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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0051-14
DOROTHY REID,)	
Employee)	
)	Date of Issuance: May 26, 2015
v.)	
)	
OFFICE OF THE STATE,)	
SUPERINTENDENT OF EDUCATION,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Katherine Lampron, Esq., Employee Representative)	
Hillary Hoffman-Peak, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 7, 2014, Dorothy Reid (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Office of the State Superintendent of Education’s (“Agency” or “OSEE”) action of terminating her employment as a Motor Vehicle Operator. Employee was terminated for “[f]ailure to obtain the necessary credentials, specifically, the “S” endorsement, required under the D.C. Municipal Regulations 1313.1(c).” The effective date of her termination was January 29, 2014.

This matter was assigned to me in September of 2014. On September 16, 2014, I issued an Order convening a Prehearing Conference for the purpose of assessing the parties’ arguments. After the November, 13, 2014 conference, the parties were ordered to submit written briefs. Both parties complied with the Order. Upon reviewing the submissions of the parties, the Undersigned has determined that an Evidentiary Hearing is not warranted in this case. The record is now closed.

JURISDICTION

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

ISSUE

Should Employee's termination be upheld?

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.

Uncontested Facts

1. Employee began working for Agency in 2000 as a Motor Vehicle Operator.
2. In August of 2010, Employee entered into a settlement agreement with OSSE. The agreement provided that Employee would be reinstated to her former position, conditional upon the successful completion of a physical exam, criminal background clearance, and drug and alcohol testing. The effective date of Employee's reinstatement was May 19, 2013.¹
3. On July 2, 2013, Agency issued a written notice to Employee reminding her that she did not hold a valid Commercial Driver's License ("CDL") in her state of residence. Agency also stated that Employee was required to maintain a CDL in good standing at all times because of her position as a Motor Vehicle Operator.
4. Employee was subsequently granted a one-time leave of absence for ninety (90) calendar days so that she could obtain an "S" endorsement on her CDL.² If Employee was unable to fulfill the requirements as provided in Agency's July 2, 2013 notice, and return to full duty by October 2, 2013, then Employee would be subject to termination.³

¹ Agency Brief, Exhibit C (December 16, 2014).

² The ninety (90) day period began on July 2, 2013. "S" endorsements are special notations on a driver's CLD, which indicate that the driver is certified to drive a school bus.

³ *Id.*

5. On December 9, 2013, Agency issued Employee a fifteen (15) day Advanced Written Notice of Proposed Removal pursuant to Chapter 16, Section 1608 of the D.C. personnel regulations. As a basis for cause, Agency cited to D.C. Municipal Regulation (“DCMR”) Section 1313.1(c); failure to obtain an “S” endorsement, as required under federal and District laws.
6. Employee was given the opportunity to respond to the advance notice in writing, but did not submit a response.
7. On January 9, 2014, Employee received a Notice of Final Decision on Proposed Removal, upholding the Administrative Reviewer’s Written Report and Recommendation. Employee’s termination became effective on January 9, 2014.
8. Employee subsequently filed a Petition for Appeal with OEA on February 7, 2014.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency’s adverse action was taken for cause.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. In January of 2000, the Federal Motor Carrier Safety Administration (“FMCSA”) was established pursuant to the Motor Carrier Safety Improvement Act (“MCSIA”) of 1999. FMCSA is a separate administration within the U.S. Department of Transportation, and its purpose is to improve the safety of commercial motor vehicles.⁴ In 2006, the FMCSA was amended to require applicants who applied for an “S” endorsement to pass a knowledge and skills test. Specifically, 49 CFR 383.123 provides the following:

(a) An applicant for the school bus endorsement must satisfy the following three requirements:

⁴ See <http://www.fmcsa.dot.gov>.

(1) Qualify for passenger vehicle endorsement. Pass the knowledge and skills test for obtaining a passenger vehicle endorsement.

(2) Knowledge test. Must have knowledge covering the following topics:

(i) Loading and unloading children, including the safe operation of stop signal devices, external mirror systems, flashing lights, and other warning and passenger safety devices required for school buses by State or Federal law or regulation.

(ii) Emergency exits and procedures for safely evacuating passengers in an emergency.

(iii) State and Federal laws and regulations related to safely traversing railroad-highway grade crossings; and

(iv) Operating practices and procedures not otherwise specified.

(3) Skills test. Must take a driving skills test in a school bus of the same vehicle group (see § 383.91(a)) as the school bus applicant will drive.

(b) Exception. Knowledge and skills tests administered before September 30, 2002 and approved by FMCSA as meeting the requirements of this section, meet the requirements of paragraphs (a)(2) and (3) of this section.

Effective February 17, 2006, the FMCSA adopted regulations which implemented Section 4140 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”). Under § 4140(a) of the SAFETEA-LU, a driver who passed the FMCSA-approved knowledge and skills tests for a CDL school bus endorsement before September 30, 2002, was deemed to have met the requirements for an “S” endorsement under 49 CFR 383.123. The compliance date for states to administer knowledge and skills tests to all school bus drivers under this provision was extended to September 30, 2006. In addition, § 4140(b) of the SAFETEA-LU extended the date for allowing states to waive the driving skills portion of the test to September 30, 2006.⁵

⁵ 71 FR 2897-01 (2006).

In order to comply with the aforementioned federal regulations, the District of Columbia enacted Title 18 D.C. Municipal Regulation (“DCMR”) § 1313.1, which states in pertinent part:

The following driver's license endorsements shall be displayed on a driver's license in order for the driver to operate certain types of motor vehicles or to operate motor vehicles hauling certain types of cargo:

(c) The School Bus Endorsement is required to operate a school bus or a multi-purpose school vehicle.

According to the Advance Written Notice of Proposed Removal, both OSSE and the DC Department of Motor Vehicles (“DMV”) attempted to schedule five (5) test dates to assist Employee with obtaining an “S” endorsement. The DC DMV unilaterally cancelled appointments on July 30, 2013 and July 21, 2013 because of a shortage in staff.⁶ The DMV scheduled a third attempt for testing on August 13, 2013. However, Employee contacted Agency to inform them that she was out of town, and could not take the test that day. Agency subsequently requested that the DMV reschedule Employee’s test for September 10, 2013. Agency was unable to secure a school bus for testing on that day; therefore, a fifth appointment was required to be scheduled. Agency states that it rescheduled a fifth appointment for testing on September 18, 2013. Employee reported to the DMV that day, but informed the examiner that she could not take the skills portion of the test because Agency did not properly prepare her for the exam.

To corroborate its position that Employee refused to take the skills exam on September 18, 2013, Agency offers the affidavit of George Mills (“Mills”), who was a trainer for bus drivers at OSSE during the relevant time at issue. The physical portion of the “S” endorsement skills test includes a: 1) pre-trip; 2) post-trip; 3) road test; and 4) driving skills test. Mills was responsible for scheduling testing times and dates for the drivers.⁷ He was also responsible for taking the school bus to the DC DMV, where the drivers would meet him for testing. According to Mills, Employee passed the written component of the “S” endorsement exam, but refused to take the skills portion of the exam when she appeared at the DMV on September 18, 2013. In addition, Mills stated that Employee failed to participate in any of the training sessions that were offered to prepare bus drivers for the exam.⁸

Employee argues that she attempted to take the road test as directed by Agency; however, Agency failed to assist her through the process. I disagree. Agency notified Employee in writing on June 29, 2013 that she was required to obtain an “S” endorsement on her CDL as a condition of continued employment.⁹ As previously mentioned, a total of five attempts were made to schedule Employee’s skills examination. Even after failing to take, and pass the skills portion of the exam, Employee was given one last opportunity to acquire an “S” endorsement. This notice was provided in a letter issued by Agency on November 22, 2013. The letter also provided

⁶ Agency states that attempts to contact Employee were made on both days to inform her of the cancellations.

⁷ Agency Brief, Exhibit A (December 16, 2014).

⁸ *Id.* Agency-sponsored trainings were offered on December 2, 2013, and December 3, 2013 at 10:00 a.m.

⁹ Agency Answer to Petition for Appeal, Exhibit A (March 11, 2014).

Employee with potential dates and times for training sessions offered by Agency. The purpose of the training was to afford Employee an opportunity to get assistance in reviewing the materials that she would be tested on.¹⁰ As of December 9, 2013, the date Agency issued its Advanced Notice of Proposed Termination, Employee did not possess an “S” endorsement on her CDL, as required by federal law. I find that there is no credible evidence in the record to support a finding that Agency failed to assist Employee with scheduling and taking the skills portion of the exam.

Employee also contends that Agency lacked cause to terminate her because she was eligible to be “grandfathered” in under the FMCSA provision by passing the skills and knowledge test prior to 2002. According to Agency, the CDL Office of the DC DMV notified Employee in writing that she was eligible to be exempted from re-testing for the “S” endorsement under 49 CFR 383.123(b) *supra*. While Agency submits that Employee never responded to this communication, there were no documents provided to this Office regarding Employee’s eligibility for being exempted from the required “S” endorsement.¹¹ Likewise, Employee has not provided any evidence to support a finding that she was approved by the DC DMV to be grandfathered in under § 383.123(b).

In this case, I find that Agency provided Employee with ample time to secure an “S” endorsement on her CLD. On July 2, 2013, Agency granted Employee a one-time leave of ninety (90) days to secure the required endorsement. Although Agency was unilaterally forced to cancel at least two testing dates, the onus remained on Employee to pass the skills portion of the test before the grace period expired.¹² There is no evidence in the record to support a finding that Employee did, in fact, take and pass the skills portion of the exam. Employee’s failure to obtain the requisite “S” endorsement made her “incapable of being in compliance with federal regulations and Agency policy,” with the result that she was “not able to lawfully perform the functions of her job at the time she was terminated.”¹³ Accordingly, the lack of the requisite licensure provided Agency with cause to take an adverse employment action against Employee.¹⁴

Whether the penalty was appropriate under the circumstances.

With respect to Agency’s decision to terminate Employee, any review by this Office of the 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.¹⁵ 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

¹⁰ *Id.*

¹¹ *E.g.*, supporting documentation to prove that Employee had the experience and clean driving record necessary to qualify for the waiver.

¹² Agency Brief, Exhibit B (December 16, 2014).

¹³ *See Washington v. D.C. Office of Employee Appeals*, No. 2013 CA 7454P (MPA) (August 2, 2014).

¹⁴ Section 1603.3 of the District Personnel Manual (“DPM”) defines cause to include “[a]ny on-duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law.” *See* Agency Brief (December 16, 2014).

¹⁵ *See Huntley v. Metropolitan Police Dep’t*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 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).

"managerial discretion has been legitimately invoked and properly exercised."¹⁶ 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."¹⁷ Employee's failure to obtain the "S" endorsement interfered with Agency's ability to perform its essential daily operations, and Employee's operation of a school bus without the proper endorsement violated both federal and District law. I further find that Agency acted reasonably within the parameters established in the Table of Penalties. Based on the foregoing, I conclude that Agency's decision to terminate Employee as the appropriate penalty for her actions was not an abuse of discretion and should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action is upheld.

FOR THE OFFICE:

Sommer J. Murphy, Esq.
Administrative Judge

¹⁶ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10

¹⁷ *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).