THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
YORDANOS SIUM,	)	
Employee	)	OEA Matter No. 1601-0135-13R20
	)	
v.	)	Date of Issuance: December 3, 2020
	)	
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Louise Ryde, Esq., Employee Representative
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION ON REMAND[1]

INTRODUCTION AND PROCEDURAL HISTORY

On August 15, 2013, Yordanos Sium ("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 Bus Driver effective April 12, 2011. Following an Agency investigation, Employee was charged with [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty. On September 18, 2013, Agency filed a Motion to Dismiss Employee's Appeal for lack of jurisdiction. On October 10, 2013, Employee filed a notice of opposition to Agency's Motion to Dismiss.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on May 14, 2014. Thereafter, I issued an Order scheduling a Status/Prehearing Conference in this matter for June 10, 2014. Both parties were in attendance.[2] Thereafter, I issued a Post Status Conference Order requiring the parties to address the issues raised during the Status/Prehearing Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[2] Agency withdrew its jurisdiction claim during the conference.

Hearing was not required. On October 10, 2014, I issued an Initial Decision ("ID") in this matter upholding Agency's decision to terminate Employee.[3]

Employee appealed the ID to OEA Board, which upheld the ID in an Opinion and Order ("O&O") dated May 10, 2016.[4] Thereafter, Employee appealed the OEA Board's O&O to the District of Columbia Superior Court. The District of Columbia Superior Court upheld the O&O. Subsequently, Employee appealed the ID to the District of Columbia Court of Appeals, which vacated the OEA Board's O&O and remanded the matter to OEA for further proceedings to address the material facts in dispute.[5] A Prehearing Conference was held on January 29, 2020. Subsequently, a video (WebEx) Evidentiary Hearing was held on September 9 & 10, 2020.[6] Both parties were present for the Evidentiary Hearing. On September 29, 2020, the undersigned issued an Order requiring the parties to submit written closing arguments on or before October 29, 2020. Both parties have filed their respective 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 Agency violated Employee's due process rights;
2) Whether Agency's action of terminating Employee was done for cause; and
3) 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 Agency. On January 5, 2011, Employee was involved in a car accident that was caught on camera. A security camera recorded Employee's bus colliding with a car on January 5, 2011. Employee left the scene of the accident without getting out of her car to check the damage. There was a witness who reported the incident to the Office of Investigations. An investigator was assigned to this matter and during the course of the investigation, Employee was interviewed on January 6, 2011, wherein, she stated that she was not in an accident. However, when confronted with the fact that there was a video recording of the accident, Employee acknowledged that she was in an accident. Employee also provided a written statement which was not included in the record before OEA. Pictures of the damage on school bus and the other vehicle that Employee collided with which were taken during the investigation were also not included in the record before OEA. Employee was placed on leave immediately following the interview, and approximately one (1) week after the incident,

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[3] *Yordanos Sium v. Office of the State Superintendent of Education*, OEA Matter No: 1601-0135-13, Initial Decision (October 10, 2014).
[4] *Yordanos Sium v. Office of the State Superintendent of Education*, OEA Matter No: 1601-0135-13, Opinion and Order on Petition for Review (May 10, 2016)
[5] *Sium v. Office of the State Superintendent of Educ.*, 218 A.3d 228, 231 (D.C. 2019).
[6] Throughout this decision, Vol. 1 denotes the transcript for Day 1 (September 9, 2020) and Vol. II denotes the transcript for Day 2 (September 10, 2020).

Employee was returned to her normal duties as a Bus Driver. Thereafter, Employee was out sick. On March 28, 2011, Employee received a notice of proposed termination for Neglect of Duty – failure to follow instructions or observe precautions regarding safety; failure to carry out assigned tasks; careless or negligent work habits. Agency issued its final Agency Decision on April 12, 2011, terminating Employee. Both the Notice of Proposed Removal and the Final Agency Decision did not state the specific conduct/reasons for Employee's termination. Employee filed a Petition for Appeal with OEA more than two (2) years after the effective date of termination.

1) Whether Agency violated Employee's Due Process rights

Employee avers that Agency violated her due process rights. Specifically, Employee argues that, Agency did not provide her with proper notice of the reasons for her proposed termination pursuant to due process requirements, as well as the D.C. Personnel Regulations. Employee explains that her termination should be rescinded because Agency's notice was deficient under Section 1608.2 of the D.C. Personnel Regulations, which provide that "[t]he advance written notice shall inform the employee of the following: (a) [t]he action that is proposed and the cause for the action; [and] (b) *[t]he specific reasons for the proposed action*." (*Emphasis added*). 6-B DCMR § 1608.2 (attached) (2012). Citing to *Office of D.C. Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994). Employee maintains that the D.C. Court of Appeals has interpreted this regulation to require the Agency to set forth, in the notice of proposed removal, details regarding the conduct which formed the basis for employee's cause for removal sufficient to "apprise the employee of the allegations he or she will be required to refute or the acts he or she will have to justify."[7]

The Due Process Clause of the Fourteenth Amendment requires that "a state agency explain, in terms comprehensible to the client, exactly what the agency proposes to do and explain the agency's reasons for its action in enough detail that the client can assess the correctness of the agency's decision, make an informed decision as to whether to appeal, and be prepared for the issues to be addressed at the hearing."[8] The due process clause prohibits "unintelligible, confusing, or misleading notices, or any notices which do not meaningfully inform clients of their hearing rights." *Mayhew v. Cohen*, 604 F. Supp. 850, 858 (E.D.Pa.1984). Section 1608 of the DPM sets forth "enumerated requirements that the notice of proposed action should afford Employee." Pursuant to the District Personnel Manual ("DPM") § 1608.2, the notice of the proposed action *shall* inform the employee of the following:

a. The type of proposed action (corrective, adverse, or enforced leave);
b. The nature of the proposed action (days of suspension or enforced leave, reduction in grade, reassignment, or removal);
c. The specific performance or conduct at issue;
d. How the employee's performance or conduct fails to meet appropriate standards; and
e. The name and contact information of the anticipated deciding official, or if a removal action, the anticipated hearing officer for the administrative review.

[7] Employee's Closing Argument, October 29, 2020.
[8] *Lelonie Curry-Mills v. Dept. of Youth Rehabilitation Services Agency*, OEA Matter No. 1601-0047-15, Initial Decision (March 30, 2016) (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)).

(Emphasis added).

In the instant matter, Agency charged Employee with "Neglect of Duty" pursuant to DPM § 1603.3(f)(3) as cause for termination.[9] However, Agency failed to provide the *specific performance or conduct at issue* as required by §1608.2(c). In *Rachel George v. D.C. Office of the Attorney General*[10], this Office noted that, "[l]acking specificity regarding the charges in the Notice of Proposed Removal is a violation of due process." In *Rachel George,* the Agency sent the employee a Notice of Adverse Action stating that the employee's termination was subject to her failure to "*satisfactorily perform one or more of the duties of your position and any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." Id*. The Notice failed to cite with specificity the DPM provision under which the adverse action penalty was considered. *Id*. Thus, the OEA Board upheld the AJ's decision to reverse the Agency's termination of Employee.[11] The OEA Board found that the employee in *Rachel George* could not adequately defend against the charges because of the Agency's lack of clarity. *Id*.

Here, the notice of proposed termination from Agency stated that, "[t]his letter is to inform you of the proposed termination of your employment as a Motor Vehicle Operator with the Division of Transportation (DOT), per chapter 16 of the D.C. Personnel Regulations, for the following cause:

1. Neglect of Duty - failure to follow instructions or observe precautions regarding safety: failure to carry out assigned tasks; careless or negligent work habits."

While the letter complies with most of the requirements outlined in DPM §1608.2, it does not specify the performance or conduct at issue as required under DPM §1608.2(c). There is no additional information the Notice of Proposed Removal or the Final Notice of Removal informing Employee of what behavior she was being disciplined for. Employee stated during the Evidentiary Hearing that the Notice of Proposed Removal did not specifically identify what incident she was being terminated for. Tr. I. 237. She testified that from reading the Notice of Proposed Removal, she did not know for certain why Agency was proposing to terminate her. Employee explained that she thought she was being terminated because she was sick. Tr. I. 237. Employee testified that no other documents were attached to Employee's Exhibit 1, Notice of Proposed Removal, when she received the document upon her termination. Tr. Vol. II. 18. She also confirmed that no other documents were attached to Employee's Exhibit 2, Notice of Removal, when she received the document. Tr. Vol. II. 18, 22. Kwelli Sneed, the proposing official in the instant matter confirmed that, the Notice of Proposed Removal did not contain any specific incident in which Employee neglected her duty or failed to observe precautions or follow instructions. Sneed acknowledged that based on the proposed letter, it would not be possible to determine what incident caused Employee to be charged with neglect of duty. She

[9] DMP § 1699.1: Cause is a reason that is neither arbitrary nor capricious, such as misconduct or performance deficits, which warrants administrative action, including corrective and adverse actions.
[10] OEA Matter No. 1601-0050-16, Initial Decision (October 22, 2018)
[11] *Rachel George v. D.C. Office of the Attorney General*, OEA Matter No. 1601-0050-16, Opinion and Order on Petition for Review (July 16, 2019).

could not recall if the entire investigative file was provided to Employee along with the Notice of Proposed Removal or the Final Notice of Removal. Tr. I. 93-96.

Based on the above testimonies and the documents in the record, it is undisputed that the Notice of Proposed Removal did not provide Employee with the specific conduct that supported the cause of action of Neglect of Duty. This lack of clarity left Employee vulnerable to assuming what actions led to the imposed adverse action and defending herself based on those assumptions. Further, Employee asserted that she was returned to her bus operator position a little over a week after January 6, 2011. She continued working as a bus operator for about two and a half months before going out on sick leave. She was out on sick leave when she was informed of her termination. Tr. Vol. II. 235 -236. Because Agency sent the Notice of Proposed Removal to Employee months after the accident, the missing specifications further hurt Employee's defense as she incorrectly assumed that she was being terminated for being sick. The Notice of Proposed Removal issued to Employee lacked the required specificity established by the due process rights in section 1608(c) of the DPM, and thus I conclude that Agency violated Employee's due process rights. Like the employee in *Rachel George*, whose Notice failed to identify a specific cause or specification under that cause, the current Employee's Notice of Proposed Removal also did not include any specifications under the Neglect of Duty cause. *Id*. Thus, consistent with this Office's ruling in *Rachel George*, where the AJ and OEA Board found that the Agency violated the employee's due process rights because the employee could not adequately defend herself, I also find that Employee's due process rights in the instant case were violated for the same reason as in *Rachel George*.

During the Evidentiary Hearing, Agency attempted to establish that although the Notice of Proposed Removal and the Final Notice of Removal did not provide the specific conduct that supported it cause of action, Employee had the option to request any additional documentation from Agency. I find this argument to be a red herring. DPM § 1608.2(c) specifically puts the burden on Agency to include *the specific performance or conduct at issue* in the Notice of Proposed Removal and not on a potential "*pro se*" employee (emphasis added). Moreover, the Merit Systems Protection Board ("MSPB"), this Office's federal counterpart, held in *Stephen v. Dep't of Air Force,* No. BN315H8710028, 1991 WL 70513 (M.S.P.B. Apr. 26, 1991) that "an appealable agency action taken without affording an appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, must be reversed because such action violates his constitutional right to minimum due process.".[12] Consistent with the above findings, I conclude that Agency's violation of DPM 1608.2(c) is a violation of Employee's due process rights.

2) Whether Agency had cause for adverse action

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

[12] *See also Joe Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No.: 1601-0001-10 (February 5, 2013) (holding that "§1608.2 is mandatory; and that an agency cannot disregard the requirements in a removal action against an employee.").

employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, neglect of duty. Agency did not include the specific conduct that led to the charge of neglect of duty in the Notice of proposed removal of Final notice of removal. However, Agency explained in its submissions to this Office that Employee's removal from her position was based upon a determination by Agency that Employee neglected her duties when she was involved in a preventable accident, failed to report the accident, fled the scene, and lied to the Investigator.

Employee does not dispute the fact that she was required to report the accident and follow the Accident Policy as listed in the DOT policy and procedure manual. She acknowledged that she was aware of Agency's Accident Procedure. Employee however testified that she did not feel the impact and she apologized for not knowing that she had made contact with the car. Tr. I. 233. Employee also noted that she had been in an accident prior to the January 5, 2011, accident, and she followed Agency's accident reporting policy. There is video evidence that shows Employee backing into a parked car at Roosevelt Senior High School. However, upon reviewing the video of the January 5, 2011, accident during the Evidentiary Hearing, George Mills, a member of Agency's Accident Review Board and a Commercial Driver's License ("CDL") holder since 1984, testified that it is possible for a driver to back up to a vehicle as seen in the video without feeling the impact. Tr. I. 204-205. Mills noted that driving a bus is totally different from driving a car because of the difference in the weight of the bus and the car. The bus weighs between 9,000 to 13,000 pounds whereas the car can weigh about 2000 pounds. Tr. I. 205-206. In describing what he saw in the video, Mills however, stated that he thinks the bus driver in the video backed up, realized that she tapped the vehicle and eased away from it in order not to report it. He stated that it was an effort by the driver to get away from the scene of the accident without acknowledging that they touched it. Nonetheless, Mills acknowledged that because he was not in the bus with Employee, he does not have proof that Employee felt the impact. Tr. I. 204 -205. Warren Lewis ("Lewis") also testified that Employee initially told him that she did not make contact with the other vehicle. Tr. I. 173. He could not recall if Employee told him that she did not feel the collision. Tr. I. 175.

During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee's. In a nutshell, I find Mills' testimony in this matter to be very compelling. Mills is a current D.C. government employee; a member of Agency's Accident Review Board ("ARB"); a CDL holder since 1984 and a seasoned bus driver. He does not have any incentive to lie about whether it is possible for a bus driver to back into another vehicle without feeling the impact. I equally found Employee's testimony in this instance to be credible. Employee consistently asserted from January 6, 2011, when she was confronted about the accident by the investigator, to date, that she did not know she backed into another vehicle. While the circumstances of Employee's prior accident were not disclosed, the record is clear that Employee reported that accident when it occurred. Additionally, Employee acknowledged that the investigator asked her if she had backed up the bus before he mentioned the video and she responded that she did back up the bus. Tr. I. 229. She affirmed that, when she backed up, she was not aware that she had made contact with the car, and she did not feel any impact or movement that would have led her to believe that she had hit a parked car. Tr. I. 226-227. There is a dispute with regards to what the investigator had in the report and the specific language Employee used when acknowledging that she hit the parked car. While the investigator,

Lewis stated that Employee recanted her story when she was informed of the video recording of the incident, Employee testified that after Lewis informed her of the video recording of the incident, she stated that "if" that was the case, then she was sorry and she did not know she hit a car else she would have reported it. Tr. I. 229- 230. Employee testified that she provided a written statement to the investigator after her interview, wherein, she explained that she did not admit to knowingly hitting the car in her written statement.[13] Tr. I. 232. She testified that she wrote in her written statement that she did not know at the time of the interview with the investigator that she had hit the car. Patricia Bowman ("Bowman"), Employee's former frontline manager, testified that if an employee is not aware of something happening, there would be no need to report anything. Tr. I. 59. Consequently, based on the above testimonies, I find that Employee did not violate Agency's Accident Reporting Policy and as such, cannot be charged with dereliction of duty. She was not required to report an accident that she was not aware of. I also find that based on Mills' testimony, it is conceivable that Employee did not feel the impact from the accident. As such, I conclude that Employee did not lie to the investigator about not being aware that she made contact with another vehicle.

