THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARY FELDER,	)	
Employee	)	OEA Matter No. 1601-0262-10
	)	
v.	)	Date of Issuance: February 22, 2013
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC LIBRARY,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Mary Felder, Employee, *Pro Se*
Grace Perry-Gaiter, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 4, 2010, Mary Felder ("Employee") timely filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Library's ("DCPL" or "Agency") decision to terminate her from her position as a Library Technician effective January 5, 2010. Following an administrative review, Employee was terminated for "the use of illegal drugs and a positive drug test result" as outlined in 6 District of Columbia Municipal Regulations ("DCMR") 1603.3.[1] On February 8, 2010, Agency submitted a Motion for an Enlargement of Time to file its Answer to Employee's Petition for Appeal. On February 18, 2010, Agency filed an Amended request to its February 8, 2010, Motion. Subsequently, on February 18, 2010, Employee submitted a Denial of Motion for Extension of Time. On March 19, 2010, Agency filled its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") in June of 2012. Thereafter, on June 11, 2012, I issued an Order Scheduling a Status Conference in this matter for July 11, 2012. Both parties were in attendance. Because this matter could not be resolved based on the documents on record, the undersigned on July 12, 2012, issued an Order scheduling a Prehearing Conference for August 8, 2012. On August 8, 2012, Agency submitted its Prehearing Statement, along with its Motion to Dismiss. An Evidentiary Hearing was initially scheduled for October 9 and 10, 2012. However, due to a scheduling conflict, on August 13, 2012, the undersigned issued an Order Rescheduling the Evidentiary Hearing for October 16, and 17, 2012. An Evidentiary Hearing was held in this matter on October 16, 2012. Both parties were present for the Evidentiary Hearing.

[1] *See also* District Personnel Manual ("DPM") §1603.3(i).

Following the Evidentiary Hearing, I issued an Order dated November 6, 2012, notifying the parties that the transcripts from the Evidentiary Hearing were available for pick up at this Office. The Order also provided the parties with a schedule for submitting their written closing arguments. The written closing arguments were due on or before December 21, 2012. Both parties have complied. 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 Employee's actions constituted cause for removal; and

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

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.

SUMMARY OF MATERIAL TESTIMONY

Agency's Case in Chief

1) Barbara Kirven (October 16, 2012. Transcript pgs.13-31)

Barbara Kirven ("Ms. Kirven") is the Director of Human Resources at Agency. She has been in this position since February of 2009. Ms. Kirven testified that DCPL is one of the District government agencies that have safety-sensitive employees. Ms. Kirven also testified that the Library Technician position is a safety-sensitive position. Ms. Kirven noted that, once an employee has a positive drug test, D.C. Human Resources' ("DCHR") Compliance Unit conducts an investigation for Agency. And with the results of those investigations, DCHR prepares a package which is given to Employee, the Hearing Officer, and one copy kept for Agency's file.

Ms. Kirven also stated that she is not aware of any request from Employee for drug counseling prior to her drug testing. Ms. Kirven explained that, once she is notified that an employee in a safety-sensitive position has a positive drug test and needs to be removed, the employee is placed on a paid administrative leave pending investigation. She also testified that, upon a positive drug test, a recommendation for termination usually goes forward after the employee has a hearing wherein they are given the opportunity to present their case. Ms. Kirven also stated that she can't recall if the hearing in this case was requested by Employee.

Ms. Kirven testified that the child safety-sensitive positions were already in place prior to her arrival at Agency. When asked if the Library Technician position was a child safety-sensitive position in 2006, at the time Employee was hired, Ms. Kirven stated that, she could not testify to something that occurred prior to her arrival at Agency. However, she noted that she can explain the process after her arrival at Agency. She further testified that the safety-sensitive list existed prior to her arrival, but she doesn't know when it went into effect.

Ms. Kirven testified that while the safety-sensitive positions had already been identified when she arrived at Agency, Agency had not yet implemented any drug testing. She further noted that one of the first trainings began under her supervision. According to Ms. Kirven, no Agency employee was subject to random drug testing until at least thirty (30) days after they had participated in the training.

2) Angela Simpson (Transcript pgs. 32 -56).

Angela Simpson ("Ms. Simpson") is the Training and Development Manager with Agency, as of February of 2009. She provides safety-sensitive training for Agency's employees. She testified that she provided training for Employee in April of 2009. She explained the training process for the safety-sensitive training, and she went through the training package. Ms. Simpson also stated that all safety-sensitive employees received training. These employees received the manual, containing the entire policy on drug and alcohol testing; a copy of the COPE brochure; a fact sheet which summarizes some of the very vital questions that employees may have in regards to being in a safety-sensitive position; another fact sheet that was identified from the questions that came up during training; and some warning signs as it relates to the different types of drugs.

Ms. Simpson further testified that the trainees were provided with a copy of the actual Individual Notification of Requirements for Drug and Alcohol Testing form ("Notification form"), which they sign at the end of the training. Ms. Simpson stated that the forms came labeled with the employees' names, their employee number and the agency; and every employee who attends the training has to sign the Notification form before they leave. She also explained that, upon signing and dating this form, the employees have thirty (30) days to notify the agency if they have any drug and alcohol problems, or be placed into the random testing pool. Ms. Simpson also testified that at the end of the training, she had a question and answer period for the employees. Ms. Simpson also noted that Employee's signature on the sign-in sheet is proof that she attended the training. She mentioned that training participants were informed on how to get assistance through COPE, through self-referral or talking to their supervisor.

Ms. Simpson recalls Employee attending the training because Employee was very vocal and asked a question during the training. Ms. Simpsons testified that since the form layout is confusing, at the end of the training, she goes over the acknowledgments of each individual Notification form,

and explains to the employees that they have thirty (30) days from the date on the form to notify the Employee Assistance Program ("EAP") that they may be in need of assistance. Ms. Simpson further noted that she always tell all the employees to make sure they read anything that they sign, before signing and handing the Notification forms back to her. Once the Notification forms were signed by the employees and handed to her, Ms. Simpson signed her name and gives the employees a pink copy, the employee's copy. Ms. Simpson identified Employee's Notification form which had her and Employee's signature. She explained that the reason the Notification form has to be dated is because, thirty (30) days from the date on the form, the employee would be placed in the random testing pool. She also stated that, to her knowledge, Employee did not inform the EAP or Agency that she was in need of assistance.

Ms. Simpson testified that Employee was one of the first employees who first spoke to her, and welcomed her when she came to Agency. Ms. Simpson also noted that she could not recall in what order Employee or anybody came into the room on the day of the training, since there were a lot of people in the room. Ms. Simpson also stated that although Employee's name was listed up top on the roster, Employee signed at the bottom probably because she assumed her name was not on the roster at all. She further explained that because Employee signed the roster last, it doesn't actually mean that she was the last person to show up at the class. Ms. Simpson also testified that the employees' managers do not get a copy of the signed Notification form. A copy of the form is kept in Agency's HR office, a copy given to the employee and a copy sent to DCHR. According to Ms. Simpson, she did not specify any amount of time for the employees to sign the Notification form, she just asked them to read and sign the form.

Ms. Simpson testified that she did not tell the employees that a copy of their Notification form would be given to their managers. She reiterated that a copy of the form is kept in Agency's HR office, a copy given to the employee, a copy sent to DCHR, and a copy is destroyed because it's of no use to Agency. She again noted that the entire training package is given to each employee during the training session, and employees have thirty (30) days from the date of signing the Notification form to notify EAP or COPE or D.C. Human Resources that they need assistance. She explained that employees are not tested prior to the expiration of the thirty (30) days. Ms. Simpson also testified that she advised the employees to contact her with any questions via email, and that they had the entire package to read within thirty (30) days.

Ms. Simpson testified that she did not have any employees who attended the training who refused to sign the Notification form. She explained that by signing the Notification form, the employee is acknowledging that they are in a safety-sensitive position, and thirty (30) days from the date they sign the form, they will be placed in the random testing pool. Ms. Simpson stated that she did not at any point during the training tell the employees that they did not have to sign the Notification form. However, employees who had problems with the form did acknowledge that to her, but she does not recall Employee being one of such employees.

3) Sonya Williams (Transcript pgs. 58 – 65)

Sonya Williams ("Ms. Williams") is a Risk Manager with Agency. She also serves as a Hearing Officer for Agency when an employee requests a hearing. Ms. Williams testified that she authored the Report and Recommendation on Thirty (30) Days of Adverse Notice of Proposal to Terminate Employee which she sent to a Deciding Official. She also stated that her conclusion in the abovementioned Report and Recommendation is based on information she received from DCHR,

Human Resources Office, the packet sent along with the result of the drug test, and any information she obtained from the Employee. Ms. Williams further testified that her recommendation to terminate Employee was based largely on the November 5, 2009, letter signed by Employee, wherein, she indicated that "I am fully aware of the child safety rule and I take full responsibility for my actions," as well as "my selfish act of off-duty recreation has place my employment in jeopardy, and I humbly apologize for my actions" (Tr. pg. 63) and the positive drug result.

Ms. Williams noted that termination was the end result for a positive urinalysis test. She noted that her recommendation for termination in such cases is not based on her own judgment, but rather on her training in understanding what safety-sensitive meant.

4) Eric Coard (Transcript pgs. 65 – 72).

Eric Coard ("Mr. Coard") is a Business Consultant with Agency and was the Deciding Official in this matter. Mr. Coard authored the Notice of Final Decision Proposed for the Removal of Employee. Mr. Coard testified that he arrived at the decision to terminate Employee based on the Report and Recommendation from the Hearing Officer, Ms. Williams, and on the documentation from DCHR that showed that Employee tested positive for drugs. He noted that Agency's action against Employee was appropriate as Agency followed the Child and Youth Safety and Health Omnibus Amendment Act of 2004 in instituting this adverse action against Employee. Mr. Coard further stated that Agency's position is to terminate employees who test positive for random drug testing.

Mr. Coard testified that he does not know how long Employee was on Administrative leave prior to being terminated following this incident. He does not understand the termination process once he issues the Notice of Final Decision Proposed for the Removal of Employee. Mr. Coard testified that prior to issuing the above referenced Notice on December 29, Employee was still employed by Agency. He also stated that it is not within his authority to recommend another drug test for Employee before making his final decision.

Employee's Case in Chief

5) Mary Felder (Transcript pgs. 72-80).

Mary Felder ("Employee") is a former employee of Agency. She testified that she had worked with Agency for four and a half (4.5) years before she was wrongfully terminated. Employee noted that until now, she had never had any positive urinalysis, and she believed that termination was not an appropriate penalty. Employee also stated that when she was hired in 2006, she did not have a urinalysis, and no one mentioned during her orientation that the Library Technician position was a child safety-sensitive position. Employee explained that Agency instituted new rules in 2009, which were different from the rules in effect when she was hired in 2006. As a Career employee, she should not have been terminated for the current offense since she never had any prior infraction for a positive urinalysis while working at DCPL.

Employee testified that she attended safety-sensitive training in April of 2009. She noted that she got a piece of paper at the training, but she did not get a chance to read over before signing the paper. Employee also testified that she received the Notification form at the end of the training; however, she was not aware that she had thirty (30) days to notify EAP or DCHR that she needed

assistance with drug usage. Employee explained that she was told by Ms. Simpson that the paper she signed would be given to her manager as proof that she attended the training. She also noted that she did not have a chance or enough time to read the Notification form because she dated it with the wrong date. (Tr. pg.76). Employee agreed that she could have asked clarifying questions about any part of the training that she did not understand at the end of the class. However, she noted that she was not aware that she could call District of Columbia Public Library Human Resources to ask questions about any part of the training that she did not understand. Employee further testified that she did not ask any questions at the training, and she did not learn that her position was a safety-sensitive position during the training. Employee also testified that she authored and submitted a letter to Agency as part of her hearing documentation. And when asked if she stated the following in the letter: "I'm fully aware of the child safety rule and I take full responsibility for my actions" (Tr. pgs 78-79), she answered in the affirmative. Employee was also questioned if she wrote the following statement in the letter "my selfish act of off-duty recreation has placed my employment in jeopardy, and I humbly apologize for my actions," and she again responded in the affirmative. (Tr. pg 79). Employee further stated that "my urinalysis was dirty, so evidently, that I had anticipated on my recreation, yes, I did admit that my urinalysis was dirty, so yes, I did admit that I had smoked marijuana, yes, that's a true thing, yes." (Tr. pg 79).

