THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JANICE COLLINS,	)	
Employee	)	OEA Matter No. 1601-0010-11
	)	
v.	)	Date of Issuance: December 20, 2012
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Clifford Lowery, Employee Representative
Justin Zimmerman, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 12, 2010, Janice Collins ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Public Works' ("DPW" or "Agency") decision to terminate her from her position as a Parking Enforcement Officer effective October 10, 2010. Following an administrative review, Employee was charged with violating "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty (failure to maintain a valid motor vehicle operator's permit)." On November 17, 2010, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 26, 2012. Thereafter, I issued an Order scheduling a Status Conference in this matter for September 18, 2012. Both parties were in attendance. On September 19, 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.[1] After considering the parties' arguments as presented

[1] Employee's Post-Status Conference Brief was due on October 30, 2012. On November 2, 2012, I issued an Order for Statement of Good Cause to Employee for failure to submit a timely Brief. However, the undersigned was verbally informed by Employee that she had submitted her Post-Status Conference Brief on October 31, 2012. OEA's electronic database revealed that Employee did submit her Brief on October 31, 2012, however, a hard copy of her Brief was not put in the file, hence the November 2, 2012, Order was generated.

in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) And if so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as a Parking Enforcement Officer in 2004.[2] According to the job description for Parking Enforcement Officers, Employee's duties included both vehicle and foot patrol, and as such, Employee was required to possess a valid driver's license.[3] Additionally, per the Collective Bargaining Agreement ("CBA"), signed between Agency and Employee's Union, an employee's failure to maintain a license as required or to immediately provide notification of any changes in license status could lead to disciplinary action or termination.[4] On March 7, 2009, Employee was arrested for Driving While Intoxicated ("DWI"), and she was convicted for DWI on July 9, 2009.[5] On February 4, 2010, Agency was notified via email by a Department of Motor Vehicles ("DMV") Hearing Examiner that Employee was present at a Show Cause Hearing and she entered a plea of guilty to the DWI charge. Agency was further notified in the email that Employee's driving privileges would be suspended for six (6) months, and she was eligible for reinstatement on August 4, 2010.[6] Subsequently, on February 23, 2010, Agency informed Employee that it had received information that Employee did not have a valid driver's license and that Employee had thirty (30) days to resolve the issues with her driver's license or she would be subject to discipline, including termination.[7] On August 18, 2010, Agency issued an Advanced Written Notice of Proposed Removal to Employee for failing to maintain a valid driver's license.[8] Employee appealed through Agency's Administrative Hearing process as noted in the August 18, 2012 Notice of Proposed Removal. Employee noted in her appeal that she was not aware that her driver's license had not been reinstated after completing the requirements of her DWI conviction. Employee further noted that her driver's license was valid and that it would be reinstated after completing and passing both the written and driving test administered by DMV.[9] On September

[2] Agency's Answer (November 17, 2010).
[3] *Id*. at TAB 2.
[4] *Id*. at TAB 3.
[5] Id. at TAB 26.
[6] *Id*. at TAB 15.
[7] *Id*. at TAB 16.
[8] *Id*. at TAB 21.
[9] *Id*. at TAB 22.

2, 2010, Employee received a valid driver's license from the DMV.[10] On September 26, 2010, the Hearing Officer assigned to the above-mentioned Administrative Hearing issued a report, concurring with Agency's August 18, 2010 Notice of Proposed Removal.[11] Thereafter, on September 27, 2010, Agency's Director sustained the proposed termination, and Employee was terminated effective October 1, 2010.[12]

Employee's Position

Employee does not deny that she did not have a valid driver's license prior to the issuance of the August 18, 2010 Notice of Proposed Removal. However, Employee notes that Agency was fully aware of her driver's license issues throughout the process and was also aware that she obtained her full driving privileges before the expiration of the proposal to remove her.[13] Employee also submits that Agency was aware of her efforts to appeal her driver's license suspension. Employee notes that Agency was aware of the status of her driver's license in October of 2009, yet it allowed Employee to continue to perform her assigned duties as a Parking Control Officer. Employee further maintains that Agency assigned her to the "walking squad" during this period.[14] In addition, Employee submits that although Agency was fully aware of her driver's license status, Agency, in its February 23, 2010 letter, gave Employee thirty (30) days within which to comply with the driver's license requirement of her position. Nonetheless, Agency did not take any action against Employee after the thirty (30) days expired. Instead, Agency allowed Employee to continue to perform her full duties.[15] Employee further asserts that because she complied with the driver's license requirement prior to the issuance of the Final Agency Decision ("FAD"), Agency's action against her is unjust and without merit or cause.[16]

Agency's Position

Agency contends that it had sufficient cause to terminate Employee. Agency notes that as a Parking Enforcement Officer, Employee was required to maintain a valid motor vehicle operator license, and there is no dispute that Employee was convicted of DWI, and consequently, her driver's license was revoked for six (6) months. Agency further submits that Employee did not report the situation with her driver's license to Agency as required by the parties' CBA. Agency notes that it informed Employee that she needed to resolve the licensing problem no later than March 6, 2010, and provided Employee with no other deadlines.[17] Agency included an affidavit form a Supervisor, Keith Cross, attesting that to the best of his knowledge, he did not notify Employee that she had until September 3, 2010 to obtain a valid driver's license.[18] Agency also asserts that Employee's history with Agency is marred by performance and disciplinary problems. In addition, Agency submits that based on the above-referenced reasons, it exercised

[10] *Id*. at TAB 26.
[11] *Id*. at TAB 23.
[12] *Id*. at TAB 24.
[13] Petition for Appeal (October 12, 2010).
[14] Employee's Brief (October 31, 2012).
[15] *Id*.
[16] *Id*.
[17] Agency's Brief (October 10, 2012).
[18] *Id*. at Exhibit 2.

its managerial discretion in terminating Employee, and requests that this Office affirms its decision.[19]

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, the District Personnel Manual ("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 was not fit to serve in her current position because Employee did not maintain a valid driver's license as required by her job description.

In the instant case, the undersigned must determine if the evidence that Employee did not possess a valid driver's license as required by her job description is adequate to support Agency's decision to terminate Employee. I find that Employee was hired as a Parking Enforcement Officer and consequently, she was required to maintain a valid driver's license in order to be able to perform her job functions. While Employee may have been assigned to a "walking squad," her position description required her to possess a valid driver's license at all times. Her job description also notes that her duties included both foot and vehicle patrol.[20] Moreover, according to the CBA, Employee's failure to maintain a license as required or to immediately provide notification of any changes in her license status is sufficient grounds for disciplinary action or termination. In a letter dated February 23, 2010, Agency notified Employee that it had been made aware by the DMV that Employee did not have a valid driver's license as required by her job description. Agency gave Employee thirty (30) days from the date of the letter, within which to comply with this requirement or be subject to discipline, including termination, yet Employee failed to comply. Moreover, the CBA notes that Agency can terminate an employee for either failing to maintain a license as required *or* failing to immediately provide notification of any changes in her license status (emphasis added). A valid driver's license was required by Employee's position, and her failure to maintain said license at all times constitutes sufficient cause for disciplinary action under DPM §1603.3(f)(3).

Employee further asserts that Agency was aware of the issues with her driver's license for over eleven (11) months, yet it took no action. Employee argues that because she complied with the driver's license requirement prior to the issuance of the FAD, Agency's action against her is unjust and without merit or cause. I disagree with Employee's assertion. Based on the record, Agency was notified by DMV on February 4, 2010 that Employee's driver's license had been revoked. On February 23, 2010, Agency notified Employee of this finding and required Employee to comply with the driver's license requirement of her position within thirty (30) days. Upon Employee's failure to comply within thirty (30) days, Agency issued a Notice of Proposed Removal on August 18, 2010. Therefore, contrary to Employee's assertion that Agency did not act for eleven (11) months, I find that Agency did take steps to remedy the situation once it

[19] Agency's Brief, *supra*.
[20] *See* Agency's Answer at TAB 2, *supra*.

became aware. I further find that the amount of time it took Agency to finally institute an adverse action against Employee is irrelevant in this matter as it does not change the fact that Employee did not maintain a valid driver's license as required and she did not immediately notify Agency that her license was suspended. Moreover, Employee has offered no evidence in support of her claim that Agency was fully aware of the issues with her driver's license in October 2009, and not February 2010. Consequently, I conclude that Employee's failure to comply with Agency's driver's license requirement provides Agency with sufficient cause 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).[21] 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 ("TAP"); 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 put on notice about the driver's license requirement, 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

[21] *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.[22] 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 TAP.

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.[23] 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.[24]

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[22] *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).

[23] *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).

[24] 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 gave credence to the nature and seriousness of the offense; Employee's type of employment; the erosion of supervisory confidence; notoriety of the offense on the reputation of the Agency; Employee's past disciplinary record and her past work record; and mitigating and aggravating circumstances. 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:

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MONICA DOHNJI, Esq.
Administrative Judge