THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0112-13
MICHAEL JOHNSON,	)	
Employee	)	
	)	Date of Issuance: December 14, 2015
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF EMPLOYMENT	)	
SERVICES,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Dawn Crawford, Employee Representative
Rahsaan Dickerson, Esq., Agency Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On June 28, 2013, Michael Johnson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Department of Employment Services' ("DOES" or "Agency") action of terminating his employment. Employee, who worked as a Support Services Assistant, was charged with violating District Personnel Manual, Chapter 16, §1603 for "Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result." Specifically, Employee tested positive for a random breath alcohol test on January 11, 2013, after being referred to the Department of Human Resources ("DHR") for reasonable suspicion of the use of alcohol while on duty. The effective date of Employee's termination was May 21, 2013.

I was assigned this matter in February of 2014. On March 7, 2014, I issued an order convening a Prehearing Conference for the purpose of assessing the parties' arguments. During the Prehearing Conference, the Undersigned determined that there were no material issues of fact raised by the parties, thus an Evidentiary Hearing was not warranted. The parties were subsequently ordered to submit written briefs addressing whether Agency had cause to take adverse action against Employee, and whether the penalty termination was appropriate under the

circumstances. Orders requesting briefs were issued on April 18, 2014, May 21, 2014, and July 2, 2014.[1] Both parties complied with the Undersigned's order. 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

1. Whether Agency's action was taken for cause

2. Whether the penalty imposed was appropriate under the circumstances.

Uncontested Facts

1. Employee's position of record at the time he was terminated was a Support Services Assistant (Motor Vehicle Operator) in Career Service.

2. Employee's position was subject to mandatory drug and alcohol testing, in addition to reasonable suspicion testing pursuant to the Child and Youth Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"). On August 28, 2008, Employee acknowledged receipt of Agency's Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth.[2]

[1] Agency filed a Motion for an Enlargement of Time on May 14, 2014 and June 27, 2014. Both motions were granted.
[2] Agency Answer to Petition for Appeal, Exhibit 2 (August 12, 2013).

3. On January 11, 2013, DOES Administrative Services Manager, Roberta Collins, contacted another supervisor Gina Toppin because she believed that she smelled an odor of alcohol coming from Employee. Toppin went to the mail room where Employee was located. Upon returning, Toppin indicated that she also smelled alcohol coming from Employee. Both Collins and Toppin previously received reasonable suspicion training.

4. Collins subsequently contacted Human Resource Project Manager, Jessica Anayannis, regarding her observations of Employee in the mail room. Ananyannis contacted the Department of Human Resources regarding the need to test Employee for reasonable suspicion alcohol testing while on duty.

5. On January 11, 2013, at approximately 6:34 p.m., a collector was dispatched to 4058 Minnesota Avenue, NE, Washington D.C. in order to perform a drug and alcohol screening. Employee submitted to the screening by giving a breath sample for analysis. The initial breath testing revealed that Employee's Blood Alcohol Content ("BAC") was 0.045. A second reading resulted in a BAC of 0.038. Employee also provided a urine sample for drug testing.

6. Employee was then placed on Administrative Leave With Pay, pending the results of the investigation into his reasonable suspicion drug and alcohol testing.

7. On January 22, 2013, Program Director, Valerie Dawkins, issued her findings regarding the Reasonable Suspicion Alcohol Result to Mr. Michael Johnson of the Department of Employment Services. Dawkins recommended that Employee be cited for adverse action as a result of his positive BAC test while on duty.

8. On January 23, 2013, eDrugTest issued its official alcohol and drug testing results for Employee. The test confirmed that Employee was positive for alcohol on January 11, 2012. Employee's drug test was negative.[3]

9. On February 19, 2013, Agency issued Employee an Advance Written Notice of Proposed Removal. The cause for the proposed adverse action stated the following:

> **Cause(s)**: As outlined in the District Personnel Manual (DPM), Chapter 16, §1603.3: "Cause for disciplinary action for all employees covered under this chapter is defined as follows: (1) Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result." And as further outlined in DPM Chapter 39, §3907.1, "[t]he following ***shall*** be grounds for termination of employment, provided that the notification requirements in section 3904 of this chapter have been met: (a) a positive breathalyzer test." [***Emphasis*** added].

[3] *Id*. at Exhibit 3.

> **Specification(s)**: On August 28, 2008, you were notified that you occupied a safety-sensitive position pursuant to the Child and Youth Safety and Health Omnibus Amendment Act of 2004, (D.C. Official Code, §1-620.32 et seq.), and that consequently you were subject to drug and alcohol testing. On January 11, 2013, you were referred to the Department of Human Resources for reasonable suspicion of the use of alcohol while on duty. A collector was dispatched to the Department of Employment Services, located at 4058 Minnesota Avenue, NE, Washington, D.C., to perform a drug and alcohol screen at which time a sample of your breath was collected. Subsequent analysis of your sample by a qualified laboratory revealed the presence of alcohol in your system. This positive breath alcohol test result was confirmed by a qualified medical review officer.

10. Employee submitted a response to the Advanced Notice of Proposed Removal. Hearing Officer, Kim McDaniel, Esq., conducted an administrative review of Agency's notice and Employee's response. McDaniel submitted her Written Report and Recommendation to the deciding official on March 12, 2013.[4]

11. On May 21, 2013, Agency issued a Notice of Final Decision on Proposed Removal, sustaining the proposed removal action against Employee. The notice stated that Employee would be terminated effective May 31, 2013.

12. Employee subsequently filed a Petition for Appeal with this Office on June 28, 2013.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

[4] *Id*. at Exhibit 12.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3 of the District Personnel Manual ("DPM") defines cause to include the "Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result."

Child and Youth Safety and Health Omnibus Amendment Act of 2004

On April 13, 2004, the City Council for the District of Columbia enacted the Child and Youth Safety and Health Omnibus Amendment Act ("CYSHA" or "the Act"). Pursuant to D.C. Official Code § 1-620.32(a), an appointee to a safety-sensitive position with a District government agency shall be subject to drug and alcohol testing. Safety-sensitive positions include jobs that affect the health, safety, and welfare of children or youth services that benefit children or youth. The following District employees are required to be tested for drug and alcohol use: 1) applicants for employment in safety-sensitive positions; 2) District employees who have had a reasonable suspicion referral; and 3) post-accident employees, as soon as reasonably possible after the accident.[5] Employees who are subject to CYSHA are given an opportunity to seek treatment if he or she has a drug or alcohol problem. Thereafter, any employee who receives a positive drug or alcohol test result, or refuses to take the aforementioned tests, will be subject to termination if the notification requirements under DPM § 3904 have been met.[6] Under DPM Chapter 39, Section 3906.8, a breathalyzer test shall be deemed positive if the vendor determines that one (1) milliliter of the employee's breath (consisting of substantially alveolar air) contains .38 micrograms or more of alcohol.[7]

On August 28, 2008, Employee signed Agency's Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth.[8] The notification stated that Employee was appointed to a position (Support Services Assistant-MVO) that was subject to drug and alcohol testing. The notification further stated in pertinent part:

> As an appointee, employee, or unsupervised volunteer in a covered position in a District government agency that was been designated as a child or youth services provider, you are hereby informed that this District government agency is subject to drug and alcohol testing. Upon receipt of this advance written notice, if you have a drug or alcohol problem, you will be given (1) opportunity to seek treatment. An employee who acknowledges a drug or alcohol problem will be given an opportunity to undergo a counseling and rehabilitation program, and may not be subject to administrative action while completing the program. However, while an employee is undergoing counseling, the employee shall be detailed to a non safety-sensitive position until he or she successfully completes the program. An employee who fails to disclose a drug or alcohol problem upon receipt of this notice and thereafter tests positive for

[5] D.C. Official Code §1-620.32 (2001).
[6] *Id*. at §1-620.35.
[7] DCMR § 3906.8.
[8] Agency Answer to Petition for Appeal, Exhibit 2 (August 12, 2013).

> drugs and alcohol will be subject to administrative action, up to an including termination. [9]

At all times relevant to the instant matter, Employee's position was a Support Services Assistant, subject to the provisions of CYSHA because he worked for a youth and services provider agency (DOES). Employee received notice that he was subject to drug and alcohol tests in August of 2008 and does not argue that his position was exempt from the provisions of CYSHA. As such, I find that Employee received proper notice as required by DPM Chapter 39, § 3904. I further find that Employee was subject to mandatory drug and alcohol testing in accordance with the applicable procedures of the Act.

Reasonable Suspicion

All District of Columbia employees are subject to drug and alcohol testing when there is a reasonable suspicion that the employee is impaired or otherwise under the influence of a drug or alcohol while on duty.[10] Before contacting the appropriate personnel authority to make a referral for drug or alcohol testing, a trained supervisor must: (1) have a reasonable suspicion that the employee is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired; and (2) gather all information and facts to support the reasonable suspicion.[11] The DPM also requires that each reasonable suspicion referral be confirmed through a second opinion from another trained supervisor or manager who has the requisite training. DPM § 431 states the following in pertinent part:

> 431.4 A reasonable suspicion referral may be based on direct observation of drug use or possession, physical symptoms of being under the influence of drugs, symptoms suggesting alcohol intoxication, a pattern of erratic behavior, or any other reliable indicators. There may be reasonable suspicion under the following conditions:
>
> 431.5 Reasonable suspicion may be established if:
>
> (a) The employee is witnessed using a drug or alcohol while on duty;
> (b) The employee displays physical symptoms consistent with drug or alcohol usage;
> (c) The employee engages in erratic or atypical behavior of a type that is consistent with drug or alcohol usage; or
> (d) There are other articulable circumstances which would lead a reasonable person to believe that the employee is under the influence of a drug or alcohol.

[9] *Id.*
[10] 6-B DCMR § 431.
[11] *Id*. at

In this case, Administrative Services Manager, Roberta Collins, reported that Employee left the building on the morning of January 11, 2013 to do his mail run. Employee returned to the building after 3:00 p.m. Approximately forty (40) minutes later, Collins went to the mail room and noticed a strong smell of alcohol. She went back to her office, but returned to the mail room a few minutes later and still smelled the odor of alcohol. Collins then approached supervisor Gina Toppin and asked that she go observe Employee in the mail room. Collins subsequently contacted Deputy Director Kameron Kima-Cherry to report her suspicions, and was told to contact Project Manager, Jessica Anayannis. Collins advised Employee that he would have to wait before going on his afternoon mail run. According to Collins, Employee became irritated and aggravated at that point. When Employee was notified that he was being tested for reasonable suspicion of alcohol, he stated that he could not stay because he needed to go get his son. However, Employee decided to stay after being informed of the consequences for leaving the building before the testing was performed.[12]

According to Support Services Supervisor, Gina Toppin, Collins approached her at approximately 4:00 p.m. on January 11, 2013, regarding the odor of alcohol that was emanating from Employee's person. Collins requested that Toppin discretely enter the mailroom where Employee was to see if she also noticed the smell of alcohol. Toppin returned to speak with Collins and confirmed that she smelled alcohol in the room where Employee was located. Collins and Toppin waited with Employee at the office until the mobile collector arrived to perform the alcohol and drug tests.[13] Both Collins and Toppin previously received reasonable suspicion for drugs and alcohol training, and both supervisors completed the Department of Human Resources Drug and Alcohol Reasonable Suspicion Forms on January 14, 2013.[14]

At the time he was terminated, Employee was a union member, thus he was covered by the Collective Bargaining Agreement ("CBA") between Agency and the American Federation of Government Employees ("AFGE"). Article 23, of the CBA provides the following in pertinent part:

> Section 1: The parties recognize that alcoholism, drug abuse and emotional illness or other personal problems are conditions that can cause excessive absenteeism, disruptive behavior, or directly affect an employee's job performance. As such, the Department shall make substantial efforts to assist the employees experiencing these conditions by giving them direct referral to the District's Employee Consultation and Counseling Service.
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> Section 2: If the employee refuses counseling, and/or there is no improvement or inadequate improvement in work performance, behavior, and/or attendance, as determined by the supervisor,

[12] Statement of Administrative Services Manager Roberta Collins, Agency Answer to Petition for Appeal, Exhibit 11.
[13] Statement of Events on 1/11/13 Regarding Reasonable Suspicion of Alcohol for OAS Employee Michael Johnson, Exhibit 11, Attachment 6.
[14] *Id*. at Attachment 6 and 6.

> disciplinary action or appropriate administrative action may be initiated as warranted. Prior to initiation of discipline, employees accepting direct referral will be provided reasonable time to improve work performance and/or attendance work record provided, however, that employees adhere to the requirements of the employee consultation and counseling service and the employee's work performance satisfactorily improves.[15]

Employee argues that he did in fact request counseling for alcohol abuse from HR Project Manager, Jessica Anayannis, on January 11, 2013. According to Employee, Agency failed to follow the guidelines as outlined in Article 23, Section 1 and 2 of the CBA because Agency did not allow him to participate in the Employee Assistance Program ("EAP") prior to taking disciplinary action against him.[16] In response to Employee's allegations, Agency states that "[its] responsibility to make substantial efforts to assist employees experiencing alcoholism…by giving them direct referral to the District's Employee Consultation and Counseling Service…is triggered by the employer's observations of possible indicators of [the] employee's illness such as excessive absenteeism, disruptive behavior, or poor job performance."[17]

I agree, and find that Employee has failed to provide any credible evidence to this tribunal to support a finding that he contacted a supervisor, Human Resources, or another member of DOES management, to communicate the existence of a substance abuse problem at the time he signed Agency's Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth, or thereafter. Employee did not request counseling for substance abuse until *after* Anayannis notified him that he would be placed on administrative leave pending an investigation into the results of his drug and alcohol test. Employee was aware of his duty to report the existence of a drug or alcohol problem to the appropriate authorities, and that the consequence of not doing so would lead to his termination. Moreover, a copy of Employee's official personnel file, provided by Agency, reveals no recordation of any excessive absenteeism, disruptive behavior, or other maladaptive conduct that would trigger the relevant provisions of Article 23 of the CBA.[18] It should be noted that Employee asks this Office to consider his previous eighteen (18) year tenure with Agency, in which he maintained a performance rating of "Valued Performer."[19]

Neither the terms of the CBA, nor the relevant provisions of the DPM, contemplate that an employee who tests positive for drugs or alcohol may seek counseling in lieu of being charged with disciplinary action. In order to continue performing the duties of a Support Services Assistant, Employee had the express duty to either: 1) identify the drug or alcohol problem and be given one (1) opportunity to seek treatment; or 2) inform Agency of the substance problem and accept a referral for treatment while working a position that was not classified as safety-sensitive. Here, Employee occupied a safety-sensitive position as defined under the Child and Youth Safety and Health Omnibus Amendment Act, and was therefore subject to drug and

[15] Employee Prehearing Statement (April 3, 2014).
[16] Employee Brief at 4.
[17] Agency Surreply Brief at 9 (July 21, 2014).
[18] Employee Personnel File (June 4, 2014.
[19] Employee Brief at 3.

alcohol testing. On January 11, 2013, supervisor Toppin physically observed Employee in the mail room and identified the smell of alcohol emanating from him. Toppin's suspicion was corroborated by a second supervisor, who subsequently contacted a member of Human Resources for advice on how to proceed. Both Toppin and Collins were trained on reasonable suspicion for drug and alcohol detection, and both utilized their training, knowledge and experience to determine that Employee should be referred for testing based on reasonable suspicion. Both of Employee's breathalyzer tests returned BAC results of .38 or more, rendering him positive for alcohol under the definition provided in DCMR, § 3906.8. The positive breathalyzer test was also confirmed by an independent testing lab on January 23, 2013.

Employee further argues that he should not have been subject to reasonable suspicion testing because he was not engaged in safety-sensitive functions prior to being tested. In support thereof, Employee cites to E-DPM, Instruction 39-2, which was amended on April 28, 2010 to effect changes in the policy for mandatory drug and alcohol testing for employees who serve children and youth.[20] Section XII (3)(e)(1) of Instruction 39-2 states that"[r]easonable suspicion alcohol test is authorized if the observations are made four (4) hours prior to, or during or immediately after the covered employee has performed safety-sensitive functions. However, Agency contends that Employee's job duties as a Support Services Assistant included coming in contact with youth on a daily basis. Specifically, Agency states that:

> Agency's Office of Youth Programs (OYP) develops and administers workforce development programs for District youth ages 14-24…On January 11, 2013, Ms. Collins observed Employee upon his return from his morning mail run…As a function of his employment, Employee was required to provide, among other services, mail delivery and pick-up for OYP…As a result, Employee was also required to visit OYP, which is located in the same building where Employee worked. Employee not only provided services to OYP that benefitted youth, Employee came in contact with youth employed by OYP on a daily basis…The services Employee provided to OYP were related to youth employment services, which unquestionably are for the benefit of youth, and affect the health, safety, and welfare of youth.[21]

I find Employee's argument that he was not engaged in safety-sensitive functions at the time he was referred for reasonable suspicion testing to be unpersuasive. Employee's position required him to have contact with youth during his morning and afternoon mail runs. But for Collins noticing the smell of alcohol after Employee returned from his first mail run, Employee would have proceeded to leave for his afternoon mail run while operating a motor vehicle while under the influence of alcohol. Employee could have potentially put himself and the public in risk of harm. I therefore find that Agency did not violate Section XII (3)(e)(1) of Instruction 39-2, and properly initiated reasonable suspicion testing in accordance with its Policy for Mandatory Drug and Alcohol Testing of Employees Who Serve Youth.[22]

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[20] E-DPM Instruction No. 39-2. The April 28, 2010 revision superseded DPM Instruction No. 39-1.
[21] Agency Surreply Brief at 3 (July 21, 2014).
[22] *Id*. at Attachment 1.

Based on a review of the record, I find that Employee was properly referred for reasonable suspicion alcohol testing. I further find that Agency properly adhered to the procedural requirements as enumerated in DPM Chapter 39, § 3904. Testing positive for alcohol, while on duty, rendered Employee unsuitable to perform the functions of a child safety/welfare provider. Accordingly, I find that Agency had cause to take adverse action against Employee as a result of his positive drug test, in violation of the laws and regulations of the District.

Whether the penalty was appropriate under the circumstances.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[23] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised.[24] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[25]

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."[26] The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for "use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result" is suspension for fifteen (15) days to removal."

In this case, Employee was notified that he was subject to alcohol and drug testing because he occupied a safety-sensitive position as defined under CYSHA. Employee was also aware that if he received a positive drug or alcohol test result, that he would be subject to termination if Agency satisfied the requisite notification requirements. Based on a review of the record, I can find no credible evidence to indicate that Agency abused its discretion in selecting the appropriate penalty as a result of Employee testing positive for alcohol. Based on the foregoing, I find that Employee's termination was taken for cause, and that the penalty of termination was appropriate under the circumstances. Accordingly, Agency's removal action must be upheld.

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[23] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).
[24] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10
[25] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).
[26] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE