

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹)	
)	OEA Matter No. 1601-0038-20R21
v.)	
)	Date of Issuance: June 30, 2022
DEPARTMENT OF PUBLIC WORKS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

This case has been previously before the Board. Employee worked as a Parking Enforcement Officer with the Department of Public Works (“Agency”). On February 19, 2020, Agency issued a final notice of separation informing Employee that he would be removed from his position. The notice provided that on November 7, 2019, Employee submitted a urine sample which tested positive for the presence of opiates, in violation of 6B District of Columbia Municipal Regulations (“DCMR”) §§ 435.6 and 1605.4(h). Consequently, he was terminated from employment effective February 22, 2020.²

The Administrative Judge (“AJ”) issued her Initial Decision on March 18, 2021. She held that there was no dispute that Employee tested positive for codeine after a random drug test on

¹ Employee’s name was removed from this decision for the purpose of publication on the Office of Employee Appeals’ website.

² *Agency Answer*, Tab #11 (July 17, 2020).

November 7, 2019. Thus, the AJ found that Agency had cause for an adverse action against Employee because of the positive test. However, she held that Agency abused its discretion by imposing a penalty of termination in this matter. According to the AJ, Employee provided justification for why he tested positive for codeine by explaining that he took his girlfriend's prescription medication the night before the test. She also considered Employee's submission from his doctor of a prescription of promethazine with codeine; his years of service; his past disciplinary history and work record; and his health/mindset at the time he took his girlfriend's medication. She explained that the range of penalty for the first offense of a positive drug test is suspension to removal. Therefore, based on the mitigating factors, the AJ held that Agency should have imposed a lesser penalty. Consequently, she ordered that Agency's termination action be reversed; that Agency reinstate Employee to his previous position of record or a comparable position; that Agency suspend Employee for fifteen (15) days for testing positive for an unlawful controlled substance (codeine) while on duty; and that Agency reimburse Employee all back pay and benefits lost as a result of the adverse action.³

On April 22, 2021, Agency filed a Petition for Review. It argued that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy and that the findings of the Initial Decision were not based on substantial evidence. Agency asserted that it provided notice to Employee that because he held a safety-sensitive position, he would be deemed unsuitable if he tested positive for drugs or alcohol. According to Agency, Employee signed this notice on October 12, 2018. Thus, it contended that it could remove Employee for a positive drug test. Further, Agency argued that Employee taking prescription medication without a prescription violates both District and federal law. However, it opined that even if Employee could have taken someone

³ *Initial Decision*, p. 4-8 (March 18, 2021).

else's prescription medication, an evidentiary hearing was warranted to determine if Employee was unaware that his girlfriend's prescription contained codeine; to determine if the letter from the doctor's office could be authenticated; and to determine the validity of Employee's unsworn assertions. Therefore, it requested that its petition be granted, and the Board reverse the Initial Decision.⁴

This Board issued its Opinion and Order on Petition for Review on August 26, 2021. It found that Agency established, and Employee conceded that, as a Parking Enforcement Officer, he held a safety-sensitive position.⁵ As it related to cause, the Board held that in accordance with 6B DCMR §§ 428.1(a), 436.6, and 1605.4(h), a positive drug test was all that was needed to establish cause. Thus, with Employee's positive submission, Agency had cause to remove him. When assessing the penalty, the Board opined that although removal is within the range of penalty for the first occurrence of a positive drug test under 6B DCMR §§ 400.4, 428.1, 435.9, and 1607, the AJ's ruling that Agency failed to consider mitigating factors and progressive discipline, required further consideration. Specifically, the Board held that the record did not support the AJ's ruling that Lindsey Parker ("Parker") was Employee's girlfriend; that Employee took medication with codeine prescribed to her; or that Parker's prescription was filled before Employee submitted to his positive drug sample. Because the Board did not believe that the record supported the AJ's mitigating factor determinations or those related to progressive discipline,⁶ it remanded the matter to the AJ for further consideration of actual evidence to support her conclusion that there were mitigating circumstances.

⁴ *Agency's Petition for Review*, p. 4-9 (April 22, 2021).

⁵ *Agency's Answer*, p. 18, 19, and 74 (July 17, 2020).

⁶ In the Hearing Officer's Report, it is alleged that Employee argued that removal was not the appropriate penalty because in accordance with Article 10, Section C of the Collective Bargaining Agreement, Agency must apply progressive discipline. However, there was no Collective Bargaining Agreement found in the record. Accordingly, the Board remanded the case for the AJ to consider the progressive discipline arguments on its merits.

On remand, the AJ held an evidentiary hearing on November 17, 2021. Both parties filed closing briefs following the hearing. On March 8, 2022, the AJ issued an Initial Decision on Remand. She found that Agency had cause and could rely on its charges against Employee to impose discipline. However, she held that Agency abused its discretion by terminating Employee. The AJ opined that Agency did not consider relevant mitigating circumstances. She noted that testimony from Parker supported Employee's assertion that he unknowingly took medication with codeine prior to the random drug test. The AJ determined that Parker was credible and offered a clear picture showing that the prescription was filled on November 4, 2019, to support her testimony. Additionally, the AJ noted that once Employee realized that the medication he took included codeine, he obtained a note from Nurse Practitioner Okeyo which confirmed that Employee was seen in her office on November 7, 2019, and he took his significant other's cough syrup containing codeine prior to the drug test. The AJ provided that the note was dated November 18, 2019, nearly one month prior to Agency issuing its notice of termination. Additionally, the AJ held that Agency did not provide evidence that the Medical Review Officer ("MRO") made contact with Employee to discuss potential reasons for his positive drug test, as required. Accordingly, she ruled that Agency did not consider that this was Employee's first offense; the availability of a lesser action; Employee's years of service with Agency; Employee's past disciplinary history and work record; and his health condition at the time he took the medication which caused him to test positive.⁷

As for the penalty, the AJ relied on Article 10, Section C of the Collective Bargaining Agreement ("CBA") between Agency and Employee's union. This section of the agreement provided that "in imposing disciplinary actions, the Department shall apply progressive discipline

⁷ *Initial Decision on Remand*, p. 8-10 (March 8, 2022).

and shall consider the mitigating factors against the alleged offense. . . .” The AJ held that because the range of penalty was suspension to removal, termination was excessive given that this was Employee’s first offense. Additionally, she held that the penalty of termination violated the Collective Bargaining Agreement which mandated progressive discipline. Accordingly, the AJ ordered that Agency’s action be reversed; that Employee be reinstated to his position and reimbursed back-pay and benefits; and that a penalty of a fifteen-day suspension be imposed instead.⁸

Agency filed a Petition for Review on April 11, 2022. It argues that the Initial Decision on Remand was based on an erroneous interpretation of statute, regulation, or policy and that the AJ’s findings were not based on substantial evidence. Agency contends that its program administrator considered each of the relevant factors that the AJ determined were not considered. It provides that its administrator found that employee’s disciplinary history, work record, and years of service were neutral factors. Furthermore, Agency found that Employee’s representation that he tested positive because he took his girlfriend’s medication, in a manner contrary to law, was not mitigating because Employee’s subjective reason for taking the prescription did not mitigate the misconduct.⁹

As for the Agency’s finding regarding the MRO, Agency provided that it did not present evidence related to the MRO’s review because their job was to validate drug test results and determine if a positive result was caused by the lawful use of a controlled substance. It is Agency’s position that Employee could not have provided the MRO with information that he was lawfully prescribed the opiates which caused him to test positive. It contends that Employee’s positive test

⁸ *Id.*, 10-12.

⁹ *Agency’s Petition for Review*, p. 5-6 (April 11, 2022).

result was settled; therefore, it had no reason to call the MRO to testify.¹⁰ Finally, Agency argues that while it was required to follow the requirements of the Collective Bargaining Agreement, the agreement did not require it to retain employees in safety-sensitive positions who test positive for opiates.¹¹

Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹²

Mitigating Factors

OEA has consistently upheld removals based on positive drug tests for safety-sensitive employees. Specifically, this Board has held that an Agency's penalty decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.¹³ 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).¹⁴ According to the Court in

¹⁰ *Id.*, 6-7. Agency also argues that it did not need to consider every mitigating factor, and it highlighted all of the factors that the AJ failed to consider in her decision.

¹¹ Agency provides that in OEA Matter No. 1601-0019-21, this Office affirmed Agency's termination action against another Parking Enforcement Officer who tested positive for drugs on a first offense in the same bargaining unit as Employee.

¹² *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

¹³ *Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14, *Opinion and Order on Petition for Review* (July 11, 2017) (citing *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012)).

¹⁴ *Anthony Payne v. D.C. Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No.

