THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SYLVESTER BUTLER,	)	OEA Matter No. 1601-0161-11
Employee	)	
v.	)	Date of Issuance: January 22, 2015
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Sylvester Butler ("Employee") worked as a Property Control and Disposal Specialist with the District of Columbia Department of Public Works ("Agency"). On July 25, 2011, Agency issued a Notice of Final Decision to Employee. The notice provided that Employee was being removed from his position for "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 motor vehicle operator's permit)."[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 11, 2011. He provided that he sought and obtained help with his drinking problem. Hence, Employee requested that OEA review his removal action.[2]

Agency filed its Response to Employee's Petition for Appeal on September 15, 2011. It

[1] *Agency's Answer,* Tab #10 (September 15, 2011).
[2] *Petition for Appeal,* p. 4-5 (August 11, 2011).

argued that as a Property Control and Disposal Specialist, Employee's duties included driving passenger vehicles to transport customers to their vehicles in the impound lot; driving vehicles to be inspected or to receive preventative maintenance; and retrieving vehicles in the lot. Therefore, it contended that in order for Employee to properly execute his duties, he was required to possess and maintain a valid driver's license.

Agency provided that, in accordance with Article 24, Section C of the Collective Bargaining Agreement ("CBA"), any employee's failure to maintain a license can lead to disciplinary action or termination. It asserted that Employee's license was revoked for seven months because he was involved in an accident which resulted in five citations.[3] Agency contended that although Employee attempted to obtain a limited occupational license, his request was denied.[4] Consequently, Employee was removed from his position for neglect of duty, failure to maintain a valid driver's license. Agency reasoned that termination was appropriate under the Table of Appropriate penalties, and it considered the *Douglas* factors.[5] Therefore, it

[3] The citations were failure to control speed to avoid collision; failure to report accident; operating with torn fender; operating a vehicle in an unsafe medical condition; colliding; and driving under the influence of alcohol, first offense. These citations resulted in Employee being assessed nineteen points on his driving record.

[4] According to Agency, the Department of Motor Vehicles ("DMV") denied Employee's request because he accumulated nineteen points on his driving record. It noted that sixteen points is the maximum you can have and still qualify for a limited occupational license. *Agency Answer*, p. 2 (September 15, 2011).

[5] The *Douglas* factors are provided in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The Court in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), provided what an agency should consider when determining the penalty of adverse action matters:

(1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) the employee's past disciplinary record;
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) consistency of the penalty with any applicable agency table of penalties;
(8) the notoriety of the offense or its impact upon the reputation of the agency;

requested that OEA sustain the termination action.[6]

During a Pre-hearing Conference conducted by the OEA Administrative Judge ("AJ"), Employee asserted that there were mistakes on his driving record that, if corrected, would have allowed him to obtain a limited occupational license. Consequently, the AJ requested that both parties submit briefs addressing the erroneous information listed on Employee's driving record.[7] In his brief, Employee provided that errors were corrected by the Department of Motor Vehicles as reflected on an October 2011 printout. According to Employee, the corrected printout reflects that he only had fourteen points assessed. Therefore, Employee contended that he would have qualified for a limited occupational license because his points did not exceed sixteen.[8]

On May 31, 2013, Agency filed its brief. It explained that there was nothing in the Department of Motor Vehicles records which indicated that there was an error committed during the initial charging process. It provided that the difference between the two records that Employee provided amounted to five points. However, Agency argued that the difference could be attributed to a remedy Employee sought himself; the result of litigation; or an act that occurred during the normal course of business. It contended that because there was no evidence from the Department of Motor Vehicles regarding the correction of errors or no date that such action took place, then there was no way to conclude that an error actually occurred. Therefore, Agency requested a summary judgment because Employee was removed for cause, and the

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(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(10) potential for the employee's rehabilitation;
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[6] *Agency Answer* (September 15, 2011).
[7] *Post Pre-hearing Conference Order* (April 26, 2013).
[8] *Memorandum of Law and Facts for Appellant Sylvester Butler* (May 10, 2013).

penalty was appropriate under the circumstances.[9]

The AJ issued his Initial Decision on September 11, 2013. He held that without a valid driver's license, Employee was unable to perform the full duties of his position, including moving vehicles on the government's impound lot. The AJ further found that Employee did not dispute that his license was revoked. Therefore, he held that Agency had cause to charge Employee with an act or omission that interferes with the efficiency and integrity of government operations: failure to maintain a valid motor vehicle operator's permit. Additionally, the AJ ruled that removal was an appropriate penalty under the circumstances.[10]

As for the alleged driving record errors, the AJ found that Employee did not offer a date for when the error was supposedly corrected, and he provided no documents from the Department of Motor Vehicles which explained that the nineteen points on his record was in error. He found that the reason for the five-point difference in the two driving records was not clarified by Employee; consequently, it would be tenuous for him to attribute the five-point difference to an error by the DMV. Moreover, he contended that Employee failed to provide notice to Agency of any errors. Because Employee offered no proof that there were errors made known to Agency, he ruled that Agency's decision to remove Employee be upheld.[11]

Employee filed a Petition for Review with the OEA Board on October 16, 2013. He presents the same arguments made before the AJ regarding the alleged errors in his driving record and his notice to Agency of the error. Employee argues that the charge of "failure to report accident" was a five-point assessment. However, he claims that this particular offense was repealed on December 12, 2003. Finally, Employee contends that Agency should have provided alternative duties while his license was revoked. It is also Employee's position that

[9] *Agency's Reply Brief* (May 31, 2013).
[10] *Initial Decision,* p. 3-4 (September 11, 2013).
[11] *Id.,* 4-5.

Agency was required to consider a lesser penalty of disciplinary action.[12]

On December 11, 2013, Agency filed its Reply to Employee's Petition for Review. It argues that Employee offered no new evidence on Petition for Review despite. Moreover, Agency contends that Employee failed to cite to any authority regarding its requirement to consider a lesser penalty. It reasoned that because the action was taken for cause and removal was within the range of penalty, then the Petition for Review should be denied.[13]

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence or when the Initial Decision did not address all material issues of law and fact. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14]

Cause of Action

In accordance with District Personnel Manual ("DPM") § 1603.3(f)(3), Employee was removed on the basis of "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 motor vehicle operator's permit)." Agency provided that a condition of Employee's employment was to maintain a valid driver's license. It submitted Article 24, Section C of the CBA which provides that "employees shall promptly report to the appropriate

[12] *Appellant Employee Petition for Review by Appellant Sylvester Butler* (October 16, 2013).
[13] *Agency's Reply to Employee's Petition for Review* (December 11, 2013).
[14] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

personnel whenever there is a change in the status of their motor vehicle operator's license; in particular, the revocation . . . or other problem(s) affecting their ability to lawfully drive." It goes on to provide that "failure to maintain a license . . . may result in termination or disciplinary action as outlined in Chapter 16 of the District Personnel Manual."[15] Moreover, Agency submitted a copy of Employee's Position Description which clearly provided that he "must possess and maintain a valid driver's license."[16] The record includes an Official Order of Revocation from the Department of Motor Vehicles which provided that Employee's driver's license was revoked for seven months effective June 1, 2011.[17] Therefore, Agency adequately proved that Employee neglected his duty to maintain a valid motor vehicle operator's permit.

Error in Employee Driving Record

Although Agency proved the neglect of duty charge against Employee, he argues that he should not have lost his position because the Department of Motor Vehicles committed an error when assessing the points against his license. Employee contends that the charge of "failure to report accident" was repealed on December 12, 2003. However, as he did before the AJ, Employee failed to provide any proof that the alleged repealed action would have impacted Agency's removal action. Employee focuses on the alleged error of the number of points assessed against him to combat Agency's removal action by providing the regulation regarding Limited Occupational Licenses.[18] However, according to the regulation, there are several reasons why an applicant's appeal to the DMV could be denied.

Chapter 18, Rule 310 of the District of Columbia Municipal Regulations provides the following, as it relates to occupational licenses:

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[15] *Agency's Answer,* Tab # 2 (September 15, 2011).
[16] *Id.* at Tab # 3.
[17] *Id.* at Tab # 4.
[18] *Memorandum of Law and Facts for Appellant Sylvester Butler*, Exhibit # 4 (May 10, 2013).

> 310.1 . . . a person whose regular driver's license . . . is revoked . . . may request, in writing, that the order be modified to allow the . . . retention of a driver's license . . . on a limited basis. An examiner shall not grant the application unless the applicant demonstrates that the . . . revocation imposes an extreme hardship for which there is no practical remedy, and, in the judgment of the examiner, the safety of the public will not be impaired . . . .
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> 310.2 In order to show extreme hardship, the applicant for an occupational license must show to the satisfaction of the examiner that loss of operating privileges precludes carrying out the applicant's normal business, trade or occupation, and that driving is necessary to support the applicant and his or her family.
>
> 310.3 In considering whether a limited license can be issued in the interest of the public safety and welfare, the examiner shall determine the general good character of the applicant, the number and seriousness of the violations on the applicant's traffic record, the period of time over which violations were accumulated, the number and seriousness of violations committed by the applicant during the hours or in the area, or both, for which applicant desires the license, the ease or difficulty of enforcement of the conditions and limitations of the license, and the probable impact, so far as the examiner can determine, of the limitation on the future driving conduct of the applicant.
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> 310.7 No occupational license shall be issued to the following:
> (a) Applicants whose licenses are revoked for an offense for which revocation is made mandatory by law;
> (b) Applicants whose licenses are revoked for physical or mental reasons;
> (c) Applicants whose licenses are revoked as a result of a conviction for operating after suspension or revocation;
> (d) Applicants who have accumulated sixteen (16) points on their driving record; or
> (e) Applicants who received an occupational license within the preceding two (2) years;
> (f) A person who holds a commercial driver's license; or
> (g) A person who has been disqualified from operating a commercial vehicle pursuant to § 1306.

Employee's Official Order of Revocation from the DMV lists that the reason that his license was revoked was due to the fact that he was "convicted of driving under the influence, 1st Offense." Chapter 18, Rule 301.1 lists the causes for mandatory revocation. The rule provides

that "the Director shall forthwith revoke the license of any person upon receiving a record of such person's conviction of any of the following offenses:(a) Operating or being in control of a motor vehicle while . . . under the influence of intoxicating liquor or any drug or any combination thereof; or while the ability to operate a vehicle is impaired by the consumption of intoxicating liquor." Therefore, even if there was an error in calculating the accumulated points on Employee's driving record, his Occupational License also could have been denied in accordance with 18 DCMR 310.7(a).[19]

Additionally, as Agency provided in its brief, the change on Employee's record could have been the result of a remedy that he sought. Attached to Employee's Memorandum of Law and Facts is a receipt that he provided from the DMV. The receipt shows that on October 13, 2011, $400 was paid for the violation of "accident fail report." The receipt lists Employee's name and address.[20] Moreover, this date corresponds with the date of Employee's new driver's record printout which provides the reduction in points on Employee's record.[21] Therefore, the AJ was correct in determining that Employee failed to provide evidence to prove an actual error in the DMV's calculation.

Appropriateness of Penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985).[22] According to the *Stokes* Court,

[19] It must be noted that this Board has only considered two of the potential six reasons why the DMV could have denied Employee's provisional license. There could be other reasons that apply, of which this Board is not aware, that the examiner could have used to deny Employee's request. For example, Employee's full driving record provides previous violations. *Id.* at Exhibit # 5.
[20] *Memorandum of Points and Authorities for Appellant Sylvester Butler,* p. 22 (August 8, 2013).
[21] On July 6, 2011, Employee's driving record reflects a total of nineteen points. Then on October 13, 2011, the same day that the receipt was issued, Employee's driver's record reflected a total of fourteen points. *Id.,* 11-12 and 15-18.
[22] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No.

OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District Government employees. DPM Section 1619(6)(c) states that the penalty for the first offense of neglect of duty is reprimand to removal. Thus, it is clear that removal is an appropriate penalty, even for the first offense for this cause.

Appropriateness of Penalty

The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[23] OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[24] Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

Love went on to provide the following:

1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No.1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review (*April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[23] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[24] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

This Board believes that the AJ's ruling upheld Agency's penalty, which was within its discretion to impose. Agency properly exercised its authority to remove Employee for cause. The penalty of removal was within the range allowed by the regulation and the CBA. Thus, the penalty was appropriate.

Consideration of Relevant Factors

The OEA Board held in *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), that an Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[25] In the current matter, the evidence did not establish an abuse of discretion by Agency. As presented above, the penalty for the first offense of neglect of duty is removal. Additionally, Agency presented evidence that it considered relevant factors as outlined in *Douglas* when arriving at the decision to remove Employee. Although it was not a requirement, the record establishes that Agency considered each of the Douglas factors before

[25] This reasoning was also presented in *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

imposing its penalty.[26] Thus, this Board cannot reverse Agency's penalty, as requested by Employee.

No Clear Error of Judgment

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was a valid penalty under the circumstances. There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of removal. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Consequently, we must deny Employee's Petition for Review.

[26] *Agency's Answer,* p. 3-6 (September 15, 2011).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.