

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:)	
)	OEA Matter No.: 1601-0051-12
TAKIA JOHNSON,)	
Employee)	
)	Date of Issuance: June 4, 2014
v.)	
)	
DEPARTMENT OF PUBLIC WORKS,)	
Agency)	
_____)	
Gina Walton, Employee Representative)	Arien P. Cannon, Esq.
Eric Huang, Esq., Agency Representative)	Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Takia Johnson (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on January 20, 2012, challenging the Department of Public Works’ (“Agency”) decision to terminate her for neglect of duty (failure to maintain a valid motor vehicle operator’s permit). Employee was a Parking Enforcement Officer with Agency at the time of her removal. Agency filed its Answer on February 23, 2012. I was assigned this matter in August of 2013. A Status Conference was held on January 27, 2014. A Post Status Conference Order was subsequently issued which required the parties to address the issues in this matter. Based on the briefs submitted by the parties, it was determined that an Evidentiary Hearing was not warranted. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 628, 59 DCR 2129 (March 16, 2012), provides that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” is defined as:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues. Jurisdiction is not an issue in this matter.

ISSUES

1. Whether Agency’s action of removing Employee from her position was supported by cause; and
2. If so, whether the penalty was appropriate under the circumstances.

Agency’s Argument

Agency argues that Employee was removed for cause based on the revocation of her driving privileges in the District of Columbia (“D.C”). Employee’s driving privileges were revoked as a result of a non-driving related drug offense.¹ Agency asserts that because Employee lost her driving privileges in the District and failed to report it to Agency, that her actions constituted an on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations. Furthermore, Agency states that the seriousness of Employee’s offense outweighed any mitigating factors, because without driving privileges in the District, Employee could not perform her duties as a Parking Enforcement Operator.²

Employee’s Argument

Employee’s primary arguments are that: (1) the unsigned letter, sent by her criminal defense attorney, to the D.C. DMV requesting a Limited Occupational License, is insufficient evidence to demonstrate that Employee was actually informed of the status of her driver’s license; (2) she is part of a union that did not agree to the Memorandum of Agreement (“MOA”) referenced in both the Hearing Officer’s Report and in Agency’s brief; (3) Agency failed to present evidence that the *Douglas* factors had been considered; and (4) in light of Employee’s work history, Agency did not consider any Last Chance Agreement or other alternative sanctions. Employee asserts that she was unaware of the status change of her driving privileges

¹ See Agency’s Answer at Tab 15 (February 23, 2012).

² See Agency’s Brief (February 28, 2014).

in the District until she received a letter on November 25, 2011 from Agency.³ Employee further argues that she was always in compliance with all requirements that she maintain a valid driver's license. She also maintains that there was never a change of status made by the issuing jurisdiction of her license (Maryland).

FINDINGS OF FACT, ANALYSIS, AND CONCLUSION

In November of 2011, Agency received a call from a newspaper reporter inquiring into the status of Employee's employment status. The reporter inquired if Employee was still employed since she had a pending non-driving related criminal charge in D.C. Superior Court. During the course of investigating the matter, Agency learned that Employee had a driving under the influence ("DUI") charge pending in D.C. Superior Court, in an apparent unrelated matter. Because of the pending DUI charge, Agency had to determine whether Employee was able to operate a motor vehicle in the District of Columbia.⁴ As a result, Agency requested the status of Employee's driving privileges in both the District of Columbia and Maryland.⁵ In response to Agency's inquiry, the Maryland Motor Vehicle Administration ("MVA") stated that Employee had a valid Maryland driver's license.⁶ However, the District of Columbia's Department of Motor Vehicles ("D.C. DMV") provided a Full Driver Record for Employee, dated November 21, 2011, which indicated that the status of Employee's *driving privilege* was "revoked" based on a "non-driving related drug offense."⁷ The revocation of Employee's District of Columbia *driving privilege* began on August 3, 2011 and ended on January 30, 2012.⁸

In a letter dated November 25, 2011, Agency informed Employee that she did not have a legal driver's license in the District of Columbia and that she had thirty (30) days to resolve the issues with her license or be subject to discipline.⁹ On December 2, 2011, Agency rescinded the November 25, 2011 letter "because, according to the governing CBA, [] Agency is not required to allow an employee time to correct a license or privilege that is revoked; instead, immediate action is to be taken."¹⁰ Accordingly, Agency issued an Advance Written Notice of Proposed Removal on December 2, 2011, the same day it rescinded its previous letter to Employee. The cause specified was: "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: Neglect of Duty (failure to maintain a valid motor vehicle operator's permit)." On December 14, 2011, the Hearing Officer recommended sustaining Agency's removal of Employee. Subsequently, on December 19, 2011, Agency issued a Notice of Final Decision on Summary Removal Action to Employee. Employee's termination became effective December 23, 2011.

³ See Employee's Response to Agency's Brief (March 28, 2014).

⁴ See Agency's Answer, p. 2 (February 23, 2012).

⁵ Agency requested Employee's Maryland driving record because Employee is a Maryland resident and holds a Maryland driver's license.

⁶ See Agency's Answer, Tab 14 (February 23, 2012).

⁷ *Id.* at Tab 15.

⁸ *Id.*

⁹ *Id.* at Tab 16.

¹⁰ See Agency's Brief at 3 (February 28, 2014); See also Agency's Answer, Tab 1 and Tab 17 (February 23, 2012).

Section 50-1403.02 of the D.C. Code states, in relevant part:

The Mayor shall revoke the motor vehicle operator's permit of a District resident or the privilege to operate a motor vehicle in the District of a nonresident, convicted as a result of the commission of a drug offense...The revocation shall be for not less than six months and not more than 2 years.

Here, Employee is a nonresident of the District. She is a resident of the State of Maryland and maintains a Maryland driver's License. Employee's D.C. driving record indicates that her driving privileges were temporarily withdrawn (revoked) as a result of a non-driving related drug offense in the District. Employee does not dispute the drug related offense. Employee's D.C. driving privileges were withdrawn (revoked) from August 3, 2011 through January 30, 2012.

The D.C. Court of Appeals has held that a suspension of *driving privileges* includes "the privilege of any person to drive a motor vehicle [in the District] whether or not such person holds a valid license issued by the District of Columbia."¹¹ For nonresidents who possess a license from another jurisdiction, the District may suspend their driving privileges. Doing so carries the same consequences as suspending a license for an in-state driver.¹²

Here, Employee's driving privileges in the District were revoked from August 3, 2011 through January 30, 2012. Although Employee did not have a D.C. driver's License, the revocation of her *driving privileges* in the District had the same effect as if her Maryland driver's license had been suspended. Essentially, although Employee had a valid Maryland driver's license, it was not honored by the District because her driving privileges were revoked in the District. Thus, I find that Agency had cause to take adverse action against Employee for failure to maintain her *driving privileges* in the District.¹³

Employee further asserts that because she was unaware of her driving privilege status in the District, she could not report it to the appropriate personnel as required under Article 24 of the Collective Bargaining Agreement ("CBA"). Employee raises the argument that the letter sent to the D.C. DMV by her attorney requesting a Limited Occupational License was unsigned, and therefore is insufficient to show that Employee was aware of the status of her license in the District.¹⁴ Employee also points out that the response from the D.C. DMV regarding her Limited Occupational License was sent to an old address. It is Employee's contention that this further demonstrates that she was unaware of her driving privilege status in the District.

¹¹ *Wall v. Babers*, 82 A.3d 794 (D.C. 2014). The Court in *Wall* found that it was logical that the suspension of *driving privileges* in another state would equate to the suspension of a *driver's license* in the District, as defined under 18 DCMR § 9901.

¹² *See Id.* at Footnote 2; *see also* D.C.Code § 50-1403.01(c) (authorizing the DMV to "revoke the right of any nonresident person ... to operate a motor vehicle in the District of Columbia, for any cause [it] may deem sufficient").

¹³ It should be noted that the undersigned acknowledges that Employee maintained a valid Maryland driver's license; however, the fact that Employee's driving privilege in the District was temporarily revoked would not allow her to operate a motor vehicle in the District, which is where her job is located.

¹⁴ *See* Employee's Brief at 4 (March 28, 2014).

Employee's assertion that she was unaware of the revocation of her driving privileges in the District is unpersuasive. It is true that the letter submitted to the D.C. DMV by Employee's criminal defense attorney, seeking an Occupational License, is unsigned. It should be noted, however, that the letter is on her attorney's law firm letterhead. Despite the letter being unsigned, it does not negate the fact that the D.C. DMV took action on the request, and denied Employee a Limited Occupational License. The letter from the D.C. DMV indicates that a copy was also sent to Employee's criminal defense attorney.

The D.C. Court of Appeals has held that an attorney's acts and omissions are imputed to the client, even though it may be detrimental to the client's cause.¹⁵ Here, Employee asserts that because the D.C. DMV sent a response regarding her Limited Occupational License to an incorrect address she was unaware of her driving privileges status in the District. However, a copy of the letter was also issued to Employee's attorney. The record is devoid as to whether or not Employee's criminal defense attorney informed her of the revocation of her driving privileges in the District. The undersigned does not find it plausible for Employee's criminal defense attorney to fail to inform Employee of the revocation of her driving privileges in the District. Even if Employee's criminal defense attorney did, in fact, fail to inform Employee of her driving privilege status, his knowledge is imputed to Employee. Thus, I find that Employee was aware of the revocation of her driving privileges in the District.

Employee also argues that the Memorandum of Agreement ("MOA") relied upon in the Hearing Officer's Report and in Agency's Answer, did not apply to her. The MOA referenced by Agency is a MOA between Agency Administrative Services, the American Federation of Government Employees (AFGE), Local 631, and the American Federation of State and Municipal Employees (ASFME), Local 2091. This MOA is signed by the presidents of both AFGE, Local 631, and ASFME, Local 2091. However, Employee is not a part of either union; rather, she is a member of *AFGE 1975*. Thus, Employee asserts that her union, *AFGE 1975*, never entered into any type of agreement with Agency regarding the issue of verifying an employee's driver's license. Employee contends that the MOA relied upon by Agency in its Answer and in the Hearing Officer's Report should not be considered. While the undersigned agrees, it does not mean that Employee was not required to "possess and maintain a valid driver's license" as set forth in the position description for Parking Enforcement Officers.¹⁶

Employee attached the pertinent part of the Collective Bargaining Agreement ("CBA") which she contends pertains to her union, *AFGE 1975*.¹⁷ Article 24, of the CBA states, in part:

Section A. Employees whose employment requires a valid motor vehicle operator's license are responsible for maintaining and carrying on their person at all times while on duty said license issued by their jurisdiction of residence.

¹⁵ *Newsome v. District of Columbia*, 859 A.2d 630 (D.C. 2004); *See also, Railway Express Agency, Inc. v. Hill*, 250 A.2d 923 (D.C. 1969).

¹⁶ *See Agency's Answer* at Tab 4, p. 5 (February 23, 2012).

¹⁷ *See Employee's Response to Agency's Brief*, Exhibit 6 (March 28, 2014).

Section C. Employees shall promptly report to the appropriate personnel whenever there is a change in the status of their motor vehicle license; in particular, the revocation, suspension or loss of driving privileges of their license and any medical or other problem(s) affecting their ability to lawfully drive. Failure to maintain a license as required or to immediately make notification of changes in the status of individual operator's license may result in termination or disciplinary action as outlined in Chapter 16 of the District Personnel Manual.

Even if Employee was truly unaware of the status change of her driving privileges in the District, that does not negate the fact that she failed to maintain her privilege to drive in the District. The CBA provides that an employee must maintain a license issued by their jurisdiction of residence. However, it is plausible that the intent of the language in the CBA is to allow for District government employees to maintain a driver's License in their state of residence; rather than requiring employees to maintain a D.C. driver's license, which would require all District government employees to become residents of the District. Because Employee's driving privileges in the District were revoked, her Maryland license did not allow her to operate a vehicle in the District, a requirement for Employee to perform her job functions in the District. Therefore, I find that Agency had cause to remove Employee for neglect of duty: failing to maintain a valid motor vehicle operator's permit in the District

Whether the penalty of removal was appropriate under the circumstances

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.¹⁸ This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.¹⁹ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.²⁰

Chapter 16 § 1619.1 of the District Personnel Manual, provides that the appropriate penalty for a first time offense for "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically: neglect of duty," ranges from reprimand to removal.²¹ Here, Employee was removed from her position for failing to maintain her driving privileges in the District.²² The Hearing Officer's *Written Report and Recommendation* discusses the *Douglas* factors taken into consideration. The Deciding Official, Director Howland, also states in the Notice of Final Decision regarding Employee's removal, that his decision was based on a careful review of the Hearing Officer's

¹⁸ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

¹⁹ See *Id.*

²⁰ See *Id.*

²¹ 6-B DCMR § 1619.1(6), Table of Appropriate Penalties.

²² The Notice of Final Decision on Summary Removal Action states that Employee's neglect of duty was failing to maintain a valid motor vehicle operator's permit. As discussed above in the analysis, failure to maintain driving privileges in the District carry the same consequences as if an out-of-state license was suspended.

Report. Based on the Table of Appropriate Penalties, I do not find that Agency exceeded the limits of reasonableness with the penalty imposed against Employee. Accordingly, I find that Agency's penalty of removal was appropriate under the circumstances.

ORDER

Based on the aforementioned, it is hereby **ORDERED** that Agency's action is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge