THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE,	OEA Matter No. 1601-0058-22
	Date of Issuance: February 16, 2023
v.	
	Joseph E. Lim, Esq.
DEPARTMENT OF PUBLIC WORKS, Agency	Senior Administrative Judge

Rahsaan Dickerson, Esq., Agency Representative
Tamika Garner Barry, Employee Representative

INITIAL DECISION

PROCEDURAL HISTORY

On June 17, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Department of Public Works' ("DPW" or "Agency") decision to terminate him from his position as a Parking Enforcement Officer ("PEO") effective May 22, 2022, in accordance with 6B DCMR §§ 435.6 and 1605.4(g).[1] The basis for Employee's termination is a positive drug test while occupying a safety sensitive position after he was involved in a vehicular accident while driving an Agency vehicle. On June 22, 2022, OEA requested Agency's Answer to the Petition. On August 5, 2022, Agency submitted its Answer to Employee's Petition for Appeal after being granted an extension by OEA.

After Agency declined mediation in this matter, it was assigned to the undersigned Administrative Judge ("AJ") on October 4, 2022. Thereafter, I issued an Order scheduling a Status Conference in this matter for October 17, 2022. Both parties were in attendance. On October 17, 2022, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

[1] Agency's Answer at Tab 12 (August 5, 2022).

JURISDICTION

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

ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
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> 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 631.2 id. States:

> For appeals filed under §604.1, 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was a Parking Enforcement Officer ("PEO") with Agency from 2007 to May 22, 2022. As a PEO, Employee's responsibilities included patrolling the streets in an assigned area on foot, serving citations to illegally parked vehicles, and general enforcement of the District of Columbia's motor vehicle parking regulations. Employee's PEO position was identified as safety sensitive as defined by Chapter 6B Section 4 of the District Personnel Manual (found at 6B DCMR § 400, *et seq.).*[2]

The safety-sensitive nature of Employee's PEO position required him to submit to drug and alcohol testing including, but not limited to, post-accident and incident drug and alcohol testing. 6B DCMR § 410.1(e). Employee acknowledged that he occupied a safety sensitive position which made him subject to reasonable suspicion and/or post-accident or incident drug and alcohol testing. Employee further acknowledged that he was subject to disciplinary action up to and including termination of employment if he tested positive for

[2] Safety sensitive positions are defined as "positions with duties or responsibilities that if performed while under the influence of drugs or alcohol could lead to a lapse of attention that could cause actual, immediate, and permanent physical injury or loss of life to self or others." 6B DCMR § 409.1(a).

drugs or alcohol either through reasonable suspicion testing and/or through post-accident or incident testing.

On October 12, 2018, and March 19, 2019, Employee signed receipts acknowledging the safety-sensitive nature of his job, along with the requirement of random, mandatory drug and alcohol testing that accompanied his position.[3] These forms notified Employee that he occupied a safety-sensitive position pursuant to Chapter 4 of the District Personnel Manual ("DPM") and consequently, he was subject to drug and alcohol testing. The forms further notified Employee that any positive test result for illicit drugs or alcohol would subject him to termination.[4]

On November 23, 2021, Employee called to notify Division Manager Preston Moore ("Moore") that he was involved in a vehicular accident while driving his government issued vehicle during his 6:00 a.m. to 2:30 p.m. shift. Employee indicated he was not injured, that he had swerved to the left in order to avoid a tractor trailer that was coming to his lane and that caused his vehicle to end up in the median along Fort Lincoln Drive, N.E. Employee also repeatedly stated that he was uninjured and declined medical attention. The Metropolitan Police Department ("MPD" or "Police") and Parking Enforcement Officer Supervisor ("PEOS") Erica Woodhouse ("Woodhouse") were notified.

By the time Moore arrived at the scene to assess the situation, the police was there. They saw that Employee's vehicle was facing southbound against the flow of traffic, in the northbound lane of Fort Lincoln Drive. When asked, Employee again indicated that he was traveling south on Fort Lincoln Drive and swerved and landed in the median. He also stated that the tractor trailer had left and that he had no information on the other vehicle. Moore noticed that there were no skid marks on the road, nor were there any physical indicators that would support Employee's account of the accident.[5]

As Employee's government vehicle was inoperable, Moore summoned a tow truck to retrieve the vehicle. PEOS Robert Polk ("Polk"), Georgina Watts ("Watts") and Woodhouse arrived, and Employee assured them he was fine. Watts noted that Employee's vehicle had four flat tires with a tire lodged under the vehicle, and a deployed airbag. They expressed suspicion about Employee's account of the accident.[6]

After Moore briefed Substance Abuse Specialist ("SAS") Richard Davis ("Davis") about the accident, Davis asked several questions about Employee. He then determined that Employee needed to report for post-accident drug and alcohol testing. Employee told Watts that the offending tractor-trailer had actually stopped after Employee went over the median, but that Employee had told the tractor trailer driver that he could leave without leaving any information such as his driver's license, license plate, or insurance information. When Watts asked why he did that, Employee replied that he did not see it as an issue. When Watts informed Employee that, due to the severity of the vehicular accident resulting in a vehicle becoming a total loss, he needed to

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[3] Agency's Answer (August 5, 2022) at Tab 4 (Individual Notification of Drug and Alcohol Testing Requirements) and Tab 5 (Employee Notification-Drug Free Workplace).
[4] *Id*.
[5] Agency Answer to Employee's Petition for Appeal, tab 9.
[6] *Id.*

report for a mandatory drug test, Employee began demanding to be taken to a hospital. When an ambulance arrived, Employee did not immediately go to the ambulance and instead used his phone.

Once Employee was brought to the hospital, he provided a urine specimen. An analysis of the urinary specimen by the immunoassay test revealed a positive result for the drug cannabinoid level of 107 nanograms per milliliter.[7] Under the Federal regulations that the District had adopted, the threshold reading for a positive drug test for marijuana metabolite is 50 ng/mL.[8] On December 6, 2021, the Medical Review Officer, Dr. Neha Badheka, verified the positive test result performed by Quest Diagnostics.[9]

On February 2, 2022, Agency issued a Notice of Proposed Separation to Employee.[10] On May 2, 2022, Hearing Officer Dwayne Johnson ("Johnson") reviewed the materials and Employee's responses and email admitting his use of marijuana. Johnson found that termination was warranted, citing that the positive drug test was a violation of 6B DCMR §§ 435.6 and § 1605.4(g).[11] The Hearing Officer concluded that Agency had sufficient basis to terminate Employee. Employee's termination was based on the following causes as outlined in 6B District of Columbia Municipal Regulations ("DCMR") § 1605.4 which states that a cause for disciplinary action includes a positive drug or alcohol test result, and under 6B DCMR §428.1, which states that separation is an appropriate action.

Agency determined that Employee's positive drug test rendered him unsuitable to retain his PEO position and effectuated his removal via the D.C. Human Resources' Policy and Compliance section in accordance with 6B DCMR § 436.6. DCHR Associate Director for Policy and Compliance Administration Justin Zimmerman subsequently issued a May 19, 2022, notice of separation informing Employee that his effective date of removal was May 22, 2022.

Whether Agency's action of terminating Employee was done for cause

Pursuant to OEA Rule 631.2, 68 DCR Ch. 600 (December 27, 2021), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Employee's removal from his position at Agency was based on 6B DCMR § 435.6 and 1605.4(h). 6B DCMR § 435.6 states: "In accordance with Section 428, a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations." Under DPM §1605.4(h), the definition of "cause" includes "[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty."

