THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0026-20
[redacted],	)	
Employee	)	
	)	Date of Issuance: September 22, 2021
v.	)	
	)	
OFFICE OF THE STATE SUPERINTENDENT	)	MICHELLE R. HARRIS, ESQ.
OF EDUCATION,	)	Administrative Judge
Agency	)	
	)	
	)	
	)	

Employee, *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative[1]
Kevin Stokes, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 9, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("Agency" or "OSSE") decision to terminate her from her position as a Bus Attendant. Agency submitted its Answer to Employee's Petition for Appeal on February 11, 2020. This matter was assigned to the undersigned Administrative Judge ("AJ") on May 27, 2020. On June 8, 2020, I issued an Order convening a Telephonic Prehearing Conference for June 29, 2020. Both parties appeared for the conference as required.

Following the Prehearing Conference, I issued a Post Prehearing Conference Order requiring the parties to submit briefs. Agency's brief was due on or before July 29, 2020, Employee's brief was due on or before August 28, 2020 and Agency had the option to submit a Sur-Reply brief on or before September 10, 2020. Agency was specifically required to address the notification process regarding the positive drug test results and Employee's request for a second test on the split sample. On July 16, 2020, Agency filed a request for an extension of time to file its brief citing that it had confirmed that Employee's request for a second drug test sample had not been completed during the process. On July 17, 2020, Employee submitted a response noting Agency's failure to follow procedure regarding the tests. On July 17, 2020, I issued an Order granting Agency's request. Agency's brief was now due by August 14, 2020, and Employee's brief was due by September 14, 2020. Agency had the option to submit a sur-reply brief by September 28, 2020.

[1] Hillary Hoffman-Peak, Esq., was counsel for Agency during the course of this matter, but is no longer at this Agency. Kevin Stokes, Esq., is the General Counsel for Agency.

On August 3, 2020, Agency filed a second motion for an extension of time for which to file its brief. Employee responded on August 4, 2020, and indicated she was seeking counsel and needed more time. Accordingly, on August 5, 2020, I issued an Order granting the request for an extension. Agency's brief was now due by August 28, 2020. Employee's brief was due by September 28, 2020 and Agency's optional sur-reply brief was due by October 14, 2020.

Following a review of the submissions to this Office, the undersigned determined that supplemental briefs were necessary to provide information required by the previously issued orders. On January 27, 2021, I issued an Order requiring Agency to supplement its brief. Agency's response was due on or before February 10, 2021. On February 8, 2021, Agency filed a Motion for an Extension citing it would not have the materials required by the deadline. Employee responded and opposed the granting of an extension. On February 9, 2021, I issued an Order granting Agency's request and extending the deadline to February 24, 2021 and noted therein that no further extensions would be granted for the submission of the documents required by the previous Orders. Agency filed its brief on February 18, 2021 and noted therein that it requested an Evidentiary Hearing, as it was otherwise unable to ascertain the information required by the Orders. On February 23, 2021, I issued an Order scheduling a Status Conference in this matter for March 11, 2021. Following the Status Conference, I issued an Order Convening an Evidentiary Hearing which was convened virtually on April 26, 2021. Following the receipt of the transcript in this matter, I issued an Order on June 17, 2021, requiring that written closing arguments be submitted on or before July 17, 2021. Both parties complied with the deadline. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether termination was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

On April 26, 2021, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions.

Dr. Janelle Jaworski ("Dr. Jaworski") – Tr. Pages 14 – 43

Dr. Jaworski works at i3screen, a medical review company. Dr. Jaworski has been working in medical review for nearly 25 years and has a degree in medicine from Indiana University. She also worked in pathology, forensics and later returned to medical review full time in 1996 with Substance Abuse Management Inc. She is certified by the American Association of Medical Review Officers and the Medical Review Officer Certification Council. Dr. Jaworski explained that testing for marijuana is done in certified labs and that most follow the Department of Transportation ("DOT") regulations. There are two different types of tests, a screening test conducted on one instrument which looks for marijuana chemicals and a confirmation test. If the screening test is positive, a confirmation test using different instrumentation is conducted which confirms that THC (tetrahydrocannabinol) is present. If both tests are positive, it goes to a certifying scientist in the lab who reviews and then releases the results to the medical review office.

