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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CAROL POWELL,)	
Employee)	OEA Matter No. 1601-0277-10
)	
v.)	Date of Issuance: January 15, 2014
)	
DISTRICT OF COLUMBIA PUBLIC)	
SCHOOLS DIVISION OF)	
TRANSPORTATION,)	
Agency)	STEPHANIE N. HARRIS, Esq.
)	Administrative Judge
<hr/>		
Ronald Holt, Employee Representative		
Frank McDougald, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 22, 2010, Carol Powell (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ Division of Transportation’s (“Agency,” “OSSE,” or “DCPSDOT”) decision to terminate her from her position. Agency’s action was based on District Personnel Manual (“DPM”), Chapter 16, §1603.3(f)(3), any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, including neglect of duty. At the time of her termination, Employee was a Motor Vehicle Operator with Agency. On March 26, 2010, Agency filed its Answer in response to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) in October of 2012. On October 25, 2012, I issued an Order scheduling a Prehearing Conference for November 30, 2012, and directing the parties to submit Prehearing Statements by November 23, 2012. Agency timely submitted its Prehearing Statement. Employee, however, did not submit a Prehearing Statement by the prescribed deadline. Thereafter, the undersigned issued a Post Prehearing Conference Order on February 7, 2013, wherein the parties were directed to submit Post Prehearing Conference Briefs to address outstanding issues. Both parties complied with the Order.

Subsequently, on May 8, 2013, the undersigned issued an Order scheduling an Evidentiary Hearing for June 18, 2013. On the day of the Evidentiary Hearing, both parties were present, and Employee's Representative submitted a Motion for Continuance. The basis of the motion Employee's request to address outstanding issues and submit her Prehearing Statement non the day of the Evidentiary Hearing. Agency opposed the Motion for Continuance. After considering the Motion for Continuance and Agency's opposition thereto, Employee's request was denied. The undersigned explained to Employee that she was given ample time to submit a Prehearing Statement and that she could have contacted the undersigned prior to the Evidentiary Hearing, if there was something that she did not understand about any of the previous Orders. Accordingly, the Evidentiary Hearing proceeded as scheduled.

Following the Evidentiary Hearing on September 6, 2013, the undersigned issued an Order notifying the parties that the transcript from the Evidentiary Hearing was available for pick up at this Office. The Order also directed the parties to submit written closing arguments by October 4, 2013. Both parties timely submitted their closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Employee's actions constituted cause for removal; and
- 2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

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.

SUMMARY OF MATERIAL TESTIMONY

Agency's Case in Chief

Kharka Lee (Transcript pages 14-42)

Kharka Lee ("Lee" or "Attendant Lee") is a Bus Attendant for OSSE. Prior to working for OSSE, she had worked for D.C. Public Schools, Department of Transportation. She has been employed by OSSE for seven years. As a Bus Attendant, Lee assists Bus Drivers with transporting students to and from school. Additionally, when asked about prior training, Lee stated that she received classes and training with D.C. Public Schools, Department of Transportation, which included skills pertaining to her job and life skills.

On January 6, 2010, Lee was assisting Employee with transporting students. Lee noted that Employee was not the usual driver for her bus. On this day, an accident occurred while Employee was coming down 17th Street and making a left toward Benning Road in North East, Washington, DC. Lee testified that as Employee was making a left, she was on her cell phone, and struck a woman and an infant who were crossing the street. She stated that the accident occurred on the driver's (left) side of the bus.

Lee explained that she was on the right side of the bus and saw pedestrians attempting to cross the street. When the accident occurred, Lee was looking at the road and saw a woman, holding a baby, walking across the street. She tried to get Employee's attention by saying "Stop." After the accident, wherein the woman and baby were struck, Employee pulled over and stopped the bus. Lee got off the bus to make sure the pedestrians were alright and stated that the woman and the baby had been knocked down by the force of the bus. While this was going on, Employee remained on the bus with the students.

According to Lee's testimony, a police officer was on the scene at the time of the accident, but he was not on duty. Another police officer in uniform came to talk to Employee and Lee. The police officer obtained everyone's information. Lee stated that the children on the bus were crying and saying "Ms. Kharka didn't do it." Lee also testified that Employee asked her "not to say she was on the phone." Thereafter, another bus was brought out to transport the students. Lee learned later that the woman who was struck was taken to the hospital.

Tracey Langley (Transcript pages 42-59)

Tracey Langley ("Langley") is the Employee Relations Manager at OSSE. She works in the Division of the Chief Operating Office in the Department of Human Resources. She is responsible for disciplining employees, employee recognition, and assisting with litigation matters.

Langley noted that Employee was terminated for driving while using her cell phone. OSSE's policy is that school bus drivers are prohibited from using cell phones while the school bus is in motion. If a bus driver is involved in an accident where a pedestrian is hit, this action constitutes egregious misconduct. Langley testified that Neglect of Duty encompasses failure to adhere to safety precautions, and the penalty for the first offense is reprimand to termination.

She further testified that Neglect of Duty, if egregious enough, “can rise to the level of termination.”

When asked by Employee Representative to describe the term ‘malfeasance’, Langley explained that it means taking government property and using it for personal use, noting that the adverse action for this type of offense would depend on the facts. She confirmed that progressive discipline includes various levels of discipline that include suspension, letters of reprimand, and other adverse actions prior to termination. Langley testified that in this case, Agency considered all of the facts in determining the appropriate discipline.

Langley stated that she was familiar with the incident that occurred with Employee and had seen documentation on it, but she did not personally know Employee. She also explained that she was familiar with Michael Kovalick, the former Director of Transportation, who issued Employee’s termination. Langley testified that employees are trained when they are first hired and receive refresher courses. However, she noted that OSSE has no control over actions taken by the Metropolitan Police Department.

Employee’s Case in Chief

Carol Powell (Transcript pages 59-115)

Employee stated that she started working with D.C. Public Schools in November of 1999 until her termination in 2010. She testified that her termination documentation was issued by Michael Kovalick. When Mr. Kovalick issued the proposed termination, he asked Employee for the citation ticket. Employee stated that during this meeting, she gave Mr. Kovalick the ticket, and he said “Oh, you’re terminated because of this ticket.” With regard to the ticket, Employee stated that a D.C. Police Officer responded to the accident and issued her a citation for failing to yield the right-of-way to a pedestrian. Employee stated that she went back to Agency to request her termination letter because Mr. Kovalick told her that she was terminated.

Employee testified that when she was given the citation, the police officer said “well, she told me that she saw the bus and she was trying to beat the bus across the street.” Employee also stated that the police officer said he was “giving her the ticket because of [his] supervisor.” Thereafter, Employee contested the ticket and subsequently, attended a hearing. Because the police officer who issued the ticket did not show up for the hearing, the ticket was dismissed. When the ticket was dismissed, Employee testified that another police officer who was present said “Oh, you need to go get your job back. That ticket was dismissed.”

Employee stated that as long as an earpiece is used, a cell phone can be used while operating a vehicle. She explained that DCPS issued a cell phone to her that did not come with an ear piece; however, this was not the cell phone in use during the accident. Employee claimed that she was trained to use the Agency issued cell phone and was required to answer the cell phone to speak with the dispatch. Employee noted that she did not receive any information on how to operate the cell phone while operating a vehicle. Further, she stated that if she did not have Agency’s cell phone, she was instructed by her manager to use her personal cell phone. Employee confirmed that she had to answer dispatch when there was a call.

Employee stated that prior to the accident, Attendant Lee was using her personal cell phone. Employee testified that the police officer who issued the citation for the accident said that the pedestrian was trying to beat the bus across the street. Employee claimed that she had no prior adverse actions taken against her. She explained that she was aware that pedestrians have the right-of-way when cars are approaching. She also testified that during the accident, the light was green and she was making a left hand turn and the pedestrian was in the intersection when she proceeded through the green light. When asked to assume that the pedestrian had a green light to cross the street, Employee acknowledged in her testimony that she would have had to yield for the pedestrian.

Employee noted that being on her cell phone while driving was not a regular habit and estimated that there was one other time where she was driving and using her cell phone. On the day of the accident, she acknowledged that she was using her personal cell phone, but she did have her Agency issued cell phone, which was to be used for emergencies. Employee testified that she was on her cell phone because her daughter's school called to tell her that her daughter was sick with a stomach ache.

Employee testified that she and Attendant Lee have worked together before and that she was operating the bus that Lee normally worked on. Employee testified that she did not tell Lee to say that she was not using her cell phone, and she does not know why Lee stated that during her testimony. Employee believed that Lee was not in her proper seat on the bus, because proper training required that Lee sit at the back of the bus.

Employee confirms that at the time of the accident, she was making a left turn onto Benning Road. After the accident, Employee was required to get a urine test. Thereafter, a meeting was held with Mr. Kovalick and Employee's union representative. Mr. Kovalick told Employee that she was terminated, but at that time, she did not receive a termination letter. She states that she had to go back to Agency and ask for her termination letter and Agency backdated it.

Employee indicated that she received training once a year with DCPS, but was not aware of any training that OSSE may have provided. She noted that Agency's training was mainly on children with disability. Employee stated that she did not receive defensive driver training. She opined that Defensive Driver training teaches proper bus operations, reinforces "driving for everybody out there," and covers all of one's area even when another driver is in the wrong. She testified that the pedestrian was on her left "blind side," and she did not see the pedestrian in the intersection. Employee stated she believed that if she had been given the proper Defensive Driver training, such training would have helped her see the pedestrian and the baby. She also explained that if she was properly trained on bus operations, she could have avoided the accident. However, she later testified that Employee stated that this particular driving during the accident did not fall under the "Defensive Driver" category.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

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.

- 1) On January 6, 2010, Employee was operating a school bus. While making a left hand turn, the bus Employee was operating struck a female pedestrian, who was carrying an infant.
- 2) Agency Investigator, Kyle R. Cochran, responded to the scene of the collision and subsequently filed a Collision Report.
- 3) A Metropolitan Police Department ("MPD") police officer was called to the scene of the accident, where he issued a citation to Employee for failing to yield the right of way to a pedestrian in a crosswalk. MPD also issued a Traffic Crash Report on the date of the accident, expounding that while attempting to make a left hand turn, Employee's vehicle struck a pedestrian and an infant because she failed to yield the right of way.
- 4) On January 7, 2010, Agency issued Employee a proposed notice of termination. The notice stated that Employee was involved in a collision, where a pedestrian was hit and a citation was issued. The notice also informed Employee that she had a right to respond to the charges and request an administrative review.¹
- 5) Employee acknowledged that she did not request an administrative review and instead opted to file an appeal with OEA.²
- 6) On January 25, 2010, Agency issued a Notice of Final Agency Decision to Employee, stating that Employee was terminated. The notice also informed Employee about her appeal rights to this Office.³
- 7) On February 23, 2010, Employee's citation from the instant accident was dismissed because the Officer who issued the ticket was not present for the hearing.⁴

ANALYSIS AND CONCLUSION

On January 6, 2010, Employee was operating a school bus and while making a left hand turn, the bus struck a female pedestrian, who was carrying an infant. Agency Investigator, Kyle R. Cochran ("Mr. Cochran"), responded to the scene of the collision and subsequently filed a Collision Report. In his report, Mr. Cochran noted that the collision occurred at the intersection of 17th Street, NE and Benning Road and that the walk signal for pedestrians crossing Benning Road, north and south, is illuminated when southbound traffic on 17th Street has a green signal for all lanes.⁵ Mr. Cochran interviewed both Attendant Lee and Employee.⁶

¹ Agency Post Prehearing Conference Order, Attachment 2 (March 4, 2013).

² Employee Post Prehearing Conference Brief (March 25, 2013).

³ *Id.*, Attachment 1.

⁴ Employee Submitted Evidence (November 30, 2012).

⁵ Mr. Cochran noted that he came to this conclusion after observing the pedestrian signal for three cycles.

⁶ Agency Answer, Tab 2 (March 26, 2010).

During Mr. Cochran's interview with Attendant Lee, she stated that Employee "was engaged in a conversation with her cellphone held to her ear with her hand," while attempting to make a left hand turn onto Benning Road. As Employee completed the turn, Lee relayed that Employee struck the pedestrian, who was carrying an infant in her arms. Lee also stated that prior to the impact she yelled stop to Employee several times to warn her about the impending collision, but Employee did not hear her and continued to talk on the phone. After the collision, Lee explained that Employee asked her to say that she was not on the phone. However, Lee advised Mr. Cochran that she was sure that Employee had her phone to her ear and was not using an earpiece at the time of the collision.⁷

Employee was also interviewed by Mr. Cochran, and she informed him that she was attempting to complete a left hand turn onto Benning Road and did not see any pedestrians. Next, she stated that she saw a woman holding a baby lying in the roadway, but she was unsure if she had struck them with the bus. Employee acknowledged that she was on the phone when the collision happened, but stated that she was using a headset with the phone. Mr. Cochran noted that Employee "was unable to provide any reason not informing [him] that she was using her phone at the time the collision occurred when interviewed at the scene of the collision."⁸

Mr. Cochran noted that an MPD officer arrived immediately after the collision and was told by the pedestrian that "she was okay." However, the pedestrian and infant were transported from the scene by Emergency Medical Services ("EMS"). Employee was issued a citation by the MPD Officer for failing to yield right of way to a pedestrian in a crosswalk and contributing to an accident with injuries." The MPD Officer also advised that the pedestrian obtained a minor injury to her leg resulting from impact to the ground, and was treated and released from the hospital. Mr. Cochran concluded in his report that the collision was preventable in nature and that Employee was at fault for the collision.⁹

Whether Employee's actions constituted cause for removal

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, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(f)(3), the definition of "cause" includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, including Neglect of Duty. Under § 1619.1(6)(c) of the DPM, Neglect of Duty is defined in relevant part as failure to follow instructions or observe precautions regarding safety.

Agency contends that Employee was properly terminated under Chapter 16 DPM §1603.3(f)(3), any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations, including Neglect of Duty.¹⁰ The Table of

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Agency Post Prehearing Conference Brief, p. 5 (March 4, 2013).

Penalties, DPM §1603.3(f)(3) further defines Neglect of Duty as failure to follow instructions or observe precautions regarding safety and performing careless or negligent work habits.

In her closing arguments, Employee argues that Agency failed to prove that there was “in fact impact and that an accident did occur.” Employee disputes Attendant Lee’s view, claiming that she would have been physically obstructed from seeing the alleged accident occur. She also alleges that she was not afforded due process or given the courtesy of a full investigation of the incident.¹¹ The undersigned finds these arguments wholly unpersuasive. Not only was Employee issued a citation by a DC Police Officer following the accident, but Agency conducted an investigation, which was detailed in a report submitted with Agency’s Answer. Employee had an opportunity to request an administrative review from Agency, but declined to do so. Moreover, Employee testified that although she did not see the pedestrian and infant in the crosswalk, she acknowledged that the mirror of the vehicle she was operating struck them.¹² Therefore, the undersigned finds it uncontested that the vehicle Employee was operating struck a pedestrian carrying an infant.

During the Evidentiary Hearing, Employee claimed that she did not receive defensive driving training, which she believes would have helped prevent the instant accident. She also argues that there was disparity between the training she received from DCPSDOT, her original employer, and OSSE, the agency that eventually took over. Employee also claimed that Agency issued telephone communications devices, which included “phone headsets and [she] was allowed to use them as part of her daily tasks,” but was not given proper training on how to use them.¹³ The undersigned finds complaints of this nature constitute grievances, which are outside OEA’s scope of review, pursuant to the Omnibus Personnel Reform Act of 1998 (OPRAA), D.C. Law 12-124.¹⁴ Further, the undersigned finds that Employee’s arguments regarding training are irrelevant to determining whether Agency had cause to terminate Employee after the bus she was operating struck a pedestrian carrying an infant.

The undersigned finds that the threshold issue in this matter is whether Employee was talking on the phone without a hands free device, when the bus she was operating was involved in a pedestrian accident. Employee and Attendant Lee, who were both first hand witnesses to the accident in question both testified to conflicting versions. Lee testified that Employee was holding her cellular phone while driving, when the school bus was involved in the instant accident. In contrast, Employee testified that she was using a hands free ear piece device while she was using her cellular phone, when the accident occurred. Employee also testified that she did not know of any reason why Attendant Lee would give a conflicting version of events regarding her cellphone use.¹⁵

It is within the province of the Administrative Judge to assess the credibility of witnesses.¹⁶ Witness credibility is at issue in this case due to the conflicting testimony regarding

¹¹ Employee Closing Arguments, pp. 2-4 (October 4, 2013).

¹² Evidentiary Hearing Transcript, pp. 73-76; 108-109.

¹³ Employee Closing Arguments, p. 7 (October 4, 2013).

¹⁴ It is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals.

¹⁵ Evidentiary Hearing Transcripts, pp. 89-92.

¹⁶ *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985).

the threshold issue in this matter. In trying to resolve issues of credibility, an Administrative Judge must identify the factual questions in dispute; summarize all evidence on each disputed question of fact; and explain in detail why the chosen version was more credible than other versions. The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by individuals who see the witness “first hand.”¹⁷ These “first-hand” observations are critical in cases, such as this, where removal is at issue. In this case, the undersigned considered the demeanor and character of the witnesses, the inherent improbability of the witness’ version, inconsistent statements of the witness, and the witness’ opportunity and capacity to observe the event or act at issue.¹⁸

In the instant case, the undersigned finds the testimony of Attendant Lee more credible because she has no vested interest in the outcome of this matter and her testimonial statements were consistent with the statements she gave immediately after the accident in the investigative report. On the other hand, the undersigned finds Employee’s testimony less credible, in part because she gave inconsistent statements during her testimony at the Evidentiary Hearing. During Agency’s cross-examination, Employee was questioned about statements she made about a police officer telling her that she should go get her job back after her traffic ticket was dismissed regarding the instant accident. Employee testified that she did not speak with anyone at the court house prior to her ticket being dismissed. However, when asked about how the Officer would have known about her termination, Employee admitted that she “probably did tell him...I can’t remember. I probably did say something...”¹⁹

This inconsistent statement lends itself to Agency’s argument that Employee’s testimony in this matter is not credible. Further, Employee clearly has a personal vested interest in the outcome of this matter, although that in and of itself does not decrease her credibility, it does have a bearing as serving self-interests. Therefore, I find that Employee was not using a hands free device while using her cell phone and operating the school bus when the instant accident occurred. Further, based on the documents of record and the testimonial evidence, the undersigned finds that while operating a school bus and attempting to make a left hand turn, Employee struck a pedestrian who was carrying an infant.

The undersigned’s finding that Employee was holding the phone to her ear when the accident occurred and not using a hands free device, also constitutes a failure to observe safety precautions, as described in the Table of Penalties for Neglect of Duty. Further, pursuant to Title 50, Subtitle VI, Chapter 17a of the D.C. Code (Distracted Driving Safety Act of 2004), it is illegal for motorists to use a mobile phone while driving in the District of Columbia, unless the device is equipped with a hands-free accessory.²⁰ Although Employee was not cited for distracted driving, based on the testimonial evidence and credibility of the witness, the finding in this case is that Employee was using her cellular phone without a hands-free device while driving. Therefore, I find that this action also constitutes Neglect of Duty and failure to follow instructions or observe safety precautions, as referenced in the Table of Penalties.

¹⁷ *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d 546 (D.C. 1985).

¹⁸ *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987).

¹⁹ Evidentiary Hearing Transcript, p. 83.

²⁰ See D.C. Code § 50-1731.04.

Regarding the citation given to Employee at the scene of the accident, Agency argues that Employee's termination "was not based in whole or part upon her being cited for a ticket by a District of Columbia Police Officer."²¹ However, Employee contends that because her ticket was dismissed, she should not have been terminated. The record reflects that Employee's ticket was dismissed based on a technicality due to the required Officer not being present at the hearing. The undersigned finds that Employee's termination was not based solely on the issuance of ticket, but instead because the bus she was operating hit pedestrians. As noted above, Neglect of Duty encompasses failure to observe precautions regarding safety and I find that being involved in a pedestrian accident while using a cell phone fits these parameters. Even assuming *arguendo* that Employee was using a hands-free device, the evidence still shows that she failed to yield the right of way and struck a pedestrian. Moreover, in her own statement, Employee acknowledged that as a School Bus Driver for Agency, she "is not allowed to use telephone communication devices at all while driving the bns [sic]."²²

The undersigned finds that the evidence Agency submitted to corroborate Employee's Neglect of Duty is adequate to support termination. The record shows that Employee was operating a school bus that struck a pedestrian while she was attempting to make a left hand turn. As noted above, the undersigned finds that Employee was using her cellular phone without a hands-free device when the accident occurred and these actions in totality show a failure to observe safety precautions and constitute Neglect of Duty. Accordingly, I find that the pedestrian involved accident while Employee was operating Agency's school bus sufficient cause for Agency to institute this cause of action against Employee.

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).²³ 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 ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the TAP for various causes of adverse actions taken against District government employees. In this case, Employee was charged with Neglect of Duty under DPM §§1603.3(f)(3),1619.1(6)(c), which comprises any on-duty act or

²¹ Agency Post Prehearing Conference Order, p. 6 (March 4, 2013).

²² Employee Closing Arguments, p. 7.

²³ 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).

employment-related act or omission that interferes with the efficiency and integrity of government operations, including failure to follow instructions or observe precautions regarding safety.

The penalty for Neglect of Duty is found in § 1619.1(6)(c) of the DPM. The penalty for a first offense for Neglect of Duty ranges from reprimand to removal. As noted above, I find that Employee's conduct constitutes Neglect of Duty, and her termination is within the range listed by the TAP and is consistent with the language of DPM § 1619.1(6)(c) for a first offense. Therefore, I find that Agency did not abuse its discretion by terminating Employee.

In her arguments, employee contends that Agency should have been more lenient because she has not previously been cited for misconduct.²⁴ She also argues that a charge of incompetence would have been a "more appropriate offense," instead of termination.²⁵ However, as provided in *Love v. Department of Corrections*²⁶ selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.²⁷ When an Agency's 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, 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 under the TAP.

Penalty was 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* (emphasis added).²⁸ The evidence does not establish that the penalty of removal constituted an abuse of discretion. Although Agency did not provide specific Agency evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee, the undersigned finds that Agency did not abuse its discretion.²⁹ Agency relayed that Employee's

²⁴ Employee Post Prehearing Conference Brief (March 25, 2013).

²⁵ Employee Closing Arguments, p. 5 (October 4, 2013).

²⁶ OEA Matter No. 1601-0034-08R11 (August 10, 2011).

²⁷ *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

²⁸ *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).

²⁹ 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 its 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;

actions were inappropriate and constituted serious and egregious misconduct, due to the nature of the accident where a pedestrian and an infant were struck.³⁰ Further, this Office has held that a Final Agency Decision that lacks discussion of the *Douglas* factors does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.³¹

In this case, the penalty of termination was within the range allowed for a first offense. In *Douglas*, the court held that “certain misconduct may warrant removal in the first instance.” In accordance with DPM §1619.1(6)(c), I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not a clear 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:

STEPHANIE N. HARRIS, Esq.
Administrative Judge

-
- 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.

³⁰ See Agency Post Prehearing Brief (March 4, 2013); Agency Closing Statement (October 3, 2013).

³¹ See *Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).