THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
DONALD MILTON	) OEA Matter No. 1601-0019-05
Employee	)
	)
v.	) Date of Issuance: July 31, 2007
	)
DEPARTMENT OF PUBLIC WORKS	) Muriel A. Aikens-Arnold
Agency	) Administrative Judge
	)

Barbara B. Hutchinson, Esq., Employee's Representative
Ross Buchholz, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On January 25, 2005, Employee, an Engineering Equipment Operator, RW-11, filed a Petition for Appeal of Agency's action to remove him effective January 7, 2005 for: Incompetency - revocation of state or District of Columbia permit or license required to perform part or all of your duties. On January 25, 2005, this Office notified Agency regarding this appeal and instructed Agency to respond thereto within thirty (30) days. After requesting and receiving an extension of time until March 9, 2005, Agency so responded.

This matter was assigned to this Judge on August 23, 2005. On December 7, 2005, a Prehearing Conference was held to discuss issues and to schedule a hearing on January 31, 2006.[1] The evidentiary hearing was held over a five-day period (January 31, 2006, February 21, 2006, April 4, 2006, May 2, 2006, and July 7, 2006). By November 9, 2006, all hearing transcripts had been received and copies were provided to the parties. Thereafter, the parties submitted closing arguments and the record closed effective January 24, 2007.[2]

[1] An initial Order was issued on 10/31/05 scheduling the conference on 11/22/05. However, due to Employee's subsequent retention of counsel, who requested additional time to prepare, said meeting was continued without any objection by Agency.
[2] Two (2) extensions of time were granted upon Agency's request.

JURISDICTION

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

ISSUE

Whether the penalty was appropriate under the circumstances.[3]

PROCEDURAL HISTORY, STATEMENT OF CHARGES, AND PARTY POSITIONS

By memorandum dated November 17, 2004, Employee was notified of a proposal to terminate his employment based on the following charge: Incompetency - revocation of state or District of Columbia permit or license required to perform part or all of [his] duties. The details in support of the proposed action are stated below:

> During a check of driver's licenses of all employees whose job requires that they have a valid driver's license, it was revealed that your license was revoked on July 14, 2004 and has not been restored. You were granted an opportunity to clear up the records in a letter dated October 21, 2004. Since you have failed to provide documentation that this matter has been resolved and your license restored, this removal is being proposed.[4]

On December 30, [2004], a notice of final decision was issued sustaining the removal of Employee effective January 7, [2005], based on the evidence of record, written responses from Employee, AFGE Local 631 and AFGE Local 2091, and the recommendation report of the hearing officer.[5]

Employee's Position.

Employee contends that Agency's action to remove Employee was based upon a clear

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[3] See OEA Rule 629.1 which provides that the burden of proof with regard to material facts shall be by a preponderance of evidence. Employee does not dispute the underlying fact that his driver's license, which was required to perform his duties, was revoked. Therefore Agency met its burden by a preponderance of evidence that the charge of Incompetence constituted cause to initiate an adverse action and is not an issue.

[4] See Agency Exhibit (hereafter referred to as "AE") -3. The remainder of the notice provided procedural rights, including the appointment of a hearing officer to conduct an administrative review and make a recommendation to the deciding official.

[5] See AE numbered 1-A, 1-B, and 1-C. On 1/10/05, Agency issued a letter amending the erroneous dates in the decision letter. That letter was erroneously dated "December 30, 2005" with an erroneous effective date of "January 8, 2004."

error and was in violation of the Agency's policy. First, Employee argues that Agency policy required referral to rehabilitation for a first off-duty offense for drugs or alcohol use. Second, Agency was obligated to reassign Employee to a vacant position "if the license problem could not be resolved," consistent with a Memorandum of Agreement (MOA) between the Department and two (2) unions representing employees therein.[6] Although Employee does not dispute that his license was revoked, he argues mitigation of the penalty in that he was unaware of the license revocation until he was subsequently informed by management; and that he made efforts to remedy the problem and could not do so. Thus, Agency's failure to abide by the MOA requires reversal of Employee's termination.[7]

Agency's Position.

