

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

\_\_\_\_\_  
In the Matter of: )  
)  
Leonard Cheeks ) OEA Matter No. 1601-0119-09  
Employee )  
) Date of Issuance: March 3, 2010  
v. )  
) Senior Administrative Judge  
Dept. of Public Works ) Joseph E. Lim, Esq.  
Agency )  
\_\_\_\_\_  
James Ivey, Employee Representative  
Charles Tucker, Esq., Agency Representative

**INITIAL DECISION**

PROCEDURAL BACKGROUND

On May 7, 2009, Employee filed a petition for appeal with this Office regarding his July 21, 2008, removal by the agency for testing positive for a controlled substance. After a January 6, 2010, Prehearing Conference, the parties submitted legal briefs and the record was officially closed on February 10, 2010.

JURISDICTION

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

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

On July 21, 2008, Agency informed Employee of its intention to remove him from his position as a Motor Vehicle Operator, WS-3501-5/5, at \$19.10/hour, based on the charge of testing positive for a controlled substance after a work-related vehicular accident.

At the Prehearing Conference on January 6, 2010, Employee admits that he had tested positive for marijuana after a work-related vehicular accident. However, he contends that Agency's penalty should be overturned because it was excessive and unfair. Employee contends that the penalty should be reduced to something less than a termination.

However, in his brief on the issue of penalty, Employee changed his tune. He now contends that his penalty should simply be overturned, that he should suffer no penalty, and that he be reinstated with full back pay and benefits. In short, Employee now argues that he be treated as if the

work-related vehicular accident and the positive drug test result has never happened.

In support, Employee points to his excellent performance ratings for the three years before the accident. He also casts doubt on his drug test result by insisting that the reporting of the test results was disorganized, tardy, and not according to Agency's drug testing procedures. In short, after conceding that Agency had cause for an adverse action against Employee, he now tries to re-litigate the issue of his culpability.

Based on the undisputed facts from the admissions of the parties and the documentary evidence, I make the following findings:

1. On January 10, 2005, Employee was hired as a Sanitation Worker with Agency's Solid Waste Management Administration.
2. On March 15, 2008, Employee became a Motor Vehicle Operator, Grade 7, Step 3, for Agency.
3. On July 11, 2008, Employee was driving a large packer truck while on duty. As he backed out of an alley, Employee struck another vehicle and was issued a citation for backing without caution.
4. Agency's Drug and Alcohol Testing Policy requires any employee involved in an accident while driving a government commercial motor vehicle to be tested for the presence of alcohol and controlled substances. In accordance with this policy, Employee was tested and his sample tested positive for the illegal drug marijuana.
5. On July 21, 2008, Employee was summarily removed from his position.
6. At Employee's request, the July 11 sample was retested on September 12, 2008, and the results again came up positive.
7. On April 6, 2009, Administrative Hearing Officer Theresa Cusick found that the agency had met its burden of proving that its actions had been taken for cause and recommended that the penalty of summary removal be upheld.
8. On April 7, 2009, Agency Director Howland issued a final notice sustaining his earlier decision to summarily remove Employee.
9. Employee filed a petition for appeal with OEA on May 7, 2009.
10. At the Prehearing Conference on January 6, 2010, Employee admitted that he had tested positive for marijuana after a work-related vehicular accident. Based on this admission and the fact that a positive test for a controlled substance is cause for adverse action under the District Personnel Manual (DPM) under Ch. 16, Pt. 1 §1603.3 (i) Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result, I therefore find that

Agency had cause to take adverse action against him.

However, Employee asserts that his penalty should be overturned and that he should be returned to work.

As noted above, the only remaining issue is whether the discipline imposed by the agency was an abuse of discretion. Any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), \_\_ D.C. Reg. \_\_ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), \_\_ D.C. Reg. \_\_ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."<sup>1</sup> When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."<sup>2</sup>

In determining the appropriate penalty, Agency took into consideration the mitigating factors of Employee's history of excellent performance evaluations and the positive comments from his supervisors. However, Agency determined that these were outweighed by the nature and seriousness of the offense, and its relation to the employee's duties, including the substantial danger to the safety and lives of others arising from a vehicle operator driving under the deleterious influence of illegal substances. I also note that Employee was on notice that the ingestion of illegal drugs violated the law and Agency's regulations.

Here, DPM Ch. 16, Pt. 1 §1616.1 authorizes an agency head to remove an employee summarily when the employee's conduct: (a) Threatens the integrity of government operations; b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or (c) Is detrimental to public health, safety, or welfare of others. In this instance, it is clear that an employee driving under the influence of an illegal drug and who caused a vehicular accident is a danger to the safety of others.

For the foregoing reasons, I conclude that the agency's decision to select removal as the appropriate penalty for the employee's infractions was not an abuse of discretion and should be upheld.

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<sup>1</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

<sup>2</sup> *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

ORDER

It is hereby ORDERED that the agency action removing the employee is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.  
Senior Administrative Judge