Agency submits that Employee was terminated for cause and that his removal was in accordance with D.C. law and regulations. Agency explains that it has a zero-tolerance policy for any positive drug test, and that Employee was aware of this. As such, Employee was appropriately

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[7] *Id*. at Tab 12, 14.
[8] 49 C.F.R. § 40.87(a) (January 1, 2018).
[9] *Id*.
[10] *Id*. at Tab 12.
[11] *Id*. at Tab 17 (Memorandum to Deciding Official Justin Zimmerman.)

terminated for testing positive for marijuana. Agency further notes that in Employee's position as a Parking Enforcement Officer driving a government vehicle, the safety of the public is paramount. Thus, the zero-tolerance policy is strictly enforced. Agency maintains that Agency had ample grounds and reasonable suspicion to drug test Employee after he totaled a government vehicle in a suspicious accident. Employee had notice that he was going to be tested and could self-identify any drug problems, which he failed to do. Agency also asserts that Employee should have known that ingesting or consuming marijuana was a violation of D.C rules and regulations.[12] By law, Employee's positive drug test rendered him unsuitable to perform the duties of a safety-sensitive position.[13]

Employee admitted to Agency's allegation of testing positive for marijuana, an illegal substance. Employee does not dispute that his position was designated as safety-sensitive, and that random drug testing was a component of such positions. He acknowledges being informed that a positive drug test would result in termination. However, Employee raises several defenses: first, he argues that no one conducted a reasonable suspicion observation or filled out a reasonable suspicion form; second, Agency failed to apply progressive discipline; and third, Agency failed to apply the Douglas factors in his adverse action. Employee asks that his termination be reversed and that this be reflected in his personnel record. Alternatively, he asks that his penalty be reduced to a five-day suspension.[14]

Because Employee held a safety sensitive position and was involved in an automobile accident where the vehicle he was operating was significantly damaged, he was, by law, subject to post-accident and incident drug and alcohol testing. The applicable regulation, found at 68 DCMR § 433 states, in relevant part:

> All District employees shall be subject to post-accident and incident drug and alcohol testing when they are involved in accidents or incidents under the following conditions:
>
> (a) The employee is involved in an on-the-job accident or incident that results in injury or loss of human life;
>
> *(b) 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 or other motor vehicle;*
>
> (c) Anyone receives bodily injury which requires immediate medical attention away from the scene;
>
> (d) The employee operating a government vehicle or equipment receives a citation under District of Columbia or another law for a moving traffic violation arising from the incident;

[12] Agency's brief (November 8, 2022) and Agency's Reply Brief (November 29, 2022).
[13] 6B DCMR § 436.6.
[14] Employee's Brief, (November 14, 2022).

> (e) There are reasonable grounds to believe the employee has been operating or in physical control of a motor vehicle within the District of Columbia while that employee's breath has an alcohol content above the limits described in §427.8, or while under the influence of an intoxicating liquor or any drug or combination thereof;
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> (f) the actions of the employee cannot reasonably be discounted as a contributing factor, using the best information available at the time of the decision; or
>
> (g) The employee is involved in an on-the-job accident or incident that seriously damages machinery. equipment, or other property.

68 DCMR § 433.1. (Emphasis added).

Thus, despite Employee's proclamations, Agency is bound by the above regulation to give him a drug test after a vehicular accident where the damaged vehicle had to be towed.

As for Employee's assertion that Agency should have conducted a reasonable suspicion observation or filled out a reasonable suspicion form after his vehicular accident, it should be noted that in stark contrast to the unequivocal "shall be subject to" language found in 6B DCMR § 433.1 which mandates that safety sensitive employees be tested after an accident or incident, the applicable regulatory provision that addresses when a safety sensitive employee who was involved in an accident or incident might be subject to reasonable suspicion observation reads as follows:

> Following an accident or incident that requires drug and alcohol testing pursuant to § 433.1, ***if feasible***, at least one (1) supervisor trained in reasonable suspicion observations shall conduct an observation to evaluate whether there is evidence suggesting that the employee is impaired or otherwise under the influence of a drug or alcohol. If there is no evidence that the employee is impaired or under the influence, the supervisor shall report that there is an absence of such evidence, and the report may be used by the employee as evidence to rebut a claim the employee was impaired. (Emphasis added.)
>
> 6B DCMR § 433.2.

