THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
David Donaldson,	)	OEA Matter No. 1601-0013-18
Employee	)	
	)	Date of Issuance: June 12, 2018
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Department of Transportation,	)	Senior Administrative Judge
Agency	)	

Gina Walton, Employee Representative
Cheri Staples, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 9, 2017, David Donaldson ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Transportation's ("DDOT" or "Agency") decision to terminate him from his position as a Traffic Control Officer effective October 14, 2017. On December 13, 2017, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on January 16, 2018. Thereafter, I issued an Order Scheduling a Prehearing Conference in this matter for February 27, 2018. Both parties were in attendance. I then issued a Post Conference Order requiring the parties to submit written briefs addressing the issues raised at the Prehearing 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.

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.

FINDINGS OF FACTS[1]

1. Employee was employed with the DDOT for approximately three (3) years as a Traffic Control Officer at the time of his termination. He is a District of Columbia resident.

2. The Traffic Control Officer position at DDOT is designated as a safety-sensitive position pursuant to the Child Youth Safety and Health Omnibus Amendment of 2004, DC Code §§1-620.31 - 1-620.37.

3. On June 2, 2014, Employee executed the Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth ("Notification").

4. The "Notification" advised Employee that he would be subject to disciplinary action, including separation from employment, as a result of any drug or alcohol test establishing the presence of a controlled substance.

5. On June 16, 2017, Employee received and signed the Notice Directing Employee to Appear for Random Drug Testing.

6. On June 16, 2017, as directed, Employee reported for a random drug test and submitted a urine sample for analysis.

7. Employee's urine sample was split into two samples for analysis.

8. One of Employee's urine samples was tested and subsequently confirmed positive for the presence of marijuana.

9. Employee did not inform the intake coordinators or medical officer of his medical marijuana use, either before or after his drug test.

10. Employee never provided the testing vendor with a valid medical marijuana program registration card.

11. At the time of testing on June 16, 2017, Employee was not enrolled in the District's medical marijuana program.

12. Enrollment in the District's medical marijuana program is good for a year and must be renewed yearly.

13. On June 23, 2017, the Medical Review Officer ("MRO") verified the test results as a non-contact positive. The MRO attempted to, but failed, to contact Employee.

[1] Facts are taken from either the parties' Joint Stipulation of Facts or undisputed facts on record.

14. Following an Agency investigation, Employee was charged with violating sections 1603.3(i) of the District of Columbia Municipal Regulation Personnel Manual ("DCMR") and 6B DCMR section 428.1(a).

15. 6B DCMR § 1603.3(i): Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result; and 6B DCMR § 428.1(a): An employee shall be deemed unsuitable and immediately subject to separation from a covered position as described in subsections 439.3 and 439.4 for: (a) A positive drug or alcohol test result.

16. By letter dated July 13, 2017, removal of Employee as a Traffic Control Officer was proposed by Andre Easley, Compliance Manager with the District of Columbia Human Resource Department ("DCHR").

17. On or about July 22, 2017, Employee received the advance written notice of proposed removal from his position as Traffic Control Officer.

18. By letter dated August 7, 2017, Ms. Gina Walton, President of the American Federation of Government Employees, Local No. 1975 responded to the proposed removal on behalf of Employee.

19. After receiving the notice of proposed termination, Employee could not supply a copy of a valid medical marijuana program registration card as he was not enrolled in the program at the time.

20. Instead, in support of said response, Employee submitted a letter from Dr. John Bedeau dated June 22, 2017, stating that Employee "was seen and re-evaluated" on "6/22/2017 for the use of medical marijuana"; that Employee "has been approved for its use since 07/08/2014"; that "his new card will be issued by the Department of Heath of the District of Columbia" and that "His current card was recently misplaced and he will not be able to use the dispensary until his new card arrives."

21. In support of said response, Employee also submitted an email from DCHR dated August 8, 2017 "that his renewal application has been approved" and to "allow 7-10 business days to receive your card in the mail."

22. By a Notice of Separation letter dated October 12, 2017, DCHR, on behalf of DDOT, terminated Employee's employment effective October 14, 2017.

23. The stated cause for termination was a positive drug test result showing the presence of marijuana.

24. Employee timely received the Notice of Separation letter dated October 14, 2017.

25. On or about November 9, 2017, Employee timely filed an Appeal with the Office of Employee Appeals.

26. On March 15, 2018, Employee submitted to DDOT as part of his discovery in this appeal: 1) a copy of Employee's Medical Marijuana Program card issued 8/8/17; 2) Physician Recommendation Form by Dr. Patrick Fasusi dated 7/2/14; and 3) Physician Recommendation Form by Dr. John Bedeau dated 6/22/17.

Employee's Position: [2]

Employee argues that the District Personnel Manual ("DPM") specifically states that an employee of the District government who has been authorized by a licensed physician to use marijuana for medical purposes is permitted to do so in accordance with applicable laws, rules, and regulations of their state of residence, provided such use does not impair or otherwise impede his ability to safely carry out assigned duties and responsibilities. He points out that DPM Instruction No. 4-34 (effective July 28, 2016) states that the employee *may* make known their participation in the medical marijuana program. (Emphasis added). Employee states that he did provide evidence to show that he was approved for the use of medical marijuana since July 8, 2014,[3] and proof that he notified the DC Department of Health on his lost medical marijuana program registration card and was approved for another card.[4] Employee received his replacement card on August 8, 2017.[5] Thus, Employee asserts that a preponderance of the evidence does not exist to support Agency's removal of Employee.

Agency's Position[6]

Agency submits that Employee occupied a safety-sensitive position and was subject to periodic drug testing. Agency notes that Employee was provided with Agency's drug and alcohol testing policy. Agency explains that it has a zero tolerance policy for any positive urinalysis, which Employee was aware of. Agency also notes that Employee failed to follow the DPM instruction regarding medical marijuana. Agency maintains that there is no dispute that Employee tested positive for illicit drugs; he knew he was in a safety-sensitive position that was subject to random drug testing; and that a positive drug test would end in administrative action, probably termination. Agency maintains that pursuant to D.C. Official Code §1-620.32, *et seq.*, any confirmed positive drug test result is grounds for termination. Additionally, Agency asserts that Agency had considered the relevant factor and acted reasonably in choosing removal as the penalty for a positive drug test in a safety-sensitive position.

ANALYSIS AND CONCLUSION

1) Whether Employee's actions constituted cause for discipline

[2] Employee's Brief (December 8, 2014); See also Petition for Appeal (February 5, 2014).
[3] Employee's Brief, Exhibit 4.
[4] *Id.*, Exhibit 5.
[5] *Id.*, Exhibit 6.
[6] Agency's Answer to Employee's Petition for Appeal (December 13, 2017), and Agency's Brief in Response to Order dated Feb. 27, 2018.

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), 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. Under DPM §1603.3(i), the definition of "cause" includes [u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result. Also, Employee's removal from his position at Agency was based on 6B DCMR § 428.1(a).

In the instant matter, Agency asserts that by having a positive marijuana result during a drug test, Employee violated DPM §1603.3(i) and 6B DCMR 428.1(a). The District of Columbia has a drug free work policy and Employee was aware of this policy. Further, 6B DCMR 3907 provides for mandatory drug and alcohol testing for safety-sensitive positions. As an employee in a safety-sensitive position, Employee herein was required to submit himself to random mandatory drug and alcohol testing. As an employee in a safety-sensitive position, Employee is one of the persons that must adhere to the drug and alcohol testing policy. Thus, Employee's positive test for marijuana constituted a violation of this policy.

Employee notes that he was aware that he occupied a safety-sensitive position within Agency with possibilities of random testing when he accepted the job. Employee also states that he was aware that a positive drug test could result in an administrative action. Employee does not deny that he tested positive for marijuana, he simply argues that his use of marijuana was medicinal and sanctioned by his doctor.

Apart from the above cited regulations DPM §1603.3(i) and 6B DCMR 428.1(a), the District of Columbia has other regulations pertinent to drug testing as it relates to a suitability for a safety-sensitive job such as Employee's position of Traffic Control Officer. DPM Chapter 4 Suitability §410 mandates various checks and tests for safety-sensitive positions. Included among these tests is a random drug and alcohol test.

The D.C. regulation most pertinent for medical marijuana use by D.C. personnel during the relevant time period is DPM Instruction No. 4-34 (effective date July 28, 2016). This instruction discusses Initiative 71; addresses how medical marijuana is treated during the D.C. government's drug and alcohol testing process; and outlines the requirements for employees authorized, as outlined therein, to use medical marijuana.

Initiative 71 or the Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, was approved by District voters on November 4, 2014. Among other things, it allowed adults to possess and cultivate a limited amount of marijuana within their principal place of residence. Although Initiative 71 became effective on February 26, 2015, it does not apply to federal property in the District and stresses that the sale and public consumption of marijuana remains illegal anywhere in the District, whether it is on District or federal property.

