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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DEBORAH POWELL WILLIAMS,	)	
Employee	)	OEA Matter No. 1601-0046-15
	)	
v.	)	Date of Issuance: February 22, 2016
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Senior Administrative Judge

Ronnie Thaxton, Esq., Employee Representative
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 25, 2015, Deborah Powell Williams ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("OSSE" or "Agency") decision to terminate her from her position as a Motor Vehicle Operator ("Bus Driver") effective October 17, 2011. Following an Agency investigation, Employee was charged with (1) Neglect of Duty – failure to follow instruction or observe precautions regarding safety: failure to carry out assigned tasks; careless or negligent work habits; and (2) Incompetence – careless work performance: serious or repeated mistakes after given appropriate counseling or training.[1] On March 30, 2015, Agency filed its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on June 12, 2015. After several failed attempts to convene a Status/Prehearing Conference, on November 11, 2015, a Status/Prehearing conference was held, with both parties present. Thereafter, I issued a Post Status Conference Order requiring the parties to address the issues raised during the Status/Prehearing Conference. Both parties have complied. After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

[1] Agency's Answer at Exhibit B (March 30, 2015).

JURISDICTION

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

ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

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

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a Bus Driver with the District of Columbia Public Schools before Agency took over the busing of special education students from the Division of Transportation effective October 1, 2010, pursuant to an Order dated May 5, 2010.[2] This Order created a Supervising Court Master position, with Mr. David Gilmore assuming the position effective May 5, 2010. As the Supervising Court Master, Mr. Gilmore's responsibilities during the transition period that ended on October 1, 2010 did not include the hiring and discharge of personnel. These responsibilities were delegated to Agency.[3]

On April 7, 2011, at approximately 10:57 am, Employee was involved in an accident when her bus struck a table located next to a building in the parking lot. Following an investigation, this accident was considered a preventable accident.[4] According to the investigative report, Employee's bus displayed scratches to the rear passenger side of the bus, and there was paint transfer found on the table that the bus came in contact with.[5]

On May 3, 2011, at approximately 6:43 a.m., Employee was involved in an accident wherein, her bus made contact with the side mirror of a stopped truck on the shoulder of the road. Following an investigation into this matter, this accident was found to be preventable because the truck was a fixed object.[6] The investigator's report further stated that, there were scratches to the passenger-side mirror casing and bracket of Employee's bus.[7]

Again on May 3, 2011, at about 9:34 a.m., Employee was involved in another accident wherein, her bus made contact with the rear bumper of a truck stopped in front of her. This incident was also investigated, and found to be a preventable accident.[8] According to the investigator's report, the damages to Employee's vehicle included dents to the front license plate and the driver-side front panel, and scratches to the front bumper and to the driver-side crossover mirror. The stopped vehicle also had a dent to the rear bumper and scratches to the rear hatch door.[9]

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[2] Agency's Brief in Support of Termination at Exhibit A (December 18, 2015).
[3] *Id*. at Exhibit A, pg. 3, section 1.
[4] *Id*. at Exhibit D.
[5] *Id*.
[6] *Id*. at Exhibit E.
[7] *Id*.
[8] *Id*. at Exhibit F.
[9] *Id*.

On September 30, 2011, Agency issued an Advance Written Notice to Employee proposing to terminate her employment as a Bus Driver.[10] On October 17, 2011, Agency issued its Final Decision terminating Employee for Neglect of Duty and Incompetence.[11]

Employee's Position

Employee does not dispute the fact that she had three (3) accidents in a twelve (12) months period. However, she argues that, prior to Mr. Gilmore's departure from DCPS, he had a meeting with Agency and the remaining staff where he informed them that Agency was taking over and all the employees would start over with a clean slate. Consequently, the first accident should not have been on her record.[12] Additionally, Employee claims that Agency's decision to fire her is in retaliation to the fact that she had been fired before, and she got her job back.[13]

Further, Employee noted that at the time of the May 3, 2011, accident, she was taking a prescription medication that affected her ability to operate the vehicle. Additionally, she had just lost her spouse of twenty (20) years, and she was still grieving the loss when the accident occurred, and this affected her ability to operate her vehicle.[14]

Employee also argues that the three (3) accidents did not result in injury or property damage. Employee explains that Agency has presented no evidence to corroborate or establish the magnitude of the property damage to the bus or other property in question.[15] Employee notes that, Agency failed to attach the pictures taken of the damage to the collision report. Furthermore, Employee maintains that there were no students or any other persons on the bus that required medical attention as a result of the accidents in this matter.[16]

Employee reiterated that the record should only reflect two (2) preventable accidents, each occurring on May 3, 2011. She explains that the April 7, 2011, accident should have been excluded from her record per Mr. Gilmore's directive that all bus operators were operating "from a clean slate".[17] With regards to penalty, Employee asserts that Agency abused its discretion when it terminated her without considering any mitigating factors.

Agency's Position

Agency submits that, based on three (3) preventable accidents within a short period of time – April 7, 2011 to May 3, 2011, it determined that Employee's driving was careless and she was failing to observe precautions regarding safety.[18]

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[10] Agency's Answer, *supra*, at Exhibit A.
[11] *Id*. at Exhibit B.
[12] Petition for Appeal (February 25, 2015).
[13] *Id*.
[14] Employee's Statement of Good Cause (October 13, 2015).
[15] Employee's Brief (January 19, 2016).
[16] *Id*.
[17] *Id*.
[18] Agency's Answer, *supra*.

Agency asserts that it took over the busing of special needs students on October 2, 2010, according to the May 5, 2010 order. Agency explains that the May 5, 2010 order gave Agency the power to hire and discharge personnel during the transition period.[19]

Agency further highlights that it has a policy on bus accident preventability which states that it is the bus driver's responsibility to avoid striking a parked vehicle, whether legally or illegally parked. Agency also explains that it has an Accident Review Board that reviews accidents to determine their preventability. Agency notes that, according to its accident policy, a driver with two preventable accidents (as determined by the Accident Review Board), in a one-year period, involving personal injury or any damages (other than minor scratches to the bumper or paint) may not continue operating a school bus. The third preventable accident may lead to termination.[20]

Additionally, Agency explains that Employee was involved in three (3) preventable accidents – one on April 7, 2011, wherein, Employee struck a table located next to the building in parking lot; the second and third accidents occurred on May 3, 2011wherein, Employee came close to a stopped truck on the shoulder of the road, and later she made contact with the rear bumper of a truck stopped in front of her. According to Agency, the investigation into these accidents found that all three (3) collisions were preventable. Therefore, Agency terminated Employee for neglect of duty and incompetence as it determined that Employee's driving was careless, and she failed to observe precautions regarding safety.[21]

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, District Personnel Manual ("DPM") § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §§1603(f)(3) & (f)(5), the definition of "cause" includes any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations to include 1) neglect of duty, and 2) incompetence. According to the record, Agency's decision to terminate Employee was based on these charges.

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

Neglect of duty is defined, in part, as a failure to follow instructions or observe precautions regarding safety; and failure to carry out assigned tasks; and Incompetence is defined, in part, as careless work performance; serious or repeated mistakes after given appropriate counseling or training; failing to complete assignment timely.[22]

Here, Agency asserts that the three (3) preventable accidents Employee was involved in within a short period of time was a result of her careless driving and failure to observe precaution. Employee does not dispute the fact that she was involved in three (3) accidents within a one (1) year period. However, she explains that before Mr. Gilmore handed over to Agency, he stated that all employees will start over with a clean slate.

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[19] Agency's Brief, *supra*.
[20] *Id.*
[21] *Id.*
[22] DPM § 1619 (c) & (e).

Pursuant to the May 5, 2010 Order, during the transition period from the Department of Transportation to the District of Columbia, Mr. Gilmore assumed the role of Supervising Court Master, starting on May 5, 2010 and ending on October 1, 2010. Mr. Gilmore was appointed to supervise the efforts of the District of Columbia to assume the management and operation of the transportation services from the Division of Transportation in accordance with the Transition Plan and to report any material breach. Agency was responsible for the hiring and discharge of personnel during the transition period of May 5, 2010, through October 1, 2010. While both parties have been unable to provide this Office with the exact timeframe that Mr. Gilmore left Agency, pursuant to the May 5, 2010 Order, Mr. Gilmore's responsibilities which ended October 1, 2010, did not include the authority to hire and discharge personnel. This responsibility was handed over to Agency. Further, Agency maintains that it took over from Mr. Gilmore before Employee had her April 7, 2011, accident. Moreover, Employee does not dispute the validity of Agency's assertion or that of the May 5, 2010, Order. Employee also stated that "*prior to handing over to Agency*, Mr. Gilmore noted that all employees were starting over with a new slate" (emphasis added). She has however failed to provide any evidence to show that her April 7, 2011, accident happened prior to Agency taking over from Mr. Gilmore. I find the alleged statement by Mr. Gilmore that all bus operators were operating from "a clean slate" to be ambiguous as it could be referencing many different situations. Consequently, I conclude that, Employee's April 7, 2011, accident that occurred approximately six (6) months after the end of the transition period can be used in deciding the number of accidents Employee was involved in, during a one (1) year period.

Although Employee does not dispute that she had three preventable accidents within a one (1) year period, she argues that Agency did not provide any photographic evidence to demonstrate the magnitude of the damage caused by the accident. She also explains that she was overwhelmed with grieve from losing her spouse of twenty (20) years. Additionally, she explained that at the time of the May 3, 2011, accident, she was taking a prescription medication that affected her ability to operate the vehicle. According to Agency's Accident policy, a Preventable Accident is an accident that a fully alert school bus driver could have foreseen and therefore avoided. This policy further notes that, a driver with two preventable accidents (as determined by the Accident Review Board), in a one-year period, involving personal injury or any damages (other than minor scratches to the bumper or paint) may not continue operating a school bus. While Agency did not provide pictures to demonstrate the damage caused by the April 7, 2011; and May 3, 2011, accidents, the Collision Report submitted by the investigator provides an extensive description of the accidents and damages incurred.

According to the Collision Report for April 7, 2011, Employee's school bus made contact with a table which was located next to a building. There were no students in the bus and no injuries reported. An inspection of the school bus showed scratches to the rear passenger side of the bus and paint transfer on the table that the bus came in contact with. The investigator concluded that the accident was preventable because Employee struck a fixed object. Employee does not dispute any of the information presented in this report.

With regards to the first May 3, 2011 accident, the report highlighted that Employee's bus collided with a freightliner truck that was stopped on the shoulder of the road, facing the same direction. While passing the truck, Employee traveled too close to the truck, and Employee's passenger side mirror made contact with the parked truck's driver side mirror. The report also noted that there were no students in the school bus. As far as damages, the report noted that there were scratches to the passenger side mirror casing and bracket of the school bus. Because the truck was

stationary at the time of the accident, it was concluded that the collision was preventable and was a result of Employee's failure to check or properly judge clearance. Employee does not dispute any of the information presented in this report.

As to the second accident on May 3, 2011, the investigator noted that the collision involved Employee's school bus and a stopped Chevrolet. Employee's bus made contact with the bumper of the Chevrolet that was stopped in front of her. There were no students in the bus. The damages on Employee's school bus included dented front license plate, scratches to the front bumper, scratches to the driver-side crossover mirror, and dent to the driver-side front panel. The damages on the Chevrolet included dent to the rear bumper and scratches to rear hatch door. The investigation revealed that Employee did not stop her vehicle in time, and she made contact with the Chevrolet which was stationary. It noted that the accident was preventable and further concluded that Employee failed to maintain control of her vehicle. Again, Employee does not dispute any of the information presented in the Collision Report.

Based on the nature of these accidents, and Employee's own admission, I conclude that Employee neglected her duty by failing to observe safety precautions. Had Employee taken the necessary precautions, all three (3) accidents could have been avoided. Employee herself admits that she was overwhelmed with the loss of her spouse and was also under prescription medication that impaired her ability to operate her vehicle. While I do sympathize with Employee, I find that, she neglected her duties by failing to observe safety precautions when operating the school bus and this led to three (3) accidents. Employee should have informed Agency of her state of mind and inability to operate her vehicle due to the loss of her spouse and the effect of the prescription medication, instead of putting herself and other in harm's way.

As noted above, a Preventable Accident is an accident that a fully alert school bus driver could have foreseen and therefore avoided. I further find that Employee was incompetent in carrying out her duties as a bus drive because her careless work performance let to three (3) preventable accidents within an approximately one (1) month period. Accordingly, I find that Agency had cause to charge Employee with neglect of duty and incompetence.

Retaliation

Employee further claims that Agency's decision to terminate her is in retaliation to the fact that she had been fired before, and she got her job back. To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) she 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) her employer took an adverse action against her; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[23] 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.[24] But for her statement that she was fired in retaliation for the fact that she had been fired before and she got back her job, Employee has not provided any evidence in support of her retaliation claim. Further, there is no dispute that Employee had three (3) preventable

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

accidents with a one (1) month period. Consequently, I find that there is no causal connection between Employee's prior termination and her current termination.

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).[25] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations to include: Neglect of Duty and Incompetence", and as such, Agency can rely on these charges in disciplining Employee.

Employee argues that Agency did not consider mitigating factors in terminating Employee. In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty" is found in § 1619.1(6)(c) of the DPM. The penalty for a first offense for Neglect of duty is reprimand to removal. The record shows that this was the first time Employee violated §1619.1(6)(c). The penalty for "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Incompetence" is found in § 1619.1(6)(e) of the DPM. The penalty for a first offense for Incompetence ranges from a five (5) fifteen (15) days suspension. The record shows that this was the first time Employee violated §1619.1(6)(e). Employee admits to having three (3) preventable accidents within a one year period. Employee's conduct constitutes an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations and it is consistent with the languages of §§ 1619.1(6)(c) & (e) 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.[26] When an Agency's charge is upheld, this Office has held

[25] *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).

[26] *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]

that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law. Accordingly, Agency was within its authority to remove Employee given the Table of Penalties.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[27] Employee contends that, by removing her, Agency abused its discretion because it did not consider mitigating factors as stated in the *Douglas* factors. 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.[28] In the instant case, Agency noted that it decided to terminate Employee because the three accidents occurred within a very short timeframe. 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 consistency of the penalty with any applicable agency table of penalties. 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

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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.*

[27] *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).

[28] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD.**

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Senior Administrative Judge