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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
LEONARD CHEEKS	)	
Employee	)	
	)	OEA Matter No.: 1601-0119-09
	)	
v.	)	
	)	Date of Issuance: October 3, 2011
DEPARTMENT OF PUBLIC WORKS	)	
Agency	)	
_____	)	

**OPINION AND ORDER**  
**ON**  
**PETITION FOR REVIEW**

Leonard Cheeks (“Employee”) began working for the Department of Public Works (“Agency”) in 2005. At that time, he was hired as a temporary Sanitation Worker. He was later promoted to the permanent position of Motor Vehicle Operator.

While on duty on July 11, 2008, Employee was driving a large packer truck. According to Agency, as Employee was backing out of an alley, the truck struck another vehicle. A police officer issued to Employee a citation for driving without caution.

As a result of the accident, Employee was required to submit to a “post-accident” drug and alcohol test. When the results came back, Agency informed Employee that his specimen sample had tested positive for the presence of marijuana. On July 21, 2008, Agency’s Director told Employee, in a letter of the same date, that he was immediately being summarily removed from his position based on the results of the drug test. The letter went on to provide that because of the positive test results, Employee’s presence on the job created an “immediate hazard to the agency, other employees, and [himself] . . . .” Therefore, on July 21, 2008, Agency terminated Employee.

Thereafter, Employee requested that his sample be retested. According to Agency, a second testing again revealed that marijuana was present in Employee’s system on the date of the accident. By letter dated April 7, 2009, Agency notified Employee of its final decision to terminate his employment.

On May 7, 2009, Employee filed a Petition for Appeal with the Office of Employee Appeals. On January 6, 2010, the Administrative Judge held a prehearing conference. The purpose of the conference was to determine what facts were in dispute, to identify what exhibits would be submitted into evidence, and, if needed, to set a date for an evidentiary hearing. The Post Conference Order that resulted from the January 6, 2010 prehearing conference provided that the issue in dispute was whether Agency’s penalty should be upheld. The order further provided that each party was to submit legal briefs and supporting documents to the Administrative Judge by January 27, 2010. Perhaps believing that the penalty was only the disputed issue, the Administrative Judge did not schedule an evidentiary hearing.

Employee timely filed his legal brief. In the brief he questioned the validity of the drug test. He even claimed that because there was a discrepancy with the social security numbers

listed on the various test forms, the specimen tested may not have been his own. Employee argued further that Agency did not follow the proper procedures when it tested his specimen. Employee concluded his brief by arguing that the penalty of removal was too harsh and did not take into account any mitigating factors. Employee attached to his brief several exhibits to support his claims. The Administrative Judge then closed the record on February 10, 2010.

On March 3, 2010, the Administrative Judge issued an Initial Decision. The Administrative Judge wrote in the Initial Decision that “[a]t the Prehearing Conference on January 6, 2010, Employee admit[ted] that he had tested positive for marijuana after a work-related vehicular accident.”<sup>1</sup> Therefore, according to the Administrative Judge, the only issue to be considered was the appropriateness of Agency’s penalty. The Administrative Judge found that removal was an appropriate penalty and thus, upheld Agency’s action.

Thereafter, Employee filed a Petition for Review. In the petition, Employee raises the same issues that he raised in his January 27, 2010 legal brief. On June 22, 2010, Agency filed an Opposition to Employee’s petition.

From our review of the record, we believe this appeal must be remanded. Contrary to what the Administrative Judge stated, it is not clear from the record that Employee has admitted to testing positive for marijuana. In fact, we believe that Employee has strenuously denied that allegation. Whether or not Employee’s specimen did in fact test positive for the presence of marijuana is a disputed issue and is critical to the outcome of this case. For this reason, the Administrative Judge should have held an evidentiary hearing and then evaluated the evidence gathered from the hearing before reaching that conclusion. Accordingly, we must grant Employee’s Petition for Review and remand this appeal for that purpose.

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<sup>1</sup> *Initial Decision* at page 1.

**ORDER**

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED** and this appeal is **REMANDED** for further proceedings consistent with this opinion.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Barbara D. Morgan

\_\_\_\_\_  
Richard F. Johns

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.