Stokes, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.¹⁵

As this Board held in its Opinion and Order in this case, removal is within the range of penalty for the first occurrence of a positive drug test under 6B DCMR §§ 400.4, 428.1, 435.9, and 1607. Moreover, this Board previously held that it was unreasonable for the AJ to rely on a prescription for Employee that had not yet been filled or taken by Employee when he submitted his sample for testing, as a mitigating factor. We stand by that holding. On remand, the AJ opined that even though Employee was prescribed Promethazine with codeine after his drug test, he provided Agency with a note from Nurse Practitioner Okeyo dated November 18, 2019 – one month prior to Agency issuing its notice of proposed separation – which explained that he took his significant other’s prescription with codeine the night before his drug test. The AJ found that the note corroborated Employee’s assertion that he was not feeling well and was not aware that the medication Parker gave him contained codeine.

This Board must accept the AJ’s credibility determinations.¹⁶ However, we do not believe

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).

¹⁵ The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that “managerial discretion has been legitimately invoked and properly exercised.” As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency’s work force is a matter entrusted to the agency, not this Office. *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

¹⁶ This Board has previously held in *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*

that Employee being prescribed promethazine with codeine hours after submitting a positive drug test is adequate to support the AJ's findings. Similarly, this Board does not believe that substantial evidence exists to uphold the AJ's determination that Employee's submission of a note to Agency corroborates that he unknowingly took his girlfriend's medication. Both actions occurred *after* Employee submitted a positive drug sample (emphasis added). A reasonable mind would not accept that actions taken after an employee submits a positive drug sample as adequate to support that Agency abused its discretion. These actions could be reasonably viewed as Employee's response to having submitted a positive sample.

Moreover, contrary to the AJ's ruling, the record shows that Agency adequately considered each of the *Douglas* factors when determining its penalty.¹⁷ OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office. *Love* also provided the following:

[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, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the

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); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); *James Washington v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0292-10, *Opinion and Order on Petition for Review* (December 10, 2014); and *Barry Braxton v. Department of Public Works*, OEA Matter No. 1601-0012-12, *Opinion and Order on Petition for Review* (September 13, 2016), that it lacks the authority to question an AJ's credibility determinations.

¹⁷ *Agency's Answer*, p. 22-32 (July 17, 2020).

parameters of reasonableness. (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

Accordingly, terminating Employee is Agency's choice that is not subject to the AJ's discretionary disagreement.

As for the AJ's ruling regarding Agency's failure to consider mitigating circumstances, this Board will rely on the holding in *Bryant v. Office of Employee Appeals, et al.*, Case No. 2009 CA 006180 P(MPA)(D.C. Super. Ct. August 2, 2012)(citing *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, 101 (M.S.P.B. 2006)). In *Bryant*, the Superior Court for the District of Columbia held that even "significant mitigating factors . . . do not offset the seriousness of the sustained misconduct and make the penalty of removal outside the bounds of reasonableness and impermissible." In this case, the AJ found that Employee unknowingly took codeine prior to the drug test; that his girlfriend was prescribed the medication days before Employee's positive drug test; that Employee was prescribed promethazine with codeine; and that Employee provided a note that he took his girlfriend's medication to Agency one month prior to his removal were all significant mitigating factors. However, in accordance with the ruling in *Bryant* those factors do not counteract the seriousness of Employee's positive drug test or make termination unreasonable in this case.

Covered and Non-covered Employees

In its Petition for Review, Agency argues that differences exist between covered versus non-covered employees, as outlined in Chapters 4 and 16 of the DCMR. This Board finds its argument disingenuous. Agency clearly relied on both 6B DCMR §§ 435.6 and 1605.4 to justify its cause for disciplinary action against Employee. In both its proposed and final decision notices, Agency cited to both sections of the DCMR and did not solely rely on Chapter 4 because it related

to “covered” employees.¹⁸ Therefore, it is puzzling for Agency to now argue now that Chapter 16 is inapplicable to Employee’s case.

Collective Bargaining Agreement

Among other reasons, this Board remanded the matter to the AJ was to obtain the CBA pertaining to this case. The CBA between the Department of Public Works and the American Federation of Government Employees, Local 1975 was provided and is now a part of the record. Employee argued that progressive discipline should have been used in his case, as outlined in the CBA. Alternatively, Agency argued that while it was required to follow the requirements of the Collective Bargaining Agreement, the agreement did not require it to retain employees in safety-sensitive positions who test positive for opiates.

Article 10, Section C of the CBA provides the following:

In imposing disciplinary actions, the Department shall apply progressive discipline and shall consider the mitigating factors against the alleged offense, in accordance with D.C. Official Code, § 1-616.51 et. seq. (2001 Ed.).

D.C. Official Code § 1-616.51 was created to offer a positive approach to employee discipline.

Specifically, it provides the following:

The District of Columbia government finds that a radical redesign of the adverse and corrective action system by replacing it with more positive approaches toward employee discipline is critical to achieving organizational effectiveness. To that end, the Mayor, the District of Columbia Board of Education, and the Board of Trustees of the University of the District of Columbia shall issue rules and regulations to establish a disciplinary system that includes:

- (1) A provision that disciplinary actions may only be taken for cause;
- (2) A definition of the causes for which a disciplinary action may be taken;
- (3) Prior written notice of the grounds on which the action is proposed

¹⁸ *Agency’s Answer*, p. 22-24 and 40-41 (July 17, 2020).

to be taken;

(4) Except as provided in paragraph (5) of this section, a written opportunity to be heard before the action becomes effective, unless the agency head finds that taking action prior to the exercise of such opportunity is necessary to protect the integrity of government operations, in which case an opportunity to be heard shall be afforded within a reasonable time after the action becomes effective; and

(5) An opportunity to be heard within a reasonable time after the action becomes effective when the agency head finds that taking action is necessary because the employee's conduct threatens the integrity of government operations; constitutes an immediate hazard to the agency, to other District employees, or to the employee; or is detrimental to the public health, safety or welfare.

In accordance with CBA Article 10, Section C, Agency did comply with the progressive discipline and mitigating factors requirements outlined in D.C. Official Code § 1-616.51. It is well-established by the AJ and this Board that Agency's adverse action was taken for cause, as provided in 6B DCMR §§ 428.1(a), 436.6, and 1605.4(h).¹⁹ Moreover, prior written notice of the grounds on which the proposed action to be taken was provided in Agency's proposed notice of termination and its final notice to Employee.²⁰ Employee was provided with a written opportunity to be heard by the Hearing Officer before the termination action became final.²¹ Furthermore, Employee was provided with an opportunity to appeal Agency's final action to this Office. Therefore, Agency did comply with Article 10, Section C of the CBA.

Additionally, 6B DCMR section 1610 provides guidance on progressive discipline. Specifically, 6B DCMR §1610.1 provides that ". . . the District uses a progressive disciplinary system when an employee's conduct fails to meet expectations. The District's progressive system

¹⁹ *Initial Decision*, p. 4 (March 18, 2021); *Employee v. Department of Public Works*, OEA Matter No. 1601-0038-20, p. 5-6, *Opinion and Order on Petition for Review* (August 26, 2021); and *Initial Decision on Remand*, p. 8 (March 8, 2022).

²⁰ *Agency's Answer*, p. 22-24 and 40-41 (July 17, 2020).

²¹ *Id.*, 32-39.

includes the following steps: [v]erbal counseling; [r]eprimand; [c]orrective action; and [a]dverse action.” However, 6B DCMR § 1610.2 provides that “[e]very situation is different and in each case[,] management must consider a number of factors when determining an appropriate action to take. This includes, among others, consideration of the seriousness of the situation, the employee’s past disciplinary history, and the employee’s work history. When appropriate, and consistent with §§ 1606 and 1607, management may skip any or all of the progressive steps outlined in § 1610.1.” As previously provided, Agency considered these specific factors and others, when it decided to terminate Employee.²² Further, contrary to the AJ’s ruling, pursuant to 6B DCMR § 1610.2, Agency could have skipped any of the progressive discipline steps. It did not have to decide to suspend Employee for a first offense of submitting a positive sample. Therefore, this Board cannot uphold the AJ’s conclusion that Agency did not apply progressive discipline.

Conclusion

Agency considered relevant factors before imposing its penalty. Moreover, the AJ’s ruling on any mitigating factors do not offset the seriousness of Employee’s misconduct and do not make the penalty of termination unreasonable. Additionally, Agency complied with the terms of the collective bargaining agreement and progressive discipline. Accordingly, we must grant Agency’s Petition for Review and reverse the Initial Decision on Remand.

²² *Agency’s Answer*, p. 26-32 (July 17, 2020).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**, and the Initial Decision on Remand is **REVERSED**.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.