Employee was also charged with violating Agency's back up policy. Bowman testified that, in order for a driver to back up a bus, the bus attendant is required to get off the bus and assist the driver in backing up the bus as they are trained. Tr. I. 45. She stated that the reason bus attendants are required to assist the bus driver in backing up the bus is because there are blind spots that the bus driver may need support when backing up. Tr. I. 45. Bowman also explained that this is a policy that both bus drivers and bus attendants are aware of, and the policy was in place in 2011. Sneed explained that the pilot and co-pilot, referring to the bus driver and attendant team, worked in-tandem. Sneed maintained that it is the co-pilot or attendant's role to assist the pilot or driver with the backup procedure. Tr. I. 136.

Lewis affirmed that based on the video, Employee did not obtain assistance from her attendant when she was backing up the school bus, in violation of the policy that requires bus drivers to use outside assistance while backing up at all times, whether at school or at the bus terminal. Tr. I. 164. Lewis averred that the accident preventability guideline states that all backing accidents are preventable. If a driver decides to back up without outside assistance of a spotter or attendant, the accident is considered preventable on the part of the bus driver. Tr. I. 166 – 167. He explained that Agency policy stated that school bus drivers should not backup the bus without proper assistance, which could have avoided the current accident. Tr. I. 176.

Mills identified the collision report in this instant matter and stated that the Accident Review Board determined that the driver backed the bus without assistance from the bus attendant. Tr. I. 199. Mills explained that, according to Agency's policy, any time a bus driver has to back up, the driver has to employ the use of an attendant. The attendant goes behind the bus and assists the driver in backing up. Tr. I. 199 - 200. Mills stated that even if someone is trying to get by a driver, Agency's policy is that the driver waits until they get the assistance of the attendant or the driver can get off from behind the wheel, walk around the bus and check behind where they are backing up, so they are forewarned of what is behind them. Tr. I. 207.

[13] The statement was not part of the record before OEA. Agency stated that its document center had a flood in 2013 and Employee's statement, along with the pictures taken of the bus and vehicle involved in the January 5, 2011, accident was destroyed in the flood.

Employee testified that while she was waiting for the attendant to return, a woman approached her and wanted her to move the bus. She told the woman she was waiting for her attendant, but the woman stated that she did not have time for all that. Employee asserted that she then got out of the bus, looked at the bus, then backed it up so the woman could leave. Tr. 225-226. Tr. Vol. II. 56. Employee affirmed that she got out of the bus on January 5, 2011, to check behind before she backed up. Tr. Vol. II. 41.

Agency's policy requires that before a bus driver can back up a bus, the bus attendant is required to get off the bus and assist the driver in backing up the bus as they are trained. In the event that the bus attendant is not available, the bus driver is required to get up from behind the wheel, walk around the bus and check behind where they are backing up, so they are forewarned of what is behind them. Employee does not dispute the fact that she backed up the bus without the assistance from the bus attendant. However, she argues that she did get up from behind the wheel, walked around the bus and checked behind before she backed up. Unfortunately, Employee's assertion is not supported by the evidence on the record. Specifically, the video recording of the January 5, 2011, incident does not show Employee getting off the bus to conduct a check before backing up without her assistant. Consequently, I conclude that Employee violated Agency's policy regarding backing up a bus. She acted negligently and as such, she can be charged with neglect of duty which is defined to include but not limited to failure to carry out assigned tasks; careless or negligent work habits.[14] Because of Employee's negligent work habit, she collided with a parked vehicle. The ARB classified Employee's accident as a preventable collision based on the policies and procedures as well as the preventability guideline since it was a backing collision. Based on the video evidence, OSSE policies and Employee's own admission, I agree with the ARB's assertion that, by backing up the bus without her attendant, and failing to get out of the bus to inspect her surrounding before backing up, Employee's negligent conduct caused a preventable accident on January 5, 2011.

Accordingly, I find that, although Employee did not flee the scene of the accident or lie to the investigator because she was not aware of the accident when it occurred, Employee nonetheless violated Agency's policy, which led to her involvement in a preventable accident. Consequently, I further find that Employee's actions constitute neglect of duty as she engaged in a careless or negligent work habits. I conclude that Agency had cause to institute this cause of action against Employee.

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

Employee highlights that by terminating her, Agency did not engage in progressive discipline. She notes that she did not receive a verbal or written reprimand, or a suspension. 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).[15] According to the Court in *Stokes*, OEA must

[14] DPM §1619.1(6)(c).

[15] *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*

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: Neglect of Duty", and as such, Agency can rely on this charge in disciplining 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 was charged for violating §1619.1(6)(c). There is evidence in the record to support Agency's assertion that Employee was involved in a preventable accident on January 5, 2011. Thus, 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 language of § 1619.1(6)(c) of the DPM.

However, I agree with Employee's claim that Agency did not engage in progressive discipline. Bowman testified that a bus accident by itself would not lend itself to a charge of neglect of duty; or improper, or negligent or willful damage to OSSE or DOT property. However, a failure to inform the proper individuals of the accident would fall within these causes. Tr. I. 49 -50. When questioned why she chose termination for Employee's first offense of neglect of duty, Sneed stated that it is based on the egregiousness of the incident and Employee's past history. Tr. I. 97-98. Lewis also explained that while not all bus drivers who hit a parked vehicle were terminated, they are in a different disciplinary category than someone who hit a parked vehicle, fled the scene, had multiple collisions, failed to perform a trip ticket, not telling the full truth, and failed to perform pre-trip and post trip inspections. Tr. I.180. Although Agency alleged that Employee had a previous preventable accident within the one (1) year period of the January 5, 2011, incident, Agency failed to provide any documentary evidence in support of this assertion. Moreover, Agency also failed to proof that the alleged prior accident was found to be preventable by the ARB. Employee testified that she was only involved in one other accident prior to the January 5, 2011, accident.

Lewis noted that based on the running log, Employee was involved in another preventable collision on February 25, 2010, where she struck a parked car. Tr. I. 172. Lewis could not recall if he produced a copy of the collision log reporting the alleged date of the prior accident. When asked if he could have written down an incorrect date for the prior accident, Lewis testified that he could not recall. He noted that the date in his investigation report is what he transferred from the collision log. Tr. 182. However, this log was never provided to this Office or made part of the record. The only evidence related to a prior accident was a letter from

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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).

Agency to Employee reversing a suspension from a prior preventable accident that occurred in June of 2009,[16] more than one (1) year before the January 5, 2011, accident. Agency did not dispute the accuracy of the June 22, 2010, letter to Employee or prove the existence of a February 25, 2010, accident. As explained by the D.C. Court of Appeals in Sium v., "[t]he record before us does not include information about the Accident Review Board's assessment, if any, of either of Ms. Slum's two Collisions."[17] Therefore, I find that Agency did not meet its burden of proof with regards to the existence of a prior preventable accident within one (1) year of the January 5, 2011, accident.

Corey Upchurch, an Agency employee and the Union Chief Steward testified that he was involved with most of the termination process at Agency. Tr. Vol. II. 64. Upchurch testified that it was unusual for a driver to be terminated based on one accident. Tr. Vol. II. 71. He explained however that, driving under the influence or something along those lines will determine a termination on a first offense. Tr. Vol. II. 72. Upchurch stated that he could not recall any employee who was terminated for one accident. Tr. Vol. II. 72. Upchurch asserted that, for a first accident, be it preventable or non-preventable, the discipline was defensive driving training. For the second accident, the discipline was either more training or suspension in some cases where the driver is deemed to be at fault. Depending on the circumstance, a third accident could lead to a demotion or termination. Tr. Vol. II. 74 - 76. Upchurch asserted that if a prior accident was reversed, it should not be used as consideration in a future accident. Tr. Vol. II. 76. According to Upchurch, everyone at Agency gets terminated for neglect of duty. He explained that neglect of duty was the standard word Agency used for every termination. He agreed that neglect of duty was one of the DPM guidelines. Tr. Vol. II. 78 - 79. Upchurch also agreed that the Accident Review Board could deem an accident egregious. Tr. Vol. II. 80. He affirmed that he has seen the Agency terminate employees on the first offense if the Accident Review Board considered an accident preventable and egregious. Tr. Vol. II. 82. Upchurch affirmed that he is aware of the Collective Bargaining Agreement and that Agency is allowed to terminate an employee for cause, even for the first offense. Tr. Vol. II. 95. I find Upchurch's testimony in this matter to be very convincing and credible.

Based on Bowman and Sneed's testimonies that absent the alleged egregiousness of the totality of the incident, the accident by itself would not lend to a charge of neglect of duty, I find that by terminating Employee for her involvement in a preventable accident, Agency did not engage in progressive discipline. Moreover, although Upchurch acknowledged that an employee can be terminated for the first incident of neglect of duty if the ARB considered the accident preventable and egregious, he, just like Bowman and Sneed credibly stated that it was unusual for a driver to be terminated based on an accident. Tr. Vol. II. 71. He also testified that for a first accident, be it preventable or non-preventable, the discipline was defensive driving training. For the second accident, the discipline was either more training or suspension in some cases where the driver is deemed to be at fault. Depending on the circumstance, a third accident could lead to a demotion or termination. Tr. Vol. 2. 74 - 76. Consequently, I conclude that while Employee was involved in a preventable accident, her conduct was not egregious as she did not flee the scene of the accident or lie to the investigator. She was not aware of the accident and Mills testified that it was possible for Employee not to feel the impact. With the conclusion that

[16] Letter Reversing Discipline for Accident (June 22, 2010). Employee Exhibit 6.
[17] *Sium v. Office of the State Superintendent of Educ.*, 218 A.3d 228, 231 (D.C. 2019).

Employee's conduct was not egregious, and following Bowman, Sneed and Upchurch's reasoning, I further conclude that the penalty of termination was excessive.

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.[18] 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. Only one of the charges against Employee was upheld, and I find that the penalty of termination was excessive for that specification. Consequently, I further find that the penalty of termination should be reversed.

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.[19] 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 terminate Employee.[20] The proposing official testified that she

[18] *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 (1981).

[19] *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).

[20] 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;
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

considered the *Douglas* factors in imposing the penalty in this matter. However, for the reasons stated above, I find that Agency's penalty of termination must be reversed.

Additionally, Agency violated Employee's due process rights as it failed to adhere to the strict requirements of section 1608.2(c) of the DPM. This constitutes another reason to reverse Agency's action against Employee. *Stephen v. Dep't of Air Force,* No. BN315H8710028, 1991 WL 70513 (M.S.P.B. Apr. 26, 1991)("holding an appealable agency action taken without affording an appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, must be reversed because such action violates his constitutional right to minimum due process.").[21]

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of terminating Employee for neglect of duty is REVERSED; and
2. Agency shall reinstate Employee to the same or comparable position prior to her termination;
3. Agency shall reimburse Employee all back-pay, benefits lost as a result of the adverse action; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[21] *See* also *Joe Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No.: 1601-0001-10 (February 5, 2013) (holding that "§1608.2 is mandatory; and that an agency cannot disregard the requirements in a removal action against an employee.").