Initiative 71 stresses that due to the provisions contained in D.C. Law 20-153[7] it has no impact on the District government's current enforcement and application of employment related

[7] Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014.

drug testing requirements. Among other things, the law expressly permits employers and the District government to continue to enforce and establish policies which prohibit any marijuana use by employees.

As for District government employees using medical marijuana, DPM Instruction No. 4-34 states that:

> 1. An employee of the District government who has been authorized by a licensed physician to use marijuana for medicinal purposes is permitted to do so in accordance with applicable laws, rules and regulations of their state of residence, provided such usage does not impair or otherwise impede his or her ability to safely carry out assigned duties and responsibilities.
>
> 2. Employees enrolled in a medical marijuana program, and who occupy safety-sensitive positions, remain subject to random drug and alcohol screenings. In the event such an employee is randomly selected for testing, he or she must comply with the testing order. However, the employee may make known their participation in the medical marijuana program. In this regard, an employee has three options:
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> a. Immediately before or following a drug or alcohol screening, submit a copy of the drug testing order along with a copy of a valid medical marijuana program registration card to dchr.compliance@dc.gov. Follow any supplemental instructions provided by DCHR.
>
> b. If the employee tests positive for marijuana usage, he or she will be contacted by a Medical Review Officer. The employee must inform the MRO of his or her enrollment in a medical marijuana program and follow any additional instructions provided by the MRO.
>
> c. If notification to DCHR or the MRO does not occur, an employee may receive a notice proposing that he or she be terminated due to a positive marijuana result. In such a case, the employee should supply the named Hearing Officer with a copy of a valid medical marijuana program registration card along with a written explanation of his or her circumstances. The Hearing Officer's contact information will be included in the notice of proposed termination. The employee should follow any additional instructions that might be provided by the Hearing Officer.

Based on the provisions of DPM Instruction No. 4-34 enumerated above, District government employees who are enrolled in a medical marijuana program have three options available to them. The first option is to submit a copy of a valid medical marijuana program registration card along with a copy of the drug testing order to DCHR. The second option is for Employee to inform the MRO of his enrollment in a medical marijuana program after testing positive for marijuana. The last option is for Employee to present the Hearing Officer, whose

contact information is the notice of proposed termination, with a copy of a valid medical marijuana program registration card along with a written explanation of his or her circumstances.

The plain language of the above regulation makes it clear that being enrolled in a medical marijuana program is a prerequisite for an employee testing positive to avail of any of the above options. Simply being prescribed marijuana by a doctor is insufficient. In the instant matter, it is undisputed that Employee was not enrolled in a medical marijuana program at the time he had a drug test. Thus, none of these options listed in DPM Instruction No. 4-34 was available to him. Although Employee later presented evidence that his doctor had indeed authorized him to use medical marijuana, he was seen by the doctor after his drug test. In addition, he did not provide any evidence or documentation that he had either once been enrolled in the medical marijuana program and then allowed his enrollment to lapse or that he was ever enrolled in the program at all. The medical marijuana registration card that he produced simply states that it was issued on August 8, 2017, and expires on August 8, 2018.[8] These are dates *after* the date of the positive drug test. The card does not indicate when he was first enrolled in the program. Regardless, what is clear is that Employee had failed to obtain a replacement for his lost or misplaced medical marijuana registration card at the time of the drug test.

In conclusion, the fact remains that while in a safety-sensitive job position, Employee had a confirmed positive drug test and was not enrolled in a medical marijuana program at the time of testing. Two independent labs confirmed that Employee's urine sample collected on June 16, 2017, was positive for marijuana. D.C. Code §1-620.35(a) states that testing positive for marijuana still remains a valid and legal ground for Agency to remove Employee. Therefore, I find that Employee's positive drug test for marijuana is sufficient cause for Agency to terminate Employee.

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

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).[9] 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 charges of the "[u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test

[8] Employee's Brief, Exhibit 6.

[9] *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).

result," and 6B DCMR 3907.1(a) – a confirmed positive drug test. As such, Agency can rely on these charges in disciplining Employee.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[10] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.

In reviewing Agency's decision to terminate Employee, OEA may look to 6B DCMR § 428.1(a) which clearly and plainly states: "An employee shall be deemed unsuitable and immediately subject to separation from a covered position as described in subsections 439.3 and 439.4 for: (a) A positive drug or alcohol test result." Therefore I find that, by terminating Employee, Agency did not abuse its discretion and acted well within its legal authority.

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.

ORDER

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

FOR THE OFFICE: JOSEPH E. LIM, Esq.
Senior Administrative Judge

[10] *Love* also provided that "[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, is it 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).