THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
METRICE JONES, Employee	OEA Matter No. 1601-0077-09
	Date of Issuance: May 23, 2011
D.C. PUBLIC SCHOOLS, DEPARTMENT OF TRANSPORTATION, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Metrice Jones ("Employee") worked as a Motor Vehicle Operator with the D.C. Public Schools, Department of Transportation ("Agency"). On December 30, 2008, Employee received a notice terminating her from employment due to "unprofessional behavior toward a co-worker (abusive language)."[1] Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 30, 2009.

In her petition, Employee requested a reversal of the charges against her and that she be

[1] Agency provided that Employee was driving a school bus with two attendants riding along with her. During the course of dropping students off at home, Employee drove a different route than that normally taken without advising the attendants. One of the attendants questioned Employee's decision. Employee responded by yelling and using profanity at the attendant while children were present. *Agency's Response to Petition for Appeal,* p. 1-2 (March 16, 2009).

reinstated to her position with salary. She argued that Agency lacked just cause for an adverse action against her. She did not believe that her behavior was unprofessional. Employee also provided that she was not afforded an opportunity to explain or defend her actions.[2]

On January 7, 2010, the Administrative Judge ("AJ") issued his Initial Decision in this matter. He provided that prior to issuing his decision, Agency proffered that the decision to terminate Employee was based on two prior incidents of job-related discipline, including disorderly conduct which resulted in a two-day suspension. Employee vehemently disagreed and insisted that she was not previously suspended. She admitted that her behavior was inappropriate, but it did not warrant termination. Agency was unable to produce any evidence of the alleged prior suspension.[3]

Accordingly, the AJ held that Agency did not meet its burden of proof. It did not provide any evidence in the record or in Employee's official personnel files that a two-day suspension was previously imposed. He further provided that Agency lacked sufficient cause to remove Employee. The AJ reasoned that because the record lacked sufficient evidence, the termination of Employee was too harsh of a penalty. Consequently, her termination was vacated, and the AJ reduced her penalty to a nine-day suspension instead.[4]

On February 9, 2010, Agency filed a Petition for Review with the OEA Board. It stated that the AJ incorrectly ruled on its Motion to Dismiss Employee's Petition for Appeal on the basis that it was untimely filed. Moreover, Agency presented that AJ improperly relied on the Table of Penalties. It argued that a penalty is not based on previous discipline for misconduct,

[2] *Petition for Appeal,* p. 6-8 (January 30, 2009).
[3] *Initial Decision,* p. 2 (January 7, 2010).
[4] *Id.,* 5-8.

but it is based on previous offenses. Thus, there may be a commission of an offense for which discipline was not imposed that could still be the basis for an enhanced penalty under the Table of Penalties.[5]

As it pertains to Agency's untimeliness claim, the District Personnel Regulations §§ 1614 and 1618 provide the following:

1614 FINAL DECISION NOTICE: GENERAL DISCIPLINE

1614.1 The employee shall be given a notice of final decision in writing, dated and signed by the deciding official, informing him or her of all of the following:

(a) Which of the reasons in the notice of proposed corrective or adverse action have been sustained and which have not been sustained, or which of the reasons have been dismissed with or without prejudice;

(b) Whether the penalty proposed in the notice is sustained, reduced, or dismissed with or without prejudice;

(c) When the final decision results in a corrective action, the employee's right to grieve the decision as provided in § 1617;

(d) When the final decision results in an adverse action, the right to appeal to the Office of Employee Appeals as provided in § 1618. The notice shall have attached to it a copy of the OEA appeal form; and

(e) The effective date of the action.

1618 APPEALS TO THE OFFICE OF EMPLOYEE APPEALS

1618.1 Unless otherwise authorized or required as provided in §§ 1601.2 through 1601.5, an employee shall be entitled to appeal the following final agency actions to the Office of Employee Appeals (OEA):

(a) Any final decision regarding an adverse action; or

(b) Any final decision placing an employee on enforced leave that lasts ten (10) days or more.

[5] *Agency's Petition for Review,* p. 4-6 (February 9, 2010).

1618.2 Any enforced leave lasting less than ten (10) days may be grieved as specified in § 1635.

1618.3 Any appeal of an action described in § 1618.1 shall be in accordance with the regulations issued by the OEA, and shall be filed within thirty (30) days of the effective date of the appealed agency action.

1618.4 The filing of an appeal to the OEA shall not serve to stay or delay the effective date of the final decision.

1618.5 When upon appeal, the action taken by an agency is reversed by the OEA, the remedial action directed by the OEA shall be taken within thirty (30) days of the final decision of the Office, unless the decision is reopened or reviewed in accordance with the regulations of the OEA.

Specifically, Section 1614.1 (d) provides that the employee shall be given a notice of the right to appeal to the Office of Employee Appeals as provided in § 1618. Section 1618.3 states that any appeal of an action shall be filed with OEA within thirty (30) days of the effective date of the appealed agency action. Hence, Agency should have informed Employee that she had 30 days in which to file her appeal with OEA. It did not, so Agency cannot benefit from not providing Employee with the 30-day deadline.

Agency also argues that the AJ improperly concluded that Employee had to be disciplined three times for it to terminate her. The Table of Penalties, as outlined in District Personnel Regulations provides a list of causes and penalties for each offense. Section 1619.1 lists a catchall category that may include "any activity for which the investigation can sustain that it is not *de minimus* (i.e., very small or trifling matters). Can include: drunkenness on duty, gambling, arguing, use of abusive or offensive language, rude or boisterous playing, or sleeping on the job." The penalties for that cause of action ranges from reprimand to a 15-day suspension for the first offense, a suspension for 20-30 days for the second offense, and removal for the third offense.

Agency is correct in that the Table of Penalties lists offenses and not discipline. The AJ in this matter focused a great deal on whether Agency disciplined Employee for each offense, and that is not a requirement under the list of penalties.[6] Great attention should have been paid to establishing if Agency adequately documented the previous offenses. This Board cannot make that determination given the documentation provided.

The historically significant and heavily relied upon case of *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981) provides the following:

> the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. This follows from the fact that selection of the penalty is necessarily an element of the agency's "decision" which can be sustained . . . only if the agency establishes the facts on which that decision rests by the requisite standard of proof. The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of persuasion, just as its burden includes proof that the alleged misconduct actually occurred . . . .

Agency provided a notice of insubordination to Employee on March 13, 2008. This notice outlines the alleged incident, and it is signed by Employee's Union Representative. There is also a handwritten line that reads "I refuse it." It is reasonable that this may have been written by Employee. Moreover, Employee admitted to being suspended for the March incident.[7] Thus, Agency adequately proved that the March 13th offense occurred.

However, as it pertains to the January 3, 2006, offense, there is no evidence that the offense occurred or that Employee ever received notice of this incident. The notice provided by

[6] The AJ provided in his Initial Decision that a letter of discipline provided that "there would be a two-day suspension for supposed prior disorderly conduct, there is no evidence in either this record or Employee's official personnel file that said two-day disciplinary action was ever taken."
[7] *Initial Decision,* p. 6 (January 7, 2010).

Agency is not signed by Employee or her Union Representative. It is only signed by an Agency terminal manager. Consequently, this Board cannot verify that this offense occurred or that it was properly documented.

As provided in *Douglas*, it is necessary for Agency to present all evidence necessary to support its decision to remove Employee. This burden includes proving that the alleged misconduct actually occurred. This issue is of extreme importance because it will determine if Employee's penalty should have been suspension, as the AJ ruled or removal, as suggested by Agency. Accordingly, we remand this matter to the AJ for the limited purpose of requesting documentation to prove that the January 2006 offense occurred.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge.

FOR THE BOARD:

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Clarence Labor, Jr., 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.