THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0004-19
EUGENE GOFORTH, Employee	
	Date of Issuance: April 30, 2020
v.	
	ARIEN P. CANNON, ESQ.
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, Agency	Administrative Judge

Charles Walton, Esq., Employee Representative
Jhumur Razzaque, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

Eugene Goforth ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 5, 2018, challenging the District of Columbia Department of Public Works' ("Agency" or "DPW") decision to remove him from his position as a Heavy Mobile Equipment Mechanic. Employee's termination was effective on June 20, 2018, pursuant to a summary removal.[2] Agency filed its Answer on November 8, 2018. I was assigned this matter on September 17, 2019.

A Prehearing Conference was held in this matter on December 9, 2019, where both parties were present. A Post Prehearing Conference order was subsequently issued on December 12, 2019, which required the parties to submit briefs addressing the issues set forth at the Prehearing Conference. Both parties have submitted their briefs accordingly. I have determined that an evidentiary hearing is not warranted. The record is now closed.

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[2] *See* Agency Answer, Tabs 15 and 17.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action for: (1) Conduct detrimental to the public health, safety, or welfare[3]; and (2) Interfering with, or refusing or failing to submit to a properly ordered or authorized drug test;[4] and;

2. If so, whether removal was appropriate under the circumstances

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:
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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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed as a Heavy Equipment Mechanic with DPW, beginning on May 16, 2016.[5] Employee's position as a Heavy Mobile Equipment Mechanic was within the Fleet Management Administration, Scheduled Maintenance Division of DPW. Part of Employee's responsibilities required him to maintain a valid Commercial Driver's License ("CDL"). Employees who maintain a CDL are subject to Agency's drug and alcohol policy. Agency's policy, entitled, "Testing of Drivers of Commercial Motor Vehicles for the Presence of Controlled Substances and Alcohol," outlines the United States Department of Transportation Federal Highway Administration's rules for controlled substance and alcohol testing for drivers required to maintain a CDL.[6] The purpose of this policy is to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

On November 9, 2017, Employee signed forms acknowledging receipt of Agency's Controlled Substance and Alcohol Testing Policy.[7] On June 13, 2018, Agency notified

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[3] 6B DCMR § 1616.2(c).
[4] *See* 6B DCMR § 1607.2(h)(6).
[5] *See* Agency Answer, Tab 1 (November 8, 2018).
[6] *Id*., Tab 11.
[7] *Id*., Tab 5.

Employee that he was required to submit to a random drug test.[8] Employee was escorted to Metro Lab, LLC, by his supervisor, Glennis Jackson, to provide a sample for testing. The events that occurred subsequent to Employee arriving at Metro Lab are addressed below.

Agency's position

Agency contends that the first urine sample provided by Employee for testing was outside of the acceptable temperature range.[9] The Federal Drug Testing Custody and Control Form ("the form") completed by the Medical Assistant collecting the urine sample, Elham Ahmed, reflects that Employee's initial urine sample was outside the acceptable temperature range of 90 to 100 degrees Fahrenheit. Although neither box for "Yes" or "No" are marked under Step 2 of the form, the remarks in this section makes clear that the Medical Assistant ascertained that the urine sample was not between the acceptable temperate ranges.

Under the Federal Department of Transportation ("DOT") Rule 49 CFR Part 40, Subpart E, § 40.65(b)(1), the collector must check the temperature of the specimen no later than 4 minutes after the employee has provided the specimen. The temperature range is determined by reading the temperature strip attached to the collection container.[10] The Medical Assistant was not required to note the exact temperature of the specimen, and was in fact unable to do so, as she was only required to determine the temperature range by reading the temperature strip—which does not measure the exact temperature. The temperature strip changes color, indicating whether the specimen is within the acceptable range. Agency contends that Ms. Ahmed read the temperature strip within four (4) minutes of collecting the sample, which indicated that Employee's specimen was not within the acceptable temperature range. Ms. Ahmed noted her findings under the "Remarks" section under Step 2 of the form.

Because Employee's first sample was not acceptable, Employee was asked to provide a second sample under direct observation in accordance with 49 CFR Part 40, Subpart E, § 40.65(b)(5). The proper procedures to be followed in a direct observation are set forth in 49 CFR Part 40, Subpart E § 40.67. Agency maintains that Employee refused to provide a sample under direct observation. Because Employee refused to provide a second specimen under direct observation, Metro Lab discarded the initial specimen pursuant to 49 CFR Part 40, Subpart E, § 40.65(b)(7). Under 49 CFR Part 40, § 40.191(a)(4), Agency treated Employee's failure to permit the direct observation of his specimen as a refusal to take a drug test.

Agency further contends that direct observation was required under DOT regulations and Employee's refusal to allow a direct observation constituted a refusal to submit to a drug test. Agency asserts that because Employee refused to provide a specimen under direct observation, it charged him with "Interfering with, or refusing or failing to submit to a properly ordered or authorized drug test…"[11]

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[8] *Id*., Tab 6.
[9] *See* Agency Answer, Tab 12, Step 2 remarks.
[10] 49 CFR Part 40, Subpart E, § 40.65(b)(2).
[11] *See* 6B DCMR § 1607.2(h)(6). Agency also charged Employee with "conduct detrimental to the public health, safety, or welfare, pursuant to District Personnel Manual § 1616.2(c). However, as explained below, this charge

Employee's position

Employee asserts that Metro Lab failed to comply with the DOT's Urine Specimen Collection Guidelines ("Guidelines") when processing his urine sample.[12] Specifically, he maintains that the Federal Drug Testing and Custody and Control Form contains several irregularities, including inconsistent data as to the time of collection and an assertion that no sample had been provided by Employee. Employee also questions whether his urine sample was collected and processed by a qualified person under DOT regulations.

Furthermore, Employee contends that Metro Lab discarded his initial urine sample without waiting for the temperature to register. Employee also contends that Metro Lab requested that Employee provide a second urine sample under direct observation even though the first urine sample had already been discarded in contradiction with DOT guidelines. Employee maintains that the circumstances surrounding the second test request made by the administrator of Metro Lab are in dispute. Namely, Employee asserts that his refusal to submit a second sample was because the administrator demanded Employee take the second test while exposing his private parts in full view of the test administrator without proof that a second test was necessary. Employee felt that he was placed in a compromising and sexually offensive position when he was told he had to expose his private parts to the administrator, thus refusing to submit a second urine sample.

Employee also contends that the collector failed to follow the collection procedures mandated by the Guidelines issued by the DOT. Specifically, Employee cites that the collector did not check any of the boxes under Step 2 of the Form to indicate if the specimen temperature was within the acceptable range. Additionally, Employee maintains that if the temperature was out of range, the collector should have completed the collection and immediately initiated a new collection under direct observation. However, Employee takes issue with the fact that the collector discarded the initial urine sample and marked "None provided" under Step two of the Form.[13] Employee argues that the discarded specimen should have been kept, properly marked, and submitted along with a second sample taken under direct observation. From Employee's perspective, both samples were required to be submitted for testing with the required marks indicating that the first one was outside of the acceptable temperature range and the second collection was taken under observation.[14]

Employee reiterated that the collector discarded his initial urine sample before his alleged refusal to submit to a second test under direct observation had taken place. Employee asserts that he was not refusing to provide a second urine sample, but rather he refused to show his penis

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cannot be sustained.

[12] Although Employee does not include a copy of the DOT guidelines referenced in his February 10, 2020 brief, nor point to anywhere in the record where the guidelines may be located, Employee presumably is referencing the guidelines that may be found at the following web address: https://www.transportation.gov/sites/dot.gov/files/docs/resources/partners/drug-and-alcohol-testing/2567/urine-specimen-collection-guidelines-january-2018.pdf

[13] *See* Agency Answer, Tab 12, Step 2.

[14] *See* DOT Urine Specimen Collection Guidelines, at 27 (https://www.transportation.gov/sites/dot.gov/files/docs/resources/partners/drug-and-alcohol-testing/2567/urine-specimen-collection-guidelines-january-2018.pdf).

to the collector because he felt it was degrading and triggered his PTSD and bipolar disorder. Thus, Employee argues that Agency did not have cause to take adverse action against him and that removal was not appropriate under the circumstances.

Whether Agency had cause to charge Employee with "conduct detrimental to the public health, safety, or welfare" pursuant to 6B DCMR § 1616.2(c).

As explained in further detail below, the facts indicate that Employee refused or failed to submit to a properly ordered drug test. I find that Employee's refusal to submit to a properly ordered drug test does not rise to the level of conduct detrimental to the public health, safety, or welfare. There is no evidence in the record that Employee was under the influence of any controlled substances or alcohol while on duty. Additionally, there is no evidence that Employee operated a government owned or leased vehicle while under the influence of a controlled substance or alcohol. As such, I find that there is insufficient evidence that Employee's conduct was a detriment to public health, safety, or welfare.

