THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARK HOLLOMAN,	)	
Employee	)	OEA Matter No. 1601-0082-15
	)	
v.	)	Date of Issuance: March 14, 2016
	)	
D.C. DEPARTMENT OF CONSUMER	)	Monica Dohnji, Esq.
AND REGULATORY AFFAIRS,	)	Senior Administrative Judge
Agency	)	
	)	

Mark Holloman, Employee, *Pro Se*
Adrianne Lord-Sorensen, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 28, 2015, Mark Holloman ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Consumer and Regulatory Affairs' ("DCRA" or "Agency") decision to terminate him from his position as a Housing Code Specialist effective May 15, 2015 for Neglect of Duty. On July 8, 2015, Agency filed its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on October 7, 2015. On November 16, 2015, Agency filed a Motion for Summary Disposition. A Status/Prehearing conference was held in this matter on November 24, 2015, with both parties present. Thereafter, I issued a Post Status Conference Order requiring the parties to address the issues raised during the Status/Prehearing Conference. Both parties have complied. After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is 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) 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 initially hired in September of 2011 as a Housing Code Specialist Contractor. Thereafter, Employee was employed with Agency as a Housing Code Specialist with an effective date of April 22, 2013.[1] The job description for the Housing Code Specialist position highlighted in part under the "Other Significant Facts" section that an applicant "[m]ust obtain and subsequently maintain a certification for ICC's International Property Maintenance Code (IPMC) within (24) twenty-four months of entry into the position."[2]

Employee's immediate supervisor from April 2013 to April 2015 was Agency's Program Manager, Gilbert Davidson. On May 28, 2013, Mr. Davidson purchased online property maintenance and housing inspector tutorial for Employee to access practice exams in order to prepare for the ICC examination. The online tutorial was available to Employee for ninety (90) days. From 2013 to 2015, Mr. Davidson also provided Employee with a copy of all the books required to take the ICC exam, as well as offer employee the opportunity to study for the exam during business hours. However, Employee did not obtain the ICC certification to maintain his Housing Code Specialist position.

On April 24, 2015, Agency issued a 15-day Advanced Written Notice of Proposed Removal and Notice of Administrative Leave to Employee.[3] The notice stated, in part, that "The Housing Code Specialist CS-1801-07 position requires that you must obtain and subsequently maintain a certification for ICC's International Property Maintenance Code (IPMC) within twenty four months of entry into the position. Your original date of employment was April 22, 2013 and as of April 23, 2015 you have failed to obtain that certification." On May 11, 2015, Agency issued its Notice of Final Decision: Proposed Removal, terminating Employee for Neglect of Duty.[4]

Employee's Position

Employee does not dispute the fact that he did not obtain the ICC certification within the twenty-four (24) month period as noted in his job description. However, he asserts that Agency was wrong in terminating him because Agency retained other employees who did not receive their certification in the allowed time. He explains that, these employees were accorded an extension to take the exam, and after the extension, they still did not receive their certification, and Agency transferred them to other positions. Thus, Employee wants to be rehired and transferred to another position.[5]

In his brief, Employee again alleges that Agency engaged in disparate treatment because there were two other employees who had not obtained their ICC certification within the required twenty-four (24) month period. Employee further explains that, employees Lori Dixon and Allen Brooks failed to obtain their ICC certification within the required two (2) years period and they were

[1] Agency's Response to Employee's OEA Petition at Tab 5 (July 8, 2015).
[2] Agency's Response to Employee's OEA Petition at Tab 2, page 4of 4 (July 8, 2015). *See also* Agency's Motion for Summary Disposition at Exhibit 4 (November 16, 2015); and Agency's Answer to OEA Post Status/Prehearing at Conference Order at Tab 1 (February 17, 2016).
[3] Agency's Response, *supra*, at Tab 7.
[4] *Id*. at Tab 8.
[5] Petition for Appeal (May 28, 2015).

both terminated from their positions as Housing Code Specialists in 2011. They filed a grievance with the union (AFGE Local 2725) and the union negotiated an agreement to reinstate these two (2) employees to their original positions, and also provide them with a one (1) year extension to obtain their ICC certification. Employee notes that they still did not obtain the ICC certification after the extension. However, Agency transferred them to another position.[6]

Additionally, Employee states that, he was not included in the October 2011 agreement that reinstated the two (2) employees because he was hired in 2011, so there was no reason for him to be identified in that particular agreement. Employee highlights that after he was terminated, he met with the union representative who stated to Employee that he would try to get Employee another position within Agency, just like the other two (2) employees. However, Employee was later informed by the union representative that the situation was out of his hands. Employee states that he wants the same agreement and treatment received by Ms. Dixon and Mr. Brooks.[7]

Agency's Position

Agency submits that Employee is a member of the American Federation of Government Employees ("AFGE"), and his conduct is governed by the Collective Bargaining Agreement ("CBA") between Agency and AFGE. Agency explains that pursuant to Article 9, section A of the CBA, "[d]isciplinary action(s), including adverse action(s), corrective action(s) and admonishment(s) shall be imposed against a bargaining unit employee only for cause as defined in D.C. Code section 1-617.1 (1987 ed.)" Agency also explains that the D.C. Official Code referenced in the CBA is codified as the Comprehensive Merit Personnel Act ("CMPA"), and that the District of Columbia Personnel Regulations ("DCPR") mirrors the CMPA. Agency notes that, DCPR defines cause to include "any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations – neglect of duty.[8]

Agency asserts that, Employee does not dispute that he failed to obtain the requisite ICC certification within twenty-four (24) months of his hire date. Agency contends that Employee's failure to obtain the requisite certification to conduct housing inspections adversely affects its mission and overall operation. Agency states that it had a reasonable expectation that Employee would obtain the requisite certification since the Housing Code Specialist position description expressly states that attainment of the certificate was a condition of employment. Agency notes that it considered how Employee's conduct affected the Agency's ability to perform effectively and other relevant factors, to include possible mitigating and aggravating factors in accordance with *Douglas v. Veterans Administration*,[9] prior to selecting the imposed sanction. Additionally, Agency maintains that, after balancing the mitigating and aggravating factors in this case, the aggravating factors weigh significantly in favor of Agency's proposed penalty of removal. Agency maintains that removal is a permitted sanction even if the offense is the employee's first.[10]

With regards to Employee's disparate treatment claim, Agency argues that Employee has failed to make a *prima facie* case of disparate treatment because he cannot prove that he was similarly situated to the other two employees (Ms. Dixon and Mr. Brooks) in regards to discipline.

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[6] Employee's Brief to Prehearing Conference Order (January 14, 2016).
[7] *Id*.
[8] DCPR Chapter 16 at section 1603.3.
[9] 5 M.S.P.B. 313, 5 M.S.P.R. 280 (1981).
[10] Agency's Response, *supra*.

Agency asserts that Ms. Dixon and Mr. Brooks had more seniority than Employee, and therefore, not similarly situated as Employee. Ms. Dixon and Mr. Brooks were hired as Housing Code Specialists in 2008, and 2007, respectively. However, Employee was hired as a Housing Code Specialist more than four (4) years later, in 2013.[11]

Furthermore, Agency contends that Ms. Dixon and Mr. Brooks were given additional time to obtain the ICC certification for the Housing Code Specialist position pursuant to an October 2011 settlement agreement between Agency and the AFGE, to allow thirteen (13) former Agency employees, including Ms. Dixon and Mr. Brooks. Employee was not a party to the settlement agreement. Thus, Employee cannot confer the rights and obligations from the terms of the October 2011 settlement to himself because there is a lack of privity. Agency also alleges that in 2015, it negotiated a new agreement with the AFGE to attempt to secure placement for Ms. Dixon and Mr. Brooks in positions that do not require inspection certifications. The 2015 agreement was a derivative of two (2) prior agreements, an October 2011 settlement agreement and a 2013 settlement agreement involving Ms. Dixon and Mr. Brooks, and Employee was not a party to either settlement agreement.[12]

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(f)(3), the definition of "cause" includes any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations to include: neglect of duty. According to the record, Agency's decision to terminate Employee was based on this charge.

Any on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty

Neglect of duty is defined, in part, as a failure to follow instructions or observe precautions regarding safety; and failure to carry out assigned tasks.[13] Here, Agency asserted that Employee's failure to obtain the requisite certification to conduct housing inspections adversely affects its mission and overall operation. Agency explained that it had a reasonable expectation that Employee would obtain the requisite certification since the Housing Code Specialist position description expressly states that attainment of the certificate was a condition of employment. I agree with Agency's assertion. Moreover, Employee acknowledged that he did not obtain the ICC certification within the two (2) year period, and he does not dispute the fact that he was aware that obtaining an ICC certification within twenty-four (24) months from when he was hired was a condition of his employment as a Housing Code Specialist. Accordingly, I find that Agency had cause to charge Employee with neglect of duty.

[11] Agency's Answer to Office of Employee Appeals Post Status/Prehearing Conference Order (Feb 17, 2016).
[12] *Id*.
[13] DPM § 1619 (c).

Disparate Treatment

In his submissions, Employee alleged that Agency engaged in disparate treatment because there were two other employees who had not obtained their ICC certification within the required twenty-four (24) months period. Employee explains that, Ms. Dixon and Mr. Brooks failed to obtain their ICC certification within the required two (2) years period and they were both terminated from their positions as House Code Specialists. They filed a grievance with the union (AFGE Local 2725) and the union negotiated an agreement to reinstate these two (2) employees to their original positions, and also provide them with one (1) year extension to obtain their ICC certification. Employee noted that they still did not obtain the ICC certification after the extension. However, Agency transferred them to another position.

Agency on the other hand noted that Employee failed to make a *prima facie* case of disparate treatment because he cannot prove that he, Employee, was similarly situated to the other two employees. Ms. Dixon and Mr. Brooks had more seniority than Employee, as they were hired more than four (4) years before Employee. Agency stated that pursuant to an October 2011, settlement agreement between Agency and AFGE, thirteen (13) Housing Code Specialists, including Ms. Dixon and Mr. Brooks were given additional time to obtain the ICC certification, and Employee was not a party to the settlement agreement. Agency also explained that in 2015, it negotiated a new agreement with the AFGE to attempt to secure placement for Ms. Dixon and Mr. Brooks in positions that do not require inspection certifications. The 2015 agreement was a derivative of two (2) prior agreements, an October 2011 settlement agreement and a 2013 settlement agreement involving Ms. Dixon and Mr. Brooks, and Employee was not a party to either settlement agreement.

OEA has held that, to establish disparate treatment, an employee *must* show that he 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).[14] Additionally, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty."[15] (Emphasis added).

After a careful review of the record, it appears that Ms. Dixon, Mr. Brooks and Employee were all working as Housing Code Specialists for Agency and it further appears they were all disciplined for not obtaining an ICC certification within a twenty-four (24) month period as required in the job description. However, despite these similarities, Employee has not provided evidence to show that they were all disciplined by the same supervisor, around the same time frame. According to the information provided by Employee in his brief, Ms. Dixon and Mr. Brooks were terminated in 2011, while Employee was terminated in 2015. Moreover, based on Employee's own assertion, similar to Employee, Ms. Dixon and Mr. Brooks were terminated for not obtaining the ICC certification within the requisite twenty-four (24) months period. Ms. Dixon and Mr. Brooks were re-hired based on a settlement agreement between Agency and the AFGE, *after* these two (2) employees

[14] *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).
[15] *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).

were terminated (emphasis added). Employee attempted to have the AFGE negotiate his termination with Agency; however, this effort was futile. I agree with Agency's assertion that because Employee was not a party to the October 2011, settlement agreement, he cannot benefit from the terms of the said agreement, and as such, his arguments with regards to said agreement are inconsequential to the issue at hand. Consequently, I conclude that Employee has not provided sufficient evidence to establish a *prima facie* claim of disparate treatment, and therefore, he has not met his burden of proof.

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).[16] 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."

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 first time Employee violated §1619.1(6)(c). Employee acknowledged that he did not obtain the ICC certification within the requisite timeframe of twenty-four (24) months as stated in his job description. 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.

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.[17] When an Agency's charge is upheld, this Office has held

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

[17] *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

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.[18] The relevant factors are generally outlined in *Douglas v. Veterans Administration*.[19] 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* factors[20] does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.[21] 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. Agency explained that it balanced the mitigating and aggravating

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[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.*

[18] *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).

[19] 5 M.S.P.R. 313 (1981).

[20] 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;
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.

[21] *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).

factors as outlined in *Douglas*, and upon doing so, the aggravating factors weigh significantly in favor of Agency's proposed penalty of removal. [22]

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:

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MONICA DOHNJI, Esq.
Senior Administrative Judge

[22] *See* Agency's Answer to Office of Employee Appeals Post Status/Prehearing Conference Order, *supra*.