Notice: This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RICKEY ROBINSON,	)	
Employee	)	OEA Matter No. 1601-0045-17
	)	
v.	)	
	)	
D.C. DEPARTMENT OF	)	Date of Issuance: September 24, 2018
FORENSIC SCIENCES,	)	
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
	)	

Raymond C. Fay, Esq., Employee Representative
Nada Paisant, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 8, 2017, Rickey Robinson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Forensic Sciences' ("Agency" or "DFS") decision to terminate him from his position as a A/C Equipment Mechanic/ Lab Support Repairer[1], effective April 8, 2017. Agency filed its Answer and Motion to Dismiss Employee's Petition for Appeal on July 22, 2017. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on August 21, 2017.

On August 23, 2017, I issued an Order convening a Prehearing Conference in this matter for September 26, 2017. Both parties appeared for the scheduled Prehearing Conference in this matter.[2] Following the Prehearing Conference, I issued an Order on September 27, 2017, requiring both parties to submit written briefs based on issues discussed during the conference. Agency's brief was due on or before October 31, 2017, and Employee's Brief was due on or before November 30, 2017. On October 26, 2017, Agency filed a Consent Motion to Extend the Briefing Schedule. On October 27, 2017, I issued an Order grating the motion. Agency's brief was now due on or before November

[1] Employee cited in his Petition for Appeal that his position was a "lab support repairer," however all of his SF-50s reflect A/C Equipment Mechanic.
[2] Employee did not appear for any of the scheduled Prehearing Conferences, but was represented by his attorney at all proceedings.

15, 2017, and Employee's brief was due on or before December 15, 2017. On November 3, 2017, Agency filed another Consent Motion to Extend the Briefing Schedule, I granted this motion on November 6, 2017, and required that Agency's Brief be filed on or before December 8, 2017, and Employee's brief was due on or before January 8, 2018. Both parties submitted their briefs within this deadline. Following a review of the briefs submitted; I issued an Order on February 1, 2018, scheduling a Status/Prehearing Conference for February 20, 2018. On February 15, 2018, Employee, by and through his counsel, submitted a Consent Motion to Continue the Status/Prehearing Conference. On February 16, 2018, I issued an Order granting Employee's Motion and rescheduling the Status/Prehearing Conference for March 14, 2018. Both parties appeared at the Status/Prehearing Conference. During that conference, the undersigned determined that both parties should submit supplemental briefs with regard to issues that were discussed during the conference. As a result, I issued an Order requiring Agency to submit its supplemental brief on or before April 6, 2018, and Employee to submit his brief on or before April 27, 2018. On April 26, 2018, Employee filed a Consent Motion for an extension of time to file his brief until May 4, 2018. On May 1, 2018, I issued an Order granting this request. All briefs have been submitted pursuant to the prescribed deadline. I have determined that an Evidentiary Hearing in this matter is not warranted. 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 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.

Agency's Position

Agency avers that it followed all appropriate procedures with regard to administration of the instant adverse action. Agency cites that Employee has been with Agency since 2008, first hired at

the Department of Health ("DOH") as an A/C Equipment Mechanic.[3] In October 2012, Employee was reassigned from DOH to Agency in the same position as an A/C Equipment Mechanic. Agency further notes that on July 21, 2016, Employee was formally notified that his position was safety-sensitive pursuant to the District's new Suitability regulations.[4] Agency asserts that on January 27, 2017, Kimary Harmon ("Harmon"), a direct supervisor of Employee, "observed Employee's behavior as being potentially under the influence of an intoxicant."[5] Agency cites that the manager noted that Employee was slurring his speech and had difficulty communicating. Agency notes that Harmon engaged another manager, Carla Butler, who agreed with Harmon's assessment of Employee. Employee was told to remain at his desk, but left and later informed the management that he was ill. Agency asserts that on February 3, 2017, following several attempts to follow up with Employee with regard to the January 27, 2017 incident, Employee had a meeting with Dr. Anthony Tran ("Dr. Tran"), Public Health Laboratory Director, and Dr. Jenifer Smith ("Dr. Smith"), Director.[6] During this meeting, Agency asserts that Employee told Drs. Tran and Smith that the incident on January 27, 2017, was due to his "prescribed medications interacting together and that he was suffering from the loss of someone close to him." Agency asserts that both directors told Employee to seek the assistance of INOVA's Employee Assistance Program ("EAP") and to call out sick if he was unable to function at work.[7] Agency argues that Employee never indicated that he had substance abuse problems with prescription or illicit drugs.[8]

On March 1, 2017, Employee was observed again by Harmon who noted that he seemed to potentially be under the influence of an intoxicant. Agency states that Harmon indicated that Employee's eyes were "half-opened" and his speech was slurred. Harmon again enlisted Carla Butler who agreed that Employee appeared to be under the influence. Agency cites that when Employee was notified that he was going to be subject to drug and alcohol testing, he became upset and demanded to speak with his union. Employee spoke with Mr. Carroll Ward, President of the American Federation of Government Employees (AFGE) Local 2978. Following this conversation, Agency indicated that Employee submitted to the drug test administered by District of Columbia Human Resources ("DCHR"). Agency asserts that on March 6, 2017, the drug screening revealed Employee tested positive for heroin.[9]

Following this result, in a letter dated March 6, 2017, DCHR proposed to separate Employee from his safety-sensitive position for testing positive for a controlled substance. Agency avers that on April 6, 2017, a hearing officer determined that Agency had met its burden of proof. Agency notes that on the same day, Jonjelyn Gamble, Steward for AFGE Local 2978 submitted a response to DCHR's proposal to terminate Employee.[10] On April 7, 2017, DCHR sent Employee a formal notice of Separation indicating that he would be terminated effective, April 8, 2017.

Agency argues that it had cause to terminate Employee and followed all applicable regulations and procedures. Agency argues that Employee's enrollment in EAP has no bearing on his positive drug test and that he was terminated appropriately given his safety-sensitive designation. Further, Agency asserts that Employee did not provide notice of his substance abuse problem, but

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[3] Agency's Brief at Page 2 (December 8, 2017).
[4] *Id.*
[5] Agency's Brief at Page 4 (December 8, 2017).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at Page 5.
[10] *Id.*

even if he did, it is irrelevant given the circumstances. Agency avers that Employee was classified in a safety sensitive position as of July 2016, and pursuant to that agreement, had 30 days from the time in which that appointment was made to give notice of any substance abuse problem. Agency argues that Employee did not give notice during that 30-day window, and that he was made aware that his position was subject to random and reasonable suspicion drug testing. Additionally, Agency argues that Employee's disclosure to Drs. Tran and Smith on February 3, 2017, did not constitute any notice with regard to substance abuse issues.

Agency asserts that the Chapter 4 Suitability regulations subject Employee to reasonable suspicion drug testing, and subsequent separation if found to be under the influence of a controlled substance. As a result, Agency argues 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 argues that his termination from his position as a "laboratory support repairer" was illegal.[11] Employee cites that during his tenure with Agency, he suffered from chronic back pain from on the job injuries. Employee asserts that he was on prescription medicine for the pain, including morphine.[12] In late 2016, Employee suffered the loss of a very close friend and began to use "non-prescribed opiate drugs in similar chemical structure to the morphine to tolerate the back pain."[13] Employee avers that in early 2017, he met with Drs. Tran and Smith to notify the Agency of his personal issues, including drug issues. Employee indicates that he did so to be in compliance with his interpretation of the Drug free Workplace Policy. Employee cites that Drs. Tran and Smith advised him to enroll in EAP and to use administrative leave to participate in the program. Employee avers that on February 28, 2017, he notified his direct supervisor, Kimary Harmon, that he needed to use administrative leave to attend EAP, but did not disclose the reasons for his enrollment in EAP. Employee argues that the next day he was subject to a "pretextual drug screening based on Ms. Harmon's claim that she had reasonable suspicion for administering the test."[14]

Employee avers that his subsequent termination was done improperly because the Agency misapplied and misinterpreted its drug policy. Employee asserts that he complied with the Drug Free Workplace Policy (Mayor's Order 90-27, January 31, 1990), but Agency failed to do so. Further, Employee avers that he notified Agency of his drug problem and that his enrollment in the EAP precluded him from being terminated for a positive drug test. Employee also argues that his position was not "safety-sensitive" at the time of his termination. Employee cites that his position does not fall into the description of safety sensitive positions pursuant to DPM § 409.2(a).[15] Employee also argues that Agency's application of DPM Chapter 4 – Suitability was erroneous in that, the suitability program requires that all "enhanced screening be performed in accordance with the collective bargaining agreement."[16] Employee avers that since he is a part of AFGE Local 2798, his CBA cites in Article 13 Section 4, that "no disciplinary action shall be taken against any employee solely for alcoholism, drug dependency or emotional disturbance unless the Employer has met its obligations under D.C. Code 1-621.7(3) (1981 ed.)."[17] Employee argues that pursuant to his CBA,

[11] Employee's Brief at Page 1 (January 10, 2018).
[12] *Id.*
[13] *Id.*
[14] *Id.* at Page 2.
[15] *Id.* at Page 5.
[16] Employee's Supplemental Brief at Page 2. (May 4, 2018).
[17] *Id.* at Page 3.

that when he accepted the director's referral to EAP on February 3, 2017, he should have been given a reasonable time to improve work performance.[18] Further, Employee avers that the reasonable suspicion policy was not appropriately followed because Kimary Harmon was not trained to make a reasonable suspicion assessment at the time she observed and later reported Employee. Employee also asserts that the behavior that was witnessed by Ms. Harmon was not unlike behavior she saw on other occasions during Employee's tenure with Agency.[19] Employee argues that on January 27, 2017, Ms. Harmon was not yet trained to make a reasonable suspicion assessment. Employee avers that Agency's safety sensitive policies are vague and its application of the Chapter 4 Suitability guidelines was improper. As a result, Employee argues that his termination was not appropriate and should be reversed.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as an A/C Equipment Mechanic[20] on October 1, 2012.[21] In a Notice of Separation dated April 6, 2017, Employee received a final notice of Agency's decision to terminate him from his position, citing that on "March 1, 2017, Employee submitted a urine sample. This sample tested positive for the presence of 6-monoacetylmorphine (heroin) and morphine. (**Positive drug test result,** 6B DCMR §§ 428.1 (a) and 1603.3(i))."[22] The effective date of the termination was April 8, 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).*

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[18] *Id.*
[19] *Id.* at Page 4.
[20] It should be noted that Employee set forth in his Petition for Appeal that he was terminated from his position as a Laboratory Support Repairer, even though that was not his job title. Employee cites that he was an "air condition technician who did maintenance and repair on cooling and heating systems." (*See* Employee's Petition for Appeal.) In its Answer to Employee's Petition, Agency cites that Employee's SF-50 documents him as an A/C Equipment Mechanic, and all of Employee's SF-50, including the one at the time of termination, reflects his position as A/C Equipment Mechanic. (*See* Agency's Brief at Exhibit 1). However, Agency cites in its Answer that PeopleSoft indicates both designations of Laboratory Support Repairer and A/C Equipment Mechanic for Employee.
[21] Agency's Answer to Employee's Petition for Appeal (July 2, 2017).
[22] Employee's Petition for Appeal at Final Notice (May 8, 2017).

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 and DPM 1603.3(i).

In the instant matter, on March 1, 2017, Employee was observed by his supervisor, Kimary Harmon ("Harmon"), who believed that he was potentially under the influence of an intoxicant.[23] Prior to this incident, Employee was previously observed by Harmon on January 27, 2017, to possibly be under the influence. Employee left work on sick leave before he was tested at that time. On February 3, 2017, Employee met with the directors at Agency. Employee informed the directors of a personal loss and issues with prescription medication. At that meeting, the directors indicated that Employee should seek EAP services and use sick leave when needed.

During the March 1, 2017 observation of Employee, Harmon notified another supervisor, Carla Butler ("Butler"), who agreed with Harmon's assessment. As a result, they informed Employee that he would be subject to a reasonable suspicion drug test. Initially, Employee refused and requested to speak to his union. Following a conversation with his union, Employee agreed to be tested. The test was administered by DCHR. On March 6, 2017, the test results indicated that Employee had tested positive for heroin. As a result, Employee was terminated pursuant to a final notice dated April 7, 2017. His termination was effective April 8, 2017. Agency avers that it followed all appropriate protocol. Agency cites that Employee was in a safety sensitive position and was subject to random and reasonable suspicion drug tests. Further, Agency asserts that it properly followed the suitability guidelines set forth in 6B DCMR §§428.1(a) and 431.1, in its administration of this disciplinary action. Agency asserts that Employee did not provide Agency notice of his substance abuse issues in the February 3, 2017 meeting with the directors, but avers that even if Employee had, that it would be irrelevant given the policies set forth in Chapter 4, and with regard to the safety sensitive classification of Employee's position.

Employee argues that Agency did not appropriately administer the instant adverse action, and that Agency improperly applied Chapter 4. Employee cites that he because he provided notice to Agency on February 3, 2017, that he should not have been tested on March 1, 2017, because he had enrolled in EAP. Employee avers that Agency failed to follow the requirements of the CBA in accordance with the application of the D.C. Code. Employee asserts that he should have been given the opportunity to improve work performance and that Agency failed to follow the Drug Free Workplace Policy (January 1990).

The undersigned disagrees with Employee. Employee was employed by agency as A/C Equipment, and as of July 21, 2016, was notified that this position was designated as safety sensitive. This designation was pursuant to the 6B DCMR §400 - Suitability policies and Employee signed the acknowledgement form on July 21, 2016. Employee's position of record on all of the SF-50s indicated that he was classified as an A/C Equipment Mechanic and this position was specifically designated as safety sensitive pursuant to the Chapter 4 Suitability instructions with regard to positions that are subject to enhanced suitability screening.[24] Employee's position of record required him to do repairs on equipment within the laboratory and other duties that if performed under the

[23] It should be noted that on January 27, 2017, Employee was observed, by the same supervisor, to be under the influence of an intoxicant. Employee was directed to stay at his desk in order to be tested for drugs and alcohol. Employee left work that day, indicating that he was sick, and as a result was not tested for drug or alcohol at that time.
[24] *See.* Employee's Supplemental Brief at Exhibit 1 (May 4, 2018). *See also.* Agency's Brief at Exhibit 2 (December 8, 2017).

influence, could cause physical harm to him and others. As a result, I find that Employee was duly notified that his position was safety-sensitive, and that he was made aware that this designation subjected him to reasonable suspicion drug screening if warranted.

In the instant adverse action, on March 1, 2017, Employee was observed by his direct supervisor trained in reasonable suspicion, Kimary Harmon, to be potentially under the influence. Harmon enlisted another supervisor, who was also trained in reasonable suspicion, Carla Butler, who agreed with Harmon that Employee was potentially under the influence. Pursuant to the reasonable suspicion guidelines set forth in Chapter 4 Suitability protocols, Employee was told that he would need to be tested. He initially refused and requested to speak to his union. Following the opportunity to confer with his union president, Employee submitted to the testing conducted by DCHR. On March 6, 2017, the test results came back positive for heroin. Because Employee occupied a safety-sensitive position, he was notified that he would be subject to termination. In the final notice dated April 6, 2017, Employee was notified that he would be separated from service effective April 8, 2017. Employee argues that Harmon was not trained in reasonable suspicion at the time she observed him; however Employee references a previous incident from January 27, 2017, wherein he avers that Harmon was not trained.[25] Employee does not indicate that Harmon was untrained on March 1, 2017. Based on the evidence in the record, I find that Harmon was trained in reasonable suspicion as of February 2017, and that Agency acted in accordance with those guidelines.[26] I also find that the incident on January 27, 2017, is irrelevant given that Employee was not subject to drug screening at that time.

Employee also avers that this drug test was pretextual in nature because he had enrolled in EAP after disclosing a substance abuse problem to Dr. Tran and Dr. Smith during a meeting on February 3, 2017. Both Drs. Tran and Smith indicate that Employee never disclosed a substance abuse problem; rather he relayed information with regard to the loss of a close friend and interactions with his prescription medication. The undersigned disagrees with Employee's assertion. 6B DCMR § 2050.8, provides that an employee's participation in an EAP *"shall not preclude the taking of a disciplinary action under Chapter 16 of these regulations, if applicable or any other appropriate administrative action, in situations where such action is deemed appropriate..."* Further, the undersigned finds the notice to be of no relevance in this matter given Employee's classification as safety-sensitive. Pursuant to the 6B DCMR §426.4, when Employee acknowledged his new designation as safety-sensitive on July 21, 2016, he had a 30-day time frame in which to disclose any substance abuse issues and not be subject to possible disciplinary action and be permitted to undergo treatment. Because this matter occurred on March 1, 2017, I find that Employee was outside of the time frame for this to be applicable. Further, Employee admits that he used "non-prescribed opiate drugs in order to cope with the back pain."[27] Employee also admits that he tested positive for illicit drugs, but felt like he should not have been tested.

Employee also avers that the "spirit" of the Drug Free Work Policy (1990) and the Collective Bargaining Agreement (CBA) through his union were violated by Agency. The undersigned disagrees. The provision of the CBA, Article 13, Section 4 provides that no "disciplinary actions

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[25] Employee's Supplemental Brief at Page 4 (May 4, 2018).
[26] *See.* Agency's Brief at Exhibit 3 - Deposition of Kimary Harmon (December 8, 2017). It should be noted that on page 55 of the deposition, Employee's counsel cites in his questioning that Harmon completed training in February 2017. Wherefore, the undersigned signs that Kimary Harmon was trained in reasonable suspicion as of the March 1, 2017. Further, I find that the January 27, 2017 observance referenced by Employee is irrelevant for the purposes of this matter, because Employee was never screened for drug use at that time.
[27] Employee's Brief at Declaration of Employee (January 10, 2018).

shall be taken against any employee solely for alcoholism, drug dependency or emotional disturbances unless the Employer has met its obligations under D.C. Code §1-621.7(3) (1981.ed). Here, I find that Agency acted accordingly with the protocols prescribed in 6B DCMR § 428.1 and §431 and implemented by the District government in 2015. As a result, because Employee was in a safety-sensitive position, he was subject to reasonable suspicion drug testing and possible separation if a test was positive. Wherefore, I find that Agency acted in accordance with the D.C. Code provisions and as a result did not violate the provisions of the CBA.

Additionally, I find that the Drug Free Workplace Policy encourages District employees to seek counseling and rehabilitation if they have an issue with drug use, but it does not say that an employee is precluded from being separated from service following a positive drug test.[28] Accordingly, I find that this policy does not apply in these circumstances, given Employee's safety-sensitive classification, and that he was subject to the guidelines promulgated in the Suitability guidelines set forth in 6B DCMR §§ 428.1 and 431. Further, 6B DCMR § 2050.8, provides that an employee's participation in an EAP *"shall not preclude the taking of a disciplinary action under Chapter 16 of these regulations, if applicable or any other appropriate administrative action, in situations where such action is deemed appropriate..."* Accordingly, I find that Agency followed the procedures set forth in 6B DCMR § 428.1 and §431, 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. 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).[29] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in the 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."[30] 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 exercised."[31]

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[28] Employee's Brief at Exhibit 1 Drug Free Workplace Policy 1990 (January 10, 2018).
[29] *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. 1601-0101-02, *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).
[30] *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).
[31] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

Here, Employee was subject to removal pursuant 6B DCMR §428.1(b), which deems an employee unsuitable for a having positive drug test. Further, DPM § 1603.3(i) provides in the Table of Penalties that the penalty for a first offense for illegal drug use ranges from a suspension of 15 days to removal. Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of removal 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 of terminating Employee from service is **UPHELD.**

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge