THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
YORDANOS SIUM,	)	
Employee	)	OEA Matter No. 1601-0135-13
	)	
v.	)	Date of Issuance: October 10, 2014
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Yordanos Sium, Employee, *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

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 2, 2013, Employee filed a notice of opposition to Agency's Motion to Dismiss. On October 10, Employee filed an 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. 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 have decided that an Evidentiary Hearing was not required. 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's action of terminating Employee was done for cause; and

2) 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 in the parking lot and the incident was reported to the Office of Investigations. An investigator was assigned to this matter and in the course of the investigation, Employee was interviewed. Employee relayed that she came close to a car but did not come into contact with any car. However, Employee later acknowledged that she struck a parked car. Approximately one (1) week after the incident, Employee 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 for the January 5, 2011, incident. Prior to the January 5, 2011, incident, Employee was involved in a "preventable" car accident on February 25, 2010, where she struck a parked vehicle.

Employee's Position

Employee does not dispute that she was involved in an accident on January 5, 2011. Instead she notes that it was a minor accident and she was cleared to return to her normal duty as a Bus Driver about ten (10) days after the accident. Employee states that she received the notice of proposed termination months after she had been cleared and while she was on sick leave. She notes that she could not reply to the notice because she was too sick. Employee explains that Agency either found her unfit for duty as a Driver and deserving of termination or found her fit to serve in her pre-incident capacity as a Driver. And because Agency returned her to the public and to her normal duty as a Bus Driver after less than ten (10) days, Agency found her fit. Therefore, Agency is estopped in its claim that Employee received a lawful adverse action. Employee further explains that Agency may not now claim that Employee's termination was due to her unsuitability to perform her assigned duties. Employee maintains that by allowing her to

return to work, Agency constructively eliminated the basis for the termination, therefore making it a wrongful termination.[1]

Employee also argues that her termination on April 12, 2011 was over ninety (90) days after the incident at issue. Employee maintains that the Collective Bargaining Agreement ("CBA") between Agency and Employee's union imposes a ninety (90) days deadline within which Agency is expected to make a decision to discipline an employee. Additionally, 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.[2]

Agency's Position

Agency submits that the DOT policies and procedures manual provided Employee with specific instructions about what to do when an accident occurs, however, Employee failed to follow these protocols. Agency explains that in accordance with § 207.2 of the DOT policies and procedures manual – Accident Procedure, a Driver involved in an accident is required to notify the Terminal Dispatcher of the accident via the handheld communications device. But instead, Employee fled the scene without reporting the incident; and lied to the Investigator until presented with evidence. Agency also notes that Employee was on notice that her preventable accident and her fleeing the scene could result in her termination. Agency explains that the DOT policies and procedures manual section §§702 and 703.3 clearly highlights this. Agency contends that Employee was terminated for cause due to Neglect of Duty, specifically her failure to observe precaution regarding safety.[3]

Agency maintains that a security camera recorded Employee's bus collide with the Assistant Principal's car on January 5, 2011, while backing up, and the Driver left the scene. Agency also notes that the investigator assigned to the case found damage to the driver-side rear panel of the school bus. Further Agency explains that during the interview with the investigator, Employee stated that she observed that she came close to make contact with a parked car while backing up, but she later changed her story and informed the Investigator that she had in fact struck the vehicle while backing up. Agency notes that Employee was in another collision within the past twelve (12) months. Agency avers that, after an accident is reported, a thorough investigation is conducted and findings and recommendations are made to the DOT Accident Review Board.

Additionally, Agency states that the CBA allows for termination for just cause on the first offense if there is reasonable cause to believe that the employee has engaged in behavior or conduct that presents a threat to the efficiency and discipline of the public school system, and Employee's conduct in this matter presented such threat. Agency states that removal was within the range of penalty allowed by the Table of Penalties for a first offense of DPM § 1603.3(f).

[1] Petition for Appeal (August 15, 2013); Employee's Brief (August 7, 2014).
[2] *Id.*
[3] District Personnel Manual ("DPM")§ 1603.3(f).

Agency explains that Employee failed to regard precautions for preventable accidents, failed to report the accident, and then lied to the inspector when asked about the accident.[4]

1) Whether Employee's actions constituted cause for discipline

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 employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, neglect of duty. Employee's removal from her position at Agency 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.

