THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0031-20
TONY JOHNSON, Employee	
	Date of Issuance: October 8, 2020
v.	
	ARIEN P. CANNON, ESQ.
OFFICE OF THE SUPERINTENDENT OF EDUCATION, Agency	Administrative Judge

Hillary Hoffman-Peak, Esq., Employee Representative
Tony Johnson, Employee, *Pro se*

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

Tony Johnson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 29, 2020, challenging the Office of the State Superintendent of Education's ("Agency" or "OSSE") decision to remove him from his position as a Fleet Maintenance Assistant. Employee's termination was effective on December 31, 2019. Agency filed its Answer on March 3, 2020. I was assigned this matter on May 27, 2020.

A prehearing conference was held via WebEx in this matter on July 7, 2020, with both parties present. A Post Prehearing Conference Order ("PPC Order") was subsequently issued which required the parties to submit briefs addressing the issues set forth at the prehearing conference. Agency submitted its brief by the prescribed timelines in the PPC Order. Employee failed to submit his brief by the deadline set forth in the PPC Order. Accordingly, a Show Cause Order was issued on September 15, 2020. Employee submitted a response to the Show Cause Order on September 22, 2020. Based upon the submissions of both parties, I have determined that an evidentiary hearing is not warranted. The record is now closed.

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

JURISDICTION

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

ISSUES

1. Whether Employee occupied a covered position in which he was rightfully subjected to a random drug test;

2. Whether Agency had cause to remove Employee for refusal/failure to submit to a drug or alcohol test[2]; and

3. If so, whether removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Chapter 4 of the District Personnel Manual ("DPM") provides that some District government positions are "covered positions" and employees occupying these positions are subject to random drug and alcohol testing. When an employee occupies such a position and tests positive for an illicit drug or alcohol, he or she is deemed "unsuitable" for the position and is subsequently separated from the covered position. In the instant case, Employee was terminated from his position as a Fleet Maintenance Assistant, effective December 31, 2019. The basis of Employee's termination was refusal/failing to submit to a drug test. The District of Columbia Department of Human Resources ("DCHR"), on behalf of OSSE, initiated the termination when it issued a Proposed Separation notice on December 19, 2019.

[2] See 6B DCMR §§ 428.1(b), 1605.4(h), 1607.2(h)(6). In Agency's Proposed Separation notice, it cites to 6B DCMR §1607.1(h)(6); however, it is evident that the intended citation is 6B DCMR § 1607.*2*(h)(6). The final Separation Notice cites 6B DCMR §§ 1605.4(h) and 435.6. The undersigned notes 6B DCMR § 435.6 does not exist.

Agency's position

Agency asserts that under the Child and Youth Safety and Health Omnibus Amendment Act of 2004, D.C. Official Code § 1-620.31, *et seq*., fleet maintenance assistants must report to duty without ever testing positive for the presence of an unauthorized controlled substance or illegal drug. To enforce this requirement, Agency administers random drug tests.

Agency asserts that on October 24, 2018, Employee acknowledged and signed an "Individual Notification Requirement for Drug and Alcohol Testing: Safety Sensitive" notice.[3] Agency maintains that this was a result of Employee's position designation being changed to "safety sensitive." This notification stated that Employee was subject to random and reasonable suspicion drug and alcohol testing as a condition of his employment in a covered safety sensitive position. The notification further advised Employee that he would be subject to disciplinary action as a result of any drug or alcohol test which established the presence of a controlled substance. At the time of Employee's termination, Agency argues that Employee was serving in a safety-sensitive position and was entrusted 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 himself or others.

In 2019, Employee's previous position as Transportation Assistant was renamed to Fleet Maintenance Assistant. The new title as a Fleet Maintenance Assistant remained a safety- sensitive designation. On September 24, 2019, Employee was notified that he was selected for a random drug test.[4] Employee provided a sample for testing upon reporting to the testing site; however, it was determined that the urine specimen provided by Employee was not the appropriate temperature.[5] Accordingly, Employee was asked to provide a specimen under direct observation. Employee expressed that he was uncomfortable "exposing himself to another male and asked if a female agency Human Resource Representative could accompany him." This request was declined. Ultimately, Employee refused to provide a specimen under direct observation and refused to provide a second sample. Agency asserts that in accordance with 49 CFR § 40.67(g), which states that an observer under direct observation procedures must be the same gender, it followed the proper protocol regarding direct observation.

Under 6B DCMR § 428.1(a), an employee shall be deemed unsuitable and immediately subject to separation from a covered position for a positive drug or alcohol test result. Further, under 6B DCMR § 1605.4(h), cause for disciplinary action includes testing positive for an unlawful controlled substance while on duty. A refusal to submit to a drug test is deemed a positive result under 6B DCMR § 428.1(b). As such, Agency found Employee to be unsuitable for his safety-sensitive position and was required to separate Employee from his covered position.

[3] *See* Agency's Brief in Support of Termination, Attachments (August 4, 2020).
[4] *See* Agency's Brief in Support of Termination, Attachments, Individual Notification for Selection for Random Drug and/or Alcohol Testing (August 4, 2020).
[5] *See* 49 CFR § 40.65(b)(5).

Employee's position

Employee asserts that his original position with Agency was a Transportation Assistant which was not initially designated as safety-sensitive. Employee further argues that he was demoted and his position was subsequently reclassified and designated as safety-sensitive while Employee was out on leave in early 2019. Employee maintains that his designation as safety sensitive is not in fact a safety-sensitive position based on definitions and factors set forth in the District Personnel Manuel ("DPM") and the D.C. Official Code.

Employee asserts that if given the opportunity to take a drug and alcohol test again alone or without a same sex observer being present, he would have no problems taking the test. Employee's main contentions are that his day-to-day duties and activities do not fall into the category of safety-sensitive and therefore he should not have been subject to a random drug and alcohol test.

Whether Employee occupied a covered position in which he was rightfully subjected to a random drug test.

On May 14, 2019**,** DCHR issued a memorandum to OSEE and Employee regarding the reclassification of Employee's new position as a Fleet Maintenance Assistant, RW-5701-07. Under "Other Significant Facts" of a position description of the Fleet Maintenance Assistant position provided by Agency indicates that the position is safety sensitive and "the incumbent…will be subject to enhanced suitability screening…." Employee notes that none of the language for his previous position as a Transportation Assistant nor that of a Fleet Maintenance Specialist, grade 9, indicate anything regarding a safety sensitive classification. Employee provided no documents to support his argument.

Based on the May 14, 2019 memorandum from DCHR, it is evident that a reclassification of Employee's original position title with OSSE occurred. This reclassification was ostensibly conducted by DCHR, which in turn was applied by OSSE. The memorandum, along with the position description for Fleet Maintenance Assistants, illustrate that Employee's position underwent a reclassification from a position that was once not designated as safety-sensitive to being designated as safety-sensitive. Employee offers nothing more to rebut this position. As such, I find that Employee occupied a covered safety-sensitive position in which he was rightfully subjected to a random drug test.

Whether Agency had cause to remove Employee for refusal/failure to submit to a drug or alcohol test under 6B DCMR §§ 428.1(b), 1605.4(h), and 1607.2(h)(6).

There are many sections in the District Municipal Regulations regarding the refusal to submit to an authorized drug test. In the Proposed Notice of Termination, Agency relies upon 6B DCMR §§ 428.1(b),1607.2(h)(6), and 1605.4, which establish cause for when an agency may take adverse action against an employee.[6] 6B DCMR § 1607.2(h)(6), provides that refusing or failing

[6] The Proposed Separation Notice provided that the proposed termination was under 6B DCMR §§ 428.1(b), 1605.4(h), and 1607.2(h)(6); however, the basis for the termination listed in the Final Notice of Separation was under

to submit to a properly authorized drug test, including substituting, adulterating, or otherwise tampering with a urine sample, constitutes cause for adverse action. Furthermore, 6B DCMR § 1605.4, which Agency relies upon in its Final Notice, sets forth cause for when an employee tests positive for an unlawful controlled substance while on duty. 6B DCMR 428.1(b) provides that 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 of the regulations for failure to submit to or otherwise cooperate with a drug or alcohol test.

Employee does not dispute that he refused to provide a urine sample as part of the drug test. He argues that he declined to provide a second urine sample with someone of the same gender present. He suggested that he would provide a sample in the presence of someone of the opposite gender.

Because Employee's initial urine sample was not the appropriate temperature when received by the collector, he was instructed that a urine sample would need to be provided under direct observation.[7] DOT regulations found in 49 CFR Part 40, § 40.191(a)(4), provides that a failure to permit direct observation of a specimen constitutes a refusal to submit to a drug test. Additionally, 49 CFR Part 40, § 40.67 sets forth with specificity the procedures for a drug test under direct observation. The relevant provisions to the instant case provide that the observer "must watch the employee urinate into the collection container. Specifically, you are to watch the urine go from the employee's body into the collection container."[8] Under 49 CFR § 40.67(g), an observer under direct observation procedures must be the same gender as the employee being tested. Thus, despite Employee's discomfort with the direct observation process, the regulations which govern this process make clear that Agency (through DCHR) was within its authority to require Employee to submit to a direct observation drug test once it was determined that his initial specimen was outside the acceptable temperature range. Employee's failure to submit to the direct observation drug test constituted a refusal to submit to a drug test and established cause under 6B DCMR § 1607.2(h)(6).

6B DCMR § 1605.4(h) provides, in pertinent part, that testing positive for an unlawful controlled substance while on duty constitutes cause and may warrant adverse action. DOT provision 49 CFR Part 40, § 40.191(a)(4), provides that a failure to permit direct observation of a specimen constitutes a refusal to submit to a drug test. Because Employee declined and failed to submit to the direct observation drug test, his actions constituted a refusal to submit to a drug test. As such, I find that Employee tested "positive" for a controlled substance while on duty and constituted cause under 6B DCMR § 1605.4(h).

6B DCMR §§ 435.6 and 1605.4(h). As noted previously, 6B DCMR § 435.6 does not exist, and the undersigned is unable to determine which section Agency and DCHR intended to cite. However, an analysis under 6B DCMR § 1605.4(h) will be performed. All of the sections cited in the Proposed Notice and Final Notice relate to drug and alcohol testing and the failure/refusal of such tests.

[7] 49 CFR § 40.65(b)(5)

[8] 49 CFR Part 40, § 40.67(j)

Whether removal was appropriate under the circumstances

In assessing 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] The undersigned may only amend an agency's penalty if the agency failed to weigh relevant factors or the agency's judgment clearly exceeded limits of reasonableness.[10] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[11]

Here, Agency included a comprehensive analysis of the *Douglas* factors with its Proposed Separation issued on October 21, 2019.[12] Additionally, the Table of Illustrative Actions provides that the appropriate penalty for the first time occurrence for refusing or failing to submit to a properly authorized drug test is removal.[13] As such, I find that Agency appropriately weighed the relevant factors and properly exercised its managerial discretion. Thus, I find that termination was reasonable under the circumstances.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's termination of Employee is **UPHELD**.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge

[9] *See Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).
[10] *See Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985).
[11] *Id.*
[12] *See* Agency Answer, Exhibit H (Proposing Official's Rationale Worksheet); *See also* Agency's Brief, Attached Exhibits (August 4, 2020).
[13] *See* 6-B DCMR § 1607.2(h)(6), Table of Illustrative Actions.