THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JEROME KENNEDY Employee	OEA Matter No. 1601-0055-05
v.	Date of Issuance: December 16, 2005
	Daryl J. Hollis, Esq. Senior Administrative Judge
DEPARTMENT OF TRANSPORTATION Agency	

Clifford Lowery, Employee Representative
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On May 26, 2005, Employee, an Asphalt Worker in the Career Service, filed a petition for appeal from Agency's decision summarily removing him from his position for "a second positive controlled substance test, which constitutes an immediate hazard to the agency, other employees, and yourself."

This matter was assigned to me on August 5, 2005. I conducted a Prehearing Conference on October 20, 2005. At that proceeding, Employee admitted that he had twice tested positive for the presence of a controlled substance, with the first test being given on July 6, 2004, and the second on March 30, 2005. However, he claimed that he

should never have been given the first test, in that he was illegally placed in the Commercial Drivers License (CDL) pool at the time of that test. Agency asserted that he was properly within the CDL pool in July 2004, and that therefore he was appropriately tested at that time.

After the Prehearing, I issued a Post Prehearing Order in which I granted the parties the opportunity to conduct further research into the issue of Employee's placement in the CDL pool in July 2004 and ordered them to submit their position statements pursuant to that research by the close of business on November 21, 2005. Both parties submitted statements, the contents of which will be discussed below.

Since this matter could be decided based on the parties' position statements and other documents of record, as well as on their presentations at the Prehearing, no evidentiary Hearing was conducted. The record is 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 was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

STATEMENT OF THE CHARGES AND PROCEDURAL HISTORY WITHIN AGENCY

By two notices to Employee, both dated April 8, 2005,[1] Agency advised him that as of the close of business on that day, he was being summarily removed from his position "based on your second positive controlled substance test, which constitutes an immediate hazard to the agency, other employees, and yourself." The notices contained the following specifications:

---

[1] The first notice gave Employee's position as "Asphalt Worker; RW-3653 – Grade 5". The second, which amended the first, gave his position as "Motor Vehicle Operator, WS-5703-07/01". In all other respects the notices were identical. I have determined that the differences in these notices are not of decisional significance and will not be addressed further.

> [1] You have violated the conditions of your agreement entered into with the District's Department of Transportation and Department of Public Works on July 19, 2004.
>
> [2] You tested for a second time positive for [a] controlled substance on March 30, 2005.
>
> [3] On July [6], 2004, you tested positive in the District's Department of Transportation and Department of Public Works "Testing of Drivers of Commercial Motor Vehicles for the Presence of Controlled Substance and Alcohol Policy."

On April 14, 2005, Employee, through Mr. Lowery, his representative, submitted a response to the charges to Stanley Stevens, who had been designated as the Hearing Officer charged with conducting a review of the action and recommending a final decision to the Deciding Official.[2] On April 22, 2005, Mr. Stevens issued his report, in which he recommended that Agency's action removing Employee be finalized. On May 10, 2005, Dan Tangherlini, Agency's Director and the Deciding Official, issued Agency's Final Decision, upholding the summary removal.

POSITIONS OF THE PARTIES

As set forth above, Agency summarily removed Employee for testing positive for the presence of a controlled substance on two occasions, July 6, 2004 and March 30, 2005. Employee does not dispute the results of those tests. Rather, he claims that he should not have been tested the first time, in that he was illegally in the CDL pool and was not in a "safety-sensitive position" at the time of that test. Thus, he contends that his removal was improper. Agency's position is that both tests were properly administered and that therefore its action removing Employee was appropriate.

FINDINGS OF FACT

There is no dispute concerning the results of the two drug tests. The sole disputed issue pertains to Employee's inclusion in the CDL pool at the time of the first test in July 2004. In response to my October 20, 2005 Post Prehearing Order, Employee submitted the following statement: "The Union is ending this correspondence with respect to [this] matter. This is to inform you that AFGE Local 1975 has no additional information to add

---

[2] Regarding the designation and duties of a hearing officer, *see* D.C. Office of Personnel (DCOP) Chapter 16 ("General Discipline and Grievances"), § 1612, 47 D.C. Reg. 7101 (2000).

to this file for review." As its response, Agency submitted a detailed statement that reads in part as follows:

> The regulations governing the testing of drivers of commercial motor vehicles[3] . . . define a Commercial Driver's License Driver on pages 3-4 as "[a]ny person who operates a [Commercial Motor Vehicle (CMV)], including: Full-time, part-time, and limited term CDL holders. In every position requiring a CDL, the CDL holder is either driving or in a state of readiness on call if required to drive. In addition, it includes any CDL holder who is required to perform a safety-sensitive function. Furthermore, for the purpose of employment testing, the term CDL driver includes a person applying for a position which requires driving a CMV at any time. The regulations clearly state that the testing period is annual and the employee is required to be able to use the CDL at any time. Specifically, the regulations state "[t]esting shall be administered at an annual rate as determined by the [Federal Highway Administration] regulations. This does not preclude DPW from testing at a rate higher than the minimum at DPW discretion. Each CDL driver shall have an equal chance of being tested each time selections are made. . . ." *See* Agency Record, Tab One at page 10.
>
> The evidence in the employee's file supports that he maintained a CDL at the time of his random drug test on July 6, 2004. Therefore, he was clearly in the CDL pool at that time. Employee's argument to the contrary is completely without merit.

Agency's Post Prehearing Brief at 2-3. (emphasis in original). (footnote added).

Submitted with Agency's brief was the affidavit of Eva L. Proctor, Substance Abuse Coordinator for Agency and the Department of Public Works (DPW). In pertinent part, Ms. Proctor's affidavit reads as follows:

---

[3] These regulations were previously submitted by Agency as part of its August 19, 2005 Response to Employee's petition for appeal.

I have reviewed the records maintained by my Office regarding the July 6, 2004 random test of Jerome Kennedy (the Employee). Based upon my knowledge of the operations of this Office and the records maintained regarding the random testing of the Employee, I present the following facts:

1. [DPW] and [Agency] have only one program in which employees are tested for the presence of controlled substances and/or alcohol.

2. The program referenced in paragraph number one (Program) is exclusively set up to test employees who hold a commercial driver's license (CDL). The CDL is a prerequisite to being tested under the Program. Employees who do not have a CDL may not be tested under this Program.

3. Employees who do not have a CDL are not tested in this Program.

4. The Program maintained by DPW and [Agency] is federally mandated pursuant to 49 CFR 382.

5. Pursuant to the Federal requirements of the Program, employees who maintain a CDL are tested year round. The test may take place during anytime of the year.

6. On the day an employee is tested, he/she is required to present his/her CDL.

7. On July 6, 2004 the Employee appeared for alcohol and drug testing. Prior to submitting to the test the Employee presented his CDL. A copy of Employee's CDL is attached.

8. The Employee signed the Employee Notification of his alcohol and/or drug testing. A copy of the signed Employee Notification is attached.

There are two attachments to Ms. Proctor's affidavit, the first being a copy of Employee's District of Columbia Driver's License, Number 1375774. On the face of the license, the words "commercial driver's license" appear immediately below a large-font "Washington, D.C.". Further, a large-font "CDL" is prominently displayed on the face of the license. This license states that it was issued to Employee on May 25, 2004 (prior to the July 6, 2004 drug test) and will expire on March 28, 2009.

The second attachment to the affidavit is Employee's "Employee Notification [form for] Alcohol and/or Drug Testing" for the tests administered to him on July 6, 2004. Pertinent sections of this document read as follows: 1) "TEST NOTIFICATION: [49 CFR] Part 382- Controlled Substances and Alcohol Use Testing applies to drivers of this [Agency]"; and 2) "[49 CFR] § 382.1 Requirement for Notice- Before performing an alcohol or controlled substances test under this part, each employer shall notify a driver that the alcohol or controlled substances test is required by this part. No employer shall falsely represent that a test is administered under this part." The form states that random alcohol and controlled substance tests were given to Employee on July 6, 2004 at the Reeves Center, 2000 14th Street, N.W. Further, Employee dated and affixed his signature to the following statement: "I understand that as a condition of my employment with [Agency], the above-identified test is required."[4]

In addition to the parties' Post Prehearing Statements and the attachments to Agency's Statement, the record contains the following documents:[5] 1) Tab 1 – the regulations governing the testing of Agency's CMV drivers for the presence of controlled substances and alcohol. These are the regulations referenced above in Agency's brief; 2) Tab 9 – a July 14, 2004 memo to Employee from Frank Pacifico, Deputy Chief of Agency's Street and Bridge Maintenance Division. Employee signed for this memo on July 14. In part, this memo reads as follows:

> Please be advised that you are being detailed to non-safety sensitive duties until further notice. This detail is being placed into effect due to an Administrative Command from the Office of Drug and Alcohol Testing, District of Columbia Government, [DPW/Agency]. This detail is in direct relation to your most Random Screening, which took place on July 6, 2004.

---

[4] For the record, I note that at the Prehearing neither party requested the opportunity to submit reply briefs.

[5] All of these documents were submitted as part of Agency's August 19, 2005 Response to Employee's petition for appeal and will be identified by their Tab Number.

3) Tab 10 – a July 19, 2004 notice to Employee that as a result of his positive test for a controlled substance on July 6, 2004, he was being placed on administrative leave with pay for three days, following which he was being suspended without pay for five days. The notice also reads as follows: "This is a mandatory suspension based on [Agency's] 'Testing of Drivers of Commercial Motor Vehicles for the Presence of Controlled Substances and Alcohol Policy', effective October 15, 1999"; and 4) Tab 13 – a December 16, 2004 memo to Employee from Deborah Bonsack, Administrator of DPW's Human Capital Administration, informing Employee that as of December 16, he was permitted to "perform safety-sensitive functions as a [CDL] holder with [Agency]." In part, the memo also reads: "This approval is based on your Substance Abuse Professional's report regarding your overall compliance with recommendations for rehabilitation and your verified 'Negative' return-to-duty test results dated December 14, 2004."

Based on the above documentary evidence, I make the following findings of fact as to the disputed issues: 1) At the time of the July 6, 2004 test, Employee held a CDL; 2) My review of the regulations governing the testing of Agency's CMV drivers clearly shows that Agency's position as to their pertinent contents is correct; 3) Since Employee was detailed to "non-safety sensitive" duties after his July 6, 2004 positive drug test, then at the time of that test he was either performing "safety-sensitive" duties or was allowed to do so. This finding is supported by the December 16, 2004 memo (Tab 13, above) permitting him to again perform safety-sensitive duties.

Thus, I find at the time of the July 6, 2004 positive drug test, Employee was properly within the CDL pool and was in a "safety-sensitive position".

ANALYSIS AND CONCLUSIONS

a. Whether Agency's action was taken for cause.

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes", ***inter alia***, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of § 1-616.51. ***See*** 47 D.C. Reg. 7094 ***et seq.*** (2000). Section 1600.1, ***id***, provides that the sections covering general discipline "apply to each employee of

the District government in the Career Service who has completed a probationary period." It is not subject to genuine dispute that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 47 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken.[6] Here, Employee was removed for "a second positive controlled substance test, which constitutes an immediate hazard to the agency, other employees, and yourself." I conclude that this cause is properly subsumed by either one, two or all of the following causes set forth in § 1603.3: 1) any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; 2) any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and 3) any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. Reg. 9317 (1999). Here, Employee has admitted that he tested positive for the presence of a controlled substance on two occasions, July 6, 2004 and March 30, 2005. In *Employee v. Agency*, OEA Matter No. 1601-0047-84, 34 D.C. Reg. 804 (1987), it was held that an employee's admission is sufficient to meet an agency's

---

[6] The entire list of causes in § 1603.3 is as follows:

> [A] conviction (including a plea of ***nolo contendere***) of a felony at any time following submission of an employee's job application; a conviction (including a plea of ***nolo contendere***) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

burden of proof. Therefore, I conclude that Agency has established cause for taking an adverse action against Employee.

b. Whether the penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985). In *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983), it was held that the penalty must be based upon a consideration of relevant factors.

In this case, Agency removed Employee for a second positive test for a controlled substance. Section IX(C)(1) of Agency's regulations governing the testing of CDL holders reads as follows: "C. Consequences of a Positive Controlled Substance Test: 1. [The employee] shall be suspended for a period of five (5) days [for a first offense]. *Please note that a second offense shall result in removal from employment.*" (emphasis added). The record establishes that Employee was suspended for five days for his first positive test. Therefore, Agency acted in accordance with the regulations by summarily removing him for a second positive test.

Additionally, Agency and its employees, as well as the citizens of the District of Columbia, have a right to trust that a CDL driver operating a CMV on the streets of the city is doing so with total control of his faculties and not under the influence of a controlled substance. By ingesting a controlled substance, Employee violated that trust. I conclude that Agency's action removing him from his position was entirely appropriate under the circumstances.[7]

ORDER

It is hereby ORDERED that Agency's action removing Employee is UPHELD.

---

[7] In some of the documents of record, Employee claims that he had a substance-abuse problem and therefore should have been treated leniently by Agency. Even assuming that Employee's claim is true, this does not in any way lessen the violation of the trust placed upon him as a CDL holder, nor does it provide grounds for mitigating the penalty.

FOR THE OFFICE:

DARYL J. HOLLIS, Esq.
Senior Administrative Judge