GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS

ERIC RIGGANS ,	)	
Employee,	)	
v.	)	OEA Matter No. 1601-0058-09
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS	)	Rohulamin Quander, Esq. Senior Administrative Judge
Agency.	)	
	)	December 8, 2010

Kevin Turner, Esq., Agency Representative
John C. Belcher, Esq., Employee's Counsel

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISORY

Employee, a former Engineering Equipment Operator, DS 11, Step 1, with the D.C. Department of Public Works ("Agency") filed a petition for appeal with the Office of Employee Appeals (the "Office" or "OEA"), appealing Agency's decision, effective on November 5, 2008, to summarily remove him from his position pursuant to District of Columbia Personnel Manuel ("DPM") Chapter 16, § 1616. The summary removal was implemented after Employee was notified by an Agency letter that he tested positive for a controlled substance on October 29, 2008. The test was verified as positive on November 3, 2008. In addition to being a violation of the DPM, Employee's positive test was also a violation of a Last Change Agreement (the "LCA") that Employee signed on August 18, 2004.

The summary suspension notification letter stated that the removal was further prompted by the concern that an employee who tested positive for a controlled substances (marijuana), posed an immediate hazard to the Agency, other employees, and to the Employee himself. The letter also recited that the positive test results were a violation of the LCA and the recited DPW policy regarding random testing of drivers of commercial motor vehicles for the presence of controlled substances and alcohol.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 dc Reg. 9317 (1999) 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:
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> > 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 629.3 *id*, states:

> For appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

The issues to be decided are:

1. Whether Agency's evidence supports a finding that, pursuant to DPM Chapter 16, § 1616.1(b), Agency had a sufficient basis to summarily remove for cause; and
2. Whether the penalty of removal that Agency imposed was appropriate, under the circumstances.

SUMMARY OF WITNESS TESTIMONY

Lottie Winters-Adona; Transcript Pages 27-87

For the past 10 years, Lottie Winters-Adona ("Winters-Adona") has been employed as a Drug and Alcohol Program Manager for Agency. In that capacity, she oversees the management of drug and alcohol testing for all employees holding Commercial Driver Licenses ("CDLs"). She is also the custodian of the records maintained for Agency's Drug and Alcohol Program. Winter-Adona knows Employee, and had previously conducted drug screening tests on him. She identified Agency's Exhibit No.1 as the LCA executed by the Employee on August 18, 2004. She testified that Employee held a safety sensitive position as a heavy equipment operator at the time that his LCA was initiated.

Winters-Adona identified Agency's Exhibit No.2, the position description for the Engineering Equipment Operator RW 11 position, which Employee encumbered at the time of his separation.[1] She recognized Agency Exhibit No. 3, as an extract from the Department of

[1] Recited among the major duties of the position is operation of heavy construction equipment such as wheeled and crawler trucks, backhoes, and the heavy duty two and/or four wheel drive trucks. Further, the position description mandates that the operator is responsible for the safety of pedestrians while operating the equipment and for the safety of employees working around the equipment.

Public Work's Drug and Alcohol Policy and Procedures.[2] A copy of this policy and procedures document is given to every employee, who is expected to be familiar with the contents, and to likewise adhere to its directives and mandates. Federal laws require all employees holding a CDL to be subject to a random drug testing system that selects them for testing. It was by this manner that Employee was required to submit to random drug testing, which revealed a positive test result for marijuana. See Agency Exhibit No.4, the Medical Review Officer's Report, a document which is produced any time that an employee tests positive. Agency collects the urine samples used for drug testing, but does not conduct any of the drug testing itself. Agency does respond and react, however, whenever the certified laboratory's test result reveals that an employee is found to have drugs in his/her system as a result of the random test.[3]

Winters-Adona received Agency's Exhibit No.5, a 40-page Specimen Summary Report from LabCorp, as a part of the Litigation Package for any potential evidentiary hearing or proceeding. Noting that this was the second time that the Employee had tested positive for controlled substances, and as a result violated the published and known DPW policy, Employed was required to be removed from his employment. In addition, Employee is made aware of this fact when signing the Last Chance Agreement.[4]

On Cross Examination, Winters-Adona could not recall whether Employee's job title reflected that he was serving as a Sanitation Worker, or had been promoted to Engineering Equipment Operator by the date when he signed the LCA. She was certain, however, that at the time he executed the Agreement, he was performing the duties of a Commercial Motor Vehicle Operator, because he already held a CDL. Further, she was not aware of Employee's assertion that he had allegedly been informed by someone from the Agency that the Agreement did not bind him because he was not serving in a specifically identified safety position.[5]

Prior to removing the Employee from his safety sensitive position, Agency received the Medical Review Officer's ("MRO") Report, confirming drug use. See Agency Exhibit #4. The result of this document alone, was a sufficient enough basis to justify the removal of Employee from his position with Agency. The Specimen Summary Report (aka, "The Litigation Package"), Agency Exhibit No. 5, had not yet been requested. Prior to Employee's termination, it was uncertain whether there would be an evidentiary hearing or other proceeding. Therefore, preparation of the package was not required. Exhibit No.4, the MRO's Report, verifies that a confirmatory test was performed. While the Litigation Package details what drug verification

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[2] This 28-page document, titled, *Testing of Drivers of Commercial Vehicles for the Presence of Controlled Substances and Alcohol*, was issued by Vanessa Dale Burns, then director, on October 15, 1999. The recited purpose of the document is to communicate the Federal requirements for the U.S. Department of Transportation and the D.C. Department of Public Works (now called the "Department of Transportation") for controlled substances and alcohol testing program designed to help prevent accidents and injuries caused by drivers who are operating commercial vehicles. The document also sets forth the rules for controlled substance testing and alcohol testing for drivers required to have a commercial driver's licenses.

[3] Agency generally uses LabCorp, a private medical corporation that is certified by the U.S. Department of Health and Human Services, to conduct its drug tests. As well, Florida Drug Screen, serves as a third party administrator, which helps the D.C. Agency maintain a wall of separation and professional independence from the drug testing and results handling process.

[4] At item #2, it states, "It is my obligation to comply with all of the conditions set forth in this letter. Violation of any of these conditions shall result in my immediate removal from employment with DPW."

[5] The record does not indicate the name of the person who allegedly made this statement to Employee.

tests were done and what the results were, the package is not needed to remove an employee who is confirmed for illegal use of a substance. If their test result(s) is a positive, they are removed.

At Page 14 of Agency Exhibit No.3, the Department of Public Work's Drug and Alcohol Policy and Procedures, Section B 2, it states that a second controlled substance test should be done if the first result is a positive. Under the circumstances herein, Employee was terminated based upon the results from only the first test and its effect, i.e., confirming the presence of a controlled substance in his urine, a violation of the Agreement. However, when the Litigation Package was subsequently prepared, it recited that on or about October 30, 2008, a confirmation test was performed on the remaining half of the split sample, using the gas chromatography/mass spectrometry method, the results of which confirmed that the illegal drug was present in Employee's urine sample. This confirming result was provided after Agency had already terminated Employee, effective November 5, 2008, before any litigation incidental to the termination was initiated.

On redirect testimony, Winters-Adona testified that regardless of Employee's job title as a "Sanitation Worker" or "Equipment Operator," the work that he was doing required that he operate heavy equipment as needed by the dictate of his duties. Whether he was operating a vehicle to remove snow, to remove leaves, etc., he was still operating heavy trucks and equipment, and for that activity he needed to posses and maintain a current CDL. Even if he was not yet an Equipment Operator, if he had obtained a CDL he would first have successfully complete the pre-employment test to qualify for the CDL. Qualifying includes executing the notification form, which states, *inter alia*, "I acknowledge that I'm going into a random pool."; "I acknowledge I'm doing a pre-employment test." You cannot do this type of work or be placed into the random pool based upon the possession of only a regular driver's license. Further, the nature of his work and his actual periodic duties came under the federal guidelines, for which a CDL and all of the statutorily and regulatory compliance mandates were applicable.

