THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PRESTON WOODARD,	)	
Employee	)	OEA Matter No. 1601-0094-11
	)	
v.	)	Date of Issuance: December 10, 2012
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Preston Woodard, Employee *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 11, 2011, Preston Woodard ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("OSSE" or "Agency") decision to terminate him from his position as a Motor Vehicle Operator ("Bus Driver") effective April 1, 2011. Following an Agency investigation, Employee was charged with violating "[a]ny act that constitutes a criminal offense whether or not the act results in a conviction; and [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" in accordance with Sections 1603.3(h) and (i) of the District Personnel Manual ("DPM").[1] On July 12, 2011, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 30, 2012. Thereafter, I issued an Order scheduling a Status Conference in this matter for September 12, 2012. Both parties were in attendance. On September 18, 2012, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

JURISDICTION

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

[1] Agency's Answer at Exhibit 1 (July 12, 2011).

ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

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

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a Bus Driver with Agency. On September 29, 2010, Employee was served with an Individual Notification of Requirement for Drug and Alcohol Testing for the Protection of Children and Youth form.[2] This form notified Employee that he occupied a safety-sensitive position pursuant to Title 1 of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"), effective April 13, 2005 (D.C. Official Code §§ 1-620.31 – 1-620.37), and consequently, he was subject to drug and alcohol testing. The form further notified Employee that if he had a substance abuse problem, he would be afforded the opportunity to seek and attend treatment without adverse employment action taken against him. The form also highlighted that if Employee self-identified as having a substance abuse problem within thirty (30) days from the date of the notification (September 29, 2010), he would not be subject to drug and alcohol testing. However, if Employee did not self-identify to having a substance abuse problem within the thirty (30) day period, he would be subject to drug and alcohol testing at the expiration of that period, and any positive test result for illicit drugs or alcohol would be subject to administrative action, up to and including termination.[3]

On November 8, 2010, upon presenting his driver's license, and signing the Notification of Selection for Drug or Alcohol testing form, and Medical Examiner's Certificate[4], Employee provided a urine specimen which was delivered to, and tested by Laboratory Corporation of America ("LapCorp"). An analysis of the urinary specimen by the immunoassay test revealed a positive result for the drug marijuana. This result was also confirmed by a gas chromatography/mass spectrometry test.[5] On November 15, 2010, the Medical Review Officer, Dr. Charles Moorefield verified the positive test result.[6] On March 15, 2011, Agency issued a Notice of Final Decision to Employee which contained the findings of the Hearing Officer assigned to the case. According to this document, the Hearing Officer concluded that Agency had sufficient basis to terminate Employee. Employee's termination was based on the following causes as outlined in 6B District of Columbia Municipal Regulations ("DCMR") § 1603.3(h) "[a]ny act that constitutes a criminal offense whether or not the act results in a conviction" and § 1603.3(i) "[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." Additionally, Employee's termination was based on D.C. Official Code § 1-620.35(a) which states that

> "a drug and alcohol testing policy, including the notice required by § 1-620.33(d), shall be issued at least 30 days in advance of implementing the drug and alcohol program to inform District

[2] *Id*. at Exhibit 3.
[3] *Id*.
[4] Agency's Answer at Exhibit 4.
[5] *Id*. at Exhibit 5.
[6] *Id*. at Exhibit 6.

> employees of the requirements of the program and to allow each employee one opportunity to seek treatment, if he or she has a drug or alcohol problem. Thereafter, any confirmed positive drug test results…shall be grounds for termination of employment in accordance with this chapter."[7]

Employee was also terminated in accordance with 6B DCMR § 407.1(c) which provides that, "DCHR … shall initiate, or initiate and take, suitability action against District government employees pursuant to this section and chapter when: (c) [d]erogatory information about an employee, of a nature that will impact the employee's suitability to continue performing the duties of his or her position, is disclosed by a credible source or independently discovered."[8]

Employee's Position

While Employee notes in his brief to this Office that he is not aware of any District laws or regulations, he submits that he was aware of Agency's policy of drug testing and that was the reason he never participated in any type of drug usage during his seven (7) years of employment with Agency.[9] During the status conference, Employee stated that he tested positive for marijuana as a result of him being around people smoking marijuana about a week before he was tested. He explained that he was unaware that hanging around people smoking marijuana would affect him. Employee further asserts that during the time when he tested positive for marijuana, he was on several blood pressure medications which may have contributed to the positive drug test.[10] However, Employee submits that he does not have any documentation from a doctor or any expert to support his belief. Employee also included a letter from his case manager at Federal City Recovery Services, Mr. Dale Douglas. Mr. Douglas highlights that Employee participated in its Access to Recovery Program, an outpatient recovery support program. In addition, Employee submits that the penalty of termination was not appropriate because he had no knowledge of any District laws, regulations, or the Table of Penalties ('TAP"). Employee further explains that since his separation from Agency in 2001, he has participated in an out service drug program to make sure that "something of this magnitude never happens to me with this agency or any other agency."[11]

Agency's Position

Agency submits that Employee was terminated for cause. Agency explains that it has a zero tolerance policy for any positive urinalysis, which Employee was aware of. And as such, Employee was appropriately terminated for testing positive for marijuana. Agency further notes that in Employee's position as a Bus Driver, the safety of children is paramount, thus, the zero tolerance policy is strictly enforced. Agency maintains that Employee was in a safety-sensitive position and he had notice that he was going to be tested and could self-identify any drug problems, which he failed to do. Agency also asserts that Employee should have known that smoking marijuana was a violation of D.C rules and regulations. Additionally, Agency asserts that removal is the penalty set forth in the

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[7] *Id*. at Exhibit 1.
[8] *Id*.
[9] Employee's Brief (October 26, 2012).
[10] *See also* Agency's Answer at Exhibit 1, line 10.
[11] Employee's Brief, *supra*.

Table of Penalty ("TAP"), even for a positive drug test in a safety-sensitive position, and it was reasonable in this circumstance.[12]

1) Whether Employee's actions constituted cause for discipline

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(h) and §1603.3(i), respectively, the definition of "cause" includes [a]ny act which constitutes a criminal offense whether or not the act results in a conviction and [u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result. Also, Employee's removal from his position at Agency was based on D.C. Official Code § 1-620.35(a) and 6B DCMR § 407.1(c).

In the instant matter, Agency asserts that by having a positive marijuana result during a drug test, Employee violated DPM §1603.3(h) and §1603.3(i). Employee does not deny that he tested positive for marijuana, he simply argues that the reason for the positive drug test was either as a result of him being around people who smoked marijuana or as a result of his blood pressure medications. However, Employee has not offered any evidence in support of these assertions. Moreover, giving the fact that Employee was aware of Agency's zero tolerance policy, Employee should have known not to associate with or be present around people smoking marijuana. The District of Columbia has a drug free work policy. As an employee in a safety-sensitive position, Employee herein was required to submit himself to random mandatory drug and alcohol testing pursuant to D.C. Official Code §1-620.35. As an employee in a safety-sensitive position, Employee is one of the persons that must adhere to this mandate. Thus, Employee's positive test for marijuana on November 8, 2010 constituted a violation of this policy. Moreover, Employee was provided with a written notification on September 29, 2010, informing him that he occupied a safety-sensitive position within Agency. According to this document, Employee was informed that he was required to participate in random drug and alcohol testing, unless he self-identified that he had a drug problem within thirty (30) days of receiving the written notification. As of November 8, 2010, when Employee was selected for drug testing, more than thirty (30) days from September 29, 2010, Employee had not notified Agency that he had a drug problem. Also, Employee was made aware in the September 29, 2010 notification 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). Therefore, I find that Employee's positive drug test for marijuana on November 8, 2010, is sufficient cause for Agency to terminate Employee.

I further find that the District of Columbia Department of Human Resources ("DCHR") had sufficient cause to initiate an adverse action against Employee. According to a November 8, 2010 urine analysis conducted by LapCorp, a credible and independent laboratory, Employee tested positive for marijuana. This positive result was later verified by Dr. Moorefield. Employee's position is classified as a safety-sensitive position under CYSHA, and Employee's conduct renders him unsuitable to continue performing his duties as a Bus Driver. Consequently, I conclude that DCHR was justified in instituting an adverse action against Employee in accordance with the provisions of 6B DCMR § 407.1(c).

[12]Agency's brief (October 3, 2012); *See also* Agency's Answer (July 12, 2011).

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).[13] 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 "[a]ny act that constitutes a criminal offense whether or not the act results in a conviction" and "[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 these charges in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalties for "[a]ny act that constitutes a criminal offense whether or not the act results in a conviction" and "[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" are found in DPM §§ 1619.1(8) and 1619.1(9) respectively. The penalty for a first offense for § 1619.1(8) is a ten (10) days suspension to removal. The penalty for a first offense for § 1619.1(9) is a fifteen (15) days suspension to removal. Employee was aware of the District's drug free policy and Agency's zero tolerance policy. Employee was also provided with the opportunity to self-identify, within thirty (30) days if he had a drug problem, but he failed to do so. Employee's conduct is consistent with the language of §§ 1619.1(8) and 1619.1(9) of the DPM. Therefore I find that, by terminating Employee, Agency did not abuse its discretion.

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.[14] 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

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[13] *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).

[14] *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).

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.[15] Employee argues that by removing him, 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.[16]

In this case, the penalties for a first time offense for these causes of actions range from a ten (10) 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 submits that it gave credence to the aforementioned *Douglas* factors. Agency explained that Employee held a safety-sensitive position and his conduct in the instant matter presents too grave of a risk to public safety to be allowed to maintain his position. Agency further explains that Employee's offense undermines the integrity of the government's efforts to protect children and youth of the District. 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 not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

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[15] *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).

[16] 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;
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.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is UPHELD.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge