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: March 18, 2021
	)	
DISTRICT OF COLUMBIA	)	MONICA DOHNJI, ESQ.
DEPARTMENT OF PUBLIC WORKS,	)	Senior Administrative Judge
Agency	)	
	)	

Employee *Pro Se*
Connor Finch, Esq., Agency Representative

INITIAL DECISION[2]

INTRODUCTION AND PROCEDURAL HISTORY

On March 19, 2020, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Public Works' ("DPW" or "Agency") decision to terminate him from his position as a Parking Enforcement Office ("PEO") effective February 22, 2020. Employee was terminated pursuant to District of Columbia Municipal Regulation Personnel Manual ("DCMR") 6B DCMR §§ 435.6[3] and 1605.4(h).[4] On July 7, 2020, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on December 17, 2020. Thereafter, I issued an Order scheduling a Status/Prehearing Conference in this matter for February 18, 2021. While Agency's

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[3] 6B DCMR § 435.6: In accordance with Section 428, a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations.
Pursuant to 6B DCMR § 428.1, Unless otherwise required by law, and notwithstanding Subsection 400.4, an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in Subsections 435.9 and 439.3 for: (1) A positive drug or alcohol test result.
[4] 6B DCMR §1605.4(h): Unlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty.

representative was present for the scheduled Conference, Employee was absent. The Order scheduling the February 18, 2021, Status/Prehearing Conference was emailed to the email address provided by Employee in his Petition for Appeal. Thereafter, I emailed an Order for Show Cause to Employee requiring that Employee submit a statement for good cause for his failure to attend the scheduled Status Conference. Subsequently, on March 2, 2021, another Show Cause Order was mailed to Employee's address of record. The deadline for Employee to respond to the March 2, 2021, Order was March 15, 2021. As of the date of this Order, Employee has not submitted a response to the Show Cause Orders. Since a decision can be made based on the documents in the record, I have decided that an Evidentiary Hearing is 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).

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 FACT, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was a PEO with Agency's Parking and Enforcement Management Administration ("PEMA"). On October 12, 2018, Employee signed an Individual Notification of Required Drug and Alcohol testing: Safety-Sensitive form.[5] This form notified Employee that he occupied a safety-sensitive position and consequently, he was subject to drug and alcohol testing. On November 7, 2019, Employee was notified that he had been selected for a random drug and alcohol testing.[6] After Employee provided a sample for testing, he met with his doctor on the same date, for a previously scheduled doctor's appointment. The doctor wrote a prescription for the medication Promethazine with codeine for Employee's health condition.[7] Thereafter, on November 18, 2019, Employee's doctor, Doctor Merab Okeyo issued a letter stating that "[Employee] is a patient of mine and is currently under my care. He was seen in office for an acute upper respiratory infection on November 7th, 2019. He reported taking his significant other's cough syrup with codeine the night before. He did not know that it had codeine in it. He was given a prescription for Promethazine with codeine to manage his cough symptoms, but the medication was on backorder and he did not fill it. He took the other prescribed antibiotic and decongestant."[8] Agency issued a Notice of Proposed Separation on December 16, 2019, informing Employee that he had a positive drug test for Codeine.[9] This

[5] *See* Agency's Answer at Tab 4 (July 17, 2020).
[6] *Id*. at Tab 5.
[7] Petition for Appeal (March 19, 2020).
[8] *See* Petition for Appeal.
[9] Agency's Answer, *supra*, at Tab 8.

matter was assigned to a Hearing Officer who issued his Written Report and Recommendation on January 27, 2020.[10] He noted that Agency met its burden of proof in this matter. However, he recommended that Employee be suspended for fifteen (15) days and retrained on Agency's drug policy.[11] Agency issued its Final Notice of Separation on February 19, 2020, terminating Employee, effective February 22, 2020.[12]

Employee's Position

Employee asserts that prior to the November 7, 2019, random drug test, he was not feeling well and had a scheduled appointment with his doctor on November 7, 2019, the same day of the drug test. He explains that he took medication to alleviate his cold symptoms so he could report to his scheduled work shift. He was not aware that the medication would affect the results of the drug test. Employee included a note from his doctor stating that he was indeed prescribed a medication containing codeine - Promethazine with codeine, but he did not fill the medication because it was on backorder. Employee also included a copy of the prescription dated November 7, 2019, from the doctor that listed the medication Promethazine with codeine, as well as the bottle of prescription in his girlfriend's name for Promethazine with codeine, filled on November 4, 2019.[13]

Agency's Position

Agency submits that Employee occupied a safety-sensitive position and was subject to periodic drug testing. Agency notes that Employee was provided with Agency's drug and alcohol testing policy. Agency explains that it has a zero-tolerance policy and safety-sensitive positions are deemed unsuitable for continued employment if tested positive for drugs.[14]

Agency asserts that Employee was appropriately terminated for testing positive for codeine. It explains that Employee did not provide a prescription from his doctor proving a need for said medication, nor a note from his girlfriend stating that she allowed him to take her medication. Agency reiterates that Employee has not provided a prescription from his doctor to indicate that he was authorized to ingest the controlled substance. Agency avers that it is not required to consider Employee's mental state regarding whether he knew he was ingesting a controlled substance. It maintains that a confirmed positive drug test at the time of testing is all that is required to warrant termination in a safety-sensitive position.[15] Agency further argues that the November 18, 2019, doctor's note was submitted after Employee had already provided a positive drug urine sample.[16]

In addition, Agency states that taking another person's medication calls into question not only the integrity of Employee's position as a government employee, but also his ability to use sound judgement in critical situations. Agency explains that any number of things could have

[10] *Id*. at Tab 10.
[11] *Id*.
[12] *Id*. at Tab 11.
[13] Petition for Appeal.
[14] Agency's Answer, *supra*.
[15] *Id*.
[16] *Id*.

happened to Employee as a result of ingesting the medication of another person, including death. Agency concluded that Employee's critical thinking skills are called into question by his actions, and thus, discipline is warranted.[17] Agency notes that termination was warranted and appropriate under the *Douglas* factors.[18] It asserts that it considered the circumstances surrounding the incident in question and evaluated those circumstances to determine whether they were mitigating, aggravating or irrelevant factors to determine the appropriate discipline. Agency also maintains that it was authorized to terminate Employee due to the positive drug test. Agency highlights that, it is well settled that it has the discretion to impose a penalty which cannot be reversed unless "OEA finds that Agency failed to weigh relevant factors or that the Agency's judgement clearly exceeds the limits of reasonableness."[19]

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. Furthermore, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency terminated Employee for violating 6B DCMR §§ 435.6 and 1605.4(h) – "…a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations" and "[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty" respectively.

In the instant matter, there is no dispute that Employee tested positive for codeine after a random drug test on November 7, 2019. As an employee in a safety-sensitive position, Employee was aware of the random testing policy. He was also aware that he must adhere to the random drug and alcohol testing policy. Employee provided a urine sample on November 7, 2019, after he was randomly selected for a drug and alcohol test. Agency was informed on December 16, 2019, that his urine sample tested positive for codeine, a controlled substance. Employee's positive test for codeine after the random drug test on November 7, 2019, constituted a violation of 6B DCMR § 1605.4(h). Consequently, I find that Agency has cause to institute adverse action against Employee for his positive drug test.

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).[20] According to the Court in

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[17] *Id*.
[18] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).
[19] Agency's Answer, *supra.*
[20] *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*

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. Here, I find that Agency has met its burden of proof for 6B DCMR §§ 435.6 and 1605.4(h) – "…a positive drug or alcohol test shall render an individual unsuitable for District employment and constitute cause for purposes of Chapter 16 of these regulations" and "[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty." As such, Agency can rely on these charges in disciplining Employee.

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.[21] 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.

In the instant matter, Employee provided justification for why he tested positive for codeine, a controlled substance. Specifically, Employee notes that he had not been feeling well prior to November 7, 2019, and he had a scheduled doctor's appointment for November 7, 2019, the same day he was randomly selected for a drug test. Employee explains that he took his girlfriend's prescription medication the night before the random drug test to alleviate his cold symptoms so he could report to his scheduled work shift. Employee also states that he was not aware that the medication would affect the results of a drug test.[22] Employee submitted a prescription script for Promethazine with codeine from his doctor, dated November 7, 2019. He also submitted a picture of his girlfriend's prescription bottle for Promethazine with codeine, which was filled on November 4, 2019, three (3) days before Employee tested positive for codeine.[23]

Agency on the other hand avers that Employee was in a safety-sensitive position and the District government is a drug free workplace. Agency further notes that Employee did not provide a prescription from his doctor proving a need for said medication, nor did he provide a note from his girlfriend stating that she allowed him to take her medication. Agency also argues

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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).

[21] *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).

[22] *See* Petition for Appeal, *supra*.

[23] *Id*.

that it was not required to consider Employee's mental state regarding whether he knew he was ingesting a controlled substance. Agency further states that the doctor's note submitted on November 18, 2019, shows that Employee was seen by the doctor after he had already provided a positive drug urine sample. Agency asserts that, taking another person's medication calls into question not only the integrity of Employee's position as a government employee, but also his ability to use sound judgement in critical situations. Agency maintains that termination was the appropriate penalty under the *Douglas* factors. It explains that it considered the circumstances surrounding the incident in question and evaluated those circumstances to determine whether they were Aggravation, Neutral or Mitigating.[24]

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Illustrative Penalties. Chapter 16 of the DPM outlines the Table of Illustrative Penalties for various causes of adverse actions taken against District government employees. The penalties for "[u]nlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty" is found in DPM § 1607.2 (h)(3).[25] The penalty for a first offense for § 1607.2(h)(3) ranges from suspension to removal. Employee was aware of the District's drug free policy and Agency's zero tolerance policy. Employee was also provided with Agency's drug policy prior to the random test selection. The record shows that this was the first time Employee was charged for violating this cause of action. Employee's positive test for a controlled substance is consistent with the language of § 1607.2(h)(3) of the DPM. However, I find that, by terminating Employee, Agency abused its discretion.

Based on the record, I find that Agency did not consider relevant mitigating circumstances or progressive discipline in its decision to terminate Employee. Employee had a scheduled doctor's appointment with his doctor for November 7, 2019, because he was not feeling well. The doctor provided a note on November 18, 2019, almost a month prior to Agency's issuance of the Notice of Proposed Separation in support of Employee's health condition. Doctor Merab Okeyo, Employee's treating physician, confirmed in the note that she saw Employee in her office on November 7, 2019. Dr. Okeyo explained that Employee was suffering from an acute upper respiratory infection on the November 7, 2019, and he 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. The doctor 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. Employee also attached a copy of the prescription script for Promethazine with codeine from his doctor's office dated November 7, 2019, to the Petition for Appeal, along with a picture of his girlfriend's prescription for Promethazine with codeine. Given the totality of the circumstances and the evidence in the record, I find that these are all mitigating circumstances. I further find that the penalty of termination was excessive given that this was Employee's first offense; the availability of a lesser action; Employee's years of service with Agency; his past disciplinary history, his work record and his health condition/mindset at the time he took his girlfriend's medication which caused his drug test to be positive.

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[24] Agency's Answer, *supra*.

[25] Reporting to or being on duty while under the influence of or testing positive for an illegal drug or unauthorized controlled substance.

Penalty 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* (emphasis added).[26] 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 terminate Employee.[27] However, I find that Agency's imposed penalty constitutes an abuse of discretion as it clearly exceeds the limits of reasonableness. The Hearing Officer in this matter recommended that Employee be suspended for fifteen (15) days and retrained on Agency's drug related policies.[28] In its *Douglas* factors analysis, Agency noted that *a lesser action could deter repeated violation of the drug policy by Employee* (emphasis added). Agency also noted that it was not aware of an alternate sanction to deter such conduct in the future. Contrary to this assertion, the Table of Illustrative Penalties clearly provides for a penalty range of suspension to removal for a first offense under this cause of action. I find that suspension would be considered a lesser action than removal in this instance.[29] Therefore, I conclude that Agency abused its discretion as it failed to consider progressive discipline or mitigating factors to include: Employee's health/mental state at the time he consumed the medication that contained codeine; the prescription from his doctor authorizing him to consume Promethazine with codeine, the same substance that caused the urine sample to test positive in Employee's drug test; the fact that the doctor prescribed the Promethazine with codeine prior to Employee being notified that he tested positive for codeine; the doctor's

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[26] *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).

[27] 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
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[28] Agency's Answer at Tab 10, *supra*.

[29] DPM § 1610 provides for progressive discipline when appropriate. Agency itself admits that a lesser penalty would be appropriate in this instance when it stated that a less penalty could deter repeated violation of the drug policy by Employee

November 18, 2019, note was also dated prior to Agency's issuance of the Notice of Proposed Separation; Agency's own assertion that a lesser action than termination could deter Employee from violating Agency's drug policies, and the actual availability of a lesser action (suspension) as provided in the Table of Illustrative Penalties. I further find that Agency's judgement to not consider the above referenced mitigating circumstances and progressive discipline clearly exceeded the limits of reasonableness; thus, I conclude that Agency's adverse action of termination must be reversed.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of terminating Employee for testing positive for an unlawful controlled substance (codeine) while on duty is **REVERSED**;
2. Agency shall reinstate Employee to his previous position of record or a comparable position;
3. Agency shall **Suspend Employee for Fifteen (15) days** for testing positive for an unlawful controlled substance (codeine) while on duty;
4. Agency shall reimburse Employee all back-pay and benefits lost as a result of the adverse action; and
5. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge