THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DEBORAH TOON,	)	
Employee	)	OEA Matter No. 1601-0085-11
	)	
v.	)	Date of Issuance: December 3, 2012
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Deborah Toon, Employee *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 14, 2011, Deborah Toon ("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 Attendant effective February 15, 2011. Following an Agency investigation, Employee was charged with Neglect of Duty: Failure to follow instructions or observe precautions regarding safety; failure to carry out assigned tasks; careless or negligent work habits, in accordance with Section 1603.3(f)(3) of the District Personnel Manual ("DPM")[1]. On April 19, 2011, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 30, 2012. Thereafter, I issued an Order scheduling a Status Conference in this matter for September 12, 2012. Both parties were in attendance. On September 18, 2012, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status 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.

[1] Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Neglect of duty.

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 Attendant with Agency. On December 15, 2010, Agency was contacted by a Student's ("Student K") parent to report an incident that occurred on the bus between Student K and Employee on the way home from school. According to the report, when Student K did not comply with Employee's request to use earphones while listening to music on the bus, Employee told Student K that she would 1) get someone to "beat his ass"; and 2) she would put Student K off of the bus and make him walk home.[2] During the course of investigating this complaint, Agency determined that Employee failed to deliver Student K to a responsible adult as required. According to the investigative report, Employee admitted that when she arrived at Student K's address, she escorted him to the door and returned to the bus before a responsible adult was present to receive him. Upon completion of its investigation, Agency further determined that Employee did not tell Student K that she would get someone to beat him. However, Agency concluded that, when Student K did not comply with Employee's request to use earphones while listening to music on the bus, Employee told Student K that she would remove or have Student K removed from the bus. Agency also concluded that Employee failed to deliver Student K to a responsible adult as required.[3]

Employee's Position

In her submissions to this Office, Employee maintains that the reason for her termination was the December 15, 2010 bus incident involving Student K. Employee provided this Office with a detailed narrative of the bus incident with Student K. Additionally, while Employee noted during the Status Conference that she was aware of Agency's policy regarding dropping off a student with a responsible adult, in her brief, Employee notes that she was not aware that students were supposed to be in the company of a responsible adult in the morning as well as the fact that a responsible adult had to be present at the drop-off address ten (10) minutes prior to the scheduled arrival of the bus. Employee also submits that she knew Student K's apartment door was secure because she could not access it on several occasions when she came to pick up Student K in the morning. Employee further explains that she did get off the bus on the day of the alleged incident and walked Student K up to the apartment door which was secured, and then

[2] Agency's Brief (October 3, 2012).
[3] *Id.*

she saw Student K walk inside of the secured apartment door before returning to the bus.[4] Employee maintains that she walked Student K as far as she could without being out of sight of the driver as required by Agency's policy.[5] In addition, Employee submits that the penalty of termination was extreme since this was her first offense.[6]

Agency's Position

Agency submits that Employee did not follow the procedures outlined in Agency's Policies and Procedures manual when dropping off Student K. Agency also notes that both Employee and the bus driver admitted that Student K was not delivered to a responsible adult as required. Agency explains that Employee's negligent action of not delivering Student K to a responsible adult was in direct violation of its Policies and Procedure. Agency also maintains that Employee was terminated for violating § 203.3 – Conduct of the Route, of Agency's Policies and Procedures Manual[7], and not as a result of the December 15, 2010 bus incident between Employee and Student K. Agency further asserts that the penalty of removal was within the range set forth in the Table of Penalty ("TAP"), even for a first offense for employees who engage in neglect of duty.[8]

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(f)(3), the definition of "cause" includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, neglect of duty. Employee's removal from her position at Agency was based upon a determination by Agency that Employee neglected her duties when she failed to adhere to § 203.3 – Conduct of the Route, of Agency's Policies and Procedures Manual.

As noted above, Agency has the burden to establish that the removal of Employee from her position as a Bus Attendant was supported by substantial evidence and appropriate under the circumstances. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[9] Therefore, the undersigned must determine if the evidence that Employee violated § 203.3 of Agency's Policies and Procedures Manual is adequate to support Agency's decision to terminate Employee. Section 203.3(E) of Agency's Policies and Procedures Manual states as follows:

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[4] Employee's Brief (October 24, 2012).
[5] Employee's Petition for Appeal (March 14, 2011).
[6] Employee's Brief, *supra.*
[7] Agency's Answer at Exhibit 3 (April 19, 2011).
[8] *Id.*
[9] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

> *Students are to be dropped-off and placed in the care of a responsible adult* (designated in the Individualized Transportation Plan). The responsible adult should be in front of the drop-off address ten minutes prior to the scheduled arrival of the bus. Attendants will exit the bus and assist students off of the bus in accordance with the safety procedures described elsewhere in this directive…
>
> If the designated adult is not at the designated drop-off location at the prescribed drop-off time, *and the attendant can access the door, the attendant will knock at the door of the drop-off address to determine if a receiving person is available.* If the designated adult is not contacted at the prescribed drop-off time, a door hanger will be placed on the door of the pick-up address notifying the parent/guardian of the failed drop-off attempt… (Emphasis added).

In the instant case, Employee was employed as a Bus Attendant from 2007 until 2011, when she was terminated. Section 203.3(E) above specifically applies to a Bus Attendant's responsibilities when dropping off a student. While Employee notes that she was not aware that students were supposed to be in the company of a responsible adult in the morning as well as the fact that a responsible adult had to be present at the drop-off address ten (10) minutes prior to the scheduled arrival of the bus, she does not allege that she was not aware of the fact that as a Bus Attendant, she was required to drop-off and place students in the care of a responsible adult. Moreover, during the Status Conference held on September 12, 2012, Employee also testified that she was aware of this policy. Furthermore, Employee states in her Petition for Appeal that according to the training instruction she received during orientation, Bus Attendants are not allowed to be out of the driver's eye sight.[10] Thus, it can be reasonable assumed from Employee's above-referenced statement that she received training on the duties of a Bus Attendant, and as such, she was familiar with the provisions of § 203.3 of Agency's Policies and Procedures Manual.

According to § 203.3(E) of Agency's Policies and Procedures Manual referenced above, Employee had a duty to place Student K in the care of his parents or guardian, and she failed to do so. Employee stated in her submissions to this Office that she did not place Student K in the care of a responsible adult as required. Employee explains that she walked Student K up to the apartment door which was secured, and then saw Student K walk inside of the secured apartment door before returning to the bus. Employee further maintains that she walked Student K as far as she could without being out of sight of the driver as required by Agency's policy. Section 203.3(E) specifically states that if the designated adult is not at the designated drop-off location at the prescribed drop-off time, and the Bus Attendant can access the door, the Bus Attendant will knock at the door to determine if a receiving person is available. It goes on to note that, if the receiving adult is not available, the Bus Attendant will place a door hanger on the door to notify the parent/guardian of the failed drop-off. Moreover, Agency also submits that its Policies and Procedures Manual does not address the issue of attendant being out of the sight line of the driver. Since there was no designated adult at the drop-off location to pick up Student K,

[10] *See* Petition for Appeal.

Employee should have walked with Student K to the secured apartment and knocked on the door to make sure that a responsible adult was present to receive Student K before she returned to the bus. Instead, Employee simply walked Student K up to the secured door and returned to the bus without making sure there was a responsible adult present at the address to receive Student K. Consequently, I conclude that Employee's failure to comply with § 203.3(E) of Agency's Policies and Procedures Manual provide Agency with substantial evidence to institute an adverse action against Employee.

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

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[11] 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: Neglect of Duty", and as such, Agency can rely on this charge in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty" is found in § 1619.1(6)(c) of the DPM. The penalty for a first offense for Neglect of duty is reprimand to removal. The record shows that this was the first time Employee violated §1619.1(6)(c). Employee was aware of the provisions of §203.3(E) of Agency's Policies and Procedures Manual for Bus Attendants, and she received the training necessary to perform her duties, yet she failed to comply. 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 language of § 1619.1(6)(c) 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

[11] *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).

of discretionary disagreement by this Office.[12] 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 was 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.[13] Employee argues that by removing her, Agency abused its discretion. 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.[14]

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[12] *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, 5 M.S.P.R. 280 (1981).

[13] *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).

[14] 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 it's 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.

In this case, the penalty for a first time offense for this cause of action is reprimand to removal. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency submits that it gave credence to the aforementioned *Douglas* factors. In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge