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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | OEA Matter No.: 1601-0129-11 |
| SHEENA WASHINGTON, |) | |
| Employee |) | |
| |) | Date of Issuance: October 15, 2013 |
| v. |) | |
| |) | |
| DISTRICT OF COLUMBIA |) | |
| PUBLIC SCHOOL SYSTEM, |) | |
| DEPARTMENT OF TRANSPORTATION |) | |
| Agency |) | Sommer J. Murphy, Esq. |
| _____ |) | Administrative Judge |
| Denise Clark, Esq., Employee Representative | | |
| Hillary Hoffman-Peak, Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 12, 2011, Sheena Washington (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the District of Columbia School Systems’ (Department of Transportation)¹ (“Agency”) action of terminating her employment as a . Agency’s notice informed Employee that she was being separated from service based on Agency’s determination that she had failed to maintain state required driving credentials. Employee’s termination was effective March 11, 2008.

This matter was assigned to me in August of 2011. On December 14, 2011, I held a Status Conference for the purpose of assessing the parties’ arguments with respect to the instant appeal. On December 16, 2011, I issued an Order directing the parties to submit briefs on the issue of whether this Office has jurisdiction over Employee’s appeal. Both parties submitted briefs in response to the Order. I subsequently issued an Order on Jurisdiction, finding that OEA could exercise jurisdiction over Employee’s appeal.² Thereafter, the parties engaged in several mediation efforts in an attempt to settle the matter; however, an agreement could not be reached. Thus, on February 27, 2013, I issued an Order Convening a Prehearing Conference to be held at this

¹ DCPS (DOT) is now the Office of the State Superintendent of Education (“OSSE”).

² See Order on Jurisdiction (October 22, 2012).

Office on March 28, 2013. During the conference, it was determined that genuine issues of material facts existed, and that an evidentiary hearing was required. An evidentiary hearing was held on June 6, 2013. I subsequently issued an order that required the parties to submit written closing statements on or before August 16, 2013. Both parties submitted responses to the order. The record is now closed.

JURISDICTION

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

ISSUE

1. Whether Agency's action was taken for cause.
2. If so, whether the penalty imposed 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.

Uncontested Facts

1. Employee began working as a motor vehicle operator/bus driver in 2001. Her primary duties included operating a school bus on various routes that were designated by Agency.
2. On June 25, 2003, the federal judge in *Petties v. District of Columbia* accepted the recommendation of the Special Master and appointed David Gilmore of Gilmore Kean, LLC as the independent Transportation Administrator.³
3. David Gilmore was authorized to oversee and supervise all personnel functions of the District of Columbia Public Schools (Department of Transportation).

³ 268 F.Supp.2d 38 (D.C. Cir. 2003)

4. By court order dated May 5, 2010, Gilmore was discharged from his position as Transportation Administrator and was reassigned to the position of Special Court Master, wherein he was tasked with transferring the special education transportation functions to Office of the State Superintendent of Education (“OSSE”).⁴
5. OSSE subsequently became responsible for the daily operations of the special transportation services, including the hiring and firing of employees.⁵
6. In 2007, bus drivers who worked for Agency were informed that they were required to have an S endorsement on their driver’s license. An S endorsement allows a driver to operate a school bus.
7. In order to obtain an S endorsement, employees were required to pass both a written test and a physical driving test. A valid commercial driver’s license (“CDL”) is required to obtain an S endorsement.
8. Bus drivers were given the opportunity to retest if they did not pass the practical skills exam on the first attempt.
9. Out of the 362 bus drivers who were required to obtain the endorsement at Agency, five (5) did not receive it.
10. Employee received a learner’s permit which expired on December 18, 2007.
11. As of the date of her termination, Employee had not passed the practical skills portion of the exam and did not have an S endorsement on her CDL.
12. On January 31, 2008, Agency issued Employee a proposed notice of termination. The notice stated that Employee failed to maintain proper driving credentials while working for Agency. The notice cited Employee’s failure to obtain an S endorsement when she renewed her CDL.
13. On March 11, 2008, Employee received notice that she had been terminated.
14. Employee subsequently filed a complaint contesting Agency’s action of terminating her in D.C. Superior Court. On March 9, 2011, the Honorable Judge John M. Mott issued a decision staying Employee’s case until she exhausted her administrative remedies with the appropriate agency.
15. On July 12, 2011, Employee filed a Petition for Appeal with OEA.

⁴ Agency’s Reply Brief (February 23, 2012).

⁵ *Id.*

Employee's Position

Employee argues that Agency failed to prove by a preponderance of the evidence that Employee was terminated for cause. According to Employee, Agency violated the Collective Bargaining Agreement (“CBA”) and the Comprehensive Merit Personnel Act (“CMPA”) when they terminated Employee. According to Employee, Agency obstructed her attempts to be in compliance with their policy that drivers must obtain an S endorsement.⁶ Employee also argues that she was treated differently than other similarly situated drivers because other drivers were permitted to drive without the S endorsement until June of 2008. In addition, Employee contends that Agency failed to provide her with an administrative hearing prior to her termination.⁷

Agency's Position

Agency contends that it terminated Employee in accordance with all District of Columbia laws, rules and regulations. Agency states that Employee was required to maintain an S endorsement on her CLD in order to continue working as a bus driver. According to Agency, Employee failed to complete the skills portion of her exam, even though she knew it was required. Agency argues that it had cause to terminate Employee based on her failure to obtain an S class endorsement as a driver, and that the penalty of termination was within the parameters of the Table of Appropriate Penalties.

SUMMARY OF RELEVANT TESTIMONY

Eva Laguerre (Transcript pages 13-26)

Eva Laguerre (“Laguerre”) is the Testing and Compliance HR Manager for the Office of the State Superintendent of Education (“OSSE” or “Agency”). Laguerre was hired January 19, 2012 and testified that Agency maintains driving records dating back to 2010. She was uncertain if any driving records are maintained prior to 2010. Laguerre is responsible for managing the payroll, the drug and alcohol testing program, and the credentialing for employees who drive commercial motor vehicles.

Laguerre testified that employees who operate commercial motor vehicles for Agency are required to have a valid Commercial Driver’s License (“CDL”) and with valid ‘P’(Passenger) and ‘S’ (School Bus) endorsements. Laguerre stated that under the Code of Federal Regulations (“CFR”), those who drive school buses must have a valid S endorsement. She further stated that under § 1313.1 of the D.C. Municipal Regulations (“DCMR”), those who drive passenger transport vehicles and school buses must possess valid P and S endorsements. According to Laguerre, the driving and skills test that is required for an S endorsement may be waived for an applicant who meets the conditions set forth in 49 CFR § 383.123(B).

⁶ Employee Closing Argument at p. 17 (August 19, 2013).

⁷ OEA Rule 619.2, 59 DCR 2129 (March 16, 2012), authorizes this Administrative Judge the discretion to grant a *de novo* evidentiary hearing when there are material issues of fact to be addressed. Agency’s alleged failure to afford Employee an internal administrative review need not be addressed, as she has been presented the opportunity to present her arguments before this tribunal.

Laguerre testified that drivers are responsible for maintaining their CDL and endorsements. She was unaware of the credentialing requirements or policies during 2007 and 2008. Laguerre testified that she was only aware of Agency's current policies. If a driver's CDL becomes invalid, they are provided notice that they have five days to get it corrected. If a driver loses their S endorsement, they may apply for any position that's open within Agency. Currently, for a bus driver to be hired, they must possess a CDL with an S endorsement.

Tracey Langley (Transcript pages 26-37)

Tracey Langley ("Langley") is the Employee Relations Manager at OSSE. She is responsible for disciplinary actions that are taken by Agency, employee recognition, and assisting with litigation related to employment. Langley previously worked in the Student Hearing Office (during 2007-2008) and was not familiar with the hiring policies of Agency during that time. Langley admitted that she contacted the Department of Motor Vehicles ("DMV") to obtain history about what was required for bus drivers, whether the S endorsement was required, and whether drivers could use "Rent-A-Bus" to take the test. She states that Ms. Tonya, the CDL Road Test Supervisor, informed her that as of February of 2007, customers (employees of the school systems or anyone driving a school bus) were advised to turn in their face cards in exchange for S endorsements because the endorsement would be added to the CDL. Langley testified that she was not aware if Agency followed up with its drivers to make sure that they turned in their face cards. She was also not aware if, in 2007, Agency checked to make sure their drivers had the new endorsement. According to Langley, if drivers did not come in, they would be required to test again. Langley stated that S endorsements require that an employee have substantive knowledge and road exams and without it, customers are not allowed to drive a bus per the Federal Motor Carrier and Safety Administration. Langley testified that Ms. Tonya said that ninety percent of customers test in a school system and that the other ten percent rent a bus from a driving school. Langley admits that a February 1, 2008 advertisement for a school bus driver did not state that drivers must have a valid S endorsement.

George Mills (Transcript pages 37-87)

George Mills ("Mills") is the Training Administrator who is responsible for CDL training with Agency. He has been working in this capacity for approximately seven years. He stated that CDL training encompasses safety information, and helping drivers with obtaining a CDL.

According to Mills, Agency was notified that all drivers needed to have the S endorsement by the end of September 2007, as it had become required for operating a school bus anywhere in the U.S. He explained that a number of drivers disregarded the notice and did not take the opportunity to obtain an S endorsement because there was a "grandfather period" wherein an employee could obtain the endorsement if they did not have any points on their driver's license. During the grandfather period, the drivers would be required to pass a 20 question test. Mills testified that the drivers were notified of this period and that he complied and obtained the endorsement. He stated that whenever a driver moves to a new jurisdiction, the S endorsement is taken away.

Mills testified that as of July, 2007, 367 drivers were not in compliance with Agency's requirement. Employees were issued an order requiring them to obtain the endorsement by August, 2007. Mills testified that the notice was put up on an announcement board and an individual letter was issued to those drivers who had not obtained the endorsement. During that time, Mills was tasked with training these drivers in order for them to pass the "pre-trip" portion of the test. The paper portion of the test was 20 questions.

With regard to Employee, Mills stated that she received the training and obtained her learner's permit for the endorsement, but failed the pre-trip portion of the test. The pre-trip portion of the test is taken before the skills test and is taken on the road with an examiner. Because Employee failed the pre-trip portion of the test, she had to reschedule for another test. Mills testified that at the time there were only two trainers: himself and another employee. Therefore, a circular was sent out by management informing drivers that they could not make an appointment on their own because it may conflict with the trainer's schedule. Mills stated that Employee rescheduled her own appointment, but it conflicted with his and the other trainer's schedule. According to Mills, when Employee came in to receive her training, she got into a dispute with the Operations Manager.

With regard to the "bidding" process for school bus routes with Agency, Mills confirmed that a driver who was bidding in June of 2007 for the 2007 summer "runs" was not required to have an S endorsement. Mills testified that drivers who did not have the S endorsement were able to bid on the school year routes as long as they were in compliance by the time the school year began. Mills further stated that if drivers were not in compliance by the end of August, they would not be employed as a school bus driver with Agency. T. Pettigrew ("Pettigrew"), the Operations Manager for Agency, along with Mills and other employees responsible for safety and training were responsible for following up with drivers who did not have the endorsement.

Bill Alston was the other trainer who worked alongside Mills. Mills testified that he was responsible for assisting the B class drivers and that Mr. Alston assisted the C class drivers. Mills stated that drivers who only had their learner's permit were required to have a driver on the bus with them who had the proper endorsements. Mills confirmed that no driver with a learner's permit was allowed to drive alone. Mills stated that one driver requested to be an attendant because he was having difficulty passing the paper test. That driver's request was granted.

According to Mills, his paperwork reflected that as of August, 2007, Employee did not have the S endorsement. Although Employee had passed the written exam, she did not pass the practical skills test. Furthermore, after Employee failed the test, she rescheduled another test on her own, although the protocol was for Mills or Alston to schedule the date for retesting. Mills stated that drivers are allowed two opportunities to take the physical pre-trip test. For testing, drivers needed to be with a trainer in order to have a fully equipped school bus that had the federally required equipment. The bus was also required to be affiliated with a school district, as employees could not rent a bus.

Sheena Washington (“Employee”) (Transcript pages 88-174)

Employee currently works at Rent-A-Car and has been working there since June of 2009. She resides in Rockville, MD. She previously worked for Agency as a Bus Driver from December 2001 to December 18, 2007. Employee drove a small bus and her duties included transporting students from their home to their school and back to their home. Previously, Employee drove for Montgomery County and the Montgomery County School System.

When Employee was driving for Montgomery County, she had a P endorsement. She continued to carry a P endorsement when she joined Agency. In June of 2007, she learned from Operations Manager Jason Campbell that she needed to get the S endorsement. Employee testified that Mr. Campbell did not provide her with any further information and did not tell her that she would be trained.

When presented with Employee Exhibit No. 3, Employee confirmed that it was a letter regarding route bidding. Prior to receiving the bidding letter, she was aware that she needed to get the S endorsement. However, she confirmed that nothing on the bidding sheet/letter stated that the S Endorsement was required. Employee testified that on June 4, 2007, an evening dispatcher requested that her manager check her CDL. She confirmed that her manager was asked again in November to check on her CDL.

Employee stated that she went to the (“Maryland Vehicle Administration”) MVA to take the test and study for the S endorsement. Thereafter, she passed the written portion of the test and obtained her learner’s permit. According to Employee, after passing the written exam, the MVA of Largo, Maryland set up an appointment for her to come back and take the skills test. Employee testified that she participated in bidding for the 2007 summer routes and was awarded one. Between July and October of 2007, Employee was not aware of any notices posted about training for endorsements. She also stated that she did not receive anything in the mail from Agency about training or classes that drivers could take for the practical and skills exam. Employee was awarded a route for fall of 2007 and testified that prior to December 12, 2007, she drove bus routes during the summer and no one indicated to her that she needed to get anything beyond her learner’s permit prior to driving routes in the fall.

Before the date that her learner’s permit was set to expire, Employee stated that she spoke with Mr. Alston and he told her that he would train her for the pre-test. Employee testified that she had an appointment for December 12, 2007. Employee also stated that Mr. Alston did not show up for the training. Accordingly, she did not go to MVA for the training because a trainer at ‘Penn Center’ told her that she needed a big bus instead of a small bus to test with. At that time, Employee only maintained a CDL with a B class endorsement, which allowed her to transport passengers on big buses. However, while working for Agency, Employee drove a small bus.

Employee testified that her last day driving for Agency was December 18, 2007. Her manager had explained that because her learner’s permit for her S endorsement had expired, she could not drive anymore. Thereafter, on January 2, 2008, Employee wrote a letter to Mr. Pettigrew to express her concern with her expired CDL. In the letter, she requested to be

reinstated as an attendant, to be transferred to another terminal, and to be reimbursed for her leave. She further requested that her manager be reprimanded.

Employee stated that she had a meeting with Mr. Pettigrew and that he said she was not terminated. Mr. Pettigrew told her that he was going to find out more information and get back with her, but he never did. Thereafter, another agency employee, Ms. Gray, gave Employee a letter stating that Agency wanted to help her step down to the position of bus attendant. Employee, unsure of her status of employment, needed a job. Employee stated that she subsequently passed the physical examination for the attendant position.

Employee testified that she was only disciplined once during her tenure with Agency, and that the matter was dismissed. She stated that she knew of other school bus drivers who were able to drive without an S endorsement. Employee confirmed that after she was sent home on December 18, 2007, she did not receive any pay until March 2008. After her termination, she filed for unemployment compensation.

According to Employee, on December 12, 2007, the date Employee was scheduled for the test, she tried to contact Mr. Pettigrew's office. She confirmed that she was given a new date to take her test, but she did not attempt to reschedule because she had received her proposed termination letter.

Antonio Washington ("Washington") (Transcript pages 175-194)

Antonio Washington ("Washington") has worked as a bus driver for DCPS since 1999. Prior to his time at DCPS, he worked for Montgomery County driving the military buses, "Ride On," and Montgomery County Public School buses. When he came to work for DCPS, he had a CDL with a P endorsement. He did not have an S endorsement at that time. However, he testified that in 2007, the Human Resources let him know that he needed an S endorsement.

Washington testified that there was a list of drivers who needed to obtain the S endorsement and that they could attend Agency's classes to obtain it. He confirmed that Agency would come to the job sites and inform employees of the training classes that were being offered. The training involved hands-on exercises and use of Agency's buses to take the exam. Washington stated that the trainers showed drivers what the instructors at MVA were looking for during the exams.

Washington stated that in 2007, he did not have an S endorsement. He was only driving with P and B endorsements. Washington said that he was not issued an S endorsement until June 26, 2008 because there were more senior employees ahead of him who had to get the same credential. He did not receive a bus for training until 2008 and his trainer was Mills. Washington testified that he attended weekend classes with Mr. Mills and that he was trained on the pre-trip and the practical skills test using a bus provided by Agency. The training took place on the side of Penn Center. Washington attended five Saturday classes.

Washington stated that Agency would drive bus drivers to the testing site at MVA. He further testified that Mills informed him of his testing date during the training. He recalled that

drivers who failed the test were able to retake it. Drivers who failed were not allowed to drive and were able to work as an attendant until their test day. Washington stated that in June of 2007, he bid for the summer routes and was able to drive during the summer and school year.

ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency's adverse action was taken for cause.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3 of the District Personnel Manual ("DPM") defines cause to include [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations—neglect of duty.⁸

In this case, I find that Agency had cause to remove Employee from her position as a bus driver. Employee was required to obtain an S endorsement in order to drive a school bus. She was put on notice of this requirement, and was given the means and opportunity to take both the written and practical skills components of the S endorsement exam. Because Employee did not acquire an S endorsement, she was terminated by Agency.

In 2007, the general process for obtaining an S endorsement was as follows: Agency's trainers were responsible for assisting bus drivers with obtaining their S endorsement, which authorized them to operate school buses. (Tr. pg. 39). In order to obtain the S endorsement, a driver would have to pass both a twenty (20) question written examination in addition to a practical skills examination. A trainer would first inform an employee of their test date, which had to coincide with the trainer's availability. The trainer would subsequently go to a bus site and pick up the driver in a bus and drive them to take the practical skills portion of the exam. (Tr. pgs. 192-195). Bus drivers were given two opportunities to retest if they failed the exam. (Tr. pg. 86).

⁸ Chapter 16 DPM § 1603.3.

Here, there is no documentary evidence in the record that specifically enumerates what Agency's written policy was in 2007 regarding the requirement that bus drivers obtain an S endorsement. In fact, during this time, Agency allowed bus drivers who did not have an S endorsement to bid on bus routes so that they would not disrupt the students' transportation to and from school. The testimonial evidence; however, supports a finding that bus drivers were put on notice that they were required to obtain the S endorsement by the end of September 2007. Both Employee's and Mill's testimony supports this finding. According to Mills, the Department of Transportation issued notices to all bus drivers that they were required to have an S endorsement, unless they could be exempted. (Tr. g. 41). Employee also conceded that she was aware of the requirement that she obtain an S endorsement. (Tr. pg. 141). Employee knew that she needed to pass the practical skills examination as a prerequisite to obtaining an S endorsement, but she failed to take the skills examination. (Tr. pg. 140-141).

Bus drivers, including Employee, were informed that they could not go out and make an appointment to take the practical skills portion of the exam on their own without a trainer to accompany them. (Tr. pgs. 83; 86). If an employee's request to schedule the practical skills exam conflicted with a trainer's schedule, then the employee would have to wait until a trainer's schedule could accommodate them. Mills testified that Employee received her learners permit and was taken to Waldorf, Maryland to test for her endorsement, but failed the 'pre-trip,' a test which is taken prior to the practical skills portion of the exam and is performed out on the road with an examiner. (Tr. pg. 42-43). Employee argues that she scheduled the practical skills portion of her exam with MVA, and that when she tried to make arrangements with the training department at Penn Center in order to receive training for her upcoming test, Employee was told by a trainer that she would have to cancel her appointment. (Tr. pg. 104-106). Employee also argues that she attempted to meet with Pettigrew to resolve this issue, and that had she "been told that the trainers could reschedule her practical skills test for a later date, [she] would have taken the practical skills test on February 1, 2008, the next appointment date the MVA had available."⁹ (Tr. pgs. 165-167).

I find no *credible* evidence in the record to indicate that Agency willfully prevented Employee from getting her S endorsement. Although Employee argues that Agency's policy was unclear regarding the process for receiving training prior to testing for the endorsement, Mr. Washington, Employee's husband, testified that he attended weekend classes with Mills and that he was trained on the pre-trip and the practical skills test using a bus provided by Agency. (Tr. pgs. 179-180). Mr. Washington was able to attend five Saturday classes; however, Employee did not attend any training classes. Employee was made aware of this requirement in 2007, and it was incumbent upon her to have a clear understanding of Agency's training policies. Employee could have met with a supervisor, trainer, or any other manager to seek clarity on what was required of her to get an S endorsement.

Regarding Employee's argument that she should have been able to work as a bus attendant while her driving credential issues were being addressed, I find that this issue is outside the purview of the instant appeal. The issue presented before this Office is whether Employee's

⁹ Employee Closing Argument at p. 7 (August 19, 2013).

termination was effectuated for cause, in accordance with D.C. rules and regulations, and whether the penalty of termination was appropriate under the circumstances. Agency's decision to transfer its bus drivers to other positions, in lieu of termination, is one of managerial discretion, and I find no evidence in the record to support a finding that Agency was required to offer Employee an alternative position if she could not be in compliance with the licensing requirements of her position.

Employee's final argument is that Agency engaged in disparate treatment by retaining bus drivers who did not have their S endorsement. The Court in *O'Donnell v. Associated General Contractors of America*,¹⁰ held that to show disparate treatment, an employee must show that he or she worked in the same organizational unit as the comparison employees and that both the petitioner and the comparison employees were disciplined by the same supervisor within the same general time period.

The reasoning in *O'Donnell* can be applied to the instant appeal. Employee only offers the testimony of one other bus driver to support her position that she should have been allowed to continue driving school buses without an S endorsement. Mr. Washington, Employee's husband, testified that he was not issued an S endorsement until June 26, 2008 because there were more senior employees ahead of him who had to get the same credential. While I find that Mr. Washington provided truthful testimony, there is no evidence in the record to show that Employee was similarly situated to other bus drivers at the time she was terminated. There have been no affidavits offered from other bus drivers to prove that they had the same supervisor, grade, years of service, or that their disciplinary records were similar. As such, I find that Employee has failed to make a credible showing of disparate treatment on Agency's part.

Based on the foregoing, I find that in 2007, all bus drivers were notified that they were required to have an S endorsement in order to continue driving for Agency. The S endorsement was required in order to be in compliance with federal regulations.¹¹ Employee was placed on notice of this requirement, but failed to pass the practical skills portion of the exam; a prerequisite to obtaining the endorsement. In 2007, Agency had 362 bus drivers who were required to obtain the endorsement, and only five (5) drivers, including Employee, did not receive it. Agency's policy required that Employee set up an appointment with a trainer, subject to that trainer's availability, prior to taking the practical skills part of the examination. Training classes were being offered during the weekends at the Penn Center during this time, and there is no evidence in the record to show that Employee took any training in preparation for her skills examination. Employees were not able to rent buses or set appointments on their own to take the test. Employee failed to comply with Agency's policies, and therefore was unable to take the practical skills exam. Her failure to obtain an S endorsement deemed her incapable of being in compliance with federal regulations and Agency policy. Accordingly, Employee was not able to lawfully perform the functions of her job at the time she was terminated. Consequently, I find that Agency had cause to terminate Employee in accordance with Section 1651 (1) of the CMPA.

¹⁰ 645 A.2d 1084 (D.C. 1994).

¹¹ See DCMR § 1311.1.

Whether the penalty was appropriate under the circumstances.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.¹² Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."¹³ When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."¹⁴

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."¹⁵ The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (neglect of duty) is reprimand to removal.

In this case, I find that Employee's failure to adhere to the Agency's policies and procedures regarding maintaining an S class endorsement constitutes an on-duty act or omission that interfered with the efficiency and integrity of Agency's operations. Employee could not be compliant with Agency's requirement that she obtain the S endorsement, therefore rendering her unable to lawfully perform the required duties of her job. Employee's failure to obtain the S endorsement interfered with Agency's ability to perform its essential daily operations. I further find that Agency acted reasonably within the parameters established in the Table of Penalties. Based on the foregoing, I conclude that Agency's decision to terminate Employee as the appropriate penalty for her actions was not an abuse of discretion and should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action is upheld.

FOR THE OFFICE:

Sommer J. Murphy, Esq.
Administrative Judge

¹² See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).

¹³ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). 1601-0417-10

¹⁴ *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

¹⁵ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).