As 6B DCMR § 433.2 indicates, a post-accident or incident reasonable suspicion observation may be done *if feasible,* however, a post-accident or incident reasonable suspicion observation is not a prerequisite to post-accident and incident drug and alcohol testing. Agency's "failure" to perform a reasonable observation assessment is not error because Agency was not legally required to perform the observation in the first place.

Assuming, *arguendo,* that Agency's failure to perform a reasonable suspicion analysis constitutes error, the error is unquestionably harmless. This Office's harmless error standard found at 6B DCMR § 634.6 reads as follows: "Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was a harmless error."

OEA Rule 631.3 provides the following with respect to the harmless error test:

> Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean:
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> 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 the agency's final decision to take the action.

Accordingly, an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency's adverse action.[18] Thus, the facts in this matter warrant the invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, OEA applies a two-prong analysis: whether Agency's error caused substantial harm or prejudice to Employee's rights *and* whether such error significantly affected Agency's final decision to terminate Employee.[15]

In this matter, Employee was fully afforded his rights to contest the results of his drug test, and because his direct involvement in disabling a government vehicle mandated a drug test, Agency's failure to prepare a reasonable suspicion form doesn't change the fact that Employee caused disabling damage to his Agency vehicle; was subjected to mandatory post-accident testing; tested positive for cannabinoids; and *admitted* to marijuana use. In any event, the fact that his position was safety-sensitive would not have affected Agency's decision to terminate his employment since a positive drug test rendered him unsuitable for employment.[16]

Employee's second argument that Agency failed to apply progressive discipline also fails as the law is clear regarding safety sensitive employees who test positive for illegal drugs. When an employee who occupies a safety sensitive position tests positive for drugs or alcohol, the following regulation 6B DCMR § 436.6 applies:

> Except as otherwise provided in §§ 429 and 430, and in accordance with § 428, a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause under Chapter 16 for corrective and adverse action.

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[15] *Employee v. Dept. of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17 *Opinion and Order on Petition for Review* (April 9, 2019).
[16] 6B DCMR § 436.6.

6B DCMR 428.1 also provides that:

> Unless otherwise required by law, and notwithstanding§ 400.4, an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in §§ 436.9 and 440.3 for:
>
> (a) A positive drug or alcohol test result (except as otherwise provided in § 429).

Employee's next argument that Agency failed to apply the *Douglas* factors[17] in his adverse action is belied by the record. In Employee's February 8, 2022, Notice of Proposed Separation, Agency attached the D.C. Department of Human Resources' "Establishing the Appropriate Action," which exhaustively discussed all the *Douglas* factors applicable to this matter. Thus, I

[17] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or 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;
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> 3) the employee's past disciplinary record;
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> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
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> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
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> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
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> 7) consistency of the penalty with any applicable agency table of penalties;
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> 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 where 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.

find that this argument also fails.

Lastly, Employee argues that OEA must reverse Agency's adverse action because it violated the Mayor's Order titled "Post Accident and Post Incident Drug and Alcohol Testing."[18] There are two problems with Employee's argument. First, the Mayor's Order itself states that its effective date is May 20, 2022. It is undisputed that Employee's vehicular accident occurred on November 23, 2021. Thus, this Order was not yet in effect and does not apply in this matter.

Assuming for the sake of argument that the Order applies, nothing in the Order contradicts Agency's action. However, Employee fails to identify any part of the order that undermines Agency's decision to terminate him. The Order states that an employee in a safety sensitive position who is involved in an accident that, among other things, "involves one or more disabled vehicles (either owned by the District or privately owned) that must be towed;" *shall* undergo drug and alcohol testing.[19] (Emphasis added.) Thus, said Order reinforces Agency's action.

If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

68 DCMR § 1605 addresses District government employees' performance and conduct deficits. Section 1605.4 of chapter 68 of the DCM R provides a non-exhaustive list of the classes of conduct and performance deficits that constitute cause and warrant corrective or adverse action. 6B DCMR §§ 1605.4 (g) and (h) list using or being influenced by intoxicants while on duty and unlawful possession of controlled substances and paraphernalia *or testing positive for an unlawful controlled substance while on duty* as cause for taking adverse action, respectively. (Emphasis added).

The District of Columbia's Table of Illustrative Actions allows for discipline of an employee, including termination of employment for reporting to duty while under the influence of an illegal drug, or operating a government-owned or leased vehicle (or privately-owned vehicle on official business) while under the influence of an illegal drug. Applicable here, in the case of safety sensitive employees who test positive for cannabis after a post-accident or incident drug test, 16 DCMR § 429.1 states:

> Employees who test positive for cannabis following a reasonable suspicion or post-accident or incident drug test pursuant to §§ 432 or 433 shall be presumed impaired by cannabis, regardless of their participation in any medical marijuana program.

Chapter 16 of the District of Columbia Personnel Regulations establishes the grounds upon which an Agency may discipline an employee for cause. The regulations authorize an Agency to initiate disciplinary proceedings for acts of misconduct including: "Using, being under the influence of, or testing positive for an intoxicant while on duty…"[20] and "Unlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful

[18] Employee's November 14, 2022, Brief, Exhibit B.
[19] *Id.*
[20] 6B DCMR §§ 1605.4(g).

controlled substance while on duty."[21]

According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant matter, I find that Agency has met its burden of proof for the charge of "[u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result," and as such, Agency can rely on this charge in disciplining Employee.

Employee has argued for a lesser penalty such as a suspension. Although the general Table of Illustrative Actions authorizes a suspension on the first occurrence of a positive drug test result, this table notably does not account for employees in safety-sensitive positions, but rather is applicable to employees in non- safety sensitive positions. 6B DCMR § 1607. This is evidenced by the fact that 6B DCMR § 435, which does specifically address safety-sensitive positions, only allows for removal or reassignment to a non-covered position following a positive drug test. In other words, a mere suspension and then subsequent continuation in a safety-sensitive position after a failed drug test is not permitted under Chapter 4 of the District regulations. In the instant matter, I find that Agency did not have the option to merely suspend Employee and continue to employ him as a PEO.

Furthermore, although reassignment to a non-covered position is permissible in this instance under Chapter 4 of Title 6-B, it is totally discretionary on the part of the agency. See 6B DCMR § 400.4. Agency was under no obligation to offer reassignment to Employee. Additionally, reassignment to a non-covered position is not always an available remedy because such a position must be available at the time, and the employee must be qualified to perform the duties of that non-covered position. Hence, reassignment is not warranted.

In assessing the appropriateness of the penalty, OEA is limited to ensuring that "[m]anagerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).[22] When an Agency has proven a charge by a preponderance of the evidence, OEA has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation, or guidelines and is not a clear error in judgment.[23] The Table of Illustrative Actions contained in 6B DCMR § 1607 authorizes removal on the first occurrence of the misconduct committed by Employee, and moreover, 6B

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[21] 6B DCMR §§ 1605.4(h).

[22] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[23] *Employee v. Agency*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review*, (September 17, 2012).

DCMR § 428.1 expressly states that an employee who renders a positive drug test in a safety sensitive position is deemed unsuitable and immediately subject to separation. This sentiment is also reiterated in 6B DCMR §§ 435.6 and 400.4. Thus, removal in this case is clearly within the range of penalties allowed by law, regulation or guidelines. Notably, this tribunal has found in favor of the agency where an employee tests positive for illegal drugs and is deemed unsuitable.[24] Furthermore, Agency submits that Employee's removal was not an error in judgment and therefore must be left undisturbed by this tribunal.

In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld. Employee's termination was properly effectuated and was mandated under the law.

ORDER

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

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

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