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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ROBIN THOMAS,)	OEA Matter No. 1601-0047-19
Employee)	
)	
)	Date of Issuance: January 30, 2020
v.)	
)	
OFFICE OF THE STATE)	JOSEPH E. LIM, ESQ.
SUPERINTENDENT OF EDUCATION,)	Senior Administrative Judge
Agency)	
_____)	
Robin Thomas, Employee <i>pro se</i>)	
Hillary Hoffman-Peak, Esq., Agency Representative)	

INITIAL DECISION

PROCEDURAL HISTORY

On April 30, 2019, Robin Thomas (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Office of the State Superintendent of Education’s (“OSSE” or “Agency”) decision to terminate her from her position as a Bus Attendant effective April 1, 2019. On June 3, 2019, Agency submitted its Answer to Employee’s Petition for Appeal. This matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on July 2, 2019.

I held a Prehearing Conference in this matter on August 19, 2019. 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 for cause; and

2) If so, whether the penalty of removal should be upheld.

FINDINGS OF FACTS¹

1. Employee was employed with OSSE as a Bus Attendant for 15 years at the time of her termination. She is a District of Columbia resident.
2. The Bus Attendant position at OSSE is designated as a safety-sensitive position pursuant to the Child Youth Safety and Health Omnibus Amendment of 2004, D.C. Official Code §§1-620.31 - 1-620.37 (2005).
3. On August 5, 2010, 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 she 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 February 8, 2018, Employee received and signed the Drug and Alcohol Testing Training Certificate of Receipt and the Employee Notification of Drug Free Workplace.
6. On December 18, 2018, as directed, Employee reported for a random drug test and submitted a urine sample for analysis.
7. Employee's urine sample was sealed in her presence. She signed the Forensic Drug Testing Custody and Control Form.
8. Employee's urine sample was tested and subsequently confirmed positive for the presence of cocaine.
9. On December 21, 2018, the Medical Review Officer ("MRO") verified the test results. The MRO contacted Employee.
10. 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).
11. 6B DCMR § 1603.3(i) provides: 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.

¹ Facts are taken from the parties' undisputed documents from Agency's Answer to Robin Thomas' Petition for Appeal (June 3, 2019).

12. By letter dated January 2, 2019, removal of Employee as a Bus Attendant was proposed by Andre Easley, Compliance Manager with the District of Columbia Human Resource Department (“DCHR”).
13. On or about January 3, 2019, Employee received the advance written notice of proposed removal from her position as Bus Attendant.
14. By letter dated March 12, 2019, the appointed Hearing Officer, Mr. Dwayne Jefferson, sustained the proposed removal of Employee.
15. By a Notice of Separation letter dated March 19, 2019, DCHR, on behalf of OSSE, terminated Employee's employment effective April 1, 2019.
16. The stated cause for termination was a positive drug test result showing the presence of cocaine.
17. Employee timely received the Notice of Separation letter.
18. On or about April 30, 2019, Employee timely filed an Appeal with the Office of Employee Appeals.

Employee's Position:²

Employee asserts that as an OSSE employee for more than 13 years, she had a clean record and received awards for her exceptional work. Employee argues that OSSE refused her request for a drug retest. Thus, Employee obtained a hair follicle test and a wellness exam with her primary care doctor, and the results were negative for illegal substances. She also submitted a negative drug screening result taken December 7, 2018. Employee also submitted an online article from verywellmind.com titled, “How Long Cocaine Stays in Your System.” She argues that based on said article, traces of cocaine would remain in her system for up to 90 days after ingestion. Lastly, Employee asserts that she is innocent.

Agency's Position³

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 maintains that there is no dispute that Employee tested positive for illicit drugs; she knew she was in a safety-sensitive position that was subject to random drug testing; and that a positive drug test would end in administrative action, including 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

² Employee's Brief (September 19, 2019); *See also* Petition for Appeal (April 30, 2019).

³ Agency's Answer to Employee's Petition for Appeal (June 3, 2019), and Agency's Brief in Response to Order (Sept. 17, 2019).

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 CONCLUSIONS OF LAW

1) Whether Employee's actions constituted cause for discipline

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 her position at Agency was based on 6B DCMR § 428.1(a) (September 13, 2017).

In the instant matter, Agency asserts that by having a positive cocaine 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 the 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 herself 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 cocaine constituted a violation of the policy.

Employee argues that her December 7, 2018, negative drug test proves her innocence. However, the undersigned notes that Employee’s negative drug test occurred eleven days *before* her December 18, 2018, positive drug result. Thus, her prior drug test does not refute Agency’s contention that she ingested cocaine after December 7, 2018.

In conclusion, the fact remains that while in a safety-sensitive job position, Employee had a confirmed positive drug test at the time of testing. Two independent labs confirmed that Employee’s urine sample collected on December 18, 2018, was positive for cocaine. D.C. Official Code § 1-620.35(a) states that testing positive for cocaine is a valid and legal ground for Agency to remove Employee. Therefore, I find that Employee’s positive drug test for cocaine is sufficient cause for Agency to terminate Employee.

2) Whether the penalty of removal should be upheld.

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).⁴ According to the Court in *Stokes*,

⁴ 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-

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 result,” and a confirmed positive drug test as per 6B DCMR 3907.1(a) (September 13, 2017). As such, Agency can rely on these charges in disciplining Employee.

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. I further find that 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 conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

cc:
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