**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| RICKY PALMER, | ) | |
| Employee | ) | OEA Matter No. 1601-0050-14 |
| | ) | |
| v. | ) | Date of Issuance: January 7, 2015 |
| | ) | |
| OFFICE OF THE STATE | ) | |
| SUPERINTENDENT OF EDUCATION, | ) | |
| Agency | ) | MONICA DOHNJI, Esq. |
| | ) | Administrative Judge |

Ricky Palmer, Employee *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

## INITIAL DECISION

## INTRODUCTION AND PROCEDURAL BACKGROUND

On February 5, 2014, Rickey Palmer ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("OSSE" or "Agency") decision to terminate him from his position as a Motor Vehicle Operator ("Bus Driver") effective January 7, 2014. Following an Agency investigation, Employee was charged with violating sections 1603.3(i) of the District of Columbia Municipal Regulation Personnel Manual ("DCMR") and 6B DCMR section 3907.1.[1] On March 11, 2014, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on July 14, 2014. Thereafter, I issued an Order scheduling a Status/Prehearing Conference in this matter for October 14, 2014. Both parties were in attendance. On October 20, 2014, I issued a Post Status/Prehearing Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status/Prehearing Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

[1] 6B DCMR § 1603.3(i): Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result; and
6B DCMR § 3907.1(a): the following shall be grounds for termination of employment provided that the notification requirement in sect 3904 of this chapter has been met: (a) A positive drug test result.

## JURISDICTION

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

## ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

## FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a Motor Vehicle Operator with Agency. On November 26, 2013, Employee signed an Individual Notification of Selection for Drug and Alcohol Testing form.[2] This form notified Employee that he occupied a safety-sensitive position and consequently, he was subject to drug and alcohol testing. Upon presenting his driver's license, and signing the Notification of Selection for Drug or Alcohol testing form, Employee provided a urine specimen which was delivered to, and tested by Laboratory Corporation of America ("LapCorp"). An analysis of the urinary specimen revealed a positive result for the drug cocaine.[3] Employee was notified by the lab of the positive result. The Medical Review Officer, Dr. Carter, interviewed Employee and advised him of his ability to authorize a second testing of the stored sample ("Bottle B"), to which Employee consented to.[4] Employee was placed on administrative leave pending the result of the Bottle B test, which was sent to a secondary laboratory – Clinical Reference Laboratory, for reanalysis.[5] The Bottle B result also tested positive for cocaine.[6] On December 16, 2013, Agency issued an Advanced Written Notice of Proposed Removal.[7] Following an administrative review, on January 7, 2013, Agency issued a Notice of Final Decision on Proposed Removal. Employee's termination was effective January 7, 2013, and his termination was based on the following causes as outlined in 6B District of Columbia Municipal Regulations ("DCMR") § 1603.3(i) "[u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result." Additionally, Employee's termination was based on 6B DCMR 3907.1(a) – "a confirmed positive drug test result."

### *Employee's Position*

Throughout his submissions to this Office, Employee argues the following:[8]

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[2] Agency's Brief at Exhibit A. (November 21, 2014).
[3] *Id*. at Exhibit C.
[4] *Id*. at Exhibit D.
[5] *Id*. at Exhibit F.
[6] *Id*. at Exhibit G.
[7] *Id*. at Exhibit I.
[8] Employee's Brief (December 8, 2014); See also Petition for Appeal (February 5, 2014).

1) Agency's drug policy only favors employees who came to management to make them aware of their problems. Employee explains that if an employee relapses or is connected to an isolated incident, termination is the only outcome.
2) Positive urinary results are supposed to be forwarded to an independent lab to confirm the results. However, in his case, the same lab handled the first and second result instead of an independent lab.
3) Agency's drug and alcohol classes instructs its employee that cocaine/opiates pass through the human body in a matter of two (2) – three (3) days, or seventy-two (72) hours. This is misinformation on Agency's part based on fact and should not be at all standard principle since other variables can affect this.
4) He was only given four (4) business days to respond to the termination letter, and he does not feel that this was fair to him.
5) Agency's administrative review Hearing Officer did not consider any of Employee's explanations, witness statements, or his doctor's opinion which has significant points and should be carefully considered because of its validity.
6) The procedure demonstrated by the termination manager was without merit and did not comply with Employee's confidentiality rights agreement that applies to all employees.
7) Employee agrees that his position was a safety-sensitive position under Children and Youth Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"). He notes that he knew he was working in a safety-sensitive position and that at any time he could be required to take a random drug test. Employee states that he is not complaining about the random testing because he accepted this when he accepted the job. He was also aware that a positive drug test could result in an administrative action.
8) Employee explains that he tested positive after a random drug test on November 26, 2013, and he was notified and asked if he used illegal drugs or had been on prescription or under a doctor's care. Employee further explains that he does not have an idea as to why he tested positive for drugs. He also notes that he told the Medical Review Officer, Dr. Carter, during the interview that he was on Percocet.
9) It appears someone made an effort to change the dates of the test result, as they do not look the same to him.
10) He did not know the reason of the random test was based on a decision of the supervisor. Employee explains that before the supervisor can recommend an employee for testing, the supervisor needs a second opinion from another supervisor and this did not happen in his case.
11) Employee should have been taken off the route immediately; instead he was allowed to drive for at least four (4) days later, carrying children.
12) He did not use cocaine, but only came in contact with it and nothing in Agency's policy manual governs exposures. He takes full responsibility for a bad decision of being in an environment where he was exposed to cocaine.
13) Agency did not discuss the Douglas factors.

***Agency's Position***

Agency submits that Employee occupied a safety-sensitive position and was subject to periodic drug testing. Agency notes that Employee was provided with Agency's drug and alcohol testing policy. Agency explains that it has a zero tolerance policy for any positive urinalysis,

which Employee was aware of. And as such, Employee was appropriately terminated for testing positive for cocaine. Agency further notes that in Employee's position as a Motor Vehicle Operator, the safety of children is paramount, thus, the zero tolerance policy is strictly enforced. Agency maintains that there is no dispute that Employee tested positive for illicit drugs; he knew he was in a safety-sensitive position that was subject to random drug testing; and that a positive drug test would end in administrative action, probably termination. Agency maintains that pursuant to D.C. Official Code §1-620.32, *et seq.*, any confirmed positive drug test result is grounds for termination. Additionally, Agency asserts that removal is the penalty set forth in the Table of Penalty ("TAP"), even for a positive drug test in a safety-sensitive position, and it was reasonable in this circumstance, given the need of the Department of Transportation ("DOT") to rely on its employees to transport students safely. Agency further explains that the selection of penalty is a matter of agency discretion.[9]

***1) Whether Employee's actions constituted cause for discipline***

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 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. Also, Employee's removal from his position at Agency was based on 6B DCMR 3907.1(a).

In the instant matter, Agency asserts that by having a positive cocaine result during a drug test, Employee violated DPM §1603.3(i) and 6B DCMR 3907.1(a). Employee does not deny that he tested positive for cocaine, he simply argues that the reason for the positive drug test was as a result of him being around people who took cocaine. However, apart from statements from the purported people engaged in the use of cocaine, Employee has not offered any credible evidence in support of these assertions. Moreover, giving the fact that Employee was aware of Agency's zero tolerance policy, Employee should have known not to associate with or be present around people using cocaine. The District of Columbia has a drug free work policy and Employee was aware of this policy. Further, 6B DCMR 3907 provides for mandatory drug and alcohol testing for safety-sensitive positions. As an employee in a safety-sensitive position, Employee herein was required to submit himself to random mandatory drug and alcohol testing. As an employee in a safety-sensitive position, Employee is one of the persons that must adhere to the drug and alcohol testing policy. Thus, Employee's positive test for cocaine constituted a violation of this policy.

Moreover, Employee notes that he was aware that he occupied a safety-sensitive position within Agency with possibilities of random testing when he accepted the job. Employee also states that he was aware that a positive drug test could result in an administrative action. Irrespective of how Employee got exposed to cocaine, the fact remains that Employee had a confirmed positive drug test. Two independent labs confirmed that Employee's urine sample collected on November 26, 2013, was positive for cocaine. Therefore, I find that Employee's positive drug test for cocaine is sufficient cause for Agency to terminate Employee.

[9]Agency's brief, *supra*; *See also* Agency's Answer s*upra*.

I further find that Employee's argument that the Bottle B was not tested by an independent lab is without merit. The first test urine analysis was conducted by LapCorp, a credible and independent laboratory. This test came back positive for cocaine, and it was verified by Dr. Carter. Following an interview between Dr. Carter and Employee, per Employee's request, the Bottle B was sent to an independent lab - Clinical Reference Laboratory, for retesting, which also came back positive. Employee's position is classified as a safety-sensitive position under CYSHA, and Employee's conduct renders him unsuitable to continue performing his duties as a Motor Vehicle Operator.

Employee further contends that he should have been taken off the route immediately; instead he was allowed to drive for at least four (4) days later, carrying children. He also maintains that, someone made an effort to change the dates of the test result, as they do not look the same to him. Employee argues that he was only given four (4) business days to respond to the termination letter, and he does not feel that this was fair to him. However, Employee has not provided any credible evidence in support of these arguments.

Moreover, 6B DCMR §1608.2(c) highlights that an employee has the right to a written response within six (6) *calendar* days of receipt of the advanced written notice. Here, Employee acknowledged in his Petition for Appeal that he was given six (6) calendar days to respond. However, Employee goes on to note that since he received the letter on a Monday, he only really had four (4) business days to respond. The Advanced Written Notice of Proposed Removal informed Employee that he had six (6) calendar days to respond. Thus, I find Employee's argument that he only had four (4) business days to respond unpersuasive because 6B DCMR §1608.2(c) calls for *calendar* days, and not *business* days (emphasis added). Consequently, I conclude that Agency was justified in instituting this adverse action against Employee.

***Grievances***

Additionally, Employee asserts the following: Agency's drug policy only favors employees who came to management to make them aware of their problems; Agency's drug and alcohol classes instructs its employee that cocaine/opiates pass through the human body in a matter of two (2) – three (3) days, or seventy-two (72) hours; the procedure demonstrated by the termination manager was without merit and did not comply with Employee's confidentiality rights agreement that applies to all employees and Employee did not know the reason of the random test was based on a decision of the supervisor.

Generally, complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press his claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

***2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.***

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).[10] According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant matter, I find that Agency has met its burden of proof for the charges of the "[u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result," and 6B DCMR 3907.1(a) – a confirmed positive drug test. As such, Agency can rely on these charges in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalties for "[u]se of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on the duty, or a positive drug test result" is found in DPM § 1619.1(9). The penalty for a first offense for § 1619.1(9) is a fifteen (15) days suspension to removal. Employee was aware of the District's drug free policy and Agency's zero tolerance policy. Employee was also provided with Agency's drug policy prior. Employee's conduct is consistent with the language of § 1619.1(9) of the DPM. Therefore I find that, by terminating Employee, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[11] When an Agency's charge is upheld, this Office has held that it will leave the 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. Accordingly, Agency was within its authority to remove Employee given the TAP.

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[10] *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 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).

[11] *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).

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.[12] Employee argues that Agency did not discuss the Douglas factors. The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.[13]

In this case, the penalties for a first time offense for this cause of action range from a fifteen (15) days suspension to removal. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency submits that it gave credence to the aforementioned *Douglas* factors. Agency explained that removal is the penalty set forth in the TAP for positive drug tests in a safety-sensitive position and was reasonable in this circumstance given the need of DOT to rely on its employees to transport students safely. In accordance with Chapter 16 of the DPM, 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 clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

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[12] *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).

[13] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

## ORDER

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

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge