THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LEONARD CHEEKS,	)	OEA Matter No. 1601-0119-09R12
Employee	)	
	)	Date of Issuance: July 24, 2014
	)	
D.C. DEPARTMENT OF PUBLIC WORKS,	)	
	)	
Agency	)	
	)	

OPINION AND ORDER
ON REMAND

Leonard Cheeks ("Employee") worked as a Motor Vehicle Operator with the Department of Public Works ("Agency"). On July 21, 2008, Employee was notified by Agency of its decision to summarily remove him from his position for testing positive for the presence of a controlled substance.[1] On April 7, 2009, Employee received the final notice informing him that the removal action was sustained.[2]

On May 7, 2009, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that the penalty of removal was too severe. Accordingly, he

[1] On July 11, 2008, Employee hit another vehicle while driving a large packer truck. In accordance with Agency's Drug and Alcohol Testing Policy, he underwent a Post-Accident Test for the presence of controlled substances and alcohol. According to Agency, Employee's sample tested positive for the presence of marijuana. Employee requested that the sample be retested. The retest sample also yielded a positive result for the presence of marijuana. *Agency Answer,* p. 2 (June 12, 2009).
[2] *Petition for Appeal,* p. 6 (May 7, 2009).

requested reinstatement to his position.[3]

Agency filed its response and contended that the penalty of removal was appropriate. It reasoned that "[t]he offense was very serious and threatened Employee's ability to perform his job duties safely."[4] Agency explained that its policy is to terminate drivers that test positive for a controlled substance, and in accordance with § 1619 of the District Personnel Manual ("DPM"), removal was within the range of penalties for the first offense of a positive drug test result. Agency further contended that it considered all of the *Douglas* Factors. Therefore, it requested that the termination action be sustained.[5]

Thereafter, the matter was assigned to an OEA Administrative Judge ("AJ"), who scheduled a Pre-hearing Conference and ordered the parties to submit Pre-hearing Statements.[6] Agency's Pre-hearing Statement reiterated its previous arguments and provided that its decision complied with case law and the Comprehensive Merit Personnel Act ("CMPA").[7] It further submitted that the penalty was reasonable because the offense was in relation to Employee's duties and responsibilities.[8] Therefore, Agency believed that its decision was warranted and requested that OEA sustain the termination action.[9]

Following the Pre-hearing Conference, the parties were ordered to submit briefs on whether Agency's penalty should be upheld.[10] Employee submitted a brief contending that Agency's termination action was procedurally flawed; it was not based on substantial evidence;

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[3] *Id.* at 3.
[4] *Agency's Answer,* p. 3 (June 12, 2009).
[5] *Id.* at 5
[6] *Order Scheduling Pre-hearing Conference* (December 1, 2009).
[7] *Agency's Pre-hearing Statement,* p. 2-3 (December 29, 2009).
[8] Agency considered Employee's work history; however, it found that Employee knew that he was subject to drug testing, and his offense threatened his and the public's safety. It argued that "these aggravating factors outweigh[ed] any mitigating effect of [his] work history." *Id.* at 3.
[9] *Id.,* 3-4. Employee subsequently submitted that Agency's policy did not warrant automatic termination. *Additional Pre-hearing Statement Information* (January 6, 2010).
[10] *Post Conference Order* (January 7, 2010).

it was not reasonable; and Agency did not consider the *Douglas* Factors when it terminated him. He explained that Agency's procedures for the drug test did not comply with its Drug Testing Policy and was in violation of federal Department of Transportation regulations. Therefore, he requested that Agency's decision be reversed and that he be reinstated with back pay and benefits.[11]

The Initial Decision was issued on March 3, 2010. First, the AJ found that during the January 6, 2010 Pre-hearing Conference, Employee conceded that he tested positive for marijuana following a work-related accident. As a result, he found that Agency had cause to terminate Employee. With regard to the appropriateness of the penalty, the AJ found that Agency considered the nature and seriousness of the offense and its relation to Employee's duties and any mitigating factors.[12] The AJ concluded that based on Employee's actions, he was a danger to the safety of others. Therefore, he ruled that summary removal was appropriate and not an abuse of discretion. Thus, Agency's termination action was upheld.[13]

Thereafter, Employee submitted a Petition for Review, arguing that the Initial Decision was not supported by substantial evidence and that the AJ did not consider his procedural and substantive arguments. He explained, *inter alia*, that neither he nor his representative had any recollection of conceding that he tested positive for marijuana, and the AJ failed to consider his evidence discrediting Agency's position. He further provided that the AJ did not consider his argument that Agency's action was untimely. Lastly, Employee argued that the AJ's conclusion that Agency considered the *Douglas* Factors was not supported by substantial evidence.

[11] *Brief of Employee Leonard Cheeks,* p. 9-14 (January 27, 2010). Agency's brief reiterated that it did consider the *Douglas* Factors; that Employee's offense was very serious; that the offense impacted its integrity and ability to carry out its mission; and that under its policy, removal for the first offense of this kind was proper. *Agency's Brief,* p. 3-6 (February 9, 2010).
[12] He further found that Employee was on notice that his actions were illegal and violated Agency's regulations.
[13] *Initial Decision,* p. 2-4 (March 3, 2010).

Therefore, he requested that the Initial Decision be overturned and that he be reinstated with back pay. [14]

In an Opinion and Order issued October 3, 2011, the OEA Board agreed with Employee and found ". . . that it [was] not clear from the record that Employee admitted to testing positive for marijuana."[15] Accordingly, it ruled that the AJ should have held an evidentiary hearing prior to reaching his conclusion, and therefore, it remanded the matter to him for further proceedings.[16]

In accordance with the Board's remand, the AJ scheduled another Pre-hearing Conference; held an evidentiary hearing; and issued his remand decision on March 14, 2013.[17] The AJ considered Employee's assertions that the drug testing procedures were flawed because his drug vials were not sealed and that he was not provided any forms to read. However, he found that Employee offered no independent proof, nor did he present a motive for why Agency witnesses would commit perjury as it relates to these issues. Thus, the AJ found that Agency met its burden of proof that Employee tested positive for marijuana. As for the appropriateness of the penalty, the AJ reiterated his previous conclusion that Agency's decision to terminate Employee was not an abuse of discretion. Accordingly, the removal action was upheld.[18]

On April 25, 2013, Employee filed a Petition for Review of the Initial Decision on Remand. He asserts that the remand decision is not supported by substantial evidence and does

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[14] *Employee's Petition for Review of Initial Decision* (April 30, 2010). Thereafter, Agency submitted its opposition to the Petition for Review, explaining that Employee's arguments were without merit. Furthermore, it provided that Employee's arguments were waived when he did not submit them in his Pre-hearing Statement or at the Pre-hearing Conference. Lastly, Agency provided that it considered the *Douglas* Factors when the Hearing Officer issued his Report for Summary Removal. Therefore, Agency requested that the Petition for Review be denied. *Agency's Opposition to Petition for Review,* p. 3-5 (June 22, 2010).

[15] The Board found that Employee denied that allegation, and whether his specimen tested positive for marijuana was critical to the outcome of the case. *Opinion and Order on Petition for Review,* p. 3 (October 3, 2011).

[16] *Id.*

[17] Although the AJ captioned the decision "Initial Decision," it should have been captioned "Initial Decision on Remand."

[18] *Initial Decision,* p. 5-7 (March 14, 2013).

not properly address all of the issues of law and fact raised in the appeal.[19] Employee ultimately believes that the sample did not belong to him and that the AJ's credibility determination regarding his testimony was made without considering the evidence. Therefore, he requests that the Initial Decision be reversed and that he be reinstated with back pay and attorney's fees.[20]

Agency filed a Motion to Dismiss the Petition for Review on May 30, 2013. It argues that the petition was untimely filed. It explains that on April 15, 2013, Employee contacted it to request consent for an enlargement of time to file the petition, and it had no objection to this extension. However, it notes that the decision became final on April 17, 2013, and that the time for filing the appeal cannot be enlarged by consent of the parties. Therefore, it argues that OEA does not have jurisdiction to consider Employee's Petition for Review and requested that the Initial decision be affirmed.[21]

Employee's petition largely questions the AJ's credibility determinations during the evidentiary hearing.[22] It is clear from the Initial Decision on Remand that the AJ determined that Agency's witnesses were more credible than Employee.[23] This Board has consistently held that

[19] Employee explains that the AJ ignored his evidence and testimony regarding his contention that Agency's sample testing could not have been his because it would have tested positive for opioids. Employee also submits a host of other arguments regarding the credibility of Agency witnesses. First, he explains that during the sample collector's testimony, he could not recall anything unusual about Employee's test. However, contrary to the sample collector's testimony, Employee notes that he testified about the conditions of the testing center and the process of his test. He submits that during his testimony, he provided that he never saw the collector split his urine sample into two containers or label them; that he did not sign a label on the bottle, but rather, on a piece of paper; that the toilet at which he provided the urine did not have blue water in it; and that the sink taps were not taped off. Employee provides that these procedures are in accordance with federal regulations. *Employee's Petition for Review of Initial Decision*, p. 6-8 (April 25, 2013).
[20] *Id.* at 10.
[21] *Agency's Motion to Dismiss the Petition for Review* (May 30, 2013). Thereafter, Employee filed an opposition to the motion, arguing that Agency consented to the motion, and there is nothing within OEA's rules that prohibit a request for an extension of time prior to a filing deadline. Therefore, he requested that Agency's motion be denied; that the case be considered on the merits; and that the Board reverse the AJ's decision in accordance with OEA Rule 633.10. *Employee's Opposition to the Agency's Motion to Dismiss,* p. 2-3 (June 10, 2013).
[22] Employee spent a great deal of time contrasting his testimony with those provided by Agency witnesses. *Employee's Petition for Review of Initial Decision*, p. 2-10 (April 25, 2013).
[23] *Initial Decision on Remand,* p. 5 (March 14, 2013).

it will not question an AJ's credibility determinations.[24] In accordance with *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Kennedy v. District of Columbia*, 654 A.2d 847, 854 (D.C.1994); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 683 A.2d 470, 477 (D.C.1996); *Kennedy, supra*, 654 A.2d at 856; and *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C.1989)), due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. The Court in *Raphael v. Okyiri* held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. Thus, although it is hard to determine how much weight the AJ gave to each witness' testimony, after a review of the hearing transcript, a reasonable mind would accept the credibility determinations the AJ made as adequate to support his conclusion.

In addition to this Board's inability to question the AJ's credibility determinations, we also lack the ability to consider Employee's Petition for Review. As Agency correctly provided, Employee's petition was not timely filed before this Board. In accordance with OEA Rule 633.1 "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision." Furthermore, D.C. Official Code § 1-606.03(c) provides that ". . . the initial decision . . . shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." As a result, the D.C. Court of Appeals held in *District of*

[24] *Ernest H. Taylor v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September, 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Anita Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012); and *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013).

Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department, 593 A.2d 641 (D.C. 1991) that "the time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters."[25] Therefore, OEA has consistently held that this statutory language is mandatory in nature.[26]

In the current case, the Initial Decision was issued on March 14, 2013. Therefore, Employee had until April 18, 2013, to file his petition. However, he did not file the Petition for Review until April 25, 2013. Because the statute is mandatory, this Board does not have the authority to waive the requirement.[27] Accordingly, Employee's Petition for Review is DENIED.

[25] *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) (citing *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 635 (D.C.1985); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C.1985); *Gosch v. District of Columbia Department of Employment Services*, 484 A.2d 956, 958 (D.C.1984); and *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C.1980)).

[26] *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); and *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010).

[27] It should be noted that Agency is correct in its claim that neither party can consent to an enlargement of time for a mandatory deadline requirement.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.