THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TONETTE BRYANT,	)	
Employee	)	OEA Matter No. 1601-0060-19
	)	
v.	)	
	)	
OFFICE OF THE STATE	)	Date of Issuance: August 6, 2020
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Administrative Judge
	)	

Tonette Bryant, Employee, *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

On June 28, 2019, Tonette Bryant, ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("Agency" or "OSSE") decision to terminate her from her position as a Motor Vehicle Operator. Agency submitted its Answer to Employee's Petition for Appeal on July 25, 2019. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on September 20, 2019. On the same day, I issued an Order convening a Prehearing Conference in this matter for October 21, 2019. On October 21, 2019, Employee appeared as directed, but Agency failed to appear. Accordingly, on that same day I issued an Order for Statement of Good Cause to Agency. Agency had until November 1, 2019 to file a Statement regarding its failure to appear for the Prehearing Conference.

On October 22, 2019, Agency filed its response citing that none of its representatives received the notice for the Status/Prehearing Conference. On October 30, 2019, I issued an Order finding Agency showed good cause for its failure to appear and scheduled the Prehearing Conference for November 13, 2019. On November 7, 2019, Agency filed a Consent Motion to Reschedule the Prehearing Conference citing a conflict. As a result, on November 12, 2019, I issued an Order granting Agency's Motion and rescheduled the matter for November 18, 2019. On November 15, 2019, Agency filed a Consent Motion to reschedule citing that its representative had a death in the family and would

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

be on bereavement leave on November 18, 2019. I issued an Order granting Agency's Motion and rescheduled the Prehearing Conference to December 10, 2019. Both parties appeared for the Prehearing Conference as required. During the Prehearing conference, I determined that an Evidentiary Hearing was warranted in this matter. Accordingly, on December 10, 2019 I issued an Order Convening an Evidentiary Hearing for February 18, 2020. Additionally, I required Agency to submit a response by December 20, 2019 to a discovery request made by Employee during the Prehearing Conference.

On January 6, 2020, Employee filed a notice indicating that Agency had not submitted the discovery documents as required and requested the matter be dismissed. Consequently, on January 13, 2020, I issued an Order for Statement of Good Cause to Agency to respond to its failure to submit the discovery request. Agency had until January 21, 2020 to respond. On January 16, 2020, Agency filed its statement of good cause and submitted the discovery response. On February 3, 2020, I issued an Order finding that Agency had complied with my Order and noted therein that the Evidentiary Hearing would still be held on February 18, 2020 as scheduled. The Evidentiary Hearing was held on February 18, 2020. Following the receipt of the transcript, on March 6, 2020, I issued an Order requiring the parties to submit their closing arguments on or before April 6, 2020. Both parties complied with the Order as required. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether termination was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That 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.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

On February 18, 2020, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case in Chief

Patrice Bowman ("Bowman") Tr. Pages 8-35

Bowman is the Associate Director of Terminal Operations/Chief of Bus Operations at OSSE. Her responsibilities include oversight of all terminal operations, including compliance for drivers in attendance, training and any other actions regarding the transportation of students. Bowman is also responsible for first level actions for discipline. Bowman testified that she was Employee's front- line manager while at New York Avenue. Bowman explained that she proposed to separate Employee from service based on a positive drug screen. Bowman stated that there is a zero-tolerance policy for motor vehicle operators at OSSE and that they follow the Department of Transportation's (DOT) rules regarding this policy. The DOT prohibits the use of illegal substances by operators. Bowman explained that a final agency notice separated Employee from service on June 26, 2019, because she had a positive drug test. Bowman testified that the Douglas factors were considered in the administration of the discipline against Employee. Specially, Bowman explained that due to the safety sensitive nature of the work, there is a zero tolerance for working under the influence of an illegal drug.

Bowman testified that a trip ticket for route number 528 on February 26, 2019, showed that Employee was the driver that day. The same day, Employee was selected for a random drug test pursuant to Agency guidelines. Because Employee tested positive on a day she was operating the vehicle, she was charged with being under the influence while on duty. Bowman explained that Employee was driving Agency's vehicle while under the influence of an illegal substance and because of this, separation from service was an appropriate punishment.

On cross-examination, Bowman testified that she was not aware of any incidents that took place on Route 528 on February 26, 2019 during either shift. Bowman further explained that there were five students assigned to the route, but only four were present during the morning shift, and five were on the afternoon shift. Based on the trip ticket, Bowman cited that all the students were transported safely to and from school except for one student who did not ride the bus in the morning. Bowman explained that on time arrival is measured in two different indicators. The first is scheduled pick up times for each student and there is a 15-minute window prior or after that staff should arrive to pick up the student. Those are based on the locations in which the students live based on the route. Bowman also noted that the D.C. Public Schools "bell" time is 8:45am and that for her staff, on time arrival would be 8:35am, ten minutes prior to school bell time.

Bowman testified that in the terminals, Employee was a reliable employee and to her knowledge had never been the cause of a bus accident nor had she received any complaints from a parent or the school. Bowman identified Employee as a driver on a trip ticket for March 4, 2019. There were six students assigned for the route, but only five were transported. Bowman did not recall any reports of incidents or accidents on this date and based on the trip ticket it appeared that students

all arrived safely to school .On redirect, Bowman testified that accidents and incidents are not a part of a determination when there has been a positive drug test. Bowman explained that those are two separate scenarios and that the OSSE DOT rules are zero tolerance for positive drug tests.

Ramia Heard ("Heard") Tr. Pages 37 -73

Heard is the Lead Compliance Specialist in the Human Resources department at Agency. She is responsible for oversight over credentialing, drug and alcohol testing for motor vehicle operators and other OSSE employees. Heard testified that employees who are in safety sensitive positions, including motor vehicle operators/drivers are required to be in random testing pools. Drivers are subject to testing on a quarterly basis and bus attendants are tested on a monthly basis. Heard explained that testing is done in the random pool. A third-party administrator determines a list of employees and then Agency will schedule dates for testing. Heard explained that on a day of random testing, an email is sent to the bus terminals to notify managers and individuals that upon their return from their morning route, they will be subject to testing.

Employees subject to testing are sent to the testing location and an agency compliance specialist and collector are there as well. Identifications are checked and employees sign the notification form and other documents. The collector then calls the individuals by numbers that they were given, and the collector will have the individual empty their pockets, take off outer clothing and will advise the employee that if they are taking any medications that they should write it down. The collector is not permitted to take information regarding any medications, so employees are advised to write it down if the Medical Review Officer ("MRO") contacts them to inquire about medications that may have appeared in the specimen. Once a specimen is received by the collector, it is processed as a split sample. This means that the collector will pour the specimen into two (2) bottles. Afterward, the collector signs off on all the specimen and bag and seal off to be sent to the lab. Once the lab receives the specimen, it runs tests for cocaine, marijuana, PCP and other similar labs.

Heard further explained that once testing is complete at the lab, the information is sent to the MRO and the MRO will verify the results. If the test is negative, the MRO will report out that it was negative. If the test results are positive, the MRO will contact the individual employee first before notifying the agency. The MRO will inquire as to whether the employee was taking any medications that may relate to the positive test and will also ask that documentation be provided, as to whether it was a prescription etc. Once this is complete, and the MRO confirms the positive test results, they will report this to Agency. Results are reported via email and are accessible to the compliance team only. Once a positive result is received, the compliance team will confirm that the individual is in fact an employee at OSSE and then confirms the terminal location. A removal email is sent to the terminal. Typically this process takes approximately two to three hours.

Heard also testified that "Bottle B" or the split sample is preserved in the event that something happens with the first bottle or in the case of a positive test result, the individual can ask that their second bottle be tested if they believe that the lab or MRO has confirmed a false positive. Agency does not accept an individual's test from another day or lab because the determinations are made on the day that the specimen was collected. Heard testified that Employee signed a Child Youth Safety Health Amendment (CYSHA) form on August 6, 2010, which indicates that anyone coming in contact with children is subject to random drug testing. Employee also completed Drug and Alcohol testing and had certificates on record that were held in the ordinary course of business at Agency. Heard also stated that Employee was provided with and signed the District's Chapter 4 Notice which is an individual notification regarding drug and alcohol testing for safety-sensitive employees. Employee also signed

a notification for random drug testing on February 26, 2019, which is signed right before employees are brought over for testing.

Heard explained that once an employee is given this form, they're notified by the manager and are then monitored by their manager until the specialist comes to take them to the testing site. On the day of Employee's test, her CDL and identification were confirmed and were kept with the chain of custody in the drug testing folders and were also dated for February 26, 2019. The chain of custody form (CCS) also links the actual testing specimen for both bottles that are collected during testing. The MRO confirmed a positive drug test for Employee. Employee tested negative for amphetamines, cocaine, opiates and PCP; but tested positive for marijuana. This information is also kept in the Compliance Drug and Alcohol folder, and this information is also sent to employee's manager to remove them from their safety-sensitive position once its confirmed that they are an employee and their terminal location is determined.

On cross examination, Heard noted that the Drug and Alcohol training dates for Employee were May 6, 2016 and October 29, 2015. Heard testified that training is typically done annually. Heard could not recall if trainings were complete in subsequent years. Heard explained that there are three (3) members on the compliance team. Heard testified that anyone on her team can make a recommendation for an individual to be placed on administrative leave based on the circumstances. Heard also explained that her team does not deal with incidents or accidents unless it's a compliance matter with a vehicular accident. Heard did not know if there were any accidents reported on February 26, 2019. Heard explained that a trip ticket on March 4, 2019 showed that Employee had completed a morning route.

On redirect, Heard testified that while the District of Columbia has different marijuana use laws, that it's still illegal for Motor Vehicle Operators to use drugs. Heard said the compliance team is responsible for staying abreast of laws pertaining to motor vehicle operators. Heard testified that morning routes for buses began at approximately 4am or 5am each day and that the compliance team is not on duty at that time.

Dr. Janelle Jaworski ("Dr. Jaworski") Tr. Pages 78 – 97

Dr. Jaworski testified that she is a medical doctor and received her Doctor of Medicine from Indiana University in 1988. She also received two undergraduate degrees in chemistry and biology in 1982 and 1984 respectively, from Indiana University. Following medical school, she did five years of pathology training and later worked as a forensic pathologist before changing to work full time as a medical review officer. In 1996, she was certified by the Department of Transportation (DOT) as a certified medical review officer through the American Association of Medical Review Officers and the Medical Review Officer Certification Council. She has been re-certified through these organizations for the last 23 years and currently works full time as a medical review officer. Dr. Jaworski explained that as a medical review officer, she has received specific training to review drug testing results that come from labs that are certified in accordance with the DOT and Health and Human Services (HHS) certified labs. The labs have a secure connection to the computer system, and they receive results from employers across the United States. Upon receipt of positive results, Dr. Jaworski speaks to people to review results and ascertain if there are any legitimate and verifiable explanations to have another test done. Following this, the results are then reported to the employer and if anyone submits any additional medical information, she reviews that as well.

When reviewing a drug test for marijuana, Dr. Jaworski testified that they initially identify the person with the test from the chain of custody form that is completed at the time of collection. Next,

she will contact the individual employee and advise them that they're going to discuss the test results and that what the employee says can be shared with their employer. She explains what the lab results showed and then asks if the employee has a medical reason or explanation or condition that would result in a positive marijuana test. More specifically, she asks whether the employee has a prescription for Marinol, also known by its generic name of dronabinol, or whether they have a prescription for a drug that is only filled in Canada called Sativex. Dr. Jaworski testified that there is only one prescription in the United States and one in Canada that can cause a test result screen to show positive for THC (marijuana). The Sativex is a prescription that is pure synthetic THC. If an employee indicated that they had prescriptions for either of these, they would then confirm that this prescription was from a doctor and filled at a pharmacy. Dr. Jaworski said that this prescription is rarely prescribed and typically is only for people who are dealing with cancer. If a person had these prescriptions and its confirmed that it was their own prescription and filled at a pharmacy before the collection date, then that may be a legitimate medical explanation. Dr. Jaworski testified that there are no other medicines, prescriptions or otherwise that would screen and confirm on the DOT testing, so those are the only prescriptions that are asked about.

Dr. Jaworski explained that approximately 30 years ago, there was a screening test that had interference with Ibuprofen, but that test was changed and was never an issue for DOT testing. Upon review of her MRO case notes, Dr. Jaworski recalled her interaction with Employee. Dr. Jaworski testified that a specialist she works with made the initial call. Once they receive the results for the lab and the chain of custody form is received then they can proceed with an interview. The initial call resulted in no answer and there was a voice message that was left. Later, Employee called in and her identity was confirmed, and she was transferred into queue to speak with an MRO. Dr. Jaworski spoke with Employee, identified her by name and her birth date on the chain of custody and explained her role as an MRO. She then provided a Miranda style warming about the results they would be discussing and that the employer would be notified if the results affect safety sensitive work. She also confirms whether a person has a commercial driver's license (CDL). Employee indicated that she did have a CDL issued in the District of Columbia.

Dr. Jaworski explained to Employee that she had tested positive for marijuana and it appeared on the screening and confirmation test. She asked Employee if there were an explanation and whether she had tried or used marijuana. Employee told her she "went out to dinner last week, and I don't know how to take, I don't even use marijuana." Employee told her that she takes tramadol. Dr. Jaworski explained that tramadol is a prescription pain medication and would not confirm a positive test result for marijuana. While Tramadol might be a safety concern because it can cause drowsiness, it is not an explanation for a positive marijuana screen. Employee did not have an explanation and denied having a prescription for Marinol (dronabinol) or Sativex. Dr. Jaworski said she specifically asked about each of those, since those prescriptions can result in positive marijuana tests. Dr. Jaworski offered Employee the split specimen option, explaining that when DOT takes samples there is an A and B bottle and they both get sealed. The lab only opened Bottle A, so if a person has a positive result, they have the option to request to split the B bottle to have it tested at a different lab to reconfirm. Dr. Jaworski stated that if the request is made within 72 hours, the lab will ship it to another lab and the employer gets billed. If the employer requires reimbursement, that is set up with the employee, but the employee is not required to cover the cost initially. Dr. Jaworski also informed Employee about the 72 hours and that she provided a caution regarding tramadol use and driving. She also asked if there were any other questions. Following the call with Employee, she called to report the results to the employer.

Dr. Jaworski explained that screening is different from the confirmation regarding the drug tests. The initial screen tests looks at different groups or categories of drugs to include a marijuana category, cocaine category, opiates, amphetamines and PCP. In each category, if something screens as a positive then it is sent to confirmation testing. Confirmation tests are run on an instrument, usually gas chromatography, mass spectrometry or gas chromatography with liquid tandem chromatography. The second confirmation test provides exact chemical structure, so in the marijuana category it confirms THC - tetrahydrocannabinol. There are other chemicals in marijuana, but THC is the component that is tested for. Dr. Jaworski explained that the second test can distinguish chemical structural differences in drugs and is very specific and exactly identifies that drug chemical only. Dr. Jaworski confirmed that the laboratory result for Employee was dated for a collection taken on February 26, 2019 and that it showed positive for marijuana. It also showed the two different tests and the cutoffs for each test. The test reported for Employee showed that marijuana metabolite was positive at 65 nanograms per millimeter (ng/ml). The report also showed the lab that completed the test. Dr. Jaworski testified that the cutoff for a positive result for a marijuana test is 15 ng/ml, which means that anything higher than that is considered a positive result. In Employee's results, hers was 65 ng/ml so it was a little over four times higher than the cutoff. Dr. Jaworski confirmed that it was her signature on the results and that she determined that this was positive result for marijuana.

On cross-examination, Dr. Jaworski noted that the MRO notes are typed at the time of the interview and that items that are in quotations in that log are verbatim quotes. The rest is information included based on the type of interview. Dr. Jaworski explained that false positives for THC for DOT screens and confirmation aren't false positive. Marinol is not a false positive, it's a real positive because it contains THC. There are no other drugs that would screen for THC other than Marinol and Sativex. Dr. Jaworski explained that she the way she explained the B Bottle to Employee was how she has explained it for several years and that if an employer does expect reimbursement, then they may contact the employee for that test. Dr. Jaworski explained that the lab that does the urine screening uses an immunoassay screening test and that accuracy is based on both the screening test and the second confirmation test if there is a positive on the screening test. Dr. Jaworski reiterated that the second confirmation test is done by mass spectrometry with either gas chromatography or liquid, tandem liquid chromatography. Dr. Jaworski noted that Employee indicated she was taking tramadol, which is a safety concern. She testified that she will ask separately about other medications, but if someone is not taking Marinol or not living in Canada, then she will not ask about other prescriptions. Dr. Jaworski explained that she did not ask Employee to submit any other prescriptions because she indicated that she had not been taking Marinol or Sativex and those are the only medications that would be pertinent to her review for THC.

Dr. Jaworski explained that "benzos"[2] is an abbreviation of the word benzoylecgonine, which is a cocaine metabolite, or benzodiazepines which are mild tranquilizers like Valium or Xanax. Neither of those are found in THC/marijuana, unless the marijuana has been laced with those other drugs, but it's not in the chemical composition of marijuana itself. Dr. Jaworski indicated that it was false that "benzos" could be added to produce barbiturates or otherwise because they are in a wholly different category and neither are screened or confirmed in that way. Further, the "benzos" and barbiturates are not of the DOT testing. Dr. Jaworski explained that people may add lots of different types of drugs to marijuana, including PCP, cocaine or others, but none of those drugs will screen for marijuana or vice versa. Dr. Jaworski said there was no possibility that those other drugs would show up as marijuana, because drugs have different chemical structures.

[2] During cross examination, Employee referred to the drugs as "benzos."

Dr. Jaworski noted that she is not in the laboratory itself, but that the labs are required to run quality control and standards with each run of every test that they do. Dr. Jaworski is not permitted to be in the lab. Upon question from the administrative judge, Dr. Jaworski explained that the DOT testing panel does not include barbiturates or benzodiazepine, so they would not show up in any testing.

Employee's Case in Chief

Renita Moore ("Moore") Tr. Pages 108 – 177

Moore testified that she worked at Agency as Human Resource Specialist in the human resources department in employee relations and had been with agency for a little over three (3) years. Moore explained that she handles Family Medical Leave Act (FMLA) packets for the entire transportation department at Agency. Moore explained that when an employee submits an FMLA request, that she reviews the request and follows up with employees to give them an appointment to meet and discuss. During the appointment they go over whatever a physician has outlined in their medical certification and then set up approvals . Moore did not know about any medications that Employee was taking at the time of the drug test that Employee was subject to. Moore did recall that Employee sent her an email inquiring about the status of her submission of an FMLA packet.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed at Agency as a Motor Vehicle Operator.[3] In a Final Agency Decision dated June 26, 2019, Employee received notice of Agency's decision to remove her from service effective June 26, 2019, for the following causes of action:

> "(1) **Conduct prejudicial to the District of Columbia Government, specifically conduct that an employee should reasonably know is a violation of law or regulation**; 6B DCMR § 1605.4(a)(3) and 6B DCMR § 1607.2(a)(4); D.C. Official Code § 50-220612 (Driving under the influence of alcohol or a drug; commercial vehicle) and D.C. Official Code § 50-220614 (Operating a vehicle while impaired).; (2). **Using, being under the influence of, or testing positive for an intoxicant while on duty**; 6B DCMR § 428.1; and 6B DCMR § 1605.4(g) and 1607.2(g)(2).; (3). **Unlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty: specifically, reporting to or being on duty while under the influence of or testing positive for an illegal drug or unauthorized controlled substance**; 6B DCMR § 1605.4(h) and 1607.2(h)(3).; and (4) **Unlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty: specifically, operating a government owned or leased vehicle while under the influence of an illegal drug**; 6B DCMR § 1605.4(h) and DCMR §1607.2(h)(5)."

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[3] Employee's Petition for Appeal (June 28, 2019).

Agency's Position

Agency avers that it had cause to terminate Employee from service following the determination that she had tested positive for marijuana during a random drug screening. Agency asserts that on February 26, 2019, Employee was selected for random drug screening, which is a part of Agency's policy for Motor Vehicle Operators (MVO). Agency cites that as an MVO with Agency, and pursuant to the Child and Youth Safety Health Omnibus Amendment Act (CYSHA), Employee was required to hold a CDL and also report to duty without ever testing positive for the presence of an unauthorized controlled substance or illegal drug.[4] Agency conducts random drug testing to enforce this rule and asserts that Employee was aware that she would be subject to random drug tests. Agency also assert that it has a "zero-tolerance" drug and alcohol policy as it relates to motor vehicle operators. Agency avers that the testing was administered appropriately and in accordance with procedures and regulations. Further, Agency notes that the Medical Review Officer (MRO) contacted Employee about her positive results and advised her of the option to have a sample tested. Agency avers that Employee did not have a sample tested and told the MRO that she did not know how to use marijuana. Agency argues that Employee tested positive at nearly four times higher than the cutoff for a positive test for marijuana. As a result, Agency maintains that it had cause to separate Employee from service and that it did so in accordance with all applicable laws, rules and regulations.

Employee's Position

Employee asserts that she has been a diligent and reliable employee at Agency for seventeen (17) years. Employee maintains that she would never do anything to intentionally cause harm to any student and has been well known at Agency to be a reliable and efficient employee. Employee asserts that on the day of the random drug testing, that there were no accidents or incidents reported for her route. As a result, Employee argues that Agency failed to appropriately consider the Douglas Factors in its decision to terminate her from service. Employee avers that her research shows that "other qualified [d]octors give a difference of opinion when it comes to Ibuprofen currently being an ingredient in THC/Marijuana."[5] To support her claim, Employee provided documentation from an article entitled "These Medications Can Cause a False Positive on Drug Tests" that was posted on GoodRX on December 26, 2018.[6] Further, Employee asserts that she was not asked to provide a list of medicines to rule out any questions about the test results. Employee avers that she was prescribed Ibuprofen and Tramadol at the time of the drug test. Employee maintains that the only drugs she has taken are those that were prescribed to her for medical conditions. Employee also maintains that she tried to obtain FMLA regarding her medical conditions and asserted that she applied for this in and around September 2018. Employee also argues that Agency did not contact her to tell her about the positive drug test until after she had completed her morning route on March 4, 2019. Accordingly, Employee avers that Agency's "slow removal" showed a lack of concern for District students and citizens. Employee asserts that she has abided by and has exhibited the Core Values of OSSE, including safety, efficiency, reliability and customer focus. Employee argues that she should be reinstated and returned to duty because she was truthful and deserves her job back.

[4] Agency's Closing Argument (April 6, 2020).
[5] Employee's Closing Argument (April 6, 2020).
[6] Employee's Notice of Discovery Request (November 5, 2019).

ANALYSIS

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee's removal was levied for the aforementioned causes of actions stemming out of a random drug test on February 26, 2019, where Employee tested positive for marijuana.

In the instant matter, Employee was required to submit to a random drug test on February 26, 2019, pursuant to the conditions of her position as a Motor Vehicle Operator(MVO) at OSSE. Specifically, in accordance with the Child and Youth Safety and Health Omnibus Amendment Act of 2004 (CYSHA) (D.C. Law 15-353; D.C. Official Code § 1-620.31 et seq.), Motor Vehicle Operators are required to hold a commercial driver's license (CDL), and must also report to duty without ever testing positive for the presence of an unauthorized controlled substance or illegal drug. Agency administers random drug tests in order to ensure compliance with this regulation. Employee's test results from the February 26, 2019 test, yielded a positive result for an unauthorized controlled substance, specifically marijuana.[7] In a Final Notice dated June 26, 2019, Employee was notified that she would be terminated from service for the aforementioned causes of action.[8] Employee argues that she had never taken marijuana and that she was on prescription medications that may have resulted in the positive test results. Agency maintains that it administered the instant adverse action in accordance with all applicable laws, rules and regulations. Agency avers that Employee's position as an MVO is safety-sensitive and subject to its a zero-tolerance drug policy. As a result, Agency maintains that it had cause to separate Employee from service for testing positive for an unauthorized controlled substance, specifically marijuana. The undersigned agrees.

As previously stated, Employee argued that the prescription medications she was taking at the time of the test, were the cause of the positive result for marijuana. Employee submitted documentation from a website that indicated that Ibuprofen, for which she had a prescription at the time of her drug test, could yield false positive results for marijuana.[9] In her testimony at the Evidentiary Hearing in

[7] Agency Answer at Exhibit 10 (July 25, 2019).
[8] Employee's Petition for Appeal (June 28, 2019).
[9] Employee's Notice of Discovery at Attachment (November 5, 2019). The attachment was an article from the Good RX and was entitled: "These Medications Can Cause a False Positive on a Drug Test by Dr. Sharon Orange and was

this matter , the Medical Review Officer (MRO), Dr. Jaworski, explained in great detail that the tests that were utilized for Employee's test would not result in a false positive for Ibuprofen or any other drug.[10] Further, Dr. Jaworski specified that there are no drugs, prescription or otherwise that would yield false positive results for marijuana. Dr. Jaworski also explained that there are only two (2) drugs that would show up as marijuana, and those are Marinol and Sativex.[11] Dr. Jaworski further explained that the confirmation tests used to determine drugs are able to identify specific chemical structures, and nothing outside of the Marinol or Sativex would yield a positive result for marijuana.

While Employee maintains that she did not take marijuana, the undersigned finds that the evidence provided in the record and the testimony from the MRO clearly indicates that marijuana was identified as the chemical structure that resulted in the positive test on February 26, 2019. Further, the test results showed and Dr. Jaworski confirmed, that the amount of marijuana found was four (4) times higher than the cutoff parameters for a positive test result for marijuana.[12] The MRO has several decades of experience with drug testing and was able to provide detailed information regarding the testing and results of the drug test used in this matter. Accordingly, I find that Employee's documentation from the website, is not sufficient to rebut the information provided by the MRO in this matter. Further, as a MVO, Employee's position was safety-sensitive and as a result, any unauthorized or illegal drug use is prohibited. Employee was aware of her safety-sensitive position and signed documentation acknowledging the drug policy on both August 6, 2019, and July 21, 2017.

Further, Employee received training on Agency's drug policies on October 29, 2015 and May 6, 2016.[13] While it is evident that Employee was a reliable and dedicated employee at Agency and that there were no incidents during her bus routes on February 26, 2019, it does not change the results of the positive drug test. I further find, that Employee's assertion that Agency waited until after she completed her morning route on March 4, 2019, to notify her that she would be placed on administrative leave to be inconsequential to the positive test results and the administration of discipline in this matter. Accordingly, I find that Employee's drug test on February 26, 2019, yielded a positive result for an unauthorized controlled substance, specifically marijuana, and that there is no evidence to suggest that there was a false positive result or that the test was administered incorrectly. As a result, I find that Agency had cause to terminate Employee from service for testing positive for marijuana and for the associated causes of actions based on those results.

Whether the Penalty was Appropriate

Based on the above-mentioned findings, I find that Agency's action was taken for cause, and as such, Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[14] According to the Court in *Stokes*, OEA must determine

posted on December 26, 2018. The article claimed that Ibuprofen and Naproxen can cause a false positive result for THC on a drug test.

[10] Dr. Jaworski noted that many years ago, there was a test that may have resulted in Ibuprofen giving a false positive for THC but indicated that that test was pulled from the market.

[11] Sativex is only available in Canada.

[12] Agency's Answer at Exhibit 10 (July 25, 2019).

[13] *Id*. at Exhibits 1 and 2.

[14] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *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-

whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM; whether the penalty is based on a consideration of relevant factors; and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[15] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[16]

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.[17] Chapter 16 § 1607.2 of the District Personnel Manual Table of Illustrative Actions ("TIA") provides that the appropriate penalty for a first offense for "*conduct prejudicial to the District of Columbia Government, specifically conduct that an employee should reasonably know is a violation of law or regulation*" ranges from reprimand to removal[18]. Additionally, a charge of being "*under the influence of, or testing positive for an intoxicant while on duty,*" ranges from suspension to removal for a first occurrence.[19]. The penalty range for the first occurrence for a charge of "*unlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty: specifically, reporting to or being on duty while under the influence of or testing positive for an illegal drug or unauthorized controlled substance*" is suspension to removal.[20] Last, the penalty range for a first occurrence for the charge of *"unlawful possession of a controlled substance or*

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] *See 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*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[16] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[17]*Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). 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.

[18] DPM Table of Illustrative Actions § 1607.2(a)(4) (2019).

[19] *Id.* at § 1607.2 (g)(2).

[20] *Id.* at § 1607.2 (h)(3).

paraphernalia or testing positive for an unlawful controlled substance while on duty: specifically, operating a government owned or leased vehicle while under the influence of an illegal drug" is removal.[21]

Consequently, I find that Agency has met its burden and had cause to take action against Employee for all the causes of action set forth in its Final Notice. Based on the penalty ranges for each cause of action as listed in the TIA, I find that removal is an appropriate penalty in the instant matter. Accordingly, I further find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and not a clear error of judgment. As a result, I further conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Administrative Judge

[21] *Id.* at §1607.2(h)(5).