THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0024-23
	)	
	)	Date of Issuance: June 20, 2023
v.	)	
	)	JOSEPH E. LIM, ESQ.
DEPARTMENT OF TRANSPORTATION,	)	Senior Administrative Judge
Agency	)	

Employee, *Pro se*
Leah Brown Simpson, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

On January 27, 2023, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Transportation's ("DDOT" or "Agency") decision to terminate her from her position as a Safety Technician ("ST") effective January 14, 2022, in accordance with 6B DCMR §§ 428.1(b) and 1605.4(d).[2] The basis for Employee's termination is a positive drug test while occupying a safety sensitive position. On February 27, 2023, Agency submitted its Answer to Employee's Petition for Appeal in response to OEA's January 27, 2023, request.

This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on February 27, 2023. Thereafter, I issued an Order scheduling a Status Conference in this matter for March 27, 2023. Both parties were in attendance. I then issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I determined that an Evidentiary Hearing is not required. The record is now closed.

[1] This Initial Decision ("ID") substitutes the one issued on June 16, 2023, as it corrects the matter number in the header.
[2] Employee's Petition for Appeal, January 27, 2023.

JURISDICTION

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

ISSUES

1) Whether Agency had cause for adverse action against Employee; 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

According to the record, Employee was a Safety Technician with Agency from September 24, 2012, to January 14, 2023.[3] Her appointment was converted from a Term Position to a Career Service Position effective November 30, 2014.[4] On September 25, 2012, and February 14, 2019, Employee signed receipts acknowledging the "Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth", along with the requirement of random, mandatory drug and alcohol testing that accompanies her position.[5] These forms notified Employee that she occupied a safety-sensitive position pursuant to Chapter 4 of the District Personnel Manual ("DPM") and consequently, she was subject to drug and alcohol testing. The forms further notified Employee that any positive test result for illicit drugs or alcohol would subject her to termination.[6]

On September 21, 2022, Employee was ordered to report for a random drug test. Although Employee acknowledged receiving the order, she failed to report to the testing area and left the worksite.[7] When her supervisor called her, Employee responded that she might have difficulty finding parking. Employee was reminded that drug testing was mandatory for her position. Employee then claimed she was sick.[8] On September 30, 2022, Agency placed Employee on Administrative Leave pending an investigation on Employee's failure to take the drug test.[9] On October 21, 2022, Agency issued a Notice of Proposed Separation to Employee.[10] The Notice instructed Employee to submit a written response to a designated hearing officer within ten (10) days from the date of notice. On November 14, 2022, the Hearing Officer reviewed the materials, noted Employee's lack of response to the charges, and found that termination was warranted, citing that Employee's refusal to report for the drug test was a

[3] Agency February 28, 2023, Response to Employee's Appeal, Tab 2 and Tab 10 (January 4, 2023, Notice of Separation) mistakenly marked Employee's ending date as January 12, 2022, instead of the correct January 12, 2023.
[4] *Id*., Tab 2.
[5] *Id*., Individual Notification of Drug and Alcohol Testing Requirements Tab 1 and Tab 3.
[6] *Id*.
[7] *Id*. at Tab 4 and Tab 5.
[8] *Id.* Tab 5.
[9] *Id.* Tab 7.
[10] *Id*. at Tab 8.

violation of 6B DCMR Sections 428.1(b) and 1605.4(d).[11] On January 4, 2023, Agency issued a Notice of Separation to Employee with an effective date of January 14, 2023.

Whether Agency had Cause for Adverse Action

Pursuant to OEA Rule 631.1 and OEA Rule 631.2, 6-B DCMR Ch. 600 (December 27, 2021), 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 §§ 428.1(b) and 1605.4(d). 6B DCMR Sections 428.1 states: "Unless otherwise required by law, and notwithstanding § 400.4, an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in §§ 436.9 and 440.3 for: …(b) A failure to submit to or otherwise cooperate with drug or alcohol testing." Under DPM §1605.4(d), the definition of "cause" includes "Failure or refusal to follow instructions."

Agency submits that Employee was terminated for cause. Agency explains that it has a mandatory drug testing for its safety-sensitive employees, and that Employee was aware of this. As such, Employee was appropriately terminated for refusing to report for testing. Agency maintains that Employee should have known that her refusal to report for drug testing was a violation of D.C rules and regulations.[12]

Employee does not dispute that her position was designated as safety-sensitive, that random drug testing was a component of such positions, or that she failed to report for the mandatory drug testing. Instead of submitting a brief, Employee submitted a Frequently Asked Questions on Drug and Alcohol Testing ("FAQ").[13] While Employee did not submit any arguments, she circled question seven, which states, "Do employees in safety-sensitive positions need to be notified that they are subject to drug and alcohol testing?" The FAQ answer is, "Yes. Before testing can occur, each employee must receive written notification of the drug policy. Notice must be given at least 30 days prior to prior to the employee being placed in the random testing pool…"[14] However, Employee did not dispute that she had signed her acknowledgment of Agency's written Drug and Alcohol Testing policy, along with the requirement of random, mandatory drug and alcohol testing that accompanies her position.[15] Considering that this is the only defense she offered for refusing her drug test, the evidence belies her argument.

The District of Columbia has a drug-free workplace policy. As an employee occupying a safety-sensitive position, Employee had been notified that she was required to submit herself 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 refusal to submit to a drug test on September 21, 2022, constituted a violation of this policy. Consequently,

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[11] *Id*. At Tab 9 ("Administrative Review of Proposed Notice of Separation…)
[12] *Id*.
[13] Employee's April 11, 2023, email with attachments.
[14] *Id.*
[15] *Supra*., Individual Notification of Drug and Alcohol Testing Requirements Tab 1 and Tab 3.

I find that Employee's refusal to go to the drug test site is sufficient cause for Agency to terminate Employee.

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).[16] Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[17] The evidence does not establish that the penalty of removal constituted an abuse of discretion. On shown in the October 21, 2022, Proposed Separation Notice,[18] Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.[19]

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[16] *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).

[17] *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).

[18] Agency February 28, 2023, Response to Employee's Appeal, Tab 8.

[19] 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.

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.[20] As noted above, 6B DCMR § 428.1 expressly states that an employee in a safety sensitive position who fails to submit to or otherwise cooperate with drug or alcohol testing is deemed unsuitable and immediately subject to separation. This sentiment is also reiterated in 6B DCMR §400.4. Thus, removal in this case is clearly within the range of penalties allowed by law, regulation or guidelines.

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. Employee's termination was properly effectuated and was allowable under the law. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE: *__/s/ Joseph Lim__*
Joseph E. Lim, Esq.
Senior Administrative Judge

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