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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ELLA CAREY,)	OEA Matter No. 1601-0063-11
Employee)	
)	Date of Issuance: September 16, 2014
)	
OFFICE OF THE STATE)	
SUPERINTENDENT OF EDUCATION,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ella Carey (“Employee”) worked as an Operations Assistant with the Office of the State Superintendent of Education (“Agency”). On February 3, 2011, Agency issued a notice to Employee informing her that she was terminated from her position. The effective date of the termination was February 18, 2011.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on February 7, 2011. She also filed an addendum to the Petition for Appeal on February 22, 2011. The addendum provided that on February 3, 2011, Agency informed her that she was terminated because she left a child in a hallway and failed to inform Agency’s Parent Call Center of a late bus route.² Employee submitted that her termination was unwarranted and that her rights were

¹ *Petition for Appeal*, p. 7 (February 7, 2011).

² Employee explained that on December 13, 2010, she volunteered her assistance as a Bus Attendant after she was

violated because she did not receive a hearing. Employee provided that she was not a Bus Attendant and did not receive training for the Bus Attendant position. Furthermore, she argued that the manager did not explain her alleged misconduct, and there was no investigation of the incident. Therefore, Employee requested reinstatement to her position and an opportunity to meet with Agency to discuss the allegations.³

In response to the Petition for Appeal, Agency submitted that Employee failed to follow instructions, observe safety precautions, and execute her assigned tasks in accordance with its procedures. It explained that on December 13, 2010, while substituting for a Bus Attendant, Employee failed to deliver a child to a responsible adult. Agency stated that Employee's "negligence placed the child in a potentially dangerous situation by her failure to follow [its] procedure for drop offs." Accordingly, it requested that the Petition for Appeal be denied.⁴

Thereafter, the matter was assigned to an OEA Administrative Judge ("AJ") who scheduled a Pre-hearing Conference which required the parties to submit Pre-hearing Statements.⁵ In its Pre-hearing Statement, Agency asserted that it terminated Employee for neglect of duty and cited the Department of Transportation's Policy and Procedures section 201.1.⁶ Agency subsequently submitted an additional Pre-hearing Statement that asserted that it considered termination rather than suspension because Employee's past performance history was unsatisfactory.⁷

Following an evidentiary hearing and the submission of closing arguments,⁸ the AJ

informed of a shortage of afternoon Bus Attendants.

³ *Petition for Appeal*, p. 3 (February 7, 2011) and *Addendum to the Petition for Appeal* (February 22, 2011).

⁴ *Agency's Response to the Petition for Appeal*, p. 2-3 (April 1, 2011).

⁵ *Order Convening a Pre-hearing Conference* (September 13, 2012).

⁶ *Office of the Superintendent of Education Pre-hearing Statement* (October 15, 2012).

⁷ Agency also explained that it was crucial that the child be delivered to a parent or guardian because it transported students who had special needs. *Office of the State Superintendent of Education Pre-hearing Statement* (November 6, 2012).

⁸ In Agency's closing argument, it stated that Employee knew the requirements of the Bus Attendant position

issued her Initial Decision on April 10, 2013. First, the AJ found that § 203.3(E) of Agency's Policies and Procedures Manual did not apply to Employee because her official title was Operations Assistant, not Bus Attendant.⁹ She held that Employee's job description did not require her to have specific knowledge of the duties of the Bus Attendant position.¹⁰ Thus, the AJ concluded that Agency should not have held Employee to the same standards as Bus Attendants. Accordingly, she ruled that Agency did not meet its burden of proof; that it did not have cause to remove Employee; that it abused its managerial discretion; and that its removal was an error of judgment. Therefore, Agency's action was reversed, and it was ordered to reinstate Employee to her prior position of record or a comparable position with all back-pay and benefits lost as a result of the removal.¹¹

