THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0022-21
	)	
v.	)	
	)	Date of Issuance: November 17, 2022
OFFICE OF UNIFIED COMMUNICATIONS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Telecommunications Equipment Operator with the Office of Unified Communications ("Agency"). On March 11, 2021, she received a final notice of separation from Agency. The notice provided that on October 14, 2020, Employee submitted a urine sample which tested positive for the presence of marijuana, in violation of 6-B District of Columbia Municipal Regulations ("DCMR") §§ 435.6[2] and 1605.4(h). Consequently, Employee was terminated effective March 12, 2021.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] This Board notes that Agency relied on 6-B DCMR § 435.6 in its proposed notice of removal, proposed official's rationale worksheet, and final notice of separation. However, 6-B DCMR § 435.6 does not exist. Given the language cited in these documents, it appears that Agency intended to rely on 6-B DCMR § 436.6.
[3] *Petition for Appeal,* p. 7 (April 9, 2021).

April 9, 2021. She explained that she was a patient enrolled in the medical marijuana program. Consequently, she presented her medical marijuana card to the Medical Review Officer immediately after testing, in accordance with Issuance I-4-34 of the District Personnel Manual ("DPM"). Employee reasoned that she was not challenging the positive test results, but she did deny being under the influence while on duty. She provided that on October 14, 2020, she was notified by a family member that her brother had passed away. However, several hours later, Employee learned that she received misinformation about her brother and that he was not deceased, but he was in the hospital for a drug overdose. Employee explained that she did not sleep prior to her shift at Agency because she was grieving the perceived loss of her brother and because she had to pick him up from the hospital. Accordingly, she requested that Agency's termination be reversed.[4]

On July 15, 2021, Agency filed its Answer to Employee's Petition for Appeal. It provided that as a Telecommunications Equipment Operator, Employee was responsible for critical tasks that required her to make rapid decisions and execute actions simultaneously. Agency explained that after Employee's supervisor, LaQuenceyer Johnson, performed a daily temperature check, she noticed a change in Employee's verbal communication; observed that she was withdrawn or less involved with people; noted that she appeared incoherent; and observed that her eyes were glossy and red.[5] Agency asserted that Employee was asked to leave the operations floor and instructed to wait in her supervisor's office. Subsequently, Agency contacted its Human Resources department and completed a Reasonable Suspicion Observation form for Employee to submit to a reasonable suspicion drug test. According to Agency, Employee was asked to leave for the day. Thereafter, Agency provided that Employee's reasonable suspicion test results came back positive

[4] *Id.*, 3-4.
[5] According to Agency, Watch Commander, Alfred Miller, also documented that she observed this behavior.

for marijuana. Consequently, it proposed separation pursuant to the *Douglas*[6] factors and DPM §§ 428.1 and 1607.2(g)(2), which provided that the penalty for a first offense for testing positive for intoxicants while on duty ranged from suspension to removal. Therefore, it requested that Employee's removal action be upheld.[7]

Prior to the evidentiary hearing, the OEA Administrative Judge ("AJ") ordered the parties to submit briefs and provide supporting documents to address: (1) Agency's drug testing policy, specifically as it applies to reasonable suspicion referrals for employees with a medical marijuana license/card; (2) whether Ms. Miller and Ms. Johnson were trained reasonable suspicion supervisors, and if so, for Agency to provide their training dates and training completion certificates; (3) the reasonable suspicion form completed by Ms. Miller and Ms. Johnson, following their observations of Employee; and (4) whether the penalty of termination was appropriate under District law, regulations, or the Table of Illustrative Actions.[8]

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

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

[7] *Agency Answer*, p. 1-4 (July 15, 2021).

[8] *Order Requesting Briefs*, p. 1 (October 8, 2021).

In its brief, Agency explained that all employees, including employees with medical marijuana cards, may be subject to reasonable suspicion testing when a proper referral is made by a trained supervisor or manager. It contended that both Ms. Johnson and Ms. Miller were trained reasonable suspicion supervisors.[9] Finally, Agency asserted that pursuant to 6-B DCMR § 428.1, any positive drug test result shall result in removal. As a result, it requested that Employee's removal action be upheld.[10]

In her brief, Employee argued that Agency accepted her medical marijuana card during the random drug testing. Additionally, she argued that the Table of Illustrative Actions in 6-B DCMR § 1605.4(h) provided that the penalty for a first offense is suspension to removal, and the penalty for a second offense is removal. Employee contended that Agency should not have removed her on the first offense. Moreover, Employee asserted that pursuant to District Personnel Instruction No. 4-39, an employee shall remain on administrative leave until the testing results are received. However, Agency allowed her to continue her tour of duty instead of placing her on administrative leave.[11]

After conducting an evidentiary hearing, the AJ issued her Initial Decision on July 25, 2022. She found that Agency allowed Employee to return to the floor and take calls after Ms. Johnson and Ms. Miller's reasonable suspicion observations. The AJ held that pursuant to 6-B DCMR § 432.2, an employee can only be referred to reasonable suspicion testing if the supervisor has reasonable suspicion that the employee is under the influence, to the extent that their ability to perform their job is impaired. The AJ reasoned that because Employee was allowed to take calls proved that neither supervisor had a reasonable suspicion that Employee was impaired in a manner

[9] According to Agency, Ms. Johnson received reasonable suspicion training on May 3, 2017, and Ms. Miller received training on August 29, 2016, May 3, 2017, and September 9, 2020.
[10] *Agency's Brief in Response to October 8, 2021, Order*, p. 1-6 (October 29, 2021).
[11] *Employee's Brief* (December 14, 2021).

that prohibited her from performing her duties. Moreover, the AJ noted that Employee testified that she did not smoke marijuana and was not impaired on October 14, 2020. The AJ further highlighted that Employee provided documentary evidence consistent with her assertion that her brother was admitted to the hospital for acute substance intoxication on October 14, 2020, at 8:15 a.m. and was discharged at 1:41 p.m. Thus, she found that it was plausible that Employee's grieving and crying, coupled with a lack of sleep, could have caused Employee's red or glossy eyes; her appearance of incoherence; or changes in her behavior. Therefore, the AJ held that Employee presented clear and convincing evidence to rebut the presumption of impairment. Consequently, she ordered that Agency's termination action be reversed; that Agency reinstate Employee; and that Agency reimburse Employee all pay and benefits lost as a result of her removal.[12]

On August 29, 2022, Agency filed a Petition for Review. It argues that the Initial Decision is based on an erroneous interpretation of statute and unsupported by substantial evidence. Agency maintains that it did have reasonable suspicion to test Employee. It argues that the AJ improperly relied on the fact that Employee was allowed to return to work after her supervisors' reasonable suspicion observations and that allowing Employee to return to work was merely poor judgment or inadequate supervision. Additionally, Agency contends that there is no policy or regulation that prohibits an employee from working pending their test results. Finally, Agency asserts that Employee did not rebut the presumption of impairment with clear and convincing evidence. Agency opines that Employee's testimony was self-serving and lacked credibility. As a result, it requests that its Petition for Review be granted, and the Initial Decision be reversed.[13]

[12] *Initial Decision*, p. 8-15 (July 25, 2022).
[13] *Agency's Petition for Review*, p. 7-19 (August 29, 2022).

Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then they must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] After a review of the record, this Board believes that the AJ's ruling was based on substantial evidence.

Reasonable Suspicion

D.C. Official Code § 24–211.21(9) defines reasonable suspicion as ". . . a belief by a supervisor that an employee is under the influence of an illegal substance or alcohol to the extent that the employee's ability to perform his or her job is impaired." Moreover, DPM § 499.1 defines a reasonable suspicion test as "an examination that is administered to a District government employee based on the reasonable belief by a supervisor that an employee is under the influence of a drug or alcohol to the extent that the employee's ability to perform his or her job is impaired." Therefore, Agency must show that Employee's supervisor believed that she was under the influence, to the extent that her ability to perform her job was impaired.

Pursuant to DPM §§ 432.1 and 432.7, employees shall be referred by a trained supervisor for drug testing where there is a reasonable suspicion that the employee is impaired while on duty. Agency provided evidence that LaQuenceyer Johnson completed reasonable suspicion training on September 9, 2020, which was five weeks before she observed Employee and arrived at her belief

[14] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

that Employee was under the influence of an illegal substance.[15] Moreover, DPM §§ 432.2(b) and 432.8 provide *inter alia* that a trained supervisor must ". . . gather all information and facts to support this reasonable suspicion." On Agency's Reasonable Suspicion Observation Form, Ms. Johnson described Employee's speech as whispering but her balance was normal. Ms. Johnson also provided that there was a change in the frequency or nature of complaints; a noticeable change in written or verbal communication; an intentional avoidance of supervision; and Employee being persistently withdrawn or less involved with people.[16] As for other observations, there is a hand-written response on the Reasonable Suspicion form that "[Employee's] eyes were glossy and red, and she appeared incoherent." During the OEA hearing, Ms. Johnson testified that when Employee came to have her temperature checked, she noticed that "her eyes appeared to be red [and] she was . . . whispering . . . speaking very low."[17]

Agency adhered to DPM §§ 432.1, 432.2, 432.7, and 432.8. Moreover, without any evidence to the contrary and based on the observation form and Ms. Johnson's testimony, there is evidence in the record of a belief by a supervisor that Employee was under the influence of an illegal substance. However, D.C. Official Code § 24–211.21(9) and DPM § 499.1 define reasonable suspicion as ". . . a belief by a supervisor that an employee is under the influence of an illegal substance or alcohol *to the extent that the employee's ability to perform his or her job is impaired* (emphasis added)." Although Agency proved its belief that Employee was under the

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[15] *OEA Hearing Exhibits*, Tab #2 (April 13, 2022). It should be noted that Ms. Johnson conferred with Ms. Miller regarding her belief that Employee was under the influence. Ms. Miller agreed, and both signed off on the Reasonable Suspicion Observation Form. According to Agency's Training Transcript, Ms. Miller completed Reasonable Suspicion training only once in May of 2017, which was three years before her observation of Employee. *Agency's Brief in Response to October 8, 2021 Order*, p. 28-30 (October 29, 2021).

[16] Agency did not expound upon any of these allegations, except Employee's intentional avoidance of supervision. When questioned during the OEA hearing, Ms. Johnson provided that on October 14, 2020, due to the Covid-19 public health emergency, employees had to report directly to their supervisors, before reporting to their desks, to have their temperature checked. However, she contended that Employee did not come directly to her desk and had to be asked to come over.

[17] *OEA Hearing Transcript*, p. 80-81 (April 13, 2022).

influence, it failed to prove that Employee's ability to perform her job was impaired. Agency provided in its Proposing Official Rational Worksheet that if Employee's work duties were performed while under the influence of drugs, it could lead to a lapse in attention that could cause actual, immediate, and permanent physical injury or loss of life to others.[18] Additionally, in its closing argument, Agency argued that "Employee was required to respond to life-threatening emergencies and provide life-saving instructions to members of the public."[19] However in the same closing brief, Agency stipulated that Employee was allowed to take fifteen (15) emergency calls over the course of nearly one and one-half (1.5) hours.[20] Because Employee was called over for a temperature check as soon as she reported to work, this Board agrees with the AJ's assessment that it can be reasonably assumed that Employee answered these calls *after* Ms. Johnson's reasonable suspicion observation.[21] Ms. Johnson conceded this fact during the OEA hearing.[22] If Agency believed that Employee's ability to perform her job was impaired, then it would not have allowed Employee to provide life-savings instructions during the 1.5 hours of emergency calls *after* it observed her impairment (emphasis added). Accordingly, there is substantial evidence in the record to support the AJ's holding that Agency did not believe that Employee's ability to perform her job was impaired.

Moreover, Agency allowed Employee to return to work the next day. In accordance with the Reasonable Suspicion Reference Guide, provided in the August 2020 Mayor's Order 2019-81, after the required test, an Employee is placed "on administrative leave until receipt of the test results."[23] Agency received Employee's positive test results on October 27, 2020.[24] However,

[18] *Agency's Answer*, p. 28 (July 15, 2021).
[19] *Agency's Closing Argument*, p. 16 (June 17, 2022).
[20] *Id.* at 3.
[21] *Initial Decision*, p. 11 (July 25, 2022).
[22] *OEA Hearing Transcript*, p. 99-100 (April 13, 2022).
[23] *OEA Hearing Exhibits*, Tab #8 (April 13, 2022).
[24] *Agency's Answer*, p. 23 (July 15, 2021).

