THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. 1601-0072-19
	)	
v.	)	Date of Issuance: May 26, 2022
	)	
DISTRICT DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
	)	

Denise Clark, Esq., Employee Representative
Leah N. Simpson, Esq, Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 30, 2019, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District Department of Transportation ("DDOT" or the "Agency") adverse action of removing Employee from his position of Laborer within the Transportation Operations Administration, Street and Bridge Maintenance Division. On April 29, 2019, DDOT served Employee with an Advanced Written Notice of Proposed Removal charging Employee as follows:

> 1. Assaulting, fighting, threatening, attempting to inflict, or inflicting bodily harm while on District property or while on duty, pursuant to 6B DCMR 1605.4(h); and
>
> 2. Interfering with, refusing, or failing to submit to a properly ordered or authorized drug test, including substituting, adulterating, or otherwise tampering with a urine sample, pursuant to 6B DCMR 1607.2(h)(6).

On July 18, 2019, DDOT issued the Notice of Final Decision for Proposed Removal sustaining the charges brought forth in the Advanced Written Notice of Proposed Removal

and notifying Employee he shall be removed from his position of Laborer, effective July 20, 2019. The crux of this action centered around Employee's alleged acts the morning of February 9, 2019, where he appeared at the DDOT's work site disheveled, dressed inappropriately and acting and speaking erratically for an overtime work shift. Allegedly, he shoved a colleague and after some inquiry it was determined by DDOT management that he should be subjected to drug and alcohol testing. Employee allegedly refused to submit to testing.

On July 31, 2019, the OEA sent a notice to DDOT requiring it to submit an Answer to Employee's Petition for Appeal. DDOT filed its Answer on August 30, 2019. After an unsuccessful attempt at Mediation, this matter was assigned to the Undersigned on December 3, 2019. At this time, it should be noted that the District Government and the Office of Employee Appeals were working under emergency circumstances due to the prevalence of the Coronavirus Covid-19 pandemic. Thereafter, the Undersigned held a Prehearing and multiple Status Conferences. During this process, it was determined that an Evidentiary Hearing ("EH") was required. However, due to the pandemic, an EH was not able to be held in-person and the parties opted to wait till the pandemic restrictions were loosened before holding an EH. Eventually, these restrictions were loosened and the EH was held on August 10, 2021. The partiers have since submitted their written closing arguments. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

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.

OEA Rule 628.2 *id.* states:

> 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.

ISSUES

Whether the Agency's adverse action was taken for cause. If so, whether the penalty was appropriate given the circumstances.

Summary of Relevant Testimony

Isidiro Davila ("Davila") (Tr. Pp 14 – 57) testified in relevant part as follows:

At the time of the EH, Davila was presently employed by Agency as a Maintenance Mechanic Lead. During the incident in question on February 9, 2019, he was employed by Agency as a Supervisor, Engineer Technician and he was part of Agency's Management Supervisory Service. Davila recalled that February 9, 2019, was a Saturday. He further noted that overtime shifts that started at 6:00 am, were available that day for which Employee had previously signed up to work. The work site for the overtime shifts for this day was 414 Farragut Street, Northeast.[1] Davila noted that he arrived approximately 20 minutes early (5:40 am) for the shift and that Employee arrived approximately 20 minutes late (6:20 am).[2] Davila recalled greeting Employee as he entered the office at the work site before Employee pushed him off balance. When Davila asked him why he did that Employee response was unintelligible.[3] Davila followed Employee to the lunchroom and continued to question him as to why he pushed him. Employee was generally unresponsive. From there, Jermain Patterson (Employee's direct supervisor) noticed the commotion and intervened. Davila noted that Employee was bare-chested and his chosen apparel included sandals, long johns (only the bottoms, no top) and a jacket with no shirt.[4] Davila noted that the Employee's chosen apparel was not weather appropriate. Davila recalled that prior to this incident that he had a collegial relationship with Employee. He also noted that it was odd that Employee kept repeating "I got you".[5]

During cross examination, Davila noted that his office is approximately ten feet from the front door of the office and that at the time of the incident, he was reviewing the written roster of employees that had opted to work overtime and checking that off with the employees that had been gathering in and around the office waiting for their respective work assignments. Regarding his interaction with Employee, he noted that Employee pushed him with his forearm and knocked him off balance.[6] During redirect examination, Davila elaborated that when Jermain Patterson came to investigate the situation, he left and had no more interaction with Employee that day. During recross examination, he explained that he had received training from DDOT on observing drug and/or alcohol impairment when he was first hired by DDOT.[7]

Jermain Patterson ("Patterson") Tr. 57 – 120 testified in relevant part as follows:

Patterson's current job title is Maintenance Mechanic Lead. During the February 9, 2019, incident, Patterson's job title was Supervisory Engineer and Technician.[8] Patterson recalled that

[1] Tr. p 16.
[2] Tr. pp 16 – 18.
[3] *Id*.
[4] Tr. pp 18 – 21.
[5] Tr. pp 21 – 23.
[6] Tr. pp 33 – 35.
[7] Tr. pp 50 – 51.
[8] Tr. p 58.

a day or so before the incident, Employee had signed up to work overtime.[9] As he approached the commotion detailed by Davila above, Patterson testified as follows:

> So, I heard some erupt noise going on in the feeding area. So, I got up from my desk, went out, … and I saw [Employee] was making a lot of noise, and as he was walking around, coming in front of the tables, he was coming towards me, and he was clapping his hands. "I got you motherfuckers. I got you motherfuckers." And I think he repeated that. So, at that point, I was like … I feared for the employees' safety and my safety as well.[10]

Patterson recalled that Employee's speech was profanity laced, slurred and unintelligible. Employee's apparel was inappropriate for the winter weather conditions of the day and was in line with the description provided by Davila.[11] Patterson also noticed that Employee was stumbling and that he was sweating even though it was below freezing outside.[12] In response to what he witnessed, Patterson contacted his supervisor (Leslie Wood) and the Metropolitan Police Department ("MPD"). During this incident, Patterson was afraid of what Employee may do. He suspected that Employee was under the influence of drugs and/or alcohol.[13] Patterson was able to coax Employee outside, where, for a time, Employee waited in his vehicle. Patterson recalled that Employee drove away from the office but came back a short while later. During this interim time, MPD officers responded to the scene. MPD first questioned Patterson then they questioned Employee.[14] Thereafter, DDOT's drug and alcohol counselor as well as paramedics responded to the scene.[15] Patterson noted that he had received training in recognizing reasonable suspicion of drug or alcohol impairment.[16]

Gregory Toner ("Toner") Tr. pp 119 – 137 testified in relevant part as follows:

Toner is employed by MPD as an Officer assigned to the 4th District. He recalled that on the date in question, he and his partner responded to a distress call for a possible assault at 414 Farragut Street. Once on the scene, he questioned some DDOT personnel who provided a brief synopsis of what had happened and directed them to Employee who was asleep in his vehicle. After repeated knocks on his windows, they were able to rouse Employee from his slumber. After a brief period of questioning, Toner called for an ambulance because he was unsure of whether Employee was under the influence of drugs or alcohol (or if he just needed medical assistance). From there, Employee's care was turned over to the paramedics that responded to the scene. Toner noted he has had training on spotting impairment, and he further noted that Employee's slurred speech and unresponsive demeanor were possible indicators that he was impaired. Toner could not recall whether Employee's eyes were dilated. He further noted that Employee was not placed under arrest.

---

[9] Tr. p 59.
[10] Tr. p 60.
[11] Tr. pp 60 – 61.
[12] *Id*.
[13] Tr. pp 64 – 66.
[14] Tr. pp 68 – 73.
[15] *Id*.
[16] *Id*.

Dejuan Hogan ("Hogan") Tr. pp 136 – 166 testified in relevant part as follows:

