THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRYAN EDWARDS,	)	
Employee	)	OEA Matter No. 1601-0091-11
	)	
v.	)	Date of Issuance: November 16, 2012
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Lauren Powell, Esq., Employee Representative
Lindsey Appiah, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 28, 2011, Bryan Edwards ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Youth Rehabilitation Services' ("DYRS" or "Agency") decision to terminate him from his position as a Youth Development Representative ("YDR") effective February 25, 2011. Following an Administrative review, Employee was charged with violating "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty." The cause of action was based upon D.C. Official Code § 4-1501.05(c)(7); and in accordance with 6B of the District of Columbia Municipal Regulations ("DCMR") §419.8.[1] On June 30, 2011, Agency submitted a Motion for Enlargement of time to file its Answer. On July 21, 2011, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 30, 2012. Thereafter, I issued an Order scheduling a Status Conference in this matter for September 19, 2012. Both parties were in attendance. On September 25, 2012, I issued a Post-Status

[1] 6B DCMR § 419.8 states the following: when the department of Human Resources ("DCHR")…resolve criminal background check information issues, the DCHR…shall make the final suitability determination whether: (d) a current employee shall be retained or employment shall terminate.

Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status 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 Employee's actions constituted cause for adverse action; and

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACT

The following are undisputed facts:

1) Employee filed a Petition for Appeal with this Office in 2005 contesting Agency's decision to terminate him.
2) Employee was a YDR when he was terminated from Agency in 2005.
3) In 2009, this Office ruled in Employee's favor in his 2005 matter.
4) According to the 2009 ruling, this Office ordered Agency to reinstate Employee to his previous position of record (YDR), along with back pay.
5) Agency reinstated Employee on May 24, 2010 in compliance with the 2009 ruling.
6) Employee was informed by Agency that his reinstatement was contingent on a background check and his possession of a valid driver's license.
7) Following his reinstatement, Employee was assigned to the front desk as 'Screener'.
8) Pursuant to a background check following Employee's reinstatement, DCHR became aware that Employee did not have a valid driver's license, as per his job description and responsibilities.
9) From June 10, 2010 through December 6, 2012, Agency provided Employee with both written and verbal notice to submit his driving record.
10) In a meeting held on October 29, 2010, Employee provided Agency with a driving record indicating that his driver's license had expired. Employee notified Agency at that meeting that he did not have the required $75 license fee.
11) Employee was asked to produce his newly issued driver's license by November 5, 2010.
12) On December 23, 2010, Agency issued an Advance Notification of a proposal to remove Employee due to his failure to comply.
13) On February 2, 2011, the removal action was administratively reviewed, and a determination was made that the proposed removal was warranted.
14) On February 8, 2011, Agency issued its final Agency decision terminating Employee effective February 25, 2011.

15) Employee had not obtained a valid driver's license as of September 19, 2012.
16) During the September 19, 2012 Status Conference, Employee alleged for the first time that his termination was in retaliation for his successful appeal against Agency in 2005.

ANALYSIS AND CONCLUSION

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, the 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 his position at Agency was based upon a determination by Agency that Employee was not fit to serve in his current position because the results of a background check revealed that Employee did not have a valid driver's license as required by his job description.

1) Whether Employee's actions constituted cause for discipline

According to the record, Employee was reinstated to his previous position of record (YDR) in May of 2010, following directives from an Opinion and Order (O&O) by OEA's Board.[2] Employee's position of record within Agency prior to his termination in 2005 was a YDR. On May 10, 2010, Agency informed Employee that in accordance with the July 22, 2009, O&O, Employee was being reinstated to his position as YDR, pending employment eligibility verification, criminal background, traffic record and Child Protection Registry checks/drug & alcohol testing. Employee was also required to participate in orientation effective May 24, 2010. While Employee signed the Letter of Reinstatement on May 24, 2010 accepting the position of YDR, Employee wrote "UNDER PROTEST" next to his signature accepting the reinstatement.[3]

On May 25, 2010, Employee signed the Criminal Background Check Referral form, authorizing Agency to conduct, among other things, a traffic record check as a condition of his employment.[4] Following the background check, Agency received documentation from the Department of Motor Vehicle ("DMV") stating that Employee's driver's license expired on August 25, 2006.[5] Thereafter, Agency notified Employee in a letter which he signed on June 16, 2010 that, as an employee in a safety sensitive position as defined by the Criminal Background and Traffic Records Checks for the Protection of Children and Youth Act of 2004, he was to provide Agency with his driving record no later than June 23, 2010.[6] On July 28, 2010, Employee was again requested to produce his driving record, but he failed to comply. Employee was given until August 4, 2010 to provide the said document, but again, he did not comply. In a

[2] In 2005, Employee filed a Petition for Appeal with this Office contesting his termination from Agency. Employee was successful in this matter, and the OEA Board upheld the AJ ruling in the Initial Decision, which reversed Agency's decision to terminate Employee, and ordered Agency to reinstate Employee to his former position of record, along with back pay. *See* Bryan Edwards v. DYRS, OEA Matter No. 1601-0017-06, *Opinion and Order on Petition for Review* (July 22, 2009).
[3] Agency's Answer, TAB 3 (July 21, 2011).
[4] *Id.* at TAB 4.
[5] *Id.* at TAB 7.
[6] *Id.* at TAB 6.

letter dated October 21, 2010, Employee was notified to attend a meeting scheduled for October 29, 2010. In this letter, Employee was also requested to bring his driving record to the meeting. On October 27, 2010, Employee received and signed the letter scheduling the meeting.[7] Employee attended the October 29, 2010 meeting, and provided Agency with his driving record which indicated that his driver's license had expired.

According to the parties' submissions to this Office, Employee noted during the October 29, 2010 meeting that he did not have the required $75 license fee. At the meeting, Employee agreed that he would have his driver's license reinstated and would be able to produce it to Agency the following week.[8] Again, Employee failed to comply. On December 6, 2010, Agency conducted a suitability investigation for Employee based on his failure to possess a valid driver's license. According to the record, Employee was informed of the driver's license requirement of his position, to which he responded that he was aware of the requirement. Pursuant to the suitability investigation, the investigator/reviewer determined that Employee was ineligible for continued employment with Agency for his continuous failure to possess a valid driver's license as required by his position description.[9] On December 23, 2010, Agency issued a Notice of Proposed Adverse Action to Employee.[10] This matter was administratively review by a Hearing Officer at Agency, and on February 2, 2011, the Hearing Officer concluded that the evidence, along with the analysis of the suitability factors, supported the Agency's Notice of Proposed Adverse Action against Employee.[11]

Employee's Position

Employee does not deny that he did not have a valid driver's license from when he was reinstated until when he was terminated. However, Employee notes that his wrongful termination in 2005 caused his driver's license issues. He further explains that as a result of his wrongful termination, he was unable to make Child Support payments, and hence, his driver's license issues. Employee also submits that he did not receive regular payments for working at Agency after he was reinstated until June 30, 2010, and as a result, he did not have funds to have his driver's license reinstated. Employee explains that he did not receive the back pay in relation to the 2005 appeal until December 29, 2011. Employee further notes that his termination from Agency was in retaliation for winning the 2005 appeal before this Office. Additionally, Employee asserts that he was reinstated as 'Screener' and not to a YDR, and as such, a driver's license was not required to perform his job functions since as a Screener, he was not required to transport residents.[12]

Agency's Position

Agency contends that it had sufficient cause to terminate Employee. Agency notes that Employee was not suitable to remain in the position of YDR because he did not have the

[7] *Id.* at TAB 8.
[8] *Id.* at TAB 10.
[9] *Id.* at TAB 12.
[10] *Id.* at TAB 13. According to the serving official and one witness, Employee refused to sign this Notice.
[11] *Id.* at TAB 14.
[12] Employee's Brief (October 5, 2012).

necessary licensure required by his position, and Employee's continued employment presented clear danger to children receiving service at Agency. Agency also asserts that Employee's termination was not in retaliation. Agency notes that there is no nexus between Employee's 2005 appeal and his current termination. Agency explains that Employee was informed that his reinstatement was contingent on the background checks. Agency maintains that Employee was reinstated as a YDR and not as a Screener. Agency explains that there is no such position as a Screener, and that Employee was assigned to the front desk pending completion of training and background check. Agency further submits that, Employee worked for approximately nine (9) months before being terminated, and he was paid on a regular basis. In addition, Agency submits that Employee received a substantial back pay award stemming from the 2005 matter. Agency also notes that it is not Agency's responsibility to provide Employee with funds to meet the basic position eligibility requirement.[13]

As noted above, Agency has the burden to establish that the removal of Employee from his position as a YDR was supported by substantial evidence and appropriate under the circumstance. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] Therefore, the undersigned must determine if the evidence that Employee did not possess a valid driver's license is adequate to support Agency's decision to terminate Employee. In the instant case, I find that Employee was reinstated as a YDR and consequently, he was required to maintain a valid driver's license in order to be able to perform his job functions. While Employee may have been assigned as a 'Screener' to the front desk when he was rehired, his official position of record was a YDR. Prior to being terminated in 2005, Employee's position of record was a YDR, and the Initial Decision from his 2005 appeal from this Office ordered Agency to reinstate Employee to his former position of record – YDR. Moreover, the letter from Agency reinstating Employee stated that Employee was being reinstated to a YDR position. As such, Employee was required to have a valid driver's license at all times. Employee also notes that he was aware of the driver's license requirement for YRDs; yet, he failed to provide Agency with a valid driver's license.

Also, Agency allowed Employee extra time from June 16, 2010, when Employee was notified of the issue with his driver's license, until December 23, 2010, when Agency issued its Notice of Proposed Adverse Action, within which to obtain a valid driver's license, but Employee failed to comply. It is also worth noting that during the Status Conference held on September 19, 2012, Employee informed this Office that he still did not have a valid driver's license. Although Employee maintains that he did not have the $75 license fees because Agency wrongfully terminated him in 2005 and he did not receive regular pay until June 30, 2012, I find that this is not sufficient reason for Employee not to possess a valid driver's license. Employee received regular pay from June 30, 2010 until he was terminated. Employee could have used some of the money he earned while working at Agency to pay for the license fees. I also agree with Agency's argument that it is not responsible for providing Employee with funds to meet the position eligibility requirement. Given the extensive period of time and the steps taken by Agency to get Employee to comply with the driver's license requirement of his job function, I

[13] Agency's response in opposition to Employee's brief in support of appeal (October 19, 2012).
[14] *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).

further find that Employee's non-compliance makes him unsuitable for a YDR position. Agency provided Employee with plenty of time and a plethora of opportunities to comply with the driver's license requirement of his job, but he failed to do so. Consequently, I conclude that Employee's failure to comply provides Agency with substantial evidence under the circumstance to institute an adverse action against Employee.

Retaliation

Employee asserts that his 2011 termination was in retaliation for winning his 2005 appeal against Agency. As to his retaliation claim, Employee maintains that his 2005 appeal and the subsequent enforcement of the appeal was protected activity, and his termination from Agency in 2011 constituted a materially adverse action. Employee explains that there is a causal connection between his 2005 appeal and the adverse action against him in 2011. Employee submits that Agency had knowledge of the protected activity as he was still engaged in it when he was terminated – he was in negotiations with Agency over back pay from the 2005 appeal until when he was terminated. Employee further notes that Agency's justification for his 2011 termination was purely pre-textual. Employee submits that his termination in 2011 was in fact retaliatory, since Agency possessed the following retaliatory intent: 1) blatant refusal to abide by OEA's Final Decision; 2) Having a valid driver's license was not job related; and 3) Agency's ultimate culpability for Employee's inability to obtain a driver's license. Agency, on the other hand submits that there is no causal relationship between Employee's 2005 appeal, and Agency's current adverse action against Employee.

To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his employer took an adverse personal action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[15] A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.[16] There is no dispute that Employee's filing of his 2005 Petition for Appeal opposing Agency's decision to terminate him in 2005 was a protected activity. However, there is no evidence to show that Employee was engaged in a protected activity when he was terminated in 2011. There is also no dispute that Agency's decision to terminate Employee in 2011 constituted an adverse action against Employee. Nonetheless, I do agree with Agency's assertion that there is no casual connection between Employee's 2005 appeal (protected activity) and his 2011 termination for failure to obtain a valid driver's license as required by his job description (adverse action against Employee).

Employee's assertion that Agency's blatant refusal to abide by OEA's Final Decision in the 2005 appeal is not sufficient to prove a claim for retaliation in this matter. In addition, I find that Employee's statement that he was still in negotiations with Agency with regards to the 2005 appeal when he was terminated in 2011 is irrelevant to the current matter. While it appears that Employee has some concerns with the way Agency handled the outcome of the 2005 appeal, I

[15] *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).
[16] *Id.*

find that this is not the right forum to resolve Employee's issues arising from that appeal. Further, I disagree with Employee's argument that having a valid driver's license was not job related, as the record shows otherwise. The job description for YDRs requires the possession of a valid driver's license, which Employee was well aware of. Additionally, Agency has provided this Office with multitudes of documents, signed by Employee, in connection with Agency's several attempts to get Employee to comply with the driver's license require. Moreover, according to the record, all YDRs, not only Employee, were required to carry a valid driver's license. Although Employee was engaged in a protected activity in 2005, I find that he was not engaged in a protected activity when he was subsequently terminated from Agency for failing to comply with the driver's license employment requirement. While Employee notes that the reason Agency gave for his termination is pre-textual, Employee has not provided this Office with any evidence to support this allegation. Therefore, I find that Agency had a legitimate reason for the employment action at issue, and it was not based on retaliation.

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).[17] 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 ("TAP"); 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: Neglect of Duty", and as such, Agency can rely on this charge in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the District Personnel Manual ("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 was put on notice on several occasions about the driver's license requirement, yet he failed to comply. 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 language of §

[17] *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).

1619.1(6)(c) of the DPM. Therefore I find that, by terminating Employee, Agency did not abuse its discretion.

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.[18] 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 was 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.[19] Employee argues that by removing him, Agency abused its discretion. The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee. 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;

[18] *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).

[19] *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).

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.

In this case, the penalty for a first time offense for this cause of action is reprimand to removal. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency gave credence to the nature and seriousness of the offense; Employee's type of employment; the erosion of supervisory confidence; notoriety of the offense on the reputation of the Agency; Employee's past disciplinary record and his past work record; and mitigating and aggravating circumstances. 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.
Administrative Judge