Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0058-22
v.	)	
	)	Date of Issuance: September 7, 2023
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Parking Enforcement Officer with the Department of Public Works ("Agency"). On May 19, 2022, he received a final notice of separation from Agency. The notice provided that on November 23, 2021, Employee submitted a urine sample which tested positive for the presence of cannabinoids, in violation of 6B District of Columbia Municipal Regulations ("DCMR") §§ 435.6 and 1605.4(h). Consequently, Employee was terminated effective May 22, 2022.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 17, 2022. He explained that he was in a vehicular accident in his Agency-issued vehicle. Employee claimed that he avoided colliding with a tractor trailer by hitting the median. He

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *Petition for Appeal*, p. 7 (June 17, 2022).

asserted that the Metropolitan Police Department officer on the scene did not cite him for driving under the influence or for reckless driving. Therefore, Employee requested that the adverse action be removed from his personnel file and that he be reinstated to his position. Alternatively, he requested that he be allowed to retire, given his age and years of service.[3]

On August 5, 2022, Agency filed its Answer to Employee's Petition for Appeal. It asserted that Employee's separation was warranted because he failed a post-accident drug test. Agency contended that Employee's marijuana use violated 6B DCMR §§ 1605.4(h) and 428.1, subjecting him to separation for a positive drug test. It also provided that it considered the *Douglas* factors when determining the appropriate discipline.[4] Therefore, Agency requested that Employee's removal action be upheld.[5]

In a post-conference order, the OEA Administrative Judge ("AJ") explained that Employee

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[3] *Id.* at 2.

[4] 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.

[5] *Agency Answer,* p. 7-10 (August 4, 2022).

admitted to testing positive for marijuana while occupying a safety-sensitive position. However, it was Employee's position that removal was too severe of a penalty and that a reasonable suspicion observation did not occur before testing. As a result, the AJ ordered both parties to submit briefs addressing whether the penalty should be upheld under District law.[6]

The AJ issued an Initial Decision on February 16, 2023. He first noted that Employee signed documents acknowledging that he held a safety-sensitive position. The AJ found that in accordance with 6B DCMR § 433(b), Employee was subject to mandatory, post-accident drug testing because he was in a motor vehicle accident, involving an Agency vehicle – which was significantly damaged. He further held that Employee admitted to testing positive for marijuana and found that Agency had sufficient cause to terminate Employee. Moreover, he opined that

[6] *Post-Conference Order* (October 17, 2022). In its brief, Agency asserted many of the same arguments presented in its Answer to the Petition for Appeal. It explained that Employee was notified in writing that he held a safety-sensitive position, and he was subject to drug and alcohol testing pursuant to 6B DCMR §§ 1605.4(g) and 1605.4(h). Agency further opined that the post-accident drug test followed the testing protocol, and Employee's results revealed the presence of cannabinoids. Moreover, it provided that the penalty for a first occurrence of reporting to or being on duty while under the influence of testing positive for an illegal drug or unauthorized substance, ranged from suspension to removal. *Agency's Brief*, p. 11-13 (November 8, 2022).

In his brief, Employee argued that Agency failed to conduct a reasonable suspicion observation. Employee explained that three supervisors, who were all certified to conduct reasonable suspicion observations, arrived on the scene, but they failed to perform the observation or complete the reasonable suspicion form. Additionally, he contended that Agency failed to apply progressive discipline and the *Douglas* factors by removing him on the first offense. Finally, Employee cited to Mayor's Order I-2020-18, which provides that a safety-sensitive employee should be suspended for five workdays on the first occurrence of a positive result for marijuana. Therefore, he requested that Agency's termination action be rescinded. *Union's Brief*, p. 3-4 (November 14, 2022).

Agency filed a reply brief on November 29, 2022. It argued that it was not required to perform a post-accident and incident, reasonable suspicion observation. Agency asserted that the lack of a completed reasonable observation form had no impact on whether Agency had cause to take the adverse action against Employe, or whether termination was an appropriate penalty under the applicable regulations. It also argued that Employee's assertions related to the Mayor's Order lacked merit. Agency explained that Employee incorrectly cited to language provided in the Random Drug Testing section of the issuance. However, it claimed that Employee's drug test was not random, and it was conducted solely because Employee's Agency-issued vehicle was impaired because of his automobile accident. Moreover, it provided that 6B DCMR § 433.2 makes clear that a post-accident or incident, reasonable suspicion observation may be done if feasible. However, Agency clarified that a post-accident or incident reasonable suspicion observation is not a prerequisite to post-accident and incident drug and alcohol testing. It contended that it did not have to suspend Employee for a first offense of submitting a positive sample and that it applied the *Douglas* factors before imposing its penalty. *Agency's Reply*, p. 1-6 (November 29, 2022).

Employee's assertion that Agency should have conducted a reasonable suspicion observation must fail because he damaged Agency's vehicle; he was subjected to mandatory post-accident testing; he tested positive for cannabinoids; he admitted to marijuana use; and Agency had cause for his removal because he occupied a safety-sensitive position and tested positive for drugs.[7] Moreover, the AJ determined that removal was in the range of penalties and that Agency appropriately considered the *Douglas* factors.[8] Consequently, the AJ ordered that Agency's removal action be upheld.[9]

Employee filed a Petition for Review on June 6, 2023. He asserts that although he had an accident while on duty, he was not impaired or under the influence. He, again, argues that Agency failed to conduct a reasonable suspicion observation in accordance with DCMR Chapter 4, Post-Accident and Post-Incident Drug and Alcohol Testing I-2022-8. According to Employee, Agency was required to conduct a reasonable suspicion observation to determine if there was evidence to suggest that he was impaired or under the influence of drugs or alcohol. Additionally, he contends that Agency failed to use progressive discipline and did not apply the *Douglas* factors in making its final decision. As a result, he requests that his termination be rescinded and that a five-day suspension be imposed instead.[10]

Agency filed its Response to Employee's Petition for Review on August 1, 2023. It provides that Employee was aware that he occupied a safety-sensitive position. Agency further contends that Employee's drug test was not random, but it was done after an accident. Consequently, it asserts that Employee's argument regarding the failure to apply progressive

[7] *Initial Decision*, p. 4-7 (February 16, 2023).
[8] As for Employee's argument regarding Mayor's Order "Post Accident and Post Incident Drug and Alcohol Testing," the AJ reasoned that the order could not be considered because it was not in effect at the time of Employee's accident.
[9] *Id.*, 8-11.
[10] *Petition for Review*, p. 1-5 (June 6, 2023).

discipline lacks merit because his positive drug test rendered him unsuitable. Additionally, it argues that it did consider the *Douglas* factors before imposing its penalty and that removal did not exceed the bounds of reasonableness. Accordingly, Agency requests that Employee's Petition for Review be denied.[11]

Substantial Evidence

According to OEA Rule 637.4(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 it 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.[12]

Safety-Sensitive

Pursuant to 6B DCMR § 409.1(a), "the types of positions that are subject to enhanced suitability screenings for . . . employees . . . with duties and responsibilities that shall be . . . safety sensitive, which are positions with duties in which it is reasonably foreseeable that, if the employee performs the position's routine duties while under the influence of drugs or alcohol, the employee could suffer a lapse of attention or other temporary deficit that would likely cause actual, immediate and serious bodily injury or loss of life to self or others." Moreover, 6B DCMR § 410.1(e) provides that "in addition to the general suitability screening, individuals . . . occupying safety sensitive positions are subject to . . . post-accident or incident drug and alcohol test[ing]." Finally, section 433.1(b) provides that "all District employees shall be subject to post-accident and

[11] *Agency's Opposition to Employee's Petition for Review*, p. 14-17 (August 1, 2023).
[12] *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).

incident drug and alcohol testing when they are involved in accidents or incidents under the following conditions: one (1) or more motor vehicle(s)(either District government or private) incurs disabling damage, requiring the motor vehicle to be transported away from the scene by a tow truck . . . ." Agency established that as a Parking Enforcement Officer, Employee held a safety-sensitive position.[13] Moreover, Agency provided evidence that he was in an accident involving a government vehicle that was towed by the Department of Public Works.[14] Thus, Employee was subject to post-accident testing.[15]

Cause

In its final decision, Agency provided that it had cause to terminate Employee under 6B DCMR §§ 435.6 and 1605.4(h).[16] As it relates to cause, 6B DCMR § 428.1(a) provides that ". . . an employee shall be deemed unsuitable and there shall be cause to separate an employee . . . for a positive drug or alcohol test result." Similarly, 6B DCMR § 435.6 provides that "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."[17] 6B DCMR

[13] Agency provided an Individual Notification of Requirement for Drug and Alcohol Testing Safety Sensitive form, which was signed by Employee on October 12, 2018, and a Drug-Free Workplace Notification form, which was signed by Employee on March 19, 2019. *Agency Answer*, Tabs 4 and 5 (August 5, 2022). Moreover, Agency submitted the position description for the Parking Enforcement Officer, which provides that ". . . this position has been designated as a safety sensitive position." *Id*., Tab 2. Finally, Employee concedes in his Petition for Review that he "work[ed] in a safety sensitive position." *Petition for Review*, p. 3 (June 6, 2023).

[14] Agency provided seven post-accident photographs. *Agency Answer*, Tab 3 (August 5, 2022). It submitted an incident report from Georgina Watts, which described Employee's accident involving an Agency vehicle. *Id*., Tab 8. Additionally, Agency provided a public incident report and a D.C. Police Crash Report from Metropolitan Police Department Officer Theodore Gray. *Id*., Tab 9. Agency offered an incident report authored by Employee which described how he "drove over the median with the work vehicle." *Id*., Tab 10. Finally, it submitted affidavits from Georgina Watts, Preston Moore, Richard Davis, and Raymond Haynesworth describing the accident. *Id*., Tabs 22, 23, 24, and 25.

[15] This Board must address Employee's reference to DCMR Chapter 4m Post-Accident and Post Incident Drug and Alcohol Testing I-2022-8. Employee's accident occurred on November 23, 2021. Agency issued its final notice of termination on May 19, 2022. However, the issuance that Employee cites to – I-2022-8 – did not go into effect until May 20, 2022. Therefore, Agency cannot be held to the guidance highlighted in the issuance because it was not effective at the time of Employee's accident.

[16] *Agency Answer*, Tab 18 (August 5, 2022).

[17] It should be noted that this section of the regulation existed under the 2018 and 2020 versions of Chapter 4.

§ 1605.4(h) provides that testing positive for an unlawful controlled substance while on duty constitutes cause for an adverse action. There is evidence in the record provided by Agency from Quest Diagnostics that Employee's post-accident sample tested positive for cannabinoids.[18] Because a positive drug test is all that was needed to establish cause, Agency established cause to remove Employee pursuant to 6B DCMR §§ 428.1(a), 435.6, and 1605.4(h).

Penalty Within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985).[19] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency. 6B DCMR § 428.1(a) offers separation as the only penalty for a positive drug test result. Moreover, 6B DCMR § 435.9 provides that "if an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action. . . ." However, the section also provides that "instead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable." Therefore, in accordance with Chapter 4, Agency had the choice to terminate Employee or reassign him. Alternatively, 6B DCMR § 1607.2(h)(3) provides that the penalty can range from suspension to removal for testing positive for an illegal drug when

[18] *Agency Answer*, Tab 18 (August 5, 2022).
[19] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01*, Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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).

reporting to or while being on duty. Thus, pursuant to Chapter 16, Agency had the ability to impose a penalty from suspension to removal.

The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[20] Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[21]

Removal is a penalty for a positive drug test under 6B DCMR §§ 428.1, 435.9, and 1607. Furthermore, the record shows that the *Douglas* factors were weighed by Agency before imposing its penalty of removal.[22] Thus, Agency's penalty determination was appropriate.

Conclusion

Agency had cause to terminate Employee. The penalty was appropriate, and Agency

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[20] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[21] *Love* also provided the following:

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

[22] *Agency Answer*, Tab 11 (August 5, 2022).

adequately considered the *Douglas* factors. As a result of these findings, this Board must uphold the Initial Decision and deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee'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.