**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | OEA Matter No.: 1601-0129-11R16 |
| SHEENA WASHINGTON, | ) | |
| Employee | ) | |
| | ) | Date of Issuance: July 18, 2016 |
| v. | ) | |
| | ) | |
| DISTRICT OF COLUMBIA | ) | |
| PUBLIC SCHOOL SYSTEM, | ) | |
| DEPARTMENT OF TRANSPORTATION, | ) | |
| Agency | ) | MONICA DOHNJI, Esq. |
| | ) | Senior Administrative Judge |

Denise Clark, Esq., Employee Representative
Hillary Hoffman-Peak, Agency Representative

**INITIAL DECISION ON REMAND**

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 12, 2011, Sheena Washington ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the District of Columbia School Systems' (Department of Transportation)[1] ("Agency") action of terminating her employment as a Motor Vehicle Operator ("Bus Driver"). Agency's notice informed Employee that she was being separated from service based on Agency's determination that she had failed to maintain District required driving credentials. Employee's termination was effective March 11, 2008.

This matter was initially assigned to former Administrative Judge ("AJ") Murphy. She held an Evidentiary Hearing on June 6, 2013. On October 15, 2013, AJ Murphy issued an Initial Decision ("ID") in this matter wherein, Agency's action was upheld. Employee appealed the AJ's ID to the District of Columbia Superior Court, which upheld the AJ's ID. Thereafter, Employee appealed the Superior Court's ruling to the District of Columbia Court of Appeals. On February 8, 2016, the D.C. Court of Appeals vacated the judgment and remanded the matter for the Superior Court to remand the case to OEA for further proceedings. The D.C. Court of Appeals further explained that:[2]

[1] DCPS (DOT) is now the Office of the State Superintendent of Education ("OSSE").
[2] *Selena Washington v. District of Columbia Office of Employee Appeals and Office of the State Superintendent of Education*, (D.C. Court of Appeals, February 17, 2016), (CAP-7454-13).

> … we conclude that there was substantial evidence to support the ALJ's conclusion that Ms. Washington had the means and opportunity to obtain an S-endorsement. But the ALJ made no explicit finding with respect to Ms. Washington's contention that, although she was told to stop working in December 2007 and discharged in March 2008, other drivers who did not have an S-endorsement were not told to stop working or discharged but rather were permitted to continue driving even into the summer of 2008. If anything, the ALJ suggested acceptance of Ms. Washington's contention by describing Mr. Washington's testimony as truthful. The ALJ also did not address the legal issues raised by Ms. Washington's factual contention: (a) whether an employer has cause to discipline an employee where there is an objective basis for discipline but the employer has not disciplined other employees as to whom the employer had the same basis for discipline; and (b) whether, assuming cause, discharge is reasonable discipline where the employer has not imposed any discipline on other employees as to whom the employer had the same basis for discipline….
>
> We also conclude that remand is warranted on two other issues raised by Ms. Washington with respect to the reasonableness of discharge as discipline. First, Ms. Washington contends that discharge was unreasonably harsh given the possibility that Ms. Washington could have instead been transferred to a position as an attendant. Without explanation or citation of authority, the ALJ in essence concluded that the possibility of transfer to a new position rather than discharge is irrelevant to whether discharge is reasonable discipline, because the decision whether to transfer an employee to a different position is always a matter entrusted solely to the discretion of the employer. The record in this case indicates that DCPS transferred at least one other employee to an attendant position after he failed to obtain an S-endorsement…. At least in the absence of further explanation from the OEA, it is not clear to us why the possibility of transfer to a position as an attendant should be viewed as irrelevant to whether discharge was appropriate discipline in this case.
>
> Second, Ms. Washington contends that the ALJ erred by failing to discuss the factors listed in Douglas in assessing whether discipline short of discharge (which could have included among other things suspension without pay) was appropriate. We agree that further discussion of those factors and their application to the present case is warranted….
>
> Finally, Ms. Washington challenges the OEA's denial of her claim of gender discrimination under DCHRA…. The OEA's current regulations, however, do not speak to whether or not the OEA has jurisdiction over DCHRA claims…. Before we address the OEA's gender discrimination ruling on the merits, we think it appropriate to hear from the OEA as to whether the OEA believes that it has jurisdiction over such claims, in light of its own regulations and those of the Office of Human Rights….

Following former AJ Murphy's promotion to Deputy General Counsel for OEA, this matter was reassigned to the undersigned AJ. A Status Conference was convened in this matter on April 19, 2016. Thereafter, I issued a Post Status Conference Order wherein, the parties were required to submit briefs addressing the issues discussed in the April 19, 2016, Status Conference. Both parties have submitted their respective briefs. The record is now closed.

JURISDICTION

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

ISSUE

1. Whether Agency engaged in disparate treatment; and

2. Whether the penalty imposed was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > 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.

OEA Rule 628.2 *id.* states:

> 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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

As part of the appeal process within this Office, former AJ Murphy held an Evidentiary Hearing on the issue of whether Agency's action of terminating Employee was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, She had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

***Uncontested Facts***

1. Employee began working as a motor vehicle operator/bus driver in 2001. Her primary duties included operating a school bus on various routes that were designated by Agency.

2. On June 25, 2003, a federal judge in *Petties v. District of Columbia* accepted the recommendation of the Special Master and appointed David Gilmore of Gilmore Kean, LLC as the independent Transportation Administrator.[3]

3. David Gilmore was authorized to oversee and supervise all personnel functions of the District of Columbia Public Schools (Department of Transportation).

[3] 268 F.Supp.2d 38 (D.C. Cir. 2003)

4. By court order dated May 5, 2010, Gilmore was discharged from his position as Transportation Administrator and was reassigned to the position of Special Court Master, wherein he was tasked with transferring the special education transportation functions to Office of the State Superintendent of Education ("OSSE").[4]

5. OSSE subsequently became responsible for the daily operations of the special transportation services, including the hiring and firing of employees.[5]

6. In 2007, bus drivers who worked for Agency were informed that they were required to have an S-endorsement on their driver's license. An S-endorsement allows a driver to operate a school bus.

7. In order to obtain an S-endorsement, employees were required to pass both a written test and a physical driving test. A valid commercial driver's license ("CDL") is required to obtain an S endorsement.

8. Bus drivers were given the opportunity to retest if they did not pass the practical skills exam on the first attempt.

9. Out of the 367 bus drivers who were required to obtain the endorsement at Agency, five (5) did not receive it.

10. Employee received a learner's permit which expired on December 18, 2007.

11. As of the date of her termination, Employee had not passed the practical skills portion of the exam and did not have an S endorsement on her CDL.

12. On January 31, 2008, Agency issued Employee a proposed notice of termination. The notice stated that Employee failed to maintain proper driving credentials while working for Agency. The notice cited Employee's failure to obtain an S endorsement when she renewed her CDL.

13. On March 11, 2008, Employee received notice that she had been terminated.

***Employee's Position***

Employee argues that she was treated differently than other drivers who did not have an S-endorsement. Specifically, she highlights that Mr. Washington testified that he continued to be employed by Agency despite the fact that he did not manage to acquire his S-endorsement until June 26, 2008. Mr. Washington's testimony was corroborated by his driving record which reflected that he did not receive his S-endorsement until June 26, 2008. Employee notes that Mr. Washington was allowed to continue working as a driver for Agency well into 2008, despite not having an S-endorsement. Employee also notes that other drivers were given the opportunity to make multiple attempts to obtain their S-endorsement without any adverse action. She explains that Mr. Washington testified during the hearing that some of the drivers who attended classes with Mr. Washington had

[4] Agency's Reply Brief (February 23, 2012).
[5] *Id.*

previously failed their practical skills test and were given the opportunity to retake the test. Employee states that OEA found Mr. Washington's testimony during the Evidentiary Hearing to be truthful. Employee asserts that, it is uncontested that despite making the decision to terminate her in March of 2008 for failing to obtain an S-endorsement for her CDL, Agency continued to employ drivers that it knew did not have S-endorsements as late as June 26, 2008. She was terminated without being afforded the opportunity to reschedule her original attempt to take the final test necessary to achieve her S-endorsement,

Employee contends that Agency has offered no explanation for why drivers like Mr. Washington and those with whom he attended training with in the summer of 2008 were allowed to take the test for their S-endorsement multiple times without disciplinary action, while Employee was terminated for missing her first scheduled test. Employee further notes that Agency has offered no explanation for why drivers in its employ like Mr. Washington and those with whom he attended training were not terminated like Employee despite lacking S-endorsement just like she did during the same time period.

Employee asserts that when asked by OEA to produce information on all employees who were similarly situated to Employee and who were transferred to the position of bus attendant, Agency could only produce information from a time period well after the time period in question. Employee maintains that Mr. Jennings is not similarly situated as Employee because he was not terminated contemporaneously with Employee. Employee was terminated on March 11, 2008, whereas, Mr. Jennings received notice of his termination on March 23, 2009, a full year after Employee was terminated. Employee further notes the fact that Mr. Jennings was terminated in March of 2009 shows that Agency continued to employ drivers like Mr. Jennings that lacked S-endorsements and provided them with the opportunity to correct that deficiency to retain their employment. She notes that Agency's treatment of Mr. Jennings is more favorable than that offered to her. Mr. Jennings was offered a full year longer than the amount of time given to Employee to achieve his S-endorsement, and even when he continued to fail the written test, he was allowed to resign in lieu of termination, a courtesy that Employee was not afforded. Therefore, despite its assertion to the contrary, Agency has not provided evidence that Employee was treated in a manner consistent with the treatment of other drivers in its employ regarding her termination. Employee highlights that the evidence regarding Mr. Jennings provided by Agency bolsters the central contention underlying her assertion of disparate treatment regarding her termination and corroborates the testimony provided by Mr. Washington regarding Agency's knowing continued employment of drivers lacking S-endorsements after Employee's termination. *Citing* to *Stoke v. District of Columbia*, 502 A.2d 1006, 1010 (D.C.1985), Employee states that OEA must and should find that disparate treatment exists regarding Agency's termination of Employee, and therefore, Agency's judgment clearly exceeded the limits of reasonableness.

Furthermore, Employee argues that she suffered disparate treatment when Agency refused to assign her to a bus attendant position in lieu of termination. She explains that she requested to be placed in a bus attendant position due to the expiration of her temporary S-endorsement. Agency asked her to take a physical examination in response to her request to be placed as an attendant. She took and passed the requested physical examination, however, she was ultimately terminated. Employee maintains that Agency's argument that there is no evidence that any person was demoted from bus driver to bus attendant position is false. Employee notes that Agency's own witness, Mr. Mills, testified during the hearing that one of the drivers, Mr. Williams, who had difficulty passing the paper test for his S-endorsement, requested to be transferred to a bus attendant position and

Agency granted his request. Employee highlights that Mr. Williams was still employed as a bus attendant at the time of the evidentiary hearing in 2013. However, Employee's request to be placed as an attendant was denied and she was terminated. Agency has not offered any evidence whatsoever as to why it allowed Mr. Williams to become a bus attendant after he failed to procure his S-endorsement, while denying Employee's attempt to do the same. Employee asserts that in the absence of any evidence provided by Agency that contradicts this testimony, this Office should issue a finding that Employee suffered disparate treatment at the hands of Agency when it chose to terminate Employee, rather than allow her to take a bus attendant position.

Lastly, Employee argues that the *Douglas* factors weigh against the imposition of the maximum penalty, termination. She explains that a review of her circumstances shows that in terminating her, Agency's decision was unreasonable and therefore should be reversed.[6]

***Agency's Position***

Agency contends that it terminated Employee in accordance with all District of Columbia laws, rules and regulations. Agency states that Employee was required to maintain an S-endorsement on her CDL in order to continue working as a bus driver. According to Agency, Employee failed to complete the skills portion of her exam, even though she knew it was required. Agency argues that it had cause to terminate Employee based on her failure to obtain an S class endorsement as a driver, and that the penalty of termination was within the parameters of the Table of Appropriate Penalties. It maintains that Employee could not perform her job functions once her learner's permit expired and her credentials would not allow her to drive a bus and therefore, her termination was appropriate.

Agency argues that it did not engage in disparate treatment because the other employees who did not have the proper credentials, were also terminated the same week as Employee. Agency maintains that there were 367 DCPS special education bus drivers who needed an S-endorsement in 2007. Three hundred and sixty-two (362) of them received their S-endorsements, and five (5) did not. Of the five (5) who did not receive the S-endorsement, one (1) died, one (1) was restricted for medical reasons, one (1) retired, one (1) was unable to pass the initial questionnaire and was reassigned as a bus attendant; one (1) failed to pass the test (Mr. Joe Jennings) and resigned before he was terminated. Agency however notes that Mr. Jennings received a termination letter dated March 17, 2008.[7]

Agency asserts that it is never required to demote a person rather than terminate them. It explains that the law is clear that demotion is a management right, not an obligation or an entitlement by an employee. Agency further asserts that despite testimony during the evidentiary hearing to the contrary, it has no evidence that someone was moved from a school bus driver to bus attendant position.

Agency highlights that the *Douglas* factors weigh heavily in favor of termination. Agency states that, even if they were ordered to bring Employee back today, Agency would not comply

[6] Complainant's Brief in Opposition to OSSE's Brief in support of its termination of Sheena Washington (July 1, 2016).
[7] Agency's Brief in support of Termination at Attachment A (May 27, 2016). A review of Agency's Attachment A highlights that Mr. Jennings' termination letter was issued in March of 2009, and not March of 2008, as Agency stated in its Brief.

because Employee still does not have an S-endorsement and is not fit for duty to drive a school bus. To allow her to do so would be a violation of federal and District laws.[8]

***Analysis and conclusions of law***

1. ***Whether Agency engaged in disparate treatment when it allowed other employees without the S-endorsement to continue working, but terminated Employee.***

There is sufficient evidence in the record to conclude that Agency had cause to remove Employee from her position as a bus driver. Employee was required to obtain an S-endorsement in order to drive a school bus. She was put on notice of this requirement, and was given the means and opportunity to take both the written and practical skills components of the S-endorsement exam. Because Employee did not acquire an S-endorsement by the end of 2007, she was terminated by Agency.

Mr. Washington testified that he did not obtain his S-endorsement until June 26, 2008. Additionally, Agency submitted documentation highlighting that Mr. Jennings, another bus driver, did not have an S-endorsement; however, he continued working with Agency until 2009, while Employee was terminated in 2008. OEA has held that, to establish disparate treatment, an employee must show that s/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 offense within the same general time period.[9] Additionally, "in order to prove disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[10]

Based on Agency's own submission, it appears Mr. Jennings and Employee were similarly situated. They both worked for the same organizational unit, Agency, as bus drivers; they were both required to obtain an S-endorsement by the end of 2007 in order to continue working as bus drivers for Agency; and they both did not have the required S-endorsement within the same general time period – end of 2007, through early 2008. However, Agency chose to terminate Employee in March of 2008, but decided to retain Mr. Jennings for one (1) addition year, before deciding to terminate him in 2009 for not obtaining an S-endorsement.

I further find that Mr. Washington and Employee were also similarly situated. Both Mr. Washington and Employee were bus drivers and worked in the same organizational unit – they were both employed by Agency; they were both required to obtain an S-endorsement within the same general time period – end of 2007 through early 2008; they both had the B and P class licenses; and they both did not obtain the required S-endorsement by the end of 2007. However, Employee was asked to stop driving in December of 2007, and terminated in March of 2008, whereas, Mr. Washington was retained by Agency and he continued driving without an S-endorsement from

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[8] *Id.*
[9] *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).
[10] *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).

December of 2007, until he obtained his S-endorsement on June 26, 2008. The former AJ assigned to this matter found Mr. Washington's testimony to be credible.

Because Mr. Washington and Mr. Jennings were not disciplined in 2008 for failing to possess the required S-endorsement by the end of 2007, but Employee was disciplined for failing to comply with the same requirement, I find that Agency engaged in disparate treatment. Instead of terminating Employee upon the expiration of her S-endorsement learner's permit in December of 2007, Agency should have given Employee more time and opportunity, like it did for Mr. Washington, Mr. Jennings and all the other employees whom Mr. Washington testified that were afforded multiple opportunities to retake the exam.

2. ***Whether Agency engaged in disparate treatment when it refused to transfer Employee to a Bus Attendant position following her failure to obtain an S-endorsement.***

Employee asserted that, she requested to be transferred to a bus attendant position due to the expiration of her temporary S-endorsement. Agency asked her to take a physical examination in response to her request to be placed as an attendant. She took and passed the requested physical examination, however, she was ultimately terminated. Agency on the other hand argues that, there is no evidence that any person was demoted from driver to attendant position.

I do not find Agency's argument convincing. During the evidentiary hearing, Agency's own witness, Mr. Mills, testified that one of the drivers, who had difficulties passing the paper test to obtain his S-endorsement requested to be made a bus attendant and Agency granted his request. Based on Mr. Mills' testimony, I find that Employee and the comparison employee were similarly situated. They were both bus drivers for the same organizational unit, Agency; they were both required to obtain an S-endorsement within the same general time period, by the end of 2007; they both failed to obtain the required S-endorsement during this time period; and they both requested to be transferred to a bus attendant position. While Agency granted the comparison employee's request, it denied Employee's request and instead terminated her, after she took and passed the physical examination required for a bus attendant position. Consequently, I find that Agency engaged in disparate treatment when it refused to grant Employee the same courtesy it granted the comparison employee, although both employees were similarly situated. Both employees should have received the same penalty for failing to obtain an S-endorsement.

Agency asserts that it is never required to demote a person rather than terminate them. It explains that the law is clear that demotion is a management right, not an obligation or an entitlement by an employee. Based on the Court of Appeals' reasoning in this matter, because Agency transferred at least one Employee to an attendant position, it should have also considered the possibility of transferring Employee to a bus attendant position. Apart from stating that it is within its managerial discretion to demote an employee, Agency has not provided this Office with any evidence in support of its decision to demote one employee, and yet, go on to terminate Employee for the same cause of action. Moreover, it has not provided any evidence to show that it did not have any open bus attendant positions when Employee requested to be transferred.

The selection of an appropriate penalty must involve a balancing of the relevant factors in the individual case. Here, Employee has provided enough evidence to at least raise the question of whether she received the same treatment as similarly situated employees. It is uncontested by the parties that the events relating to Employee's termination and the comparison employee's demotion

to bus attendant position, as well as Mr. Jennings and Mr. Washington being offered additional time and opportunity to obtain their S-endorsements resulted from the same incident. Moreover, they worked in the same organizational unit and they were disciplined by the same administration. Employee should have received the same penalty (demotion/transfer to bus attendant position) or at least be provided with additional time and opportunity for her to obtain her S-endorsement as was the case with Mr. Washington and Mr. Jennings.

***Discrimination***

Employee further asserts that she was discriminated upon based on her gender. With regards to her discrimination claim, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.[11] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*[12] stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation…"[13].

In the instant case, Employee simply alleges that her termination was based on discrimination. As explained to the parties during the April 2016, Status Conference, this Office has consistently held that it does not have jurisdiction over discrimination claims. Moreover, Employee's claim as described in her submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear to be retaliatory in nature. Consequently, I find that Employee's claim falls outside the scope of OEA's jurisdiction.

***3. <u>Whether the penalty was appropriate under the circumstances.</u>***

With respect to Agency's decision to terminate Employee, any review by this Office of an agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[14] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised.[15] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[16]

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[11] D.C. Code §§ 1-2501 *et seq.*
[12] 730 A.2d 164 (May 27, 1999).
[13] *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).
[14] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).
[15] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10
[16] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32

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.[17] Employee argues that, by removing her, Agency abused its discretion. The evidence does 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.[18]

In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, although Agency gave credence to the *Douglas* factors, I find that because Agency engaged in disparate treatment, it abused its discretion and its action of removing Employee from service should be reversed.

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D.C. Reg. 2915, 2916 (1985).

[17] *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).

[18] The *Douglas* factors provide that an agency should consider the following when determining the penalty for 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.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to a bus driver position or a comparable position pending her compliance with the driver's license requirement for the bus driver position; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Senior Administrative Judge