THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KERMIT KIAH,	)	
Employee	)	OEA Matter No. 1601-0070-18
	)	
v.	)	Date of Issuance: July 22, 2019
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

Kermit Kiah, Employee, *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 27, 2018, Kermit Kiah ("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 him from his position as a Motor Vehicle Operator, effective June 29, 2018. Employee was terminated for (1) [a]ny on-duty or employment-related act or omission that an Employee knew or should reasonably have known is a violation of law[1] - (Failure to maintain the required credentials, specifically the Commercial Driver License (CDL), required under the District of Columbia Municipal Regulations 1305.3[2]; and Disqualification from operating a commercial vehicle under the District of Columbia Municipal Regulations 1306.1[3]) and (2) [a]any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically: Neglect of Duty: careless or negligent work habits.[4]

[1] District of Columbia Municipal Regulations ("DCMR") section 1305.3.
[2] No person shall drive a commercial motor vehicle in the District of Columbia unless the person holds a commercial driver license with the applicable class and endorsements for the vehicle(s) he or she is driving, except when driving under a commercial driver learner permit and accompanied by the holder of a commercial driver license for the vehicle being driven.
[3] Agency did not state the specific subsection under 1306.1 that applies to Employee in the current matter.
[4] Agency cited to the old regulation – DCMR section 1603.3(f)(3).

On August 9, 2018, Agency submitted its Answer to Employee's Petition for Appeal. Following a failed mediation attempt, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on October 3, 2018. A Status/Prehearing Conference was held on November 13, 2018, with both parties present. Thereafter, I issued a Post-Status/Prehearing Conference Order requiring the parties to submit written briefs addressing the issues raised at the Conference. Agency's brief was due on or before December 14, 2018, and Employee's brief was due on or before January 11, 2019. Both parties submitted their respective briefs. Thereafter, I issued an Order scheduling a Prehearing Conference for February 27, 2019. While Agency timely appeared for the scheduled conference, Employee arrived about 40 minutes later, at which point Agency's representatives had been excused. Consequently, on January 27, 2019, I issued another Order rescheduling the Prehearing Conference for March 20, 2019. Employee notified the undersigned via telephone on the day of the conference that he could not make it to the scheduled conference due to a family emergency. This matter was thus rescheduled for May 7, 2019. On May 7, 2019, Employee again, informed the undersigned via telephone that he would not attend the scheduled conference due to his ill health. Subsequently, the Prehearing Conference was rescheduled for June 24, 2019. While Agency was present for the scheduled conference on June 24, 2019, Employee informed the undersigned via telephone that he was involved in an accident on his way to the scheduled conference.[5] Upon further review of the record and considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

1) Whether Agency utilized the appropriate District of Columbia Municipal Regulation in discipling Employee; and

2) Whether Agency had cause to discipline Employee for:

    a. [a]ny on-duty or employment-related act or omission that an Employee knew or should reasonably have known is a violation of law;[6] and

    b. Whether Agency had cause to discipline Employee for [a]any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty; and

[5] The undersigned spoke to Employee about one hour before the scheduled conference. The Employee informed the undersigned that he was not hurt during the accident, and that he will attempt to show up for the conference. However, he ultimately did not appear.

[6] Specifically, (1) Whether Employee failed to maintain the required CDL while at Agency; and (2) Whether Employee was disqualified from operating a commercial vehicle under DCMR section 1306.1.

3) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions.

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 FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA.

1) Agency's Use of District of Columbia Municipal Regulations

The District of Columbia Municipal Regulations ("DCMR") regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. A new DCMR (DCMR 6-B Chapter 16) regulating the manner in which agencies administer adverse action went into effect in the District on May 12, 2017. Consequently, all adverse actions commenced after this date were subject to the new DCMR. In the instant matter, Employee was terminated effective June 29, 2018 and the new DCMR was already in effect. However, Agency levied an adverse action against Employee utilizing an older version of the DCMR.

In the current matter, I find that the applicable DCMR is not substantively different from the older version utilized by Agency in the current matter with regard to the charge of Neglect of Duty. Furthermore, 18 DCMR 1305 which Agency also relied on in discipling Employee was not affected by the change in the DCMR. Consequently, I find that Agency's action constitutes harmless error.[7]

[7] OEA Rule 631.3 provides that: "Notwithstanding any other provisions of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause

2) Whether Agency had cause to 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, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause.

Whether Agency had cause to discipline Employee for [a]ny on-duty or employment-related act or omission that an Employee knew or should reasonably have known is a violation of law

Agency argued that Employee failed to maintain the required credentials, specifically the Commercial Driver License, required under 18 DCMR § 1305.3. 18 DCMR section 1305.3 provides as follows:

> No person shall drive a commercial motor vehicle in the District of Columbia unless the person holds a commercial driver license with the applicable class and endorsements for the vehicle(s) he or she is driving, except when driving under a commercial driver learner permit and accompanied by the holder of a commercial driver license for the vehicle being driven.

Here, there is sufficient evidence in the record to support agency's assertion that Employee did not have a valid CDL at the time of his termination. In Agency's Prehearing Statement dated February 13, 2019, Agency checked the box that stated that Employee had a 'Valid CDL' under the list of required credentials.[8] Employee also attached to his Petition for Appeal, a document from the District of Columbia Department of Motor Vehicles dated April 18, 2019, acknowledging receipt of a Medical Examiner's Certificate signed on September 28, 2017. According to the submission, the medical examiner who examined Employee on September 28, 2017, stated that Employee met the standard as prescribed in the Federal Motor Carrier Safety Regulations (49 CFR 391.41-391, 49). The certificate also provided that Employee qualified for a 2-year certificate and as such, the current certificate was valid from September 28, 2017 to September 28, 2019.[9] However, a review of Employee's five (5) Year Driver Record obtained from the District of Columbia Department of Motor Vehicles ("DMV") which is dated March 30, 2018, highlights that Employee's CDL was disqualified for failure to comply with CDL physical examination on October 15, 2017.[10]

The Medical Examiner's Certificate stated that Employee was medically cleared for two years effective September 28, 2017 through September 28, 2019.[11] However, the DMV, which is

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substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take action."

[8] Agency's Prehearing Statement at Exhibit F.

[9] Petition for Appeal (July 27, 2018). Employee also attached his prior CDL medical certification covering the period of September 28, 2015, through September 28, 2017.

[10] Agency's Prehearing Statement, Exhibit F, *supra*, at pg. 1 of 3.

[11] 18 DCMR 1327 provides that, "[no] person shall be issued or maintain a commercial driver license… unless he or she is physically qualified and, except as provided in 49 C.F.R. section 391.49, present to the department a valid medical examiner's certificate, as set forth in … that is not more than two (2) years old.

the department tasked with the issuance of CDL in the District of Columbia, still noted in the March 30, 2018 Driving record, that Employee's CDL, was "Disqualified" for Failure to comply with CDL Physical Examination. Employee was disqualified on October 15, 2017, approximately two (2) weeks after the Medical Examiner Certificate was issued on September 28, 2017. As of March 30, 2018, when the Driving record was obtained, Employee still did not have a valid CDL, as it was still marked as "Disqualified" for Failure to comply with CDL Physical Examination. Consequently, I conclude that per the DMV records, Employee did not have a valid CDL at the time of the adverse action and could not legally drive a commercial motor vehicle in the District of Columbia which is a violation of District laws, pursuant to 18 DCMR section 1305.3.

Moreover, after Employee's accident, and his positive drug test result, the Medical Review Officer ("MRO") recommended a fit for duty physical because Employee was taking medication that posed a potential safety risk. As such, Agency requested that Employee be reexamined pursuant to 18 DCMR section 1327.8.[12] The fit for duty physical was completed and a determination was made by Dr. Karen Singleton who stated that Employee was not medically fit to operate a school bus. Dr. Singleton noted that, after consulting with Employee's physician, Employee should be permanently disqualified from operating a school bus. Additionally, the Washington Occupational Health Associates ("WOHA") administered a medical examination per Agency's request and determined that Employee was medically unfit to operate a school bus. Employee does not dispute these findings. Consequently, based on the above, I find that Agency had cause to institute the instant adverse action.

Whether Agency had cause to discipline Employee for [a]any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty

Agency charged Employee with [a]any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty. Agency noted that Employee engaged in careless or negligent work habits by failing to maintain a valid CDL as required by law. A CDL is required to drive a school bus and Employee's failure to maintain his CDL affected his ability to perform his job. Employee's CDL was disqualified effective October 2017 for failure to comply with the CDL physical examination. Thus, Employee did not have a valid CDL and was legally not able to drive a school bus, as required when he was terminated. Accordingly, I find that Agency had cause to take adverse action against Employee for neglect of duty.

3) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions.

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).[13] According to the Court in

[12] Any commercial motor vehicle driver whose ability to perform his or her normal duties has been impaired by a physical or mental injury or disease must be reexamined and submit the certification required by § 1327.3.

[13] *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,*

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 charges of "[a]ny on-duty or employment-related act or omission that an Employee knew or should reasonably have known is a violation of law" and "[a]any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty" and as such, Agency can rely on these causes of action in disciplining Employee.

Employee asserted that the penalty of removal is unwarranted. Employee argues that Agency should have allowed him the opportunity to stop taking the prescription medication, change the medication or change his position to bus attendant. While these options provided by Employee are valid options, this Office has held that, the selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[14] 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. Accordingly, Agency was within its authority to terminate Employee.

Moreover, in reviewing Agency's decision to terminate Employee, OEA may look to the Table of Illustrative Actions. Chapter 16 of the DPM outlines the Table of Illustrative Actions for various causes of adverse actions taken against District government employees. The penalty for "[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty" is found in District Personnel Manual § 1607.2(e). The penalty for a first offense for this cause of action is counseling to removal. The record shows that this was the first time Employee violated DPM §1607.2(e). Because removal is within the range of penalties for neglect of duty, I find that, by separating Employee, Agency did not abuse its discretion.

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).

[14] *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011). *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*, 5 M.S.P.R. 313 (1981).

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.[15] 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 terminate Employee.[16] In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to terminate Employee. Agency has properly exercised its managerial discretion and its chosen penalty of termination is reasonable and is not clearly an error of judgment. Accordingly, I find that Agency's action should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Senior Administrative Judge

[15] *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).

[16] 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.