Hogan noted that at the time of the EH, he was employed by DDOT as a Substance Abuse Specialist.[17] His duties and responsibilities included: drug and alcohol testing; random testing; post-accident testing; and reasonable suspicion evaluation.[18] On the date in question, he received a call from Leslie Wood asking him to respond to 414 Farragut Street to evaluate Employee for suspected on the job impairment. Hogan recalled that when he encountered Employee that he was wearing long john bottoms, bare chested with no shirt or hat and an open jacket. The outside temperature was around 30 – 40 degrees.[19] Upon initial assessment, Hogan testified that Employee seemed impaired noting his "unsteady gait, fidgety movement, … eyes were kind of rolling, flesh all red, (sic) was sweating profusely."[20] Hogan then informed Employee that he had to submit to drug and alcohol testing regardless of whether it was conducted onsite at the DDOT facility or at a local hospital.[21] Hogan then proceeded to follow the ambulance to Washington Hospital Center ("WHC") where he intended to have the testing conducted. Hogan explained that he was not alone when he followed Employee's ambulance to WHC. He traveled with Sean Cherry who works with him, and he was responsible for collecting the specimen for testing.[22] They were ultimately unsuccessful in obtaining a specimen. They could not interfere with the investigation being carried out by the MPD and they were unable to obtain the specimen when they went to WHC. Hogan noted that he had informed Employee that he was required to provide a specimen to him (or Cherry) for drug and alcohol testing. Ultimately, Employee did not comply either at the DDOT work site or at WHC.[23]

S*ean Cherry ("Cherry") Tr. pp 165 – 196, testified in relevant part as follows:*

Cherry testified that he is presently employed as a Drug and Alcohol Tester with SWAT LLC. His company is contracted by the District of Columbia government to conduct drug and alcohol specimen collection.[24] Cherry was instructed to respond to Farragut Street on the date in question in order to collect a specimen from Employee. He was at the Farragut Street location at the express direction of Hogan. Cherry recalled that he went to WHC in order to get a specimen sample from Employee. He recalled that when he attempted to approach Employee he was stopped by someone else who indicated that Employee would not provide a specimen for testing. Cherry did not know the identity of the other person. Cherry was unable to procure a sample from Employee for testing.[25]

---

[17] Hogan worked for several District government agencies, under a Memorandum of Understanding, providing his substance abuse specialist expertise.
[18] Tr. pp 137 – 138.
[19] Tr. p 139.
[20] Tr. p 143.
[21] Tr. pp 143 – 146.
[22] *Id*.
[23] Tr. pp 155 – 158.
[24] Tr. pp 166 – 168.
[25] Tr. pp 172 – 177.

Leslie Wood ("Wood") Tr. pp 195 – 218. Wood testified in relevant part as follows:

During the incident in question, Wood was employed by DDOT as a Roadway Maintenance Superintendent and Patterson was a direct report subordinate in his chain of command. Hogan called him and told him about Employee's conduct, so he instructed Hogan to call MPD and he called Cherry and instructed him to respond to Farragut Street for specimen collection. Wood responded to the Farragut Street location and was able to interview Employee. Wood testified that Employee did not admit to pushing Davila and he asserted that he was not impaired and that he did not clock in due to the employee punch clock allegedly malfunctioning. Wood did not find any of Employee's responses credible.[26] Wood noted that when an employee is under reasonable suspicion said employee is not allowed to move about freely before the test is conducted. However, Wood noted that this situation was pragmatically different due to the alleged assault and the verbal threats lodged by Employee. Given Employee's erratic and dangerous behavior, his care was offloaded to MPD and Emergency Medical Services.[27] This decision was made for the safety of everyone else in DDOT's facility.

Joseph Parker ("Parker") Tr. pp 217 – 262 testified in relevant part as follows:

Parker testified that he is a Motor Vehicle Operator for DDOT. At the time of the incident in question, Parker was serving as Vice President of AFGE Local 1975. Parker's opined "that if a person is not on the clock, they're not in a pay status that, they should not be subjected. I've never heard of a person being subjected to a drug test not being in a pay status."[28] Parker responded to DDOT's work site and then left to meet with Employee at WHC, when he learned that Employee was being transported there via ambulance. While at WHC, he told Employee that since he was not on the clock, he should not subject himself to a drug and alcohol specimen collection.[29]

During cross examination, Parker revealed that the scenario that unfolded regarding Employee was peculiar, and the advice given was his "belief".[30] Parker elaborated that since his regular position is Motor Vehicle Operator, he is regularly subjected to drug and alcohol testing from the vantage point of a post-accident review. He admitted that he did not have experience with reasonable suspicion drug and alcohol testing.[31] With respect to his directive to Employee, Parker admitted that he did not consult the President of AFGE Local 1975 before providing this erstwhile instruction; and that Article 4, Section 81 of the Collective Bargaining Agreement states that "Management has the exclusive right to direct employees of the Department."[32] Parker also admitted that when he first responded to the scene, he found Employee "inside of Government property."[33]

---

[26] Tr. pp 199 – 202.
[27] Tr. pp 208 – 212.
[28] Tr. p 218.
[29] Tr. pp 220 – 222.
[30] Tr. pp 231 – 234.
[31] *Id*.
[32] Tr. pp 244 – 248.
[33] Tr. p 248.

Employee (Tr. pp 262 – 314) testified in relevant part as follows:

Employee testified that on the date in question, he was employed by DDOT as a Laborer. He had held this position for approximately three years. Employee admitted that his apparel consisted of long johns and jacket and that it was not his uniform. He explained that he had intended to change into his uniform (DDOT issued jumper) at work.[34] He further explained that since he is a "heavy set dude" that cold temperatures generally do not affect him and that he is always "hot."[35] Regarding his interaction with Davila, Employee explained that he walked into the office to clock in to work and change clothes but then realized that he had forgotten his work ID. As he was leaving to get it, he encounters Davila in the lobby area of the office and admits to bumping him by accident and that he then told him "my bad" and proceeded to his car.[36] To his surprise, Employee was confronted by some of his colleagues who were telling him that he had assaulted Davila. Employee denies all of the following allegations: cursing; threating Davila; or screaming "I got you" or "I got you motherfuckers" to either Patterson or Davila.[37] Employee admitted that Parker met him at WHC and told him that he did not have to submit to a drug and alcohol test.[38] He also assumed that Parker was operating as his Union Representative when he was given the advice to not submit to a specimen collection.[39] Employee recalled that after he left the hospital, his aunt picked him up and he was later instructed by Wood that he could not come back to work and that he was being placed on administrative leave with pay till further notice. Employee also revealed that at the time of the incident he was being treated for anxiety disorder. Some of the symptoms included panic attacks and cold sweats.[40]

During cross examination, Employee admitted that he had volunteered to work overtime on the date in question and that he reported for work at around 6:00 am. He recalled leaving the premises after his coworker alerted him that he had assaulted Davila, he then left but decided to come back since he felt had done nothing wrong.[41] After he returned, Employee was asleep in his vehicle when he was then confronted by MPD. Employee explained that any indication of impairment noted by everyone else was due to him suffering from anxiety. Moreover, he denied having recently used drugs or alcohol prior to this incident. Employee also asserted that DDOT management never told him to submit to a drug and alcohol test and that the only time it was presented was when he was confronted by Cherry at WHC.[42] Under advice from Parker, Employee declined to submit to a drug and alcohol collection.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during Employee's appeal process with this

[34] Tr. pp 263 – 265.
[35] Tr. pp 265 – 266.
[36] Tr. pp 269 – 272.
[37] Tr. pp 273 – 276.
[38] Tr. p 278 - 280.
[39] *Id*.
[40] Tr. pp 284 -286.
[41] Tr. pp 293 – 295.
[42] Tr. pp 299 – 302.

Office. DDOT notified Employee on December 28, 2018, of the Drug Free Workplace Policy which subjects all positions within the District of Columbia government to reasonable suspicion and post-accident / incident drug and alcohol testing. Employee signed and acknowledged receipt of the notification on that same day.[43] DDOT asserts that on February 9, 2019, Employee appeared at its 414 Farragut Street work site dressed inappropriately for the weather; that, without provocation, aggressively shoved Davila; started acting dangerous and erratic shouting curse words and threatening those around him; and that he refused to submit to drug and alcohol testing under a reasonable suspicion held by various members of Agency's management team. Employee denies these allegations and asserts that any sort of erratic behavior was due to his anxiety disorder. Employee further asserts that he was never instructed to submit to drug and alcohol testing.

The Undersigned had the opportunity to observe poise, demeanor and assess the credibility of the witnesses that testified in this matter. With that, the Undersigned makes the following findings of facts:

1. On February 9, 2019, Employee appeared at DDOT's 414 Farragut Street work site to work an overtime shift that he had volunteered for.

2. When he presented himself for work, he was dressed wholly inappropriately for the prevailing weather conditions in that he was bare chested, shirtless and wore long john bottoms, and an unzipped jacket.

3. When Employee first entered the office area of this worksite, he encountered Davila and without provocation aggressively shoved him. Employee then became aggressive and boisterous and started shouting dangerous and violent threats including "I got you motherfuckers!"

4. Inexplicably, Employee left the premises and short time later returned to be greeted by MPD officers. After initial review, EMS personnel were summoned. During this time frame, Employee was questioned by Agency management and was first told he would need to submit to drug and alcohol testing. However, this did not occur because Employee was taken by EMS personnel to WHC.

5. While there, Employee followed bad advice from Parker telling him to not provide a drug and alcohol sample to Cherry (who was present solely to provide that service). Employee was initially placed on administrative leave with pay and after internal DDOT review, was eventually removed from service.

Despite Employee's contention to the contrary, I find that DDOT's removal action was appropriate given the circumstances. Employee asserts that he should not have been subjected to drug and alcohol testing since he had not officially punched in to start his workday. What Employee fails to consider is that he was firmly present on DDOT's premises and was attempting to report for duty. He would have Agency wait for him to "clock in" while he was acting dangerous, erratic and issuing threats. Given the circumstances, I find that Agency utilized its

[43] Agency Closing Argument p. 2 (November 22, 2021).

authority appropriately when it required Employee to submit himself for drug and alcohol testing. Employee also contends that a member of Agency management was required to follow him throughout this process till the specimen collection was complete. Practically speaking, Employee was acting erratic and violent, so I find that Agency acted appropriately when it alerted authorities and allowed them to take charge of the situation thereby ensuring the safety and well-being of everyone present. I also find that Employee's claim that the Agency changed the causes of action against Employee between the Proposed and Final stage of the Adverse action is erroneous and untrue. Agency used the same two causes for both the proposed and final stage of the Adverse Action against Employee.[44]

I find that Agency's adverse action was within the Table of Illustrative Penalties as codified in 6B DCMR 1607.2. The table illustrates a penalty of a 14-day suspension to removal for the first offense for *Assaulting, fighting, threatening, attempting to inflict, or inflicting bodily harm while on District property or while on duty*. The table illustrates a penalty of removal for the first offense for *Interfering with, refusing or failing to submit to a properly ordered or authorized drug test, including substituting, adulterating, or otherwise tampering with a urine sample*. Therefore, the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment. *See Employee v. Agency*, OEA Matter, No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Overall, I find that Agency's testimony and rendition of events as shared by Davila, Patterson, Cherry, Wood, Hogan, and Toner were forthright, credible and consistent. Conversely, I also find that Employee's explanations of his actions in this matter were inconsistent, untrustworthy and self-serving. I further find that Agency's action was done in accordance with applicable laws or regulations. My examination of the record reveals that Agency's action was proper. Given the gravity of the conduct and the proper procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to remove Employee from service under both charges of misconduct levied against Employee.

Appropriateness of the Penalty

When assessing the appropriateness of the penalty, OEA is not to substitute its judgment for that of the agency. *Stokes v. District of Columbia*, 502 A.2d 1006, 1985 (D.C. 1985). The OEA itself recognized in *Employee v. Agency*, 29 D.C. Reg. 4565, 4570 (1982):

> Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for this Office to specify how the Agency's penalty should be amended. This office is guided in this matter by the principles set forth in *Douglas v. Veterans Administration, [supra]*.

Although the OEA has a "marginally greater latitude of review" than a court, it may not

[44] See, Agency's Exhibit Nos. 10 and 13.

substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Douglas v. Veterans Administration, supra*, 5 M.S.P.B. at 327-328. The "primary discretion" in selecting a penalty "has been entrusted to agency management, not to the [OEA]." *Id.*at 328.

> Selection of an appropriate penalty must . . . involve a responsible balancing of the relevant factors in the individual case. The [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.
>
> *Id.* at 332-333. *See also Villela v. Department of the Air Force*, 727 F.2d 1574, 1576 (Fed. Cir. 1984).

In this matter, I find that the relevant *Douglas* factors were carefully considered when determining the appropriate penalty for Employee. I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing Employee from service should be Upheld. [45]

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of REMOVING Employee from service is hereby UPHELD.

FOR THE OFFICE:

/s/ *Eric T. Robinson*
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[45] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").