according to timesheets provided by Agency, Employee returned to work on October 15, 2020, one day after she submitted her drug testing sample. Employee provided that she continued to work from October 15, 2020, until November 25, 2020, when she received her proposed notice of separation.[25]

Employee was allowed to take emergency calls immediately after her supervisor's suspicion that she was under the influence. Contrary to the reasonable suspicion guidance, she was also permitted to return to work the day after her drug test. Further, Employee continued to work for nearly one month after Agency received her positive test results. If Employee's supervisor held a belief that Employee's ability to perform her job was impaired, then it would reasonably be expected that she would not have been allowed to take emergency calls after her observations, and subsequently, allowed to continue to work for one month. Thus, although Employee's supervisor may have held a belief that she was under the influence, the evidence in the record does not support Agency's assertion that Employee's ability to perform her job was impaired. Therefore, Agency lacked reasonable suspicion in this case.

Clear and Convincing Evidence

Agency relied heavily on DPM § 429.1, which provides that "[e]mployees who test positive for cannabis following a reasonable suspicion . . . drug test . . . shall be presumed impaired by cannabis, regardless of their participation in any medical marijuana program." While this is true, DPM § 429.4 provides that "when a[n] . . . adverse action has been proposed due to a positive drug test result, . . . an employee may provide a written response with supporting evidence challenging that action. . . . Evidence supplied by an employee to rebut a presumption of cannabis impairment

[25] *Employee's Supplemental Brief,* p. 1 (January 6, 2022).

must be clear and convincing." The AJ ruled that Employee presented clear and convincing evidence to rebut the presumption of cannabis.

The D.C. Court of Appeals defines clear and convincing evidence as "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Harris-Lindsey*, 242 A.3d 613 (D.C. 2020) (quoting *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) and *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004)). The AJ relied on the documentary evidence and testimony provided by Employee to establish that she was not impaired by drugs, but she was tired and crying before her shift. Employee provided to Agency's hearing officer and to the AJ that on October 14, 2020, she was mistakenly informed that her brother died, only later to discover that he was alive and hospitalized.[26] Employee provided her brother's hospital discharge forms showing that he was admitted to the hospital at 8:15 a.m. and discharged at 1:41 p.m.[27] Employee testified that she was at the hospital the entire time and took her brother home after he was discharged. According to Employee after she dropped her brother off and returned home herself, it was time for her to start her shift. She testified that she did not consume marijuana that day. Employee conceded that she was tired but consumed energy drinks to perform her duties.[28] As the trier of fact, the AJ found that Employee presented evidence to produce a firm belief or conviction as to the facts. Employee's removal can be reversed based on Agency's lack of reasonable suspicion. *Assuming arguendo*, that Agency was able to establish reasonable suspicion, this Board also believes that substantial evidence exists to support the AJ's findings regarding Employee's rebuttal evidence.

[26] *Agency's Answer*, p. 35 (July 15, 2021) and *Initial Decision*, p. 13 (July 25, 2022).
[27] *Petition for Appeal*, Attachment #3 (April 8, 2021).
[28] *OEA Hearing*, p. 106-109 (April 13, 2022).

Credibility Determinations

As for Agency's argument that Employee's testimony was self-serving and lacked credibility, the Court in *Metropolitan Police Department v. Baker,* 564 A.2d 1155 (D.C. 1989), provided that great deference to any witness credibility determinations is given to the administrative fact finder. Similarly, the Courts in *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Kennedy v. District of Columbia,* 654 A.2d 847, 854 (D.C.1994); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services,* 683 A.2d 470, 477 (D.C.1996); and *Kennedy, supra,* 654 A.2d at 856, provided that due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. Furthermore, the Court in *Raphael* held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. After a review of the hearing transcript and documentary evidence, a reasonable mind would accept the credibility determinations the AJ made as adequate to support her conclusions.

Conclusion

Although Employee's supervisor may have held a belief that she was under the influence, the evidence in the record does not support Agency's assertion that Employee's ability to perform her job was impaired. Therefore, Agency lacked reasonable suspicion in this case. Even assuming that reasonable suspicion could have been established by Agency, there was substantial evidence to support the AJ's holding that clear and convincing evidence existed to rebut that Employee was impaired. This Board accepts the credibility determinations made by the AJ and finds them adequate to support her conclusions. Accordingly, Agency's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

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