THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0038-20
v.	)	
	)	Date of Issuance: August 26, 2021
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Parking Enforcement Officer with the Department of Public Works ("Agency"). On February 19, 2020, Agency issued a final notice of separation informing Employee that he would be removed from his position. The notice provided that on November 7, 2019, Employee submitted a urine sample which tested positive for the presence of opiates, in violation of 6B District of Columbia Municipal Regulations ("DCMR") §§ 435.6 and 1605.4(h). Consequently, he was terminated from employment effective February 22, 2020.[2]

On March 19, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He asserted that he was wrongfully terminated from his position. Employee claimed that he was not feeling well and took medication to alleviate his cold symptoms. He

[1] Employee's name was removed from this decision for the purpose of publication on the Office of Employee Appeals' website.
[2] *Agency Answer*, Tab #11 (July 17, 2020).

contended that he was not aware that the medication would impact the results of his urine sample. Employee explained that during a doctor's visit, he informed his doctor that the test was performed. According to Employee, his doctor provided a letter explaining his symptoms and the medication she prescribed. Employee requested that his termination action be reversed and that he be reinstated to his position of record.[3]

Agency filed its Answer to Employee's petition on July 17, 2020. It asserted that Employee held a safety-sensitive position and that his positive test was all that was required to warrant termination. Agency asserted that Employee was seen by his doctor *after* he provided a positive drug urine sample (emphasis added). Agency also provided that the note from the doctor explained that Employee was prescribed medication which contained a controlled substance; however, the doctor noted that Employee did not fill the prescription. Finally, Agency submitted that it considered the relevant factors provided in *Douglas v. Veterans Administration*, 5 MPSR 280 (1981).[4] As a result, it requested that Employee's removal action

---

[3] *Petition for Appeal*, p. 2-3 (March 19, 2020).

[4] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). 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 its 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

be upheld.[5]

On February 18, 2021, the OEA Administrative Judge ("AJ") held a telephonic status conference. Agency's representative appeared as required; however, Employee was absent. Accordingly, the AJ issued two show cause orders for Employee's failure to attend the scheduled status conference. Employee failed to submit a response to either of the AJ's orders.[6]

The AJ issued her Initial Decision on March 18, 2021. She held that there was no dispute that Employee tested positive for codeine after a random drug test on November 7, 2019. Thus, the AJ found that Agency had cause for an adverse action against Employee because of the positive test. However, she held that Agency abused its discretion by imposing a penalty of termination in this matter. According to the AJ, Employee provided justification for why he tested positive for codeine by explaining that he took his girlfriend's prescription medication the night before the test. She also considered Employee's submission from his doctor of a prescription of promethazine with codeine; his years of service; his past disciplinary history and work record; and his health/mindset at the time he took his girlfriend's medication. She explained that the range of penalty for the first offense of a positive drug test is suspension to removal. Therefore, based on the mitigating factors, the AJ held that Agency should have imposed a lesser penalty. Consequently, she ordered that Agency's termination action be reversed; that Agency reinstate Employee to his previous position of record or a comparable position; that Agency suspend Employee for fifteen (15) days for testing positive for an unlawful controlled substance (codeine) while on duty; and that Agency reimburse Employee all back pay

---

12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[5] *Agency Answer*, p. 1-7 (July 17, 2020).

[6] *Order for Statement of Good Cause* (February 18, 2021) and *Order for Statement of Good Cause* (March 2, 2021).

and benefits lost as a result of the adverse action.[7]

On April 22, 2021, Agency filed a Petition for Review. It argues that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy and that the findings of the Initial Decision were not based on substantial evidence. Agency asserts that it provided notice to Employee that because he held a safety-sensitive position, he would be deemed unsuitable if he tested positive for drugs or alcohol. According to Agency, Employee signed this notice on October 12, 2018. Thus, it contends that it could remove Employee for a positive drug test. Further, Agency argues that Employee taking prescription medication without a prescription violates both District and federal law. However, it opines that even if Employee could have taken someone else's prescription medication, an evidentiary hearing was warranted to determine if Employee was unaware that his girlfriend's prescription contained codeine; to determine if the letter from the doctor's office could be authenticated; and to determine the validity of Employee's unsworn assertions. Therefore, it requested that its petition be granted, and the Board reverse the Initial Decision.[8]

OEA Rule 633.3 provides the basis upon which the OEA Board may grant a petition for review. The rule provides the following:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a petition for review when the petition establishes that:
>
> a. New and material evidence is available that, despite due diligence, was not available when the record closed;
> b. The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
> c. The findings of the Administrative Judge are not based on substantial evidence; or
> d. The initial decision did not address all material issues of law and fact properly raised in the appeal.

---

[7] *Initial Decision*, p. 4-8 (March 18, 2021).
[8] *Agency's Petition for Review*, p. 4-9 (April 22, 2021).

In its petition, Agency adequately sets forth its objections to the Initial Decision. It contends that the Administrative Judge's findings were not based on substantial evidence and that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy.

Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[9]

Cause

Pursuant to 6B DCMR § 409.1(a), "the types of positions that are subject to enhanced suitability screenings . . . are positions with duties and responsibilities that shall be categorized as . . . safety sensitive, which are positions with duties or responsibilities if performed while under the influence of drugs or alcohol could lead to a lapse of attention that could cause actual, immediate and permanent physical injury or loss of life to self or others."[10] Agency established, and Employee conceded that, as a Parking Enforcement Officer, he held a safety-sensitive position.[11] Further, 6B DCMR § 410.1(f) provides that "in addition to the general suitability screening, individuals . . . occupying safety sensitive positions are subject to . . . random drug and alcohol test." Thus, it was within Agency's authority to conduct a random drug test against

---

[9] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[10] This regulation was effective as of November 9, 2018; therefore, it was in effect at the time of Employee's positive drug test.

[11] *Agency's Answer*, p. 18, 19, and 74 (July 16, 2020).

Employee.

As it relates to cause, 6B DCMR § 436.6 provides that ". . . a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16. . . ."[12] Additionally, 6B DCMR § 428.1(a) provides that ". . . an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in §§ 435.9 and 439.3 for a positive drug or alcohol test result."[13] Moreover, 6B DCMR § 1605.4(h) provides that testing positive for an unlawful controlled substance while on duty constitutes cause for an adverse action. Therefore, in accordance with 6B DCMR §§ 428.1(a), 436.6, and 1605.4(h), a positive drug test is all that was needed to establish cause. Thus, with Employee's positive submission, Agency had cause to remove him. As a result, this Board agrees with the AJ's finding that Agency had cause to institute an adverse action against Employee for his positive drug test.[14]

Penalty Within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

As for the penalty imposed, the AJ concluded that Agency's decision regarding mitigating circumstances and progressive discipline exceeded the limits of reasonableness; thus,

---

[12] This regulation was effective as of November 9, 2018; therefore, it was in effect at the time of Employee's positive drug test.

[13] 6B DCMR § 435.9 provides the following:

> If an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement. Instead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable.

6B DCMR § 439.3 provides the following:

> If the program administrator or employing agency determines that an existing employee is unsuitable to continue serving in a covered position, and that he or she should be separated from employment, the removal action shall be carried out by the personnel authority in accordance with the employee's type of appointment (i.e., probationary, term or permanent, etc.) and service (i.e., Career, Legal, Excepted, Management Supervisory Service, etc.), and the applicable legal and regulatory provisions governing adverse actions, including but not limited to Chapter 16 and applicable collective bargaining agreement provisions.

[14] *Initial Decision*, p. 4 (March 18, 2021).

she ordered that Employee's termination be reversed and that a fifteen-day suspension be imposed instead.[15] 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).[16] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.[17]

6B DCMR § 428.1(a) offers removal as the only penalty for a positive drug test result. 6B DCMR § 435.9 provides that "if an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action . . ." However,

---

[15] *Id* at 8.

[16] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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).

[17] The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office. *Love* also provided the following:

> [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, it is 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)).

the section also provides that "instead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable." Therefore, in accordance with Chapter 4, Agency had the choice to terminate Employee or reassign him. Alternatively, 6B DCMR § 1607.2(g)(2) provides that the penalty can range from suspension to removal for testing positive for intoxicants when reporting for duty or anytime while on duty. Thus, pursuant to Chapter 16, Agency had the ability to impose a penalty ranging from suspension to removal.

Mitigating Factors

Although removal is within the range of penalty for the first occurrence of a positive drug test under 6B DCMR §§ 400.4, 428.1, 435.9, and 1607, the AJ ruled that Agency failed to consider mitigating factors and progressive discipline. The AJ provided that Employee had a scheduled doctor's appointment on November 7, 2019, because he was not feeling well and that the doctor provided a note prior to Agency's issuance of the Notice of Proposed Separation in support of Employee's health condition. The AJ held that Dr. Okeyo confirmed in the note that she saw Employee in her office on November 7, 2019. She went on to note that Dr. Okeyo explained that Employee was suffering from an acute upper respiratory infection on the November 7, 2019, and Employee informed her that he had taken his significant other's cough syrup which contained codeine the night before, but he did not know that it had codeine in it. According to the AJ, Okeyo also stated that she gave Employee a prescription for promethazine with codeine during the November 7, 2019 visit, to help manage Employee's cough symptoms. The AJ provided that Employee attached a copy of the prescription for promethazine with codeine from Dr. Okeyo's office dated November 7, 2019, along with a picture of his girlfriend's prescription for promethazine with codeine, which she held was filled three days before

Employee's drug test. Therefore, given the totality of the circumstances and the evidence in the record, the AJ held that these were all mitigating circumstances.[18]

However, this Board disagrees with the AJ's assessment of the record. Employee failed to provide to Agency with any of the information that the AJ highlighted in her decision as mitigating factors, prior to Agency imposing a penalty. This is evidenced in Agency's Proposing Official's Rationale Worksheet, the Hearing Officer's Written Report and Recommendation, and the Final Notice of Separation.[19] In his Petition for Appeal before the AJ, Employee offered a note from Okeyo and a picture of a prescription bottle for promethazine with codeine prescribed to Lindsey Parker.[20] The AJ noted in her Initial Decision that she considered it a mitigating factor that Okeyo prescribed promethazine with codeine.[21] However, according to the sample collection record provided by Agency, Employee's sample was taken at 9:56 a.m.[22] His appointment with Okeyo was not until after he submitted a positive drug sample.[23] Thus, Okeyo did not prescribe him with promethazine with codeine until after Employee submitted his positive drug sample. Consequently, it is not reasonable for the AJ to rely on a prescription that had not yet been filled or taken by Employee when he submitted his sample for testing, as a mitigating factor. This is especially troubling because Okeyo conceded that the medication was

[18] *Initial Decision,* p. 6 (March 18, 2021).
[19] In Agency's Proposing Official's Rationale Worksheet, it provided that it "[had not] identified any mitigating circumstances." *Agency's Answer,* p. 30 (July 16, 2020). In the Hearing Officer's Report, he noted that "unfortunately, the employee has not submitted any evidence which would support his assertion of taking the medication prior to the drug test. There is no statement from the girlfriend, no copy of a prescription which would determine if the medicine in question contained codeine or other opiates, etc." *Id.,* 33-34. Finally, in the Final Notice of Separation, the Associate Director found that "without evidence supporting [Employee's] defenses, I find his assertions unpersuasive." *Id.* at 40.
[20] It should be noted that Merab Okeyo's title is a Certified Registered Nurse Practitioner, not a doctor.
[21] *Initial Decision,* p. 7 (March 18, 2021).
[22] *Agency's Answer,* p. 20 (July 16, 2020).
[23] According to Employee, during his visit, he informed Okeyo of the test performed, and Okeyo issued a letter explaining Employee's symptoms and her prescription of the medication prescribed to Employee. *Petition for Appeal,* p. 3 (March 19, 2020).

on backorder and was not actually filled by Employee.[24]

The AJ also considered the fact that Employee took medicine with codeine belonging to his significant other prior to submission of his sample, as a mitigating factor. However, as Agency provided, there is no evidence in the record, other than Employee and Okeyo's unsworn statements, that Lindsey Parker was Employee's girlfriend. There are also no statements from Ms. Parker that she gave Employee her medicine to take prior to the drug test.

In her Initial Decision, the AJ relied on a picture of Employee's alleged girlfriend's prescription bottle for promethazine with codeine that the AJ claimed was filled on November 4, 2019, three days prior to Employee's positive test for codeine.[25] However, this Board disagrees with this determination. Even if the AJ determines that it is a mitigating factor that Employee consumed medication that was not prescribed to him, there is not substantial evidence in the record that the prescription was filled three days prior to Employee's sample submission. The picture submitted by Employee of the prescription bottle for Lindsey Parker only offers one visible date on the bottle, and that is the expiration date. The date that the prescription was filled and the original prescription date, are obscure. Both dates are blurred and illegible. Therefore, the record does not support the AJ's ruling that Lindsey Parker was Employee's girlfriend; that he took medication with codeine prescribed to her; or that Ms. Parker's prescription was filled before Employee submitted to his positive drug sample.

The AJ provides that suspension was within the range of penalties for testing positive for an unlawful controlled substance, as provided in DPM § 1607.2(h)(3). She seems to rule that the lesser penalty of suspension should be imposed because of the mitigating factors outlined above. However, this Board does not believe that the record supports the AJ's mitigating factor

---

[24] *Petition for Appeal,* p. 6 (March 19, 2020).
[25] *Initial Decision,* p. 5 (March 18, 2021).

determinations. As a result, this matter must be remanded to the AJ for further consideration of actual evidence to support her conclusion that there were mitigating circumstances.

Progressive Discipline

In the Hearing Officer's Report, it is alleged that Employee argued that removal was not the appropriate penalty because in accordance with Article 10, Section C of the Collective Bargaining Agreement, Agency must apply progressive discipline. However, there was no Collective Bargaining Agreement found in the record. Accordingly, we remand this matter for the AJ to consider the progressive discipline arguments on its merits.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**. This matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.