THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GEORGE DOWARD, SR.,	)	
Employee	)	OEA Matter No. 1601-0320-10
	)	
v.	)	Date of Issuance: August 21, 2013
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Robert Epstein, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 9, 2010, George Doward, Sr. ("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 him from his position as a Transportation Assistant, effective May 10, 2010. Following an investigation, Employee was terminated for "[m]isuse of resources or property." On July 9, 2010, Agency filed its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") in July of 2012. Thereafter, on July 12, 2012, I issued an Order scheduling a Status Conference for August 8, 2012. Agency was a no-show at the Status Conference. Subsequently, I issued an Order for Statement of Good Cause requiring Agency to establish cause for its failure to attend the August 8, 2012 Status Conference. Agency submitted a timely response to the Order for Statement of Good Cause. In an Order dated August 13, 2012, the Status Conference was rescheduled for August 29, 2012. On August 29, 2012, the parties filed a Joint Motion to Continue [the] Status Conference. The Motion was granted, and the Status Conference was rescheduled for October 3, 2012. Thereafter, a Prehearing Conference was held on November 28, 2012. Subsequently, the Undersigned on December 3, 2012, issued an Order scheduling an Evidentiary Hearing for February 27, 2013. Both parties were present for the Evidentiary Hearing. Following the Evidentiary Hearing, I issued an Order, dated April 4, 2013, notifying the parties that the transcripts from the Evidentiary Hearing were available for pick up at this Office. The Order also provided the parties with a schedule for submitting their written closing arguments. The written closing arguments were due on or before May 9, 2013. Both parties complied with this Order. Upon further review of the case file, the

Undersigned issued an Order dated May 20, 2013, requiring the parties to address the issue of the appropriateness of the penalty in this matter. Both parties have complied. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for removal; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF MATERIAL TESTIMONY

Agency's Case in Chief

1) Alfred Winfield (January 22, 2013. Transcript pgs. 8-30).

Alfred Winfield ("Mr. Winfield") is currently a Lead Transportation Assistant ("TA") at the Southwest Terminal ("Yard"). In 2010, he was a Lead TA at the New York Avenue Terminal, along with Employee. Mr. Winfield's duties include making sure that school buses are properly inspected, that they are taken to the shop and picked up from the shop, as well as making sure that the VIN and Tag numbers are correct. Mr. Winfield testified that Agency deals with different vendors to conduct repairs on buses. (Tr. pg. 10). He also stated that Mr. Juan Segundo ("Mr. Segundo") was a Mechanic at the New York Avenue Terminal in 2010. Mr. Winfield explained that Mr. Segundo was not a D.C. government employee. He was an employee of R&S Springs, which had a contract with the D.C. government to supply mechanics to the terminal. (Tr. pg. 13). According to Mr. Winfield, Mr. Segundo's sole responsibility was to diagnose problems with buses and fix them in the Yard or decide whether or not the bus could be towed off the Yard. (Tr. pg. 14).

Mr. Winfield also testified that he became aware in 2010 that Mr. Segundo was working on Employee's car. He stated that he witnessed Mr. Segundo taking a door panel off of Employee's car. According to Mr. Winfield, he walked over to Mr. Segundo while he was working on Employee's car and asked him what he was doing, to which Mr. Segundo responded that he was putting Employee's window back up. Mr. Winfield explained that he informed Mr. Segundo at that point that he could not work on Employee's car because it was a conflict of interest for the government since he was hired to work on school buses and not Employee's car. (Tr. pg. 14). Mr. Winfield further testified that he took pictures of Mr. Segundo removing the window panel on Employee's car with his work issued Blackberry, and he asked Mr. Segundo to get away from the car, which he did. (Tr. pgs. 15-16, & 28-30). During the Evidentiary Hearing, Mr. Winfield positively identified Mr. Segundo in the picture, as well as Employee's car. Additionally, Mr. Winfield testified that he actually heard Employee ask Mr. Segundo to fix his car. He explained that he was about three (3) to four (4) feet away from Mr. Segundo and Employee. (Tr. pgs. 21 & 26). When asked why he did not stop them or say something before Mr. Segundo started working on the car, Mr. Winfield explained that he had a radio call about a broken bus and he had to leave. (Tr. pg. 24). Mr. Winfield noted that Employee's car was on the government premises when it was being fixed by Mr. Segundo. (Tr. pg. 26).

According to Mr. Winfield, the alleged incident happened between 11 a.m. and 12 p.m. Mr. Winfield also testified that he later had a conversation with Employee about the incident and Employee mentioned that Mr. Segundo was just putting his window back up. (Tr. pg. 17). Mr. Winfield also testified that he informed Employee that it was a conflict of interest and that Mr. Segundo cannot perform work on Employee's car in the Yard since he was hired to work on school buses. Mr. Winfield also stated that he informed management about the incident and it was investigated. (Tr. pg. 19). Mr. Winfield stated that after Employee was terminated, he came back to the Yard to confront Mr. Winfield. He also noted that Employee does not speak Spanish and Mr. Segundo's first language is Spanish. (Tr. pg. 23).

2) Jesse Marks (Transcript pgs. 31-36).

Jesse Marks ("Mr. Marks") is employed with R&S Springs, a Mechanic Shop which has a contract with the D.C. government to do repairs on school buses. R&S Springs has had a contract with the D.C. government for about four (4) years. According to Mr. Marks, Mr. Segundo is an employee of R&S Springs and he work at the New York Avenue yard. Mr. Marks explained that, under his contract with the D.C. government, he is required to work only on buses and not private vehicles. (Tr. pgs. 32-33). Mr. Marks testified that Mr. Segundo got direction regarding what buses needed to be worked on from Employee and the other TAs at the Yard. (Tr. pgs. 33-34). Mr. Marks also testified that he was not present on the date of the alleged incident, but he later found out that Mr. Segundo had been caught working on Employee's car on the premises. (Tr. pg. 34). Mr. Marks noted that he was told by Mr. Segundo that Employee asked him to fix his car. (Tr. pg. 35).

3) Juan Segundo (Transcript pgs. 36-44).

Juan Segundo ("Mr. Segundo") is employed with R&S Springs and was working at the New York Avenue Terminal in 2010, along with Employee. (Tr. pg. 37). Mr. Segundo testified that on the day of the alleged incident, Employee got his car window down, and asked Mr. Segundo to check his car to see what was wrong with the window. (Tr. pg. 38). Mr. Segundo identified himself on the picture taken by Mr. Winfield, along with Employee's car. (Tr. pg. 39). Mr. Segundo noted that he doesn't know if Employee was there when Mr. Winfield took the picture, and he does not know if

Employee was present at the same time as Mr. Winfield. (Tr. pgs. 43-44). According to Mr. Segundo, he was the only one present when Employee asked him to check his car. (Tr. pg. 40). Mr. Segundo acknowledged that Employee does not speak Spanish and English is not Mr. Segundo's first language. He testified that there was no miscommunication between him and Employee. (Tr. pg. 41). According to Mr. Segundo, when Employee asked him to fix his car, he thought that Employee had the authority to do so. (Tr. pg. 42). Mr. Segundo further explained that he worked every day with Employee and the other TAs and he does what they want him to work on. (Tr. pg. 43).

4) Tracey Langley (Transcript pgs. 45-50).

Tracey Langley ("Ms. Langley") has worked with Agency since 2008. She is currently employed as an Employee Relations Manager. Her responsibilities include administering discipline of employees, and advising managers about employee discipline, as well as advising employees of their rights under certain labor laws. (Tr. pg. 46). Ms. Langley testified that she does not know Employee, however, she knows of him, as she was aware of his termination for misuse of government property. (Tr. pg. 47). Ms. Langley explained that the offense committed by Employee was very serious as it violates ethical standards and policies and procedures of the Department of Transportation. (Tr. pg. 48). Ms. Langley noted that she was not present when the alleged incident occurred.

Employee's Case in Chief

5) George Doward, Sr. (Transcript pgs. 51 – 76).

George Doward, Sr. ("Employee") is a former employee of Agency. Employee worked for Agency from 2000 to 2010, as a TA. His responsibilities included checking school buses, doing minor repairs, taking buses through inspection, and making sure the buses were able to go out and transport kids. (Tr. pg. 52). He testified that Agency hired vendors who fixed buses for Agency. (Tr. pg. 53). Employee testified that he was suspended for two (2) weeks in 2009; however, the suspension was later reversed and he did not lose any pay. (Tr. pg. 54). However, Employee noted that he believes there were some lingering bad feelings as a result of the 2009 incident. (Tr. pg. 54). Employee stated that he was a hard worker who loved his job. (Tr. pg. 55). According to Employee, he was involved in a car accident on March 3, 2010, and the other driver was found to be at fault and Employee received personal injury settlement property damage from the insurance to take care of repairing his car. (Tr. pgs. 56-57).

Employee explained that the alleged incident with Mr. Segundo occurred a few weeks after the car accident. (Tr. pg. 57). He noted that the car was fixed and all the repairs were covered by the insurance. (Tr. pg. 59). When asked if he asked Mr. Segundo to repair his car, Employee responded by stating the following:

Q: Did you ask Mr. Segundo to repair your car at any time?

A: No, Sir

Q: Did you order him to repair your car?

A: No, Sir

Q: Did you have the authority to order him to repair the car?

A: No, Sir. (Tr. pgs. 62, 68, & 72).

Employee maintained that on the date in question, Mr. Segundo was standing at the front lot, and Employee went over to his car a couple of times, fiddling with his window. He explained that one of the windows was slightly down and he was trying to get it up. When he returned, Mr. Segundo asked him what was wrong with his window and he said "I can't wait to get my car fixed. Its acting up…I'll be glad when I get my window fixed." (Tr. pgs. 62-63, & 71-72). He explained that, thereafter, he received a call on his radio to help a driver on the lot, and he was gone for about twenty (20) to thirty (30) minutes. Employee also stated that when he returned from taking the call, everything in the car was intact and Mr. Segundo told him that he had looked at Employee's car, and it can't be fixed. Employee noted that, he informed Mr. Segundo that it wasn't important, and that he didn't have to do that since he was getting the car fixed. (Tr. pgs. 63 & 72-73). According to Employee, no one was present, not even Mr. Winfield, when he had the conversation with Mr. Segundo. (Tr. pg. 68). He stated that he was standing with Mr. Segundo at the front gate, and his car was a couple of feet away from the front gate. Employee further stated that he did not say anything to Mr. Segundo that could have been interpreted as asking him to fix the car. (Tr. pgs. 63 & 71). He noted that he doesn't speak Spanish and Mr. Segundo's English is broken. Employee testified that he was not present when Mr. Winfield took the picture, and he does not know when the picture was taken, and he didn't see the picture being taken on the day of the alleged incident. (Tr. pg. 68). Employee identified the car in the picture taken by Mr. Winfield as his. (Tr. pg. 72).

Employee testified that there was an incident with Mr. Segundo supposedly fixing another employee's car and an investigation was being conducted. Employee explained that it was during the investigation that he was asked by the Investigator if Mr. Segundo had ever worked on his car, because someone mentioned (Mr. Winfield) something about Mr. Segundo working on the Employee's car. Employee testified that he told the Investigator that he never asked Mr. Segundo to work on his car. Employee noted that on April 23, 2010, Mr. Kovalchick called him to his office and fired him for misuse of government property. (Tr. pg. 65).

6) Ronald Holt (Transcript pgs. 76-89).

Ronald Holt ("Mr. Holt") is a former Agency Employee. He worked for Agency from 2000 to 2006 in several capacities, including Deputy TA. (Tr. pg. 77). Mr. Holt testified that Employee and Mr. Winfield worked under him from 2003 to 2006. (Tr. pgs. 78-79). Mr. Holt testified that he interacted with Employee on a regular basis, he was the go-to guy, and he had an exemplary work ethic. (Tr. pg. 79). According to Mr. Holt, Employee was capable of doing minor repairs on his car. Mr. Holt does not know Mr. Segundo and he was not employed by Agency at the time of the incident. Mr. Holt stated that he was Employee's personal friend.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of terminating Employee was done in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. In a nutshell, I find Mr. Segundo's testimony in this matter to be very compelling. Mr. Segundo is not a D.C. government employee and

does not have any incentive to lie about what happened. Additionally, Mr. Segundo and Mr. Marks testified that Mr. Segundo got his work instructions while at the terminal from the TAs. Although English is not Mr. Segundo's first language, he understood and adequately answered the questions posed to him by the parties during the Evidentiary Hearing. On the other hand, Employee has an interest in the outcome of this matter and I find his assertion that he did not ask Mr. Segundo to fix his car or say anything to Mr. Segundo that could have been interpreted as asking him to fix the car to be contradictory. (Tr. pgs. 63 & 71). However, during the investigation into the alleged misconduct, Employee insisted to the Investigator that he asked Mr. Segundo to fix his car while Mr. Segundo was taking a lunch break.[1] I further find Employee's assertion that there may have been a miscommunication between Employee and Mr. Segundo because English is not Mr. Segundo's first language to be self-serving and unconvincing. Mr. Segundo was able to effectively communicate in English during the Evidentiary Hearing, and he received his work instructions in English from TAs like Employee who did not speak Spanish. When it came to salient instances regarding Employee's conduct that were cited as a predicate to Agency's action, I did not find Mr. Winfield to be very credible. He testified that he was about three (3) to four (4) feet from Employee and Mr. Segundo, when Employee asked Mr. Segundo to work on his car, yet he did not say anything because he was called away. (Tr. pgs. 21 & 26). Moreover, both Mr. Segundo and Employee testified that Mr. Winfield was not present when the alleged request was made. (Tr. pgs. 40 & 68).

1) Whether Employee's actions constituted cause for removal

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. DPM § 1619.1(5)(b) defines "cause" to include "[a]ny on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law: (b) [m]isuse of resources or property." Employee's removal from his position at Agency was based upon a determination by Agency that Employee misused government resources or property when he asked Mr. Segundo to work on his personal vehicle at the terminal. Mr. Segundo testified that he was asked by Employee to fix his personal vehicle. Additionally, while Employee testified that he did not ask Mr. Segundo to fix his vehicle, according to the investigative report, Employee contradicts himself when he insisted that he asked Mr. Segundo to fix his vehicle while Mr. Segundo was on his lunch break. Consequently, I find Mr. Segundo to be more credible than Employee. And based on the evidence presented during the course of the appeal process and the analysis above, I conclude that Agency has met its burden of proof and that it had sufficient cause to discipline Employee.

2) Whether the penalty of removal is within the range allowed by law, rules, or regulation

In a nutshell, I find that Agency's adverse action was taken for cause, and as such, Agency can rely on this charge in disciplining Employee. 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).[2]

[1] Agency's Answer at Tab 2 (July 9, 2010).

[2] *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*

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 as prescribed in DPM 1619.1; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[3] 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."[4]

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.[5] Here, Employee argues that Agency's termination of Employee is cruel, unusual and inappropriate. The penalty range for a first time offense for any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law, to include misuse of resources or property ranges from thirty (30) days suspension up to removal. Employee notes that the penalty in this matter was inappropriate for the crime that was alleged, and that Employee was an exemplary employee.[6] Agency in its Brief regarding penalty noted that it considered relevant factors as outlined in *Douglas v. Veterans Administration*[7] in reaching the decision to remove Employee.[8]

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).

[3] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[4] *Stokes v. District of Columbia*.

[5] *Id.*; *See also Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995).

[6] *See* Employee's Brief on Penalty (August 13, 2013).

[7] 5 M.S.P.R. 313 (1981).

[8] 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;
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;

However, Employee contends that under *Stoke*, OEA may intervene in this matter because Agency failed to either conscientiously consider the relevant *Douglas* factors or strike a responsible balance within tolerable limits of reasonableness. In reaching the decision to remove Employee, Agency submits that it gave credence to the nature and seriousness of the offense.[9] Additionally, as provided in *Love v. Department of Corrections*,[10] selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. *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."[11]

Employee also argues that under the Table of Appropriate Penalties ("TAP"), the penalty for a first offense for the cause of action in this matter - misuse of resources or property is far less harsh than removal. He notes that the penalty ranges from reprimand to a suspension of thirty (30) days or less.[12] As noted above, the penalty for a first offense for misuse of resources or property ranges from a thirty (30) days suspension to removal.[13] In *Douglas*, the Court held that "certain misconduct may warrant removal in the first instance." In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. I further conclude that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is clearly not an error of judgment. Accordingly, I find that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

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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.

[9] Agency's Brief on Penalty (May 31, 2013).
[10] OEA Matter No. 1601-0034-08R11 (August 10, 2011).
[11] *Citing Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).
[12] *See* Employee's Brief on Penalty (August 13, 2013).
[13] *See* Agency's Brief on Penalty at Attachment 2. (May 31, 2013).