THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 1601-0003-23
EMPLOYEE[1]	)	
Employee	)	Date of Issuance: April 3, 2024
v	)	
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS	)	LOIS HOCHHAUSER, Esq. Administrative Judge
Agency	)	

Employee, *Pro Se*
Stephen Milak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal ("PFA") with the Office of Employee Appeals ("OEA") on October 11, 2022, contesting the decision of the District of Columbia Department of Public Works ("Agency"), to terminate her employment, as a Parking Enforcement Officer, effective September 10, 2022. On October 12, 2022, Sheila Barfield, Esq., OEA Executive Director, notified Michael Carter, Agency Interim Director, of Employee's Petition for Appeal ("PFA") and provided him with a copy of the appeal. The Executive Director advised Interim Director Carter that, pursuant to OEA Rule 6012.1, the filing deadline for Agency's response was November 11, 2022. Agency filed its Answer on November 15, 2022. The matter was assigned to this Administrative Judge ("AJ") on or about December 7, 2022.

After reviewing the submissions, the AJ identified parts of the PFA which were incomplete, incorrect or raised jurisdictional issues. By Order dated December 14, 2022, she directed Employee to address those items by January 9, 2023.[2] Employee submitted a timely response, but did not address all of the issues. Therefore the February 28, 2023 Order notified the parties of that the prehearing conference ("PHC") would take place on March 30, 2023. It also directed Employee to address specific items by March 27, 2023.[3]

[1] This Office does not identify employees by name in Initial Decisions published on its website.

[2] The December 14 Order also stated that compliance with OEA Rules and AJ directives was mandatory, and that failure to comply could result in the imposition of sanctions. The parties were advised that copies of the Rules were available on-line and at OEA

[3] Agency was directed to submit documentation regarding the type of appointment held by Employee by that deadline, since Employee's responses on that issue remained unclear.

On the evening of March 29, 2023, Mr. Milak, left the AJ a voicemail message requesting a continuance of the PHC stating that due to an emergency, he was unavailable to appear in person at the PHC, but could participate by telephone. The AJ explained the situation to Employee the following morning, and gave her the option of proceeding with the PHC that day with counsel participating remotely[4] or rescheduling the PHC. Employee stated that she would prefer that both parties participate in person, and chose to reschedule the PHC. Subsequently, the parties agreed to April 19, 2024 for the rescheduled PHC. The April 3, 2023 Order confirmed that the PHC would take place on April 19, 2023, and extended the March 27 deadline until April 14, 2023.

At the PHC, the parties summarized their positions and addressed matters raised by the AJ in previous Orders. Agency declined mediation, and the parties agreed that an evidentiary hearing was necessary. By Order issued May 10, 2023, the hearing was scheduled for August 3, 2023 and filing deadlines were established.[5]

The hearing took place at OEA on August 3, 2023 and October 17, 2023.[6] At the proceedings, the parties had full opportunity to, and did, present testimonial and documentary evidence and argument to support their positions.[7] The parties agreed to file closing briefs by January 19, 2024. Following several extensions, the briefs were filed and the record closed on March 15, 2024.

JURISDICTION

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

ISSUES

Did Agency meet its burden of proof regarding its decision to terminate Employee? Is there any basis to disturb the penalty?

SUMMARY OF EVIDENCE

A. Uncontested Facts[8] and Summary of Documentary Evidence

1. Employee was a Parking Enforcement Officer ("PEO") from May 2006 until her

[4] Employee was given the option of participating remotely or in person.

[5] On July 17, 2023, Agency filed a motion seeking an extension of the filing deadline from July 17 until July 21, 2024. The motion was granted and Joint Witness/Exhibit List was filed by Agency on July 21, 2023.

[6] The delay between the first and second hearing was due to the lengthy absence of Erica Woodhouse, a witness that Agency deemed essential. At the August 3 hearing, Mr. Milak informed the AJ that Ms. Woodhouse had an emergency and could not testify that day as scheduled. He had no information about when she would be return to work, so the parties agreed to schedule the second hearing day based on her availability and that Employee would also testify at that time. Mr. Milak was directed to check with Agency and the witness regularly and advise the AJ when she was scheduled to return to work. He subsequently informed the AJ that she was scheduled to return in late September, and was then asked to check on her earliest available date. The date agreed upon by the witness and parties was October 17, 2023. The September 29, 2023 Order confirmed that hearing date.

[7] The transcript is cited as "Tr" followed by "1" (August 3, 2023 proceeding) or "2" (October 17, 2023 proceeding), and then the page number. Exhibits ("Ex") are cited as "E"(Employee) or "A" (Agency) followed by exhibit number.

[8] The Uncontested Facts are based on the documentary and testimonial evidence presented in this matter.

termination on May 10, 2022.[9] She was in permanent and career status at the time of her removal. (Exs A-5, A-7).

2. The major duties of a PEO include patrolling "assigned areas on foot or by operating a motor vehicle to conduct surveillance of the District's streets and roadways for citations of various non-moving traffic violations." (Ex A-1).

3. The PEO is identified as a "safety sensitive" position and subject to mandatory random drug and alcohol testing. *See* Chapter 4 of the District Personnel Manual ("DPM"), Section 426.1 (Transmittal No. 223, December 14, 2015)

4. Employee acknowledged receipt of the Individual Notification of Requirements Drug and Alcohol Testing (Safety Sensitive) on October 12, 2018. (Ex A-3).

5. On May 23, 2022, Employee was notified that Agency was proposing the termination of her employment, charging that on April 12, 2022, she "refused or interfered with a Mandatory Drug Screening (**Failure to submit or otherwise cooperate with drug or alcohol testing)"** in violation of 6B DCMR §§428.1(b) and 1605.4(d). (emphasis in original). In the letter, Tamika Cambridge, District of Columbia Department of Human Resources ("DCHR") Compliance Review Manager ("CRM"), the Proposing Official, also reviewed the relevant factors considered in reaching its decision to propose Employee's termination. (Ex A-5).

6. The administrative review was conducted by Hearing Officer ("HO") Hillary Hoffman-Peak. By memorandum to Justin Zimmerman, Deciding Official ("DO") dated June 8, 2022; the HO stated that she received submissions from Employee and Agency in this matter. She concluded that Agency met its burden of proof that Employee failed to submit to drug and alcohol testing on April 12, 2022; and that removal was the "only penalty" that could be imposed. (Ex A-6).

7. Agency issued the Notice of Separation on September 6, 2022. In the Notice, Mr. Zimmerman, D.C. Department of Human Resources (DHR) Associate Director, Policy and Compliance Administration, stated that he reviewed the May 23 notice of proposed removal and the HO's report. He concluded:

> I adopt and sustain the cause, findings and conclusions outlined in the [proposed notice and Hearing Officer memorandum], and those documents are incorporated into this final decision. (Ex A-7).

B. Positions of the Parties and Summary of Testimonial Evidence

Agency's position is that Employee was in a safety-sensitive position which required her to submit to mandatory random drug and alcohol testing; and that she was aware of this requirement. It maintains that on April 12, 2022, Employee refused to submit to mandatory testing.

Tamika Cambridge, Agency's first witness, testified that she has been the Compliance Review

[9] When the date is identified by month and day only, the referenced year is 2022.

Manager for about nine and one-half years, and is responsible for overseeing and enforcing "compliance-related activities" as required by the DPM. (Tr1, 45, 78). She stated that she is familiar with the drug testing requirements since she is often the proposing official for corrective or adverse actions involving the Mandatory Drug and Alcohol Testing Program. (Tr1, 45). The witness testified that Employee held a safety-sensitive position, which, according to the witness is one "covered" by the DPM and DCMR" (Tr, 46).

The witness reviewed the Employee Notification/Drug Free Workplace, stating that Employee's signature on the document dated on or about May 1, 2006, constituted her acknowledgement that the District Government has a "zero tolerance drug-free workplace policy." She testified that the document also states that Employee holds a "covered position, specifically safety-sensitive." (Tr, 47-48, Ex A-2). The witness explained that testing is required for safety-sensitive employees "as one way to protect the safety of District employees and visitors." She defined a safety-sensitive position as one in which:

> [It is reasonably] foreseeable that if the employees performs the position routine duties while under the influence of drugs or alcohol the employee could suffer a lapse of attention …that would likely cause actual immediate and severe bodily injury or loss of life to self or others. (Tr1, 59).

Ms. Cambridge testified that DCHR provides a list of safety sensitive employees it has identified for testing, to a third party vendor that conducts randomized testing. She stated that DCHR provides the list to Agency; and Agency is responsible for notifying the employees who have been selected. According to the witness, the vendor notifies DCHR of the test result, which is validated by the medical review officer before the results are released. If the test is negative, the case is "closed" according to the witness, and the employee resumes his or her duties. Ms. Cambridge stated that if the test result is positive, DCHR, as the District-wide program administrator of all agencies under the Mayor's personnel authority, conducts an administrative investigation. (Tr1, 52-53). The witness testified that it was her understanding that Employee "refused to cooperate with the testing. (Tr1, 54). She stated that an employee who refuses to be tested is considered having tested positive, and is subject to disciplinary action. Ms. Cambridge reviewed the "Individual Notification of Selection for Drug and/or Alcohol Testing" ("Notification of Selection") dated April 12, 2022, which directed Employee to report to the Reeves Center at 8:00 a.m. for drug and alcohol testing. She said that the document was not signed by Employee in the required space, and explained that it was her understanding that Employee refused to sign it. (Tr 50, Ex A-4).

The witness testified that as a result of Employee's refusal to be tested, Agency proposed her termination. She stated that termination is the appropriate penalty consistent "with what [is done] across the program." (Tr1, 56-57, Ex A-5). Ms. Cambridge then reviewed the factors listed in the proposed notice that Agency determines are "aggravating, mitigating, or neutral." She identified the items as the *Douglas Factors*. She stated that the factors were considered, based on the evidence provided by Agency. (Tr, 58, Ex A-5). Ms. Cambridge testified that the first factor, *i.e.*, the nature and seriousness of the offense, was considered serious since Employee was aware that she was subject to "mandatory" testing.

On cross-examination, Ms. Cambridge stated that she did not know when Employee's position became safety-sensitive. (Tr1, 61). She said that it was her understanding that an attempt was made to give Employee a copy of the Notification of Selection, but Employee refused to take the document.

(Tr, 65, Ex A-4). Ms. Cambridge agreed with Employee that the disciplinary action was proposed based on the evidence submitted by Agency and without speaking with Employee. (Tr1, 67). Ms. Cambridge stated that employees are supposed to sign the "Individual Notification of Requirements Drug and Alcohol Testing: Safety Sensitive" ("Individual Notification of Requirements") form annually but that "the rules allow for the agency to establish that the employee knew that they were subject…to these requirements." (Tr1, 69-70; Ex A-3). She agreed that the form submitted by Agency was signed by Employee in 2018. She did not know if Agency had an Individual Notification of Requirements form signed by Employee in 2022. (Tr1, 72).

On redirect, Ms. Cambridge testified that DCHR is responsible for the 5,500 employees holding safety-sensitive positions in 32 different agencies, and estimated that 100 employees are tested monthly. (Tr1, 74). She stated that it was her understanding the Employee held the same position that she encumbered when she signed the Individual Notification of Requirements form in 2018. She testified that she was not aware that Ms. Barnes was ever given a document stating that her position was no longer safety-sensitive. (Tr1, 75, Ex A-3).

Richard Davis, Agency's next witness, stated that he is employed by Agency and has served as a Substance Abuse Specialist for three years. (Tr1, 81). He testified that each month DCHR provides him with a list of between 25-50 employees to be tested, and among his responsibilities is notifying supervisors the morning of or the night before that an employee is scheduled for testing. He stated that employees have one hour from notification to report for testing. (Tr1, 83).

Mr. Davis testified that at the time he was given her name for testing in 2022, he had never had "direct contact" or "met" her, although he may have seen her before. (Tr1, 84). He said that he notified Preston Moore and Erica Woodhouse that Employee was scheduled for testing; and was told that Ms. Woodhouse was her supervisor. (Tr1, 85). He said that he thought that he notified them on April 11, *i.e.*, the day before the scheduled testing. The witness said that Ms. Woodhouse telephoned him on April 12, and informed him that Employee did not want to report for testing. He said that while talking with Ms. Woodhouse, he could hear Employee, or someone he assumed was Employee, "shouting and saying that she wasn't testing, and [to]leave her alone' He said that he "distinctly" heard shouting of "I wasn't testing" and heard Employee say "you take the test" to Ms. Woodhouse. Mr. Davis said that his practice when an employee is refusing to test, is to talk with the individual, and therefore he asked Ms. Woodhouse to put Employee on the phone. He said that Ms. Woodhouse told him that Employee would not come to the phone, but eventually Employee came to the phone, and he thought Ms. Woodhouse put him on speaker. Mr. Davis said that Employee could hear him talking. He said that at some point, Ms. Woodhouse told him that Employee "had walked totally away." He said that although usually an employee refusing to test will talk with him about the matter, Employee did not respond "at all." (Tr1, 86-89). He said that he was not told that the problem was because Employee was experiencing a family issue involving her uncle, (Tr1, 90-91). Mr. Davis testified that when an employee refuses to test, his practice is to ask the supervisors to document the incident, and that he forwards the report to the compliance officer.

On cross-examination, Mr. Davis testified that he did not recall previously giving her a "random drug test" after she was in an accident and was in the hospital. (Tr1, 91-93). The witness testified that he did not know if Employee heard what he was saying when he was on the telephone on April 12. (Tr1, 94). He stated that the Individual Notification of Requirements should be completed annually, but it is not a paper form and is completed on-line. (Tr1, 95). closet." (Tr1, 102).

Mr. Davis testified that the decision on how to proceed when an employee refuses to be tested, is made on a case-by-case basis. (Tr1, 99). He said he tries to talk with an employee who is refusing to test, and he has met with DCHR and explained the circumstances in individual cases; and at times the matter has been resolved. He said that he asked Employee what was "going on" so he would know her reasons, and that he explained the consequences of refusing to test with her' but that he "heard other voices" and thought Employee had walked away from the phone, which was confirmed by Ms. Woodhouse." He said that other outcomes were possible, it depended "on if the individual is forthcoming with the information. We have to have the information. (Tr1, 101). On redirect, Mr. Davis stated that he did not know of any situation where an employee was excused from testing that day. (Tr1, 103).

Erica Woodhouse,[10] Agency's final witness, stated that she has worked at Agency for 34 years, and was a supervisor as well as acting coordinator with the Parking Enforcement Management Administration during the relevant time period. She said that as acting coordinator she was responsible for the 6:00 a.m. and 8:00 a.m. shifts. She stated that although she was not Employee's direct supervisor at the time, she knew Employee since they worked the same shift. (Tr2, 6, 49). According to Ms. Woodhouse, on April 12, 2022, Employee arrived at about 7:04 a.m., although she is scheduled to begin work at 6:00 a.m., adding that she assumed Employee had notified someone else that she was going to be late. Ms. Woodhouse testified that she learned that employees were scheduled for random drug testing that morning at the Reeves Center; and that Georgina Watts, a colleague, had driven the other employees to the Reeves Center for testing before Employee's arrival.

Ms. Woodhouse testified that she was responsible for driving Employee to the Reeves Center for drug testing because Employee's immediate supervisor was out on extended leave at the time. She testified that shortly after Employee arrived, she told Employee that she would be driving Employee to the Reeves Center to be tested, and that she come outside and meet her after she signed in and got her equipment. Ms. Woodhouse said that after Employee returned and she told Employee that they were leaving; Employee asked her where they were going. The witness said that she told Employee that they were going to the Reeves Center. She testified that Employee then said that she needed to use the bathroom. The witness said that she told Employee to meet her outside when she was finished. Ms. Woodhouse testified that when Employee did not return after a few minutes, she went to the bathroom to look for her, but did not find her there. Ms. Woodhouse said that she then looked outside for her, and saw her getting out of her personal vehicle which was parked in a lot across the street from their worksite.

Ms. Woodhouse stated that she then drove to the lot, and motioned Employee to get into the vehicle that she was driving. She said that once Employee was in the vehicle, the witness gave her the documents that she needed to bring for the testing. She related that Employee then told her that she was not ready to leave, and that she asked Employee what she needed in order to be ready. She said that Employee told her that she needed "her lunch bag, her radio and her equipment," and she told Employee that she could get her lunch bag, but could get her radio and equipment when she returned from the Reeves Center. According to Ms. Woodhouse, Employee then got out of the vehicle, and said that she wanted to take leave for the remainder of the day. The witness testified that she told Employee that although she would not grant the leave request then, she would do so when they returned after Employee was tested at the Reeves Center. The witness said that Employee told her that she could leave if she wanted, and that she told Employee that she would be abandoning her

[10] This summary of Ms. Woodhouse's testimony is drawn from both the evidence she presented at the October 17, 2023 proceeding (Tr2, 5-68) and her affidavit of November 9, 2022 (Ex A-8).

position if she left then. Ms. Woodhouse said that she again asked Employee to get in the vehicle and that they would go back to the building and discuss the matter further, but Employee refused.

Ms. Woodhouse stated that she returned to the building, and shortly thereafter saw Employee had also returned and had gone to Jocelyn Chase, another supervisor, and was requesting leave. The witness testified that she told Ms. Chase not to grant the request. She testified that Employee then went to the storage room to take her equipment to the storage room, and she told the employee assigned to the storage room not to accept the equipment. Ms. Woodhouse testified that after putting a printer on the counter, Employee entered the storage room, locking the door behind her. Ms. Woodhouse stated that she tried to open the locked door several times. She said that also asked Employee to open the door three times, and each time Employee responded that the door was not locked. Ms. Woodhouse said that after she left to get key for that door, Employee unlocked the door.

Ms. Woodhouse testified, that she telephoned Mr. Davis, the substance abuse specialist, to report the situation and was speaking with him while Employee was in the locked storage room. She said that Mr. Davis asked to speak with Employee, but Employee refused to take the phone. The witness that she then placed the call on speaker so that Employee could hear what Mr. Davis was saying. Ms. Woodhouse testified that after Mr. Davis told Employee that she had been notified that if she refused to test, she could be terminated, Employee left the storage room and went to Ms. Chase's office and was trying to give her paperwork for the requested leave. The witness stated that, Employee then left Ms. Chase's office, and according to Ms. Woodhouse, was walking down the hallway "screaming and hollering…I'm not taking no drug test [and] you take the drug test, Erica." Ms. Woodhouse testified that she assumed Employee left Ms. Chase's office when she realized that she was not going to get leave at the time. The witness testified more attempts were made to calm Employee and encourage her to return to talk with the witness. She testified that Employee did not comply, but instead left the work site and drove away in her own vehicle.

Ms. Woodhouse testified that at about 7:46 a.m., she was told that Employee had come back to return her equipment, but did not return the keys to the vehicle.. The witness said that she and Aubrey Williams, a colleague, tried to talk with Employee again at that time, but that Employee "kept insisting on using leave for the remainder of the day." She said that she again explained to Employee that the request would not be granted until after she was tested. The witness said that she notified the Deputy Administrator and Program Manager that Employee still had keys to the vehicle, and that Employee returned again at about 9:24 a.m. and returned the keys to the vehicle.

On cross-examination, Ms. Woodhouse testified that she began working for Agency on August 28, 1989, and became a parking officer supervisor about 20 years ago. She explained that an employee selected for random testing is not permitted to drive to the testing site at the Reeves Center; but is driven there and back by another employee. She stated that Jocelyn Chase, Aubrey Williams, and Alex Weaver, all supervisors, were present when she tried to talk with Employee while she was in the storage room. The witness testified that she tried to open the door but could not because it was locked. Ms. Woodhouse denied that Employee told her that she had " a lot going on.."

Employee's position is that she did not actually refuse to submit to mandatory testing on April 12, but did not go for testing with Ms. Woodhouse, as directed. She maintained that at the time, she was having a panic attack. She argued that Agency could not order her to be tested because Agency failed to have her sign an Individual Notification form annually as required. She said she had last signed a form in 2018.

Employee testified that during the relevant time period, her tour-of-duty was from 6:00 a.m.until 2:30 p.m. (Tr2, 63). She said that on April 12, 2022, she first telephoned Georgina Watts at about 6:50 a.m. to request one hour sick leave at about 6:50 a.m. on April 12, 2022. She said that she next telephoned Ms. Watts at 7:03 a.m., when she realized that she would not get to work by 7:05 a.m., and asked Ms. Watts if she would be docked an hour if she was a few minutes late, and Ms. Watts told her that Ms.. Woodhouse would have to make that decision. Employee said that when she arrived at 7:06 a.m., she was told by a supervisor to sign a leave slip, and get her equipment and a vehicle key; but was not told by anyone that she had to take a drug test. She testified the "protocol" states that employees who are getting drug tested do not get keys before they are tested. (Tr2, 64-65). Employee said that she then left to get her lunch and purse from her vehicle; and it was then she saw Ms. Woodhouse driving around looking for her. She testified that Ms. Woodhouse then told her to "get in the car…that she was taking [her] to the Reeves Center." Employee testified that before she saw Ms. Woodhouse, she received a telephone call that her uncle had "collapsed at his job." She said that she told Ms. Woodhouse that she "was not going," and went back into the building. She testified that Ms. Woodhouse followed her back and was yelling at her.. Employee said that she then asked Ms. Chase for a leave slip, but Ms. Woodhouse told Ms. Chase not to grant the leave/ (Tr2, 65-66).

Employee testified that she went into the storage room because she had a panic attack due to the way that Ms. Woodhouse spoke to her.. She said that while in the storage room she was talking with Ms. Mitchell, a friend. she talked with regularly. She said that although Ms. Woodhouse was telling her to unlock the door, she had not locked it. Employee stated that when she opened the door, she saw that Ms. Woodhouse was on the phone and heard a male voice; but she did not know who was on the other end. She said that Aubrey Williams asked to talk with her after she left the area, and that she told him that she had "a lot of stuff going on [and didn't] have time for this." . (Tr2, 67). Employee stated that she then left the building. She said that Ms. Watts called to ask her to return the key, and that she did so. Employee testified that she did not refuse the drug test, but "had a lot of stuff going on," stating that her uncle had just collapsed and that due to COVID, she could not see an aunt and grandfather before they died the previous year. (Tr2, 68).

On cross-examination, Employee agreed that she read and signed Refusal to Submit document the morning of October 12. She testified that she was aware that she was subject to mandatory random drug and alcohol since she occupied a safety-sensitive position, but contended that she did not know that she was required to drug test if she had a family emergency. Employee agreed that she was supposed to take the drug test when directed to do so, but stated that at the time, she was unaware that there was any penalty if she refused to comply. (Tr2, 70-71, ExA-3). She asserted that she did not sign the Notification of Testing form on April 12, 2022 because Ms. Woodhouse did not give it to her to sign. She said that she "saw it in her hand, but it never got to my hand." (Tr2, 74; Ex A-4). Employee maintained that she did not refuse to go with Ms. Woodhouse to drug test, but told her she had "a lot of stuff going on." She testified that no one asked her to go for the drug test once she left the storage room. (Tr 2; 77-79). She maintained that neither Mr. Williams nor Ms. Woodhouse asked her to drug test at that meeting. She said that at that meeting that she told Ms. Woodhouse that she "had a lot going on," (Tr2,80-81).

Employee testified that after getting the keys, she received the call informing her that her uncle had collapsed. She agreed that she did not tell Ms. Woodhouse about this family emergency when Ms. Woodhouse subsequently told her to get in the car so they could go to the Reeves Center. She testified that she thought telling Mr. Williams and Ms. Woodhouse that she had " a lot going on" was

sufficient to excuse her from mandatory testing and she did not think she had to be more specific. (Tr2, 83). She said that she would have told HR or the coordinator, but Ms. Woodhouse was the acting shift coordinator, and she was not going to talk with the supervisor. She stated that she did not call anyone from management that day to explain that she had a family emergency. (Tr2, 84).

Employee testified that she telephoned Dr. Daniel Jackson, her psychiatrist, before she went home on April 12, 2022. She said that he did not have any in-person appointments available, so she spoke with him by telephone. Asked if she told him that she had been asked to drug test that morning, she stated that she did not tell him; testifying that she did tell him about "what was going on with [her] and the things that [she] was experiencing." Referring to Dr. Jackson's statement in the Verification of Treatment following his conversation with Employee on April 12, 2022, that Employee was "ill due to experiencing excessive worry and panic attacks and unable to work on April 12, 2022" Employee reiterated that she had not told him about the drug test, stating that the "stress and worry was because of what was going on at the job…and how Ms. Woodhouse was talking to her." (Tr2, 85-86; Ex E-1). She testified that on April 12, she wanted to see her uncle as soon as she heard that he had collapsed, but was told as she was driving there that she could not do so because of COVID. She reiterated that she did not refuse to drug test, but explained that she had a family emergency. (Tr2, 87-88).

Employee stated that she did not ask Ms. Woodhouse if she was going to dock her an additional hour, because Ms. Woodhouse gave her the leave slip to sign when she arrived, and she saw that she had not been charged leave for the additional hour. Employee said that Ms. Woodhouse told her to get her equipment and keys at the time, but did not mention the drug testing. She testified that Ms. Woodhouse first told her that she was taking her to be drug tested when she saw her "outside driving around looking for" her, after she had returned to her car. (Tr2, 96). She said that she had just gotten the call about her uncle. Employee stated that when Ms. Woodhouse told her she needed to go with her to the Reeves Center for testing, she told Ms. Woodhouse that she could not go at that time. Employee testified that while she was at the window of the vehicle, she saw the papers in Ms.. Woodhouse's hand, but "the papers never got from her hand to mine." (Tr2, 97).

Employee testified that she got her equipment and keys after reporting to work that morning, and then returned to her car to get her lunch and purse. She said that she got the call that her uncle was taken to the hospital while opening the car door. She stated that after she received the call, she left her lunch and purse in the car; and was walking to the building to return the equipment and keys when she saw Ms. Woodhouse driving around. She testified that it was then that Ms. Woodhouse told her that she had to report for drug testing. She testified that she told Ms. Woodhouse that she had "a lot going on," explaining that she "didn't want to tell Ms. Woodhouse the reason for her decision not to go [for drug testing], was because she heard that supervisors "have a habit of emailing other supervisors [and other] people your personal business." She said she had been told that "a lot about them handing out [her] personal business." Employee testified that she thought that she could "say no [and] go another time." (Tr2, 100-103). Employee said that when she was waiting at Ms. Chase's desk to request leave, Ms. Woodhouse told Ms. Chase not to grant leave to her even though she had not yet made the request. (Tr2, 106).

Employee testified that she had taken drug tests "every month" and "four or five drug tests" at the Reeves Center and other locations. She asserted that she had never refused a drug test. She reiterated that she had been told at the training she took when the position became "safety-sensitive" that she was required to submit to drug tests when ordered to do so, but that she had "never thought

about" it. She testified that she did not know the "repercussions" for failing to submit to random testing, and was never given information about that. (Tr2, 104-105).

Employee said that she left Agency at about 8:00 a.m., and was "going to [her] mom's house" when she called to ask for an appointment with Dr. Jackson, because she was "stressed." She stated that she returned to Agency after Ms. Watts called and told her that she still had keys to the Agency vehicle. She testified that she planned to immediately go to the hospital to see her uncle, but then received a call from his daughter telling her that he could not have visitors. (Tr2, 1116). Employee said that at 10:30 a.m. she had a tele-visit with Dr. Jackson, her psychiatrist, and Ms. Anderson, her therapist. She testified that she did not mention anything about being told she had to submit to a drug test that morning when she made the appointment, or had the tele-visit with Dr. Jackson and Ms.; Anderson, and instead talked about the job "stressing [her] out," Ms. Woodhouse's tone of voice when she spoke to her, and the recent deaths in her family. (Tr2, 109-114).

. Employee agreed that it was reasonable for Ms. Woodhouse to assume that Employee was refused to go for the drug test on April 12, although she never specifically said that to Ms. Woodhouse, only telling her only that she had " a lot of stuff going on;" She stated that she never mentioned having a panic attack because she did not have it until she went into the storage room. She agreed that she did not tell Ms. Woodhouse "what was going on with [her]." (Tr2, 121). Employee stated that Agency had previously denied several applications for relief she filed pursuant to the American with Disabilities Act ("ADA"); and that her most recent application, signed by Dr. Jackson on April 5, 2022 was pending at the time of her removal. (Tr2, 122-125; Ex E-5).

Employee testified that Agency should not have terminated her because it had failed to have her complete a suitability form which it was a prerequisite for testing.. She stated that there was no signed suitability form in 2022. (Tr2, 127-128). Asked if her position was that her failure to sign the form after 2018 excused her from mandatory testing, Employee testified that failure to complete the sign did not excuse her from mandatory testing but that Agency wasn't "supposed to test [her] unless [she] had a signed statement on file." (Tr2, 129).

Madeline Richards testified on behalf of Employee. She said that she often spoke on the phone with Employee; and that they spoke multiple times by phone between 6:00 a.m. and 8:00 a.m. on April 12. (Tr1, 106). Ms. Richards said that while she was on the phone with Employee, she heard Ms. Woodhouse ask Employee to open the door, and then Employee respond, stating that the door was open. She said that she heard Ms. Woodhouse tell Employee that the door was not open and again ask her to open the door, and that Employee again replied that the door was open. The witness said that she then told Employee who was on the phone with her, that "maybe the door isn't open because [Ms. Woodhouse is] saying it's not open." She said Employee told her that the door was open and Ms. Woodhouse "just [had] to turn" the knob. (Tr1, 107). She said that Mr. Davis, the trainer, stated that "employees need to have a signed suitability about every year." (Tr1, 109).

On cross-examination, the witness stated that she has been friends with Employee since 2006, when they both started working for Agency, where she is still employed. She said that during the relevant time period, she often spoke by phone with Employee, and saw her at work.. (Tr, 112). Ms. Richards agreed that at the training she attended, Mr. Davis, the trainer, showed the Notification form to attendees on a screen and telling them the form was distributed and had to be signed annually. (Tr1, 114-116).

FINDINGS OF FACT[11], ANALYSIS, AND CONCLUSIONS OF LAW

The jurisdiction of this Office is established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Law 2-139; D. C. Official Code § 1-601.01 *et seq*. (2016 Repl.. and 2019) as amended by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124. Section1605.1 of the District Personnel Manual ("DPM") (May 19, 2017) states that an adverse action is "warranted" when an employee violates standards of conduct, fails to meet performance measures or disregards rules of the workplace in order to "encourage conformity to acceptable behavioral and performance standards or to protect operational integrity." DPM §1605.2 states that discipline can only be imposed "for cause." Agency carries the burden of proof in this matter; and must establish by a preponderance of evidence[12], that Employee failed to meet "identifiable conduct or performance standards which adversely affects the efficiency or integrity of government service."

The AJ considered a number of factors while analyzing this matter in order to reach a decision. First, throughout these proceedings and in reviewing the evidence presented in this matter, the AJ was sensitive to Employee's *pro se* status, and took "special care," particularly on procedural issues OEA Rules. *Macleod v. Georgetown Univ. Med. Center*, 736 A.2d 977, 980 (D.C. 1999). For example, all of Employee's exhibits were admitted into evidence although Agency argued some had not been disclosed by the stated deadline.[13] In addition, the AJ did not sanction Employee, although she failed to follow directives or comply with required procedures. Employee was given leeway in her cross-examination of witnesses and in her direct testimony, sometimes over Agency's objections. When Employee failed to submit closing arguments in the required manner, the AJ explained what needed to be done and gave her additional time to comply. Employee did not file within those deadlines. In March, Employee advised the AJ that she had been injured during an assault the previous month and needed more time to comply with the requirements. The AJ advised the parties that she would accept the initial submission, rather than delay closing the record in this matter or placing additional stress on Employee.[14] However, the AJ did not give Employee "special treatment [or] substantial assistance." The AJ ensured that the "special care" given to Employee in no way prejudiced Agency. *Palou v. District of Columbia*, 998 A.2d 286 (D.C. 2010).

The AJ also assessed credibility and reliability of the documentary and testimonial evidence. The District of Columbia Court of Appeals has emphasized the importance of credibility evaluations by the individual who sees the witness "first hand." *Stevens Chevrolet Inc. v. Commission on Human Rights,* 498 A.2d 440 (D.C. 1985). Upon careful review, she found the testimonial and documentary evidence to be credible, despite some inconsistencies.. *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985). The AJ primarily focused on Employee and Ms. Woodhouse, the only witnesses to the relevant events of April 12. With regard to Employee, the AJ noted some conflicts and inconsistencies between testimony at her deposition and at this proceeding.. However, the AJ

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[11] These findings supplement the uncontested facts identified in the Summary of Evidence section and are based on the analysis of the evidence. *Infra*, at 3-4. However, many of facts in this section are in similarly uncontested.

[12] OEA Rule 631 defines "Preponderance of evidence" as "the degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."

[13] *See, e.g.,* Tr1, 10-21 and Tr2, 53-55.

[14] The AJ commends both Employee and Agency counsel who were courteous and cooperative throughout these proceedings. The AJ notes with appreciation that Agency counsel did not object when extensions were granted and rarely voiced any objection to exceptions allowed by the AJ in this matter..

realized that Employee was under a great deal of stress, and was also trying to maneuver through the unfamiliar territory of this administrative process on her own. In addition, the factfinder can reject some testimonial evidence and still accept other testimony as credible. The inconsistences or conflicts were not important in reaching a decision in this matter.. For example, it was not necessary to decide if the storage room was locked or when Employee returned the keys and equipment. The only issue in this proceeding was whether Employee "failed to submit or otherwise cooperate with drug or alcohol testing" as directed, on April 12. (Ex A-5). Those facts are not in dispute. Although the parties did not agree on when Ms. Woodhouse told Employee that she was required to be drug tested that morning, it is undisputed that Employee was notified by Ms. Woodhouse at some point during their interactions on the morning of April 12, 2022 that Employee was required to go with her for mandatory drug testing, and that Employee did not comply. Employee stressed that she never refused testing that morning, but conceded that it was reasonable for Agency to conclude by her actions that she was refusing to submit to the drug test on April 12, and the AJ agrees with er concession.. It is irrelevant that she did not use words conveying that she was refusing to be tested. The AJ finds that by her words and actions Employee refused to be drug tested and to cooperate with those trying to take her to be tested on April 12, 2022. The AJ concludes that Agency presented sufficient evidence to meet its burden of proof that Employee refused to submit to mandatory testing and refused to cooperate with that process on April 12, 2022.

Employee offered several reasons for failing to cooperate with Ms. Woodhouse and failing to be tested, but provided little support. One of her primary arguments was that Agency was prohibited from testing her that morning, because it had failed to provide her with an Individual Notification form annually as required, a claim disputed by Agency. The AJ found no evidence to support this claim. *See, e.g., Employee v. Department of Public Works*, OEA Matter No. 1601-0058-22 (February 16, 2023). In support of her position that Agency failed to follow other procedures which led her to believe that she was not required to go for testing that day, she maintained that employees who are being tested are not permitted to get their keys until after they return from testing, and she had picked up her keys first. However, Employee did not establish that allowing her to get her keys negated the requirement of being tested or of cooperating with the testing process. *See, Pupis v. U.S. Postal Service*, 2007 M.S.P.B. 47 (2007). Employee also maintained that she thought that she had the option of rescheduling the test. However, she offered no evidence that her belief was correct*, i.e.*, there was no evidence to support a conclusion that mandatory drug testing was optional and could be rescheduled on request. In addition, Employee had been notified by Agency on the morning of April 12, 2022 that she was required to go for drug testing. The AJ finds that Employee is an intelligent individual who held a responsible position for more than 16 years at Agency where she received training and written material regarding mandatory random testing, and she had been tested on multiple occasions although, by her own testimony, she had not signed an annual form since 2018.. The AJ concludes that a reasonable person with the Employee's intelligence and experience would not maintain that belief.

Employee presented testimonial and documentary evidence that she has been in treatment for "adjustment disorder with mixed anxiety and depressed mood" and that she was experiencing a panic attack at the time. (Ex E-6). She argued that Agency previously rejected her efforts to receive accommodations pursuant to the Americans with Disabilities Act ("ADA"), and her most recent application signed by Dr. Jackson was pending at the time of her removal. However, the document submitted by Employee to support this contention was a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) ("FLMA") signed by Dr. Jackson on April 5, 2022. In the document, Dr. Jackson wrote that he had treated Employee on

February 2 and March 3, 2022, and that he thought her condition probably had a duration of 12 months. Dr. Jackson stated that Employee would require leave in order to be diagnosed and treated. Although no diagnosis was given, Dr. Jackson identified anxiety, panic attacks and stress as "relevant medical facts." (Ex E-5). In the March 1, 2018 Office Visit Summary listed five medications, including ferrous sulfate, fluticasone, acetaminophen-codeine, iron-vitamin C, and Sertraline. The AJ does not know which, if any, of the medicines treated anxiety or panic attacks. In addition, all of the medications were discontinued on 2019. (Ex A-6). *The Diagnostic and Statistical Manual of Mental Disorders,* 5th Edition, is the standard used by professionals to diagnose psychiatric and mental disorders. It required the individual to meet certain criteria. It appears that as of April 5, 2022, Dr. Jackson had not determined if Employee met the criteria of generalized anxiety disorder and panic disorder in adults.[15]

Employee maintained that her reason for leaving work was the news about her uncle, but that she did not tell Ms. Woodhouse, because she was concerned that Ms. Woodhouse, a supervisor, could repeat this personal information to others. Employee said that she only told Ms. Woodhouse that she had "a lot going on," because she had heard that supervisors told others personal information about employees, including Employee. However, there was no support for this allegation; and knowing this information could have helped Ms. Woodhouse and others that morning. For example, Ms. Woodhouse might have allowed Employee to contact the hospital; at which point Employee would have learned that she could not visit him and gone for the test. She could have ensured that Employee did not have to wait to be tested. The information would not have excused her from testing, but could have made the process less difficult.

Employee similarly limited the information she provided to Dr. Jackson and Ms. Anderson when she spoke to them, failing to mention the mandatory drug testing when she spoke with them on April 12. In the Verification of Treatment, signed by Dr. Jackson at 1:51 p.m. on May 26, 2022, he states that Employee received "medical advice on 4/12/22 [that she] was ill due to experiencing excessive worry and panic attacks and unable to work" that day. However, Dr. Jackson did not state that Employee was unable to be driven to be drug tested that morning. The AJ finds that there is insufficient evidence to support a conclusion that there was a medical or psychiatric basis for Employee's failure to cooperate with the drug testing requirement on April 12, 2022. *See also*, *Employee v. D.C. Department of Transportation*, OEA Matter No. 1601-0024-23 (June 20, 2023).

Based on a thorough review of the evidence and arguments presented by the parties[16], the AJ concludes that Agency met its burden of proof that Employee engaged in the charged misconduct, *i.e*., that on April 12, 2022, Employee refused to submit to mandatory drug and alcohol testing and to cooperate with Agency to proceed to testing. Employee failed to establish that there was any basis for excusing her from that requirement . Having reached that decision, the AJ must assess the penalty.

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[15] It is unclear if Employee's position that she did not go for drug testing on April 12 because she was suffering from a panic attack; anxiety due to the news about her uncle, recent family deaths, and stress; and/or had a history of such attacks. However, if she was presenting this argument, she did not present sufficient evidence of her diagnosis on April 12, 2022; or of a causal relationship between any disorder or panic attack and her failure to cooperate with the testing requirement on April 12; or that having such a diagnosis would excuse her from the requirements.

[16] The AJ reviewed each argument carefully in reaching her decision, and to the extent that this decision does reflect an analysis of each argument, inclusion would significantly increase the length of the document but would not have impacted on the outcome. *Antelope Coal Company/Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014).

The selection of the penalty is a management prerogative that will not be disturbed provided it is within the permitted range, based on the consideration of the relevant factors and is clearly not an error of judgment. *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). *See also, Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14 (July 11, 2017). The penalty will not be disturbed if Agency weighed "relevant factors" in a fair and unbiased manner. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991).

The evidence established that Employee was in the category of employees subject to mandatory random drug and alcohol testing. Section 6-B District of Columbia Municipal Regulations ("DCMR") Section 428 states that an employee "shall be deemed unsuitable and subject to separation from a covered position…for (b) [a] refusal to submit to a drug or alcohol test." Further, Section 1607.2(h)(6) states that the only penalty for "refusing or failing to submit to a properly ordered or authorized drug test" is "removal." There is no evidence that Agency's decision was an error of judgment, arbitrary or unreasonable. *Smallwood v. D.C. Metropolitan Police Department*, 956 A.2d 705, 707 (D.C. 2008). For these reasons, the AJ concludes that she has no authority to disturb a penalty in this matter. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272 (2001).

ORDER

Agency's decision is sustained. The appeal is hereby dismissed.

FOR THE OFFICE: LOIS HOCHHAUSER.