Dr. Jaworski explained that a split sample was held from collection. She explained that when a sample is collected at the collection site from the donor, there are two different vials and one is poured into sample "A" and the other into sample "B". Both are sealed with tamper evident seals that come off the custody and control form. They have ID numbers that match the specimen number and then both are sent to the lab. The lab opens Sample A for testing to run the screening and confirmation test. The B Sample bottle remains sealed in storage in case someone requests the split. Dr. Jaworski has never been in one of the labs and could not explain the storage. She said there is frozen storage that is organized to keep many samples and for DOT purposes are kept for a year, if they're positive. If the split is requested for testing, it is sent to a different lab and only goes through confirmation testing only.

Dr. Jaworski testified that she is not a lab scientist, so she could not answer how accurate the testing for marijuana is but explained that by doing two different types of tests, on two different instruments, it's to eliminate the possibility of an error. The second test identifies the exact compound, THC, (Delta-9-tetrahydrocannabinol). There are other cannaboids in marijuana, like CB and other chemicals, but the test confirms the THC. Dr. Jaworski also explained that a report gets sent to the company that requests the testing and after the review is done. If no review is completed, it would reflect "non-contact positive". This happens if they're unable to contact the donor. Dr. Jaworski noted that the report reviewed indicated Employee's name for a 2019 test result. Dr. Jaworski also noted that there were Medical Review Officer (MRO) notes and that those are kept during the course of action for their business. When a case comes, it is given a case number and anything that happens is kept in the computer along with dates and time and when entries are made.

Dr. Jaworski testified that there was a contact entry for Employee dated September 16, 2019 which reflected that one of her staff members, Jamie Roblust and Employee had spoken about the test results. [Dr. Jaworski did not have the contact with Employee at this time.] Dr. Jaworski testified that ordinarily when a case comes in, they identify the person on the phone because interviews are done over the phone and ask for an identifying information, like social security number which was identified in Employee's case. Next, they typically explain why they are calling and what the drug tests revealed. She also said that they provide a "Miranda-type" warning and indicated that the information discussed can be shared with the company.

They will then report the results, and in Employee's case it was positive for marijuana. They will also ask about certain prescriptions that may show up in marijuana, and ask whether a person is taking Marinol, Dronabinol or Sativex. If they are, that may be a legitimate and verifiable medical explanation for the test. If there is a prescription, they would then call the pharmacy to confirm. If there is no medical explanation, then that is typically included in the note and then it is told that they will report to the company about the positive result.

Dr. Jaworski also noted that another part of the interview is for the donor to ask questions and that they offer the option to have a portion of the original specimen sent for reanalysis. Dr. Jaworski stated that if a person asks for a B test, that an extra note would be added. She indicated that she did not see that notated for Employee. Dr. Jaworski testified that if a B sample test is requested, that the bottle is pulled out of storage and then shipped to another lab. In this matter, she indicated that the test was originally done at Quest Diagnostics and that the split sample went to Clinical Reference Lab. Dr. Jaworski noted that the results for Employee indicated that there was THCA (acid) and it also reflects the rations etc. She noted that a chemist would be better able to explain the abbreviations in the report but noted that it showed that there was a peak and that the THCA was present. She also explained that the reconfirmation test showed positive for marijuana.

On cross examination, Dr. Jaworski indicate that she did not personally know who handled Employee's sampled but noted that names were listed in the reports. Dr. Jaworski said that urine samples are kept in a freezer, and there is a secure storage for positive results and those are stored for a longer time. Negative results are stored for a shorter amount of time. Dr. Jaworski testified that she is separate from the laboratories which is in accordance with federal regulation. She is separate from the labs and does not watch each step of the process from collection through testing. Dr. Jaworski testified that she did not know whether Employee's call had been recorded. She said it was not documented in the notes that a request was made for the B bottle to be tested.

When asked by the administrative judge what the process is for calls that are chosen to be recorded and have transcripts, Dr. Jaworski was unable to answer that question. She suggested that if there is someone new who is being trained it may happen then, but she didn't know which calls are selected. She did not have any knowledge whether Employee's call was recorded, and she did not listen to that call. She explained that a split was requested later and completed and reconfirmed at another lab. But there is no notation in the interview notes. On redirect, Dr. Jaworski indicated that she is not in the office to observe training, but that there is a process of notes that are used to document the call. People are also given a script or template to use, so they know to ask about Marinol, Dronabinol or Sativex, but if they were doing an interview for a different drug, that wouldn't be asked because that would not be applicable.

Brett Oswald ("Oswald") – Tr. Pages 44 – 66

Oswald works as a Compliance Manager at Clinical Reference Laboratory and deals with laboratory operations and compliance with regulatory agencies. The lab's chain of custody includes documenting every event as it occurs. This includes tradeoffs from person to person, or of an instrument, sample, testing or otherwise. After a split sample is tested, the sample is transferred to a refrigerator and after approximately five to seven days, it goes to long term freezing storage in a secured facility.

Oswald testified that his lab conducted the split sample on Employee. When they received it, they put a sticker on the upper right-hand side for an internal tracking number. Then a document goes to the certifying scientist to determine what the request is from the MRO and what needs to be tested. Employee's test was marked as an "R715" which is a marijuana metabolite reconfirmation. There was also a chain of

custody from Quest to the courier and then to their laboratory. Oswald noted that they are very careful with the chain of custody. They have training documents that must be signed once an event is completed.

Oswald was able to confirm that it was Employee's sample that was sent because it has the bar code and tracking number. There is also a chain of custody documenting the bottle placement and when they are placed in the storage location. Additionally, there is a document for when the bottle is placed in a long-term freezer. Freezers are generally better at keeping a sample stable for longer periods of time and help to reduce degradation in the sample. He said that all samples are treated the same and that there isn't any distinction between reconfirmations and initial confirmation. Oswald could not verify, but said that under typical standard operating procedures, they would still have Employee's sample. He testified that Employee's sample showed THCA. Oswald noted that the chain of custody continues through the testing process. The test tubes are also tracked through the laboratory. There is also a CREP sheet that documents all the donor samples in a batch and their plate position. The confirmation chain of custody also includes aliquots that are prepared for testing and then the pipetting instrument that takes a portion of the aliquot (urine sample) and places into the wells in the plates for testing and help identify values. The testing includes several sheets of chromatography and contains evaluations to determine whether there is a good result for the samples and controls. The forms for Employee showed instrumentation, positions and the concentrations. Additionally, retention times were noted. The results showed that there were 26.6 nanograms of THCA and that it was a valid result of the sample.

Torey Draughn ("Draughn") Tr. Page 69 – 82

Draughn currently works as the Drug and Alcohol Coordinator at the DC Department of Human Resources (DCHR). He oversees all drug testing in terms of suitability, reasonable suspicion, pre-employment and post accidents. There are several methods of drug testing including random testing for safety sensitive positions. Testing also includes reasonable suspicion which follows when a supervisor thinks that an employee is under the influence of alcohol or drugs. Draughn also handles contracts with Medical Review Officers (MRO). Draughn explained that there are requirements for chain of custody, and for MROs and that they follow federal guidance as it applies to non-DOT.

Draughn testified that split sample testing is when they go back to test a sample that a donor has provided. Donors provide specimen A and B, and specimen B is held for split sample testing. When a donor/employee requests a split sample be tested, DCHR provides a number to the Medical Review Office and the employee sets up their own testing because a fee is involved. Following a positive drug test, Draughn testified that either a removal is proposed for that person and it goes through a hearing officer and then to a final decision; or if a split sample is requested then it is sent for testing, and the process is continued once the results are received.

Draughn testified that he briefly worked with Employee's case and was involved when it first started, but otherwise he was not familiar. He recalled that Employee had a positive drug test and that she requested a split sample from the office. Draughn also testified that the split sample was not done when initially requested. He said it was later completed when Employee brought the subject up again and that when notified, he scheduled a test. The District paid for this test, though this was not the normal process. The employee typically would pay. Draughn explained that the split sample is not a new urine sample, but the retesting of the specimen B from the original screen. Draughn said that if the Sample B came back negative, that even if termination had been done, that the separation would have been retracted and employee would have been returned to work. In Employee's matter, Draughn testified that the Sample B tested positive, therefore there was no correction to be made because there was no harm to Employee. Draughn testified that typically, the general timeframe for a Bottle B sample test is within five (5) days

after they receive it. DCHR will get it and then the person will set the appointment with the MRO's office and then the process is started immediately.

On cross examination, Draughn testified that he did not know whether Employee's sample was contaminated at the laboratory but said that the samples numbers all lined up based on specimen IDs. Draughn recalled that Employee sent a request via email to him to have the split sample tested but did not know what happened after that.

When asked by the administrative judge whether there were any procedural rules regarding how split sample requests are to be handled, Draughn stated that there is a response to the person requesting it with the contact information to the MRO's office, along with a $140 charge for the test. Draughn explained that the MROs office confirms to set up paperwork and notifies that the sample is being tested again.

On redirect, Draughn testified that the contract with the MRO says that they handle that process. They find the laboratory, remove it from the freezer and retest it and its outlined in the contract. There are federal standards that apply to the laboratory and collection site protocols. Laboratories must be certified by Health and Human Services. This certification process ensures protocols and outlines how things are tested and any contamination levels. It also outlines what machinery or testing processes must be used.

Tamika Cambridge ("Cambridge") Tr. Pages 85 – 103

Cambridge currently works at DCHR as the Compliance Review Manager and oversees Enhanced Suitability which includes criminal background checks, and mandatory drug and alcohol testing for about 30 District agencies. In August of 2019, she had just transitioned into this role. Cambridge was familiar with Employee in that she had a random drug test. Cambridge testified that she had been in her position as Compliance Review Manger for about three to five days, noting that she was interim in the role at that time. Cambridge also testified that she remembered Employee requested a split sample test. She explained that "there was a lot going on in the Agency at the time... [t]here was some transition within our administration…[a]nd I had just taken the role." She noted that Employee did make the requests, but that "it was overlooked, it was a mistake in this case."

Cambridge explained that in her role, she prepares documents specific to the mandatory drug and alcohol program, to include proposed notices and proposed separation notices for employees. Cambridge prepared the separation documents in Employee's matter. She noted that Justin Zimmerman was the deciding official in this matter. A hearing officer also oversaw the matter and that report would have gone to Zimmerman. Cambridge is responsible for securing the hearing officers. She also explained that the proposed separation would have gone to OSSE's HR officer, Ramia Heard. Cambridge indicated that once an agency is put on notice, they are to serve the employee a certificate of service to let them know there is a proposed separation. In Employee's case this was done because of a positive drug test result and Employee's designation as safety sensitive. Cambridge completed the rationale sheet and considered the Douglas factors in this matter. There were mitigating and aggravating considerations made for certain factors. The proposed action was removal which she said was consistent with the discipline for this matter. The separation documents also included a memo to her from Torey Draughn who would have received the results from the vendor and the memo outlined what happened. There are other attachments about the notifications, that Employee was in a random pool and that she was a part of the random testing program. Cambridge noted Employee had acknowledged the drug testing in August 2017. There were also copies of the drug test results for marijuana. Cambridge could not recall what else was attached with a Petition for Appeal form but noted that it would have been in the final notice, not the proposed.

Cambridge testified that if Employee's split sample had tested negative, that since decisions are based on cause, that Employee would have been returned to duty with back pay. Cambridge explained that

since the split sample showed positive for marijuana that it would not change. Cambridge also testified that her split sample was retested and that it was a mistake, overlooked initially, but that they have up to a year to test the split sample. She said at the time she reached out to the vendor; it still came back positive. On cross examination, Cambridge testified that she did not recall a phone call and voice message left by Employee regarding the split sample.

When asked by the administrative judge whether Cambridge was aware that the split sample had not been tested when she was preparing the proposed separation notice, Cambridge indicated that she did not recall whether she was notified that the request for the split sample had not been done. Cambridge explained that at the time Employee's request was made, it was forwarded to two of her colleagues, but it was overlooked at the time. She said they provide instructions in the proposed notice that employee had up to 72 hours to make the split sample testing request. She said that she later learned that generally what should have happened is that Employee would have been redirected back to the lab for that process to be initiated. She said that since then, the language has been updated such that the request is now directed to the lab and the request is submitted directly to the vendor. Cambridge said that she was the person who forwarded Employee's request to her colleagues. On redirect, Cambridge said that this was her first time receiving a request for split sample test. She testified that during her tenure maybe they received around two to four requests for split samples to be tested a year. She said it was an infrequent request because they use the exact sample.

John Tarver ("Tarver") – Tr. Pages 105 – 109

Tarver works for Quest Diagnostics in Lenexa, Kansas, in drug screening. He explained that the chain of custody in drug testing does not start with them, but at collections. They do make sure that samples have tamper evidence seals on them when they're being shipped to them. Those seals must be intact, or they will not test it. He maintained that they would know if a sample had been tampered with. He noted that the bag would show it, or the seal. His laboratory is certified by the federal government and every state. Once samples are taken from bottles, it's reclosed and goes into trays in a refrigerated environment. Following that it goes into a frozen state until it is eventually discarded. That process keeps the sample from degenerating. If a sample was tampered with in some way, then during the process they would find that it was not suitable. He said there is no chance of a bottle being outside of the chain of custody.

Justin Zimmerman ("Zimmerman") – Tr. Pages 111 – 123

Zimmerman is the Associate Director in DCHR for the Policy and Compliance Administration. Random drug testing falls under the compliance branch of operations. He is a couple of levels removed from that process but said that Tamika Cambridge is the Compliance Review Manager and oversees that program and that Torey Draughn is the program manager. Zimmerman has some level of oversight and usually serves as the deciding official in a corrective or adverse action in a drug or alcohol matter.

Zimmerman was the deciding official and signed the final notice for separation in Employee's matter. He testified that he decided to adopt the recommendations of the hearing officer which found that there was cause to move forward. He said his decision was mostly based on safety and deterrence. Employee worked at Agency as a bus attendant and was responsible for the safety of children. He said that marijuana can have a deleterious effect on one's ability to react momentarily if there's an accident or some other incident. Employee's test was positive for marijuana. He reviewed the hearing officer's report and noted that there was a situation with the split sample, but indicated that at the hearing officer's level, Employee did not raise any concerns about whether she was or wasn't positive, but raised technical issues regarding a wrong date etc.

Zimmerman testified that if Employee's split sample had come back negative that they would have reinstated her to her position. Typically, when they do a split sample, which is early on, the employee would only be in an administrative leave capacity, such that they would just be returned to duty. But in Employee's case where it had gone on for some time, they would have been reinstated with back pay if the sample was negative. Because Employee's sample tested positive for marijuana, he noted that it confirmed the original result and does not change his decision and that the outcome would have been the same.

On cross examination, Zimmerman explained that there was no issue raised that related to a date during the hearing officer's review. He investigated that and determined it was a clerical error and wasn't otherwise dispositive of any problem. Regarding the split sample, he said that he's done a lot of these cases and that when an individual finds out they're positive for a drug, usually an employee is shocked. Employees will then talk about how they've never used the substances before etc. In Employee's case, Zimmerman noted that even though the split sample was mentioned, there was no defense provided toward the hearing officer, in that either there was no way this person could have tested positive for marijuana, or that the test was wrong. It was just technical errors that were highlighted, so he did not see any basis not to proceed. Zimmerman noted that there is always a possibility of things happening with how samples are handled, but that is why there is a chain of custody process and verifications and retesting if requested.

When asked by the administrative judge if at the time of his decision whether he was aware that Employee had requested a split sample and that it had not been done, Zimmerman testified that he could not "recall specifically whether that was in [his] mind". He said that he knew it was mentioned in the hearing officer's report and that was all he could say about it at this point. Typically, split sample requests do come to his attention. There are templates that indicate that they should have the split sample request completed, and that they should receive it within 72 hours with a notice being issued. This is to expedite the split sample so that they can capture it earlier on in the beginning of the case. Zimmerman was not aware of any timeframe for which the test should be completed. On redirect, Zimmerman confirmed that the labs that are used for testing are certified by the federal government and follow all protocols required.

Employee's Case-in Chief

Employee presented no witnesses and noted that for the record that "everything that I needed to get out, everything that I needed to say, I've already said it."

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed at Agency as a Bus Attendant.[2] In a Final Agency Decision dated December 9, 2019, Employee received notice of Agency's decision to remove her from service effective the same day, for the following causes of action: "[o]n August 29, 2019, you submitted a urine sample. This sample tested positive for the presence of marijuana. (Positive drug test result, 6B DCMR §§ 435.6 and 1605.4(h))."[3]

Agency's Position

Agency avers that it had cause to terminate Employee from service following the determination that she had tested positive for marijuana during a random drug screening. Employee was employed as a Bus Attendant with Agency. Agency contends that on "October 7, 2019, Employee was served an advance written notice of proposed removal for failure to follow instructions, specifically: positive drug test. 6B

[2] Employee's Petition for Appeal (January 9, 2020).
[3] *Id*. at Attachment - Final Notice.

DCMR §§ 435.6 and 1605.4(h)."[4] On August 29, 2019, Employee was selected for random drug screening, which is a part of Agency's policy for safety. Agency cites that as an Bus Attendant with Agency, and pursuant to the Child and Youth Safety Health Omnibus Amendment Act (CYSHA), Employee was required to report to duty without ever testing positive for the presence of an unauthorized controlled substance or illegal drug.[5] Agency conducts random drug testing to enforce this rule and asserts that Employee was aware that she would be subject to random drug tests. Further, Agency avers that "in accordance with Chapter 4 of the District Personnel Manual, some government positions are considered "covered positions" and employees occupying these positions are subject to drug and alcohol screening." Additionally, Agency maintains that "whenever an employee occupies such a position and test positive for an illicit drug or alcohol, he or she is deemed "unsuitable" for the position and, accordingly, is separated from the covered position."[6]

Agency argues that on August 29, 2019, Employee tested positive for the presence of marijuana. As a result, Agency avers that pursuant to DPM Chapter 4 and Chapter 16, Employee was terminated from service as Bus Attendant. Agency also asserts that Employee had notice about the testing requirements. Agency notes that on January 8, 2018, OSSE provided Employee "with notice of this drug prohibition and the drug testing requirements, and Employee acknowledged her receipt of these requirements."[7] As a result, Agency asserts that Employee held a safety-sensitive position and that termination was appropriate under the circumstances.

During the Prehearing Conference held in this matter on June 29, 2020, Employee averred that Agency did not conduct a split sample test that she requested. Following the conference, Agency asserted that it "followed up on that statement with DCHR and DCHR confirmed the accuracy of Employee's claim."[8] Agency asserts that once it determined this was not done, that it had the split sample (which was kept frozen) tested on July 18, 2020. Agency asserts that that test confirmed the presence of marijuana.[9] Agency provided affidavits of the laboratory officials regarding the custody and testing perimeters of the split sample that was tested. Because that sample still resulted in a positive result for marijuana, Agency asserts it had cause to terminate Employee from service. Further, Agency asserts that its failure to conduct the split sample retest constituted harmless error. Agency maintains that it had cause to separate Employee from service for testing positive for marijuana. Agency also asserts that it considered the relevant *Douglas* factors in making its determination. Further, Agency asserts that the penalty range for a positive drug test in a safety-sensitive position is removal. Consequently, Agency contends that its action of removing Employee from service should be upheld.

Employee's Position

Employee asserts that the drug test was not administered correctly. Employee notes that she was employed as a Bus Attendant at OSSE and had notice of the drug testing requirements as of January 8, 2018.[10] Employee asserts that she was subject to a random drug test on August 29, 2019. Employee contends that she was not notified of the results of the test until September 16, 2019. Employee also avers that she voiced concerns about how the test was administered and the results and that they had to be incorrect because she did not consume marijuana. Employee maintains that her concerns were never addressed by Agency. Employee also asserts that she contacted Tamika Cambridge in order to have the split sample tested, but that she did not get a response. Employee also asserts that she relayed her concerns

[4] Agency's Brief in Support of Termination (August 17, 2020).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at Page 3
[9] *Id.*
[10] Employee Brief (September 28, 2020).

to "Mr. Chounone[11]", but that he did not address her concerns, but only addressed the date of the test.[12] Employee avers that there are inconsistencies with the paperwork associated with her drug test, including that the wrong date was indicated on the form. Further, Employee avers that she made a timely request for a second sample to be tested and that Agency never tested it in the time for which she requested. Employee argues that Agency admitted to its failure to test the second sample as she requested and did not test until July 2020, which was unfair. Employee asserts that Agency noted that this second sample not only tested positive for marijuana, but also for oxycodone which puts into questions the efficacy of Agency's testing.[13] Employee contends that Agency's testing of the sample nearly a year later was unfair. Employee avers that she did not consume marijuana and believes that the test results are incorrect and/or that the wrong sample was attributed to her. Employee argues that she should not have been terminated and should be reinstated to her position, because Agency did not appropriately administer the drug test or subsequent disciplinary action.

ANALYSIS

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee's removal was levied for the aforementioned causes of actions stemming out of a random drug test conducted on August 29, 2019, where Employee tested positive for marijuana.

In the instant matter, Employee was required to submit to a random drug test on August 29, 2019, pursuant to the conditions of her position as a Bus Attendant at OSSE. Specifically, in accordance with the Child and Youth Safety and Health Omnibus Amendment Act of 2004 (CYSHA) (D.C. Law 15-353; D.C. Official Code § 1-620.31 et seq.), bus attendants must report to duty without ever testing positive for the presence of an unauthorized controlled substance or illegal drug. Agency administers random drug tests in order to ensure compliance with this regulation. Employee's results from the August 29, 2019 test, yielded a positive result for an unauthorized controlled substance, specifically marijuana.[14] In a Final Notice dated

[11] This person was later determined to be the Hearing Officer in Employee's matter.
[12] Employee references the Hearing officer and the reports submitted by that person in Agency's disciplinary process.
[13] Employee's Brief (September 28, 2020). The undersigned notes that in its August 17, 2020 Brief, Agency noted that there was the presence of oxycodone in the results. However, based on the undersigned's review of the laboratory affidavits and testing documentation provided, there is no mention of, or result pertaining to the presence of oxycodone. Consequently, it appears that this was a typographical/ministerial error made on the part of Agency's counsel in the brief. Further, because oxycodone was not listed as a substance for which Employee's was charged, the undersigned would not otherwise take this into consideration.
[14] Agency's Brief (August 17, 2020).

December 9, 2019, Employee was notified that she would be terminated from service for testing positive for marijuana.[15] Employee argues that the test was not administered appropriately, that the notice regarding the results was untimely and that Agency did not test a second split sample as she requested. Agency maintains that it administered the instant adverse action in accordance with all applicable laws, rules and regulations. Agency avers that Employee's position as a bus attendant is safety-sensitive and subject to its a zero-tolerance drug policy. As a result, Agency maintains that it had cause to separate Employee from service for testing positive for an unauthorized controlled substance, specifically marijuana, and that its oversight in not testing the split sample when Employee requested it was harmless error. Employee maintains that the test was wrong and that she did not consume marijuana. Employee also asserts that Agency failed to follow all procedures in administering the disciplinary action against her.

Harmless Error

OEA Rule 631.3 provides that "harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect agency's final decision to take the action." In the instant matter, it is uncontroverted that following her drug test, Employee requested a split sample be tested. For the reasons explained below, the undersigned finds that Agency has not provided justification for its failure to conduct a timely testing of the split sample. As previously noted, during the Prehearing Conference in this matter, Employee asserted that her request for a split sample test was never completed. Following an investigation into this claim, Agency acknowledged its failure to test the split sample in 2019 and proceeded to have the test done in July 2020. Agency provided the July 2020 test results, along with the affidavits of the laboratory administrators regarding the storage and the validity of the test and cited that the results were still positive for marijuana.[16]

It should be noted that Employee asserted during the appeal before this Office that it did not seem fair that Agency could conduct the test nearly a year after her request. Testimony elicited during the Evidentiary Hearing in this matter, evinces that the parties responsible for ensuring that the retest request was completed, failed to do so. DCHR Compliance Manager Tamika Cambridge and Program Manager Torey Draughn, both testified that they received notification of Employee's request to have a split sample tested. Mr. Draughn noted that he was not sure what happened after the request was received. Ms. Cambridge asserted that she was relatively new in her position at the time, and that the request was overlooked and was a mistake. Agency also maintains that because it tested the sample within a year, that positive test results confirms that its decision to separate Employee from service was appropriate. Agency relies on the one-year time frame and the positive test result to proffer its appropriateness of testing and the assessment of discipline in this matter, and to support its assertion that its failure to test prior to this time constitutes harmless error.

For the reasons that will be explained below, the undersigned finds that Agency's argument fails. The split sample testing of Employee's specimen was only completed incident to the appeal process before OEA. The undersigned finds that Agency had ample and fair notice to test this sample well ahead of this process, but continuously failed to do so. I find that the timing of Agency's testing of this sample during the appeal process at OEA, was of its own volition, but was not done respective to Employee's original request made in 2019. Because Agency only tested following an inquiry by the undersigned during the Prehearing Conference in this matter, I find that Agency failed to act with due diligence in ensuring that all procedures and processes were followed in this matter. Additionally, the undersigned would note that Agency's reliance on the fact that the testing was done within a one-year timeframe, does not cure itself of

[15] Employee's Petition for Appeal (January 9, 2020).
[16] Agency's Brief in Support of Termination at Exhibits (August 17, 2020).

the oversight in this matter. Further, the undersigned finds that Agency's failure to timely test the split sample also warrants an analysis regarding Fifth Amendment Due Process.

Due Process

When making a determination of whether the government has violated the Fifth Amendment Due Process clause, the court "must determine whether [the employee] was deprived of a protected interest, and if so, whether [she] received the process [she was] due."[17] The United States Court of Appeals, Federal Circuit, has held that "[w]hen a public employee has a property interest in continued employment, the Due Process clause of the Fifth Amendment requires that the employee be afforded notice "both of the charges and of the employer's evidence and an opportunity to respond."[18] In the instant matter, Employee was deprived of her protected property interest because she was terminated from service for testing positive for marijuana. I find that Agency's failure to test Employee's split sample in a timely fashion, precluded her due process with regard to the employer's evidence (the positive drug test) and her ability to respond in a time ahead of this matter being appealed at OEA.[19] Agency's representatives testified that its drug testing rules and procedures are guided by those found in the federal guidelines.[20] Agency provides the "Mandatory Guidelines for Workplace Drug Testing" in its brief.[21] In section 13.8 of these guidelines, it provides that an employee/donor has 72 hours to request a split sample following the notification of a positive test. Further, section 14.1 (a) indicates that this request may be made verbally or in writing. In the instant matter, Employee made a timely request, however Agency representatives failed to forward that information for testing, and as a result, the split sample was not tested until this matter was pending before OEA. Agency had the sample tested following the undersigned's inquiry based on Employee's claim made during the Prehearing Conference in this matter.

I also find that Agency's failure to timely test the split sample precluded Employee from raising any issues and presenting any defenses at the Agency level, including responses to the hearing officer and the like. Specifically, the hearing officer noted in his report dated November 18, 2019, that Employee was given the opportunity to have a test performed on a stored sample, but she did not exercise this option. However, based on the testimony in the Evidentiary Hearing, as well as Agency's own admission, it is clear that Employee was never afforded the opportunity to do so. Thus, I conclude that the hearing officer's report does not accurately reflect what transpired in this matter.[22] Wherefore, I find that Employee did not receive the due process she should have been afforded regarding her protected job interest, which includes appeal and response procedures that occur before the matter was appealed at OEA. Further, it should be noted that had this matter been scheduled at a later date before this Office, Agency would not have been able to rely upon its argument regarding the one-year time frame for testing. Consequently, the undersigned finds that it is not appropriate to consider Agency's split sample tested in July 2020, because it is untimely and was tested during the adjudicatory process at OEA. Agency's failure to follow procedures and to test the split sample back in 2019, cannot be cured during the adjudicatory process before OEA. As previously noted, OEA Rule 631.3 provides harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect

---

[17] *District Council 20 et al, v District of Columbia et al.* No. Civ A 97-0185 (EGS), 1997 WL 446254 (D.D.C. July 29, 1997).
[18] *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (2011)
[19] The undersigned would note that other federal guidelines for workplace drug testing, specifically the Department of Transportation guidelines found under 49 CFR 40.171,notes that the "split sample exists to provide an employee with "due process" in the event that he or she desires to challenge the primary results. *See. 49 CFR 40.171 Question and Answer section.*
[20] Evidentiary Hearing Transcript – Torey Draughn at Page 73. (April 26, 2021).
[21] Agency's Supplemental Brief at Attachment Mandatory Workplace Testing Guidelines (February 19, 2021).
[22] *See.* Employee's Petition for Appeal, Attachment-Hearing Officer's Report dated November 19, 2019 at Page 6. It should also be noted that this is the second iteration of the Hearing Officer's report. In a footnote, the Hearing Officer indicated that "[o]n November 15, 2019, this Hearing Officer issued a Report and Recommendation that misinterpreted one of [Employee's] arguments. She sent a follow-up email on November 16, 2019 and a call on November 18, 2019, prompting this Hearing Officer to update the Report and Recommendation." (January 9, 2020).

agency's final decision to take the action." For the aforementioned reasons, I find that Agency's failure to timely test the split sample, caused prejudice to employee's rights. While it is noted that the July 2020 test showed a positive result for marijuana, the undersigned finds that test to be untimely. Further, I find that it was a violation of Employee's due process for Agency to rely on those July 2020 test results to support its contentions of harmless error and as an argument that the disciplinary action should be sustained. For these reasons, the undersigned finds Agency's procedural error in the administration of this action was not harmless.

Whether the Penalty was Appropriate

Because I find that Agency violated Employee's due process rights, I will not otherwise address the merits of this matter. Accordingly, I find that Agency has not met its burden and committed harmful error by failing to timely test Employee's B Sample. Wherefore, this matter should be reversed.

ORDER

Based on the foregoing it is hereby **ORDERED that:**

1. Agency's action of terminating Employee from service is hereby **REVERSED.**
2. Agency shall reinstate Employee to her position of record, and Agency shall reimburse employee all pay and benefits lost as a result of her removal.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
Michelle R. Harris, Esq.
Administrative Judge