Whether Agency had cause to take adverse action against Employee for "refusing or failing to submit to a properly ordered or authorized drug test…" pursuant to 6B DCMR § 1607.2(h)(6).

It is uncontroverted that Employee did not provide a second urine sample. Whether Employee's reasons for refusing to submit a second specimen are justified are disputed between the parties. As discussed below, I find that Agency had cause to take adverse action against Employee for "refusing or failing to submit to a properly ordered or authorized drug test…" pursuant to 6B DCMR § 1607.2(h)(6).

Employee contends that the testing contractor, Metro Lab, failed to comply with the DOT's Urine Specimen Collection Guidelines when processing Employee's urine sample. He further contends that the Federal Drug Testing and Custody and Control Form contains several irregularities, including inconsistent data as to the time of collection and an assertion that no sample had been provided by Employee. Employee also questions whether Employee's urine sample was collected and processed by a person who was qualified to do so under DOT regulations. All of Employee's arguments fail.

The parties dispute whether the first urine sample provided by Employee was, in fact, out of the appropriate temperature range. Employee points to the Federal Drug Testing and Custody and Control Form used for the first urine sample which does not provide a response indicating "Yes" or "No" in Step 2 of the form as an attempt to support his position that the form was incomplete.[15] However, this argument must fail. Despite neither the "Yes" box or "No" box being checked, the response to the question is clearly made in the "Remarks" section directly under Step 2—which states that the temperature of the specimen was outside of the acceptable range. Specifically, the remarks state, "Donor temperature out of range," indicating that the specimen was not within the acceptable range of 90 to 100 degrees Fahrenheit. Although neither the "Yes" box or "No" box are not marked, I find this omission to be *de minimis*, as the collector made clear in the remarks that the temperature was outside of the acceptable range.

[15] *See* Agency Answer, Tab 12

Additionally, although Employee suggests that the collector was required to show him the temperature strip to confirm the specimen being out of range, he does not point to any rule or regulation that requires such action.

As an attempt to identify irregularities with the Federal Drug Testing form, Employee states that the remarks under Step 2 of the form indicate a time of 5:22 p.m., whereas in Step 4 of the form, it states the time of collection is 6:13 p.m.[16] However, a review of the remarks under Step 2 indicate that Employee drank forty (40) ounces of some type of liquid at 5:22 p.m. and the collection time of the sample was 6:13 p.m. As such, I find no irregularity with the times provided in the initial drug testing form.

Employee further asserts that the collector of his first urine sample immediately discarded the specimen without allowing the temperature to register on the temperature strip. As explained by Ms. Elham Ahmed in her affidavit, the temperature range is determined by reading the temperature strip on the specimen cup, which changes colors when the temperature is within the appropriate range.[17] If the color does not change and remains black, the collector is able to determine that the temperature is not within the acceptable range. Here, the temperature strip on Employee's specimen cup did not change color and remained black.[18] Employee points to no reliable evidence that the specimen was discarded without waiting the necessary amount of time for the temperature to register. Thus, Employee's argument that his first specimen was discarded without allowing the temperature to register must also fail.

Employee's argument that the initial specimen was prematurely discarded falls short. The only evidence in the record to support Employee's argument that Ms. Ahmed prematurely discarded his initial specimen are his own statements. Employee's supervisor, Glennis Jackson, provided a statement which reiterated Employee's assertions about the specimen being discarded.[19] Mr. Jackson does not offer a first-hand perspective on whether the initial specimen was immediately discarded. Ms. Ahmed provides in her affidavit that the initial specimen was only discarded *after* Employee refused to submit to a drug test under direct observation. Had Employee provided a second specimen under direct observation, then it would have been Metro Lab's responsibility—and not Employee's—to provide the initial specimen along with the second specimen administered under direct observation. Employee's concern about his initial specimen being discarded only comes from his attempt to challenge the process followed in administering his drug test. If Employee had a genuine concern about Metro Lab supposedly discarding his initial specimen prematurely, he could have still provided a second specimen under direct observation, which would have then required Metro Lab to explain why both specimens were not processed. However, because a second specimen was not provided by Employee under direct observation, the DOT provisions call for the initial specimen to be discarded.[20] Accordingly, I find that Employee's specimen was not prematurely discarded.

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[16] *See* Agency Answer, Tab 12.
[17] *See* Agency's Reply Brief, Exhibit 1, Affidavit of Elham Ahmed at 2 (March 4, 2020).
[18] *See Id.*
[19] *See* Agency Answer, Tab 8.
[20] 49 CFR Part 40, Subpart E, § 40.65(b)(7).

Employee's attempt to discredit the qualifications of the employees of Metro Lab also fails. Employee loosely implies, without pointing to any evidence in the record, that his urine sample was not collected and processed by a qualified individual under DOT regulations.[21] In fact, the documents of record indicate that both Mr. Kassahun Tefera—the owner of Metro Lab—and Ms. Elham Ahmed are qualified collectors of specimen under DOT regulation 49 CFR 40.33.[22] Ms. Ahmed completed the first Federal Drug Testing Custody form but did not sign the form; the form was signed by her supervisor, Mr. Tefera, who attempted to administer the second test under direct observation.[23] However, Employee refused to provide a second specimen under direct observation and stated to the collector "he's no homosexual and don't allow no man to watch his dick."[24]

The cataclysm of Employee's argument is his uncontroverted refusal to submit a second specimen under direct observation. DOT provision 49 CFR Part 40, § 40.191(a)(4), provides that a failure to permit direct observation of a specimen constitutes a refusal to submit to a drug test. 49 CFR Part 40, § 40.67 sets forth with specificity the procedures for a drug test under direct observation. The relevant provisions to the instant case provide that the observer "must watch the employee urinate into the collection container. Specifically, you are to watch the urine go from the employee's body into the collection container."[25] Thus, despite Employee's discomfort with the direct observation process, Agency, through Metro Lab, was within its authority to require Employee to submit to a direct observation drug test once it was determined that Employee's initial specimen was outside the acceptable temperature range. Employee's failure to submit to the direct observation drug test constituted a refusal to submit to a drug test and established cause under 6B DCMR § 1607.2(h)(6).

In Employee's brief, he notes that he is the only employee out of more than 300 Agency employees who has been selected for five random drug tests during his two-year tenure with Agency. He expresses his belief that management selected him for numerous "random" drug tests as a form of harassment and retaliation because of a prior incident with a co-worker. Employee's harassment and retaliation claims in this regard are outside the purview of this Office and will not be addressed in this decision.

Whether termination was appropriate under the circumstances

In assessing the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).[26] The undersigned may only amend

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[21] *See* Employee's Brief, at 2 (February 10, 2020).
[22] *See* Agency Answer, Tab 10, Affidavit of Kassahun Tefera (November 8, 2018); *See also* Agency's Reply Brief, Exhibit 1, Affidavit of Elham Ahmed (March 4, 2020). Despite there being discrepancies in the records as to who completed the Federal Drug Testing and Custody and Control Form, either Ms. Ahmed or Mr. Kassahun Tefera, I find this discrepancy to be *de minimis*, as both are qualified collectors of specimen under DOT regulations. It is further noted that Mr. Tefera is the owner of Metro Lab and direct supervisor of Ms. Ahmed.
[23] Per DOT regulations, direct observation must be completed by the same gender as the employee (49 CFR Part 40, § 40.67(g)). It should be noted that an observer carrying out a direct observation need not be a qualified collector of specimen.
[24] *See* Agency Answer, Tab 9, Affidavit of Dejuan Hogan, DPW's Substance Abuse Specialist.
[25] 49 CFR Part 40, § 40.67(j)
[26] *See Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on*

an agency's penalty if the agency failed to weigh relevant factors or the agency's judgment clearly exceeded limits of reasonableness.[27] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[28]

Here, Agency included an analysis of the *Douglas* factors with its Notice of Final Decision on Summary Removal, issued on September 7, 2018.[29] Additionally, the Table of Illustrative Actions provides that the appropriate penalty for the first time occurrence of refusing or failing to submit to a properly authorized drug test is removal.[30] As such, I find that Agency appropriately weighed the relevant factors and properly exercised its managerial discretion. Thus, I find that termination was reasonable under the circumstances.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's termination of Employee is **UPHELD**.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge

Petition for Review (May 23, 2008); *Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[27] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[28] *Id.*

[29] *See* Agency Answer, Tab 17.

[30] *See* 6-B DCMR § 1607.2(h)(6), Table of Illustrative Actions.