Agency filed a Petition for Review with the OEA Board on May 15, 2013. It argues that the AJ's decision was based on an erroneous finding that its policy did not apply to Employee because she was acting as a Bus Attendant; the findings were not based on substantial evidence; and the decision did not address all the issues of law and fact. Agency explains that “. . . it is not appropriate for a hearing officer to revise [Department of Transportation] policies and procedures by finding a substitute bus attendant is held to a lower standard of conduct than a full

because of the policies and procedures manual and her previous positions. It reasoned that although she was not a Bus Attendant, she was not precluded from being disciplined. It considered that Employee received progressive discipline in the past and understood from a previous demotion letter that another disciplinary action could result in termination. Finally, it explained that the termination was reasonable because Employee knew its protocol for when a parent was not home. *Office of the State Superintendent of Education Closing Argument*, p. 3-6 (March 28, 2013).

Employee's closing argument provided that she did not violate any of Agency's policies. She contended that she was a victim of ongoing harassment from management. Employee claimed that she followed the protocol for the Bus Attendant position although she was not officially trained on dropping off and picking up children. *Employee's Closing Argument* (March 29, 2013).

⁹ Section 203.3(E) discusses Agency's policies and procedures for Bus Attendants dropping off students.

¹⁰ Furthermore, the AJ found that Agency failed to prove that Employee was trained on the duties of a Bus Attendant. *Initial Decision*, p. 6 (April 10, 2013).

¹¹ *Id.* at 7.

time bus attendant.”¹² Agency submits that if a Bus Attendant is absent, the Operations Assistant must step into their role, per its practices. Further, it provides that Employee was aware of its requirement that a child must be delivered to a responsible adult. Lastly, Agency provides that the AJ did not consider that Employee received progressive discipline during her tenure and that her previous demotion letter warned that another disciplinary action would result in removal. Thus, it argues that the termination action was warranted. Accordingly, Agency requests that the AJ’s decision be overturned.¹³

Employee filed her Response to the Petition for Review on June 17, 2013. She argues that Agency provided false statements in order to discredit her submissions to the AJ. She provides a number of rebuttals to Agency’s claims.¹⁴ Ultimately, Employee believes that Agency’s claims were not supported, and Agency failed to provide a preponderance of evidence for its allegations.

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. 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

¹² Agency reasons that Employee previously performed this job and should be held accountable for her performance. Furthermore, Agency notes that Employee’s job description stated that she would perform other duties as assigned. *Office of the State Superintendent of Education Petition for Review*, p. 4-5 (May 15, 2013).

¹³ *Id.*, 7-10. Employee filed a Motion for Compliance on May 16, 2013. The motion requested enforcement on her reinstatement and reimbursement for back-pay and benefits lost as a result of her removal. *Motion for Compliance* (May 16, 2013).

¹⁴ Specifically, Employee states that she was not interviewed during Agency’s investigation; she did not testify that she was not aware of the student being delivered to the responsible adult; she did not have instructions from the parent regarding what the student needed to do once they were dropped off; her testimony provided that she did not receive training for the Bus Attendant position; her position did not require that she have specific knowledge of the Bus Attendant’s duties; she did not fail to deliver the student; Agency’s protocol was followed; she was never suspended for leaving a child at home; and Agency did not submit evidence proving that she violated its policies as it relates to her termination. *Response to Petition for Review*, June 17, 2013.

as evidence that a reasonable mind could accept as adequate to support a conclusion.¹⁵

Cause of Action

First, it must be noted that Agency provided no cause of action against Employee when it provided her termination notice. The actual cause of action taken against Employee was not disclosed until Agency provided its answer to Employee's Petition for Appeal. This is a violation of the District Personnel Manual ("DPM") because the termination notice provided no basis upon which Employee could contest her removal, and it failed to provide her rights to be represented by an attorney and appeal rights.¹⁶ Therefore, on this basis alone, the AJ could have

¹⁵ *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).

¹⁶ Pursuant to DPM §§ 1608.1 and 1608.2, advance written notice should have been provided to Employee, and the notice should have contained the details outlined below.

- 1608.1 Except in the case of a summary suspension action . . . , an employee against whom corrective or adverse action is proposed shall have the right to an advance written notice, as follows:
- (a) In the case of a proposed adverse action, an advance written notice of fifteen (15) days.

- 1608.2 The advance written notice shall inform the employee of the following:
- (a) The action that is proposed and the cause for the action;
 - (b) The specific reasons for the proposed action;
 - (c) The right to prepare a written response, including affidavits and other documentation, within six (6) days of receipt of the advance written notice;
 - (d) The person to whom the written response or any request is to be presented;
 - (e) The right to review any material upon which the proposed action is based;
 - (f) In the case of a proposed adverse action only, the right to be represented by an attorney or other representative;
 - (g) The right to an administrative review by a hearing officer appointed by the agency head, as provided in § 1612.1, when the proposed action is a removal; and
 - (h) The right to a written decision.

Furthermore, DPM §1614.1 provides the following regarding final notice to employees:

The employee shall be given a notice of final decision in writing, dated and signed by the deciding official, informing him or her of all of the following:

- (a) Which of the reasons in the notice of proposed corrective or adverse action have been sustained and which have not been sustained, or which of the reasons have been dismissed with or without prejudice;
- (b) Whether the penalty proposed in the notice is sustained, reduced, or dismissed with or without prejudice;
- (c) When the final decision results in a corrective action, the employee's right to grieve the decision as provided in § 1617;
- (d) When the final decision results in an adverse action, the right to appeal to the Office of

reversed Agency's action against Employee. However, the AJ went on to address the merits of Agency's adverse action claims. Based on a review of the record, this Board believes that the AJ's ruling was based on substantial evidence.

In its answer to Employee's Petition for Appeal, Agency provided that Employee was removed for neglect of duty for her failure to follow instructions, failure to observe safety precautions, and failure to carry out assigned tasks in accordance with DPM §1603.3(f)(3).¹⁷ Agency went on to provide that Employee specifically violated section 203.3(E) of its Policies and Procedures Manual. In accordance with the policy, section 200 *et seq.* specifically applies to Bus Drivers and Bus Attendants. This policy provides the following:

Students are to be dropped-off and placed in the care of a responsible adult (designated in the Individualized Transportation Plan). The responsible adult should be in front of the drop-off address ten minutes prior to the scheduled arrival of the bus. Attendants will exit the bus and assist students off the bus in accordance with the safety procedures described elsewhere in this directive

If the designated adult is not at the designated drop-off location at the prescribed drop-off time, and the attendant can access the door, the attendant will knock at the door of the drop-off address to determine if a receiving person is available. If the designated adult is not contacted at the prescribed drop-off time, a door hanger will be placed on the door

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- Employee Appeals as provided in § 1618. The notice shall have attached to it a copy of the OEA appeal form; and
- (e) The effective date of the action.

The record reflects an Agency termination notice that fails to comply with DPM §1608.2 because it fails to state a cause of action; the specific reason for the action; the right to prepare a written response and to whom the response should be sent; the right to review material upon which the action is based; the right to be represented by an attorney; the right to an administrative review; and the right to a written response. Additionally, the notice fails to comply with DPM § 1614.1 because it does not provide which of the reasons within the advance notice for the adverse action were sustained; whether the proposed penalty is sustained; or the right to appeal the action to the Office of Employee Appeals.

¹⁷ This regulation provides the following:

For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows:

- (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include:
 - (3) Neglect of duty;

at the pick-up address notifying the parent/guardian of the failed drop-off attempt. The driver will make a notation on the Trip Ticket of the failed drop-off attempt, notify the Terminal Dispatcher of the failed attempt via radio and proceed with the designated route. Procedures for the securing of students at the Intake Center or Child and Family Services are described elsewhere in this manual.

At the time of her termination, Agency concedes that Employee's position of record was an Operations Assistant.¹⁸ Agency provided the position description for an Operations Assistant. The duties and responsibilities list activities that are consistent with an office position.¹⁹ It is obvious from the duties described for the Operations Assistant position that substituting as a Bus Attendant is not one of the tasks anticipated for the Operations' position. Moreover, the duties in the work environment section of the position description for Operations Assistants provide that "the work is performed in the normal office setting." Because the duties of a Bus Attendant take place outside of an office setting, it is unreasonable for Agency to have used Section 203.3(E) as a basis for Employee's removal. Nowhere in the Operations Assistant position description does

¹⁸ *The Office of the State Superintendent of Education's Answer to Ella Carey's Appeal*, p. 1 (April 1, 2011).

¹⁹ The list of duties and responsibilities for an Operations Assistant include the following:

- Provide a variety of supportive services as directed by Terminal, Deputy, or Assistant Terminal Managers.
- Contribute in increasing team efficiency by giving support both operationally and administratively.
- Prepare a variety of reports for transportation activities, (i.e., Field trips, car seats, booster seats, etc).
- May assist with supervising front line employees in the absence of Assistant Terminal Manager.
- Maintain administrative or personnel files for terminal, (i.e., bid assistance, leave slips, etc.)
- Communicate with leadership from other transportation departments (i.e., routing and scheduling, finance for booster seats, fleet (TAs).
- Pick up, sort, and prepare daily routine trip tickets for daily runs.
- Complete daily overtime reports by researching the time and labor system.
- Complete daily workforce reports with daily absentees.
- Monitors the collection of time and leave form; supports processing functions by assisting with the entry of time and leave; reviews and ensures accuracy of time and leave in ADP.
- Utilize and support the OSSE DOT policies and procedures manual.
- Produce special reports as requested by the deputy or terminal managers.
- Other tasks as needed.

it describe the tasks outlined in Section 203.3(E) of Agency's Policies and Procedures Manual.²⁰

As the AJ held, because Employee did not officially hold the position of a Bus Attendant, then Section 203.3(E) of Agency's Policies and Procedures Manual could not be applicable to her.

Moreover, the AJ correctly provided that Employee was not on notice that, while serving as a Bus Attendant, her actions violated Agency's policy and procedure. Agency offered one witness, Mr. Bailey, who the AJ deemed incompetent to testify because he was not an Agency employee during the time of Employee's termination. Agency's other witness, Ms. Houston, provided that prior to Employee's termination, she was not aware of the policy and procedures upon which Agency relied to remove Employee. She testified that when she worked as a Bus Attendant and Bus Driver, she was actually trained not to enter into the building when dropping students off.²¹ Finally, Ms. Houston explained that it was not until after Employee's removal that she became aware of the policy and procedures provided in 203.3(E).²²

As a result of the above-mentioned, Agency did not adequately prove the charge of neglect of duty. Consequently, we must DENY Agency's Petition for Review. Therefore, Agency's removal action is reversed.

²⁰ It must be noted that when Employee was questioned about her job duties, she provided that Operations Assistants were regularly tasked with assisting managers and dispatchers. *OEA Hearing Transcript*, p. 75-75 (January 22, 2013). This is consistent with what is listed in her duties and work environment of her position description. Moreover, in its Petition for Review, Agency provided all of the positions held by Employee during her tenure, and Bus Attendant is not one of the listed positions. *Office of State Superintendent of Education Petition for Review*, p. 2 (May 15, 2013).

²¹ *OEA Hearing Transcript*, p. 51 (January 22, 2013).

²² *Id.* at 54-55.

ORDER

Agency's Petition for Review is denied. Agency is ordered to reinstate Employee to her position with back pay and benefits within thirty calendar days from the date this decision becomes final. Evidence documenting Agency's compliance shall be provided to the OEA General Counsel's Office.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

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.