THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KENDRA PEARSON,	)	
Employee	)	OEA Matter No. 1601-0061-11
	)	
v.	)	Date of Issuance: February 25, 2014
	)	
DISTRICT OF COLUMBIA	)	STEPHANIE N. HARRIS, Esq.
DEPARTMENT OF HUMAN RESOURCES	)	Administrative Judge
&	)	
OFFICE OF THE STATE SUPERINTENDENT	)	
OF EDUCATION,	)	
Agency	)	
	)	

Kendra Pearson, Employee *Pro-Se*
Margaret Radabaugh, Esq., Agency Representative
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 18, 2011, Kendra Pearson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("OSSE") action of terminating her. The effective date of Employee's termination was December 17, 2010. Employee's position of record at the time of her termination was a Motor Vehicle Operator and she was serving in Career Service status at the time she was terminated. Agency submitted its Answer in response to Employee's Petition for Appeal on March 9, 2011.

I was assigned this matter on July 26, 2012. On November 1, 2012, I ordered ("November 1st Order") the parties to attend a Prehearing Conference on December 13, 2012. The Prehearing Conference was rescheduled for January 15, 2013, where both parties were in attendance and requested mediation in this matter. Mediation attempts were unsuccessful, due in part to OSSE's contention that it lacked settlement authority because the District of Columbia Department of Human Resources ("Agency" or "DCHR") instituted the termination.

Subsequently, the undersigned issued a March 29, 2013 Order for Designated Representative requiring DCHR to assign a designated Representative for this matter. On April 30, 2013, the undersigned issued an Order for Statement of Good Cause to DCHR, for their failure to submit a designated Representative in this matter. DCHR submitted its designated Representative on May 14, 2013. The parties, including both OSSE and DCHR, attempted mediation again, but were unsuccessful.

A Status Conference was held on August 5, 2013, and a Prehearing Conference was held on November 18, 2013. All parties were present for the proceedings. A Post Prehearing Conference Order was issued on December 16, 2013, requiring the parties to submit Post Prehearing Briefs. Both parties timely submitted their briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts at issue in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of terminating Employee was done in accordance with District laws, rules and regulation.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

In her Petition for Appeal, Employee states that she got herself "into a situation that caused [her] legal problems" and made her unable to operate a motor vehicle. She submits that she is not disputing her termination as a Motor Vehicle Operator, but believes that her position should have been downgraded to a Bus Attendant.[1]

In her Prehearing Statement and Brief, Employee explains that she accepted a plea bargain at the insistence of her public defender. She states that she attempted to get her plea bargain vacated based on her attorney's false information, but to no avail. Employee relays that after she lost her driver's license in August 2011, she requested to be demoted to a Bus Attendant position, and was told that OSSE was "working on it."[2]

Since OSSE was undergoing an administrative transition during the time of Employee's termination, DCHR instituted the termination of Employee. In its Answer, DCHR states that Employee worked as a Motor Vehicle Operator, which entailed operating a multi-passenger vehicle and required a Commercial Driver's License ("CDL"). Because of Employee's direct, unsupervised contact with children and youth, DCHR states that Employee's position was covered by Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"), which requires, among other things, periodic criminal background checks. The

[1] *See* Petition for Appeal (January 18, 2011).
[2] Agency Prehearing Statement (December 2, 2013); Agency Brief (January 6, 2014).

information obtained from the criminal background check is assessed by DCHR to determine the suitability of an employee or applicant to provide unsupervised services to children and youth. Agency submits that pursuant to Title 6-B, District of Columbia Municipal Regulations ("DCMR") §419, DCHR has authority to conduct suitability investigations of District of Columbia government employees. Agency relays that its analysis was based upon seven factors denoted in 6B DCMR §419.5, to determine whether a current employee shall be retained or terminated.[3]

On August 16, 2010, at the request of Agency, Employee appeared at the Metropolitan Police Department ("MPD") for a background check, which revealed that on November 14, 2009, she was arrested in the District of Columbia and charged with Driving Under the Influence and Operating While Impaired, both misdemeanor offenses. Based on these charges, DCHR instituted a suitability investigation, which revealed that on June 9, 2010, Employee pled guilty to Driving Under the Influence and was sentenced to ninety (90) days confinement, suspended; one (1) year of supervised probation; and attendance at a court ordered alcohol testing and treatment program. Further, Employee's certified driving record reflected that based on Employee's conviction, her CDL was revoked by the District of Columbia Department of Motor Vehicles.[4]

Agency asserts that based on its suitability investigation and consideration of the seven factors enumerated in 6B DCMR §419.5, Employee was unsuitable for employment in the CYSHA covered position, Motor Vehicle Operator. Consequently, on October 18, 2010, DCHR issued a Notice of Proposed Adverse Action ("Proposed Notice"), proposing to remove Employee from her position with OSSE. The proposed removal was based upon: (1) conviction of a misdemeanor based on conduct relevant to Employee's position, job duties, or job activities-specifically, Employee's misdemeanor conviction for Driving Under the Influence and revocation of her required CDL; and (2) DCHR's determination, based on its suitability assessment, that Employee was no longer suitable for her position and that her continued employment presented a clear danger to children and youth serviced by OSSE. DCHR notes that the Proposed Notice advised Employee of her right to review any material upon which the proposed action was based; to respond in writing within six (6) days of receipt of the Proposed Notice; to be represented by an attorney or other representative; to have any response reviewed by a designated Hearing Officer; and to an administrative review by a designated Deciding Official.[5]

Employee filed a written response on October 29, 2010, and met with the appointed Hearing Officer in this matter. After a review of the documents of record, the Hearing Officer issued a letter to the Deciding Official recommending that Employee's termination be upheld. DCHR submits that the Deciding Official considered the *Douglas* factors and reviewed the entire record, including the suitability investigative report, supporting documentation in her recommendation. In her assessment of the *Douglas* factors, the Deciding Official noted that

[3] *See* Agency Answer (March 9, 2011).
[4] Agency Answer (March 9, 2011); Agency Brief (January 6, 2014).
[5] *Id*.

DCHR did not want to send a message to the public that it allows its children's school bus drivers to remain employed after they are convicted of Driving Under the Influence.[6]

On November 29, 2010, DCHR issued a Notice of Final Decision to Employee, sustaining her removal from her position with OSSE. The effective date of Employee's termination was December 17, 2010. DCHR asserts that its decision to remove Employee was reasonable and appropriate, such that the termination should be affirmed. DCHR's Final Decision also notified Employee of her right to appeal this action with OEA.[7]

DCHR submits that Employee's misdemeanor conviction Driving Under the Influence, renders her unsuitable for employment in the safety-sensitive covered Motor Vehicle Operator position. DCHR states that Employee's continued employment would pose a danger to the health and safety of the children and youth whom she would come in contact with as part of her daily responsibilities. DCHR further states that Employee's termination was "based upon the existing law, and is well grounded in the underlying facts and evidence." Agency also argues that Employee has neither rebutted nor disproved DCHR's finding that her conviction renders her unsuitable in a CYSHA covered position.[8]

Termination For Cause

Pursuant to OEA Rule 628.2,[9] 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 a disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(b), the definition of "cause" includes conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities ("Misdemeanor Conviction"). In the instant case, the undersigned must determine if the evidence Agency submitted to corroborate Employee's Neglect of Duty is adequate to support termination.

DCHR submits that it had cause to terminate Employee after a criminal background check revealed that she had a recent criminal misdemeanor conviction for driving under the influence of alcohol and a revoked CDL. Agency notes that Employee was a Motor Vehicle Operator whose job duties included safely operating a multi-passenger vehicle to transport disabled children and youth required a valid CDL. DCHR states that Employee's criminal conviction for driving a vehicle under the influence was relevant because she was entrusted to safely operate a vehicle carrying disabled children. Further, the revocation of Employee's CDL rendered her unable to perform the essential job functions of a Motor Vehicle Operator.

Employee has not contested any of the evidence provided by DCHR in support of its Misdemeanor Conviction charge. Employee acknowledges that she was arrested in November 2009 and pled guilty to Driving Under the Influence in June 2010. Employee states that she requested to be demoted, as opposed to being terminated. She also argues that a Driving Under the Influence ("DUI") charge should not be related to an individual working with children,

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[6] *Id*.
[7] *See* Agency Answer, Exhibit 12 (March 9, 2011).
[8] *Id*.
[9] 59 DCR 2129 (March 16, 2012).

noting that she would never do anything to harm a child and does not have any arrests indicating that she would harm a child.[10]

Based on the documents of record showing that Employee was charged and convicted for a misdemeanor relevant to her position, I find that Agency had cause to terminate Employee based on a charge of Misdemeanor Conviction. Employee's misdemeanor conviction for Driving Under the Influence has a direct impact on her job as a Motor Vehicle Operator. Although Employee did not directly harm any children, the conviction was related to her driving, which was the major essential function of her position, Motor Vehicle Operator. Further, her Misdemeanor Conviction for DUI also resulted in the revocation of her CDL, which was an essential and mandatory requirement for her job.

Accordingly, I find that Agency's submitted documentation corroborates its charge of Misdemeanor Conviction. Employee acknowledges that she was charged and pled guilty to a misdemeanor. Employee also argues that she was not actually driving the vehicle and her attorney gave her false information. However, I find that Employee willingly participated in plea bargaining negotiations, despite finding the results unfavorable. Further, the undersigned agrees with Agency's assertion that pursuant to 6-B DCMR §1603.9, a criminal conviction will not estop the convicted party from denying the facts underlying the conviction. Thus, Employee's arguments regarding the validity of her conviction are unpersuasive.[11]

Penalty Within Range

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).[12] 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

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[10] Employee Brief (January 27, 2014).

[11] *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) – The U.S. Supreme Court held that under the doctrine of res judicata, parties are precluded from contesting matters where they have had a full and fair opportunity to litigate. *See also Garnetta Hunt v. District of Columbia Department*, OEA Matter No. 1601-0375-10 (February 14, 2014) – OEA held that Employee's issues that were argued and addressed by the D.C. Court of Appeals were precluded from being addressed under the doctrine of res judicata.

[12] *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).

Misdemeanor Conviction under DPM §1603.3(b), which comprises a conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities.

The penalty for Misdemeanor Conviction is found in § 1619.1(2) of the DPM. The penalty for a first offense for Misdemeanor Conviction is removal.[13] As noted above, I find that Employee's conduct constitutes Misdemeanor Conviction, and her termination is within the range listed by the TAP and is consistent with the language of DPM § 1619.1(2) for a first offense. Therefore, I find that, by terminating Employee, DCHR did not abuse its discretion.

As provided in *Love v. Department of Corrections*[14] selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[15] 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 and DCHR was not required to demote or assign Employee to a different position. In fact, the penalty of removal was the only option listed in the TAP for this cause of action. Accordingly, DCHR 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.[16] The evidence does not establish that the penalty of removal constituted an abuse of discretion. DCHR 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.[17]

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[13] *See* DPM §1619.1 (2).
[14] OEA Matter No. 1601-0034-08R11 (August 10, 2011).
[15] *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).
[16] *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).
[17] 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;

In this case, the penalty of termination was within the range allowed for a first time offense for this cause of action. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, DCHR gave credence to the nature and seriousness of the offense; Employee's job level and type of employment; past disciplinary record; notoriety of the offense on the reputation of the Agency; Employee's past work record; and the effect of the offense on job performance ability.[18] In accordance with DPM §1619.1(2), I conclude that DCHR had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not an error of judgment. Accordingly, I further conclude that DCHR'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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STEPHANIE N. HARRIS, Esq.
Administrative Judge

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.

[18] *See* Agency Answer, Tab 12 (March 9, 2011).