro se</i>		
Bradford Seamon, Jr., Esq., Agency Representative		

INITIAL DECISION

PROCEDURAL HISTORY

On March 25, 2021, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Department of Public Works’ (“DPW” or “Agency”) decision to terminate him from his position as a Grade 6, Step 3, Parking Enforcement Officer (“PEO”) effective March 17, 2021, in accordance with 6B DCMR §§ 435.6 and 1605.4(h).¹ The basis for Employee’s termination was a positive drug test while occupying a safety sensitive position. On July 17, 2021, Agency submitted its Answer to Employee’s Petition for Appeal after receiving an extension to OEA’s April 22, 2021, request for an answer.

This matter was assigned to the undersigned Senior Administrative Judge (“AJ”) on September 3, 2021. After granting a postponement request, I held a Prehearing Conference in this matter on November 4, 2021. Both parties were in attendance. On November 8, 2021, I issued a Post Conference Order requiring the parties to submit written briefs addressing the issues raised at the Prehearing Conference. Both parties complied by the January 28, 2022, deadline after they requested another extension. 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.

¹ Agency’s Answer at Tab 8 (July 17, 2021).

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 FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was a PEO with Agency from January 7, 2019, to March 17, 2021. He is a union member with the AFGE 1975 Collective Bargaining Unit. As a PEO, Employee's responsibilities are to patrol the streets on foot or in a vehicle to cite illegally parked vehicles, enforce motor vehicle parking regulations; to record identifying information into a hand held computer; to investigate resident, business, visitor and government agency requests for parking enforcement services received through the Mayor's City-wide Call Center, by telephone, mail, electronic correspondence or personal contacts; to investigate customer service inquiries regarding the status of vehicles parked for more than seventy-two (72) consecutive hours on the public roadway or on other public spaces; to identify and document malfunctioning parking meters, and conflicting or missing parking signs or traffic control signs; and to operate and monitor a radio transmitter to keep in contact with appropriate officials and dispatch centers to inform them of any circumstances requiring police or emergency assistance and to act in accordance with instructions received, among other things.²

On January 7, 2019, Employee signed a receipt acknowledging the safety-sensitive nature of his job, along with the requirement of random, mandatory drug and alcohol testing that accompanies his position.³ These forms notified Employee that he occupied a safety-sensitive position pursuant to Chapter 4 of the District Personnel Manual ("DPM") and consequently, he was subject to drug and alcohol testing. The forms further notified Employee that any positive test result for illicit drugs or alcohol would subject him to termination.⁴

Employee's tour of duty began at 10 p.m. and ended at 6:30 a.m. On December 8, 2020, at approximately 9:50 p.m., the Parking Enforcement Coordinator, Ms. Kathy Harrison-Crews, informed Employee that he had been selected for random drug testing.⁵ Ms. Kathy Harrison-Crews advised Employee's immediate supervisor, John Dews, that Employee was coming with her and would be excused from roll call. Employee was then escorted upstairs to the testing site. While Employee was at the testing site, Ms. Kathy Harrison-Crews, using her initials "KHC," signed out Employee's work equipment (a parking ticket-writing device and ticket printer) because the IT

² See Agency brief, attachment 1.

³ Agency July 17, 2021, Response to Employee's Appeal, Tab 4 (Employee Notification-Drug Free Workplace) and Tab 2 and 6 (Individual Notification of Drug and Alcohol Testing Requirements).

⁴ *Id.*

⁵ See Agency brief, attachment 4.

Office (where the equipment is housed) was closing at 10:30 pm and would no longer be open by the time Employee returned from his random drug test.⁶ Ms. Harrison-Crews left Employee's equipment with his supervisor Dews. After signing the requisite forms and completing the pre-screening process,² Employee submitted his final urine sample shortly after 11 p.m.⁷

Upon completion of the drug test, Employee retrieved his equipment from Dews and worked the remainder of his tour of duty. At about 11:45 pm, Employee placed a call from his work-issued cell phone, which he only had access to while physically at work and on duty. From 11:54 p.m. on December 8, 2020, to 5:01 a.m. on December 9, 2020, Employee issued 38 parking tickets.⁸ Employee returned his equipment at the end of his tour of duty and "signed in" his equipment.⁹ Employee was paid for the entire tour of duty and was not charged for any leave of absence.¹⁰

An analysis of the urinary specimen by the immunoassay test revealed a positive result for the drug Phencyclidine ("PCP"). PCP is an illegal street drug that often comes in powder or liquid form, and is a synthetic compound derived from piperidine that is commonly used as a veterinary anesthetic, or in hallucinogenic drugs, such as angel dust.¹¹ On March 16, 2021, Agency issued a Notice of Proposed Separation to Employee.¹² On December 16, 2020, the Medical Review Officer ("MRO"), Dr. Stephen Kracht, verified the positive test result.¹³

On January 28, 2021, the District of Columbia Department of Human Resources' ("DCHR") Compliance Review Manager, Tamika Cambridge, drafted a *Notice of Proposed Separation*.¹⁴ In the notice, Ms. Cambridge advised Employee that he was being charged with violating 6B DCMR §§ 435.6 and 1605.4(h) for testing positive for Phencyclidine and that the Agency was seeking his removal. Ms. Cambridge sent the notice to DPW's Human Resource Manager, Fredline Lebrun, and instructed that it be served on Employee. The notice was subsequently mailed to Employee on January 29, 2021, and advised Employee that he had the right to authorize an independent analysis of the urine sample he submitted, as well as a right to respond to the proposed separation within 10 days.

On March 5, 2021, Administrative Review Officer Robert Warren reviewed the materials and Employee's responses and found that termination was warranted, citing that the positive drug test was a violation of 6B DCMR Sections 435.6 and 1605.4(h).¹⁵ On March 16, 2021, Agency issued a Final Notice of Separation to Employee which contained the findings of the Hearing Officer's findings and recommendations.¹⁶ The Hearing Officer concluded that Agency had sufficient basis to terminate Employee. Employee's termination was based on the following causes

⁶ See Agency brief, attachment 5.

⁷ See Agency brief, attachment 6.

⁸ See Agency brief, attachment 7 (showing the first and last ticket issued by Employee during his shift).

⁹ See Agency brief, attachment 5.

¹⁰ See Agency brief, attachment 8.

¹¹ Agency July 17, 2021, Response to Employee's Appeal at Tab 11.

¹² *Id.* at Tab 12.

¹³ *Id.* at Tab 19.

¹⁴ See Agency brief, attachment 9.

¹⁵ *Id.* at Tab 11 ("Administrative Review Proposed Separation-Employee" to Deciding Official Justin Zimmerman.)

¹⁶ *Id.* at Tab 12.

as outlined in 6B District of Columbia Municipal Regulations (“DCMR”) § 1605.4 which states that a cause for disciplinary action includes a positive drug or alcohol test result, and under 6B DCMR §428.1, which states that separation is an appropriate action. Employee’s effective date of removal was March 17, 2021. That same day, Employee signed a form acknowledging receipt of the notice of his removal.

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. Employee’s removal from her position at Agency was based on 6B DCMR § 435.6 and 1605.4(h). 6B DCMR § 435.6 states: “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.” Under DPM §1605.4(h), the definition of “cause” includes “[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty.”

Agency submits that Employee was terminated for cause. Agency explains that it has a zero-tolerance policy for any positive drug test, and that Employee was aware of this. As such, Employee was appropriately terminated for testing positive for Phencyclidine. Agency further notes that in Employee’s position as a Parking Enforcement Officer driving a government vehicle, the safety of the public is paramount. Thus, the zero-tolerance policy is strictly enforced. Agency maintains that Employee was in a safety-sensitive position, and that he had notice that he was going to be tested and could self-identify any drug problems, which he failed to do. Agency also asserts that Employee should have known that ingesting or consuming Phencyclidine was a violation of D.C rules and regulations.¹⁷

Employee admitted to Agency’s allegation of testing positive for Phencyclidine, an illegal substance. Employee does not dispute that his position was designated as safety-sensitive, and that random drug testing was a component of such positions. He acknowledges being informed that a positive drug test would result in termination. Employee does not deny that he failed to disclose his use of Phencyclidine to Agency prior to his positive drug test. However, he points out that at the time of his positive drug test, he had not attended roll call for work and that therefore he should not have been given a drug test. Employee states that Agency violated D.C. Personnel Regulations for testing him when he was not on official duty.¹⁸

In the instant matter, Employee does not deny that he tested positive for Phencyclidine. He simply argues that he never should have been drug tested in the first place as he had not attended roll call. Employee referenced 6B DCMR § 406.8 in support of his argument that an employee cannot be randomly drug tested when not on duty. 6B DCMR § 406.8, states that “[e]mployees shall not be responsible for the cost of any enhanced suitability screening requirements. Employees shall only be required to participate in suitability assessment activities while on-duty and in a pay

¹⁷Agency’s brief (January 3, 2022).

¹⁸ Employee’s brief (January 4, 2022).

status.” Moreover, Employee claimed that on the day of the test, one of his supervisors, Ms. Kathy Harrison-Crews, “illegally” signed out his equipment on his behalf.

However, the undisputed facts in this matter all indicate that Employee was indeed on-duty and in a pay status when he took the drug test. Contrary to Employee’s assertions, he was officially on duty at the time of his random drug test on December 8, 2020. Employee argues that because he missed roll call at the start of his shift, he was not considered on-duty at the time. However, Employee did not *miss* roll call but rather was *excused* from roll call by the Parking Enforcement Coordinator, Ms. Harrison-Crews, who also notified Employee’s supervisor of the excusal prior to roll call. Thus, Employee’s argument is inapplicable. Generally, if a PEO is late to work and misses roll call, he or she will be required to use leave to cover the amount of time that was missed from the employee’s tour of duty. However, in Employee’s case, his authorized excusal from roll call for a drug screening did not constitute any official time missed from his tour of duty. This is evidenced by the fact that Employee was paid for his entire December 8, 2020, tour of duty—10 p.m. to 6:30 a.m.—without having to use any leave.

6B DCMR § 406.8 ensures that District employees will not be called in for the sole purpose of a drug test while they are scheduled to be off duty. Here, Employee arrived to work on time prepared to begin his shift before being instructed by management to report upstairs to a drug screening. Moreover, Employee was in a pay status beginning at 10 p.m. and did not submit his first urine sample until 10:07 p.m. The sample that was tested was not submitted until 11:07 p.m., which was well after Employee’s scheduled tour of duty officially began.¹⁹ Following the drug test, Employee proceeded to work his entire shift and issued 38 tickets. Employee also placed an 11:45 p.m. phone call from his agency-issued cell phone that he only had access to while on duty. Employee’s own exhibit, a note from fellow employee Jason Thomas, indicated that Thomas received a call from Employee on Employee’s work phone.²⁰ Thus, Employee cannot deny that he was on duty on December 8, 2020, and the fact that he spent the early portion of his shift completing an agency-mandated drug test did not affect his duty status. I therefore find that Employee was on duty at the time he had his drug test.

Employee also states that when Ms. Harrison-Crews signed out his equipment on December 8, 2020, this action was “illegal.” Employee has presented no basis for his illegality claim. Ms. Harrison-Crews signed using her own initials, “KHC.” She did not “illegally” sign Employee’s name. In fact, Employee did not dispute Agency’s assertion that Ms. Harrison-Crews, or other management, has routinely signed out equipment for a PEO when the employee is unable to retrieve his or her equipment from the Information Technology (“IT”) office for any particular reason. In this case, the IT office was closing before Employee would have the opportunity to retrieve his equipment after the drug test. As stated above, Ms. Harrison-Crews gave Employee’s equipment to his supervisor to hold, and Employee later retrieved his equipment and used it to issue 38 tickets during his shift. At the conclusion of his shift, Employee returned the equipment and documented the return by “signing in” the equipment on the sign-out/sign-in sheet. Thus, Employee cannot refute that he used the equipment on the day in question, and the fact that Ms. Harrison-Crews signed out the equipment is irrelevant to the discussion of whether the Agency has cause to bring the underlying disciplinary action.

¹⁹ Because Employee did not provide a sufficient urine sample the first time, he had to provide additional samples.

²⁰ Employee’s brief, Exhibit B.

The District of Columbia government has a drug-free workplace policy. As an employee occupying a safety-sensitive position, Employee herein was required to submit himself to random mandatory drug and alcohol testing pursuant to D.C. Official Code §1-620.35. As a safety-sensitive employee, Employee must adhere to this mandate. Thus, Employee's positive test for PCP on December 8, 2020, constituted a violation of this policy. Moreover, Employee was provided with a written notification on January 7, 2019, informing him that he occupied a safety-sensitive position within Agency. According to this document, Employee was informed that he was required to participate in random drug and alcohol testing, and that 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 PCP on December 8, 2020, is sufficient cause for Agency to terminate Employee. I also find that in accordance with 6B DCMR §435.6, Employee's conduct renders him unsuitable to continue performing his duties as a Parking Officer. Consequently, I conclude that Agency was justified in instituting an adverse action against Employee in accordance with the provisions of 6B DCMR § 435.6.

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

In assessing the appropriateness of the penalty, OEA is limited to ensuring that “[m]anagerial discretion has been legitimately invoked and properly exercised.” *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).²¹ When an Agency has proven a charge by a preponderance of the evidence, OEA has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation, or guidelines and is not a clear error in judgment.²² The Table of Illustrative Actions contained in 6B DCMR § 1607 authorizes removal on the first occurrence of the misconduct committed by Employee, and moreover, 6B DCMR § 428.1 expressly states that an employee who renders a positive drug test in a safety sensitive position is deemed unsuitable and immediately subject to separation. This sentiment is also reiterated in 6B DCMR §§ 435.6 and 400.4. Thus, removal in this case is clearly within the range of penalties allowed by law, regulation or guidelines. Notably, this tribunal has found in favor of the agency where an employee tests positive for illegal drugs and is deemed unsuitable.²³ Furthermore, Agency submits that Employee's removal was not an error in judgment and therefore must be left undisturbed by this tribunal.

²¹ 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 Acheson 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).

²² *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

²³ *Donaldson v. D.C. Department of Transportation*, OEA Matter No. 1601-0013-18 (June 12, 2018).

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 charge of “[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 as such, Agency can rely on this charge in disciplining Employee. In this case, the penalty for a first offense of a positive drug test in a safety-sensitive position is removal.

In reaching the decision to remove Employee, Agency explained that Employee’s conduct in the instant matter presents too grave of a risk to public safety to be allowed to maintain his position. 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. I find that the penalty of removal was within the range allowed by law. Accordingly, I further conclude that Agency's action should be upheld. Employee’s termination was properly effectuated and was allowable under the law.

ORDER

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

FOR THE OFFICE:

/s/ Joseph Lim
Joseph E. Lim, Esq.
Senior Administrative Judge