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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

_____)	
In the Matter of:)	
)	
WILLIAM HENDERSON,)	
Employee)	OEA Matter No. 1601-0004-20
)	
v.)	Date of Issuance: August 6, 2020
)	
D.C. DEPARTMENT OF PUBLIC)	
WORKS,)	MICHELLE R. HARRIS, ESQ.
Agency)	Administrative Judge
)	
)	
)	
_____)	
William Henderson, Employee, <i>Pro Se</i>		
Anna Kaprelova, Esq., Agency Representative		

INITIAL DECISION¹

INTRODUCTION AND PROCEDURAL HISTORY

On November 4, 2019, William Henderson (“Employee”), filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Public Works (“Agency” or “DPW”) decision to terminate him from service. The effective date of the termination was October 25, 2019. On December 16, 2019, Agency filed its Answer to Employee’s Petition for Appeal. This matter was assigned to the undersigned on January 21, 2020. On January 22, 2020, I issued an Order scheduling a Prehearing Conference in this matter for February 26, 2020. Both parties appeared as required. Following the Prehearing Conference, I issued an Order requiring the parties to submit briefs. Agency’s brief was due on or before, March 23, 2020. Employee’s brief was due on or before April 20, 2020, and Agency had the option to submit a sur-reply brief by or before May 11, 2020. Both parties submitted their briefs in accordance with the prescribed deadline.² I have determined that an Evidentiary Hearing is not warranted in this matter. The record is now closed.

¹ This decision was issued during the District of Columbia’s Covid-19 State of Emergency.

² An Order for Statement of Good Cause was issued to Employee on April 28, 2020, because the undersigned had not received a response by the date required. Due to the Covid-19 operational status, the parties were directed to send their responses electronically via email. Employee did not respond to any emails sent by the undersigned. Agency’s representative informed the undersigned that it had received a document from Employee. Later, it was

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Heavy Mobile Equipment Mechanical Helper. In accordance with the specifications of this position, Employee was required to maintain a valid driver's license. In a Final Written Notice of Proposed Removal dated October 22, 2019, Employee was informed that he would be removed from service for the following causes:

(1) *"Inability to Carry Out Assigned Duties: Any circumstances that prevents an employee from performing the essential functions of his or her position, and for which no reasonable accommodation has been requested or can be made.* [See Section 1607.2(n) of Chapter 16 of the Regulations and DPW Vehicle Operator Accountability Policy, Section VI, Responsibilities of Employees, (A): ensure that he or she maintains a valid driver's license authorizing him or her to drive the vehicle to be used to perform government business; and

(2) *"Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same*

discovered that Employee had submitted his response to OEA via postal service and it was received at the Office on April 13, 2020. As a result, the undersigned dismissed the Order for Statement of Good Cause.

position. [See Section 1607.2(e) of Chapter 16 of the Regulations].³ The effective date of Employee's removal was October 25, 2019.

Agency's Position

Agency avers that it had cause to remove Employee from service and administered the action in accordance with all applicable laws, rules and regulations. Agency asserts that Employee was a Heavy Equipment Mechanic Helper, and that this position specifically required him to possess and maintain a valid driver's license.⁴ Further, Agency maintains that Employee signed the Government of the District of Columbia Vehicle Operator's Acknowledgement Form which also notes that employees in this position are required to possess and maintain a valid driver's license, and they will notify their employer if there are any changes in the status of a license. This form also cites that employees are subject to disciplinary action, including termination for failure to comply.⁵ Agency argues that on July 5, 2019, Employee's license was revoked for 180 days due to seven (7) traffic violations and fifteen (15) points accrued over the past two years.⁶ Agency avers that Employee reported for duty on July 5, 2019.⁷

During a routine check of licensure, Agency became aware of Employee's license revocation on July 12, 2019. Following this, Agency issued a letter to Employee on July 15, 2019, informing him that he had thirty (30) days (until August 13, 2019), to obtain his license and provide a certified driving record. Employee also had to answer questions in the letter and was advised that he could be terminated for a failure to meet these requirements by August 13, 2019. Agency avers that Employee filed a notice with the Department of Motor Vehicles (DMV) on July 31, 2019, indicating that he was required to have a license for his job. On August 14, 2019, Agency conducted another license check and discovered that Employee had not obtained his license as required. As a result, on September 5, 2019, an Advanced Notice of Proposed Removal was issued to Employee. Agency notes that thirty-five (35) days after the deadline to obtain a license, and thirteen (13) days after the notice of proposed termination, Employee requested that Agency provide a letter to the DMV Adjudication Services to certify his need for a license for his employment. This request was denied.⁸

Agency asserts that the Hearing Officer submitted their report on October 21, 2019 and recommended that the penalty be sustained. On October 22, 2019, Agency issued its Notice of Final Decision on Proposed Removal and sustained Employee's removal. Further, the Final Notice cited that as of the date of the issuance of the Notice that Employee still had not obtained a valid driver's license. Agency avers that Employee was removed for cause. Further Agency asserts that it provided Employee ample notification of the requirement to maintain a valid license. Additionally, Agency argues that it discovered Employee's license renovation in a routine check, but the Acknowledgment Form that Employee signed indicated he was responsible for informing his supervisors of any changes in the status of his license.⁹ Agency also asserts that Employee could have applied for a Limited Occupational license that would have allowed him to solely drive for his job. However,

³ Employee's Petition for Appeal at Final Notice (November 4, 2019). *See also* Agency's Answer at Final Notice (December 16, 2019).

⁴ Agency's Brief at Page 2. (April 6, 2020).

⁵ *Id.*

⁶ *Id.* at Page 3.

⁷ *Id.* at Exhibit 1-Time and Attendance Sheet .

⁸ *Id.* at Page 4.

⁹ *Id.* at Page 7.

Agency avers that Employee requested a letter 35 days after the deadline for which he was to remedy the issue with his license. Accordingly, Agency maintains that Employee violated DPW policy and as a result, it had cause to take adverse action and that removal was an appropriate penalty under the circumstances.

Employee's Position

Employee argues that he was never aware that his license was revoked until he was notified by his supervisor. Employee asserts that he immediately went to the DMV, but was told that in his situation, there was an automatic 180-day revocation of his license and there was no eligibility for a provisional license. Employee acknowledges that he went to work after the notification of his license revocation but asserts that he was not driving any vehicles. Further, Employee asserts that he needs to maintain his employment in order to get a payment agreement plan at the Central Collection Unit. Employee asserts that he is a long time Washingtonian and supports his family and is a productive citizen. Employee avers that he could have been assigned to a position that did not require him to drive vehicles and does not understand why the government is trying to destroy instead of assisting someone in building their life.¹⁰

ANALYSIS

Whether Agency Had Cause for Adverse Action

Employee was a Heavy Mobile Equipment Mechanic Helper at Agency and had been with Agency since 2013.¹¹ Pursuant to the requirements of his job, he was required to maintain a valid driver's license. On July 5, 2019, Employee's driver's license was revoked due to traffic violations and accrual of points on his license. Employee still reported for duty, despite the revocation. Agency avers that it had cause to terminate Employee from service because it gave notice to Employee of the requirement to possess and maintain a valid license. Further, Agency asserts that Employee was required to notify his supervisors of any change in the status of his license. However, Agency was made aware of Employee's license revocation during a routine check of employees' licenses at Agency. Employee maintains that he was not aware that his license had been revoked until his supervisors notified him. Employee admits to working following the notice of the revocation but avers that he did not drive any vehicles. Employee argued that Agency could have assigned him to a position where a license was not necessary for employment. Agency maintains that it had cause to terminate Employee from service and that its action was in accordance with all applicable laws, rules and regulations. The undersigned agrees.

The District Personnel Manual indicates that an inability to carry out duties includes "any circumstance that prevents an employee from carrying out the essential functions of his or her position." In the instant matter, Employee's position as a Heavy Mobile Equipment Mechanic Helper required him to possess a valid driver's license.¹² In a letter dated June 25, 2019, the DMV

¹⁰ Employee's Brief (April 13, 2020).

¹¹ Agency Answer at Tab 1 (December 16, 2019). Employee was first employed at Agency as a term employee but was later converted to a career appointment on August 24, 2014 (see SF-50 at Tab # 3).

¹² Agency's Answer at Tab 2- Vehicle Operator's Acknowledgement Form (December 16, 2019). This form was signed by Employee on February 26, 2014, and part (I)(C) cites that a valid driver's license is required. See also Employee's SF-50 and position description which also indicates the requirement for a valid driver's license.

indicated that Employee's license would be revoked for 180 days effective ten (10) days from the date of the letter. Employee's license was revoked due to an accrual of points on his license and from seven (7) violations.¹³ Further, Employee did not notify Agency of this revocation, instead, Agency received this information through a routine check. Employee was sent a notice on July 15, 2019, indicating that Agency had found his license to be invalid, and that he had a deadline in which to remedy the deficiency. Despite Employee's contention that he was unaware of the revocation of his license, I find that he was still required to possess and maintain a valid driver's license as a condition of his employment. Further, it was noted that even at the time of the issuance of the Final Notice that Employee still did not possess a valid license.

Accordingly, I find that Employee did not possess a license as required, and this prevented him from carrying out the essential functions of his position. For the same reasons, Employee was charged for neglect of duty. The DPM holds that there is a neglect of duty where there is a failure to carry out official duties and responsibilities as would be expected of a reasonable person. The undersigned finds that Employee's inability to possess a valid driver's license as required impeded him from carrying out his official duties. Additionally, Employee failed to notify his supervisors of his revocation as required by his position. Although Employee argues that he was not aware of the revocation until he was notified by his supervisors, his job responsibilities still included the requirement to maintain a license. Further, Employee was unable to remedy the deficiency in his license after being provided time to do so. As a result, I find that Agency had cause for adverse action for both causes of action.

Whether the Penalty was Appropriate Under the Circumstances

Based on the above-mentioned findings, I find that Agency's action was taken for cause, and as such, Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).¹⁴ According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM; whether the penalty is based on a consideration of relevant factors; and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."¹⁵ Therefore when assessing the appropriateness of a penalty, this Office is not to substitute

¹³ Agency's Answer at Tab5 – Revocation Letter from DMV dated June 25, 2019 (December 16, 2019)

¹⁴ *Shairmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). 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).

¹⁵ See *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

its judgment for that of the Agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.”¹⁶

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.¹⁷ Chapter 16 § 1607.2 of the District Personnel Manual Table of Illustrative Actions (“TIA”) provides that the appropriate penalty for a first occurrence for the “inability to carry out assigned duties is removal.”¹⁸ Further, the penalty range for a first occurrence for neglect of duty ranges from counseling to removal.¹⁹ Consequently, I find that Agency has met its burden and had cause to take action against Employee for all the causes of action set forth in its Final Notice. Based on the penalty ranges for each cause of action as listed in the DPM, I find that removal is an appropriate penalty in the instant matter. Accordingly, I further find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and not a clear error of judgment. As a result, 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 from service is **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Administrative Judge

¹⁶ *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

¹⁷ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). 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;
- 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.

¹⁸ DPM §1607.2 (n) (2019).

¹⁹ DPM §1607.2 (e) (2019).