

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Leonard Cheeks)	OEA Matter No. 1601-0119-09R12
Employee)	
)	Date of Issuance: March 14, 2013
v.)	
)	Senior Administrative Judge
Dept. of Public Works)	Joseph E. Lim, Esq.
Agency)	
)	

Kevin Turner, Esq., Agency Representative
Brenda Zwack, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On May 7, 2009, Employee filed a Petition for Appeal with this Office (Office of Employee Appeals or OEA) 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. On March 3, 2010, I issued an Initial Decision (ID) upholding Agency's penalty. Employee appealed the ID, arguing that he disputed the cause for adverse action as well as the penalty. On October 3, 2011, the OEA Board issued an Order and Opinion remanding the matter for an evidentiary hearing. I held a hearing on December 10, 2012, and closed the record at its conclusion.

JURISDICTION

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

ISSUES

1. Whether Agency's adverse action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

Undisputed Facts:

1. On January 10, 2005, Employee was hired as a Sanitation Worker with Agency's Solid Waste Management Administration.
2. On March 16, 2008, Employee became a Motor Vehicle Operator, WS-5703, Grade 7, Step 3, for Agency.

1. On July 11, 2008, Employee was driving a large packer truck while on duty. As he backed out of an alley, a vehicular accident occurred with another truck and a police officer issued Employee a citation for backing without caution.
2. 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.
3. On July 21, 2008, Employee was summarily removed from his position under the provisions of §1617 of the District Personnel Regulations (DPR) and Section X-A1, 2, & 3 title "Disciplinary Action: Consequences of Policy Violations" of the DPW policy, titled "Testing of Drivers of Commercial Motor Vehicles for the Presence of Controlled Substances and Alcohol."
6. At Employee's request, the July 11 sample was retested on September 12, 2008, and the results again came up positive for marijuana.
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 William Howland issued a final notice sustaining his earlier decision to summarily remove Employee.
9. On July 21, 2008, Agency informed Employee of its intention to remove him from his position as a Motor Vehicle Operator, based on the charge of testing positive for a controlled substance after a work-related vehicular accident.
10. Employee filed a Petition for Appeal with OEA on May 7, 2009.

Summary of Evidence

Testimony of Dr. Charles Moorfield (Transcript pgs.11-30):

Dr. Charles Moorfield testified that he is a medical doctor who is also certified as a LabCorp medical review officer for drug tests. Part of his job is to review positive drug test results and determine any medically acceptable reason for the donor to test positive for a particular substance.

On July 18, 2008, he spoke to Employee after reviewing Employee's drug test results which was administered on July 11, 2008. (See Agency Exhibit 1). Dr. Moorfield wanted to find out if Employee had a medically acceptable reason for testing positive for marijuana. After talking with Employee, he determined there was none as the only medication that Employee took pertained to opioids. (See Joint Exhibit 1, 2, and 3.)

Testimony of Kamlesh Patel (Transcript pgs.30-51):

Kamlesh Patel works for LabCorp, the second largest clinical testing laboratory in America certified according to federal standards. Patel confirmed that his title is Responsible Person, as he is the one who oversees the entire process and is ultimately responsible for maintaining the integrity of the test results.

He explained the gas chromatography/mass spectrometry (GC/mass spec.) method of drug testing and also described how LabCorp ensures that the chain of custody for drug results is kept intact. The integrity of the drug test is insured by having the collector check the identity of the person being tested, personally verifying that the tested person is the one giving the test sample, checking that the seals are applied and remained intact throughout the process, and that all the data printed on the test label is accurate. These data include the name of the person tested, his or her demographic information, temperature of the test sample, date and time of collection, name and signature of the collector, etc. Once the testing laboratory receives the urine sample, everything is verified again before opening the sample for testing by enzyme immunoassay. Throughout the process, a unique identification is given and maintained for the sample.

Patel testified that if the result is negative, then the sample is removed from further consideration. However, if the result is positive for a banned substance, then the result must be confirmed by an alternate methodology using GC/mass spec.

Patel testified that marijuana and opiates are chemically different, distinct classes of drugs. Thus, a positive result for marijuana has nothing to do with whether the person took any type of opiate. Thus, a person taking Percocet could not result in a positive test for marijuana. When asked whether Employee tested positive for any type of opiates associated with a prescribed medication, Patel replied that any such positive result had tested below the required cutoff of 2,000 nanograms for codeine and morphine, and was thus discounted.

Testimony of Therman Cherry (Transcript pgs. 52-69):

Therman Cherry works as LabCorp's collector of specimens for drug screening. He described the process of collecting a urine sample for drug testing as follows: have the person being tested sign in a register; verify their identity and Xerox their driver's license and medical card; make sure their pockets are empty; have them choose their cup; direct them to a specified bathroom where the toilet tank top has been taped and its water has been dyed blue to detect any attempted adulteration; collect the cup from the person tested after they have filled it with their urine, have the person tested sign the specimen sheet. Cherry also clarified that the collected urine specimen is then poured into two separate vials, one for testing and the second for reserve. The person who gave the urine sample gets to see him seal the vials after receipt. The donor then initials both vials after the control and signs the control and custody form (Agency Exhibit 2) after the custody number is verified. Everything then goes into a bag that is sealed in front of the donor. The donor then gets a copy of the signed form. Cherry then keeps custody of the sealed bag until it is shipped to the laboratory by FedEx.

Cherry stated that in case the donated sample is not within the range of expected temperature within four minutes of donation, he asks the donor to give another sample under direct observation. He recalled taking the urine sample from Employee because this was a post-accident

case. He also clarified that if the sample was collected too late to be shipped by FedEx, he then takes the sample home to be stored under lock and key until the next day.

Cherry testified that he specifically remembers collecting Employee's urine sample because it arose out of a vehicular accident. Post-accident work would arise at any time of the day or night. He has collected thousands of urine samples for drug testing since 2008 and thus he could not recall the exact date and time he obtained Employee's sample without looking at the paperwork. However, apart from it being a post-accident work, there was nothing unusual that occurred when he collected Employee's sample according to his usual protocol.

Testimony of Employee (Transcript pgs. 71-108):

Employee was a motor vehicle driver for Agency. On July 11, 2008, as he was backing up a 26 ton truck into an alley with his tech directing him, a little pickup truck blew its horn behind him. Its driver accused him of backing up into his truck. Both Employee and his tech denied the charge, and both Employee's supervisor and the police were called. Employee claimed his supervisor looked at the scene and backed up his version, saying that based on respective heights of Employee's truck and that of the accuser's, the little scar damage could not have been from Employee's truck.

Employee also stated that the police appeared to be very chummy with the accuser, even hugging the accuser and mentioning three people they both know. Then the police gave Employee a citation for unsafe backing. Employee's supervisor then instructed Employee to return his truck to the yard; after which the supervisor brought him to the testing center for a drug test.

Employee claimed that no one gave him any forms to read; that the urine cup he was handed was unsealed; that there was no blue water in the toilet; and that there was no tape on the toilet. Although he later admitted signing some forms before he was able to give a urine sample, Employee claimed that the tester did not pour the contents into two bottles or seal the bottles in front of him after he signed the bottle labels.

Later Dr. Moorfield called him to inform him that he tested positive for marijuana. Employee was surprised at the result because he never used marijuana but was taking pain medication such as Percocet and Acetaminophen with Codeine (see Employee Exhibit 2 for prescriptions and receipts) for leg ulcers. The prescriptions were dated between May 22, 2008, and September 7, 2008. (See also Employee Exhibits 3, 4, and 5.) Employee informed Dr. Moorfield regarding his pain medications, to which Moorfield replied that he could have a retest for \$250. Employee claimed that he never got a drug retest. (p. 99.)

Employee testified that prior to this, he had never tested positive for drugs. Currently, he works as a truck driver for American University where he regularly passes his drug tests. Employee emphatically denied ever using marijuana.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Whether Agency's adverse action was taken for cause.

Agency's witnesses all testified credibly and in a forthright manner. Therman Cherry testified as to how he collected Employee's urine sample in accordance with the established drug testing protocol and how he safeguarded its integrity. Kamlesh Patel credibly testified that he received Employee's urine sample and ascertained that the integrity of its chain of custody remained intact by double-checking the accompanying documentation, seals on the vials, and the signatures on the delivered samples. He also clarified that the prescribed medication that Employee was taking at the time of testing would have tested positive only for opioids, not marijuana, as they have different chemical components. Medical Review Officer Dr. Charles Moorfield testified credibly that he reviewed Employee's drug test results for accuracy and stressed that Employee's positive test result for marijuana could not possibly result from Employee's prescribed medications.

Employee presents a dramatically different story in his testimony. He begins by denying that he was ever involved in a work-related vehicular accident, contending that the other driver falsely accused him of causing an accident. He contended that the responding police officer was evidently chummy with the other driver and indicated that was the reason he was issued a citation. Employee also asserts that his tech assistant would corroborate his contention; however, he never presented his assistant as a witness. In addition, Employee does not explain why the other driver would fabricate a tale of a vehicular accident.

Employee then goes on to attack the integrity of the drug test. Employee asserts that he was not given any forms to read, but then later admits signing them. He also claims that there were no seals on his drug vials and that the tester, Mr. Cherry, did not take measures to protect the integrity of the drug test.

Employee could not explain how his drug sample would test twice for marijuana. He admits that his medication would not have led to a positive test for marijuana, so he contends that the urine sample was not his. However, apart from his bald assertion that the drug test procedure in his case was not followed, he offers no independent proof. Neither does he present any motive or reason why the witnesses who testified regarding the drug test would commit perjury in this instance. In short, Employee indicates that all the witnesses who testified, including those who did not, such as the police officer who responded to the scene and the other driver involved in the accident, fabricated their stories, presumably in a conspiracy against him.

OEA Rule 628.1 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 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." See 59 DCR 2129 (March 16, 2012). I find Agency's witnesses to be much more credible than Employee. Indeed, I do not find Employee to be credible at all with regards to the drug test. I therefore find that Agency has met its burden of proof by a preponderance of the evidence that Employee did indeed test positive for marijuana. I also find that Agency met its burden of proving the chain of custody of Employee's drug sample.

A positive test for a controlled substance is cause for adverse action under the District Personnel Manual (DPM) 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.

If so, whether the penalty was appropriate under the circumstances.

Employee contends that Agency's penalty should be overturned and that he should be returned to work because it was excessive and unfair. Employee contends that the penalty should be reduced to something less than a termination. 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 and not according to Agency's drug testing procedures.

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); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994). 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."¹ 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."²

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.

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

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

For the foregoing reasons, I conclude that 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.

ORDER

It is hereby ORDERED that Agency's action removing Employee is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge