THEDISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SERRINA WILLIAMS,	)	
Employee	)	OEA Matter No. 1601-0042-13
	)	
v.	)	Date of Issuance: October 24, 2014
	)	
DISTRICT OF COLUMBIA	)	STEPHANIE N. HARRIS, Esq.
DEPARTMENT OF TRANSPORTATION,	)	Administrative Judge
Agency	)	
	)	

Gina Walton, Employee Representative
Michael F. O'Connell, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 3, 2013, Serrina Williams ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Transportation's ("DDOT" or "Agency") action of terminating her. The effective date of Employee's termination was December 28, 2012. Employee's position of record at the time of her termination was a Traffic Control Officer and she was serving in Career Service status at the time she was terminated. Agency submitted its Answer in response to Employee's Petition for Appeal on February 4, 2013.

I was assigned this matter on February 25, 2014. On March 14, 2014, I ordered ("March 14th Order") the parties to attend a Prehearing Conference on May 20, 2014. Both parties submitted their required Prehearing Statements on May 13, 2014 and were present for the proceeding on May 20, 2014. A Post Prehearing Conference Order was issued on June 10, 2014, requiring the parties to submit Post Prehearing Briefs. Agency submitted its brief on July 1, 2014 and Employee submitted her brief on July 22, 2014. Agency submitted an optional rebuttal brief on July 29, 2014. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts at issue in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of terminating Employee was done in accordance with District laws, rules and regulation.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee's Position

In her Petition for Appeal, Employee states that she was improperly removed from her position as a Traffic Control Officer. In her Prehearing Statement, Employee contends that Article 10 §C of the Collective Bargaining Agreement ("CBA") between the American Federation of Government Employees ("AFGE"), Local 1975 and Agency states that when imposing disciplinary actions, the Department shall apply progressive discipline and shall consider the mitigating factors against the alleged offense.

Employee also contends that CBA, Article 37, §A notes that "the parties recognize that alcoholism, drug abuse and emotional disorders are illnesses that can interfere with job performance. As such, Management shall assist bargaining unit employees suffering from these illnesses to recover by referring them to the District's Employee Assistance Program."[1] As a member of AFGE's collective bargaining unit, Employee explains that she is covered by the current CBA and as such, she should have been afforded an opportunity to seek counseling to mitigate the imposed penalty.

In her Brief, Employee acknowledges that she tested positive for drugs and "has never denied that fact."[2] Additionally, Employee asserts that she "understands that the Agency has cause to take an adverse action against her for her actions and is not disputing this fact."[3] However, Employee contends that she is wrongfully categorized as a covered employee in a safety sensitive position. She argues that her job description does not support her being classified as a covered employee in a safety-sensitive position pursuant to District Personnel Manual ("DPM") §3903, which states that strictly tangential, casual, or occasional contact with children or youth does not automatically make an employee subject to testing. Employee also relays that Agency did not present any evidence to show that it considered relevant factors as outlined in *Douglas*[4] in reaching the decision to remove her.

Additionally, Employee asserts that she is not a habitual user of drugs and did not know that she had an actual problem until counseling. She states that her initial contact with COPE was May 8, 2012, where she set up an appointment for her first counseling session which took place

[1] Employee Prehearing Statement, p. 2 (May 13, 2014).
[2] Employee Brief, p. 3 (July 22, 2014).
[3] *Id*.
[4] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

on June 29, 2012.[5] Employee contends that Agency was put on notice that she was seeking counseling through COPE based on their referral and claims that she had no knowledge that she needed to divulge the nature of her sessions with Agency. She also contends that Agency violated CBA, Article 37 §A because they were aware that she was seeking treatment through COPE and after she subsequently tested positive for drugs, Agency had an obligation to allow her to continue to seek treatment for her issues.

Agency's Position

In its Prehearing Statement, Agency submits that on July 6, 2012, Employee was placed on administrative leave with pay to conduct an investigation in Employee's June 25, 2012 drug screen results, which tested positive for the presence of marijuana/cannabinoids, an illegal substance. Upon receiving confirmation of the positive drug screen results, Agency provided Employee with fifteen (15) days advance written notice of its proposal to remove Employee from her position pursuant to 16 DPM § 1603.3(i) and 1619.1(9). The cause for the proposed action was based upon the following charge: Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result.

