THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
METRICE Y. JONES	)	OEA Matter No. 1601-0077-09
Employee	)	
	)	Date of Issuance: January 7, 2010
v.	)	
	)	Rohulamin Quander, Esq.
D.C. PUBLIC SCHOOLS	)	Senior Administrative Judge
DIVISION OF TRANSPORTATION	)	
Agency	)	
	)	

Frank McDougald, Esq., Counsel for Agency
Metrice Y. Jones, *pro se,* Employee

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Metrice Y. Jones ("Employee"), a former permanent part time Motor Vehicle Operator, DS 7, Step 6, with the D.C. Public Schools' Division of Transportation (the "Agency") was terminated effective December 30, 2008, for alleged, "Unprofessional behavior toward [sic] a co-worker (abusive language)" and was discharged in accordance with the provisions of the D.C. Personnel Manual, Chapter 16, § 1603.3.[1] This case was assigned to me on August 19, 2009. I convened a Pre-Hearing Conference on September 15, 2009, to give consideration to the pleadings filed through that date, to consider whether to conduct an evidentiary hearing, and to determine if this matter could potentially be resolved through mediation.

Agency, which bears the burden of proof in this termination matter, proceeded on the record first, and stated, through its designated counsel of record, that the basis for Employee's termination was her alleged misconduct (abusive language towards a fellow co-worker) on November 21, 2008, while operating an Agency school bus. Further, the incident complained of was witnessed by two Agency staff members and at least one child who was a passenger and witness to the verbal incident. Agency's representative

[1] Employee's termination was based upon discourteous treatment and inter-action with another employee, which would appear to be included in DPM 1603.3 (g), "Any other on-duty or employment-related reason for coercive or adverse action that is not arbitrary or capricious."

proffered that the decision to terminate Employee was based upon two prior incidents of imposed job-related discipline, including an alleged disorderly conduct which resulted in a two-day suspension in January 2006.

Employee expressed total surprise at the assertion that there had been a prior disciplinary action taken against her on January 5, 2006, including the imposition of an alleged two-day suspension. Denying the allegation, Employee challenged Agency to establish that she had been disciplined for such an alleged incident.[2] Further, Employee, while admitting that her behavior on November 21, 2008, was inappropriate, questioned how Agency, under the guise of the official progressive discipline policy, could terminate her for misconduct of a relatively minor nature – abusive language – based in major part upon a prior incident that never occurred in the first place.

Caught by surprise, Agency's counsel was unable to provide any documentary evidence to counter Employee's assertion that there never was any January 2006, disciplinary action. As the presiding Administrative Judge, I directed Agency to produce documentary evidence within three days of the alleged January 10-11, 2006 disciplinary action. Agency was unable to provide any document within that time, but requested an extension of time to conduct more in-depth research into the alleged matter, including the opportunity to interview personnel who might have personal knowledge or recollection about that alleged disciplinary action. I accorded Agency 30 days to provide the information, and then briefly extended the time again.

On November 30, 2009, Agency filed *Agency's Submission.* In the submission, Agency noted as follows:

> . . . the Administrative Judge directed the Agency to produce evidence to support the suspension of Employee for the period January 10-11, 2006. Agency has been unable to produce any evidence that demonstrates Employee was suspended for the period January 10-11, 2006.

Agency then concluded its submission by asserting that Employee's termination should still be upheld, based upon her admitted misconduct on November 21, 2008, and the prior four day suspension that was imposed effective March 24, 2008. This record closed on November 30 2009, upon receipt of *Agency's Submission.*

CHARGES AND SPECIFICATIONS

On December 15, 2008, Agency issued a letter of proposed termination to Employee, based upon her alleged unprofessional behavior (abusive language) to a co-worker. The letter stated, *inter alia* the following:

> This letter is to inform you of your proposed termination from your position of Motor Vehicle Operator, with the Division of Transportation

[2] Employee never indicated whether there had been any incident which led to the supposed discipline in January 2006, only that there was never any January 2006 disciplinary action taken against her.

> (DOT), Office of the State Superintendent for Education (OSSE), for the following causes: 1. Unprofessional behavior toward [sic] a co-worker (abusive language) [.] On Thursday, November 21, 2008, you verbally abused both of your attendants while serving your route. Both individuals have submitted evidence confirming your behavior. In fact, during a meeting with the Transportation Administrator, on Wednesday, December 10, 2008, you admitted to the conduct. To make matters worse, you exhibited this unprofessional and abusive behavior while a child we service was on the bus.
>
> Unprofessional and abusive language towards your co-workers or our clients is unacceptable and will not be tolerated. Additionally, according to our records, you have been suspended on two separate occasions for similar behavior. Therefore, based on all of the above, you are being terminated. . . . [T] he effective date of your removal will be Tuesday, December 30, 2008.

Although the letter stated that it was a "proposed termination" notification, and likewise contained an incomplete notice of Employee's appeal rights, the content of the document clearly reflected that it was intended to be a final notice of termination. Specifically, and despite the fact that a *proposed* termination is not a *final* determination, the latter stated, "Therefore, . . . you are being terminated. . . . [T] hus, the effective date of your removal will be Tuesday, December 30, 2008."

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

Whether the Agency's decision to terminate Employee was supported by substantial evidence, without harmful procedural error, in accordance with applicable laws or regulations.

A/ Agency's Case

On November 21, 2008, Employee, a Motor Vehicle Operator with the Agency, while operating one of Agency's school buses, got into a heated argument with one of her co-workers, a bus monitor. The basis of the argument was Employee's election to make an unannounced detour in the driving route while returning children to their homes. Bus Monitors supervise the children while on the bus and also escort them to and from their homes as they enter and exit the school bus. During the argument, Employee used abusive and profane language. In addition to the affected co-worker, the entire incident was witnessed by a child passenger and another co-worker, who recorded the entire incident on his cell phone. The affected co-worker reported the incident. Both she and the co-worker witness submitted written statements, which formed the underlying basis for the complaint that resulted in the decision to terminate Employee from her position.

Agency filed a Motion to Dismiss the appeal, noting that Employee was one day late in filing her Petition for Appeal. After evaluating the record to date, this Administrative Judge (the "AJ") determined that the Motion could not be granted as the 30-day notice requirement of Agency's termination notice was defective, having failed to advise Employee that any appeal filed must be filed with the Office within 30 days of the effective date of Employee's termination.

The offense at hand represented Employee's third offense of a related nature.[3] Specifically, she was cited for misconduct and disciplined with a two-day suspension on January 10-11, 2006, for Disorderly Conduct (abusive language), and again with a four-day suspension for March 24-28, 2008, (Insubordinate Behavior – abusive language). Under the concept of progressive discipline, this is Employee's third offense. The Table of Penalties, codified at § 1619.6 (d), Insubordination, and § 1619.7, which includes non *de minimis* offenses, including arguments, each provide for a suspension of up to 45 days, to removal upon the commission of the third offense.

Considering the matter at hand, and given that this is Employee's third offense within the present three-year period, and her second offense within the last several months, despite the short terms suspensions that she has endured in the past, the appropriate action at this time is not a longer suspension, but termination.

B/ Employee's Case

[3] At the time that Agency's counsel proffered this statement, September 15, 2009, it had not yet been determined that the alleged first disciplinary action of January 2006, could not be established. That determination was subsequently filed with the Office as a component of *Agency's Submission,* dated November 30, 2010.

During the Pre-Hearing Conference, Employee admitted that she had committed both the March 2008, and November 2008, offenses and apologized to Agency's counsel for her frustration and inappropriate behavior on two prior occasions. However, she vigorously contested Agency's assertion that Employee had been disciplined with a two-day suspension on January 10-11, 2006, asserting that no such disciplinary action ever occurred.[4] Further, Employee contested the appropriateness of imposing maximum discipline, i.e., termination, noting that on both the March 2008, and November 2008, occasions, she did engage in spirited conversations that became somewhat out of hand and abusive in both words and tone.

In conclusion, Employee challenged Agency's counsel to provide documentation in support of Agency's assertion that there was a January 2006, disciplinary action. Agency requested that the record be left open for a brief time, to allow it to conduct some research into the question of whether Employee was subjected to disciplinary action on January 10-11, 2006.

FINDINGS OF FACT, LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Agency's initial position was that Employee had a history of committing verbal abuse that included insubordination to supervisors and arguing and abusive language to co-workers. Under the standard procedure of Agency's authority to impose progressive discipline in an effort to assist an employee to improve her conduct, Agency attempted on at least two prior occasions to help Employee learn from her past experiences. However, the efforts to get her to take control of her personal behavior on the job in her interactions with supervisors and co-workers have not been successful. Further, although Employee had been a valued permanent part-time employee since 2001, her conduct of late proved to be problematic.

Upon Agency's request during the September 15, 2009, Pre-Hearing Conference, I left the record open so that research could be conducted, including reviewing her official personnel file and interviewing a specific individual, whose name and relationship to this case was not made a matter of record. After about 30 days, Agency's counsel contacted me and advised that Agency was still searching its records, seeking to secure documentation to support the alleged January 2006, disciplinary action.

Subsequently, on November 30, 2009, Agency filed *Agency's Submission*. Agency stated in its submission:

> Agency has been unable to produce any evidence that demonstrates Employee was suspended for the period January 10-11, 2006. However, Agency contends that the termination of Employee should be upheld based upon the admitted misconduct of Employee that occurred on November 21, 2008, and the suspension of Employee for the period March 24-28, 2008.

[4] See Footnote #2, *Supra*.

Employee admitted that her behavior on November 21, 2008, was inappropriate, and apologized to Agency's representative. Further, she also acknowledged that there was one prior incident of discipline, and that she sustained a short suspension in March 2008. However, Employee disputed Agency's assertion that she had been disciplined for cause in January 2006, and challenged Agency to produce documentation.

Employee concluded her brief presentation by urging that termination of a permanent part-time employee for one minor incident of insubordination, and now for the admitted use of abusive language, while not excusable, was an excessive punishment. Further, under the Table of Penalties, which is Agency's official guide for what level of progressive discipline is appropriate and should be imposed for certain types of offenses, arguing and abusive or offensive language carries a potential enhanced suspension for the second offense, but does not include termination.

Pursuant to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), Agency has the burden of proof in adverse action appeals. OEA Rule 629.1 requires that the burden be met by "a preponderance of the evidence," as defined on Page 3, above. In sum, after carefully considering all of the evidence, documentary and testimonial, and all of the arguments presented by the parties, the AJ concludes that Agency did not meet its burden of proof by a preponderance of the evidence. Agency lacked sufficient cause for removal, and the penalty of termination must be vacated.

Although the Notice of Proposed Termination letter cited two alleged previous suspension to support Employee's termination, the strength of Agency's case faded once it was determined that there is no evidence to support a finding that there was a January 2006, disciplinary action. While I note that Agency's initial *Answer* included a letter of discipline from Joy Binns-Grayton, Assistant Terminal Manager, which recited that there would be a two-day suspension for supposed prior disorderly conduct, there is no evidence in either this record or Employee's official personnel file that said two-day disciplinary action was ever taken.[5] As such, this letter has no status before this forum, and remains but an anomaly that appears to have never been implemented. As such, both the letter and any underlying circumstances or event that might have led to its being created, are totally without standing.

The Merit Systems Protection Board, the Office's federal counterpart, has held that it would "take a more active role" in determining the reasonableness of a penalty imposed in cases where the Agency fails to support all aspects of a charge against an employee. See, *Vigil v. Dept. of Veterans Affairs*, 46 M.S.P.R. 57, 59 (1990). The Office has seen fit to follow this same guideline on occasion. See, *Employee v. Agency*, OEA Matter No. 1601-0052-82 (1987) (Mitigating a penalty from 14 to 10 days), and *Palmer v. D.C. Metropolitan Police Department*, OEA Matter No. 0048-05, March 6, 2007, ___ D.C. Reg. ___ (reducing a 35-day suspension to 13 days).

Further, with regard to the penalty of removal, this Office has long recognized that an agency has the primary responsibility for managing its employees, and that part of that responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v.*

[5] See Agency submission at Tab #4.

Metropolitan Police Department, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __D.C. Reg. __. In this matter, the AJ cannot substitute his judgment for that of Agency when determining if the penalty should be sustained. Rather the review is limited to determining that "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty should not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review, 32* D.C. Reg. 2915 (1985). Although Agency argues that it presented sufficient evidence to establish that its action was not arbitrary or capricious, and likewise, no error of judgment, the AJ finds that termination of this Employee was too harsh a penalty, and concludes that Agency's actions must be reversed. The AJ cannot sustain the arbitrariness of Agency's decision in this matter, as the record lacks a sufficient evidentiary basis for the ultimate penalty of termination.

The Office has on occasion determined that an Agency-imposed penalty should be reversed, and reduced to something less severe.[6] See *Palmer v. D.C. Metropolitan Police Department,* OEA Matter No. 0048-05, March 6, 2007, ___ D.C. Reg. ___ (reducing a 35-day suspension to 13 days). That situation is applicable if the AJ finds Agency's initial disciplinary action to be arbitrary, excessive, or otherwise outside of the realm of managerial discretion, in terms of the character of the offense and the nature of the discipline imposed. Generally what happens is that an Agency-implemented termination or extended suspension may be reduced, with Employee reinstatement or the number of days of the extended suspension lessened, provided the AJ first determined that "cause" for disciplinary action still does exist, which would serve an any underlying basis for the imposition of some disciplinary action.

I find that although Agency has not documented that it engaged in sufficient progressive discipline over time to support the implementation of this termination action, Agency still had "cause" to impose some level of discipline upon Employee for her highly inappropriate conduct. Employee admitted to her misconduct, and apologized to both the AJ and Agency's representative for her misbehavior on that date. Therefore, while I will vacate Agency's action of termination from employment, I elect to impose a nine (9) day suspension upon Employee for her conduct. Further, I warn Employee that

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[6] In an earlier appeal, the Board of this Office issued an *Opinion and Order on Petition for Review* on January 26, 2007, upholding the determination of the Office to reduce the removal of an employee to a suspension. In the matter of *Robert Aronson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter 1601-0128-99, the Board found that the employee's ten (10) year history with no previous adverse actions and his strong potential for rehabilitation supported that decision. Agency sought review of the *Opinion and Order on Petition for Review* before the Superior Court of the District of Columbia (*District of Columbia Fire and Emergency Medical Services Department v. Office of Employee Appeals*, Civil Action No. 2007 CA 001923 P(MPA). On April 22, 2008, the Honorable Judith E. Retchin, Associate Judge of the Superior Court of the District of Columbia, issued an Order affirming the *Opinion and Order* of the Board of the Office of Employee Appeals.

her history of two incidents of inappropriate conduct within a short time frame possibly underscores the presence of anger-related issues that perhaps need to be addressed, if she is going to continue to be a valued worker.

Cause Seven (7) in the Table of Penalties, that includes arguing and the use of abusive and offensive language, only allows termination if the affected employee has three or more similar prior incidents. The penalty for two or fewer prior incidents is suspension or reprimand. I conclude that, without prior documentation of discipline to support it, the termination of this Employee, based upon two documented offenses, cannot be sustained. Agency's action of terminating Employee must be reversed.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's disciplinary action taken against Employee is vacated, and Agency's action of terminating Employee as an Motor Vehicle Operator is REVERSED; and
2. Agency shall immediately reinstate Employee to her last position of record, and reimburse Employee all back-pay and benefits lost as a result of her removal, and adjust her official personnel file, to reflect no break in service, and to remove any adverse information indicative of her having been terminated;
3. A penalty of nine (9) days suspension is imposed to be reflected in the form of withheld salary and benefits for the suspension period, plus appropriate reflection in Employee's office personnel file; and
4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/ s /
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge