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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
JAMES RICE,	)	
Employee	)	OEA Matter No. 1601-0026-16
	)	
v.	)	Date of Issuance: December 12, 2016
	)	
D.C. DEPARTMENT OF MOTOR	)	
VEHICLES,	)	
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
_____	)	
Clifford Lowery, Employee Representative	)	
Milena Mikailova, Esq., Agency Representative	)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 23, 2016, James Rice (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Motor Vehicles’ (“Agency” or “DMV”) decision to terminate him from his position as a Motor Vehicle Inspector. The effective date of the removal was January 30, 2016. Agency’s Answer was due on or before March 28, 2016. On March 25, 2016, Agency filed a Motion for Summary Disposition. Following an unsuccessful attempt to resolve this matter through mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on June 13, 2016. On June 28, 2016, I issued an Order Convening a Prehearing Conference in this matter. The Prehearing Conference was scheduled for August 2, 2016. On July 8, 2016, Agency filed a Consent Motion to Reschedule the Prehearing Conference. On July 12, 2016, I issued an Order granting Agency’s request. The Prehearing Conference was now scheduled for August 12, 2016. Prehearing statements were due by August 5, 2016. Both parties submitted Prehearing statements.

On August 12, 2016, a Prehearing Conference was held in this matter. A Post Prehearing Conference Order was issued the same day, wherein Agency’s Motion for Summary Disposition was denied. Further, parties were ordered to address the issues in this matter and submit briefs in accordance with the briefing schedule agreed upon during the conference. Agency’s brief was due on or before September 12, 2016. Employee’s brief was due on or before October 12, 2016. On September 15, 2016, Employee filed a Motion to Dismiss for Non-Compliance alleging that Agency

had not followed the briefing schedule deadline as required by the August 12, 2016 Order. On September 26, 2016, I issued an Order denying Employee's Motion, citing that Agency had complied and filed its brief on September 12, 2016, as directed. Employee filed his brief on October 12, 2016.

Based on the briefs submitted by the parties, I determined that an Evidentiary Hearing was not warranted. 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 had cause to take adverse action against Employee; and
2. If so, whether removal 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.

### SUMMARY OF PARTIES' POSITION

#### **Agency's Position**

Agency contends that Employee was a Motor Vehicle Inspector and was required to possess a valid driver's license. Agency argues that following a failure on Employee's part to pay for moving violations, his license was suspended on October 7, 2014.<sup>1</sup> Agency asserts that Employee continued to operate vehicles between the periods of October 7, 2014 through November 28, 2014, even though he did not have a valid driver's license.<sup>2</sup> Agency avers that on November 28, 2014, Employee "allegedly sustained injuries when a cord burst and caused hot fluid to leak onto Employee's boot as he was performing an emission inspection."<sup>3</sup> Following this incident, Employee

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<sup>1</sup> Agency's Brief at Page 1; *See also* Exhibit 5 and Exhibit 6 (September 12, 2016).

<sup>2</sup> *Id.* at Page 3.

<sup>3</sup> *Id.*

filed a worker's compensation claim with the Office of Risk Management. On May 15, 2015, ORM denied Employee's claim indicating that the injury did not occur within the course and scope of employment.<sup>4</sup> In a Compensation Order on Remand issued June 30, 2016, a Department of Employment Services ("DOES") ALJ held that Employee did sustain a workplace injury. Agency argues that it has timely appealed this Order with the Compensation Review Board ("CRB").

Agency asserts that on January 6, 2015, it informed Employee that it had "received information indicating that Employee did not have a valid driver's license."<sup>5</sup> Agency gave Employee until January 16, 2015, to remedy the issue with his license. Following a request from Employee's Union Representative, Agency extended the time for Employee to obtain a valid driver's license to January 21, 2015.<sup>6</sup> Agency contends that Employee obtained a valid license on January 20, 2015. However, Agency notes that on August 10, 2015, they were made aware that Employee's license had been revoked on July 12, 2015, due to Employee's failure to pay child support.<sup>7</sup> Agency cites that on August 19, 2015, and "unbeknownst to management" that Employee returned to work and failed to report that his license has been revoked. Agency argues that Employee worked that day until the Inspection Station manager told him to stop. Agency issued an Advance Written Notice of Proposed Removal on August 19, 2015.<sup>8</sup>

Agency maintains that Employee was removed for cause and that the penalty assessed was within the range allowed by law, regulation and the Table of Appropriate Penalties ("TAP"). Agency also notes that the Collective Bargaining Agreement between Agency and Employee's Union AFGE 1975 ("CBA")<sup>9</sup>, provides that "employees whose employment requires a valid driver's license shall promptly report to the appropriate personnel whenever there is a change in the status of their motor vehicle operator's license, in particular, the revocation, suspension or loss of driving privileges of their license."<sup>10</sup> Further, Agency notes that the Government of the District of Columbia Vehicle Operator's Acknowledgement Forms ("Acknowledgement Forms") indicates that employees are responsible for notifying Agency regarding changes in their license status. Agency also asserts that the same is applicable in Administrative Order No. 2010-005 ("Administrative Order"), in that employees bear the responsibility for notifying the appropriate personnel authorities of a change in their license status. Agency argues that there is no evidence in the Administrative Order, CBA, or Acknowledgement Forms that note a "joint responsibility" regarding the notice of an employee's licensure status.<sup>11</sup> Agency maintains that Employee's failure to maintain a valid license was a "serious offense that was directly related to his job."<sup>12</sup>

Additionally, Agency notes that the Administrative Order sets forth that "it is the employee's responsibility to maintain a valid driver's license and to notify Supervisor immediately of any change in status."<sup>13</sup> Further, Agency asserts that the Administrative Order states that "employees are only given ten (10) business days to restore their license privileges, *if they timely notify* the DMV of a license status change."<sup>14</sup> As such, Agency contends that Employee was aware of his responsibility to

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at Page 4.

<sup>9</sup> Neither party provided a copy of the CBA along with their submissions to this Office.

<sup>10</sup> Agency's Brief at Page 6. (September 12, 2016).

<sup>11</sup> *Id.* at Page 7.

<sup>12</sup> Agency's Brief at Page 11 (September 12, 2016).

<sup>13</sup> *Id.* at Page 7.

<sup>14</sup> *Id.* at Page 8.

have a valid license and report any changes in status to Agency. Agency proffers that on two separate occasions, one in 2012 and another in 2014, Employee signed the Acknowledgement Form which also informed Employee that “he was required to notify either his supervisor or manager of any change in the status of [his] driver’s license by his next scheduled work day.”<sup>15</sup>

Agency proffers that it would be improper for this tribunal to rely on the DOES ALJ’s findings regarding the compensation claim and Compensation Order on Remand from June 30, 2016. Agency argues “that notwithstanding the Compensation Order, which it has timely appealed to the Compensation Review Board (CRB),” it still had cause to terminate Employee. Further, Agency argues that the ALJ “held that Employee was disabled only from November 28, 2014, until December 5, 2014.”<sup>16</sup> Agency avers that based on Employee’s timesheets, he received compensatory pay “from the DMV through at least December 24, 2014.”<sup>17</sup> As a result, Agency contends that the DOES ALJ’s “holding (even if it is affirmed by the CRB) does not undercut the validity of DMV’s adverse action against Employee for malfeasance and an employment related act that he knew or should reasonably have known is a violation of law.”<sup>18</sup>

Agency maintains that the action of removal was reasonable under the circumstances. Agency argues that removal is reasonable given the “(1) seriousness of Employee’s offense as related to his inability to perform his job; (2) the fact that Employee was provided with ample notice during his tenure that his position required a valid driver’s license and that he was obligated to report changes in its status; and (3) the fact that Employee unlawfully operated vehicles brought to the DMV.”<sup>19</sup> Further, Agency cites that by failing to maintain a license and report changes, Employee neglected his duty. Additionally, Agency argues that in “operating customer’s vehicles without a license, Employee engaged in an on-duty act that he knew or should reasonably have known is a violation of law.” Agency argues that “examination of Employee’s conduct and the *Douglas* factors reveals that the DMV’s decision to remove Employee was reasonable” under the circumstances.<sup>20</sup>

### **Employee’s Position**

Employee contends that Agency’s final decision to remove him from service failed to utilize progressive discipline and consider mitigating factors faced by Employee.<sup>21</sup> Further, Employee cites that Agency’s advance notice of removal did not afford Employee the opportunity to be “fully aware” of the charges and specifications that were levied against him.<sup>22</sup> Additionally, Employee argues that he was not given an opportunity to address these charges and specifications in accordance with the provisions in the District Personnel Manual and the Collective Bargaining Agreement between Agency and Employee’s Union, AFGE Local 1975 (“CBA”). Employee does not dispute that he performed the full scope of his duties from October 7, 2014 through November 28, 2014, without having a valid driver’s license. Rather, Employee maintains that he was unaware that his license was suspended at that time, and that Agency suffered “no adverse effect on its operations.”<sup>23</sup>

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<sup>15</sup> *Id.* at Exhibits 5 and 6.

<sup>16</sup> *Id.* at Page 10.

<sup>17</sup> *Id.* See also Tab 10 of Attachment K.

<sup>18</sup> Agency’s Brief at Page 10 (September 12, 2016).

<sup>19</sup> *Id.* at Page 12.

<sup>20</sup> *Id.*

<sup>21</sup> Employee’s Brief at Page 3 (October 12, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Employee avers that on January 6, 2015, Agency notified him that there was an issue with his driver's license. Employee indicates that Agency "after having full knowledge of an issue with Employee's license granted employee until January 21, 2015 to correct any deficiency regarding the said driver [sic] license with the only penalty being Employee not operate any vehicle in the scope of his duty until the aforementioned license issue is resolved."<sup>24</sup> Employee contends that on January 20, 2015, his license was restored. Employee argues that Agency's action of charging him with violating the law after having allowed him to become compliant is without merit.

Employee also argues that he was in a non-active/non-pay status during the time frame in which Agency charged him with "neglect of duty for failure to notify Agency of a change in his license status."<sup>25</sup> Employee contends that Agency's reliance on the DMV Administrative Order No. 2010-005 ("Administrative Order") should not justify its removal action. Employee argues that since he was in a non-pay status, he was never made aware of the requirements of the Administrative Order. Further, Employee argues that Agency failed to comply with the CBA Article 10 "to utilize progressive discipline and consider mitigating factors against an alleged offense."<sup>26</sup> Employee argues that he maintained satisfactory or "above [sic] performance rating [sic] throughout his tenure with Agency."<sup>27</sup> Moreover, Employee argues that after sustaining a workplace injury, he was denied the receipt of compensatory pay which prevented his efforts to return to duty. Employee argues that his license was in good standing from January 20, 2015, through July 12, 2015, when it was revoked for non-compliance with child support. Employee argues that his license was revoked because "there was no direct payroll deduction to the Office of Child Support Compliance."<sup>28</sup>

Employee also argues that Agency's assertion that this tribunal should not rely on the findings from the Compensation Order on Remand issued by Department of Employment Services' ALJ D'Souza on June 30, 2016, to determine whether Agency had cause to terminate employee is contradictory and improper.<sup>29</sup> Employee argues that Agency's position that this tribunal reliance on these findings would be improper given that an appeal is pending, "directly contradicts its own position when it was decided to use the initial COMP [sic] determination as justification with regard to Employee's original injury claim despite the fact the said original COMP [sic] determination was timely appealed by Employee."<sup>30</sup> Employee argues that ALJ D'Souza's determination that Employee sustained a workplace injury is indicative that Agency has failed to show just cause for removal for the causes related to violation of law (misuse of resources) and malfeasance.

Employee additionally contends that the DMV Administrative Order 2010-005 ("Administrative Order") requires Agency to conduct full license status of each covered employee at least twice a year. Employee argues that Agency must allow an employee ten (10) days to remedy licensure issues. Employee asserts that Agency has not demonstrated that he knowingly violated the law with respect to driving vehicles from October 7, 2014, through November 28, 2014. Further, Employee avers that Agency has not demonstrated that Employee's neglect of duty warranted removal, because Agency failed to establish that Employee was aware of its Administrative Order, and because Agency failed to follow CBA guidelines regarding progressive discipline.

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<sup>24</sup> Employee's Brief at Page 4 (October 12, 2016).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at Page 10.

<sup>27</sup> *Id.* at Page 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at Page 6

<sup>30</sup> *Id.*

## FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Motor Vehicle Inspector CS-1802-06.<sup>31</sup> In accordance with the specifications of this position, Employee was required to maintain a valid driver's license.<sup>32</sup> In an Advance Written Notice of Proposed Removal dated August 19, 2015, Employee was provided a fifteen day (15-day) notice that he would be removed from his position based on the following causes of action :“(1) [a]ny on-duty or employment related act or omission that an employee knew or should have reasonably known is a violation of law.<sup>33</sup>; and (2) [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically; Neglect of Duty and Malfeasance.<sup>34</sup>; and (3) [a]ny act which constitutes a criminal offense whether or not the act results in a conviction.”<sup>35</sup>

In a Final Written Notice of Proposed Removal dated January 24, 2016, Employee was informed that in accordance with section 1608 of Chapter 16 of the D.C. Personnel Regulations that he would be removed from service based on two of the three grounds outlined in the Advance Notice. The causes for removal were: “(1) [a]ny on-duty or employment related act or omission that an employee knew or should have reasonably known is a violation of law Section 1603.3(e); and (2) [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically; Neglect of Duty and Malfeasance Section 1603.3(f) (3) and (7).”<sup>36</sup> The effective date of Employee's removal was January 30, 2016.

### ANALYSIS

#### ***Whether Agency had cause for adverse action***

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. (*Emphasis added*).

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause.

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<sup>31</sup> Employee's Petition for Appeal (February 23, 2016).

<sup>32</sup> Agency's Brief at Exhibit 5 and Exhibit 6 (September 12, 2016)

<sup>33</sup> See Section 1603.3(e) of Chapter 16 of the regulations (2015).

<sup>34</sup> See Section 1603.3(f) (3) and (7) of Chapter 16 of the regulations (2015).

<sup>35</sup> Agency's Motion for Summary Disposition at Tab 9 (March 25, 2016).

<sup>36</sup> *Id.*

Employee's removal was levied pursuant to DPM § 1603.3, wherein the definition of cause includes the following: §1603.3(e): "[a]ny on-duty or employment-related act or omission that an employee knew or should have reasonably have known is a violation of law"; and §1603.3 (f) (3) and (f) (7): "[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 and Malfeasance."

***"[A]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations; specifically Neglect of Duty and Malfeasance."***

Based on the charges and specifications in the instant matter the central issue is whether Employee, in his role as a Motor Vehicle Inspector maintained a valid driver's license as required by the mandates of his position. District of Columbia personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.<sup>37</sup> Additionally, District personnel guidelines provide that malfeasance can be an employee has done something illegal that interferes with the performance of their duties.<sup>38</sup> In the instant matter, Employee, as a Motor Vehicle Inspector with Agency was required to maintain a valid driver's license. As a part of the scope of Employee's duties, he was responsible for driving customers' cars as they came to Agency for services. Based on the record, on more than one occasion, Employee failed to maintain a valid driver's license. The first time period was from October 7, 2014, through January 20, 2015.<sup>39</sup> The next documented time was from July 12, 2015, through his subsequent removal.<sup>40</sup> It was also noted that as of the time of the Final Notice regarding removal, Employee still failed to have a valid driver's license.<sup>41</sup>

Employee does not contest that his license was suspended or revoked on the cited occasions; rather, Employee maintains that he was unaware of the changes, and that mitigating circumstances caused him difficulty in the reinstatement of his license. Further, Employee acknowledges that during the time period between October 7, 2014, and November 28, 2014, that he was still driving cars in the course of his duties at Agency. Employee argues that he was unaware that his license was suspended, but argues that there was no adverse effect to Agency. The undersigned finds this assertion by Employee to be unconvincing. On January 6, 2015, Agency notified Employee of the suspension of his license and afforded him ten (10) days in which to cure the issue. Additionally, following a request from Employee's Union Representative, Agency allowed Employee additional time to have his license restored. Employee restored his license on January 20, 2015; however, it was subsequently revoked just a few months later on July 12, 2015.<sup>42</sup>

Further, it is clear from the Administrative Order No. 2010-005 and the Acknowledgement Forms, that Employee bore the responsibility of maintaining a valid driver's license, and as well as the responsibility for promptly reporting any changes to his license status to the appropriate personnel authority. While the circumstances surrounding Employee's license revocation may be unfortunate, I find that he was still required by his job to maintain a license and to report any changes in the status of his licensure. Further, the Acknowledgement Forms signed by Employee in both

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<sup>37</sup> *Karen Falls v. Department of General Services*, OEA Matter No. 1601-0044-12R14 (August 12, 2014). *See also* 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

<sup>38</sup> *Id.*

<sup>39</sup> Agency Brief's Brief at Page 12 (September 12, 2016).

<sup>40</sup> *Id.* at Page 13.

<sup>41</sup> *Id.* at Exhibit 7.

<sup>42</sup> *Id.*

2012 and 2014, outlined employee's responsibilities regarding the maintenance of a valid driver's license.<sup>43</sup> As a result, I find that Employee's continued failure to maintain a valid driver's license, and his failure to notify the appropriate personnel authorities of the changes of status in his license are tantamount to a neglect of duty and malfeasance. Consequently, I find that Agency had cause to take adverse action against Employee for neglect of duty and malfeasance.

***“[A]ny on-duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law.”***

Employee's failure to maintain a valid license would also reflect an employment related act that employee knew or should have reasonably known is a violation of law. As previously cited, Employee does not dispute that he drove customer's vehicles during the course of his duty without a valid license. Employee proffers that he was merely unaware of the change in his license status. The undersigned does not find this argument to be compelling. Thus, I find that Employee, in driving customer vehicles without a valid driver's license, engaged in on-duty act that he knew or should have reasonably known was a violation of law. Accordingly, I find that Agency had cause to take adverse action against Employee for this reason.

Agency argues that Employee received compensatory pay “for an alleged injury that was not caused by a work-related incident, which would support the DMV's adverse action against him for malfeasance and an employment-related act that he knew or should reasonably have known is a violation of law (in particular, misuse of resources).”<sup>44</sup> However, in a Compensation Order on Remand issued by DOES on June 30, 2016, the ALJ found that Employee did sustain an accidental work injury, and as such Employee was awarded benefits and related expenses.<sup>45</sup> Agency has appealed this decision and contends that it would be improper for this tribunal to rely on the ALJ's findings in order to determine whether Agency had cause to terminate Employee. Further, Agency argues that even if the ALJ holding is affirmed that it does not “undercut the validity of DMV's adverse action against Employee,” because he received pay after the timeline reflected in the ALJ's holding.<sup>46</sup> Employee argues that Agency's reasoning is contradictory and improper.<sup>47</sup>

The undersigned finds that notwithstanding the June 30, 2016, Compensation Order Remand and the pending appeal to the Compensation Review Board, that Agency had cause to remove Employee from service for his actions associated with his failure to maintain a valid driver's license as required by the scope of his job and duties. Upon consideration of the aforementioned findings, I find that Agency has met its burden of proof in this matter, and it has adequately proven that there was proper cause for adverse action against Employee.

### **Whether the Penalty of Removal Was Appropriate**

Based on the aforementioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of*

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<sup>43</sup> Agency's Brief at Exhibit 5 and Exhibit 6. (September 12, 2016).

<sup>44</sup> Agency's Brief at Page 9 (September 12, 2016).

<sup>45</sup> *Id.* at Page 10 (September 12, 2016).

<sup>46</sup> *Id.*

<sup>47</sup> Employee's Brief at Page 6 (October 12, 2016).



*Columbia*, 502 A.2d. 1006 (D.C. 1985).<sup>48</sup> According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in DPM 1619.1; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, “the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not this Office.”<sup>49</sup> Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercise.”<sup>50</sup>

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to remove Employee from service.<sup>51</sup> In *Douglas*, the court held that “certain misconduct may warrant removal in the first instance.” Further, Chapter 16 § 1619.1 of the District Personnel Manual Table of Appropriate Penalties (“TAP”) provides that the appropriate penalty for a first offense for “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically; neglect of duty and malfeasance ranges from reprimand to removal.”<sup>52</sup>

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<sup>48</sup> *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). 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).

<sup>49</sup> See *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>50</sup> *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

<sup>51</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee’s past disciplinary record;
- 4) the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in employee’s ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee’s rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

<sup>52</sup> 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of removal is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to remove Employee from service. As a result, I conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

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Michelle R. Harris, Esq.  
Administrative Judge