Agency contends that removal was the appropriate penalty based on Employee's inability to perform all or part of his required duties due to the revocation of his driver's license due to a conviction for Driving While Intoxicated. Further, Employee had knowledge of his driver's license (and CDL) revocation and the duty to report same to management. Yet, Employee concealed his license revocation while continuing to operate heavy equipment, and endangering the safety of co-workers and the public. Employee violated Agency regulations and U.S. Department of Transportation requirements, subjected the District to significant liability exposure, and had a work history of an unreported accident and a 15-day suspension for improperly operating equipment by assisting in fueling in violation of express instructions not to do so.[8]

Summary of Material Testimony

William Howland, Director, Department of Public Works (Deciding Official)

Mr. Howland testified that Agency annually checks the validity of driver's licenses of all employees who are required to drive; and those who are required to have commercial driver's licenses (CDL's) are required to immediately self-report if their licenses become invalid. The policy is the same for (state) driver's licenses. If employees self-report, efforts are made to place

[6] See Employee Exhibit (hereafter referred to as "EE") -1. The MOA was entered into between the D.C. Department of Public Works/Office of Administrative Services (OAS) and the American Federation of Government Employees (AFGE) Local 631, and the American Federation of State, County and Municipal Employees (AFSME) Local 2091, on January 23, 2002.

[7] See Employee's Closing Brief (hereafter referred to as "ECB") at pp. 3, 5-8.

[8] See Agency's Closing Brief (hereafter referred to as "ACB") at pp. 2, 5, 10; AE-6, Title 49, Transportation, Subtitle VI, Motor Vehicle and Driver Programs, Part B, Commercial, Chapter 313, Commercial Motor Vehicle Operators, Section 31303, Notification Requirements.

them in non-CDL positions. Otherwise, employees who do not self-report are dismissed.[9] Although this witness was not familiar with the MOA regarding employees required to have CDL's, he was aware of two (2) employees with CDL's, who management attempted to reassign to other positions.[10]

Disqualifications are typically based on medical reasons and are distinguished from license suspensions or revocations based on actual driving/moving violations. Although he did not initially recall taking disciplinary action or transferring any motor vehicle operators because they had not resolved CDL problems, he subsequently testified that one employee, whose CDL was disqualified, was terminated after attempts were made to place him somewhere else.[11]

In October 2004, letters were sent to all employees, including Employee, who had license issues to be resolved. However, the initial letter to Employee was issued in error as he was not entitled to any opportunity to correct his license revocation issue. Nevertheless, a second letter was issued to Employee, in mid-November, allowing him time to resolve his problem.[12]

On cross-examination, Mr. Howland testified as follows: There was no self-disclosure regarding Employee's license revocation, which was serious enough to warrant termination. The limited period of revocation did not make a difference in this instance. He wasn't sure why the license was revoked, other than knowing it was a driving violation. However, his concern was for the safety of the Department and the public. For a number of months, Employee operated "heavy equipment that could have endangered other employees or the public and [he] did not disclose that he was operating it while not licensed."[13]

Consideration was given to the Hearing Officer's report and recommendation, written responses from Employee, Employee's past work record, his length of service, that he knew he was required to keep his CDL in good standing and he did not do so. Thus, termination was the only appropriate sanction for his actions. Mr. Howland was not aware of any other employee who had his CDL revoked.[14]

Barbara Milton (President, AFGE Local 631)

Ms. Milton testified that she negotiated and drafted the MOA with Kevin Green at the time that Agency started reviewing Employee licensing. Upon her request, Mr. Green

[9] See hearing transcript dated 1/31/06 (hereinafter referred to as "Tr.-Vol. 1") at pp. 55, 58-60
[10] See Tr.-Vol. 1 at pp. 67-68.
[11] See Tr.-Vol. 1 at p. 72, 76, 90-92.
[12] See Tr.-Vol. 1 at pp. 95-97. Based on information that Employee did not receive the first letter, a second letter was issued to him.
[13] See Tr.-Vol. 1 at pp. 105-107, 111, 119.
[14] See Tr.-Vol. 1 at pp. 111-112, 115-118.

subsequently issued a written interpretation of same on February 3, 2005.

On cross-examination, Ms. Milton testified that, according to Section four (4) of the Agreement, when a license is revoked, there was no time allowed, " . . . Agency would take immediate action , which is spelled out in [Section] number five and [Section] number six on the next page." If Agency could not find an employee another job, "either reassignment or a job that ended up in a reduction in pay . . . they would be terminated." Ms. Milton distinguished a license problem where there was "No license ever issued" for which no time was allowed and provided "immediate action to terminate" [in Section 4] versus a revocation for which no time was allowed [in Section 4] which triggers a step-by-step process established [in Section 6] to reassign
or reduce the employee's pay *before* taking action to terminate the employee (emphasis added).[15]

James Ivy (President, (AFSCME, Local 2091)

Mr. Ivy's understanding regarding paragraph four (4) of the MOA was that, considering mitigating circumstances, Agency had three (3) options: reassignment, reduction in pay or termination when a driver had his CDL revoked. There was no requirement to follow a step-by-step process[16]

On cross examination, Mr. Ivy testified that he had conversations back and forth with Mr. Green to clarify specific issues relative to the MOA. He understood that Section six (6) was applicable to license problems listed in Section four (4) for which time was allowed to remedy same.[17]

Bertha Guerra (Labor Liaison)

Ms. Guerra testified that she attended all discussions regarding the terms and conditions of the instant labor contract. It was her understanding that when an employee's license was revoked, Agency had a choice of three (3) options: reassignment, reduction-in-pay or termination.[18]

On cross examination, Ms. Guerra testified that she attended two (2) meetings; one to review the procedure and the second one when an agreement was discussed, reached and signed. She was not involved in the intermediate discussions prior to signing the MOA. However, she

[15] See hearing transcript dated 2/21/06 (hereafter referred to as "Tr.-Vol. 2") at pp. 12-16, 20-31; also EE-1, Memorandum of Agreement dated 1/23/02.
[16] See Tr.-Vol. 2 at p.58. Mr. Ivy also signed the MOA, assuming that was everybody's understanding.
[17] See Tr.-Vol. 2 at pp. 63-64, 67, 72, 75. Upon examination by the Judge, the witness affirmed his previous testimony regarding the Employer's options.
[18] See Tr.-Vol. 2 at pp. 79-82.

edited and formatted the final document.[19]

Kevin Green (former Administrator, Office of Administrative Services)

Mr. Green testified that, in collaboration with a number of unions and staff members, he discussed, drafted and executed the aforementioned MOA, under which there is no time allowed to remedy a license revocation problem and no requirement to offer another position to an employee whose license has been revoked.[20] Section six (6) of the MOA allows an employee, who has license problems listed in Section four (4) to be transferred into a vacant position during the time allowed to remedy the problem. " . . . this is the key, during the time allowed." However, there is no time allowed to remedy a revoked license under Section four (4), therefore, immediate action must be taken in accordance therefore. "[B]ut, typically, one of the three (3) choices was at management's discretion." In doing so, management considers the employee's history, including any other concerns or past problems. The reassignment allowed, pursuant to Section six (6) "is not with respect to [a] license revoked . . . you always go back to the time allowed . . . the time allowed means you always go back to paragraph four (4) . . .."[21]

Thomas Henderson (Administrator, Solid Waste Management Administration)

Mr. Henderson, the proposing official, testified that, during a routine check, Agency learned that Employee's driver's license had been revoked without its knowledge. On October 21, 2004, Employee was sent a letter advising him, *inter alia,* that he was afforded fifteen (15) days to get his driver's license reinstated.[22]

In determining that termination was the appropriate penalty, the following factors were considered: Employee did not have the minimal qualifications to do the job as his driver's license was not reinstated in the period of time he was given to do so; he had an obligation, based on Department of Transportation regulations, to inform his supervisor that he no longer had a driver's license; his nondisclosure created a significant liability problem for the District; and his recent work history which included an unreported accident and a 15-day suspension for work performance.[23]

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[19] See Tr.-Vol. 2 at pp. 86-92.

[20] See hearing transcript dated 4/4/06 (hereafter referred to as "Tr.-Vol. 3") at pp. 8-10.

[21] See Tr.-Vol. 3 at p. 11, 23-25; and EE-6.

[22] See Tr.-Vol. 3 at pp. 38-40; AE-3 and 4. A similar letter was previously sent by certified mail on 9/29/04, but not retrieved; and a copy subsequently faxed to Ms. Milton. The file copy of this letter reflects that Employee refused to sign an acknowledgment of its receipt. Employee was further advised that he would be given temporary work assignments during the 15-day period, and that failure to provide documentation by 11/5/04 would result in further action up to and including termination.

[23] See Tr.-Vol. 3 at pp. 46-47, 51, 55.

On cross examination, Mr. Henderson testified as follows: When he proposed Employee's removal, he was aware that Employee's driver's license was revoked for 180 days; that he followed the MOA guidelines; and that he did not look for a vacant position. He's not sure when, but he remembers seeing documents reflecting Employee's efforts to seek reinstatement of his license, which had been denied by the judge. Between January 1, 2003 and January 1, 2005, more than two (2) employees had their driver's licenses disqualified or revoked and subsequently reinstated within the required time frames given. Mr. Henderson was the deciding official when Employee was suspended from duty in September 2004 for his failure to follow instructions in two (2) instances.[24]

On redirect examination, Mr. Henderson testified that Employee's operation of heavy equipment, without a license, was dangerous to other agency and commercial trucks who enter and drop off disposal material at Agency's transfer stations.[25]

Donald Milton

Employee testified that, sometime in September, 2004, Supervisor Peter Mitchell asked whether there was a problem with his license. He responded, " . . . I told him there was no problem . . . I have to go to court . . . it may be pending suspension, but at this time, I am not suspended."[26] On that same day, Mr. Mitchell stopped Employee from operating motorized equipment at work Employee maintains that he did *not* receive the revocation notice until his visit to the Department of Motor Vehicles, which followed his conversation with Mr. Mitchell. Employee had previously been arrested for Driving While Under the Influence, pled guilty in court and had a hearing at Traffic Adjudication regarding the status of his driver's license. Although Employee admits that, at the time he left said hearing, he "may not have been paying attention . . ."; he did not know that his license was revoked and was "driving to work and around town every day . . . [I] was wondering why nobody took my license." Employee, thereafter, submitted a letter to Traffic Adjudication requesting a temporary license to drive back and forth to work, and during his tour of duty. That request was denied.[27] However, on January 18, 2005, Employee's driving privileges were reinstated. [28]

On cross examination, Employee testified that he was arrested on April 23, 2004 for

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[24] See Tr.-Vol. 3 at pp. 63-65, 68, 72-73, 85-86, 88-89; EE-4, Official Order of Revocation effective 7/14/04 for conviction of Driving While Intoxicated.

[25] See Tr.-Vol. 3 at p. 95.

[26] See hearing transcript dated 5/2/06 (hereafter referred to as "Tr.-Vol. 4") at pp. 8-10, 25. Sometime in September, 2004, Peter Mitchell, Supervisor, questioned Employee regarding his driver's license problem.

[27] See Tr.-Vol. 4 at pp. 18, 26-29; EE-9, letter dated 10/7/04 requesting a restricted license; EE-10, Review of Application For Limited Occupational License dated 11/16/04.

[28] See Tr.-Vol. 4 at 42; EE-11, Traffic Adjudication decision.

DWI, convicted on May 13, 2004 and never mentioned that to anyone at the agency.[29]

Lottie Winters-Johnson (Acting Administrator, Human Capital Administration)

Ms. Winters-Johnson testified that she has been involved with the license verification program since 2002; and recently oversees the program to check for valid licensing of employees who are required to operate government vehicles under the Federal Motor Carriers statute. Employees should report, to their supervisors, any violations while operating any vehicle or working for the District government. Any suspension or revocation should be immediately reported. No other employees whose duties required a CDL had that license revoked as a result of a DWI conviction.[30]

On cross-examination, Ms. Winters testified that Agency policy recommends referral to the Employee Assistance Program (EAP) when it is aware of a first offense of off-duty use of alcohol.[31]

Peter Mitchell (Manager, Bates Road Transfer Station)

Mr. Mitchell testified that, pursuant to notification from Agency's Drug and Alcohol Section sometime in September, 2004, he questioned Employee regarding his suspended license. Employee was unaware of the license suspension. Mr. Mitchell advised Employee could not drive the equipment until he brought in documentation. Employee subsequently provided a document reflecting that his license was revoked. Employee did not request a transfer to a non-driving position.[32]

ANALYSIS AND CONCLUSIONS

Whether Agency was required to reassign Employee in lieu of termination.

Pursuant to a D.C. Court of Appeals decision, an Administrative Judge of this Office may reverse the Agency's decision if it was not in accordance "with law or applicable regulations."[33]

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[29] See Tr.-Vol. 4 at pp. 73, 79; EE-9, 5 Year Record Request.

[30] See hearing transcript dated 7/7/06 (hereafter referred to as "Tr.-Vol. 5") at pp. 10-16; A-6, 49 USCS, Section 31303 (2005).

[31] See Tr.-Vol. 5 at p. 24; Agency Record (hereafter referred to as "AR") at Tab 6, p. 21, Control Substance and Alcohol Testing Policy (Policy), Section X, Disciplinary Action,. A. Consequences of Agency Violations(4)(d).

[32] See Tr.-Vol. 5 at pp. 36-38, 40, 44; AR at Tab 12, Position Description.

[33] *See District of Columbia Metropolitan Police Department v. Elton L. Pinkard*, 801 A.2d 86 (D.C. 2002).

Further, the Board previously found as follows:

> A collective bargaining agreement is a contract between an employer and a union for the purpose of establishing the conditions of employment. When such an agreement establishes guiding principles and nondiscretionary policy for a government agency, it has the effect of a regulation, and this Office has jurisdiction to interpret any provision of the agreement which pertains to an issue under review.[34]

In support of his argument that removal was not the appropriate penalty, Employee contends that Agency, through an agreement with the Unions regarding licensing problems, was obligated to reassign him instead of terminating him.[35] Specifically, Employee argues that Agency was required to reassign him to a vacant non-driving position, if his license problem could not be resolved. Agency, on the other hand, contends that it has discretion to choose, among three (3) options: reassignment, reduction in pay or termination, consistent with the MOA. Since there was a dispute between the parties regarding the interpretation of the contract language agreed upon, testimony was presented by the parties in order for this Judge to interpret the contract language and evaluate the issue.

The following provisions were the center of dispute regarding the aforesaid Memorandum of Agreement:

> 4. The Employer agrees that it shall allow CDL and Non-CDL employees time to remedy problems related to their license, including, but not limited to the following:
>
> | License Problem | Time Allowed to Remedy the Problem |
> |---|---|
> | No medical card for CDL drivers | 15 calendar days |
> | No CDL license (has regular license) | 30 calendar days |
> | No license ever issued | No time allowed-Immediate action to terminate |
> | License suspended | 30 calendar days |
> | License Revoked | No time allowed - Immediate action (reassignment, reduction in pay or termination) |
> | No ("G") endorsement to drive a government vehicle | 15 calendar days |
>
> 5. The Employer agrees that employees found not to have a valid driver's license

[34] *See Rousey and Jones v. Department of Consumer and Regulatory Affairs,* OEA Matter Nos. 1602-0114-90 and 1602-0115-90, *Opinion and Order on Petition for Review* (September 30, 1992), __ D.C. Reg. __. at 4.
[35] See footnote 6 and EE-1. .

> shall be suspended from driving a vehicle requiring a CDL or regular driver's license and shall be given the time allowed in Section four (4) of this Agreement without loss of pay. The employee will be temporarily assigned other duties during the remedy period listed in Section four (4) of this Agreement.
>
> 6. The Employer agrees that employees who are not able to remedy their driver's license problem(s) during the allowed time indicated in Section four (4) of this Agreement shall be transferred to a vacant position (that does not require a CDL or a regular driver's license) for which he/she meets the minimum qualifications. It is understood that during the transfer to a vacant position, an employee may be demoted if the vacant position pays less than their current salary. However, if an employee fails to meet the minimum qualifications for a vacant position or no vacant position is available, the employee shall be subject to disciplinary action up to and including termination.

Employee's contention that Agency, in accordance with Section six (6) above, was required to reassign him because his license problem could not be resolved, is misplaced. He ignores the phrase, "during the allowed time indicated in Section four (4)." As reflected in Mr. Green's testimony, said phrase is key to an employee's reassignment, pursuant to Section six (6). That phrase specifically spells out the remedy period (where there is one) and, for those *eligible* employees, requires transfer to vacant positions, under the circumstances therein. Employee's license revocation had *no time allowed* and, based on the witness testimony, there were three (3) options. Even though Ms. Milton's testimony was forthright, her interpretation of the Agreement, in this instance, was clearly in error. She was the only cosigner of the MOA who presented a different interpretation of the language.

Based on the plain language and an overall evaluation of witness testimony, there was no step-by-step process required prior to termination. This Judge, therefore, concludes that it was left to Agency's discretion, in accordance with Section 4 of the MOA, to initiate one of three (3) immediate actions: reassignment, reduction in pay, or termination.

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is 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. 1915, 1916 (1985).

Employee's position required that he possess a valid Motor Vehicle Operator's permit, a D.C. Government Operator's permit, a Commercial Driver's License, Class B, and a valid Operating Engineer License, Class7B. His primary responsibility was to operate heavy construction equipment and drive heavy duty trucks or other engineering equipment; all of which required the exercise of sound judgment and operation in accordance with safety rules and regulations. His duties included, among other things, "operates equipment in accordance with the rules and regulations of the Department of Public Works; and responsible for the safety of pedestrians while operating equipment and for the safety of employees working around equipment." Employee failed to meet those responsibilities when he did not disclose his license problems to his supervisor and continued to operate heavy equipment.[36]

Employee's arguments regarding Agency's failure to offer rehabilitation or a vacant position as required by its drug policy and the MOA are without merit. First, relative to Agency's drug policy, this Judge cannot ignore another provision which allows Agency to initiate a removal action, "in certain circumstances", without referring a driver to the Employee Assistance Program (EAP).[37] Under the circumstances here, Employee failed to disclose the DWI (which triggered the mandatory license revocation), in violation of federal regulations and subsequently blames Agency for its unwillingness to reassign him to a nondriving position. His nondisclosure was not only dishonest, but also showed his failure to take responsibility for his actions and the safety of others. Second, as explained above, Agency did not violate the MOA when Employee was removed from service.[38]

Further, this Judge had the opportunity to listen to the testimony of witnesses and to

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[36] See AR at Tab 12, Position Description.

[37] See Tr.-Vol. 5 at pp. 27-28; footnote 31, Agency file at Tab 6; X(A)(3) which reads: In certain circumstances, DPW may initiate disciplinary action, up to and including removal from employment without referring a CDL driver to EAP. Agency was precluded from questioning Ms. Winters-Johnson as to whether Employee was qualified for such referral as she was limited, as a rebuttal witness, to testimony regarding the policy itself.

[38] See footnote 8; 49 USCS, Section 31303 reads, in pertinent part: (a) Violations. An individual operating a commercial motor vehicle, having a driver's license issued by a State, and violating a State or local law on motor vehicle traffic control . . . shall notify the individual's employer of the violation . . . not later than 30 days after the date the individual is found to have committed the violation.

(b) Revocations, suspensions, and cancellations. An employee who has a driver's license revoked, suspended or cancelled by a State, who loses the right to operate a commercial motor vehicle in a State for any period, . . . shall notify the employer of the action not later than 30 days after the date of the action.

observe their demeanor as they testified. Having done so, this Judge found the testimony of Agency's witnesses to be more credible than that of Employee. Specifically, a number of factors, including, but not limited to his testimony, diminished Employee's credibility relative to the license revocation issue: 1) Employee testified that he was previously *aware* of pending legal action relative to his driver's license; and wondered why "nobody took" his license; 2) Employee's admission that he did not tell anyone about his arrest and conviction for the DWI charge; 3) Employee's request for Restricted License (EE-9) reflecting, *inter alia*, twice-weekly court-ordered drug testing and his attendance in substance abuse/treatment groups (on seven occasions) prior to when Employee claims he became aware of the license revocation; and 4) Employee's signature on the Annual Record of Violations (Employee Self-Report) demonstrates his awareness that any convictions for traffic law violations must be reported to the employer.[39]

In addition, Employee attempted to show that he was treated differently from similarly situated employees, eg., those whose licenses were revoked based on medical disqualification, and who may have been reassigned in lieu of termination. Yet, that argument fails for three (3) reasons: 1) management's discretion under Section four (4) of the MOA to choose the action to take; 2) Employee's nondisclosure of his DWI conviction and license revocation while continuing to perform his duties operating heavy equipment; and 3) Employee's violation of the law is distinguishable from a medical disqualification.[40]

Agency and its employees, as well as outside contractors have a right to trust that a CDL driver, operating heavy equipment, is doing so with proper licensing and total control of his faculties (ie., not under the influence of alcohol or drugs). Employee violated that trust when he failed to disclose his license revocation and the earlier DWI conviction on which it was based. Clearly, the off-duty offense, which resulted in Employee's license revocation, adversely affected Employee's performance of his assigned duties and thereby, had a significant effect on service efficiency. Further, Agency considered prior discipline; however, there is no evidence that, prior to court-ordered counseling, Employee rehabilitated himself, a mitigating factor the agency could have also considered.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the totality of circumstances, this Judge concludes that the penalty promoted the efficiency of the service, was within the parameters of

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[39] See AR at Tabs 13, Employee signed the Annual Request for Driving Record and the Annual Record, certifying that he had no convictions for traffic law violations during the past 12 months, on 4/14/07, prior to the instant DWI arrest.

[40] See EE-9; and EE-10 which cites Title 18, DCMR, Sections 301.1 and 310.7. Employee's conviction mandated revocation of his driver's license, which, in turn, prohibited the issuance of a limited occupational license.

reasonableness, and should be upheld.[41]

ORDER

It is hereby Ordered that Agency's action in removing Employee is UPHELD.

FOR THE OFFICE:

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MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

[41] See Tr.-Vol. 5 at p. 54. Agency also considered an unchallenged suspension.