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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CHANELLE MATTOCKS,)	
Employee)	OEA Matter No. 1601-0127-13
)	
v.)	Date of Issuance: October 20, 2014
)	
OFFICE OF THE STATE)	
SUPERINTENDENT OF EDUCATION,)	
Agency)	MONICA DOHNJI, Esq.
)	Administrative Judge
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Ronald Holt, Employee Representative		
Hillary Hoffman-Peak, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 31, 2013, Chanelle Mattocks (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Office of the State Superintendent of Education’s (“OSSE” or “Agency”) decision to terminate her from her position as a Bus Driver effective February 16, 2012. 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 & Misfeasance. On August 29, 2013, Agency filed a Motion to Dismiss Employee’s Appeal for lack of jurisdiction.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge (“AJ”) on May 14, 2014. Thereafter, I issued an Order scheduling a Status/Prehearing Conference in this matter for June 10, 2014. Both parties were in attendance. Thereafter, I issued a Post Status 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 Bus Driver with Agency. On January 4, 2012, after completing her afternoon route, Employee realized that she left her wallet at the school. Employee was already on her way to the terminal when she discovered she didn't have her wallet. Employee dropped off the Bus Attendant at the terminal and she went back to the school with the school bus to retrieve her wallet. Employee did not notify the dispatcher that she was taking the school bus back to school to retrieve her wallet. On her way back to the school, Employee drove by her house where she saw her son's bus. Employee pulled over and had a conversation with the Bus Attendant of her son's school bus. After the conversation, Employee proceeded to the school and retrieved her wallet.

On January 11, 2014, after Employee was done with her morning route, she stopped at a Harris Teeter store which was four (4) miles away from her route. Employee left the bus running while she was inside the Harris Teeter. Fleet Director, Ronald Briscoe ("Briscoe") observed the bus and waited for Employee to return. When Employee returned to the bus, Mr. Briscoe approached her and identified himself. Mr. Briscoe asked Employee why she left the bus idling and unattended to which Employee replied that she had called the Southwest terminal to request for a bathroom break. Mr. Briscoe called the Southwest Terminal Manager, Janice Waters, to inform her of the incident.

On February 1, 2012, Employee was served with a fifteen (15) day advance written notice of proposed removal for violating Chapter 16 of the DC Personnel Regulation for the following causes of action: [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty & Misfeasance. On February 14, 2012, Employee submitted a response to Agency's February 1, 2012 Notice. On February 16, 2012, Agency issued its final agency decision terminating Employee from her position as a Bus Driver.

Employee's Position

Employee notes that on January 4, 2012, after dropping off her attendant, she returned to the school to retrieve her wallet. She explains that because her duties required her to have her license, upon realizing that she left her wallet, it was necessary that she retrieved it in order to maintain compliance in performing her job. Employee maintains that her returning to the school to retrieve her wallet does not constitute the use of DOT material or resources for personal gain or advantage as indicated by Agency. Employee further states that on her way to collect her wallet, she was rerouted due to construction, and coincidentally, she observed her son's school bus. She maintains that she did not let her son into the house as her son was already in the house.

upon her arrival. Employee notes that the rerouting of the bus was justifiable as indicated in §203 of the Policy and Procedure Manual. Additionally, Employee highlights that the communication between her and her son's Bus Operator was not personal, but rather an opportunity to discuss and correct some operations procedural information concerning the afternoon ("PM") route as indicated in §203.3 of the Policy and Procedure Manual. Citing *Pickering v. Board of Education*, 391 U.S., 347 (1976), Employee explains that she was acting as a concerned co-worker and was very conscientious in her attempts at conversing with her co-worker in order to promote a more efficient and correct student drop-off procedure.

In addition, Employee provides that on January 11, 2012, after finishing her route, she proceeded to Penn Center for a radio battery, but realized that she didn't have her wallet, so she turned around heading back towards the terminal, and she made a stop for a bathroom break at a Harris Teeter store. Employee maintains that she left the Bus Attendant in the vehicle while she went into the store for a bathroom break. She explains that she left the vehicle running because of the need for the heating due to inclement weather, and because the Bus Attendant requested that she leave the heat on. Employee maintains that she called the dispatcher and gave her location; time of arrival and destination. Employee states that, a further investigation, as well as interrogation of the Terminal Dispatcher – Tammie Jones will show that operational policy procedure was followed and that the bathroom stop was previously approved.

Employee also argues that Agency violated §1608(c) of the D.C. Register. She explains that she was not given the rights enumerated under this provision during her appeal inquiries. She notes that her written response does not constitute an administrative hearing as per Chapter 14 §§1405.7; 1404.5; 1404.6; and 1405.8 of the D.C. Personnel Regulations. Employee also contends that she was denied her due process rights as she was denied an Adverse Action Appeal Hearing according to §107 of Title 5 of the Municipal Regulations. Further, Employee contends that although the penalty for the first offense for Neglect of Duty ranges from reprimand to removal; and the penalty for the first offense for Misfeasance is a fifteen (15) days suspension, she was not offered the option of reprimand. Thus, Agency abused its discretion by not instituting progressive discipline. She explains that Agency was negligent in considering the available penalty options; Agency failed to consider relevant factors; and its imposition of penalty constitutes an abuse of discretion. Employee also notes that Agency failed to provide specific evidence that it considered the Douglas factors, thus a due process violation.¹

Agency's Position

Agency submits that in accordance with § 203.2-3 of the DOT Policies and Procedures manual, drivers are required to return to the terminal according to the prescribed route and park the bus in the prescribed space. Agency explains that deviation of duty without authorization constitutes dereliction of duty and is cause for discipline action. Agency notes that Employee knew that she was not allowed to return home and that she was not allowed to go into a Harris Teeter store. Agency maintains that, it is clearly delineated that deviation of route requires prior approval for items such as maintenance, fuel or service, and there is no allowance for personal use of the school bus. Agency highlights that the penalty associated with deviation from route is

¹ Petition for Appeal (July 31, 2013); *See also* Employee's Brief (August 7, 2014).

clearly outlined in the DOT policies and Procedures Manual and that Employee made this deviation at her own peril.

With regards to penalty, Agency maintains that Neglect of Duty allows for removal for the first offense. Agency explains that the two (2) offenses – January 4, 2014 and January 11, 2012, occurred within a few days of each other, and Agency chose to terminate Employee for violating the use of the school bus for her personal use and failing to carry out her assigned task, which is to bring the school bus directly back to the terminal when the route is completed.²

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, District Personnel Manual (“DPM”) § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §§1603.(f)(3) & (f)(6),³ the definition of “cause” includes any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations to include 1) neglect of duty, and 2) misfeasance. According to the record, Agency’s decision to terminate Employee was based on these charges.

A) Any on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Misfeasance

Neglect of duty is defined, in part, as a failure to follow instructions or observe precautions regarding safety; and failure to carry out assigned tasks; Misfeasance is defined in part as unauthorized use of government resources; using or authorizing the use of government resources for other than official business.⁴ Here, Agency asserts that Employee deviated from her given route without authorization, despite the fact that she was aware of the specific policies with regard to this. Agency explains that once the route is completed, Bus Drivers are required to immediately return the bus to the terminal according to the prescribed route without delay. Agency further notes that, if the bus requires maintenance, fuel or service, the Driver will seek approval from the Terminal Dispatcher via radio, and once the approval is granted, the Driver may deviate from the immediate return policy. However, Employee failed to follow this instruction when she took the bus on January 4, 2012, after completing her route and dropping off her attendant to go retrieve her wallet from the school without approval from the Terminal Dispatcher. Employee stated in her Brief that an analysis of the dispatch records and communication with Dispatcher Tonya Holmes and Bus Monitor, Bernadette Smith will indicate that Employee communicated to Agency management that she was returning to her assigned school to retrieve her wallet.⁵ However, this is contrary to Employee’s signed statement made on February 14, 2012, wherein, she stated that “I dropped my attendant off at the terminal and attempted to contact dispatcher. To let her know I was proceeding back to the school *but I*

² Agency’s Brief (July 2, 2014).

³ See also D.C. Mun. Reg. tit. 16 § 1603(f)(3) & (f)(6)

⁴ DPM § 1619 (c)-(f).

⁵ Employee’s Brief, *supra*.

couldn't get through on the radio."⁶ (Emphasis added). Based on Employee's own statement made just about six (6) weeks after the January 4, 2012, incident, Employee could not reach the Terminal Dispatcher to get approval before taking the bus to retrieve her wallet from the school.

Furthermore, Employee also explains that it was necessary that she retrieved her wallet in order to maintain compliance while on duty. Employee maintains that per Agency's policy, she was required to have her employee identification, as well as report to duty in the proper uniform, carrying or wearing Agency prescribed equipment. However, Employee had already completed her route on January 4, 2012, before she realized she had left her wallet at the school. Moreover, Agency policy required the immediate return of the bus to the terminal after completing the route, unless approval is sought and given by the Terminal Dispatcher to conduct maintenance or other services, and not for personal use, such as retrieving a wallet. Because Employee had already completed her route and she did not have approval from the Terminal Dispatcher to return to the school with the bus, she should have returned the bus to the terminal as required. Employee did not need to take the school bus to go retrieve her wallet from the school – she could have found an alternate means of returning to the school to retrieve her wallet. By taking the school bus without approval to go retrieve her wallet from the school on January 4, 2012, I find that Employee used the school bus for personal use, and her action constitutes misfeasance. Employee's failure to follow instructions by not carry out the assigned task of immediately returning the school bus to the terminal upon completion of her route constitutes neglect of duty.

Employee further maintains in her Brief that if interviewed, her Bus Attendant Ms. Gloria Powell will provide that due to construction and traffic congestion, Employee was rerouted onto High Street when she saw her son's school bus and had a conversation with the bus operator of her son's school bus.⁷ However, this statement contradicts Employee's previously signed statement that highlights that on January 4, 2012, she had dropped off her attendant at the terminal and was on her way to retrieve her wallet when the incident with her and her son's bus operator occurred. Thus, Ms. Powell was not privy to the reason as to why Employee went by her house and encountered her son's bus operator. Additionally, since it has been established that Employee took the school bus after she completed her route without approval from the Terminal Dispatcher to go retrieve her wallet from the school, all of her actions from this point onward were a violation of Agency's policies. I conclude that because Employee was not authorized to take the school bus to retrieve her wallet, her possession of the school bus at that particular time was not justifiable by §203 of the Policy and Procedure Manual. Instead, I find that it was in violation of §203.2 and §203.3 of the Policy and Procedure Manual. Employee was not officially "on duty" as she had completed her route and dropped off her attendant. I further conclude that her possession of the school bus at that time was unauthorized, and for her personal use – to

⁶ Agency's Brief at Exhibit D.

⁷ Citing *Pickering v. Board of Education*, Employee stated that she was acting as a concerned co-worker and was very conscientious in her attempt to correct her son's bus operator. She explained that she was informing her co-worker of the operations procedure for PM routing so as to promote a more efficient and correct student drop-off procedure. Thus, in order for Agency to determine the series of events that occurred, Agency must consider the "Pickering balancing test". I find that, because Agency's cause of action in no way impedes on Employee's first Amendment rights, I find that *Pickering* does not apply to the instant case because Employee was simply charged with neglect of duty and misfeasance for having an argument with a co-worker in public, and not for the content of the conversation between Employee and her co-worker.

retrieve her wallet from the school. Consequently, I find that Agency had sufficient cause to charge Employee with neglect of duty and misfeasance for the January 4, 2012, incident.

With regards to the January 11, 2012, incident, where Mr. Briscoe observed Employee's bus at a Harris Teeter store and had a conversation with Employee with regards to the incident, Employee notes that she was on an approved bathroom break and the attendant was on the bus. However, Employee does not dispute Mr. Briscoe's assertion that when he called the Southwest Terminal to verify whether Employee was on an approved bathroom break, he was notified by the Terminal Manager, Janice Waters that Employee was calling into dispatch at that same time to request a bathroom break and to report that she had just encountered Mr. Briscoe. This highlights that Employee did not receive prior authorization to take the alleged bathroom break. Moreover, Employee has not provided any evidence in support of her assertion that her bathroom break was approved prior to her conversation with Mr. Briscoe, or prior to taking the break as required.⁸ Further, there is no incentive for Mr. Briscoe to provide false statements with regards to this incident. Accordingly, I find that Agency had cause to charge Employee with neglect of duty and misfeasance.

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).⁹ 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 Misfeasance", and as such, Agency can rely on these charges in disciplining Employee.

Employee argues that Agency did not engage in progressive discipline. 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

⁸ Agency's Brief at Exhibit B.

⁹ 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).

Neglect of duty is reprimand to removal. The record shows that this was the first time Employee violated §1619.1(6)(c). The penalty for “[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Misfeasance” is found in § 1619.1(6)(f) of the DPM. The penalty for a first offense for Misfeasance is a fifteen (15) day suspension. The record shows that this was the first time Employee violated §1619.1(6)(f). Employee admits to taking the school bus without approval to go retrieve her wallet from the school after completing her route. Employee also does not deny that she did not take the school bus directly to the terminal upon completing her route. Employee does not dispute that on January 12, 2014, she called dispatch to request for a bathroom break after speaking with Mr. Briscoe outside of the Harris Teeter store. 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) & (f) of the DPM. Therefore I find that, by terminating Employee, Agency did not abuse its discretion.

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.¹⁰ 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.

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.¹¹ Employee contends that, by removing her, Agency abused its discretion because it did not specifically consider the *Douglas* factors. The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.¹² In the

¹⁰ *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*.

¹¹ *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).

¹² 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;

instant case, Agency noted that it decided to terminate Employee because both offenses occurred within days of each other. In *Douglas*, the court held that “certain misconduct may warrant removal in the first instance.” In reaching the decision to remove Employee, Agency gave credence to the consistency of the penalty with any applicable agency table of penalties. 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.

Violation of Section 1608.2 and Due Process

Employee highlights that Agency violated her due process by failing to provide her with the rights listed under § 1608(c); (e); (g) of the DPM during her appeal inquiries. DPM §1608(c); (e); (g) provides that, [t]he advance written notice shall inform the employee of the following:

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- (c) The right to prepare a written response, including affidavits and other documentation, within six (6) days of receipt of the advance written notice;
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- (e) The right to review any material upon which the proposed action is based;
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- (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...

A review of the February 1, 2012 notice from Agency to Employee highlight that Employee was actually provides with fifteen (15) days within which to prepare a written response. This is more than the required six (6) days. Employee prepared a written response on February 14, 2012. Further, the February 1, 2012, notice informed Employee that she had the right to review all non-privileged material upon which the proposed action is based; as well as

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- 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;
 - 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.

the right to an administrative review of the proposed termination. Based on these, I find that Agency complied with § 1608(c); (e); (g) of the DPM.

Employee also contends that she was denied her due process rights because Agency did not hold an Adverse Action Appeal hearing in accordance with sections 1407; 1404; and 1406 of Title 5 of the Municipal Regulations. A close review of these provisions highlight that, they do not apply to the current matter. Accordingly, I find that Agency did not deny Employee her due process rights.

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