THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TRACY HUDGENS,	)	OEA Matter No. 1601-0153-09
Employee	)	
	)	Date of Issuance: January 30, 2012
	)	
	)	
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Tracy Hudgens ("Employee") was an Engineering Equipment Operator with the Department of Public Works ("Agency"). On June 9, 2009, Employee received a notice of final decision to remove him from his position based on the charges of neglect of duty and malfeasance.[1] He filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 8, 2009. Employee argued that he was terminated without cause and in violation of the District Personnel Manual ("DPM") Table of Penalties. He alleged that his removal was the result of false accusations, that Agency engaged in disparate treatment, and that the action was

[1] Employee was charged with failure to follow instructions or observe precautions regarding safety and concealment of an incident by failing to report it to his supervisor. Specifically, Employee was charged with scooping up Ms. Stackhouse, a fellow co-worker, into a piece of equipment he was operating and dumping her down a trash chute and failing to report it.

taken in response to a Whistleblower claim.[2]

Agency filed its Response to Employee's Petition for Appeal on August 13, 2009. It contended that Employee threatened the safety of his colleagues and flagrantly disregarded Agency's safety policies. Agency believed that it had significant cause to remove Employee. It argued that picking up a human being and dumping them down a trash chute and onto the back of a truck constituted neglect of duty. It further provided that Employee's failure to report the accident was neglect of duty and malfeasance. Accordingly, Agency utilized the Table of Penalties as outlined in the DPM when making its final decision to remove Employee. It considered previous disciplinary actions against Employee and found that removal was an appropriate penalty for both charges.[3] Agency explained that it was unaware of any Whistleblower claims and requested that the decision to remove Employee be upheld.[4]

After conducting a pre-hearing conference and requesting statements, the OEA Administrative Judge ("AJ") held an evidentiary hearing on August 4, 2010. Soon after the hearing, the AJ issued his Initial Decision on this matter. He made a number of credibility determinations during the hearing and found that Employee's testimony was inconsistent when compared to the credible testimony of multiple Agency witnesses. The AJ also relied on the written statements submitted by the witnesses and found that the statements support Agency's charges against Employee. Therefore, he held that Employee failed to follow instructions and observe safety precautions and neglected his duty to operate heavy machinery safely.[5]

As for the malfeasance charge, the AJ noted that Employee admitted to failing to report

[2] *Petition for Appeal*, p. 3 (July 8, 2009).
[3] Agency relied on *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), when considering the relevant factors in making its final decision to terminate Employee.
[4] *Agency Answer* (August 13, 2009).
[5] *Initial Decision*, p. 6 (October 15, 2010).

the incident to his supervisor. Moreover, he coerced Ms. Stackhouse to participate in a cover up. The AJ held that Employee's prior record of safety violations was his motive to conceal the incident from supervisors. Thus, Agency proved that Employee committed malfeasance.[6]

The AJ found that the penalty was proper and consistent with the *Douglas* factors. He also reasoned that the penalty was appropriate because of Employee's similar, past behavior. Removal was the next progressive disciplinary action to take. Thus, Agency's action of removal was upheld.[7]

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board. In his petition, Employee asserted that the AJ's findings that he dumped Ms. Stackhouse into the truck were not supported by substantial evidence. He also argued that the AJ's witness credibility determinations were not consistent with the record. Employee went on to contend that because Ms. Stackhouse did not state to Employee that she was injured, he could not be charged with concealing the incident.[8] Finally, Employee claimed that the AJ improperly characterized his disciplinary record when considering the *Douglas* factors.[9]

On December 23, 2010, Agency filed its Response to Employee's Petition for Review. It reasoned that the AJ's credibility determinations should be given great weight. Agency discussed Employee's failure to follow its policy to report the incident. It further asserted that the AJ's use of Employee's disciplinary history was accurate, and his decision was based on

[6] *Id.* at 7.
[7] *Id.*
[8] Employee claims that Agency's policy provides that an accident or incident is any property damage, vehicular damage, or personal injury. It is his position that if an incident does not involve personal injury, then an employee is not required to report it.
[9] *Petition for Review*, p. 2-7 (November 19, 2010).

substantial evidence.[10]

Employee argues that the AJ's witness credibility determinations were not consistent with the record. OEA has held that it will not question an AJ's credibility determinations.[11] The Court in *Metropolitan Police Department v. Ronald Baker,* 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the administrative fact finder in this matter. Thus, this Board will not second guess his credibility determinations.

Moreover, the Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[12] After review of the OEA Hearing Transcript, a reasonable mind would accept Agency's witnesses as credible and adequate to support its decision to remove Employee.

Employee also contends that the neglect of duty and malfeasance charges were not based on substantial evidence. It is his position that he did not dump Ms. Stackhouse into the chute, but she jumped into the truck's trailer. Therefore, this Board must determine if a reasonable mind would accept the Agency and AJ's assessments of the charges.

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[10] *Agency's Response to Employee's Petition for Review* (December 23, 2010).
[11] *Ernest H. Taylor v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinions and Orders on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); and *Paul D. Holmes v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009).
[12] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Per Employee's position description, one of his duties is to exercise extreme caution to avoid contact with adjacent equipment and workers. Employee is also responsible for the safety of pedestrians while operating the equipment and for the safety of employees working around equipment. When he is close to other persons, buildings, or utility wires, he is required to operate the equipment in accordance with the safety rules and regulations.[13] Employee's admission that he did not see Ms. Stackhouse on the floor is proof that he was not operating the equipment safely because he failed to check that the path was clear before proceeding to scoop her into the trash.[14] As the AJ provided in his Initial Decision, it is unreasonable to accept Employee's position that Ms. Stackhouse jumped into the trailer given the evidence.

Employee admits to concealing the incident during his hearing and concedes that in hindsight, he should have reported the incident to his supervisor.[15] According to Agency's accident/incident notification procedures, a person involved in or a witness to an accident/incident has the responsibility to notify a supervisor by the most expedient method. Thus, Agency's charges against him were based on substantial evidence.

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).[16] According to the Court in *Stokes* OEA must determine whether the penalty was within the range allowed by law,

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[13] *OEA Hearing Transcript,* Exhibit #6 (August 4, 2010).
[14] *Id.* at 198.
[15] *Id.* at 257 and 260.
[16] *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*

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.

Penalty Within Range Allowed by Law, Regulation, or Applicable Table of Penalties

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. Section 1619 of the DPM clearly lists that the penalties for an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations, neglect of duty charge ranges from a reprimand to removal for the first offense. The penalty for a second offense is suspension for fifteen days to removal. Suspension for 30 days or removal is the penalty range for a third offense of neglect of duty.

Employee was previously issued a letter of reprimand for inexcusable neglect of duty on September 29, 2006; he was charged with failure to adequately perform duties safely and concealing an accident. This incident resulted in an injury to an employee and dumping recycled trash on him. Furthermore, he was suspended for thirty days on May 29, 2007, for failing to observe safety precautions while operating equipment. His failure to safely operate the equipment resulted in a co-worker's injury. Again, Employee attempted to pressure the injured employee into concealing the incident.[17] Removal is appropriate for the first, second, or third offense of neglect of duty. Employee had progressive disciplinary action taken against him for previous incidents involving this charge. Thus, removal was an appropriate penalty for

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v. Alcoholic Beverage Regulation Administration, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[17] In accordance with DPM § 1602, an Agency may not consider previous adverse actions no more than three years prior to the effective date of the current action. The effective date of the current action was June 9, 2009. Thus, the Agency and AJ properly considered Employee's previous adverse actions. They all occurred after June 2006, which is three years before the current action.

Employee.

DPM section 1619 defines malfeasance as "doing something illegal. This term is often used when a professional or public official commits an illegal act that interferes with the performance of his or her duties. This includes misuse, mutilation or destruction of government property; concealment, misuse, removal, mutilation, alteration of government property, public records or funds; misuse of official position for unlawful or personal gain." The penalty for this charge is suspension for thirty days to removal for the first offense, suspension for forty-five days to removal for the second offense, and removal for the third offense. As stated above, Employee was previously charged with concealment of an incident on at least two other occasions.[18] Accordingly, removal was also an appropriate penalty for the malfeasance charge against Employee.

Penalty Based on Consideration of Relevant Factors

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[19] OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[20] Agency's reliance on DPM § 1619 to determine the penalty for the neglect of duty and malfeasance charges is proper. 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

[18] *Agency's Answer* Exhibit #20 (August 13, 2009).
[19] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[20] *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 and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.[21] 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.[22]

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[23] The evidence did not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas* in reaching the decision to remove Employee.[24]

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[21] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

[22] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

[23] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

[24] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

(1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) the employee's past disciplinary record;
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) consistency of the penalty with any applicable agency table of penalties;
(8) the notoriety of the offense or its impact upon the reputation of the agency;

Agency gave great weight to the nature and seriousness of the offense; employee's past disciplinary record; his past work record; the consistency of penalty with those imposed on other employees for a similar offense; the consistency of penalty with the Table of Penalties; the notoriety of the offense and its impact on the agency; the clarity with which Employee was on notice of the rules that were violated; the potential for Employee's rehabilitation; mitigating circumstances; and the effectiveness of alternative sanctions to deter such conduct in the future.[25] There was no evidence presented that Agency was prohibited by law, regulation or guidelines from imposing the penalty of removal.

No Clear Error of Judgment by Agency

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was within the range of penalties for the neglect of duty charge, as evidenced in Chapter 16 of the DPM. It was also a valid penalty given Employee's previous charges of malfeasance. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Consequently, we must **DENY** Employee's Petition for Review.

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(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.

[25] *Agency's Answer,* p. 7-9 (August 13, 2009).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.