THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0016-21
[redacted]	
Employee	
	Date of Issuance: March 23, 2022
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES,	ARIEN P. CANNON, ESQ. Administrative Judge
Agency	

Employee, *Pro se*
Bradford Seamon, Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 2, 2021, challenging the District of Columbia's Department of Youth Rehabilitation Services' ("Agency") decision to terminate her employ. Pursuant to a letter issued by OEA on April 22, 2021, Agency's Answer was due on or before May 22, 2021. Agency filed its Answer on May 13, 2021. I was assigned this matter on September 3, 2021.

A Prehearing Conference was convened in this matter on October 26, 2021. Subsequently, a Post Prehearing Conference Order was issued which required the parties to submit legal briefs supporting their position. Employee's brief was due on or before November 30, 2021; Agency's brief was due on or before December 30, 2021; and Employee's was afforded the opportunity to submit a sur-reply brief on or before January 14, 2022. Employee submitted lab test results via email on January 5, 2022.[1] No additional arguments were submitted by Employee along with her lab results. Agency submitted its Brief in Support of Employee's Termination on January 6, 2022. The record is now closed.

[1] The lab test results submitted by Employee contained personal identifying information. In a January 3, 2022 email, the undersigned requested that Employee resubmit her lab test results and redact her confidential and personal identifying information. Because Employee did not resubmit a redacted version of her lab test results, the undersigned took the liberty of redacting Employee's date of birth on all lab tests submitted by Employee.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee for a positive drug test result, pursuant to 6B DCMR§§ 435.6[2] and 1605.4(h).

2. 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

Employee began her employment with Agency on October 3, 2016, when she was hired as a Youth Development Representative ("YDR") and held this position at the time of her termination. YDRs occupy safety-sensitive positions subject to enhanced suitability screenings, including random drug and alcohol testing and reasonable suspicious testing.[3] On June 24, 2020, Employee signed the "Individual Notification of Requirements Drug and Alcohol Testing" form, acknowledging that she was subject to enhanced suitability screening, including reasonable suspicion testing.[4] This form advised that safety-sensitive employees who test positive for marijuana are presumed to be in violation of this policy and subject to administrative action, including termination. The form also advised that Employee had 30 days from receipt of the form to self-report any existing drug and alcohol use. Employee did not self-report any drug or alcohol use.

On September 30, 2020, YDR Ashley Colbert observed Employee falling asleep while on duty.[5] While speaking with Employee, YDR Colbert noticed that Employee struggled to

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[2] Agency cites to § 435.6 in its Notice of Separation to Employee. However, the District Personnel Manual ("DPM") regarding suitability (Chapter 4) was recently amended. This particular section now corresponds with 6B DCMR § 436.6 and will be referenced as § 436.6 throughout this decision.
[3] Safety-sensitive positions are outlined in 6B DCMR §§ 409.2 and 410.
[4] *See* Tab 3 to Agency's Answer (May 13, 2021).
[5] *See* Tab 3 to Agency's Answer (May 13, 2021).

communicate clearly regarding some of her work duties. YDR Brittany Sweetney also observed Employee sleeping and believed Employee to be impaired based on Employee's behavior.[6] YDR Sweetney reported her observations to Shift Commander Patricia Smith, who then notified Operations Lead Kianna Richardson, and the Shift Commander on duty, Jacqueline Brown.[7] After seeking guidance regarding the proper protocol for handling an employee suspected of being under the influence of drugs or alcohol, Shift Commander Brown was instructed to refer Employee for a drug test by completing a Reasonable Suspicion Observation Form. In this form, Shift Commander Brown also indicated that she observed Employee being uncharacteristically "talkative" and appearing "emotional" when leaving the bathroom.[8]

Part of the reasonable suspicion process involved Employee being referred for a drug test where she submitted a urine sample for analysis. Employee's sample tested positive for the presence of Cannabinoids.[9] Dr. Neha Badheka, the Chief Medical Review Officer, interviewed Employee as part of the screening process and Employee failed to provide a medical explanation that would explain the positive test result.

On December 4, 2020, the District of Columbia Department of Human Resources' ("DCHR") Compliance Review Manager, Tamika Cambridge, issued a Notice of Proposed Separation to Employee. This notice advised that Employee was in violation of 6B DCMR §§ 436.6 and 1605.4(h) by submitting a positive drug test. Upon review of the Hearing Officer's Report, DCHR Associate Director Justin Zimmerman, who served as the Deciding Official, concurred with the recommended action and issued a Notice of Separation to Employee on January 28, 2021.[10] Employee's termination became effective on February 1, 2021.

Agency's Position

Agency relies upon 6B DCMR § 436.6 which provides that a positive drug or alcohol test shall render an individual unsuitable for District employment and constitutes cause under Chapter 16 of the DPM. Furthermore, Agency cites 6B DCMR § 1605.4(h), which provides that testing positive for intoxicants while on duty constitutes cause and warrants adverse action. Agency elected to terminate Employee pursuant to these two provisions for testing positive for marijuana on September 30, 2020, while on duty.

Employee's Position

In response to the undersigned's October 26, 2021 Post Prehearing Conference Order, which required the parties to submit briefs addressing their arguments, Employee simply provided lab test results taken outside of the relevant time frame in the instant matter. Specifically, Employee submitted lab test results from August 31, 2020, March 1, 2021, June 1, 2021, and

[6] *Id.*
[7] As part of the referral process, YDR Sweeney, Shift Commander Smith, and Operations Lead Richardson all completed Incident Notification Forms describing their observations and/or involvement in this matter.
[8] *Id.*
[9] *Id.*
[10] *See* Tab 4 to Agency Answer.

August 24, 2021. Employee did not provide a brief or any other written arguments, other than her statement submitted with her Petition for Appeal, to support her position.

Discussion

While Employee did not specifically present any arguments in response to the Post Prehearing Conference Order, in Agency's brief, it addressed Employee's previous arguments submitted to the Hearing Officer and reiterated by Employee at the prehearing conference. Primarily, Employee asserted that her drug test was inaccurate. However, 6B DCMR § 427.5 provides a process for employees to challenge the accuracy of drug test results, stating that an employee may authorize that their stored urine sample be sent to another HHS-certified laboratory of his or her choice, at his or her expense, for a confirmation using the GCMS testing methodology. Employee did not follow this process; therefore, Agency contends that Employee waived her opportunity to challenge the urine sample which resulted in a positive drug test. I agree.

6B DCMR § 429.4 provides that evidence submitted by an employee to rebut a presumption of impairment must be clear and convincing. Employee presented no such evidence at the administrative level prior to her termination, nor has she presented any such evidence to this tribunal. In a statement along with her Petition for Appeal, Employee asserts that her drug test was inaccurate because she regularly takes prescribed opioids which did not register on the drug test leading to her termination. However, Employee has failed to show that she was, in fact, taking opioids that would have registered at the time of her positive marijuana test. The August 31, 2020 LabCorp drug test submitted by Employee show that she tested positive for "Oxycodone Class" and "Other Opioids." The March 1, 2021, June 1, 2021, and August 24, 2021 drug tests submitted by Employee also show results indicating oxycodone use. However, Employee has not submitted any documentation showing that she was taking opioids in close proximity to the September 30, 2020 drug test which led to her termination.

Significantly, Employee has not identified the type of medication prescribed to her and has not provided any proof of a prescription for the relevant time. Thus, no determination can be made as to whether this alleged medicine should have or would have actually registered a positive opioid result on the September 30, 2020 drug test. Even if the Agency-administered test should have detected the presence of opioids and failed to do so, that would not necessarily indicate that the detection of marijuana, or 'cannabinoids,' was erroneous or unreliable.

Additionally, Employee seemingly attempts to use the negative 'cannabinoids' result from her August 31, 2020 LabCorp test as evidence that she had not consumed marijuana at the time of her September 30, 2020 Agency-administered test. However, the drug test from the month prior does not negate the September 30, 2020 drug test that led to Employee's termination. As such, I find the August 31, 2020 LabCorp test irrelevant to the instant matter. The results of this drug test from the month prior does not negate the September 30, 2020 drug test results that led to Employee's termination.

Employee was on notice of the District's drug policy at the time of her positive drug test and violated that policy, rendering her unsuitable to remain a YDR. Furthermore, in conjunction

with Employee's positive drug test for 'cannabinoids', the behavior observed by Employee's colleagues led them to reasonably suspect that she was impaired or under the influence of drugs while on duty in her safety sensitive position. Thus, Employee's attempt to minimize her September 30, 2020 positive drug test by showing she tested negative for Cannabinoids on a previous occasion is not "clear and convincing." Accordingly, I find that Agency had cause to take adverse action against Employee for violating 6B DCMR §§ 436.6 and 1605.4(h) by submitting a positive drug test.

Appropriateness of the Penalty

In assessing the appropriateness of the penalty, the OEA is limited to ensuring that "[m]anagerial discretion has been legitimately invoked and properly exercised."[11] According to *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. Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the administrative judge.[12] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[13] As explained above, I find that Agency had cause to take adverse action against Employee for a positive drug test for Cannabinoids.

The Table of Illustrative Actions contained in 6B DCMR § 1607 authorizes removal on the first occurrence of the misconduct committed by Employee. Moreover, 6B DCMR § 428.1 expressly states that an employee who renders a positive drug test in a safety sensitive position is deemed unsuitable and immediately subject to separation. This sentiment is also reiterated by 6B DCMR §§ 436.6 and 400.4. I find that Employee's removal was not an error in judgment and therefore must be left undisturbed. Thus, removal in this case is clearly within the range of penalties allowed by the DPM. Furthermore, DCHR considered all twelve *Douglas*[14] factors in a Rationale Worksheet in arriving at the appropriate penalty as set forth in the December 4, 2020 Notice of Proposed Separation.

The undersigned recognizes that the DPM's guidance regarding a positive cannabis test has recently changed; however, I do not find these changes applicable to Employee. 6B DCMR § 429.2 provides that an employee who *randomly* tests positive for marijuana with *no additional evidence of impairment* will generally be subject to a five (5) day suspension on his or her first offense. Here, Employee's drug test was not random, but rather was the result of Agency's reasonable suspicion based on the observations of multiple colleagues who believed Employee to be impaired. Therefore, 6B DCMR § 429.2 is inapplicable and Employee is still subject to the regulations provided by 6B DCMR § 1607, which authorizes removal on the first offense of a positive drug test result.

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[11] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[12] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[13] *Id*.
[14] *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981).

ORDER

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

FOR THE OFFICE:

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