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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
JEROME BARNES,)	
Employee)	OEA Matter No. 1601-0066-17
)	
v.)	
)	
D.C. DEPARTMENT OF)	Date of Issuance: July 6, 2018
TRANSPORTATION,)	
Agency)	Michelle R. Harris, Esq.
)	Administrative Judge
)	

Gina Walton, Employee Representative
Cheri Hance-Staples, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 3, 2017, Jerome Barnes (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Transportation’s (“Agency” or “DDOT”) decision to terminate him from his position as a Traffic Control Officer, effective June 10, 2017. Agency filed its Answer to Employee’s Petition for Appeal on August 7, 2017. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on November 3, 2017.

On November 7, 2017, I issued an Order convening a Prehearing Conference in this matter for December 13, 2017. Both parties appeared for the scheduled Prehearing Conference in this matter. During the Prehearing Conference, I determined that an Evidentiary Hearing was warranted. As a result, I issued an Order Convening an Evidentiary Hearing in this matter for January 30, 2018. The Evidentiary Hearing was held on January 30, 2018, where both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on February 14, 2018, requiring both parties to submit their written closing arguments on or before March 19, 2018. On March 7, 2018, Agency filed a Joint Request to extend the time to submit closing arguments. On March 12, 2018, I issued an Order granting this request and required closing arguments be submitted by April 16, 2018.¹ Both parties submitted their written closing arguments by the prescribed deadline. The record is now closed.

¹ April 16, 2018, was a District of Columbia holiday. As a result, parties were allowed to submit the brief on April 17, 2018.

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 the appropriate penalty 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 January 30, 2018, 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

Jason Godfrey (“Godfrey”) Tr. Pages 16-37

Jason Godfrey worked as a Supervisory Control Officer with Agency. Godfrey testified that he was not Employee’s direct supervisor, but was in control of notifying Employee that he had been selected for random drug testing on the date of the test. Godfrey indicated that initially, Employee did not want to sign the notification regarding the random drug test, and that he wanted to talk to his union representative first. Godfrey testified that he told Employee that a refusal to sign was like testing positive. Godfrey indicated that he spoke with another supervisory management analyst who told Employee to have his union representative meet him down town, and at that point, Employee signed the notification. Godfrey testified that earlier in the morning he saw Employee and others playing basketball in the gym where they were gathered for mandatory classroom training for that

day. Godfrey testified that on the way to the location² for testing, that Employee began gagging and spitting up in the vehicle. Godfrey indicated that he asked Employee if he was ok and if he needed to go to the hospital, and that Employee said he did not. Once they arrived at the testing site, Godfrey noted that Employee was laid across the back seat of the car. Godfrey says they eventually made it upstairs and Employee sat down with his paperwork and was provided a trash can in the event that he threw up again. Godfrey indicated that Employee said he was ok, and was just trying to collect himself.

Godfrey testified that he observed the collector give Employee water and ginger ale after he was not able to provide urine for the test. Godfrey could not recall how much fluid Employee was given. Godfrey testified that Employee was not providing enough urine for the testing, and that eventually it was suggested that Employee go to the Police Fire Clinic for evaluation and that Godfrey accompanied Employee to the clinic. Godfrey indicated that while at the clinic, the doctor shared with them that nothing seemed wrong with Employee and that she asked him to give urine and gave him some water but that he threw it up. Godfrey indicated that Employee's mother came to the Police Fire Clinic and asked why they didn't take her son to the hospital. Godfrey indicated that Employee left the clinic with his mother. Godfrey testified that he told Employee that if he did not produce urine, it would be like a positive drug test. Godfrey also indicated that the statements he made in his declaration on March 8, 2017, were still true at the time of the hearing.

During cross-examination, Godfrey testified that he was one of Employee's supervisors, but not his director supervisor. He said that Employee was actually on a different supervisor's shift, but that all supervisors will supervise employees if another supervisor is not there. Godfrey indicated that Employee never indicated that he needed an ambulance.

Dr. Olusola Malomo ("Dr. Malomo") Tr. Pages 41-71

Dr. Malomo is the medical director of the Police and Fire Clinic in DC. Dr. Malomo is a practicing physician, and has worked with the DC Police and Fire Clinic, which is an occupational medicine clinic, for 10 years, first as a staff physician and now as the medical director. Dr. Malomo also testified that she is a medical review officer (MRO) and is trained to review workplace drug results. Dr. Malomo testified that in March of 2017, Mr. Zimmerman in DCHR requested that she evaluate and examine Employee following his failure to provide sufficient urine for random drug testing. Dr. Malomo explained that she took a medical history and completed a physical exam on Employee. She indicated that Employee was also given the opportunity to provide another urine sample. Dr. Malomo said that she provided Employee with water during this examination, but Employee appeared to be retching, but that there were no gastric contents that were expelled. Dr. Malomo indicated that Employee told her that he was dehydrated. Dr. Malomo indicated that based on her exam of Employee, all his vitals were normal and that there was no medical reason why he was unable to produce the requisite 45 milliliters of urine for drug testing. Dr. Malomo explained that if someone was experiencing severe dehydration there would be other signs that would have been observed.

² The witness referred to the location as "441" which was the address for District of Columbia Human Resources (DCHR) at the time.

On cross-examination, Dr. Malomo testified that outside of her physical exam and taking Employee's medical history, she also observed him walking into the exam room. She also indicated that she checked his skin and felt his skin turgor. She indicated that if Employee was dehydrated his skin could lose its elasticity. Dr. Malomo referred to her notes from the exam and indicated that she also checked his pulse, gait and overall condition. She ultimately concluded that there was no medical reason for his inability to produce urine for drug testing. Dr. Malomo reiterated that she was contacted by Justin Zimmerman, who was the Designated Employee Representative (DER), to evaluate Employee following his inability to produce urine for drug tests. Dr. Malomo testified that in her years of practice she had not witnessed a person who was unable to provide the 45 milliliters of urine. Dr. Malomo said the clinic does roughly 3,000 to 4,000 tests per year.

On re-direct examination, Dr. Malomo explained that with dehydration, it typically has to be severe to preclude a person from being able to produce urine. She indicated that to her knowledge only one person has been unable to do so at the clinic, and that person had an underlying kidney disease. Dr. Malomo also was asked about the subsequent medical report from Employee's visit to his own doctors. Specifically, Dr. Malomo indicated that the report showed normal vitals, but that the sodium was slightly elevated, but that his overall report was essentially normal, and that he was prescribed an anti-nausea medication called Zofran. Dr. Malomo reiterated that only in the case of severe dehydration would it affect kidneys in a way that could affect the ability to provide a sufficient urine sample.

Ann Green Cherry ("Cherry") Tr. Pages 72-95.

Cherry is a collector with Cherry Mobile Collections and has been with that organization for approximately twelve (12) years. She does collections with random, reasonable suspicions, post-accident and breath alcohol tests. Cherry indicated that all collectors working for DCHR must receive training every year and that she was last trained and certified in June of 2017. Cherry recalled meeting Employee during a collection at the DCHR laboratory location at 441 4th Street, NW.

Cherry was then asked to explain the chain of custody form she completed during the collection in March of 2017. Cherry indicated that she noted that Employee had a shy bladder at 12:38p.m. on the day of testing and that he produced 15 milliliters of urine, which was not the full amount needed for the testing. She also noted that he had water, which indicated that he had some water to drink. Cherry then testified that she offered Employee some ginger ale from her lunch; because he indicated that something was going on with his stomach. Cherry could not remember how much she gave to Employee or how much he drank. Cherry testified that he had a second try which resulted in "no void" at 3:38p.m. Cherry indicated that Employee had some water around 12:55 p.m. Cherry said that once a person comes in and is not able to produce urine, the time clock starts, and a person has three hours and 40 ounces of liquid in order to try and produce a sufficient sample. Cherry explained that Employee was vomiting when he first arrived and that ultimately she noted that he was referred to a physician. Cherry testified that in her experience, a person does not have to drink water when offered in a shy bladder situation.

On cross examination, Cherry explained that she was not sure how much water Employee had during the course of this testing and the shy bladder process. Cherry explained she did not indicate ginger ale on the chain of custody form. Cherry also stated that her notes say Employee produced ten milliliters but she marked it later as no void. Cherry admitted that this was an error on her part, and that Employee did have some void of urine after her initial documentation of 15 milliliters provided by Employee.

Andre Easely (Easely) Tr. Pages 95 -145.

Easley works for DCHR as a Compliance Review Manager, and has been in that position since 2014. Easley testified that he was involved with the drug testing for Employee. Easley said he observed Employee dry heaving during the collection process, following a member of his staff alerting him about the situation with Employee. Easley indicated that he asked Employee if he needed any help or needed to go the hospital. Easley stated that Employee said he did not need any medical assistance. Easley testified that at the end of this process, he spoke with Ms. Cherry, the collector, and contacted the contractor to find out the next step with regard to the drug testing since Employee did not provide a sufficient sample.

Easley explained that the next step in situations like this is to have the employee see a physician. Easley testified that he told Employee that he would need to be seen by a doctor to be examined to check if there is any reason why he was unable to produce a urine sample. Easley indicated that physical examinations are typically done within five (5) days. Easley explained that he prefers to have them done within the next two (2) day or as quickly as possible. Easley testified that he did not tell Employee "exactly" that he had five days to be examined, but did tell him that a physical examination would have to be completed. Easley stated that during this process, Employee did not ask to be transported to the hospital. Easley testified that he offered to have an ambulance come, or have a supervisor take him to the emergency room, but that Employee replied that he was "okay."

Easley explained that during this process he, Justin Zimmerman, and an agency attorney-advisor walked through this entire process and that he explained all of that to Employee. Easley also indicated that Mr. Godfrey also informed Employee of what would happen. Easley testified that Employee ultimately consented to go to the Police and Fire Clinic. Additionally, Easley indicated that he told the supervisor about duties as Designated Employee Representative (DER). Easley explained that a DER is an individual that stays with the employee at all times during drug testing and ensures that appropriate testing procedures are carried out. Easley testified that there were maybe three or four DERS present on the day of this particular session. Easley explained that he stayed at the DCHR site, while Employee left with Mr. Godfrey to go to the Police and Fire Clinic.

Easley stated that he worked to ensure an incident report was done and also wanted an affidavit of all that occurred on the day of the drug test. Easley testified that they received a report from the MRO, Dr. Malomo, which indicated that there wasn't anything found during her examination that would have precluded Employee from producing a urine sample. Easley testified that ultimately upon review of all documents received and based on DDOT rules that Employee would be subject to termination for the drug test. Easley indicated that it was his belief that they must abide by the Department of Transportation rules with regard to refusals or failed drug tests.

On cross examination, Easley testified that on April 10, 2017, Employee was placed on administrative leave, but before that time, he was allowed to continue to work, even in his safety-sensitive position. Easley could not recall why that was the case and why Employee was not placed on administrative leave earlier in this process. Easley indicated that this was a unique situation and the first time it happened, so his team wanted to ensure that the correct paperwork was completed. Easley explained that DDOT rules indicate that positive drug test results in removal, however each case is reviewed on a case by case basis and is not an automated process. Easley also indicated that they contacted their contractor, Joe Riley, to elicit advice on how to address this issue with Employee. Easley stated that DDOT rules were very strict versus non-DDOT employees. Easley also

indicated that Justin Zimmerman called the MRO with regard to Employee's examination. Easley also explained that in accordance with their rule "20 (b)" in their health chapter rules, an employee must see an agency doctor for an examination in circumstances like this. Easley also indicated that they will review other documents, specifically if the employee goes to their own doctor as well. Easley testified there are federal and District Personnel Manual (DPM) guidelines that must be followed in cases like this.

On re-direct, Easley iterated that the federal guidelines and DPM both indicated that an employee must use an agency physician for examinations in situations of shy bladder.

Justin Zimmerman (Zimmerman) Tr. Pages 146-169

Zimmerman is the associate director of Policy and Compliance at DCHR. His responsibilities included overseeing the drug testing program that is managed by Andre Easley. Zimmerman indicated that if there is a positive result, then Easley would also serve as the proposing official for any adverse action that had to be taken, and that he would be the deciding official. Zimmerman explained that in drug testing, a refusal is considered as a positive drug test. Zimmerman testified that he did not meet Employee in March 2017, but was involved by advising on the situation and also making a final decision following the hearing officer's conclusions. Zimmerman explained that on the day of the drug testing, he was contacted because of Employee's shy bladder situation. Zimmerman explained that they contacted their vendor to seek advice on how to handle the situation.

Zimmerman explained that he had previously worked with the Police and Firefighter relief board so he was able to contact Dr. Malomo at the Police and Fire Clinic to have Employee evaluated due to his inability to produce a sufficient urine sample for drug testing. Zimmerman indicated that he recalled speaking to Dr. Malomo over the phone to tell her that they needed an assessment for Employee. Zimmerman testified that after all this had occurred, the Employee Relations team prepared a package for his review, which includes all the documentation for the matter for Employee. Zimmerman explained that after his review of that entire package, he ultimately decided to separate Employee from service.

On cross-examination, Zimmerman testified that this was not the first incidence of shy bladder; but that he believed it was the first instance that an employee was still unable to produce a sufficient urine sample after the three hour time frame. Zimmerman also testified that he did not know if Employee was placed on administrative leave between March 14th and April 10th of 2017. Zimmerman also indicated that he was able to schedule an appointment for Employee to be examined by Dr. Malomo. Zimmerman testified that he was unaware of what a Designated Employee Representative was, indicating that he had heard of the phrase "DER" but did not know what it was.

On re-direct, Zimmerman explained that he did not see any conflicts in Employee's physician report at Kaiser and Dr. Malomo's report with regard to Employee's ability to provide a sufficient sample. Zimmerman testified that he would have been able to identify a conflict if there had been one.

Employee's Case-in-Chief

Jerome Barnes ("Employee") Tr. Pages 176-211

Employee was a traffic control security officer for approximately two and a half years. Employee was aware that his position was subject to drug testing. Employee testified that on March 8, 2017, he was at work for mandatory training. Employee stated he was at work outside of his usual tour of duty which was from 1p.m. until 11:30p.m. Employee indicated that he wasn't feeling well, but felt that since the training was mandatory, there was not a point in advising someone about it. Employee indicated that they were in a large gymnasium and that around 11:30a.m.; Mr. Godfrey came with papers saying that they were having drug and alcohol testing. Employee testified that he was taking medicine for his feet at the time, and said he needed to call his union representative to ask about that. Employee said that Mr. Godfrey told him that if he didn't sign the papers that it would be considered a refusal.

Employee testified that he signed the papers and went over to the testing site. Employee explained that on the way to the testing site, he began to vomit. Employee stated that once they arrived at the testing site he was still feeling unwell and was still vomiting. Employee indicated that he was called and that he "gave them what he could," but was told by the testing official that it was not enough. Employee testified that he sat there from approximately noon until 5pm so that he could try to provide enough urine for a drug test sample. Employee stated that he was vomiting; shaking the whole time and all they cared about was the sample for the urinalysis. Employee testified that sometime around 5:00p.m. or 5:30p.m. he was told that they were going to take him to the PFC clinic for a doctor to evaluate him.

Employee testified that upon arrival at the clinic, he met with the nurse's assistant who checked his vitals and asked him some questions. Employee indicated that he told the nurse's assistant that he had been vomiting. Employee said that he was provided a cup and a bucket and was told to go urinate or sit still if he could not urinate. Employee said that he sat there for about an hour, until around 6:30p.m., when he was notified that his mother was outside. Employee stated that he did see the doctor, but that she only asked a few questions and told him that he would need to do a urinalysis. Employee testified that the doctor checked his chest and arm. Employee also indicated that he was present at work for training and that it was mandatory, which is why he did not call out sick. Employee stated that he never refused the testing because he knew the repercussions of doing so.

Employee also testified that while he was at the testing center, he was provided a cup of water. He indicated that it was a red solo cup, which he recalled as being filled halfway. Employee also indicated that he had ginger ale that was in the same cup which was filled less than the halfway. Employee indicated that on the next day following this incident that he went to his own doctor at Kaiser Healthcare. He explained to them his symptoms and they put him on bed rest for three hours while he was there. Employee indicated that he returned to work on March 11, 2017, and that his supervisor asked for his doctor's note, which he provided him with. Employee testified that he was working on March 17, 2017, when he was struck by a car and was subsequently placed on worker's compensation. Employee also stated that on June 1, 2017, he returned to work on a light duty schedule. Employee indicated that a week later he was removed from the light duty position and was told he was on administrative leave.

On cross-examination, Employee testified that he knew that his position was subject to drug testing. Employee also stated that he didn't know that he could still call out sick, even if there was a mandatory training. Employee testified that he was playing basketball the morning of the test. Employee asserted that he wasn't running, but only shot the ball a couple of times. Employee reiterated that the reason he wanted to contact his union representative was because this was the first time he had been subject to random drug testing, and he was on medication at the time. Employee did not disclose to anyone other than his union representative that he was on other medication at the time of testing.

Employee testified that he did tell Mr. Easley that he needed medical attention around 3:30p.m. or 4:30p.m. on the date of testing. Employee maintained that during his visit to the clinic, Dr. Malomo did not examine him. Employee could not remember whether he was able to finish the first red cup of water provided to him at the testing site. Employee stated that he did finish the ginger ale that was provided by the collector, Ms. Cherry.

On re-direct, Employee testified that when he went to be examined by his own doctor that he was given IV fluids and was prescribed medicine.

Employee's Position

Employee argues that he was not afforded the appropriate procedures for shy bladder when he was unable to provide a sufficient urine sample for drug testing. Employee asserts that he was feeling unwell and was vomiting before, during and following the testing. Further, Employee argues that he was not given an opportunity to get an evaluation from his own physician. Employee argues that Agency failed to utilize the appropriate procedures for shy bladder, and also showed no interest in his well-being over the course of the testing day.

Agency's Position

Agency avers that it followed all appropriate procedures with regard to administration of the random drug test that Employee was subject to. Agency asserts that on March 8, 2017, Employee was selected for random drug testing pursuant to the requirements of his safety-sensitive position. Agency argues that it followed DOT Federal guidelines in accordance with 49 CFR §40.191 (a) (5) in addressing Employee's inability to produce a sufficient sample. Further, Agency avers that pursuant to the code, the inability to produce a sample for testing, without having any medical reason for not doing so, is the same as testing positive. As a result, Employee was terminated. Agency asserts that its administration of drug testing and the shy bladder protocols were followed appropriately, and as a result, Employee's termination should be upheld.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Traffic Control Officer. In a Notice of Separation dated June 7, 2017, Employee received a final notice of Agency's decision to terminate him from his position, citing that on March 8, 2017, Employee refused "to submit to a required drug or alcohol screening. (**Refusal to follow testing requirements**, 6B DCMR §428.1 (b), and D.C. Code § 1-620.35(a), 49 CFR §40.191 (a) (5))."³ The effective date of the termination was June 10, 2017.

³ Employee's Petition for Appeal at Final Notice (July 3, 2017).

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. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee's termination was levied pursuant to 6B DCMR §428.1 (b), D.C. Code § 1-620.35(a), and 49 CFR §40.191 (a) (5).

In the instant matter, on March 8, 2017, Employee was at work for a mandatory training. During that time, he was selected for random drug testing. At the time of the test collection, Employee was unable to provide a sufficient sample. Employee cited that Agency failed to follow the shy bladder procedures as outlined in 49 CFR Part 40 § 40.193 (b) (4-5)⁴. The "shy bladder" process is utilized in a situation where an employee does not provide a "sufficient amount of urine (45mL) for a DOT-required drug test. Here, Employee arrived at the site for drug testing and submitted an initial urine sample at 12:38p.m., however the amount was insufficient. As a result, the collector noted a shy bladder. The code requires that in instances of shy bladder, that an employee should be "urged to drink up to 40 ounces of fluids, distributed reasonably through a period of up to three hours or until the individual has been able to provide a sufficient urine specimen, whichever occurs first." If an employee is unable to produce a sufficient specimen at the end of three hours, the collector must notify the Designated Employee Representative ("DER") immediately.⁵

During the course of Employee's time at the site, he was provided with fluids, including water and ginger ale. The collector, Ms. Cherry, indicated in her testimony during the Evidentiary Hearing that on the day of testing that the site had what she believed were 16-ounce cups.⁶ Employee noted that when he had water, and was given ginger ale, that the neither cup was full. The collection was documented on the lab form and the "Shy Bladder Log" utilized by the collector at the time of

⁴ Because Agency is the Department of Transportation, they are governed by the Federal Guidelines for DOT Employees.

⁵ See. 49 CFR Part 40 § 40.193 (b) (4-5) provides in relevant part: "If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. (5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day."

⁶ Evidentiary Hearing Transcript at Page 85 (January 30, 2018).

the drug test.⁷ Employee was ill before the collection and was vomiting, and also vomited while at the test site. The collector noted that Employee was ill and vomiting in her log. Another attempt for a sample was done at 3:38pm, and this sample was also insufficient. As a result, Employee's test was discontinued and the collector notified the Agency representative, Mr. Andre Easely. Mr. Easely was not the DER for the site, however he contacted, Mr. Justin Zimmerman, who was noted as the DER. Additionally, Andre Easley testified during the Evidentiary Hearing that he advised Employee that he would need a physical evaluation by a doctor.

Later, Agency transported Employee to the Police and Fire Clinic for evaluation by Dr. Olusola Malomo, the Medical Review Officer. She testified that she did an exam and took Employee's vitals, and ultimately concluded that there was no medical reason that Employee was unable to provide a sufficient sample for the drug test. Employee left the testing site with a relative and later went to see a doctor at Kaiser Healthcare. That doctor provided Employee with fluids and medication for nausea and vomiting. Employee was provided an excuse by that doctor to be out of work on March 9, 2017, and March 10, 2017. However, there was no notice or indication of a medical reason why Employee was unable to produce a sufficient urine sample for the drug testing held on March 8, 2017.

Ultimately, Employee was unable to provide a sufficient urine specimen during drug testing. The evaluation by the MRO indicated that there was no medical reason why Employee was unable to do so.⁸ Further, there is no indication or notice from Employee's doctor visit that he had a medical reason that would cause him to be unable to submit a sufficient sample. Additionally, the collector followed the shy bladder protocols and Employee was provided a three (3) hour time period in which to produce a sufficient sample for the test. Further, the DOT Code provision in 49 CFR Part 40 § 40.193 (e), specifically notes that a medical condition that may preclude a person from being unable to submit a sufficient sample includes "an ascertainable physiological condition, such as a urinary system dysfunction or a medically-documented pre-existing psychological disorder, but does not include unsupported assertions of "situation anxiety" or "dehydration (*emphasis added*)."⁹ Neither of Employee's medical reports indicated a condition that would have precluded Employee from providing a sufficient sample pursuant to the code provision. Consequently, because an inability to produce a sufficient sample without medical reason is considered the same as a refusal, Employee was subject to termination. Upon consideration of the aforementioned findings, I find that Agency followed the "shy bladder" procedures as required by 49 CFR Part 40 § 40.193, and has adequately proven that there was proper cause for adverse action against Employee.

Whether the Penalty was Appropriate

Based on the aforementioned 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. Agency is bound by the federal DOT guidelines. Accordingly, 49 CFR §40.191(a)(5) provides if an employee fails "to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure" that it is the same as a refusal. As a result, Employee was subject to removal pursuant to D.C. Code §1-620.35 (a) and 6B DCMR §428.1(b), which deems an employee unsuitable for continued employment for refusal to submit to a drug test. The penalty for a first offense is termination. Accordingly, I find that Agency properly exercised its discretion, and its chosen

⁷ See. Agency Exhibit 3 and Exhibit 4 (Evidentiary Hearing January 30, 2018).

⁸ Agency's Answer at Tab 6 – Report of Medical Evaluation (August 7, 2017).

penalty of termination is reasonable under the circumstances, and not a clear error of judgment. As a result, I conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge