IN ARBITRATION

In The Matter Of The Arbitration Between:
FRATERNAL ORDER OF POLICE
DEPARTMENT OF CORRECTIONS
LABOR COMMITTEE

Grievance of:
[redacted]
Termination

and

DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS

Before M. David Vaughn, Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to Article 11 of the collective bargaining agreement (the "Agreement") between the District of Columbia Department of Corrections (the "Department" or the "Employer") and the Fraternal Order of Police/Department of Corrections Labor Committee ("FOP/DOC" or the "Union") (together, the Department and the Union are the "Parties" to the proceeding) to resolve a grievance which protests the Employer's termination of Correctional Treatment Specialist (also "CTS") [redacted] ("Grievant") based on a confirmed positive drug test result for marijuana. The Parties were unable to resolve the dispute, and the Union invoked arbitration. From a panel of arbitrators maintained by the Parties, I was selected to hear and decide the dispute. The case was set for hearing on April 8, 2019.

The Union filed a Motion for Leave to File a Motion for Summary Disposition, asserting that such disposition is an appropriate way to resolve the dispute without the necessity of an evidentiary hearing. It contends that such disposition is allowed under the District of Columbia's Revised Uniform Arbitration Act, which authorizes arbitrators to decide requests for summary disposition upon the request of one party if the other party has a reasonable opportunity to reply.

The Employer assented to the Union's proposal. The Union filed its Motion on March 25, 2019. The Employer filed its

Opposition to the Motion on April 5, 2019 and the Union filed its Reply on April 12, 2019, completing the record for purposes of the Summary Disposition Motion. Union Exhibits accompanying the Union's submissions are designated as "UX_." Department Exhibits are designated as "DX_."

The Union set forth in the Motion its factual assertions with respect to the dispute. The Employer indicated in its Opposition that "the facts as presented by the Union . . . are generally not in dispute" and offered no counter-facts inconsistent with the Union's description.

Rule 56 of the Federal Rules of Civil Procedure – applicable by analogy – provides for granting summary disposition if the moving party establishes that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.

RELEVANT STATUTES

Title 24, Chapter 2, Subchapter II, Part B Department of Corrections Employee Mandatory Drug and Alcohol Testing, provides, in relevant parts:

24-211.21, Definitions

For purposes of this part, the term:

* * *

(8) "Random testing" means drug or alcohol testing taken by Department employees at an unspecified time for the purposes of determining whether any Department employees have used drugs or alcohol and, as a result, are unable to satisfactorily perform their employment duties.

* * *

24-211.23, Testing Methodology.

* * *

(b) For random testing, the contractor shall . . . collect urine specimens . . . The contractor shall perform enzyme-multiplied-immunoassay technique ("EMIT") testing on one sample and store the split sample. Any positive EMIT test shall then be confirmed by the contractor using gas chromotography/mass spectrometry ("GCMS").

(c) Any Department employee found to have a confirmed positive urinalysis shall be notified of the result. ***

24-211.24

The drug testing policy shall be issued in advance to inform employees and allow them the opportunity to seek treatment. Thereafter, any confirmed positive test results . . . shall be grounds for termination of employment in accordance with Subchapter 1 of Chapter 6 of Title 1. * * *

APPLICABLE DISTRICT REGULATIONS

Part 406, of the District Personnel Manual ("DPM"), provides in part:

406.1 ENHANCED SUITABILITY SCREENING - GENERAL PROVISIONS

In addition to a general suitability screening, appointees, volunteers and employees shall be subject to one (1) or more of the following enhanced suitability screenings, as dictated by the applicable positions:

* * *

(G) Random drug and alcohol test:

* * *

406.2 Agencies under the personnel authority of the Mayor shall conform to the standards and procedures established in this chapter for screenings.

Part 425 of the DPM provides, in part:

425 MANDATORY DRUG AND ALCOHOL TESTING – GENERAL PROVISIONS

425.1 Each program administrator with safety or protection sensitive positions shall contract with a professional testing vendor(s) to conduct required drug and alcohol testing. The vendor(s) shall ensure quality control, chain-of-custody for samples, reliable collection and testing procedures, and any other safeguards needed to guarantee accurate and fair testing notwithstanding 49 CFR § 40.1, vendors shall follow all procedures stated in 49 CFR Part 40 and District government procedures, as applicable, for all drug and alcohol testing for applicants and employees.

425.2 The vendor(s) selected to conduct the testing shall ensure that any laboratory used is certified by the United States Department of Health and Human Services (HHS) to perform job-related drug and alcohol forensic testing.

425.3 The Director of the DCHR shall develop operating policies and procedures for implementing the drug and alcohol program (Program) under this chapter for agencies subordinate to the Mayor that have safety, protection, or security sensitive positions.

Part 428 of the District Personnel Manual ("DPM") provides, in part:

428 MANDATORY DRUG AND ALCOHOL TESTING – POSITIVE DRUG OR ALCOHOL TESTS RESULTS

428.1 Unless otherwise required by law, and notwithstanding Subsection 400.4, an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in Subsections 435.9 and 439.3 for:

(a) A positive drug or alcohol test result;

* * *

RELEVANT DISTRICT INSTRUCTION

District Personnel Manual Instruction NO. 4-34 provides, in relevant parts:

Effective Date	Expiration Date	Related DPM Chapters
July 28, 2016	Until Superseded	4

Overview

The District of Columbia government provides its employees with a drug-free workplace and aims to actively discourage drug and alcohol abuse. In this context, the Department of Human Resources provides ongoing guidance related to its drug and alcohol testing procedures. This instruction reiterates information concerning Initiative 71; addresses how medical marijuana is treated during the D.C. government's drug and alcohol testing process; and outlines the requirements for employees authorized, as outlined herein, to use medical marijuana.

* * *

Initiative 71 Overview

On November 4, 2014, District voters approved Initiative 71 – Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, which among other things legalized the limited possession and cultivation of marijuana. Specifically, adults who are 21 years of age or older may, within the interior of a house or rental unit that constitutes their principal place of residence, possess or grow marijuana plant(s) in accordance with the provisions of the law. Initiative 71, which became effective on February 26, 2015, does not apply to federal property in the District and therefore possessing any amount of marijuana on federal property remains illegal. The sale and public consumption of marijuana also remains illegal anywhere in the District, whether it is on District or federal property.

Safety Sensitive Positions

1. Title 6B of the District of Columbia Municipal Regulations contains provisions relating to drug and alcohol testing. These provisions require drug and alcohol testing of candidates for employee in safety-sensitive positions. Examples of safety sensitive positions include, but are not limited to, positions that involve:

* * *

d. Engaging in duties directly related to the public safety, including, but not limited to, responding or coordinating responses to emergency events;

* * *

Impact of Initiative 71

Initiative 71 has **no impact** on the District government's current enforcement and application of employment related drug testing requirement. This is because the provisions contained in D.C. Law 20-153 expressly permit employers to continue to enforce and establish policies which restrict marijuana use amongst employees. Specifically, the plain language of the legislation permits District government agencies to maintain and develop policies which prohibit any marijuana use by employees. The legislation also, among other things, expressly permits District government agencies to bar the possession, consumption, use, or transportation of marijuana on District government property. Accordingly, Initiative 71 has no legal effect or impact on the District government's drug and alcohol testing programs.

Medical Marijuana

1. An employee of the District government who has been authorized by a licensed physician to use marijuana for medicinal purposes is permitted to do so in accordance with applicable laws, rules and regulations of their state of residence, provided such usage does not impair or otherwise impede his

or her ability to safely carry out assigned duties and responsibilities.

2. Employees enrolled in a medical marijuana program, and who occupy safety-sensit[ive] positions, remain subject to random drug and alcohol screenings. In the event such an employee is randomly selected for testing, he or she must comply with the testing order. However, the employee may make known their participation in the medical marijuana program. In this regard, an employee has three options:

   a. Immediately before or following a drug or alcohol screening, submit a copy of the drug testing order along with a copy of a valid medical marijuana program registration card to dchr.complianceCdc.gov. Follow any supplemental instructions provided by DCHR.
   b. If the employee tests positive for marijuana usage, he or she will be contacted by a Medical Review Officer. The employee must inform the MRO of his or her enrollment in a medical marijuana program and follow any additional instructions provided by the MRO.
   c. If notification to DCHR or the MRO does not occur, an employee may receive[] a notice proposing that he or she be terminated due to a positive marijuana result. In such a case, the employee should supply the named Hearing Officer with a copy of a valid medical marijuana program registration card along with a written explanation of her or her circumstances. The Hearing Officer's contact information will be included in the notice of proposed termination. The employee should follow any additional instructions that might be provided by the Hearing Office.

Department of Corrections Standard Operating Procedure (SOP) 6050.4B provides the following in pertinent parts:

1. **PURPOSE AND SCOPE.** To provide procedures for the mandatory drug and alcohol testing program within the D.C. Department of Corrections. (DOC).

2. **POLICY.** It is the policy of the DOC to provide a drug and alcohol free workplace.

1) DOC employees are prohibited from using or being under the influence of alcohol while on duty and using or possessing any drug that is unlawful to possess without a prescription under local or federal law. This prohibition extends to the commission of unlawful drug or alcohol activity outside of the workplace.
2) DOC encourages employees to seek assistance via Employee Assistance Program (EAP) opportunities available for DOC incumbents.
3) Any confirmed positive test results or refusal to submit to the test shall be grounds for termination of employment.

* * *

5) Violations of these prohibitions on drug or alcohol use within or outside of the workplace shall result in termination of employment pursuant to District Personnel Manual (DPM) Chapter 16 and Title 1, Chapter 6 of the D.C. Code governing the Merit Personnel System.

* * *

24. DISCIPLINARY ACTION AGAINST EMPLOYEES

a. Positive Test

1) An Employee who has a confirmed positive test result shall be placed on no more than three (3) days administrative leave pending removal. Removal shall be in accordance with District Personnel Manual (DPM).

2) The individual shall be informed that he/she has the right to have his/her specimen tested by an independent laboratory that the employee chooses from the approved list of labs. The employee shall be informed that testing shall be at his/her own expense. The employee shall be notified that a request for an independent

confirmation test must be initiated within three (3) work days of this notification.

3) Disciplinary action is held in abeyance until DOC receives the results of the independent laboratory test.

4) A positive confirmation from the independent laboratory test or an employee's failure to request an independent laboratory test shall result in the issuance of a Summary Removal.

APPLICABLE PROVISIONS OF THE AGREEMENT

Article 2 (Management Rights) of the Agreement (J. Ex. 7), in relevant parts, provides:

Section 1: The Department and the Union recognize the Comprehensive Merit Personnel Act, as codified at D.C. Code § 1-618.8, provides that the Department shall retain the sole right, within applicable laws and rules and regulations:

* * *

B. To hire, promote, . . . discharge, or take other disciplinary action against employees for cause;

Article 10 (Grievance Procedure) of the Agreement, in relevant part, provides:

Section 6:

* * *

C. The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision on the issue(s) presented and shall confine his/her decision solely to the precise issue(s) submitted for arbitration.

* * *

Article 11 [Discipline (Corrective/Adverse Actions)] of the Agreement, in relevant parts, provides:

Section 9:

* * *

C. Disinterested Designee/Hearing Officer shall review the proposed action, receive and review all relevant statements, conduct a hearing if a hearing is requested by the employee and issue a recommendation to the Deciding Official normally within ten (10) days after conducting a hearing [or] receiving the disciplinary action if a hearing is not requested. * * *

D. Deciding Official shall issue a final decision after reviewing the recommendation of the Disinterested Designee/Hearing Officer. The deciding official may sustain [or] reduce the penalty recommended by the Disinterested Designee, remand the matter for further consideration by the Hearing Officer, or dismiss the charge but may not increase the penalty recommended by the Disinterested Designee/Hearing Officer.[1]

* * *

Section 14: The Employer agrees that disciplinary action shall not be punitive but based on conduct or performance deficiencies. The selection of the appropriate penalties shall be based on progressive discipline principles consistent within the department. Consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist.

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[1]In the current Agreement (J. Ex. 1), Sub-section D of Article 11, Section 9, reads as follows:

> "The Hearing Officer, if there is one, shall make a written recommendation and report to the Deciding Official. The Deciding Official shall issue a final decision after reviewing the report and recommendation of the Hearing Officer. The Deciding Official may sustain the penalty proposed by the Proposing Official, reduce the penalty, but may not increase the penalty proposed by the Proposing Official, remanding the matter to the Hearing Officer with instructions for further consideration by the Hearing Officer, or dismiss the charge. If a case is remanded, the Union shall be notified."

ISSUES FOR DETERMINATION

The underlying issues for determination are:

Did the Employer terminate Grievant for just cause? If not, what shall be the remedy?

The immediate issue, and one which may also resolve the underlying issues, is:

Whether the Union's Motion for Summary Disposition shall be granted?

FACTUAL BACKGROUND AND FINDINGS

Grievant's DOC Employment

Grievant was employed by the Department as a Correctional Treatment Specialist. The Duties of her position are described in DX9. She was hired in December of 2015. UX1. At the time of the termination at issue in this proceeding, Grievant had two years and 10 months of service. She had positive job performance and ratings (UX2) and had no prior discipline.

The Department designated Grievant's position as Safety Sensitive. By the terms of the Department's Mandatory Employee Drug and Alcohol Testing Program (DOC SOP 6050.4B "MEDAT"), employees in such positions are subject to random drug testing in accordance with the Program.

Grievant's Use of Medical Marijuana

Grievant, a resident of the State of Maryland, had enrolled in that ate's medical marijuana program and was certified to use medical marijuana. UX3. Her certificate was in effect during the entirety of her employment with the DOC. Her use of marijuana was, therefore, legal under both Maryland and District of Columbia law. At the time of the drug test at issue, Grievant was using legally-

prescribed medical marijuana in the form of a cream[2] applied to her ankle to treat pain from an injury resulting from an automobile accident in 2005. The Union asserts, and the Department does not contest, that Grievant was not "high" – that is to say impaired in the performance of her duties – as a result of her use of the cream.

Grievant's Positive Test

In a random test for which the results were released on August 21, 2018, Grievant tested positive for marijuana. Instruction 4-34 and the SOP require "MRO review" by a designated Medical Review Officer following receipt of notice of the positive rest result, in order to be deemed a MRO confirmed positive. The MRO must be a licensed physician. As provided in Instruction 4-34 (DX10) and the SOP, Grievant attempted to provide the Agency MRO with her documentation to use medical marijuana. UX7. The MRO did not accept Grievant's documentation, did not conduct the required review based thereon and, perforce, did not make any determination as to a legitimate medical explanation for the positive test result, although her electronic signature is on the form. UX5. Grievant did provide the Department's Human Resources Office with documentation of her status as a legal user of medical marijuana. UX7.

Neither the MRO nor Human Resources deemed her status as a legal consumer of medical marijuana to be a "legitimate medical explanation" for the positive test result. As indicated, Section 10 (1) (2) of the SOP specifically provides that consumption of a hemp product (presumably including the marijuana-containing substances used by Grievant) is not a legitimate medical explanation for a positive marijuana test result. The MRO signed

[3]The Union described cream as Grievant's mode of delivery, which the Agency did not dispute. The Hearing Officer states that she used "patches, salves and an occasional flower."

the test result on September 10, 2018, notwithstanding her failure and refusal to examine Grievant's documentation, confirming it to be an "MRO Positive" test.

Grievant's Summary Termination

Based on Grievant's confirmed positive test result, and applying the Agency's Zero Tolerance policy for drugs, DOC placed her on administrative leave (UX6) and summarily terminated her employment for cause, citing 6B DCMR Section 1605.4 (h).

Grievant invoked the Department's administrative hearing procedure and made a written submission in support of her position. UX10. The Union's Submission to the Hearing Officer stated that the MRO had advised that Grievant's documentation was irrelevant because medical marijuana she used was not in pill form. UX10. The Hearing Officer who conducted the hearing found that Grievant did not report for duty under the influence of marijuana, nor did she consume marijuana while at work. UX11. He found that her marijuana use was legal. Nevertheless, he recommended that Grievant be removed from her position, based on the Department's Zero Tolerance policy, which prohibits the use of marijuana, regardless of whether the marijuana use was legal or illegal under the law. He upheld that policy.

The Director of the Department upheld the Hearing Officer's Recommendation, (UX12) and confirmed the Decision as final. In summarily removing her, DOC described Grievant's violation as "(h) Controlled Substances/Paraphernalia (3) Reporting to or being on duty while under the influence of or testing positive for an illegal drug or unauthorized controlled substance." It justified her removal based on its assertion that her conduct "a) Threatens the integrity of District government operations" and "(b) Constitutes an immediate hazard to the agency, to other District

employees, or to the employee." Grievant was terminated from her position on September 21, 2018.

The Union's Invocation of Arbitration

The Union grieved the Department's action, contending that her removal was not for cause. The Parties were unable to resolve the dispute through the steps of the grievance procedure. This proceeding followed.

POSITIONS OF THE PARTIES

The positions of the Parties are set forth in their pleadings. They are summarized as follows:

The Union argues that the DOC erred in its application of the District's Department of Personnel Management's (DPM's) Instruction 4-34 and in its application of the DOC's Mandatory Employee Drug and Alcohol Testing Program (MEDAT) policy.

The Union maintains that Instruction 4-34, which applies to agencies subject to the Mayor's personnel authority, allows the use of medical marijuana by employees in safety sensitive positions, including those employed by the Department of Corrections. It points to the explicit language of the Medical Marijuana section of the Instruction, which authorizes the employment of authorized medical marijuana users, absent impairment or other impediment on the part of an employee in carrying out the employee's duties. The Union maintains that the record establishes that Grievant was not impaired or so impeded.

The Union also argues out that DOC's MEDAT policy, as set out in Standard Operating Procedure (SOP)6050.4B-17, does not prohibit the use of medical marijuana by DOC employees. It argues that the MEDAT Zero Tolerance Policy only applies to *illegal* drug use, citing SOP 6050.4B-17 Sec. 2. Since Grievant's medical marijuana

was legal as she used it, the Union argues that the Zero Tolerance Policy does not apply and cannot be used to support her removal. FOP maintains that the Department has consistently and erroneously labelled the Grievant's use of medical marijuana as "illegal" when it was, in fact, legal under the law.

The Union also points out that the MEDAT policy requires the MRO to review "all medical records made available" by the employee; and, if there is a "legitimate medical explanation" for the marijuana use, the MRO is instructed to report the test as negative. It asserts that the "legitimate medical explanation" for the positive test result is Grievant's authorized, legal use of marijuana for legitimate medical reasons. It asserts that the MRO was obligated under the circumstances to review the documentation, deem the result to be consistent with legal drug use and take no further action other than reporting the test result as negative.

The Union also takes exception to the Hearing Officer's interpretation of the SOP as requiring automatic termination for a failed drug test and to the role that the MRO undertakes in determining whether or not to deem the drug test as "failed." The Union protests that, although the Hearing Officer found that the MRO failed to undertake the review procedures required by MEDAT; he, nevertheless found that the procedural error was "harmless." The Union disputes this conclusion, arguing that the MRO's error which designated the test result as MRO positive was the direct cause of Grievant's removal from duty. As such, contends FOP, it was not harmless.

The Union urges that its Motion be granted, the grievance sustained and Grievant's termination overturned. It seeks, by way of relief, that she be reinstated to employment and made whole for wages and benefits lost.

The Department maintains that the DPM's Instruction 4-34 does not apply to it because Section 426.1 of the DPM recognizes that

subordinate public agencies may establish their own drug and alcohol requirements above and beyond the minimum requirements set out in Chapter 4 of the DPM.

The Employer points out that DOC's own MEDAT policy specifically prohibits medical marijuana use by its employees and that it establishes a zero tolerance policy with respect to all marijuana use, whether such use is legal or illegal under District law.

The Department contends that it did not err by failing to take into consideration the Grievant's legal medical marijuana use because the MEDAT policy does not permit the MRO to do so, since it specifically rejects legal medical marijuana as a "legitimate medical explanation" for the confirmed presence of THC in an employee's specimen.

DOC urges that the Union's Motion for Summary Disposition be denied and an evidentiary hearing convened to ascertain whether termination was the appropriate remedy for Grievant's MEDAT violation.

DISCUSSION AND ANALYSIS

Summary Disposition

The Parties do not dispute the facts relating to essential elements of the claim. The question is what the law and regulations require. The dispute is, therefore appropriate for summary disposition.

Legalization of Medical Marijuana

The District of Columbia passed a law to legalize medical marijuana effective in 2010. D.C. Code Section 7-1671.01 et seq. The District also legalized the recreational use of marijuana, subject to specified constraints, in February of 2015. Initiative

71. Recreational marijuana use is not applicable to the dispute. As a result of these laws, medical (as well as recreational) marijuana use is legal in the District of Columbia. *See* DC Code Ch 16B (DX13). That said, neither law by its terms authorizes District of Columbia government employees to use marijuana at work or excuses them from the disciplinary consequences of being under the influence of marijuana at work. The laws which legalize marijuana do not excuse District employees from required participation in agency-level drug testing programs.

Statutory and Regulatory Framework

The use of marijuana by District employees is regulated by a hierarchy of statutes, regulations, guidance, operating procedures and Agreement provisions. In the hierarchy, clear statutory language trumps regulations, regulations trump guidance. Internal department-level procedures are subordinate to regulations. The drug screening procedures are subject to the provisions of the Agreement, which control when the two documents are inconsistent. *See* DPI 4-38 (DX8). It is a well established principle of interpreting statutes and regulations that all provisions must be assumed to be valid and that they be read and interpreted together so as to give effect to all parts.

The Department's Testing Program

The Department was required by a 1996 District of Columbia Law (D.C. Code Sec 24-211.21-24) to implement a drug and alcohol testing program. That law has not changed in any relevant aspect. To implement the law, DOC put MEDAT in place, where it has remained at all times relevant to the proceeding. In its present iteration, the SOP became effective January 17, 2017. The Department's MEDAT policy is to maintain a drug and alcohol-free work place (Section 2) and provides that "any confirmed positive test results....shall be grounds for termination of employment." Section 2(3). The zero

tolerance policy established by the Department contains no exception for legal use of medical marijuana.

The random drug testing procedure portion of MEDAT is described in its Standard Operating Procedure (SOP) 6050.4B-17. The SOP provides, in part, that any initial positive test result is subject to GC/MS confirmation and to review by a Medical Review Officer ("MRO"), who is instructed to determine whether there is a "legitimate medical explanation" for the positive test result. Under MEDAT, "use or consumption of a hemp product . . . which may contain [THC] is not a legitimate medical explanation for the confirmed presence of THC in an employee's specimen." Section 10 (1) (4). As indicated, I assume for purposes of analysis, that the cream (and other substances) which Grievant uses pursuant to her Maryland Medical Marijuana authorization is a hemp-based product containing THC.

DPM Instruction 4-34

DPM Instruction 4-34 was issued to provide guidance as to the District's policy involving medical marijuana use by employees. It became effective July 28, 2016. As indicated, the Instruction is applicable to all agencies under the Mayor's personnel authority, of which the Department of Corrections is one. The Instruction establishes an affirmative right on the part of employees who are authorized medical marijuana users, to continued employment by covered agencies:

> An employee of the District government who has been authorized by a licensed physician to use marijuana for medicinal purposes is permitted to do so in accordance with applicable laws, rules and regulations of their state of residence, provided such usage does not impair or otherwise impede his or her ability to safely carry out assigned duties and responsibilities.

That said, the Instruction also explicitly allows continuation of existing drug testing programs or disciplinary policies, including zero tolerance policies:

> Employees enrolled in a medical marijuana program, and who occupy safety-sensit[ive] positions, remain subject to random drug and alcohol screenings. In the event such an employee is randomly selected for testing, he or she must comply with the testing order. However, the employee may make known their participation in the medical marijuana program.

The Instruction allows (but does not require) employees legally using medical marijuana to submit a copy of the drug testing order along with a copy of a valid medical marijuana program registration card to DCHR and follow any supplemental instructions provided. If the employee tests positive for marijuana usage, the Instruction provides that he or she "will be contacted" by a Medical Review Officer. The employee must inform the MRO of his or her enrollment in a medical marijuana program and follow any additional instructions provided by the MRO.

The instruction contemplates that an employee may receive a notice of proposed termination based on a positive marijuana test. In such a case, the Instruction directs that the employee supply the named Hearing Officer with a copy of a valid medical marijuana program registration card along with a written explanation of her or her circumstances. The employee should follow any additional instructions that might be provided by the Hearing Office.

The clear implication is that, if employees disclose their legal use of medical marihuana and submit documentation, the MRO or the hearing officer will address the issue. However, the Instruction does not require agencies subject to its terms to ignore or excuse legal marijuana use. Indeed, it is silent as to the disposition of a positive test resulting from use of medical marijuana.

Thus, while Instruction 4-34 purports to provide a place in DC government employment for employees using medical marijuana, it trails off inconclusively, leaving employees to the application of any applicable agency-specific drug testing programs. I note that the law legalizing medical marijuana does *not*, by its terms, negate the 1996 Law which directed the Department to establish a drug testing program, nor parts 425 or 428 of the DPM, which provide for drug testing and for termination of employment as a consequence of a positive drug test.

Instruction 4-34 does not direct subordinate departments to allow employees use of medical marijuana, nor does it preclude the Department of Corrections, as a subordinate agency, from promulgating, applying and enforcing an Agency-specific drug testing program to enforce a zero tolerance policy. Indeed, neither the law establishing the legality of medical marijuana nor the law establishing the legality of recreational marijuana use negated the drug testing program required of the Department pursuant to the 1996 law.

Instead, Instruction 4-34 allows individual agencies to continue testing programs and zero tolerance policy. The Instruction is misleading, in that it allows employees properly registered to use medical marijuana to be permitted to continue their employment and, in the event of a positive drug test, to notify their employing agencies and document their legal status and to work through the MRO and hearing officer. The implication is that such notification will explain – and excuse – what would otherwise be the disciplinary consequences of a positive drug test.

However, an employee's reliance on procedures authorized by the Instruction places the employee in a "Catch 22" situation, since it does not require an agency to accept such documentation as excuse or mitigation of a positive drug test, nor does the general language purporting to allow legal users of medical marijuana to

retain their employment in the face of a positive test result override the right of the individual agencies – including DOC – which are operating their testing programs pursuant to separate statutory mandates, to continue their existing programs.

Instruction 4-34 is misleading and hypocritical in the message it sends to District employees who use or may seek to use medical marijuana. The system cries out for clarification and consistency. That said, for the reasons set forth above, I reluctantly reject the Union's argument that Instruction 4-34 precluded DOC from continuing to administer its random drug testing program and enforcing its zero tolerance policy against marijuana by employees.

DOC's MEDAT Program

As indicated, the Department of Corrections had and has a zero tolerance policy for marijuana use by employees and uses the drug testing program as a mechanism to police the policy. As also indicated, nothing contained in Instruction 4.34 required the Department to modify or discontinue MEDAT. That said, DOC remains required to comply with its own Policy and with its own procedures. The evidence in the instant matter is clear that the Department failed to comply with that Policy on multiple levels.

Interference with Performance of Duties Required

As an initial matter, the Statute [DC Code 24-211(8)] is clear that random testing, as defined in the law, is "for the purpose of determining whether any Department employees have used drugs . . . *and, as a result, are unable to satisfactorily perform their employment duties.*" Emphasis Added. The purpose of drug testing is not simply to find employees who have used drugs; the testing is for the purpose of determining drug using employees who, as a result, are unable to perform their jobs. The Agency has a obvious and legitimate concern about employees being "under the influence" of or impaired by drugs in the DOC workplace, because sound

judgment and quick responses by employees are critical to Agency operations.

That said, in the instant dispute, the Parties have stipulated that Grievant was not "high" from the use of substances containing THC. See Motion at p.3. "The Medicine does not produce a high...." Opposition at p. 1 "The facts as presented by the Union in its [Motion] are generally not in dispute." Indeed, the Hearing Officer found that Grievant used "medical marijuana products legally," "*did not report for duty under the influence of marijuana*," and "provided her medical marijuana card to DOC." Emphasis added. The record also establishes that the Deciding Official in Grievant's discipline, Director Booth, "adopted and incorporated by reference" as contained herein, the Hearing Officer's analysis. Accordingly, where the Parties have stipulated, a Hearing Officer has found and the Deciding Official adopted determinations that Grievant was *not* under the influence of marijuana, (and, by necessary inference), was not unable to perform her employment duties as a result of such impairment. Grievant's positive test result does not, therefore, meet the required purpose of random testing, which is to determine not simply whether employees have used drugs, but to determine drug use *which renders them unable to satisfactorily perform their employment duties*. A program result which does not establish such inability cannot and does not support the downstream disciplinary consequence under the "for cause" standard.

Illegality Required

The drug and alcohol free Policy is also clear that the Department's prohibition on drug use which the testing program enforces is against "using or possessing *any drug that is unlawful to possess without a prescription* under local or federal law." Emphasis added. The evidence is clear that the drug which Grievant used (THC, a cluster of psychoactive metabolites of marijuana) was *lawful* – not unlawful – to possess without a prescription, once she

had received her Patient Identification Card, which she possessed at all times relevant to the dispute. UX3. The terms "lawful" and "unlawful" are terms which have specific meanings; DOC does not have authority to use its own, special definition of what is illegal. Indeed, the Hearing Officer found, and the Department has conceded, that Grievant's use of medical marijuana was "legal" – that is, lawful – and not "illegal" – that is, unlawful. MEDAT exists to enforce a prohibition against use of *unlawful* drugs, which the THC which Grievant used was not.

MRO Review Required

The required testing procedures for DOC's MEDAT Program, are set out in the SOP. (SOP 6050.4B-17 (U. Ex. 18) The Program explicitly adopts the Federal testing procedures set forth in 49 CFR. The Instruction (4-34), the SOP and the Federal testing procedures all require MRO Review. The SOP requires the MRO to undertake a complete evaluation of the information provided by the employee to "determine alternative medical explanations" before the result can be MRO confirmed positive. The alternative for which the review is conducted is to differentiate the medical explanation for a positive drug test from use of an illegal drug. Indeed, SOP 23c. states that "if the MRO determines there is a legitimate medical explanation for the positive test result, the MRO may deem that the result is consistent with legal drug use" and report the test result as negative.

The word "may" in this context must be read as "dependent on circumstances" rather than as establishing discretion on the part of the MRO with respect to whether the positive test resulted from legal drug use, because the determination of whether the positive test is "consistent with legal drug use" is not a discretionary or subjective standard. As indicated, the term "lawful" means legal as provided by law; and it is clear that Grievant's marijuana use was lawful. A finding of Grievant's legal drug use constituted a "legitimate medical explanation" for the positive test. The

provision of the SOP that states that use of a hemp product is not a legitimate medical explanation when applied to the proper – that is, legitimate – use of a legal drug is, by definition, a legitimate medical explanation. A requirement otherwise and the application of such a requirement are arbitrary and contrary to both law and common sense and required an MRO determination that the test result had a legitimate medical explanation and, so applied, that it be reported as a negative test. Failure on the part of the MRO to conduct the review was clear error, as was the Department's direction that the legitimate medical explanation was not a legitimate medical explanation.

The Hearing Officer's recommendation and the Director's decision were, therefore, based on the erroneous premise that Grievant tested positive as a result of using an unlawful drug (even after the Hearing Officer determined, and the Director concurred by adopting the Hearing Officer's Report, that her drug use was legal!).

The clear and required result was that Grievant's positive test was the result of lawful drug use. The Hearing Officer's Report and Recommendations reflects the fact that the MRO failed to follow the Department's SOP, and failed to review the medical documentation and make the clear finding, which failure led directly to Grievant's termination. The Hearing Officer improperly excused the Department's error as harmless.

MRO Review of all Medical Records Required

Testing procedures and protocols must be strictly complied with, as they go to the heart of an employee's due process protections as well as to the efficacy of the test result. The MEDAT policy explicitly requires the MRO to review "all medical records made available" by the employee. Indeed, there could be more than one possible explanation for a positive test result. Without the required MRO review of all medical records – which the

Agency concedes the MRO did not perform – the test was and remained incomplete, and the result could not be final, let alone an "MRO confirmed positive." Here, the required MRO review of all medical documents never took place – or if it took place, was arbitrarily and medically improperly rejected – and the test result never became MRO confirmed positive. Indeed, the testing program provides that, if there is a "legitimate medical explanation" for the marijuana use, the MRO is *obligated* to report the test as negative.

Hemp Exclusion not Proper

The Department points to the provision of Testing requirements (SOP Section 10.1) 4)) which states:

> Hemp Products: Use or consumption of a hemp produce (food, drink or other), which may contain tetrahydrocannabinol (THC), is not a legitimate medical explanation for the confirmed presence of THC in an employee's specimen. A positive urinalysis for THC (marijuana), regardless of the use of the aforementioned products, shall be considered a positive test, resulting in corrective or adverse action pursuant to DPM Chapter 16.

Well, no. Grievant's use of medical marijuana explains her positive test result. It is, in fact and as the foregoing discussion describes, a "legitimate medical explanation" for the positive test result. The hemp exclusion written into the Department's testing procedures is not, in fact, a *medical* judgment and is not supported in the record by any *medical* documentation. It appears, instead, to be the Department's expression of a command determination to maintain its "zero tolerance" policy, notwithstanding the law. Where, as here, Grievant's use of medical marijuana was not unlawful and where, as here, she was not impaired in the performance of her employment duties, reliance on the hemp exclusion was beyond the scope of the policy's prohibition and arbitrary and unreasonable in its application.

Harmful Error is Fatal to Decision

The Agency does not dispute that the MRO failed to review the medical records provided by Grievant, although the MRO signed the report, confirming the test result as positive. The Hearing Officer noted that error, but concluded it to be "harmless" because the testing procedures specifically exclude the use of hemp products as a "legitimate medical explanation" for Grievant's positive test result is her legal use of marijuana for legitimate medical reasons. As the foregoing analysis indicates, the hemp exclusion is not and cannot be valid.

Moreover, the MRO holds a position as an objective professional, who was *obligated* to review *all* medical records made available *before* drawing a conclusion as to the status of the test result. As a result of her failure, the test result was incomplete and unconfirmed and was not, as a matter of law, an MRO confirmed positive. The test result was required to be designated as negative. No discipline for a positive drug test based on such a result can stand.

Lack of Proper Notice of Test Results

The law (Title 24-211.23(c) requires that Employees are entitled to notice of the confirmed positive test result. As indicated in the foregoing discussion, the term "MRO confirmed positive" is a term of art. It requires a positive result on the EMIT screening test – which produces a "yes/no" result at whatever level the testing Authority sets – *and* a confirmatory test using GC/MS, which produces an exact concentration, measured in nanograms per milliliter. 24.211.23(b). That result is then reviewed by the MRO, who is obligated to review all medical documentation as described above. The result of that process is an MRO confirmed positive test.

The notice sent to Grievant was not only defective because of the failure of the MRO to review the medical documentation –

leaving the result short of a confirmed positive – but contained neither the EMIT cutoff level nor the GC/MS concentration. UX5. There is no clear documentation of the confirmation of the screen and no notice of the GC/MS concentration. Indeed, it does not even confirm that a GC/MS confirmatory test was administered to the sample. The notice contains only conclusions and administrative gobbledygook.

Absent the positive test results, it cannot be a "confirmed positive", even if the MRO's failure to review or her erroneous conclusion were excused (which it is not). A test result which is not MRO confirmed positive is not a positive test for purposes of further Department action.

***Douglas* Factors**

DPM Chapter 16 requires the Agency to consider, after a confirmed positive test, corrective or adverse action. The Agreement requires the use of corrective discipline and consideration of mitigating factors. A unilateral Agency determination that termination in consequence of a positive drug test is automatic does not relieve the proposing and deciding officials from the obligation to consider the *Douglas*[3] factors, and make a reasoned assessment of a particular violation. Indeed, the Deciding Official accepted the responsibility to consider such factors. Here, the Deciding Official rejected each and all of the considerations, based on his assessment that Grievant had a positive drug test for marijuana. As indicated, above, the premise that the test was positive was incorrect as a matter of both law and fact.

However, even if the test was to be considered as confirmed positive, the Deciding Official's consideration of the *Douglas* factors was based on characterizations which are clearly erroneous.

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[3] *Douglas v. Veterans Administration*, 5 MSPB 313 (1981)

Factors 1, 2, 4, 5, 8, 10, 11 and 12 were incorrectly assessed and applied to [redacted] circumstances in that the Director's analysis for each of these factors relied on his incorrect characterization of the drug that she tested positive for as "illegal." That is a blatant and prejudicial mischaracterization. For reasons set forth above, Grievant's use of THC-containing hemp products was *not* "illegal." Assessment of the *Douglas* factors based on that clearly erroneous premise is prejudicial and cannot stand.

The Director was also incorrect in his application of Factors 10, 11, and 12. For example, for Factor 10, (The potential for the employee's rehabilitation), the Director found, "The potential for rehabilitation is not a factor in cases involving mandatory drug testing." I am not persuaded that Grievant's legal use of medical marijuana placed her beyond and consideration for rehabilitation, even if all of the other factors established a confirmed positive test.

For Factor 6 (Consistency of the penalty with those imposed upon other employees for the same or similar offense), the Director concluded that, "In the same or similar circumstances, the penalty is always removal." The Union challenges the Director's conclusion as invalid. It pointed out in the Motion that it has some non-direct evidence that at least one DOC employee, whose case was on all fours with Grievant's, was not removed as the result of a random drug test. The Agency did not contest the Union's assertion.

I conclude that, based on these errors, the DOC's failure to reasonably and accurately assess and apply the *Douglas* factors is arbitrary and capricious and is not sufficient to support the Department's summary removal of Grievant.

Conclusion

The program exists for the purpose of ensuring that employees are not impaired in the performance of their duties, which the record conclusively establishes Grievant was not. Standard Operating Procedure Section 23b states that a positive test result does not "automatically identify an individual as an illegal drug user." Indeed, as indicated, Grievant was not using an illegal drug and

was not impaired in the performance of her duties, so the positive test did not – could not – identify her as such.

The Union, as moving Party, has shown that it is entitled to Disposition in its favor as a matter of law. The undisputed representations establish that the Department of Corrections violated law, regulations and the SOP in removing Grievant from employment and require me to grant Union's Motion.

A W A R D

The Union's Motion for Summary Disposition is Granted. The Department lacked cause for Grievant's removal. The Grievance is sustained.

For reasons set forth in the Opinion, Grievant's random drug test result shall be changed to "negative." Grievant's removal shall be rescinded and she shall be reinstated to employment in such position as her seniority and qualifications permit and made whole for wages and benefits lost as a result of her removal.

The Employer shall implement the Award within 30 calendar days from the date of issuance of this Award and shall make Grievant whole for back pay and benefits lost in the normal payroll cycle, not to exceed 90 calendar days from the date of its issuance.

I will retain jurisdiction of the case for a period of 180 calendar days from the date of issuance, and for periods thereafter, at the written request of either Party for good cause shown, such request being made within the initial 180 day period, to address and resolve disputes arising from implementation of the Award and for purposes of receiving a petition for attorneys fees.

Issued at Clarksville, Maryland this 10th day of June, 2019.

M. David Vaughn
Arbitrator