THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
BRYAN EDWARDS Employee v	OEA Matter No. 1601-0017-06
D.C. DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency	Date of Issuance: July 22, 2009

OPINION AND ORDER

ON

PETITION FOR REVIEW

Bryan Edwards ("Employee") worked as a Correctional Officer with the D.C. Department of Youth Rehabilitation Services ("Agency"). By letter dated October 3, 2005, Agency issued Employee a notice of summary removal from his position. The adverse action was based on a charge of "employment-related conduct that threatens the integrity of government operations and constitutes an immediate hazard to the agency, to other employees, and is detrimental to the public health, safety, or welfare." The notice stated that Employee was being separated from service based on two random drug tests performed on May 17, 2004 and

September 14, 2005. Both tests returned positive for cocaine and/or cocaine metabolites. The notice further stated that the test results rendered Employee "unsuitable for employment in a setting in which children or youth are present."[1]

The event from which the charges stemmed occurred on September 14, 2005 when Employee was subjected to a standard random drug test. Employee made several unsuccessful attempts over a four hour period to provide a specimen sufficient to conduct a proper urine analysis.[2] Because Employee was unable to produce enough urine to collect an adequate sample, he was instructed to drink water and walk around during this time period. Employee requested the presence of a union representative after being informed that Agency's rules state that the failure to provide a sufficient urine sample for random drug tests is tantamount to a refusal. Employee asked if the persons from DYRS administering the exam had his files from his last drug exam. One of the employees, Mr. Redd, responded that Employee's file was not on site.[3] Employee also stated that no one asked him during the exam if he was on any prescription medications or had any recent surgeries.[4]

After the fourth attempt, Employee provided enough urine for Agency's drug test but not enough for a split sample.[5] The specimen was collected from Employee and Agency's urine collector filled out a chain of custody form as required by Agency's procedures.[6]

Earlier in the morning of September 14, 2005, Employee went to a scheduled dentist appointment with Dr. Shavez Tidwell, a general cosmetic dental surgeon.[7] According to Dr.

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[1] Notice Terminating Employee, *Petition for Appeal* (October 3, 2005).
[2] Mr. Thomas testified that Employee was believed to have "shy bladder" syndrome, which occurs when a specimen giver is unable to produced the required amount of urine in one attempt.
[3] Tr. at 270.
[4] *Id*.
[5] Generally 45 milliliters of urine are required for a proper analysis; however, Employee provided approximately 30 milliliters. If an employee cannot provide 45 milliliters of urine, then Agency will have the employee waive their rights for an independent test.
[6] *See* Agency Exhibit No. 1.

Tidwell, Employee underwent a "scaling procedure of quadrants one and two…we anesthetized him with two [capsules] of two percent Xylocaine with Epinephrine, one to one hundred thousand."[8] In response to the Administrative Judge's inquiry, Dr. Tidwell stated "I would say it's probably likely that a Xylocaine or Prilocaine, Octocaine, or some other anesthetic probably can be detected as cocaine."[9] Dr. Tidwell further testified that Xylocaine was the only cocaine derivative he administered to Employee during his visit.

In response to the Court's inquiry, Lance Presley, Laboratory Director for Quest Diagnostics, testified that he was not aware of any situations in which a prescribed medication would interact with a person's body, thereby creating a false positive of the presence of cocaine metabolites.[10] However, Mr. Presley stated that some physicians still employ the use of cocaine in cases of ear, nose, throat and nasal surgeries.[11] In these cases, a cocaine metabolite could be found present in a urine sample.

Approximately one week after the September 14, 2005 drug test, a Medical Review Officer ("MRO") called Employee to inform him that his urine tested positive for cocaine and/or cocaine metabolites. Employee was unable to discuss the matter with the MRO at that time because he was on duty and could not leave his station. Eventually Employee spoke with someone in the MRO's office who informed him that the only excuses for positive drug test results were for surgery, i.e., dental surgery. Employee informed the person with whom he was speaking that he had undergone dental surgery on the same day of the random drug test. Employee testified that he subsequently submitted documentation verifying his September 14,

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[7] Dr. Tidwell testified that he did not remember exactly what time Employee's procedure was performed, but stated that his procedures are customarily performed in the morning. Employee's shift with Agency did not begin until 2:30 pm that day.
[8] Tr. at 193-195.
[9] Tr. at 194.
[10] Tr. at 78-80.
[11] *Id.*

2005 dental procedures. Agency, however, proceeded with the termination process and placed Employee on non contact status at the front gate of the correctional center until his termination on October 3, 2005.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 15, 2005. In his appeal, Employee argued that a previous kidney donation and removal of half of his bladder prevented him from giving the required amount of urine to complete the drug test. Employee also reiterated that the anesthetic used in his dental procedure the day of the September 2005 drug test was responsible for producing a urine specimen containing cocaine and/or cocaine metabolites. Employee asserted that he had legitimate reasons for testing positive for cocaine and/or cocaine metabolites after both the May 2004 and September 2005 drug tests.[12]

In an Initial Decision issued on May 14, 2007, the Administrative Judge reversed Agency's decision to remove Employee and reinstated him to his former position. In his decision, the AJ addressed the both the May 2004 and September 2005 random drug tests.

Regarding the May 2004 test, the AJ held that Employee legitimately tested positive for the use of cocaine and/or cocaine metabolites because he offered no credible evidence during his appeal process or before this Office to prove that he was prescribed cocaine or a derivative of cocaine.[13] The AJ further stated:

> "[a]ccording to Agency's policy relative to this matter, in order to effectuate the removal of an employee on the basis of a verified positive random drug and/or alcohol test result, the offending employee is given the opportunity, after the first positive test result, to enter into Agency's EAP (Employee Assistance Program), and then is given the opportunity to enter into a last

[12] *See Petition for Appeal*, December 15, 2005. Employee alleged that the urine tested positive for cocaine in 2004 because of an interaction of over the counter and prescribed medications including Percocet, Tylenol and blood pressure pills.
[13] *Initial Decision* at p. 14 (May 14, 2007).

> chance agreement…an employee's failure to either successfully complete the EAP program or a second verified positive drug test result, puts the offending employee in immediate jeopardy of summary removal from service."[14]

Since the Employee successfully completed both the EAP program and entered into a last chance agreement with Agency, the AJ was required to make a finding as to the September 2005 drug test results in order to determine whether Employee's termination was warranted.

In a separate analysis of the September 2005 random drug test, the AJ held that the proper result for Employee's urine analysis for cocaine and/or cocaine metabolites should have been negative due to a legitimate medical explanation. The AJ considered the testimony of both Dr. Tidwell and Lance Presley in finding that Employee's urine sample tested positive for cocaine and/or cocaine metabolites. The reason for positive test result was because of the dental surgery performed on September 4, 2005 which utilized Xylocaine, a derivative of cocaine. The AJ held that Agency's regulations afforded the MRO an opportunity to determine if there was a legitimate medical explanation for a positive test result, thereby rendering the result consistent with legal drug use.[15] Since the Agency did not utilize the opportunity during the evidentiary hearing to provide the MRO's testimony, the AJ stated that Employee provided sufficient evidence and testimony to prove that he was in lawful use of a cocaine derivative.

Agency then filed a Petition for Review with this Office on June 18, 2007. Agency asks us to reverse the Initial Decision on the grounds that 1) the denial of Agency's request to allow the MRO to testify telephonically was an abuse of discretion and 2) the denial of Agency's request for a continuance was an abuse of discretion.

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[14] *Id.* at 13.
[15] *Id.* at 15.

Agency argues that there is nothing in this Office's rules that prevents telephonic testimony. Moreover, Agency contends that while in-person testimony may be preferable in the evaluation of witness credibility and demeanor, these considerations are far less important for expert witness testimony.[16] Agency directs our attention to *Djedovic v. Gonzales.*[17] In *Djedovic*, the Court stated that "[o]bservable factors like demeanor and tone of voice are less important when it comes to expert witnesses, whose reliability is supposed to be based on their expertise rather than on what they claim to have witnessed.[18]

Agency's position is that the denial of their request to have the MRO testify telephonically was an abuse of discretion. However, a trial court has broad discretion to determine the mode and manner of a witness' testimony and the exercise of that discretion will not be disturbed unless it has been abused or substantial harm has improperly been done to the complaining party.[19] The trial court's findings of fact are reviewed under the clearly erroneous standard and will only be set aside if after a review of all the evidence, there is a definite and firm conviction that a mistake has been made.[20]

In *People ex rel O.S.*, the State offered the telephonic testimony of its own expert witness regarding Indian Child Welfare Act. The issue of allowing the expert to testify electronically was brought before that judge for the first time on the morning of the hearing.[21] The judge did not allow the telephonic testimony in part because of the difficulty in judging the credibility of such testimony. On appeal, the trial court was found not to have abused its discretion in disallowing the telephonic testimony of the expert witness. The Court noted that the expert's

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[16] *Petition for Review* at. 3 (June 18, 2007).
[17] 441 F.3d 547, 551 (7th Cir. 2006).
[18] *Djedovic v. Gonzales*, 441 F.3d 547, 551 (7th Cir. 2006).
[19] *In re T.A.*, 2003 SD 56, ¶ 5, 663 N.W.2d 225, 229.
[20] *Id.*
[21] *People ex rel. O.S.*, 701 N.W.2d 421, (S.D. 2005); *See Byrd v. Nix*, So.2d 13176, 1319-20 (Miss. 1989).

testimony could also be offered via deposition or other forms of testimony such as examinations or evaluation reports.[22]

Similarly, in this case, the issue of allowing the MRO's testimony to be elicited telephonically was brought to the attention of the judge for the first time on the morning of the hearing. In both *People ex rel O.S.* and the instant case, the judge denied the requests for telephonic testimony based on an inability to evaluate the witness's demeanor and credibility.

Although Agency received notice that the MRO would not be available to testify in person in the "eleventh hour," they were aware that the expert witness resided out of state. Agency did not offer a deposition, proffer of the expert's testimony or provide a designee who would be available to testify regarding the same facts. Furthermore, the AJ stated at the outset of the hearing that he would have "considered something of that nature [telephonic testimony]" several weeks back.[23] This Board finds that the AJ did not abuse his discretion in disallowing the MRO's telephonic testimony based on the reasons mentioned above.

Agency also argues that the denial of their request for a continuance was an abuse of discretion. Agency cites *King v. D.C. Water and Sewer Authority*[24] and *Murphy v. A.A. Beiro Construction Co*.[25] wherein the court addresses the factors it considers in determining whether there was an abuse of discretion in denying a request for continuance. These factors include 1) the reason for a continuance; 2) the prejudice that would result from its denial; 3) the parties' diligence in seeking relief; 4) lack of good faith; and 5) any prejudice to the opposing party.[26] Agency suggests that its case is similar to the moving party in *Murphy* whose request for a continuance was denied when the petitioner's lead counsel unexpectedly resigned on the last

[22] *Id.*
[23] Tr. at 13.
[24] 803 A.2d. 966, 968-969 (D.C. 2002).
[25] A.2d 1039, 1042-1044 (D.C. 1996).
[26] *Id.* at. 968.

working day before the hearing. While the circumstances which prevented the MRO in this case from appearing in court were out of Agency's hands, we do not believe that the facts in *Murphy* are sufficiently similar to serve as controlling case law.

It is well established that a request for a continuance is within the discretion of an agency or trial court, and will only be set aside for an abuse of discretion.[27] A party demonstrates an abuse of discretion when they are deprived of a substantial right or when the party is seriously prejudiced.[28] A decision on a motion to continue will not be held erroneous unless it is clear that the court either did not consider the motion or objection on its merits or that injustice will definitely result from the court's decision, for example, where the defendant has been deprived of a reasonable opportunity to prepare a defense.[29] An abuse of discretion may also occur if the court exceeds the bounds of reason, all circumstances being considered.

The evidentiary hearing, originally scheduled for May 23 and 24, 2006, was rescheduled for June 19, 2006 because of the "unavailability of an essential witness, the Medical Review Officer."[30] Agency knew that the MRO resided in Pennsylvania and had the foresight to list "Benjamin Gerson (*or designee*)" on its witness list; however, no designee was called upon to testify [emphasis added].[31] In this case, Agency had adequate time to prepare for a designee to testify in the MRO's place in case he was unable to attend the hearing. While Agency stated that the MRO was an integral part of their case, as mentioned above, no proffer of the MRO's testimony was given to the AJ. In addition, the AJ stated that he may allow Agency to call

[27] *Hairston v. Gennet*, 501 A.2d 1265, 1268 (D.C.1985); *Harris v. Akindulureni*, 342 A.2d 684, 686 (D.C.1975).
[28] Sylvester v. Sylvester, 723 P.2d 1253 (Alaska 1986).
[29] *State v. Echols*, 175 Wis. 2d 653, 499 N.W.2d 631 (1993); *Tenn v. 889 Associates, Ltd*., 127 N.H. 321, 500 A.2d 366 (1985).
[30] Agency's Consent Request for Continuance (May 26, 2006).
[31] Agency's Amended Witness List (March 24, 2006).

witnesses out of turn if a second day of proceedings was needed.[32] The AJ properly considered the interests of justice and the potential prejudice to Agency and concluded that a continuance in this case was not warranted. We do not find that the AJ abused his discretion in this matter and based on the foregoing we are compelled to DENY Agency's Petition for Review.

[32] Tr. at 23.

ORDER

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

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

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Hilary Cairns

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Clarence Labor, Jr.

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 the formal notice of the decision or order sought to be reviewed.