Agency explains that DCHR notified Employee in writing, on August 11, 2008, that she occupied a safety-sensitive covered position under Title I of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"), D.C. Code §§1-623.31 – 1-620.37. This notice specifically informed Employee that she occupied a covered employment position and performed services that affected the health, safety, and welfare of children and youth.[6] The written notification specifically informed Employee that her position required her to submit to random drug and alcohol testing and she was required to disclose any drug use problem within thirty (30) days of notification in order to avoid any disciplinary action. Agency asserts that Employee never informed Agency that she suffered from any substance abuse problems and failed to avail herself of the opportunity to self-report any substance abuse problems within thirty (30) days of being appointed to a CYSHA position. Further, the only occasion in which Employee alleged that she suffered from a drug problem occurred subsequent to her positive drug test result.[7]

On November 16, 2012, Agency issued its Hearing Officer Report and Recommendation, which sustained Agency's proposed removal of Employee. Agency notes that Employee provided a response to the proposed removal, where "she admitted to failing the drug test while holding a coveted position."[8] In its Rebuttal Brief, Agency disputes Employee's claim that she was not covered by CYSHA, noting that she signed the form, Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth on August 11, 2008.[9] This written notice further stated that in this covered position, she would 1) be subject to random drug and alcohol testing; 2) be required to disclose any drug use problem; and 3) have

[5] *Id.*
[6] Agency Answer, Tab 2, p. 3 (February 4, 2013); Agency Post Prehearing Brief, Tab 1 (July 1, 2014
[7] Agency Answer, Tab 6.
[8] *Id.*
[9] Agency Post Prehearing Brief, Tab 1.

thirty (30) days from the date of signing to disclose a substance abuse problem without being terminated.[10]

Agency relays that in her brief, Employee acknowledged that she knew she was subject to drug testing. Additionally, Agency explains that in the position description, which was submitted by Employee, it explicitly states that "this position performs a safety sensitive function and is subject to pre-employment and post-employment random substance abuse testing.[11] Agency asserts that this is a clear admission that Employee held a safety-sensitive position covered by CYSHA and was informed that she was subject to drug testing.[12] Further, Agency does not contend that Employee is automatically subject to substance abuse testing simply because certain positions are subject to testing. Instead, Agency asserts that Employee was subject to substance abuse testing based upon the specific position description, the services provided by Employee, and the fact that Employee acknowledges to being subject to testing.

In response to Employee's allegations that she self-reported her alleged drug problem, Agency explains that upon being provided notice of the CYSHA policy, Employee had one opportunity to seek treatment prior to receiving positive drug test results. Despite Employee's claim to the contrary, Agency asserts that Employee never informed Agency that she suffered from a substance abuse problem prior to testing positive for marijuana. Agency notes that in Employee's response to the Proposed Notice, she made no reference to her alleged self-reporting of a substance abuse problem or having been enrolled in a substance abuse counseling and rehabilitation program at the time of her drug test on June 25, 2012. Instead, in her response, Employee "merely states that she now seeks to utilize an opportunity to seek treatment."[13]

Regarding Employee's submission of a COPE letter purporting to show self-reporting of a substance abuse problem, Agency asserts that the letter "merely states that Employee contacted COPE in May 2012 after experiencing a traumatic incident at work and [to seek] support for family issues."[14] Agency notes that Employee had an initial appointment on June 29, 2012, which took place after her June 25, 2012 positive drug test. Additionally, Agency explains that employees may contact COPE for multiple reasons, none of which need to be related to drug counseling and rehabilitation. Further, Agency relays that mere contact with COPE does not constitute enrollment in a substance abuse counseling and rehabilitation program. Agency contends that Employee has offered no proof that her contact with COPE was related to substance abuse counseling, or that she ever informed Agency that she was in contact with COPE due to a substance abuse problem. Moreover, Agency explains that Employee's COPE letter does not state that Employee was referred by Agency to COPE in order to enroll in a substance abuse counseling and rehabilitation program, "as would have happened if Employee had self-reported a substance abuse problem prior to testing positive for drugs."[15]

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[10] *Id*.
[11] Employee Brief, Tab 1.
[12] Agency Rebuttal Brief, Tabs 1, 5 (July 29, 2014).
[13] Agency Post Prehearing Brief, Tab 9.
[14] Employee Post Prehearing Brief, Tab 9 (July 22, 2014).
[15] Agency Rebuttal Brief, p. 6.

Termination For Cause

Pursuant to OEA Rule 628.2,[16] Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that a disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(i), the definition of "cause" includes use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result. Agency's termination was also based on D.C. Code §1-620.35(a), which states in relevant part that any confirmed positive drug test result shall be grounds for termination.

In the instant matter, Agency asserts that by having a positive marijuana result from a drug test, Employee violated DPM §1603(i). Employee does not deny that she tested positive for marijuana and acknowledges that Agency has cause to take the instant adverse action.[17] However, Employee argues that she was incorrectly categorized as an employee in a safety sensitive position.

The record shows that on August 8, 2008, Employee signed the 'Individual Notification of Requirements for Drug and Alcohol Testing for the Protection of Children and Youth' ("CYSHA Notice").[18] The CYSHA Notice states that Employee was appointed to or occupied a covered position that made her subject to drug and alcohol testing. The CYSHA Notice also states that Employee would have one opportunity to seek treatment if she had a drug or alcohol problem, but notes that an employee who fails to disclose a drug or alcohol problem upon receipt of the Notice, and "thereafter tests positive for drugs and alcohol will be subject to administrative action, up to and including termination."

Based on this documentation, the undersigned finds that Employee occupied a CYSHA covered position at the time she tested positive for drugs. The undersigned finds Employee's arguments that her position did not directly involve dealing with children unpersuasive. Agency has discretion to decide which positions should be covered under CYSHA, and Employee was duly notified that she occupied one of these positions. Additionally, the record shows that Employee did in fact test positive for drugs, a result which she does not dispute and has acknowledged. Accordingly, I find that based on the evidence of record, Agency had cause to terminate Employee under DPM §1603.3(i), which includes use of illegal drugs.

Penalty Within Range

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).[19] According to the Court in

[16] 59 DCR 2129 (March 16, 2012).
[17] Employee Post Prehearing Brief, p. 3.
[18] Agency Post Prehearing Brief, Tab 1.
[19] *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 Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and*

Stokes, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the TAP for various causes of adverse actions taken against District government employees. In this case, Employee was charged with Use of Illegal Drugs under DPM §1603.3(i).

The penalty for the Use of Illegal Drugs cause of action is found in § 1619.1(9) of the DPM. The penalty for a first offense for Use of Illegal Drugs ranges from a fifteen (15) day suspension to removal.[20] As noted above, I find that Employee's conduct meets the requirements for the charge of Use of Illegal Drugs, and her termination is within the range listed by the TAP and is consistent with the language of DPM § 1619.1(9) for a first offense. Therefore, I find that, by terminating Employee, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*[21] selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[22] When an Agency's charge is upheld, this Office has held that it will leave Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law.

Penalty was 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).[23] The relevant factors are generally outlined in *Douglas v. Veterans Administration*.[24] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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).

[20] *See* DPM §1619.1 (2).

[21] OEA Matter No. 1601-0034-08R11 (August 10, 2011).

[22] *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).

[23] *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).

[24] 5 M.S.P.R. 313 (1981).

1) the nature and seriousness of the offense, and it's 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 the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Employee argues that Agency did not present any evidence to show that it considered relevant factors as outlined in *Douglas*. In its Brief, Agency provided an analysis of Employee's removal in relation to the *Douglas* factors.

Agency relayed that the nature and seriousness of the offense and its relation to Employee's duties, position, and responsibilities, as well as Employee's service in a safety-sensitive position, were factors assessed in determining Employee's removal.[25] Further, this Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.[26] Accordingly, the undersigned finds that Agency considered the relevant *Douglas* factors when determining Employee's termination.

In this case, the penalty of termination was within the range allowed for a first offense. As noted above, the evidence does not establish that the penalty of removal constituted an abuse of discretion. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In accordance with DPM §1619.1(9), I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not a clear error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

[25] Agency Post Prehearing Brief, p. 8 (July 1, 2014).
[26] *See Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).

Violation of CBA

Employee alleges that Agency violated AFGE CBA, Article 37, §A, which she claims requires management to assist bargaining unit employees suffering from drug abuse by referring them to the District's Employee Assistance Program. Employee argues that Agency was aware that she "was seeking treatment through COPE after witnessing a traumatic event while at work."[27] Additionally, Employee argues that because she is covered by the CBA, she should have been afforded an opportunity to seek counseling to mitigate her penalty of termination. Agency argues that it is not required to refer Employee to counseling subsequent to a positive drug test result.[28]

Generally, D.C. Code §1-605.02, specifically reserves resolution of unfair labor practice allegations, CBA violations, and union related retaliation to the Public Employee Relations Board ("PERB"). According to the preceding statute, PERB is tasked with deciding whether unfair labor practices and CBA violations have been committed. While OEA may assess an applicable CBA violation to help determine whether Agency had cause to institute an adverse action, it cannot singularly assess whether Agency violated a provision of the CBA.[29]

In this case, the undersigned finds that the alleged CBA violation raised by Employee does not preclude Agency's adverse action of terminating Employee. The record reflects that Employee did not self-report that she had a substance abuse program prior to her testing positive for drugs, as required by the CYSHA Notice she signed in August 2008. While the portion of the CBA that Employee cites to states that management shall assist employees suffering from substance abuse by referring them to the District's Employee Assistance Program, Employee has not shown that this was requested prior to her positive drug test.[30] Employee submitted documentation showing that she contacted COPE on May 8, 2012 to request an appointment after "experiencing a traumatic incident at work."[31] However, this request does not denote that it was in connection to a substance abuse problem. Further, there is no additional evidence in the record to corroborate Employee's allegations that Agency was aware that she had a substance abuse problem or should have been referred to an substance abuse program. Therefore, the undersigned finds that Agency did not commit a CBA violation in terms of Employee's termination. Additionally, the undersigned finds that Employee was afforded an opportunity to seek counseling prior to her positive drug test result.

[27] Employee Post Prehearing Brief, p. 8.
[28] Agency Brief, pp. 11-12.
[29] *Brown v. Watts*, 933 A.2d 529, 533-34 (D.C. 2010). The Court of Appeals held that OEA is not jurisdictionally bared from considering claims that an adverse action violated the express terms of an applicable CBA.
[30] The undersigned notes that Employee failed to provide a copy of the CBA for review.
[31] Employee Prehearing Brief, Exhibit 9.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

_____
STEPHANIE N. HARRIS, Esq.
Administrative Judge