When an employee is notified that, for the first time they have tested positive in a drug test, that employee is immediately removed from safety sensitive vehicular access, given a disciplinary suspension, provided with information on how they can obtain drug counseling through the services of COPE, and helped to enroll in that program. See Agency Exhib. #6, dated August 18, 2004. They are also presented with an LCA as an alternative to termination. Therefore, the offending employee is given two documents at the same time, one the notice of disciplinary action, i.e., the suspension, and the other being the LCA. See Agency Exhibit #1, also dated August 18, 2004. To the best of the witness's knowledge, Employee was given a multi-day suspension, without pay, as reflected in the August 18, 2004, letter. Once he returned to work after his suspension, according to the provisions of the suspension letter, he remained removed from access to operating safety sensitive equipment until he completed the COPE program. The decision of whether to execute a LCA always remains with the employee. In the case at hand, Winters-Adona had no knowledge or information suggesting that Employee questioned the LCA or its contents and purpose before he executed it in August 2004.

Winter-Adona clarified Employee's implication that he was terminated illegally, because there was only one drug evaluation performed, instead of the standard additional verification test, before Agency terminated him, which was in violation of the regulations. She noted that, because

the position was a safety sensitive position, it was necessary to initiate immediate disciplinary action. The policy is to impose discipline on all employees who fail the random test, which includes removing them from access to safety sensitive equipment. Employee's test results violated the LCA. Employee's urine specimen[6] was split into two parts, apportioned to Bottle "A" and Bottle "B." Initially only the contents of Bottle "A" were tested. Once Agency was notified of a positive drug[7] result from that sample, steps for disciplinary action were immediately initiated. Once there is a positive test result on the first half of the split sample (Bottle "A"), the standard policy, which was followed in this case, is to send the other half of the split sample (Bottle "B") to the laboratory for separate testing, using a different testing procedure, to verify whether there is likewise a positive test result.[8] If that result comes back as a "negative," then the disciplinary action is cancelled. In this case Agency received no notification that the verification test of the other half of the sample received a negative result. Therefore, there was no reason to cancel the summary removal action, effective November 5, 2008, or the permanent termination, effective November 19, 2008. See Agency Exhibits #7 and #8.

Ingrid L. Jackson Transcript Pp. 87 – 102

Ingrid L. Jackson ("Jackson") is employed by the District of Columbia Government at the Department of Public Works ("Agency"). Jackson serves as the Agency's Human Capital Administrator, and is the primary human resources administrator. Her duties include supervising human resources training and development, and drug and alcohol-related functions, and maintaining Agency records incidental to those functions. Although Jackson did not personally know Employee, she recognized his name from paperwork associated with his removal. He was removed because he tested positive on August 12th [9], which violated his LCA.

It was the Agency's practice that violations of a LCA resulted in summary removal. She recognized Agency's Exhibit No. 8 as the Agency Final Decision, verifying that the summary removal was now made permanent. Further, removal for a second offense drug use is consistent with the District's Table of Penalties, the practice of the Agency, and the LCA.

Although the Table of Penalties does not specifically recite that removal is mandated for a second offense drug use, removal does fit under the category of threat to the integrity of a government operation, i.e., public safety. She stated, "It is under that umbrella that we terminate employees for testing positive a second time in partnership with the Last Chance Agreement". She expounded that individuals under the influence of drugs or alcohol are operating vehicles over 10,000 lbs. They may operate them improperly and harm themselves, a co-worker, or someone from the community they are working in.

In some instances you may find that an employee who is in violation of the LCA may

[6] According to the documents from the record, Employee provided the specimen on October 29, 2008.
[7] The Medical Review Officer's report is dated October 31, 2008, and references that the specimen was collected on October 29, 2008. Agency apparently received the results on November 3, 2008, and imposed summary removal discipline on November 5, 2008, and final termination effective November 19, 2008.
[8] This confirmation test was identified as the gas chromatography/mass spectrometry technique test.
[9] Jackson misspoke when she referred to the current violation date as "August 12th," which was the cited date of the initial offense in 2004, which gave rise to the prior disciplinary action and the LCA, dated August 18, 2004.

have a less serious sanction than removal imposed. However, the Agency head, William Howland, who has been in his position since 2004, has opted not to exercise less serious options. She has been with the Agency for more than three years, and it has been the practice, even before her arrival, to terminate employees when they violate the LCA. According to the Table of Penalties, Chapter 16 of the District Personnel Manual, Penalties are at the full discretion of the agency head. While the Table of Penalties can be very general, where you have individuals with CDL licenses who can pose a threat to citizens, co-workers, and themselves, you have to exercise a higher degree of caution and penalty.[10]

Jackson testified that the Agency did not rescind the LCA prior to the Employee's removal. She noted further that, Attorney Teresa Cusick, the Hearing Officer (aka, the Administrative Review Officer), a licensed attorney who reviews all of Agency's proposals for removal, in accordance with Chapter 16 to ensure that they are following the requirements of the *District Official Code,* would not have let the Agency sustain a removal if there were any questions about the documentation. Jackson was not aware of whether the Employee was restored to his position in the middle of the period of suspension. However, since she had been employed with the Agency, there have not been any rescinded LCAs. The LCA did not only apply to drivers with a CDL. If you are performing safety sensitive duties or transitioning from a position that does not perform safety sensitive duties to a position that does, you may still be subjected to the LCA.

Employee's case

Employee elected not to testify, but notified the court, through his counsel, that he would present the balance of his case through written arguments, that were to be submitted, post hearing, to the AJ. In his post hearing brief, Employee challenged the propriety of the evidentiary hearing proceedings, reasserting his initial *Motion in Limine.* He argued that Employee had the right to not have the purported results of the drug test admitted into the record where there was no expert witness present to confront the Employee and likewise to testify on behalf of the Agency. Without such, Agency's drug test documents constituted hearsay, and lacked a proper authentication before being offered and accepted into the record. Employee also argued that Agency committed a fundamental unfairness when it did not disclose to Employee the full content of a packet of documents, which were subsequently identified as Agency Exhibit #5, the Litigation Package, until the eve of the evidentiary hearing.

LEGAL ANALYSIS AND CONCLUSIONS

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. Reg. 9317 (1999).

After considering all of the evidence of record, I make the following Findings of Fact.

[10] See DPM 6-1616.1, Summary Removal.

Further, inasmuch as Employee elected not testify or put on a case in chief, the following findings of fact are undisputed:

1. Employee was initially employed by Agency as a Sanitation Worker. Because he operated heavy equipment and worked in a safety sensitive capacity, he was required to obtain and maintain a CDL. To maintain the CDL, Employee was mandated to meet and adhere to the federal safety requirements for maintaining his CDL in good standing.[11] On August 10, 2004, Employee submitted to random drug testing as required by federal law and the Agency. That test was positive for marijuana, which violated both the federal and Agency safety standards.
2. Employee was disciplined for violating the safety standard, and given at least a five-day suspension without pay. However, and consistent with Agency policy, he was accorded an opportunity to retain his job, provided he agreed to submit to drug counseling and rehabilitation through the COPE program, and further agreed to the terms of a LCA.
3. On August 18, 2004, Employee signed a LCA, which document recited that he had read and fully understood the terms and conditions set forth.
4. Pursuant to Item #2 of the LCA, Employee agreed to submit to unannounced, direct observation, controlled substance and/or alcohol testing, which must yield a negative result(s). If he tested positive for substance abuse, at any time within five years from the date the LCA was executed, the LCA provided that Employee was to be terminated.
5. On November 29, 2005, Agency promoted Employee to the position of Engineering Equipment Operator, RW-11.
6. Subsequently, on October 29, 2008, pursuant to another random drug test, Employee tested positive for marijuana.
7. On November 5, 2008, Agency summarily removed Employee from his position.
8. Agency cited cause for removing Employee summarily, pursuant to DPM Chapter 16, Section 1603.3(f)(i), i.e., "Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result."
9. DPM Chapter 16, Section 1619.1, as it relates to substance abuse states, "The District government has a drug-free work policy that prohibits not only the use of illegal drugs, but extends to the inappropriate use (or abuse) of prescription drugs and over-the-counter drugs."
10. Agency is a component of the D.C. Government. Although the Table of Penalties does not specifically recite that removal is mandated for a second offense drug use, removal does fit under the category of threat to the integrity of a government operation, i.e., public safety.
11. Agency emphasized that the underlying basis for Employee's termination was twofold: First because of the adverse safety implications of the drug test results to Employee's co-workers, the general public, and to himself; and Second, testing positive in the random drug test was a clear violation of the LCA, which itself recited

[11] In accordance with the Federal Motor Carrier Safety Regulations, 49 CRF Part 382 and Agency's drug free workplace policy, employees who hold CDLs must undergo random substance abuse testing, to verify that they remain in compliance with the conditions of their authority to retain their CDL licenses.

that termination from employment would be the remedy, if Employee tested positive for use of a controlled substance.

CONCLUISIONS OF LAW

The question before me is whether Agency, by a preponderance of the evidence, proved that summary removal was appropriate under the circumstances. DPM Chapter 16, Section 1616.1 sets forth Agency's authority to summarily remove an employee:

> An agency head may remove an employee summarily when the employee's conduct:
>
> (a) Threatens the integrity of government operations;
>
> (b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or
>
> (c) Is detrimental to public health, safety, or welfare of others.

DPM Chapter 16, Section 1616.2 states:

> An agency head may summarily remove an employee under this section only if at the time the summary removal action is taken, a good faith effort has been made to determine that at least one (1) of the conditions described in section 1616.1 is met; and only if the action is taken for cause pursuant to section 1603. Otherwise, the employee shall be entitled to an advance written notice as specified in section 1608.

Employee did not produce any evidence to refute Agency's contention that he tested positive for a controlled substance on October 29, 2008. However, relying upon the recent Supreme Court case, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (U.S. 2009), Employee objected to Agency introducing the results of his urinalysis and MRO's report confirming the positive drug test as inadmissible hearsay. Employee argued that to accept hearsay is a violation of his Sixth Amendment Constitutional right to confrontation. Agency responded by noting that *Melendez-Diaz* case concerns a criminal defendant's rights under the Sixth Amendment of the Constitution, and is neither controlling nor persuasive in this civil proceeding. See *Hijar v. Dep't of the Army*, 6 M.S.P.B. 121 (M.S.P.B. 1981); *See also*, *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. Ky. 1983), (There exists no Sixth Amendment right to confront witnesses or compulsory process which applies to administrative discharge proceedings.). For this reason, I conclude that Employee's claim to Sixth Amendment protection is misplaced here.

The undisputed evidence in the record is that Employee tested positive for marijuana. Agency acted as soon as it received the results of the testing on Bottle "A" of the split sample. Bottle "B" was tested shortly thereafter, and the results were received prior to the final separation date of employment. The summary removal was taken as a safety measure. Jackson testified to the inherent dangers posed by virtue of Employee's safety sensitive position, and the heavy equipment that he operated, and the equipment that is operated around him. Under these circumstances substance abuse presents a hazard not only to Employee, but also to his co-

workers and the public. Had the test result on Bottle "B" been negative, Agency would have vacated the summary removal and reinstated Employee.

I conclude that Agency has demonstrated in accordance with DPM Chapter 16, Section 1616.1 that Employee's substance abuse:

(a) Threatens the integrity of government operations;

(b) Constitutes an immediate hazard to the Agency, to other District employees, or to the Employee, himself, and to the general public; or

(c) Is detrimental to public health, safety, or welfare of others.

ORDER

Accordingly, I affirm Agency's decision to summarily remove Employee.

FOR THE OFFICE:

/ S /
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge