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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 1601-0071-14
KEVIN BRYANT, JR.,)	
Employee)	
)	Date of Issuance: July 31, 2015
v.)	
)	
DEPARTMENT OF PUBLIC WORKS,)	
Agency,)	
)	
)	
)	Arien P. Cannon, Esq.
)	Administrative Judge

Constance Pate, Employee Representative
Charles Wharton, Employee Representative
Eric Huang, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Kevin Bryant (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on April 15, 2014, challenging the Department of Public Works’ (“Agency”) decision to remove him from his position as a Motor Vehicle Operator. Employee was terminated for “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically: Neglect of Duty—failure to maintain a valid driver’s license.”¹ Agency filed its Answer on May 19, 2014. I was assigned this matter on November 7, 2014.

A Status Conference was convened on February 25, 2015, where both parties were present. It was determined that there were no material issues of fact and the parties were ordered to submit briefs on the issues. Both parties submitted their briefs accordingly. The record is now closed.

¹ See DCMR § 1603.3(f)(3); Agency Answer, Tab 22 (May 19, 2014).

JURISDICTION

This 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 the penalty of removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.² “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.

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.³

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency’s adverse action was taken for cause

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.

² 59 DCR 2129 (March 16, 2012).

³ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

Chapter 16, Section 1603.3 of the District Personnel Manual (“DPM”) sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Here, Employee was terminated under Section 1603.3(f)(3): Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations; specifically: Neglect of Duty—failure to maintain a valid driver’s license.

The facts of this case are largely undisputed. Employee asserts that because he was granted a reasonable accommodation under the American with Disabilities Act (“ADA”), and it was recommended that all of his driving requirements be removed, he did not have to maintain a valid driver’s license at the time of his termination. Agency asserts that the timing of the ADA recommendation does not negate the fact that Employee failed to maintain a valid driver’s license and operated government vehicles with a revoked license.

Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations; specifically: Neglect of Duty—failure to maintain a valid driver’s license.

The District’s personnel regulations provide, in part, that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.⁴ Agency’s neglect of duty charge is a result of Employee’s “failure to maintain a valid driver’s license.”⁵

In 2001, Employee was promoted to a Motor Vehicle Operator and was required to possess a valid Motor Vehicle Operator’s Permit.⁶ On April 20, 2013, Employee’s driver’s license was revoked for “more than or equal to 12 points.”⁷ On June 26, 2013, Agency became aware that Employee did not possess a valid driver’s license through its routine employee license validation process. By letter dated August 8, 2013, Agency gave Employee thirty (30) calendar days to remedy his license or be subjected to disciplinary action.⁸

On August 26, 2013, Employee requested Family and Medical Leave Act (“FMLA”) leave. Employee stated that he was required to be “off and [was] unable to perform [his] assigned tour of duty” for approximately ninety (90) days as a result of a medical illness. Agency’s Director approved Employee’s FMLA leave application on August 29, 2013. On September 10, 2013, two weeks after Employee submitted his FMLA application, Employee, through his union representative, submitted a request to be demoted to a Sanitation Worker because his medical conditions prevented him from driving.⁹ This request was denied.¹⁰ While Employee seems to argue that he was wrongfully denied a demotion, Agency was under no obligation to grant Employee’s demotion request.

⁴ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

⁵ Agency’s Answer, Tab 22 (May 19, 2014).

⁶ *Id.*, Tab 6.

⁷ *Id.*, Tab 16.

⁸ *Id.*, Tab 17.

⁹ *Id.*, Tab 18.

¹⁰ *Id.*, Tab 19.

Subsequently, Employee requested a reasonable accommodation under the ADA. Agency's Office of General Counsel reviewed Employee's ADA request, and by letter dated February 21, 2014, recommended that Employee be given "temporary reasonable accommodation of not being required to drive while performing his duties."¹¹ On February 28, 2014, Agency issued its Notice of Final Decision removing Employee from his position as a Motor Vehicle Operator.¹²

Here, Employee's license was revoked on April 20, 2013. Employee's primary argument is that he was terminated after being afforded a "reasonable accommodation" which removed the requirement of driving while performing his duties. Although Agency's General Counsel's Office recommended that Employee be granted temporary accommodation of not being required to drive, this does not negate the fact that Employee's driver's license was revoked from April 20, 2013, through the time Agency issued an Advance Written Notice of Proposed Removal on February 7, 2014. When Agency discovered Employee's failure to maintain a valid driver's license on June 26, 2013, he had been operating government vehicle unlawfully for more than two months. From April 2013 until December 2013, Employee made no request for FMLA leave, no request for a demotion, and no request for reasonable accommodations under the ADA. Had Employee notified Agency of his medical conditions prior to it discovering that his license was revoked, Agency's duty to withhold discipline may have been altered. Once Agency discovered that Employee had failed to maintain a valid driver's license, only then did Employee make a reasonable accommodation request under ADA. This request did not abrogate Employee's duty to maintain a valid driver's license from April 20, 2013, through the time he requested reasonable accommodations under the ADA. Employee did not request a reasonable accommodation until nearly eight (8) months after his license was revoked. The threshold question is whether Agency had cause to take disciplinary action against Employee for neglecting his duty to maintain a valid driver's license. I find that Agency has satisfied its burden that Employee failed to follow instructions and failed to maintain a valid driver's license as required by his position description.¹³

Whether the penalty of removal was appropriate under the circumstances

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.¹⁴ This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.¹⁵ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.¹⁶

The Table of Appropriate Penalties, as set forth in Chapter 16 § 1619.1(6), of the District Personnel Manual, provides that the appropriate penalty for a first time offense of neglect of duty

¹¹ *Id.*, Tab 28.

¹² *Id.*, Tab 22.

¹³ *Id.*, Tab 6.

¹⁴ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

¹⁵ See *Id.*

¹⁶ See *Id.*

ranges from a reprimand to removal. Here, the undersigned finds that Employee neglected his duty by failing to maintain a valid driver's license. I find that Agency did not exceed the limits of reasonableness with the penalty imposed against Employee. Accordingly, I find that Agency's penalty of removal was appropriate based on Employee's neglect of duty.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's decision to terminate Employee is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge