THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Florentino Rodriguez,	)	OEA Matter No. 1601-0418-10R16
Employee	)	
	)	Date of Issuance: April 25, 2017
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Department of Human Resources,[1]	)	Senior Administrative Judge
Agency	)	

John Pressley, Jr., Esq. Employee Representative
Pamela Brown, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 24, 2010, Florentino Rodriguez ("Employee") timely filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Human Resources's ("DCHR" or "Agency") decision to terminate him from his position as an Urban Park Ranger, effective August 28, 2010. Following an administrative review, Employee was terminated for violating the District Personnel Manual ("DPM") Chapter 16, §1603.3(i) (August 27, 2012): "…use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result…"

On December 19, 2013, I issued an Initial Decision ("ID") upholding Agency's action. Employee filed an appeal with the Superior Court of the District of Columbia, and on July 29, 2015, the Court affirmed the ID. Employee again appealed the decision, this time to the D.C. Court of Appeals ("Court of Appeals"). On August 25, 2016, the Court of Appeals reversed the decision of the Superior Court, vacated the ID, and remanded this matter back to OEA for further proceedings consistent with its opinion.

I held a Status Conference in this matter on October 28, 2016. The parties agreed to engage in settlement talks. The parties were then ordered to submit periodic status reports. By April 2017, Agency placed Employee back to work and began processing documents relating to Employee's back pay. The parties have stated that progress had been made as Employee is back

[1] Employee initially designated the D.C. Department of Parks & Recreation ("DPR") as the disciplining agency. However, Agency clarified that the proper party is the D.C. Department of Human Resources ("DCHR" or "Agency") since DCHR exercised its personnel authority under the Child Youth Safety Health Act to terminate Employee.

to work and that documents relating to back pay are being processed. The parties were ordered to submit either a signed settlement agreement resolving the matter, or a motion to dismiss the appeal indicating that the back pay issue had been resolved, by close of business April 17, 2017. To date, back pay is still being processed. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's violation of the CBA requiring written notice to Employee's union precluded adverse action against Employee.

FINDINGS OF FACTS

Employee was an Urban Park Ranger with the D.C. Department of Parks and Recreation ("DPR"). At all relevant times, Employee was a member of the American Federation of Government Employees ("AFGE"), local 2741.

On July 25, 2008, Employee was informed that he occupied a covered position under Title 1 of the Child and Youth, Safety and Health Omnibus Amendment Act ("CYSHA") 2004 (D.C. Official Code §§ 1-620.31 through 1-620.37.) The District Personnel Manual §4-16 lists the DPR as a subordinate agency, and which is a "Considered Child or Youth Services Provider," that "provides direct services that affect the health, safety and welfare of children or youth." It states that all positions within DPR are subject to criminal background checks, traffic record checks, and drug and alcohol testing. This policy subjects covered employees to drug and alcohol testing as part of the performance of his or her official job duties if he has direct contact with children and youth; is entrusted with the direct care and custody of children or youth; and if the performance of his duties in the normal course of his employment could potentially affect the health, welfare, or safety of children and youth.

In compliance with the applicable federal regulations located in 49 Code of Federal Regulations ("CFR") Part 40, the District government in 6-B District of Columbia Municipal Regulation ("DCMR") §3901.2 requires that, "Each personnel authority with safety-sensitive[2] positions shall contract with a professional testing vendor or vendors to conduct testing under the Program. The vendor or vendors shall ensure quality control, chain-of-custody for samples, reliable collection and testing procedures, and any other safeguards needed to guarantee accurate and fair testing, in accordance with the procedures in 49 C.F.R. Part 40, and District government procedures."

On April 20, 2010, Employee was notified in writing that he had been selected to take a random drug test, and he was instructed to report to the drug testing facility at the DCHR. Employee gave a urine sample that was collected and packaged by a trained specimen collector.

[2] Employee's position in Parks and Recreation was considered safety-sensitive. 6-B DCMR 3903.1(b).

Employee signed a Chain of Custody Form indicating that he was submitting his urine to a designated agent of drug test vendor Laboratory Corporation Holdings of America ("LabCorp").

The initial screening of the Employee's urine sample using the immunoassay method established that the Employee tested positive for marijuana. (*See* Agency Exhibit "E" and attached electronic mail, dated November 4, 2013).

A confirmation test was initiated to determine the concentration of the drug/metabolite. (*See* Agency Exhibit E, LabCorp letter to Dr. Moorefield, dated May 14, 2010). The Specimen Summary indicated that the confirmation test results were positive for Marijuana. (*See* Exhibit E, Specimen Summary, dated May 14, 2010).

Dr. Moorefield issued a Medical Review Officer Report to DCHR verifying the positive result for marijuana. Dr. Moorefield wrote on the bottom of his Medical Review Officer's report that he interviewed the donor, that is, Employee, three times, reopened the test and confirmed again that the test results were positive. (*See* Exhibit D, Medical Review Officer's Report).

If he were dissatisfied with the results of LabCorp's analysis, Employee's remedy was to submit a written request to DCHR to authorize that his stored urine sample be sent to another Health and Human Services certified laboratory of his choice, at his expense, using the GC/MS testing method. *See* 6B DCMR § 3906.5. The Employee instead chose to obtain an independent drug test at Howard University Hospital on May 13, 2010, more than twenty-three days after his initial testing with DCHR.

On June 18, 2010, DCHR notified Employee in writing that they were proposing his removal from the position of Urban Park Ranger. There is no evidence that Agency gave notice of its proposed adverse action to Employee's union.

Pursuant to DPM Chapter 16, §1612.1 (August 27, 2012),[3] Agency appointed Will Potterveld as its Hearing Officer to conduct an administrative review of the proposed removal action. Pursuant to DPM Chapter 16, §1612.10,[4] the hearing officer was required to make a written report and recommendation to the deciding official, Associate Director Karla Kirby of the Department of Human Resources. On finding that no notice of the proposed adverse action was given to Employee's union, Potterveld concluded in his report that this failure precluded the adverse action.[5] However, Potterveld also stated that apart from that failure, the adverse action of termination was justified.[6]

Pursuant to DPM §1613.2, the deciding official could only "sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty."

In the Notice of Final Decision: Removal, the deciding official wrote that "timely service

[3] Employee's Exhibit No. 4.
[4] *Id.*
[5] Employee's Exhibit No. 2.
[6] *Id.*

in writing on the employee, a union member, constituted notification to the union." [7]

In September 12, 1994, Agency and Employee's union, the American Federation of Government Employees Local 2741, signed a Collective Bargaining Agreement ("CBA") governing, among other things, the corrective and adverse action procedure to be followed.

Article 24, Section 2, ¶ 2 of the CBA[8] provided, in pertinent part, that:

> [a]n employee and the Union shall be notified in writing of any proposed disciplinary or adverse action within forty-five (45) days, no (sic) including Saturdays, Sundays, or legal holidays, after the date that the Employer knew or should have known of the act or occurrence. . . . . The failure of the Employer to issue such notice shall preclude the discipline pursuant to the law.

The CBA provides by its terms that it "shall remain in full force and effect until September 30, 1995," and, that absent objection, it "shall automatically be renewed for a one (1) year period thereafter." Although the CBA was not formally extended, the parties continued to abide by the terms of the CBA at all relevant times. Both parties agree that the CBA was still in force at the time of Employee's removal.

ANALYSIS AND CONCLUSION

Whether Agency's violation of the CBA requiring written notice to Employee's union precluded adverse action against Employee.

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. Further, DPM § 1603.2 (August 27, 2012) provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(i), the definition of "cause" includes "*[u]se of illegal drugs*, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or *a positive drug test result* (emphasis added)."

In the instant matter, Agency asserts that by having a positive marijuana result during a drug test, Employee violated DPM §1603.3(i) and thus his removal was warranted. Employee contests this and states that Agency violated the Collective Bargaining Agreement (CBA) with Employee's union when it failed to give the required prior written notice to the union of its June 30, 2010 proposed adverse action.

Here, it is undisputed that Agency failed to provide the notice to Employee's union as provided by the CBA. Employee seizes upon Agency's Hearing Officer's report which states the Hearing Officer's opinion that this failure precludes any adverse action against Employee.

[7] Employee's Exhibit No. 3.
[8] Employee Exhibit No. 1.

Agency maintains that the CBA provision relied on by Appellant, Article 24, Section 2(2), of the Master Agreement between the American Federation of Government Employees Locals 383, 2737, 2741, 3406, 3444 and 3871 and the Government of the District of Columbia, is invalid. It states that at the time the CBA was negotiated, the law in effect, D.C. Official Code § 1-617.1(b-1)(1) required a 45 day notice for adverse actions to be considered valid. This section has since been repealed. Therefore, the argument that Agency failed to issue a notice pursuant to a law that is no longer in effect, is without merit because the CBA provision is invalid.

Agency further argues that even if the provision is valid, the CBA provision does not preclude the employee's termination under these circumstances. The language in Article 24, Section 2(2) precludes discipline "pursuant to the law." In this instance, precluding the discipline is not consistent with the Child and Youth, Safety and Health Omnibus Amendment Act ("CYSHA"), the relevant law in this matter. The CBA was negotiated nearly 20 years before the D.C. Council enacted CYSHA. This law was enacted to protect the children and youth of the District. Therefore, reinstating a DPR employee who tested positive for drugs would violate CYSHA. Consequently, precluding the termination of Appellant in this instance is not consistent with the law.

Lastly, Agency maintains that the termination should be upheld because any purported violation of the procedural provision of the CBA was harmless. The whole purpose behind the notice provision is to allow an employee ample opportunity to secure representation during the administrative proceedings. In this case, Appellant was represented throughout the administrative proceedings before Agency, and is currently represented by the same counsel, thus, he cannot show that he has been harmed or that his rights have been substantially prejudiced. (*See* Agency's Answer to Appeal.)

Analysis

To summarize, Employee argues that because Agency violated Article 22, § 2(2) of the Master Agreement ("the CBA") between the American Federation of Government Employee Locals 383, 2737, 2741, 3406, 3444 and 3871 ("the Union") and the Government of the District of Columbia, the disciplinary action against him is precluded. On the other hand, Agency argues that because the provision of the CBA was in accordance with D.C. Official Code § 1-617-1(b-1)(1) and this law has been repealed, the CBA provision is invalid. It further argues that precluding discipline is not consistent with CYSHA, the law that is relevant to Employee's matter. Finally, it states that the termination should be upheld because its alleged violation of the procedural provision of the CBA was harmless.

Agency Erred in Failing to Notify Union

From my review of the OEA record, I agree with the Hearing Officer that there is no indication that Employee's Union was notified in writing of the proposed adverse action as provided for in Article 22, § 2(2) of the CBA. There is only evidence that Employee was notified in writing. Therefore, it appears that Agency violated Article 22, § 2(2) of the CBA.

The notice further provided that Employee "had a right to be represented by an attorney or other representative." While the notice did inform Employee of the right to be represented by an attorney or representative, it does not appear to notify him of his right to *Union* representation. Article 22, § 2(3) states:

> Employees requested to reply during investigation or proposal states of a disciplinary action shall be informed of the right to have a Union Representative present.

It appears that Agency not only violated Article 22, § 2(2), it also violated Article 22, § 2(3) and the CBA's grievance procedures. Nevertheless, based on the Hearing Officer's report dated July 21, 2010, it appears that sometime in advance of the six day reply deadline, Employee contacted Agency requesting an extension of time so that he could confer with his attorney in order to provide a response. The Hearing Officer stated in his report that he granted the extension and subsequently received a written response from Employee's attorney. This indicates that Employee obtained representation and timely responded to the proposed notice. Therefore, although Agency violated Article 22, § 2(3), Employee still obtained legal representation and provided a response.

In my ID dated December 19, 2013, I concluded that although Agency violated the CBA, the technical procedural error was harmless because it did not affect Employee's substantial rights, did not affect Agency's decision, and did not affect Employee's presentation of his defense so that a different decision could have been reached.

Employee appealed the ID, first to the D.C. Superior Court, and finally to the Court of Appeals. On August 25, 2016, the Court of Appeals agreed with Employee that Agency's failure to adhere to Article 24, § 2.2 of the CBA precluded Employee's termination in light of Agency's failure to give timely notice to Employee's union. Because of this conclusion, the Court of Appeals did not reach Employee's other arguments.

The Court of Appeals did not take issue with the ID's invocation of OEA's harmless error regulation. However, the Court pointed out that, by its own terms, the CBA's Article 24, Section 2.2 provides that, "[t]he failure of the Employer to issue such notice shall preclude the discipline[.]" If Agency had complied with the provision, Employee's employment would not have been terminated, and thus, Agency's failure cannot be said to be harmless error.[9] The Court held that this provision of the CBA was a bargained-for provision that Agency and Employee's union negotiated and thus, coupled with a provision that spelled out the consequence of such failure, made it mandatory. Accordingly, I further conclude that Agency's action should be overturned.

ORDER

[9] The Court compared this case to *Sutton v. United States*, No. 14-CO-0955, 2016 D.C. App. LEXIS 204 (D.C. June 23, 2016).

Based on the foregoing, it is **ORDERED** that:

1. Agency's action of removing Employees from service is **REVERSED**;
2. Agency shall reimburse Employee all back-pay, benefits lost as a result of his termination; and
3. 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:

Joseph E. Lim, Esq.
Senior Administrative Judge