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

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

Following a positive drug test, Employee was removed from her position as a Library Technician effective January 5, 2009. When Employee was initially hired in 2006, she was not informed that her position was a child safety-sensitive position. However, sometime before 2009, Employee's position was made a safety-sensitive position, subject to Title II of the Child and Youth Safety and Health Omnibus Amendment Act of 2004 ("the Act"). The Act, which became effective on June 10, 2008, requires employees in safety-sensitive position to undergo mandatory random drug and alcohol testing.[2] All employees in safety-sensitive positions, including Employee, were required to attend mandatory Drug and Alcohol training to educate them on the requirements of the Act. Employee attended mandatory training on April 17, 2009.[3] At the training, Employee was again informed that (1) her position, Library Technician position, was a safety-sensitive position;[4] (2) she would be subject to random drug and alcohol testing, as well as criminal background checks; and (3) she had thirty (30) days from the date she signed the Notification form to disclose any drug and/or alcohol problems to COPE and/or self-referral so that her name would be removed from the random testing list while she received treatment. Employee was also provided with copies of the training documents.[5] During the training session, Employee signed the class roster.[6] Employee also signed and was given a copy of the Notification form after it was signed by Employee and Ms. Simpson.[7] The Notification form signed by Employee at the end of the training informed Employee that she had

[2] Agency's Prehearing Statement (August 8, 2012) at Appellee's Exhibit 1. The provisions of the Act are contained in Chapter 39 of the DPM.
[3] *Id.* at Appellee's Exhibit 8b.
[4] *Id.* at Appellee's Exhibit 2.
[5] *Id*. at Appellee's Exhibit 8a.
[6] *Id.* at Appellee's Exhibit 3.
[7] *Id*. at Attachment 1.

thirty (30) days from the date of signing the form to notify COPE or Agency of any alcohol or drug related problems.

Employee did not disclose to COPE and/or Agency that she had alcohol and/or drug problems; thus, she was not removed from the random testing list for alcohol and drug testing. Thereafter, Employee was selected for a random drug and/or alcohol test on August 11, 2009, which was conducted by Laboratory Corporation of America Holdings ("LabCorp).[8] Employee tested positive for marijuana.[9] On October 6, 2009, Agency issued a Notice of Proposed Adverse Action to Employee.[10] Subsequently, on November 6, 2009, Employee submitted a letter to Agency stating that "I'm fully aware of the child safety rule and I take full responsibility for my actions… my selfish act of off-duty recreation has placed my employment in jeopardy, and I humbly apologize for my actions."[11] This matter was referred to a Hearing Officer, whom, on December 8, 2009, issued a Report and Recommendation upholding Agency's decision to terminate Employee.[12] On December 29, 2009, Agency issued a final agency decision terminating Employee.[13]

1) Whether Employee's actions constituted cause for removal

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* (emphasis added).

In the instant matter, Agency asserts that by having a positive marijuana result during a drug test, Employee violated DPM §1603.3(i). Employee does not deny that she tested positive for marijuana, she simply argues that (1) she was not given an opportunity to seek treatment prior to the testing; (2) her position was not a child safety-sensitive position when she was hired; and (3) she did not receive a "frequently asked questioned" sheet prior to being tested as provided in the Act.[14] However, the November 5, 2009, letter from Employee to Agency contradicts these assertions. In the letter, Employee acknowledges that she was aware of the child safety-sensitive rules. Moreover, during the Evidentiary Hearing, Employee testified that she submitted the November 5, 2009, letter to Agency. The Act which became effective in 2008 made Employee's position a safety-sensitive position. Employee was notified of this change in an email dated June 10, 2008.[15] And while Employee's position was not a safety-sensitive position when she was hired in 2006, she was informed in 2008 that according to the Act, her position was now being considered a safety-sensitive position. Moreover, Employee was also afforded training applicable to safety-sensitive positions, and she was also informed during that training that her position was now a safety-sensitive position. Therefore, I find that Employee was aware of the nature of her position, and she received the appropriate training pertaining to such position.

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[8] *Id.* at Attachment 2.
[9] *Id.* at Attachment 4.
[10] *Id*. at Appellee's Exhibit 4
[11] Agency's Exhibit 7 (October 16, 2012). *See also* transcript at pgs. 78-79.
[12] *Id*. at Agency's Exhibit 6.
[13] Id. at Agency's Exhibit 8.
[14] Employee's Closing Arguments (January 2, 2013).
[15] Agency's Prehearing Statement *supra,* at Appellee Exhibit 1.

Employee also testified that she did not have enough time to read and sign the Notification form at the training. Employee explained that she thought the Notification form she signed was for submission to her Manager and she did not look at the content of the form she signed. Despite her arguments, Employee was given a copy of the form to take home, and she had thirty (30) days from the date she signed the Notification form to inform Agency of her drug problems, which she failed to do. I find that thirty (30) days is sufficient time to read, and make an informed decision on the subject matter. Moreover, Ms. Simpson testified that she admonished the employees at her training to read any document before signing. She also testified that she provided employees with her email, and encouraged them to contact her after the training if they had questions.

As an employee in a safety-sensitive position, Employee herein was required to submit herself to random mandatory drug and alcohol testing. During such random testing, Employee tested positive for marijuana, a violation of the Act. Employee was provided with a Notification form on April 2009, informing her that she occupied a safety-sensitive position within Agency. According to this document, Employee was informed that she was required to participate in random drug and alcohol testing, unless she self-identified that she had a drug problem within thirty (30) days of receiving the Notification form. As of August 11, 2009, when Employee was selected for drug testing, more than thirty (30) days from April 17, 2009, Employee had not notified Agency that she had a drug problem; consequently, she was placed in the random drug testing pool. Employee highlights that she informed her supervisor, and Union Representative, Toni Richardson-White, about her drug problems.[16] However, throughout the appeal process, Employee did not offer any evidence in support of this assertion. Employee did not enlist testimonies and/or affidavits from these individuals. Furthermore, Employee was made aware in the Notification form that if an employee did not self-identify within thirty (30) days, any confirmed positive drug test results *shall* be grounds for termination of employment (emphasis added). Employee held a safety-sensitive position; she was aware of Agency's drug policies; she did not notify Agency or COPE of any drug problems; and she tested positive for drugs. Accordingly, I find that Employee's positive drug test is sufficient cause for Agency to terminate Employee.

In addition, Employee asserts that she was not given an opportunity to seek treatment prior to the testing, referencing the provisions of the Act. The purpose of the Act is to inform covered employees of the program, "…and to allow each covered employee one (1) opportunity to seek treatment *prior to testing* if he or she has a drug or alcohol problem" (emphasis added).[17] Per the aforementioned provision, an employee will only be given an opportunity to seek treatment prior to testing. Here, Employee highlights that she informed her supervisor, and Union Representative, Toni Richardson-White, about her drug problems prior to being tested. However, as previously noted, Employee has not submitted any evidence in support of this assertion. Moreover, Employee did not notify COPE or Agency about her drug problems, so that she could be removed from the random drug testing pool, but she failed to so do. Because Employee only raised her drug problem after she received a positive drug test, I find that this provision does not apply to her.

In her closing argument, Employee also references §V(5) of the Act, which applies to covered employees who had been detailed to non-safety-sensitive positions after disclosing a drug problem. This section provides that, such employees shall be subject to return to duty testing upon completion of the counseling and rehabilitation program and prior to resuming safety-sensitive duties. This section is irrelevant to this matter because Employee was never detailed. She was hired

[16] *Id*.
[17] Agency's Exhibit 3 (October 16, 2012).

by Agency in 2006 as a Library Technician, and she occupied said position when she was terminated. And Employee has not provided this Office with evidence to the contrary. Additionally, Employee has not provided any evidence that she disclosed her drug problem to COPE or self-referred to Agency and as such, Agency was not under any duty to detail Employee to a non-safety-sensitive position while she completed counseling and rehabilitation as provided in the Act. Consequently, I find that, Agency was not required to provide her with an opportunity to seek treatment.

Employee also argues that she did not receive a frequently asked questioned sheet ("FAQ") prior to being tested as provided in the Act. She notes that the first time she saw the FAQ was in the training package which was included as an Exhibit in the Evidentiary Hearing. Section VIII of the Act highlights that, along with the Notification form, an FAQ sheet will be distributed to each covered Employee prior to being tested. As per Ms. Simpson's testimony and affidavit, Employee was provided with the entire training package in April 2009, which included an FAQ. Employee does not contest that she did not receive the training package during the training in April of 2009; she only asserts that she did not receive the FAQ. The training package submitted by Agency in support of it arguments contains the FAQ. Based on the record, it can be reasonably assumed that the FAQ was part of the training package Employee received in April of 2009, and like the Notification form, Employee simply did not go take the time to read through the training material after the training.

Given the record, and the totality of the circumstances, I conclude that (1) Employee was aware that her position was classified as a safety-sensitive position under the Act; (2) she signed the Notification form in April of 2009; (3) she was tested in August of 2009, more than thirty (30) days from the time she signed the Notification form; (4) her urine analysis conducted by LapCorp, a credible and independent laboratory, was positive for marijuana, an illegal drug; (5) she admitted that her urine was 'dirty" (tr. pg. 79); (6) she admitted to using marijuana (tr. pg. 79); and (7) she admitted that she was fully aware of Agency's child safety rules. Consequently, I further conclude that her conduct renders her unsuitable to continue performing her duties as a Library Technician and as such, Agency was justified in instituting an adverse action against 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).[18] 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 "*[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 as such, Agency can rely on this charge in disciplining Employee. (Emphasis added).

[18] *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).

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties ("TAP"). Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalties for "[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" is found in DPM § 1619.1(9). Employee argues that the penalty of termination is not progressive. Employee opined that, termination was inappropriate because she was a career service employee and this was her first infraction. The penalty for a first offense for § 1619.1(9) is a fifteen (15) days suspension to removal. As an employee holding a safety-sensitive position, Employee was aware of the District's drug free policy and zero tolerance policy. Employee was also provided with the opportunity to self-identify within thirty (30) days if she had a drug problem, but she failed to do so. Employee's conduct is consistent with the language of § 1619.1(9) of the DPM. Moreover, DPM § 3907.1 provides *inter alia* that, a confirmed positive drug test shall be grounds for termination if the notification requirement in § 3904 of this chapter has been met. Agency has met the notification requirements, and therefore; I find that Agency did not abuse its discretion when it terminated Employee for testing positive for marijuana, an illegal drug.

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.[19] 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. I find that the penalty of removal was within the range allowed by law. Accordingly, Agency was within its authority to remove Employee given the TAP.

Penalty was based on consideration of relevant factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[20] Employee argues that by removing her, Agency abused its discretion. The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.[21] In this case, the penalties for a first time offense for this cause of action range from a

[19] *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).

[20] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

[21] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

fifteen (15) days suspension to removal. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency explained that Employee's November 5, 2009 letter, along with the positive drug test were factors in its decision to terminate Employee. Agency also notes that Employee held a safety-sensitive position and her conduct in the instant matter poses a safety risk to children and youth. Agency maintains that Employee's positive drug test and use of illegal drugs makes her unsuitable for her position at DCPL. 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 clearly not 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 and Agency's Motion to Dismiss is DENIED, as it is now moot.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Administrative Judge

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3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.