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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
KATHRYN HOPKINS,)	
Employee)	OEA Matter No. J-0058-15
)	
v.)	Date of Issuance: January 15, 2016
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF PUBLIC WORKS,)	
Agency)	MONICA DOHNJI, Esq.
)	Senior Administrative Judge
<hr/>		
Gina Walton, Employee Representative		
Milena Mikailova, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 8, 2015, Kathryn Hopkins (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Works’ (“DPW” or “Agency”) decision to terminate her from her position as a Parking Enforcement Officer (“PEO”) in the Parking Enforcement Management Administration (“PEMA”) effective March 6, 2015. Employee was charged with [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 May 11, 2015, Agency filed its Answer to Employee’s Petition for Appeal.

This matter was originally assigned to Administrative Judge (“AJ”) Harris. AJ Harris issued an Order on Jurisdiction on June 23, 2015, noting that this Office had jurisdiction over this matter. Following AJ Harris’ departure from OEA, this matter was reassigned to the undersigned AJ on August 12, 2015. Thereafter, I issued an Order scheduling a Status/Prehearing Conference for September 23, 2015. The September 23, 2015, Status/Prehearing Conference was later rescheduled for October 14, 2015. Both parties were in attendance. Thereafter, I issued a Post Status/Prehearing Conference Order requiring the parties to address the issues raised during the Status/Prehearing 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.

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) If so, 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 Parking Enforcement Office ("PEO") with Agency prior to her termination. To conduct her duties as a PEO, Employee was required to possess and maintain a valid driver's license at all times. In a letter dated December 2, 2014, Agency informed Employee that it had received information that Employee did not have a valid driver's license. In this letter, that she was told that she had thirty (30) days from the date of the letter, or until January 1, 2015, to obtain a valid driver's license. Employee was further notified that a failure to obtain a valid driver's license during the allotted time would result in disciplinary action, to include termination. Employee did not obtain a valid driver's license within the thirty (30) day time frame. On January 13, 2015, Agency issued an Advanced Written Notice of Proposed Removal to Employee for violating Chapter 16 of the DC Personnel Regulation for the following cause of action and specification:

Cause(s): Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: Neglect of Duty (failure to maintain valid motor vehicle operator's permit). [See section 1603.3(f)(3) of Chapter 16 of the regulations].

Specification 1: On December 4, 2014, you were served written notice informing you that DPW had discovered you were not in possession of a valid motor vehicle operator's permit as required to maintain employment as a Parking Enforcement Officer. The written notice dated December 2, 2014, further informed you that you would have thirty (30) calendar days to obtain a valid motor vehicle operator's permit in the District of Columbia or a surrounding jurisdiction. The written notice also informed you that failure to obtain a valid permit in the District of Columbia or a surrounding area would "result in disciplinary action up to termination from your position."

To date, you have failed to provide the Agency with supporting documentation to show that the deficiencies of your license have been remedied. As Parking Enforcement Officer it is your responsibility to

possess and maintain a valid vehicle operator's permit. As a result, you are being removed from your position of Parking Enforcement Officer.¹

On January 26, 2015, Employee submitted a response to the Advance Written Notice of Proposed Removal to the Hearing Officer noting that her driver's license was reinstated on January 15, 2015.² On February 2, 2015, the Hearing Officer issued her report, sustaining Agency's decision to terminate Employee.³ Thereafter, on February 23, 2015, Agency issued its Notice of Final Decision on Proposed Removal, terminating Employee from her position as a Parking Enforcement Officer effective March 6, 2015.⁴

Employee's Position

Employee acknowledges that there was a change in her driver's license status. However, she explains that she was subjected to disparate treatment, because another employee with substantially similar circumstances as Employee received a different penalty for the same cause of action. Employee explains that another Agency PEO, Charnita Alston, was issued a notice dated January 22, 2015, informing her that there was an issue with her driver's license and she was given until February 20, 2015 to resolve the issue. However, Ms. Alston complied with the notice on February 23, 2015, after the February 20, 2015, deadline. Nonetheless, Agency proposed a suspension of nine (9) days for Ms. Alston. Employee states that Ms. Alston provided a statement as to why she was unable to comply within the thirty (30) day period. Employee argues that there is sufficient evidence to show that both Ms. Alston and Employee worked in the same organization unit, and they both complied with Agency's notice after the thirty (30) day time period. However, Employee was terminated, while Ms. Alston was suspended for nine (9) days.

Additionally, Employee argues that Agency failed to consider relevant factors in its decision to terminate her. Employee asserts that because Agency deemed all of the relevant mitigating factors irrelevant, it can be concluded that they were not considered and therefore were not given any weight in determining Employee's penalty. She explains that termination exceeds the limits of reasonableness and thus her removal should be reversed.⁵

Agency's Position

Agency submits that Employee's removal was for cause and that it was the appropriate penalty under the circumstances. Agency explained that, as a PEO, Employee was required to possess a valid driver's license. Agency notes that Employee's license was suspended, and Agency issued a written notice to Employee directing her to obtain a valid license within thirty

¹ Agency's Brief at Attachment 3 (December 30, 2015); *See also* Agency's Answer (May 11, 2015).

² *Id.* at Attachment 4.

³ *Id.* at Attachment 5.

⁴ *Id.* at Attachment 6.

⁵ Employee's Brief (November 30, 2015).

(30) days, but she failed to comply. As a result, Employee was terminated from her position as a PEO.⁶

With regards to Employee's disparate treatment claim, Agency asserts that Employee has failed to satisfy her initial burden because she did not present any evidence that a penalty was imposed on Ms. Alston for similar misconduct. Agency notes that Employee has not demonstrated that a similarly situated employee received a different penalty. Agency maintains that Employee submitted an Advanced Written Notice of Proposed Suspension of Nine Days and not a Notice of Final Decision with regards to Ms. Alston's penalty. Agency highlights that Employee cannot establish a *prima facie* case of disparate treatment on the basis of an Advanced Written Notice because the document merely indicates a proposed penalty, and does not prove that the penalty proposed was actually imposed on Ms. Alston. Agency further states that Ms. Alston was only three days late in correcting the deficiencies with her license and she had already reinstated her driver's license prior to the issuance of the Advanced Written Notice, whereas, Employee on the other hand, was two (2) weeks late in correcting the deficiencies with her license. Agency maintains that, because Employee has failed to proffer evidence showing that she and Ms. Alston were subjected to different penalties for similar misconduct, Employee has not satisfied her initial burden with regards to her disparate treatment claim.⁷

Additionally, Agency contends that Employee's failure to maintain a valid driver's license was a serious offense that was directly related to her job. Employee was aware that driving was an integral aspect of her job and that she was required to hold a valid driver's license. Agency also notes that, Employee's driver's license was suspended on August 17, 2014, and she did not take any action to address this issue immediately after her license was suspended in August of 2014. Instead, she waited until Agency explicitly directed her to obtain a valid license months later. As such, she could not lawfully perform her assigned duties for a lengthy period of time. Furthermore, Agency states that an examination of the *Douglas* factors reveal that its decision to remove Employee from her position was reasonable and appropriate under the circumstances. Agency maintains that its removal of Employee was reasonable in light of the seriousness of Employee's offense as it related to her inability to perform her job, and the fact that she had ample notice during her tenure with Agency that her position required a valid driver's license.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, 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

⁶ Agency's Brief, *supra*.

⁷ *Id.*

⁸ *Id.*

neglected her duties when she failed to possess and maintain a valid driver's license as required to perform her job duties.

Neglect of duty includes, but is not limited to, failure to carry out assigned tasks; careless or negligent work habits.⁹ Employee does not dispute that she did not possess and maintain a valid driver's license from August 17, 2014, until January 15, 2015, a few days after Agency issued its Advanced Written notice of Proposed Removal on January 13, 2015. Employee admits that she did not have a valid license. Employee's conduct of not possessing and maintaining a valid license is considered neglect of duty. Accordingly, I find that without a valid driver's license, Employee could not legally operate a motor vehicle, which is part of her job duties. Consequently, I conclude that Employee's action constitutes neglect of duty. And based on Employee's own admission, I further conclude that Agency had cause to institute this cause of 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).¹⁰ 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 to include: Neglect of Duty."

Disparate Treatment

Employee contends that Agency engaged in disparate treatment because she was not disciplined in the same way as her colleague. She explained that Ms. Alston, a PEO, was suspended for nine (9) days for failing to maintain a valid driver's license, as well as failing to comply with Agency's directive within the allotted thirty (30) day period. However, Employee was terminated for the same offense. Employee provided this Office with the Advanced Written notice Agency issued to Ms. Alston in relation to the nine (9) days suspension. Agency maintains that Employee submitted an Advanced Written Notice of Proposed Suspension of Nine Days and not a Notice of Final Decision with regards to Ms. Alston's penalty. Agency further highlights that Employee

⁹ DPM §1619.1(6)(c).

¹⁰ 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).

cannot establish a *prima facie* case of disparate treatment on the basis of an Advanced Written Notice because the document merely indicates a proposed penalty, and does not prove that the penalty proposed was actually imposed on Ms. Alston.¹¹

OEA has held that, to establish disparate treatment, an employee *must* show that she worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (emphasis added).¹² Additionally, “in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty.”¹³ (Emphasis added).

After a careful review of the record, it appears that Ms. Alston and Employee were both PEO working for the same organizational unit – PEMA. Both Employee and Ms. Alston were disciplined for the offense of neglect of duty (failure to maintain valid motor vehicle operator’s permit), during the same general time period (between January 2015 and March 15). Additionally, Employee and Ms. Alston received different penalties – Employee was terminated, while Ms. Alston had a proposed penalty of nine (9) days suspension. However, despite these similarities, Employee has not provided evidence to show that she and Ms. Alston were disciplined by the same supervisor. Moreover, Employee’s Advanced Written Notice was issued by Administrator Teri Doke, while Ms. Alston’s Advanced Written Notice was issued by Acting Parking Control Manager, Preston Moore. Consequently, I conclude that Employee has not provided sufficient evidence to establish a claim of disparate treatment, and therefore, she has not met her burden of proof.¹⁴

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

¹¹ Unless Agency is attempting to argue that the proposed adverse action against Ms. Alston was withdrawn, I find that this argument is not persuasive. Employee’s submission of the Advanced Written Notice as opposed to the Notice of Final Decision does not change the fact that Ms. Alston, a PEO, failed to maintain a valid driver’s license and Agency at some point, proposed to discipline her for this offense by issuing an Advanced Written Notice of Proposed Suspension of Nine Days. Additionally, pursuant to DPM § 1613.2, an Agency cannot impose a greater penalty than the proposed penalty. In Ms. Alston’s case, the proposed penalty according to the Advanced Written Notice was a nine (9) days suspension. Thus, relying on DPM § 1613.2, Agency could not increase the proposed nine (9) days penalty in its Final Agency Decision if it decided to proceed with its disciplinary actions against Ms. Alston.

¹² *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

¹³ *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).

¹⁴ Moreover, unlike Ms. Alston whose driver’s license was reinstated prior to Agency’s issuance of the Advanced Written Notice of Proposed Suspension of Nine Days, here, Employee’s driver’s license was reinstated on January 15, 2015, two (2) days after Agency issued the Advanced Written Notice of Proposed Removal.

first time Employee violated §1619.1(6)(c). Employee acknowledged that there was a change in her driver's license status. Employee also does not deny that she did not have a valid driver's license when Agency issued it Advanced Written Notice of Proposed Removal on January 13, 2015. Nor does she dispute the fact that her driver's license was reinstated after the thirty (30) days deadline Agency allotted for her to obtain a valid driver's license. 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 languages of §§ 1619.1(6)(c) of the DPM. Therefore I find that, because termination is within the range allowed as penalty for the first offense for Neglect of Duty, Agency did not abuse its discretion by terminating Employee.

Furthermore, Employee contends that Agency did not consider the relevant factors in its decision to terminate her. She asserts that because Agency considered the relevant factors irrelevant, they were not given any weight in determining her penalty. Employee explains that termination exceeds the limits of reasonableness and thus her removal should be reversed.

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 of discretionary disagreement by this Office.¹⁵ 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 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.¹⁶ The relevant factors are generally outlined in *Douglas v. Veterans Administration*.¹⁷ The evidence does not establish that the penalty of removal constituted an abuse of discretion. This Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors¹⁸ does not amount to reversible

¹⁵ *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*.

¹⁶ *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).

¹⁷ 5 M.S.P.R. 313 (1981).

¹⁸ 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;

error, where there is substantial evidence in the record to uphold the Initial Decision.¹⁹ Moreover, in the current matter, Agency has presented evidence that it considered relevant factors as outlined in *Douglas*, in reaching its decision to remove Employee.²⁰

In this case, the penalty of termination was within the range allowed for a first offense. As noted above, the evidence does not establish that the penalty of removal constituted an abuse of discretion and/or that Agency engaged in disparate treatment. 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.
Sr. Administrative Judge

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- 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.

¹⁹ See *Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).

²⁰ See Agency's Answer, *supra*, at Tab 4 (Notice of Final Decision on Proposed Removal at pages. 2-4).