THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
REYNOLD MORRIS	)	OEA Matter No. 1601-0261-10
Employee	)	
	)	Date of Issuance: September 4, 2013
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION	)	Administrative Judge
Agency	)	

Reynold Morris, Employee, *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On December 24, 2009, Reynold Morris, Employee, filed a petition with the Office of Employee Appeals (OEA) appealing the decision of the District of Columbia Office of the State Superintendent of Education[1], Agency, to remove him from his position of Motor Vehicle Operator, based on positive breathalyzer results of alcohols. (Ex A-7).[2]

The matter was assigned to this Administrative Judge on May 2, 2012. At the prehearing conference on August 7, 2012, the parties agreed to participate in the mediation services offered by this Office, and the matter was referred for mediation. On or about January 15, 2013, the matter was returned to the undersigned after mediation efforts were not successful. By Order dated January 17, 2013, the matter was scheduled for a hearing. At the hearing, which took place on March 4, 2013, the parties had full opportunity, and did in fact, present testimonial and documentary evidence.[3] The record was closed at the end of the proceeding.[4]

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[1] At the time the adverse action was initiated, the Office of the Transportation Administrator, Division of Transportation was identified as Agency. However, by the time the matter was assigned to this Administrative Judge, the District of Columbia Office of the State Superintendent of Education had taken over the responsibilities of the Office of Transportation and was identified as Agency. It is therefore identified as Agency throughout this Initial Decision.

[2] Only Agency introduced exhibits into evidence. They are identified as "A" followed by the number of the exhibit. Employee removed his objection to Ex A-3, therefore that document was admitted into evidence with the notation that the times the tests were administered are incorrectly stated on the document. The tests were administered in the morning according to both Employee and Mr. Martinez. (Tr, 63).

[3] Witnesses testified under oath. The transcript is cited as "Tr" followed by the page number.

[4] The parties chose to present oral closing arguments, and the record was thereafter closed. By Order dated April 9, 2013, the parties were notified of the availability of the transcript.

JURISDICTION

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

ISSUE

Should Agency's removal of Employee should be upheld?

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Undisputed Findings of Fact

1. On September 8, 2009, Employee was promoted from a Bus Attendant to a Motor Vehicle Operator with Agency. (Tr, 5-6). He was assigned to Route 109 which driving students to and from Hardy Middle School (Tr, 6).
2. On November 24, 2009, Employee was reported for leaving his bus and acting unprofessionally to two citizens. In addition, he was reported by the bus attendant accompanying him, as driving unsafely. The attendant stated Employee failed to stop at a stop sign, failed to slow at crosswalks, and driving "too fast." (Tr, 6). Employee disputes these accusations. (Tr, 9).
3. On December 2, 2009, Employee tested positive for alcohol on two tests administered during working hours. (Tr, 6). Employee does not dispute the test results, but challenges the "calibration." (Tr, 10).
4. Employee stated he had been drinking the night of December 1, 2009. (Tr, 10).
5. On December 4, 2009, Agency issued a letter of proposed termination to Employee. (Ex A-5).
6. On January 10, 2010, Agency issued its final notice removing Employee "for cause" based on "[p]ositive breathalyzer results of alcohol during normal work hours." (Ex A-7).[5]
7. At the time of his removal, Employee was in permanent and career status.

Position or the Parties and Summary of Evidence

Agency's position is that Employee tested positive for alcohol on December 2, 2009 and that the appropriate procedures were utilized to obtain the results. It contends that the applicable law and regulations, as well as the safety of the passengers and the public, required that Employee be terminated.

Patrice Bowman, Agency Chief of Bus Operations, oversees the operation of terminals. She testified that drivers are responsible for the "safe transport" of the vehicle which requires them to be "focused in reference to their surroundings." (Tr, 17-18). Ms. Bowman stated that that an operator under the influence of alcohol cannot be aware of his or her surroundings and may not be able to make required decisions regarding safety. (Tr, 18). She stated that Agency's

[5] An earlier final notice was issued on December 18, 2009. The two are not significantly different,. The parties did not explain why a second final notice was issued, but they do not dispute the final notice at issue in this matter was issued on January 7, 2010. (Ex A-7).

Policies and Procedures Manual[6] prohibits employees from "[u]sing or being under the influence of intoxicants while on duty." (Tr, 21, Ex A-2). She stated that employees are tested both at random or if there is a reasonable suspicion that they are using drugs or alcohol. (Tr, 19). Ms. Bowman testified that it was reported to her that Employee was sent for alcohol testing on December 2, 2009, after he was reported to be "smelling of alcohol." (Tr, 19).

Eva Laguerre is Agency's Substance Abuse Program Manager and administers the drug and Agency's drug and alcohol testing program for its drivers. She testified that at the time relevant to this proceeding, school bus drivers were subject to the regulations of the Federal Motor Carriers Safety Administration of the U.S. Department of Transportation (DOT) regarding drug and alcohol testing as well as the Child Safety Omnibus Act which governs the actions of employees who work with children. She stated that in 2009, Agency utilized the policies of DOT and the D.C. Department of Human Resources (DCHR), both of which prohibit bus drivers from operating vehicles while under the influence of alcohol at any time." According to the witness, the current policies, while not in effect in 2009, are substantially the same as those in effect at the time. (Tr, 23-26).

The witness reviewed the federal alcohol testing form and the procedures used to administer the test. (Tr, 27-28). She stated that when the results are above .020, the maximum allowed by federal law for safety sensitive positions, a confirmation test is administered after 15 minutes. If the results of that test exceed .020, the employee's supervisor is notified. The witness testified that when Employee was tested on December 2, 2009 at Providence Hospital, the result of the first test was .183 and the result of the second was .174. (Tr, 29-30). According to Ms. Laguerre, the breathalyzer machine is 100% accurate, and "very stringent rules" are followed in administering the tests. (Tr, 35).

Sergio Martinez has been terminal manager with Agency since 2006 and was Employee's supervisor in 2009. Mr. Martinez stated that he was present on December 2, 2009, when DCHR employees were present verifying credentials of the drivers. (Tr, 55). According to the witness, when Employee approached, a DCHR employee,[7] she smelled alcohol and reported the matter "based on reasonable suspicion." He defined reasonable suspicion as "when …a driver has an erratic walking and his behavior is a little bit abnormal." (Tr, 50-51). Mr. Martinez stated that Employee was then taken for alcohol testing. According to Mr. Martinez, at the time of the incident, Agency's policy was to remove an Employee who failed a breathalyzer test. (Tr, 51). Mr. Martinez stated it was his understanding that Agency's policy is to remove any employee

[6] At the proceeding, Agency sought to introduce the 2010 Manual and an insert from that Manual. However, since these documents were not in use at in December 2009, Agency was ordered to submit the Manual in use at that time. Agency represented that the pertinent provisions were unchanged. The admission of the Manual was taken under advisement. Agency was directed to submit the documents in place at the time of the removal by March 4, 2010. Employee was given until March 18, to object to those documents as well as submit his objections to Exs A-1 and A-2. (Tr, 62). Employee did not submit any objections. Those documents are therefore admitted. Agency submitted the 2005 Manual. There were no objections, and the Manual and the insert were accepted into evidence. The Manual is identified as "Ex A-1" and the insert as "Ex A-2). (Tr, 14-16, 20).

[7] Mr. Martinez identified the employee as Mary Cole. Employee stated it was a different DCHR employee (Tr, 53).

who tests positive. (Tr, 57). He testified that he was aware of one employee who was reinstated after being removed by Agency for a positive test result, but he did not know the circumstances. (Tr, 56).

Employee's position is that although the results may not have been incorrect, the time on the test was incorrect, and that the "DOT can only suspend your license for like six months." (Tr, 40). Initially he contended the test form submitted by Agency differed from the form he received, but upon review, he agreed they were the same. (Tr, 42). He stated Agency should not have terminated him but should have placed him in a drug or alcohol program and given him another chance (Tr, 44-45).

Employee stated that shortly after he reported to work at about 8:30 a.m. on December 2, 2009, he was directed to report to Providence Hospital where two alcohol tests were administered by Cheryl McDowell. (Tr, 38-39). He testified that he had been drinking "a lot of beer" until about 2:00 a.m. that morning. (Tr, 40). He stated he was not surprised by the test results:

> No, I'm not surprised. I was drinking the night before. I was going through some stuff before anyway. My dad had just passed away. So I'm not going play like I'm innocent or nothing like that, you know. (Tr, 42).

Employee stated that the testing was done in the morning, and that the times on the Alcohol Testing Form, i.e., 15:08 and 15:27, were incorrect. (Ex A-3). He agreed, however, that he had signed both Step 2 of the Form that certified he was submitting to the testing as required by DOT, and Step 4 of the Form in which he certified that he had "submitted to the breath alcohol test the results of which are accurately recorded on this form." (*Id)*. He further agreed that Cheryl McDowell, whose name appears on the form as the technician who administered the tests, was the person who tested him.

Employee stated he was appealing the removal, because other employees with positive drug tests were not terminated. (Tr, 43). He noted that he had never been late or had an accident, and asserted that Agency had tried to "paint [him] like if [he was] the worst person on that one day out of a year and a half." (Tr, 44). With regard to the removal, he stated that he was "not going to fight" no more, that he was "just putting [his] name out there." (Tr, 45). [8]

In response to questions from the Administrative Judge, Agency explained that no employee involved in the removal decision was still employed by Agency. Ms. Laguerre testified, in response to another question by the Administrative Judge, that she had researched the policies and practices in place at the time of Employee's removal, and Agency did not refer employees who testified positive for drugs or alcohol to treatment programs. (Tr, 47).

[8] Employee stated that he wanted to put on the record that Michael Kovalcik was prejudiced. He did not explain the relationship of Mr. Kovalcik to this matter. (Tr, 47). However, the Administrative Judge notes that Michael Kovalcik issued the final Agency notice dated December 18, 2009 and is identified as Chief of Bus Operations in the letter. (Ex A-7).

Analysis, Findings of Fact and Conclusions of Law

Agency is required to prove its case by a preponderance of evidence. "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). See also 5 C.F.R. § 1201.56(c)(2). This is the lowest quantum of proof, and is often preceded by the word "mere" or "only." *See, e.g.*, Elkouri & Elkouri, How Arbitration Works (6th Ed), p. 949, ft. 124. The standard to meet the burden is that the evidence must be "sufficient."

After carefully reviewing the testimonial and documentary evidence using the standard of proof applicable in this matter, the Administrative Judge concludes that Agency met its burden. The Administrative Judge recognizes that Agency was at disadvantage because many of the individuals involved in Employee's removal no longer worked for Agency. However, it did offer witnesses who were familiar with the standards and procedures utilized in 2009. Agency did not present evidence that employees were on notice regarding the use of alcohol. However, it was evident from Employee's testimony, that he was aware that he had engaged in misconduct by testing positive for the use of alcohol. He did not challenge that he smelled of alcohol that morning, but only differed on which DCHR employee had reported him.

The Administrative Judge was also concerned that Agency did not offer evidence regarding chain of custody of the testing, present evidence by the individual who administered the test, or address the discrepancies in the time on the form. It appears that Employee was tested in the morning, so the times of 15:08 and 15:27 appear to be incorrect. However, although Employee initially challenged calibration, he did not explain or pursue that charge. Most significantly, Employee did not challenge that the accuracy of the results of .183 and .174. He testified that he had been drinking heavily up until the early morning of December 2, and conceded that the results reflected that fact. He did not challenge that he had signed both Step 2 of the Form that certified he was submitting to the testing as required by DOT, and Step 4 of the Form in which he certified that he had "submitted to the breath alcohol test the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.01 or greater." (*Id).* Although Agency's case had flaws, Agency met its burden of proof by a preponderance of the evidence.

Employee stated that he sought a hearing because he wanted the opportunity to raise inequities he had observed and some problems he encountered with certain individuals while employed at Agency. He also wanted to explain that the incident of December 2 was the result of significant personal problems that he was experiencing, and that until that time, he had not had problems with his performance. Employee challenged only the time on the form. He did not challenge the test results. There is substantial evidence[9] in the record to support the conclusion

[9] Substantial evidence is described as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313, 316 (D.C. 1987).

that Employee tested beyond the permitted limit for alcohol use on December 2, 2009, and that having exceeded those limits, Agency could subject him to adverse action.

Although the Administrative Judge sympathizes with Employee that his use of alcohol was due to the significant personal difficulties he was experiencing at the time, and that he otherwise adhered to Agency's rules and regulations; these facts do not mitigate the severity of his offense. *See Taggart v. Metropolitan Police Department*, OEA Matter 161-0114-95, 47 DCR 1714 (February 27, 1997). Agency was not required to give him another chance or to send him to a treatment program. School bus operators are subject to both federal and District laws and regulations regarding testing for drugs and alcohol. As a school bus operator, Employee is responsible for the safety of the school children on his bus, as well as for the safety of members of the public who are in vehicles or are pedestrians. The fact that Employee tested positive for alcohol shortly after he reported to work on December 2, 2009, establishes that it was likely that his judgment would be impaired and that the safety and well-being of his young passengers and the public in general could be in jeopardy. Accordingly, removal was reasonable in light of the seriousness of the offense, and its relation to Employee's "duties, position and responsibilities." *Jones v. Department of the Interior*, 97 M.S.P.R. 282, 288 (2004). In addition to the issue of safety, it would have a serious adverse impact on the reputation of the Agency, and the District government as a whole, if a District government employee responsible for operating a commercial vehicle and for complying with the laws governing CDL drivers, is permitted to operate a bus carrying school children.

Employee alleged that other employees had not been terminated after positive drug or alcohol testing. Employee was required to establish a *prima facie* case on allegations of disparate treatment. *See, e.g., Aronson v. D.C. Fire Department*, OEA Matter No. 1601-0128—99 (August 17, 2004). He presented no evidence on this issue. Mr. Martinez, an Agency witness, stated that one employee who tested positive for drug or alcohol use was reinstated, but from his testimony it appear that Agency had removed that employee. Thus, there was insufficient evidence that the penalty of removal was not applied consistently to bus drivers who tested positive for drug or alcohol use. The Administrative Judge concludes that Employee did not establish a *prima facie* case. Finally, Employee's charges of prejudice and mistreatment by some Agency employees were also allegations without factual support. In addition, Employee did not allege or establish the nexus between the disciplinary action and the alleged prejudice or mistreatment.

D.C. Official Code §1-616.51 (2001) requires that the Mayor "issue rules and regulations to establish a disciplinary system [for agencies over which he has personnel authority] that includes…1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken." The Mayor has personnel authority of Agency. The D.C. Office of Personnel, the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of §1-616.51 and apply to all employees in permanent status. See 47 D.C. Reg. 7094 et seq. (2000). The definition of "cause": includes "any on-duty or employment–related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or

employment-related reason for corrective or adverse action that is not arbitrary or capricious". 47 D.C. Reg. 7096. Agency's policies and procedures at the time of the incident, consistent with those of DOT and DCHRC Manual, prohibited bus drivers from being under the influence of alcohol while on duty. (Ex A-2). Employee's positive alcohol test results is substantial evidence that he was under the influence of alcohol when he reported to duty on December 2, 2009.

Agency has primary responsibility for managing its employees. That responsibility includes determining the appropriate discipline. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994). This Board has long held that it will not substitute its judgment for that of an agency when determining if a penalty should be sustained, but rather will limit its review to determining that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). Agencies have considerable discretion in determining penalties. Agency's decision will not be reversed unless the Administrative Judge concludes that it failed to consider relevant factors or that the imposed penalty constitutes an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, Opinion and Order on Petition for Review, 30 D.C. Reg. 352 (1985). Having concluded that Agency met its burden of proof, the Administrative Judge further concludes that the evidence did not establish that the penalty constituted an abuse of discretion. Agency is not prohibited by law, regulation or guidelines from imposing the penalty of removal.

The appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment." *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). The Administrative Judge concludes that Agency did not abuse its discretion or act in an arbitrary or capricious manner. When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Based on the facts and conclusions reached in this matter, as discussed herein, the Administrative Judge concludes that Agency met its burden of proof in this matter regarding its decision to remove Employee from his position.

ORDER

It is hereby:

ORDERED: This petition for appeal is dismissed.

FOR THE OFFICE:

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LOIS HOCHHAUSER, Esq.
Administrative Judge