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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0075-13
BOGALE DEMISSIE,)	
Employee)	
)	Date of Issuance: August 31, 2015
v.)	
)	
OFFICE OF THE STATE SUPERINTENDENT)	
OF EDUCATION,)	
Agency)	
_____)	
)	Sommer J. Murphy, Esq.
)	Administrative Judge
Bogale Demissie, Employee, <i>Pro Se</i>		
Hillary Hoffman-Peak, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 15, 2013, Bogale Demissie (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Office of the State Superintendent of Education’s (“Agency” or “OSSE”) action of terminating his employment. Employee, who worked as a bus driver, was charged with: “[N]eglect of Duty: failure to follow instructions or observe precautions regarding safety.” The charge stemmed from a May 10, 2010 incident in which Employee allegedly struck a pedestrian on a bicycle. The effective date of his termination was May 26, 2010.

I was assigned this matter in April of 2014. On April 18, 2014, I issued an Amended Order, scheduling a Prehearing Conference for the purpose of assessing the parties’ arguments. I subsequently issued an Order on Jurisdiction on September 12, 2014, directing the parties to address whether this Office has jurisdiction over the instant appeal. After reviewing the submissions, I determined that an Evidentiary Hearing on the merits of Employee’s appeal was warranted. An Evidentiary Hearing was subsequently held on May 7, 2015. The parties were ordered to submit written closing arguments on or before August 24, 2015. The record is now closed.

JURISDICTION

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

ISSUES

Whether Employee's fifteen (15) day suspension should be upheld.

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 RELEVANT TESTIMONY

The following represents what I have determined to be the most relevant facts adduced from the transcript generated as a result of the Evidentiary Hearing. Both Agency and Employee had the opportunity to present documentary and testimonial evidence during the course of the hearing to support their positions.

Agency's Case-in-Chief

Jerry Crute Tr. pgs.7-20

Jerry Crute ("Crute") was the cyclist involved in the accident with Employee on May 20, 2010. Crute was on his way to work and was cycling westbound on 5th Street in northwest D.C. According to Crute, the light was green when he attempted to make a left-hand turn on I street. He was hit by a school bus as he turned the corner. After Crute was hit, he had a terse exchange of words with Employee. Crute identified Agency Exhibit 1 as a series of photos taken at the scene of the accident. Crute did not suffer any major injuries, but an ambulance was called to the scene. He stated that Agency paid him money to help replace his cell phone that was broken when Employee hit him with the bus. According to Crute, Employee did not have the right-of-way when the accident occurred.

Janice Waters Tr. pgs. 20-37

Janice Waters (“Waters”) has been employed by OSSE since 2006 and is responsible for transporting special needs students to and from school. She also supervises bus dispatchers, drivers, attendants, and managers. Waters identified Agency Exhibit 2 as an investigative report from one of OSSE’s investigators. Investigative reports are generated as a result of investigations into incidents or accidents involving OSSE school buses. A Complaint Investigation was conducted on May 10, 2010, after Employee allegedly hit a pedestrian while driving a school bus. When bus drivers are involved in an accident, they are instructed to immediately stop the vehicle, remove the key from the ignition, and check to make sure if any passengers are on the bus. If there are injuries, the driver must call 911. If there are not any injuries, the driver should contact OSSE’s dispatcher to report the location and nature of the incident, including the names of any student(s) or other person(s) involved. After accidents occur, bus drivers are required to take a random drug and alcohol test.

Waters identified Agency Exhibit 3 as the manual that governs OSSE’s Operating Policies and Procedures. According to Agency policy, bus drivers are required to provide safe and timely operation of the bus, and must fully comply with all traffic laws and regulations. They must also take all safety precautions and implement all safety procedures based on their training.

According to Waters, the Collective Bargaining Agreement (“CBA”) between the American Federation of State, County and Municipal Employees (“AFSCME”) and OSSE contains guidelines for discipline and adverse actions. Article 5 provides that:

“An employee may be immediately suspended pending an investigation and/or may be terminated upon the first offense if the Division of Transportation has reasonable cause to believe that the employee has engaged in behavior or conduct that presents a threat to the efficiency or discipline of the public school system; threatens or may threaten the public health, safety and welfare. Any employee charged with committing a crime may be suspended immediately pending a complete investigation of this matter.”

Waters stated that a bus driver would be terminated if they hit a pedestrian or someone on a bus or motorized wheelchair and it was determined that they were negligent.

*Employee’s Case-in-Chief***Bogale Demissie Tr. pgs. 38-57**

Bogale Demissie (“Employee”) testified that he was driving a bus for OSSE on May 10, 2010. Employee stated that he did not hit Crute or his bicycle. According to Employee, the police spoke with both him and Crute following the accident; however, Crute failed to provide any evidence that Employee actually struck him with the school bus. Employee was involved in one accident prior to May 10, 2010, but it was determined that he was not at fault.

When questioned by Agency, Employee admitted that he saw Crute on his bicycle because he was the only person crossing through the intersection. Employee stated that the sun was in his eyes, but he did not believe that the bus actually made contact with Crute. He did not see Crute fall; however, a passerby flagged Employee down and said “Don’t move the bus. Don’t move the bus. Someone’s fell down on the—on the floor, on the ground. So don’t move the bus.” Employee subsequently parked the bus and got out.

The police issued Employee a citation for failure to yield at the scene of the accident and a hearing was held before the Department of Motor Vehicles (“DMV”) on July 19, 2010.¹ Employee believed that the infraction was dismissed because he received a refund of the \$150.00 ticket (and \$50.00 fine). However, Employee presented documentation from the DMV, which stated that the money was refunded because the traffic appeals board administratively cleared the ticket since the case was not decided within one year of the appeal filing date.²

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

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.

In accordance with Section 1651(1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3(e) of the District Personnel Manual (“DPM”) defines cause to include “Neglect of Duty: Failure to follow instructions or observe precautions regarding safety.”

After reviewing the documentary and testimonial evidence submitted throughout the course of this appeal, I find that Agency has met its burden of proof in establishing that Employee’s actions on May 10, 2010 constituted a neglect of duty. At the time of the accident, Employee was traveling eastbound E Street, approaching 6th Street, N.W. As Employee entered the intersection to make a left turn, he noticed that a pedestrian cyclist (Crute) had fallen in front of his bus.

¹ Employee Exhibit 1. The hearing examiner determined that Employee failed to yield the right of way to a bicycle, causing an accident at 6th and E Streets in Northwest D.C.

² *Id.*

Employee argues that he did not physically hit anyone with the bus, and that Crute fell off his bicycle in front of the bus. However, there is substantial evidence in the record to support a finding that Employee failed to yield to Crute when he entered the intersection of 6th Street and E Street. Employee's failure to observe proper safety precautions resulted in Crute being struck by the school bus that he was operating. After observing Crute's disposition and demeanor during the Evidentiary Hearing, I find that he provided truthful testimony and there is no *credible* reason to question the veracity of his statements regarding the May 10, 2010 accident. Moreover, the witness statements contained within Agency's Complaint Investigation Report corroborate Crute's version of events.³ It should be noted D.C. Department of Motor Vehicles held an administrative hearing on July 19, 2010, after Employee was issued a citation for failure to yield to a pedestrian. The hearing record reflects the following findings of fact and conclusions of law:

“District of Columbia law establishes regulation for right-of-way at and between intersections. The driver of a vehicle intending to leave a public roadway by turning left between intersections shall yield to the right-of-way to any vehicle approaching from the opposite direction that is so close as to constitute an immediate hazard (DCMR Title 18 section 2207.4). When two (2) vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. (Title 18 DCMR section 2208.1)...Respondent is liable for the violation. Points are assessed.”⁴

Employee's failure to yield to Crute was also a violation of Agency's written policies and procedures. Section 201.2 of OSSE's Policies and Procedures Manual requires that all bus drivers “comply fully with all traffic laws and regulations.” Drivers must also “take all safety precautions and implement all safety procedures and skills for which they have been trained.”⁵ Employee believes that he was not responsible for the accident because the citation fine he paid to the DMV was refunded to him on April 29, 2013. However, the citation was administratively cleared by the DMV because the case was not decided within one year of the appeal filing date; not because the citation was dismissed on the merits. Based on the foregoing, I find that Employee failed to observe the required safety precautions on May 10, 2010, and that his actions resulted in him striking Crute with the school bus. Employee's failure to yield to a pedestrian was therefore a neglect of his duty to comply with all traffic laws and regulations. As such, I find that Agency has met its burden of proof with respect to the Neglect of Duty charge.

Whether the penalty was appropriate under the circumstances.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted

³ See Agency Exhibit 2.

⁴ Employee Exhibit 1. Case No. C1020000525.

⁵ *Id.*

to the agency, not this Office.⁶ Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."⁷ When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."⁸

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."⁹ The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of "Neglect of Duty: Failure to follow instructions or observe precautions regarding safety" is reprimand to removal.

In this case, I find that Employee's failure to observe proper safety precautions constituted a neglect of his duty as a bus driver. I further find that Agency acted reasonably within the parameters established in the Table of Penalties, and that it did not abuse its discretion in choosing the penalty of termination. Accordingly, Agency's decision to terminate Employee is upheld.

ORDER

It is hereby **ORDERED** that Agency's action is **UPHELD**.

FOR THE OFFICE:

Sommer J. Murphy, Esq.
Administrative Judge

⁶ See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).

⁷ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

⁸ *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

⁹ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).