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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
AARON MAHONEY,)	
Employee)	OEA Matter No. 1601-0006-14
)	
v.)	Date of Issuance: November 3, 2014
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF TRANSPORTATION,)	
Agency)	MONICA DOHNJI, Esq.
)	Administrative Judge
<hr/>		
Gina Walton, Employee Representative		
Michael F O’Connell, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 7, 2013, Aaron Mahoney (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Transportation’s (“DDOT” or “Agency”) decision to terminate him from his position as a Motor Vehicle Operator effective September 12, 2013. Following an Agency investigation, Employee was charged with [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty. On November 8, 2013, Agency filed its Answer to Employee’s Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge (“AJ”) on June 16, 2014. Thereafter, I issued an Order scheduling a Status/Prehearing Conference in this matter for July 7, 2014. Both parties were in attendance. Thereafter, I issued a Post Status/Prehearing Conference Order requiring the parties to address the issues raised during the Status/Prehearing Conference. Both parties complied. After considering the parties’ arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Agency's action of terminating Employee was done for cause; and
- 2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a Motor Vehicle Operator with Agency. As a Motor Vehicle Operator, Employee was required to possess and maintain a valid commercial driver's license ("CDL") at all times. On February 26, 2013, Agency gave Employee a written directive to produce a valid CDL as proof that he was legally qualified to operate a government motor vehicle, a core duty of his job as a Motor Vehicle Operator. On March 13, 2013, Employee pleaded guilty to a Driving while under the influence ("DUI") charge in the District of Columbia Superior Court. Consequently, his driving privileges were revoked. Employee did not respond to the February 26, 2013 directive. On May 10, 2013, Agency issued an Advanced Written Notice of Proposed Removal to Employee for violating Chapter 16 of the DC Personnel Regulation for the following cause of action and specification:

Cause 1: Neglect of Duty, pursuant to District Personnel Manual ("DPM") §1603.3(f)(3) and § 1619.1(6)(c).¹

Specification 1: Employees whose employment requires a valid motor vehicle operator's license are responsible for carrying the license on their person at all times while on duty. On February 26, 2013 you were issued a notice requesting verification within thirty (30) calendar days of your possession of a valid driver's license. You failed to provide a valid license within the specified time period. Your lack of possession of a driver's license renders you incapable to execute the full range of duties in your position description. Your failure to maintain and possess a license is in contravention of a requirement in the position description for Motor Vehicle Operator, which states, under heading Other Significant Facts that the incumbent of the position must possess and maintain a valid Commercial Driver License (CDL).

In accordance with Article 24 § C of the Collective Bargaining Agreement ("CBA") between DDOT and the AFGE Local 1975, failure to maintain a license as required or to immediately make notification of changes in the status of the individual's operator's license may result in termination or disciplinary action.

Employee was placed on administrative leave pending the outcome of an investigation into this matter. On July 19, 2013, the Hearing Officer ("HO") issued his

¹ Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty.

report and decision in this matter. Thereafter, on September 6, 2013, Agency issued its Notice of Final Decision for Proposed Removal terminating Employee from his position as a Motor Vehicle Operator effective September 12, 2013.

Employee's Position

Employee notes that he is aware that as a Motor Vehicle Operator, he is required to possess and maintain a valid CDL. Employee acknowledges that there was a change in his driver's license status. However, he explains that, in November 2012, he notified his supervisor, Jeff Baxter of this change in compliance with the CBA, and he was reassigned to the Street Division. Employee also maintains that by promptly notifying his Supervisor of the change in his license status, and the fact that he voluntarily enrolled in, and completed alcohol treatment program, he was in compliance with the requirements of the CBA. Employee further explains that Article 10 §C of the CBA provides that in imposing disciplinary action, the department shall apply progressive discipline and shall consider mitigating factors against the alleged offense in compliance with D.C. Official Code § 1-616.5 et. seq (2001). Employee further relays that Article 24 of the CBA provides that failure to maintain a license as required or to immediately make notification of changes in the status of individual operator's license may result in termination or discipline action as outlined in Chapter 16 of the DPM. Employee states that Agency did not apply progressive discipline when it terminated him.

During the Status/Prehearing Conference, Employee stated that Agency engaged in disparate treatment. However, in its brief, Employee notes that there is insufficient evidence to support his claim for disparate treatment and as such, he withdraws this claim. Additionally, Employee submits that he has presented several mitigating factors that Agency should have considered in determining an appropriate penalty to include the facts that; 1) Employee willingly disclosed the change in his driver's license status to management; 2) he provided evidence to show that he accepted responsibility of his action and sought treatment for the issue; and 3) he has established that he is an asset to Agency and the likelihood of rehabilitation is very high. Employee states that every effort should have been taken to give him another chance such as the use of an alternate sanction. He reiterates that termination exceeds the limits of reasonableness and thus his removal should be reversed.²

Agency's Position

Agency submits that Employee was given a written directive on February 26, 2013 to produce a valid CDL to assure Agency that he was legally qualified to operate a government motor vehicle, which is a core duty of his job as a Motor Vehicle Operator, and in accordance with the CBA between Agency and Employee's union, AFGE 1975. Agency further notes that because Employee failed to respond to this directive, Agency provided Employee with an Advanced Notice of its intent to terminate Employee. Employee was placed on administrative leave pending the outcome of an investigation by the Hearing Officer. Employee was subsequently terminated. Agency notes that Employee was charged with Neglect of Duty as he failed to provide proof that he possessed and maintained a valid CDL within the given thirty (30) days, and he was ultimately terminated.

² Petition for Appeal (October 7, 2013); *See also* Employee's Brief (August 7, 2014).

Agency submits that a review of the D.C. Superior Court cases online system revealed that Employee pled guilty to Driving while under the influence of alcohol (“DUI”) on March 13, 2013. Agency highlights that Employee acknowledged that he failed to possess and maintain a valid CDL. Agency explains that Employee admitted that his license was revoked. Agency submits that Employee was terminated for cause pursuant to 16 DPM § 1603.3(f)(3) and § 1619.1(6)(c). Agency also maintains that it has established by a preponderance of evidence that cause existed to take the adverse action of removal against Employee and it acted within its discretion and as allowed by the applicable Table of Appropriate Penalties in terminating Employee.

Additionally, Agency relays that Employee offered no proof that he informed his Supervisor of the revocation of his license in accordance with Article 24 of the CBA. Agency notes that, the purported notification to the Supervisor is irrelevant to the fact that he was subject to termination for failure to possess and maintain a valid CDL. Agency highlights that Article 24 of the CBA subjects an employee to termination regardless of whether they informed their Supervisor. Failure to maintain a license exposed Employee to termination, and progressive discipline is not required for the charge of Neglect of Duty. Agency reiterates that Employee cannot perform his duties without a valid CDL and as such, he is subject to termination. The valid CDL requirement is clearly related to Employee’s duties, position and responsibilities, and failure to maintain the CDL inhibits his ability to perform his duties. Agency also states that it is irrelevant that Employee has sought treatment for an alcohol abuse problem as Agency did not charge Employee with an alcohol related offense, but rather, he was charged with neglect of duty because he was unable to perform his job duties without a license.³

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(f)(3), the definition of “cause” includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, neglect of duty. Employee’s removal from his position at Agency was based upon a determination by Agency that Employee neglected his duties when he failed to possess and maintain a valid CDL license as required to perform his job duties.

Neglect of duty includes, but is not limited to failure to carry out assigned tasks; careless or negligent work habits.⁴ Employee does not dispute that he did not possess and maintain a valid CDL from February 26, 2013, when Agency requested that he provided proof of his license, up until when Agency issued its Advanced Notice of Proposed Removal on May 10, 2013. Employee admits that he did not have a valid license. Employee further admits that he was aware that he was required to possess and maintain a valid CDL in order to perform his duties as a Motor Vehicle Operator. Further, Employee’s conduct of not possessing, as well as maintaining a valid license is a violation of Article 24 of the CBA. Article 24 of the CBA further provides that an Agency may impose disciplinary action based on an employee’s failure to

³ Agency’s Answer (November 8, 2013); *See also* Agency’s Brief (August 26, 2014).

⁴ DPM §1619.1(6)(c).

comply with this provision. Accordingly, I find that without a valid CDL, Employee cannot legally operate a government motor vehicle, which is part of his job duties. Consequently, I conclude that Employee's action constitutes neglect of duty. And based on Employee's own admission, I further conclude that Agency had cause to institute this cause of action against Employee.

2) *Whether the penalty of removal is within the range allowed by law, rules, or regulations.*

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).⁵ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations to include: Neglect of Duty", and as such, Agency can rely on this charge in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty" is found in § 1619.1(6)(c) of the DPM. The penalty for a first offense for Neglect of Duty is reprimand to removal. The record shows that this was the first time Employee violated § 1619.1(6)(c). Employee acknowledged that there was a change in his driver's license status. Employee also does not deny that he did not have a valid driver's license when Agency requested that he submit proof of such. Employee's conduct constitutes an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations and it is consistent with the languages of §§ 1619.1(6)(c) of the DPM. Therefore I find that, because termination is within the range allowed as penalty for the first offense for Neglect of Duty, Agency did not abuse its discretion by terminating Employee.

Employee argues that Agency did not engage in progressive discipline. Employee further notes that Agency should have considered mitigating factors in determining the appropriate penalty. Employee explains that Article 10 § C of the CBA between Agency and Employee's union highlights that Agency shall apply progressive discipline and shall consider mitigating factors against the alleged offense.

⁵ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 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).

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.⁶ When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law. Accordingly, Agency was within its authority to remove Employee given the Table of Penalties. Moreover, Article 24 of the CBA gives Agency the discretion to terminate an employee for failure to maintain a license as required *or* a failure to immediately make notification of changes in the status of an individual operator's license (emphasis added). Therefore, I find that Employee's willing disclosure of the change to his license status to management as well as his enrolment and completion of an alcohol treatment program are inconsequential to the issue at hand. Employee failed to maintain a valid driver's license, and this failure constitutes Neglect of Duty as Employee was unable to perform his job duties and termination is an appropriate penalty pursuant to the Table of Penalties as well as Article 24 of the CBA.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.⁷ The relevant factors are generally outlined in *Douglas v. Veterans Administration*.⁸ The evidence does not establish that the penalty of removal constituted an abuse of discretion. This Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors⁹ does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.¹⁰

⁶ *Love* also provided that "[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, is it 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*.

⁷ *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).

⁸ 5 M.S.P.R. 313 (1981).

⁹ The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its 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;

In this case, the penalty of termination was within the range allowed for a first offense. As noted above, the evidence does not establish that the penalty of removal constituted an abuse of discretion. In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

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- 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;
 - 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.

¹⁰ See *Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).