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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

|   |   |                                    |
|---|---|------------------------------------|
| _____                                   | ) |                                    |
| In the Matter of:                       | ) |                                    |
|   | ) |                                    |
| JAMES KING,                             | ) |                                    |
| Employee                                | ) | OEA Matter No. 1601-0345-10        |
|   | ) |                                    |
| v.                                      | ) | Date of Issuance: February 4, 2013 |
|   | ) |                                    |
| D.C. PUBLIC SCHOOLS,                    | ) |                                    |
| Agency                                  | ) | Eric T. Robinson, Esq.             |
|   | ) | Senior Administrative Judge        |
| _____                                   | ) |                                    |
| James King, Employee <i>Pro-Se</i>      | ) |                                    |
| Sara White, Esq., Agency Representative | ) |                                    |

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 26, 2010, James King (“Employee”) filed a petition or appeal with the Office of Employee Appeals (“OEA” of the “Office”) contesting the District of Columbia Public Schools (“DCPS” or the “Agency”) action of removing him from service. Employee’s last position of record with the Agency was Custodian and he was stationed at Malcolm X Elementary School (“Malcolm X”). At the time of his removal, Employee was a member of the International Brotherhood of Teamsters local 639 (“Union”). Moreover there was a Collective Bargaining Agreement (“CBA”) between DCPS and the Union.

Employee received two separate letters removing him from service. The first Termination Letter was dated July 2, 2010 with an effective removal date of July 22, 2010. The reason cited for Employee’s removal in this letter was a violation of 5 DCMR Section 1401.2 (I) “Lack of Dependability”. On July 23, 2010, Employee received a second termination notice wherein he was informed that he was rated Ineffective under the IMPACT rating system for school based employees and that he was being terminated effective on July 30, 2010. I was assigned this matter on or around July 7, 2012. A prehearing conference was held during which I required the parties to address how Employee was removed from service. The parties briefed this issue and based on the documents of record as well as the fact that the second letter was issued after Employee had already been removed from service, I find that Employee was removed from service due to Lack of Dependability as described in the July 2, 2010, letter. After

informing the parties of this finding, I then scheduled an evidentiary hearing. However, that date was delayed multiple times due to Employee's unavailability and his multiple attempts to find legal counsel. Employee was unable to acquire legal counsel so eventually the evidentiary hearing was held on October 22, 2013. The record is now closed.

### JURISDICTION

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

### ISSUE

Whether the Agency's action of removing the Employee from his last position of record was supported by cause and whether the penalty was appropriate.

### BURDEN OF PROOF

OEA Rule 628 *et al*, 59 DCR 2129 (March 16, 2012) states:

628.1 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 the 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.

628.2 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 FACT, ANALYSIS AND CONCLUSIONS OF LAW

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.

### SUMMARY OF THE TESTIMONY

*Danielle Reich ("Reich") Transcript ("Tr.") pages 11 – 61.*

Reich testified in relevant part that she is employed by DCPS as a Manager of Labor management and Employee Relations. Part of her job duties includes working on team that administers progressive discipline to the multitude of employees working for DCPS. Reich defined progressive discipline as “a system by which supervisors clearly outline job expectations for their employees when they are not meeting them and lets them know where exactly they’re falling short and it progresses. So it starts with a lesser penalty, usually a warning or a reprimand and then it escalates from there to a suspension. Sometimes we deliver multiple suspensions. And then the last step is termination.”<sup>1</sup> Reich recalled that prior to Employee’s termination, that he received the gamut of lesser penalties including several written reprimands and two suspensions.<sup>2</sup> According to Reich, in order to warrant a suspension, an employee only needs one written reprimand or warning. Employee herein had approximately five written reprimands and warnings. In the matter at hand, Principal Bobbitt, would have had to initiate the inquiry to have Employee suspended. As part of that process, Reich reviewed the inquiry in order to ensure that DCPS was adhering to all applicable CBA guidelines. Ultimately, Employee’s on the job conduct did not improve and he was issued a Termination Letter on July 2, 2010.<sup>3</sup> The effective date of Employee’s termination was July 22, 2010. According to the Termination letter, “Lack of Dependability” was the reason cited for Employee’s termination. Moreover, this letter indicated that Employee had received several reprimands and two suspensions because Employee failed to adequately perform his custodial duties. Reich asserted that DCPS followed the proper procedures for progressive discipline when it removed Employee from service.

*Kathryn McMahon-Klosterman (“McMahon”) Tr. pages 61 – 91.*

McMahon testified in relevant part that she is employed with DCPS as its Director of IMPACT in the Office of Human Capital. McMahon testified that IMPACT is a staff evaluation tool for school based employees of DCPS. Moreover, as part of the IMPACT review process, Employee was provided with a growth plan that would have alerted him to the issues that need improving.<sup>4</sup> According to Employee’s growth plan, he needed to arrive to work on time, complete his daily assignments with accuracy and follow his daily schedule. Based on the sub-par scores that he received during the 2009/2010 school year, Employee herein would have received an Ineffective rating for his final IMPACT score for school year 2009/2010.<sup>5</sup> If so, Employee would have faced removal from service through the IMPACT rating process. However, Employee was removed from service due to lack of dependability prior to the Agency issuing its final IMPACT rating for Employee.

*Garry Robinson (“Robinson”) Tr. pages 91 – 246.*

Robinson testified in relevant part that he is employed by DCPS as a Custodian Foreman. His on the job duties include overseeing the cleanliness of the schools and supervising other custodians. During the 2009/2010 school year Robinson was stationed at Malcolm X

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<sup>1</sup> Tr. at 12 – 13.

<sup>2</sup> See Agency Exhibit Nos. 1 – 10.

<sup>3</sup> See Agency’s Exhibit No. 13.

<sup>4</sup> See Agency’s Exhibit Nos. 14 – 15.

<sup>5</sup> See Agency’s Exhibit No. 16.

Elementary school. Prior to his removal, Robinson was Employee's direct supervisor. Robinson explained that Employee and his colleagues were each assigned a floor of the school that they were primarily responsible for cleaning. Robinson created Agency Exhibit Nos. 18 and 19, wherein he provided written recommendations to discipline Employee to Principal Bobbit. According to Robinson's testimony and the aforementioned exhibits, he took issue with Employee's lackluster work performance and his repeated failure to complete his assigned work tasks. According to Robinson, Employee failed to clean his assigned area on a daily basis. Of note, bathrooms and other areas would not be properly sanitized so that when Robinson did a morning follow-up inspection he would smell urine and other foul odors indicating that Employee had failed to properly clean his assigned areas. Moreover, Employee was repeatedly late for work.

Robinson would provide his subordinates with a written daily checklist whereby they would know their exact duties on any given work day. Robinson was the first person in the school building and would inspect the entire building noting on his checklist whether the areas that were supposed to be cleaned the day before were done and other areas that may need attention. Moreover, this checklist would indicate whether the assigned duties were adequately completed or not. Employee's checklists were included within Agency's Exhibit Nos. 18 and 19 as evidence that Employee was not properly executing his assigned tasks. Robinson noted that Employee's job performance did not improve during the school year in question.

Robinson recalled one Sunday morning that he had an argument with Employee. Employee had asked for extra time during the weekend to catch up on his task list. Robinson had to meet Employee at the school so that he could unlock the doors and disable the alarm system. Robinson was supposed to meet Employee at 7am but was running late due to car troubles. According to Robinson, Employee was belligerent because he had been waiting for some time. Robinson assured Employee that he would be compensated for all of the time that he had been waiting. He then let Employee into the building and informed Employee that when he returned after church service that he would have to go so that he could lock and secure the building. Ultimately, when Robinson returned to the building at approximately 1:30pm Employee was not ready to leave. From there, Robinson and Employee got into an argument. Robinson then called security and informed them that he was leaving the building but that Employee was refusing to leave. Security informed both of them that they both had to exit the building immediately, at which point Employee left.

*James King ("Employee") Tr. pages 246 – 259.*

Employee testified in relevant part that prior to his last school year he had worked under another custodian foreman and that the previous foreman had a different system for distributing the work load of the custodial staff. However, when Robinson came aboard, the custodial staff responsibilities were divvied up floor by floor. Moreover, Robinson contends that some of the responsibilities that were foisted onto him were tasks that should have been done by either Robinson or a trade specialist (e.g. plumber or electrician). Employee repeatedly confronted Robinson about some of his work items (e.g. cleaning the light ballast or working outside) being Robinson's responsibility. However, Employee was rebuffed and then was blamed for not doing his job. Of note, Employee took issue with one of his suspensions because it was alleged that he

did not clean his assigned area for a two week time period. Employee contends that he was on approved sick leave during the time in question and should not have been disciplined for this infraction.<sup>6</sup> However, during cross examination, Employee admits that his sick leave was only for one week during this period.

### Analysis

Employee herein was cited for and ultimately removed from service due to a charge of Lack of Dependability which centered on Employee's alleged failure to perform his assigned tasks in a workmanlike manner. According to testimonies of Reich and Robinson, DCPS utilized progressive discipline in a failed attempt to rehabilitate Employee's lackluster job performance. On multiple occasions, Employee was issued reprimands, warnings and was suspended twice without pay. Moreover, Agency's failed efforts at rehabilitation were documented in Agency Exhibit Nos. 1- 10, 12 – 13, 18 and 19. Employee admitted that he was having difficulties in completing his assigned tasks. However, Employee attempts to explain his failure due to a change in supervision from previous custodian foreman's to Robinson. I disagree. The record reflects that Employee was provided with a daily checklist that would document what he was required to do and whether he had adequately accomplished his assigned tasks. Employee admits that he was unable to complete his assignments and instead deflects responsibility to other DCPS coworkers. Employee's explanation is unacceptable to the undersigned. The Agency attempted to rehabilitate Employee's behavior through progressive discipline consistent with the guidelines of the CBA. I find that Reich and Robinson's testimony was consistent and readily buttressed through several exhibits. In contrast, I also find that Employee's explanations were self-serving.

The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof. *See Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987). I find that the Agency's adverse action was taken for cause. Considering as much, I find that the Agency has met its burden of proof in this matter. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), \_\_ D.C. Reg. \_\_ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), \_\_ D.C. Reg. \_\_ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

When an Agency's charge is upheld, this Office has held 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. *See Stokes, supra; Hutchinson, supra; Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), \_\_ D.C. Reg. \_\_ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995),

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<sup>6</sup> See Agency Exhibit No. 20.

\_\_ D.C. Reg. \_\_ ( ). I find that based on the preceding findings of facts and resulting conclusion thereof that the penalty of removal was within managerial discretion and otherwise within the range allowed by law.

ORDER

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

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.  
Senior Administrative Judge