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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0235-11R16
ROBERT TATE,	)	
Employee	)	
	)	Date of Issuance: May 11, 2016
v.	)	
	)	
DISTRICT OF COLUMBIA DEPARTMENT	)	
OF PARKS RECREATION,	)	
Agency	)	
_____	)	Arien P. Cannon, Esq.
	)	Administrative Judge
Frederic W. Schwartz, Jr., Esq., Employee Representative		
Rahsaan J. Dickerson, Esq., Agency Representative		

**INITIAL DECISION ON REMAND**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

An Initial Decision was issued by the undersigned in this matter on April 7, 2014, upholding Agency's decision to remove Employee from his position as a Recreation Specialist. Employee filed a Petition for Review on May 1, 2014, with the Superior Court for the District of Columbia asserting that the Initial Decision was arbitrary, capricious, not supported by substantial evidence, in violation of statute and clearly erroneous as a matter of law.

On August 31, 2015, Judge Ramsey Johnson of the District of Columbia Superior Court issued an Order remanding this matter to the undersigned for further analysis as to whether Employee's position, at the time he was drug tested and regardless of job title, required that he have "direct contact with children or youth," be "entrusted with the direct care and custody of children or youth," and perform "duties in the normal course of employment [that] may affect the health, welfare, or safety of child or youth."

An order addressing outstanding discovery on remand was issued by the undersigned on October 8, 2015. Subsequently, a Status Conference was convened on November 17, 2015, to address the issues to be considered on remand from Superior Court. Upon completion of the discovery issues, the parties submitted cross-motions for summary disposition on March 18,

2016. Employee submitted a response to Agency's Motion for Summary Disposition on April 19, 2016. Based upon the filings, I determined that an evidentiary hearing was not warranted. The record is now closed.

### **JURISDICTION**

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

### **ISSUE**

1. Whether Employee's position, at the time he was drug tested and regardless of job title, required that he have "direct contact with children or youth," be "entrusted with the direct care and custody of children or youth," *and* perform "duties in the normal course of employment [that] may affect the health, welfare, or safety of child or youth."

### **FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW**

#### **Agency's position**

All positions within Agency were designated safety-sensitive by Agency in conjunction with the D.C. Department of Human Resources ("DCHR"), the department charged with administering the applicable personnel regulations applicable in the instant case. Agency asserts that its decision to designate all of its employees safety-sensitive is reasonable in light of the services it provides to children, youth, senior citizens, and visitors to the District. Agency contends that it (and DCHR) are not required to rigidly adhere to the requirements found within 6B DCMR § 3903.1 (2011) as the Remand Order indicates. Agency highlights that "[t]he underlying guiding standard to be applied in identifying safety-sensitive positions shall be one of reasonableness, coupled with the standards outlined in section 3903.2(b) through (f)..."<sup>1</sup> Agency further maintains that District government agencies have latitude in determining what positions are designated as safety-sensitive and therefore subject to random drug testing.

Agency argues that because it "provides...urban recreation and leisure services for residents and visitors of the District of Columbia" and "supervises many of the [District's] recreation/community centers, parks, athletic fields, playgrounds, spray parks, tennis courts, community gardens, dog parks, aquatic facilities and features," that the nature of its services called for the positions which Employee was transferred to around the time of his drug test to meet the safety-sensitive requirements.

#### **Employee's position**

Employee asserts that Agency does not provide any evidence to support that it made an attempt to comply with either the statute or regulations regarding drug testing employees in

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<sup>1</sup> See 6-B DCMR § 3903.2(a) (emphasis added).

safety-sensitive positions. Employee offers a number of e-mails as exhibits in his Motion for Summary Disposition regarding his assignments at various Agency locations. In an e-mail dated November 3, 2009, Agency indicated that Employee would be assigned to Agency's Hillcrest Senior site location where he "could be of great assistance."<sup>2</sup> Employee was reassigned to another Senior Center location in January 2010.<sup>3</sup> In June 2010, Employee was detailed to the Columbia Heights Community Center (CHCC) to assist with "daily senior activities/programs."<sup>4</sup> In April 2011, at the time Employee was drug tested, he was assigned to the senior services division of Agency at its Fort Stevens location.<sup>5</sup>

### Discussion

The Superior Court for the District of Columbia, in an Order issued by Judge Ramsey Johnson, remanded this matter to solely determine whether Employee's position, at the time he was drug tested and regardless of job title, required that he have "direct contact with children or youth," be "entrusted with the direct care and custody of children or youth," and perform "duties in the normal course of employment [that] may affect the health, welfare, or safety of child or youth." The Court remanded this case to OEA "for a determination not inconsistent with [its order] on this question." The analysis of this inquiry addresses whether Employee should have been subject to random drug and alcohol testing under D.C. Code § 1-620.32(a)-(b).

It is uncontroverted that when Employee was drug tested on April 6, 2011, he was assigned to Agency's Fort Stevens location, in the Senior Services Division.<sup>6</sup> In an e-mail dated April 6, 2011, the same day as Employee's drug test, a Lead Recreation Specialist, issued an e-mail justifying several reassignments within the Senior Services Division.<sup>7</sup> In the e-mail, Agency justified assigning Employee to Fort Stevens and stated that Employee, along with a co-worker, will implement "Basic and Advance Computer Training, board/card games, [h]ealthy, fit, social, and leisure activities as well as schedule and set up transportation to [Agency] Senior Events." The Lead Recreation Specialist believed that Employee would give Fort Stevens' seniors the "extra and exciting positive boost they deserve..."<sup>8</sup> The reassignment of employees within the senior services division apparently stemmed from community complaints regarding a lack of services for senior residents.

Based upon the documentary evidence presented, there is no material dispute that Employee began working with Agency's senior services division in November of 2009.<sup>9</sup> From November 2009, until the time Employee was drug tested on April 6, 2011, Employee worked at various Agency locations within its Senior Services Division. It is also undisputed that on April 1, 2011, Employee was reassigned to the Fort Stevens Recreation Center where he remained in the Senior Services Division.<sup>10</sup> The documentary evidence suggests that children were also

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<sup>2</sup> Employee's Motion for Summary Disposition, Exhibit H (March 18, 2016).

<sup>3</sup> *Id.*, Exhibit I.

<sup>4</sup> *Id.*, Exhibit J.

<sup>5</sup> *Id.*, Exhibit M and N.

<sup>6</sup> *Id.*, Exhibit N and O.

<sup>7</sup> *Id.*, Exhibit N.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, Exhibit H.

<sup>10</sup> *Id.*, Exhibit N.

present at Agency's Fort Stevens location; however, there is no evidence that Employee's position required him to be "entrusted with the direct care and custody of children or youth," and perform "duties in the normal course of employment [that] may affect the health, welfare, or safety of child or youth." The evidence is unclear whether Employee had direct contact with children or youth, although the mere presence of children at the Fort Stevens location makes it difficult to find that he did not have direct contact with children or youth. However, as the Superior Court's Order highlights, "[s]trictly tangential, casual, or occasional contact with children or youth does not automatically make an employee subject to testing under the [drug and alcohol testing] Program."<sup>11</sup>

Agency argues that the guiding standard to be applied in identifying safety-sensitive positions shall be one of reasonableness, coupled with the standards outlined in the pertinent municipal regulations. While the undersigned finds Agency's argument persuasive in regards to identifying safety-sensitive positions, I am limited to the inquiry set forth in the Superior Court Remand Order.

Given that Employee's position was within Agency's Senior Services Division, and it appeared that Employee was not entrusted with the direct care and custody of children or youth in the normal course of his employment, I must find, consistent with the Superior Court's Order, that Employee was not subject to drug testing under D.C. Code § 1-620.32 (a)-(b).

### **ORDER**

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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Arien P. Cannon, Esq.  
Administrative Judge

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<sup>11</sup> 6-B DCMR § 3903.2(d) (2011).