Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HAROLD MILLS,	)	OEA Matter No. 1601-0001-09
Employee	)	
	)	Date of Issuance: December 12, 2011
	)	
	)	
D.C. DEPARTMENT OF PUBLIC	)	
WORKS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Harold Mills ("Employee") worked as a tow truck operator with the D.C. Department of Public Works ("Agency"). On June 19, 2008, Employee received a proposed notice of removal from Agency. The adverse action was based on the charge of "any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law."[1] Agency issued its final notice of removal on September 9, 2008.

On October 1, 2008, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that the penalty of removal was excessive given that no prior

[1] On December 28, 2007, Employee was operating a tow truck to haul a 10-wheel trash packer to a vendor. While parking the trash packer, Employee backed into a parked body truck which then slid into a parked 1996 Toyota Camry. Agency alleged that Employee failed to assess the damage done. He violated Agency's policy by failing to contact his supervisor regarding the incident. He also fled the scene of an accident in violation of D.C. Official Code § 50-2201.05.

disciplinary action was taken against him. Moreover, no traffic ticket was written. Finally, Employee provided that other tow truck operators had similar accidents but received less severe penalties. Accordingly, he requested that he be reinstated to his position with back pay and benefits.[2]

Agency filed its response to Employee's Petition for Appeal on November 6, 2008. It explained that Employee admitted in a written statement that he "[brushed] a truck [,] pushed it [into] a car . . . [and] left not knowing the extent of damage." It argued that Employee's statement was consistent with the report given to his supervisor and with a report of the vendor who stated that he saw Employee's vehicle hit another and tried to stop him before he left the scene. Agency also addressed Employee's position that because he did not receive a ticket for the accident, he could not be disciplined for a violation. It reasoned that an employee did not have to be charged with a violation or convicted; he only had to reasonably know that he violated the law. Employee knew or should have known that leaving the scene of an accident violated the law. Finally, Agency stated that Employee was not singled out for disciplinary action; his discipline was consistent with its general disciplinary policy. As a result, Agency requested that OEA sustain the penalty imposed on Employee.[3]

The Administrative Judge ("AJ") held a hearing on December 2, 2009. He issued his Initial Decision in this matter on July 6, 2010. In his decision, the AJ found that Agency presented sufficient evidence to prove that Employee caused the accident and should have been aware of the damage that resulted. The AJ relied on testimony from Agency witnesses and an

[2] *Petition for Appeal,* p. 3-5 (October 1, 2008).
[3] *Agency Answer,* p. 2-5 (November 6, 2008).

affidavit written by Employee providing that he might have brushed against the truck.[4]

The AJ also considered Employee's previous accidents within a three-year period before the current accident. In these prior incidents, Employee failed to remain at the scene or failed to report the incident entirely. According to the AJ, the previous accidents established a pattern of Employee's conduct. He was well aware of Agency's policy for reporting all accidents or incidents with Department of Public Works agents. Thus, he should have known that fleeing the scene of an accident violated the law and Agency's policy.[5]

The AJ found that Agency's Hearing Officer committed harmless error when making its decision because it considered incidents beyond the previous three-year period. He addressed them all and found the errors to be insignificant. The AJ determined that Agency's decision to remove Employee was the appropriate penalty. As provided in the Table of Penalties, the penalty for a first offense of any on duty or employment-related act or omission that the Employee knew or should reasonably have known is a violation of law, misusing resources or property is a 30-day suspension to removal.[6] Hence, Agency's action of removal for cause was upheld.[7]

Employee filed a Petition for Review on August 11, 2010. He provided that Agency violated the District Personnel Manual ("DPM") by considering incidents that occurred more than three years before the current incident. Employee requested that the Initial Decision be reversed because the AJ considered this harmless error.[8]

Employee also alleged that the AJ improperly changed the offense with which he was

[4] *Initial Decision*, p. 10 (July 6, 2010).
[5] *Id.*
[6] *Id.*, 10-11.
[7] *Id.* at 12.
[8] *Employee's Petition for Review of the Initial Decision,* p. 6-7 (August 11, 2010).

charged. He claimed that Agency's witnesses testified that Employee committed a felony and therefore, chose DPM § 1619.1(5)(c) as the basis to remove Employee. However, the AJ recognized the error of Agency's witness testimony and changed the charge to DPM § 1619.1(5)(b) in his Initial Decision.[9]

Furthermore, Employee contended that the AJ failed to consider that Agency imposed a suspension on another employee for committing essentially the same offense of misusing property. He explained that Agency did not provide ample evidence or testimony to support a conclusion that it is more probably true than not that the accident even occurred. Thus, he requested that the OEA Board reverse the Initial Decision. [10]

Agency filed its Opposition to Employee's Petition for Review on October 1, 2010. As it pertains to the harmful error argument by Employee, Agency points to the Initial Decision which details the errors committed and concluded that they were insignificant. Because Employee did not provide a legal basis for his disagreement with the AJ's conclusion, then he did not demonstrate that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy. Agency also asserts that Employee failed to adequately develop an argument for disparate treatment. It contends that merely mentioning that one employee was suspended is not sufficient to establish that disparate treatment occurred. Agency concludes by stating that Employee's disagreement with the AJ's decision is not a basis to grant his Petition for Review; thus, it should be denied.[11]

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).[12] According to the Court in

[9] *Id.* at 4 and 7.
[10] *Id.*, 8-10.
[11] *Agency's Opposition to the Petition for Review,* p. 3-5 (October 1, 2010).

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.

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

Employee contends that Agency did not provide ample evidence or testimony to establish that the accident occurred. However, Employee conceded in a hand-written, signed memorandum that he brushed a truck that was pushed into a car.[13] This is consistent with a report by Employee's supervisor.[14] Therefore, there is sufficient evidence to conclude that the accident occurred.

Employee also alleged that the AJ improperly changed the offense with which Employee was charged. He argued that Agency's witnesses testified that he was removed based on DPM § 1619.1(5)(c). However, the AJ recognized the error of Agency's witnesses and changed the charge to DPM § 1619.1(5)(b) in his Initial Decision.

Based on a review of the record, it appears that there may be some credence to Employee's allegations. It is clear from a review of the OEA hearing transcript that Agency's

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[12] *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).

[13] OEA has held that an employee's admission is sufficient to meet Agency's burden of proof. *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011) citing *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

[14] *OEA Hearing Transcript,* Agency Exhibit #5 (December 2, 2009) and *Agency Answer*, p. 2-5 (November 6, 2008).

director, William Howland, provided that Employee was removed for any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law, as provided in DPM § 1619(5).[15] However, it is less clear on which section of DPM § 1619(5) Agency relied to determine the penalty for Employee.[16]

At one point during his testimony, Mr. Howland highlighted the penalties outlined in DPM § 1619(5)(b) and provided that removal was within the range of penalties. [17] However, when questioned further, he asserted that Employee's conduct fit better under DPM § 1619(5)(c) because that subsection mentions the word "felony" which is a criminal offense.[18] When questioned by the AJ about DPM § 1619(5)(b), the witness provided that Employee's conduct went beyond this subsection and impugned the reputation of the department and District government, which is why he took the more serious action to remove Employee.[19]

Assuming arguendo that Agency relied on DPM § 1619(5)(c), as provided in the transcript, the penalty could have still be removal in this matter. DPM § 1619(5)(c), provides that any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law, engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws and statutes, such as:

> (c) assault or fighting on duty, battery, violation of EEO laws; such as incidents of sexual harassment involving physical of financial threats; touching (Class Four felony or stalking); or violations of EEO law that result in the loss of employment; misuse of funds; resources or property; unfair labor practices or

[15] *OEA Hearing Transcript*, p. 61.
[16] *Id.*, 62-64 and 84-91.
[17] DPM § 1619(5)(b) provides that "any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law, such as: (b) misuse of resources or property; unwanted sexual advances or propositions; etc." The penalty for a first offense is suspension of 30 days up to removal. A second offense is removal, and the third offense is listed as not applicable. *Id.*, 63-65.
[18] *Id.*, 88-89.
[19] *Id.*, 90-91.

illegal work stoppage; use or distribution of controlled substances, etc.

The penalty for a first offense of this charge is removal; penalties for the second and third offenses are not applicable. Mr. Howland testified that he chose the charge of any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law because it covers employees who engage in activities that have criminal penalties or are in violation of federal or District of Columbia laws and statutes. He stated that Employee was charged with fleeing the scene of an accident which violates D.C. Official Code § 50.2201.05. Therefore, he violated a D.C. law. [20] However, it appears that the AJ considered DPM § 1619(5)(b) a better charge for Employee and highlighted it in his Initial Decision.

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."[21] 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.[22] Agency's reliance on DPM § 1619(5) in general is reasonable given the charges. Employee did engage in an act that he should have reasonably known was a violation of law. 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

[20] *Id.* at 63.
[21] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[22] *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).

judgment.[23]

While it may be argued that DPM § 1619(5)(b) was the more appropriate charge, we find that the penalty of removal was within managerial discretion and otherwise within the range allowed by law. 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.[24] Despite the subsection used by Agency, it was well 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.[25] 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 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,

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[23] *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).

[24] *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).

[25] *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).

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.

Agency considered 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 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.[26] There was no evidence presented that Agency was prohibited by law, regulation or guidelines from imposing the penalty of removal.

Error of Judgment By Agency

Employee argued that the AJ committed harmful error when he failed to find that Agency

[26] *OEA Hearing Transcript*, Employee Exhibit #11 (December 2, 2009).

violated the DPM by considering incidents that occurred more than three years before the current incident. As the AJ provided in his Initial Decision, OEA Rule and DPM § 632.4 define harmless error. The sections provide that:

> notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean: error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.[27]

In the current case, Employee takes issue with Agency's Hearing Officer considering previous incidents that violated DPM § 1602 which provides that Agency may not consider previous adverse actions more than three years prior to the effective date of the current action.[28] However, the AJ reviewed the record and found that the Hearing Officer's consideration of these previous actions were harmless error.

Employee's removal was effective on September 12, 2008. According to the Report and Recommendation of the Hearing Officer, there were eight incidents cited as evidence to support Employee's removal.[29] The AJ found that five of the eight incidents were properly considered

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[27] *See also Harding v. D.C. Office of Employee Appeals, et al.*, 887 A.2d 33, 34 (D.C. 2005).

[28] Employee relies on DPM § 1602.2 which provides that "an admonition may be considered in determining the penalty for a corrective or adverse action when the admonition was issued not more than three (3) years prior to the date of the proposed corrective or adverse action, and has not been ordered withdrawn as provided in § 1602.1." The AJ also highlighted in his Initial Decision that DPM § 1606.2 provides that when "determining the penalty for a disciplinary action under this chapter, documentation appropriately placed in the OPF [Official Personnel Folder] regarding prior corrective or adverse actions, other than a record of the personnel action, may be considered for not longer than three (3) years from the effective date of the action, unless sooner ordered withdrawn in accordance with section 1601.7 of this chapter."

[29] The evidence improperly relied upon by the Hearing Officer include a letter of warning dated on March 7, 2000; a memorandum from Employee's supervisor dated October 23, 2000, concerning his unsatisfactory performance; and an incident report regarding a stolen vehicle dated September 21, 2001. All three actions occurred more than three years before the current action of September 12, 2008. *Employee's Petition for Appeal*, Report and Recommendation on Fifteen Days Advance Written Notice of Proposal to Terminate Employment of Harold Mills, p. 2-3 (October 1, 2008).

because they fell within the three year period as provided by DPM 1606.[30] The Hearing Officer's error in considering three incidents outside the scope of review did not cause substantial harm or prejudice to Employee's rights and did not significantly affect Agency's final decision to take the action. Five prior incidents involving motor vehicle accidents adequately support Agency's decision to remove Employee.[31]

Disparate Treatment

Employee's final argument is that Agency engaged in disparate treatment when assessing his penalty. Employee provided notices of final decisions to suspend two employees, Mr. Frazier and Mr. McGill, for thirty days for what he alleged was the same charge for which he faced removal. Because those employees were suspended, it is Employee's position that he, too, should be suspended and not removed from his position.

OEA held in *Manning v. Department of Corrections,* OEA Matter No. 1601-0049-04 (January 7, 2005), that to establish disparate treatment an employee must show that he worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same

[30] The five incidents that the Hearing Officer properly considered were separate incident reports dated March 23, 2006, April 14, 2006, July 22, 2006, May 3, 2007, and June 7, 2007, of motor vehicle accidents involving Employee. *Id.*

[31] This Board finds that the AJ's assessment of error was based on substantial evidence. Substantial evidence is defined as such relevant evidence as reasonable mind might accept as adequate to support conclusion. According to the Courts in *Metropolitan Police Department v. Ronald Baker,* 564 A.2d 1155 (D.C. 1989) and *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), 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. *See also Ernest Taylor v. Department of Fire and Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 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); and *Paul Holmes v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009).

offense within the same general time period.[32] In the current case, Employee did not offer any evidence to support a finding of disparate treatment.

After a careful review of the record, it appears that Mr. Frazier, Mr. McGill, and Employee all held positions as towing operators and were all supervised by Mr. Franklin Hagan. However, the charges against the three employees were not the same. Mr. Frazier and Mr. McGill were charged with negligence in performing official duties and failure to report an accident. Employee was charged with any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law. According to the testimony provided by Mr. Frazier and proposed notice provided by Mr. McGill, it appears that neither of them had previous accidents. However, Employee had five, separate motor vehicle accidents before the current incident. Thus, Employee failed to prove disparate treatment because they were not similarly situated.[33]

Conclusion

The Agency's decision is upheld because the penalty could have been removal on the basis of DPM § 1619(5)(b) or DPM § 1619(5)(c). Agency was within its managerial discretion to remove Employee. As the AJ provided, Agency's consideration of incidents outside the scope of the three years was harmless error. Finally, Employee failed to prove that disparate treatment occurred. Accordingly, Employee's Petition for Review is DENIED.

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[32] *See also Ira Bell v. Department of Human Services,* OEA Matter No. 1601-0020-03, *Opinion and Order on Petition for Review* (May 6, 2009); *Alvin 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).

[33] The Court in *Bess v. Department of the Navy*, 46 M.S.P.R. 583, 589 (1991) provided that it is not sufficient for an employee to simply show that other employees engaged in misconduct that the agency was aware of. The employee must show that the circumstances surrounding the misconduct are substantially similar to his own.

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.