Neglect of duty includes, but is not limited to failure to carry out assigned tasks; careless or negligent work habits.[5] Employee does not dispute Agency's statement that she was required to report the accident and follow the Accident Policy as listed in the DOT policy and procedure manual.[6] Employee also does not deny that she was aware of Agency's Accident Procedure. Agency explains that Employee was in another accident less than a year prior to the instant accident, and Employee also does not dispute this fact. Thus, it can be reasonably assumed that Employee was familiar with Agency's policy on reporting accidents based on her past experience. Further, Employee has not provided any evidence to show that she was not aware of Agency's policy on reporting accidents. Employee also does not deny that she struck a parked car on January 5, 2011; failed to report the accident to the Terminal Dispatcher; and left the scene of the accident. Moreover, Employee also does not dispute that she was the driver of the school bus seen in the video submitted by Agency.[7] The review of the video shows the school bus backing into a parked car. According to the video, any reasonable person in Employee's position should have felt the impact from the collision and they would have realized that they just hit a car or an object. At no point in the video was the driver seen leaving the school bus to check the damage caused from the accident. Instead, the driver is seen leaving the scene a few minutes later. Consequently, I find that Employee's actions constitute neglect of duty. I conclude that Agency had cause to institute this cause of action against Employee.

Employee also argues that because Agency returned her to the public and to her normal duty as a Bus Driver after less than ten (10) days from the date of the incident, Agency found her fit. Employee explains that she was cleared of the accident after less than ten (10) days and as such, Agency cannot now use the same accident to discipline her. However, Employee has not submitted any documentation from Agency showing that she was cleared of the accident. The mere fact that she was returned to her normal duties pending an official decision on the matter does not imply that she had been cleared of the accident. Moreover, Employee does not dispute that she was aware of Agency's policy which states in part that after a thorough investigation has

[4] Agency's Brief (July 2, 2014).
[5] DPM §1619.1(6)(c).
[6] Agency's Brief at Exhibit D.
[7] *Id*. at Exhibit A.

been conducted and the findings presented to the DOT Accident Review Board, "a Driver with two preventable accidents…in a one-year period involving … any damage… may not continue operating a school bus…"[8] Based on the record, the Investigator noted in his report that the collision in the instant matter was preventable, and she had another preventable collision on February 25, 2010. Employee also does not dispute this fact. Consequently, I find that Employee's argument is without merits.

Collective Bargaining Agreement Violation

Employee maintains that the CBA between Agency and Employee's union imposes a ninety (90) day deadline within which Agency is expected to make a decision to discipline an employee. However, Employee has not provided any evidence in support of this assertion. Moreover, Article V of the CBA between Employee's union and Agency does not provide for a ninety (90) days deadline to institute adverse action against an employee.[9] Assuming arguendo that there was in fact a ninety (90) days deadline within which Agency was required to make a decision; I find that Agency would have complied with such deadline in the instant matter. The incident in this matter occurred on January 5, 2011, and Agency issued its proposed termination notice to Employee on March 28, 2011. This is less than ninety (90) days from the date of the alleged incident. Although Employee's termination effective date is April 12, 2011, more than ninety (90) days from the date of the accident, Employee was made aware of Agency's decision to discipline on March 28, 2011, which is within ninety (90) days from the occurrence of the accident. Therefore, I find that Employee's allegation regarding Agency's alleged CBA violation is without merit.

2) 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).[10] 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; 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.

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[8] *Id*. at Exhibit D, pages 22-23.
[9] *Id*. at Exhibit C.
[10] *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).

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). Employee does not dispute that she was involved in a preventable accident on January 5, 2011; left the scene of the accident; and did not report the accident as required. Employee also does not dispute that she was involved in another preventable accident (February 25, 2010), less than one (1) year from the date of occurrence of the instant accident. 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. Therefore, I find that, by terminating Employee, Agency did not abuse its discretion.

While reprimand, suspension, as well as removal are all allowable forms of penalties for a first offense under this cause of action, as provided in *Love v. Department of Corrections*,[11] selection of penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[12] 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. I find that the penalty of removal was within the range allowed by law. Accordingly, Agency was within its authority to remove Employee given the Table of Penalties.

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

[11] OEA Matter No. 1601-0034-08R11 (August 10, 2011).
[12] *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).