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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
PRESTON RUCKER	) OEA Matter No. 1601-0152-10
Employee	)
	) Date of Issuance: May 21, 2012
v.	)
	) Lois Hochhauser, Esq.
D.C. DEPARTMENT OF PUBIC WORKS	) Administrative Judge
Agency	)
	)

Ms. Angela Pringle, Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Preston Rucker, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on November 20, 2009, appealing the decision of the D.C. Department of Public Works, Agency herein, to remove him from his position as Motor Vehicle Operator, effective October 23, 2009. At the time of his removal, Employee was in career service and in permanent status.

This matter was assigned to me on February 16, 2012. After reviewing the documents filed by the parties, I issued an Order on March 26, 2012, directing Employee to respond to allegations raised by Agency in its December 23, 2009 Answer and to raise any factual disputes with regard to the documentation, information and allegations contained in the Answer . Employee was also directed to present legal and factual arguments in support of his position that he was entitled to another position. Employee filed his submission in a timely manner. The parties were notified that unless they were advised to the contrary, the record would close on April 17, 2012. Upon careful analysis of all submissions, I determined that no relevant factual issues were in dispute and therefore no evidentiary hearing was necessary.[1] The record closed on April 17, 2012.

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[1] The documents submitted in this matter and relied upon by the undersigned were the petition for appeal and attachments filed by Employee, the Answer and attachments filed by Agency on December 23, 2009 and Employee's submission of April 17, 2012. Since the pertinent representations in the submissions were unchallenged, they were accepted as facts in reaching the decision in this matter.

Many of the attachments in the petition for appeal were also attached to Agency's Answer. Since Agency's Answer provided "tabs" with numbers, Agency's submissions are cited for the ease of the reader. References to

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Did Agency meet its burden of proof that its removal of Employee was for cause? Is there any basis upon which to change the penalty imposed by Agency?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Employee was hired by Agency in 2004 as a Sanitation Worker. In 2007, he was promoted to the position of Motor Vehicle Operator, Grade 4, Step 5. (Answer, Tab 3). The position description for a Motor Vehicle Operator states that the incumbent "must possess a valid Motor Vehicle Operator's Permit". The incumbent must operate motor vehicles in the District of Columbia "streets, alleys and other public rights-of-way with a gross vehicle weight of more than 10,000 pounds" but less than 26,000 pounds, as well as operate "a light snowplow vehicle equipped with a plow". (Answer, Tab 1). District of Columbia law requires an operator of a motor vehicle to possess a valid driver's license. *See*, D.C. Official Code §50-1401. (Answer, Tab 15).

On March 23, 2009, Agency notified Employee that it had received information that Employee did not possess a valid driver's license issued by the District of Columbia or any of its neighboring jurisdictions. It directed him to produce his license by March 31, 2009. (Answer, Tab 8). On March 24, 2009, Employee produced a document issued by the Child Support Services Division of the Office of the Attorney General on that date, stating that Employee had met his child support obligation and was therefore eligible to have his driving privileges reinstated. (Answer, Tab 4). Employee then took and failed the written portion of the driver's license test on March 25, 2009, March 26, 2009 and April 1, 2009. (Answer, Tab 5). A document entitled "5 Year Driver Record", issued by the Department of Motor Vehicles on April 30, 2009, states that Employee's license had been suspended since September 17, 2002. (Answer, Tab 6). Employee was unable to sit for another examination since District of Columbia law prohibits anyone who fails the test three times within a 12 month period from taking the test for a year from the date of the first failed test. *See* 18 DCMR 104.10. (Answer, Tab 16). Therefore, he remained without a valid driver's license.

Agency issued an Admonition to Employee, on May 22, 2009, which stated, in pertinent part, that Employee had produced the March 24, 2009 document, described above, but had subsequently been unable to obtain his driver's license. (Agency, Tab 8). On August 3, 2009, Agency notified

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Agency's submission in this document are cited as "Answer" followed by the tab or page number. References to Employee's submissions are cited as "Petition" or "April 17 submission" followed by the attachment or page number.

Employee that if he did not obtain and produce a valid driver's license within the next 30 calendar days, Agency would impose "disciplinary action up to termination." (Agency, Tab 9). However, as noted above, Employee could not take another driver's test until March 2010 because he had failed the test three times within a twelve month period. (Answer, Tab 16). Since Employee could not take the test again until March 25, 2010, he could not produce a valid license within the required time period.

On August 9, 2009[2], Agency issued a proposed notice of removal, charging Employee with engaging in "[any] on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty" based on his failure to possess a valid driver's license, which Agency maintained, rendered him unable to fulfill his duties as a Motor Vehicle Operator. (Answer, Tab 11). On October 6, 2009, Theresa Cusick, Esq., Hearing Officer, issued her recommendation that the proposed penalty of removal be sustained. (Answer, Tab 12). The final notice removing Employee from his position was issued by Agency Director on October 19, 2009. (Answer, Tab 13).

Employee did not dispute that he lacked a driver's license while employed as a Motor Vehicle Operator, that he was subsequently failed the test three times and could not take another test until March 2010. The relief sought by Employee is "consideration for a demotion from RW-6 to RW-4" and to be allowed to "return to work without prejudice". (Petition, p. 3). Employee notes that his driving privileges were suspended based on child support issues rather than driving infractions, and that he never hid the fact that he did not have a license from Agency. He maintained that he was a productive and reliable employee. He contended that Agency assisted other employees with similar issues and that the Master Agreement between Agency and AFSCME "allows" Agency to demote Employee "based on personal issues." (April 17 submission, pp 2-3).

D.C. Official Code §1-616.51 (2001) authorizes the Mayor to "issue rules and regulations to establish a disciplinary system that includes…1) a provision that disciplinary actions may be taken for cause… [and]… 2) A definition of the causes for which a disciplinary action may be taken" for those employees of agencies for whom the Mayor is the personnel authority. Agency is under the Mayor's personnel authority.

In adverse actions, agencies bear the burden of proof, and are required to meet that burden by a preponderance of evidence. OEA Rule 629.3, 46 D.C. Reg. 9217 (1999). "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). After carefully considering the record in this matter, the Administrative

[2] Agency concedes the notice was written before the expiration of the 30 day period Employee was given to obtain his license, but contends it was harmless error. (Answer, p. 2, ft. 1). The Administrative Judge agrees that the premature issuance is harmless error since it is undisputed Employee did not obtain his license within the permitted time period.

Judge concludes that Agency met its burden of proof in this matter. Employee's position required that he possess a valid motor vehicle license.[3] His duties included operating motor vehicles in "streets, alleys and other public rights-of-way with a gross vehicle weight of more than 10,000 pounds" and operating "a light snowplow vehicle equipped with a plow". (Answer, Tab 1). It is unlawful for anyone to operate a motor vehicle without a license, and doing jeopardized the safety of Employee, his co-workers and the public. The requirement that a Motor Vehicle Operator possess a valid motor vehicle license is reasonable, and without such a license, Employee cannot perform the essential functions of his position. *See* Chapter 16, Section 1603.12. Employee may not have kept his lack of a license a secret from Agency, but that does not alter the fact that he was unable to legally perform essential duties of that position because he lacked a valid license and therefore could not lawfully operate a motor vehicle. Even if Agency erred in placing him in the position, the hiring procedures are not relevant to the outcome of this decision.

Agency established that Employee did not have a valid license and was not eligible to take another driver's test to obtain his license until March 2010. From the time he assumed the position until some unknown time in the future, Employee could not perform essential duties. One could argue that Employee was able to safely operate a motor vehicle, and perhaps he did so for several years until Agency realized he did not have a license. However, he was operating the vehicle illegally, because possessing a driver's license is a requirement not only for the position for Motor Vehicle Operator but for operating a motor vehicle in the District of Columbia. Employee's actions interfered with the integrity of government operations because District of Columbia residents who operate a motor vehicle must have a valid license, yet Agency, an entity of the government, allowed an unlicensed individual to drive motor vehicles throughout the city's busy streets, placing citizens at risk and subjecting the government to significant liability. The fact that Employee failed the test three times within a short period of time would reasonably lead one to conclude that he lacked knowledge of basic rules of the road. Thus, his operation of a motor vehicle without a license placed the residents of the District of Columbia at considerable risk. This would certainly negatively impact on the confidence that the public has in Agency and its employees. Therefore, Agency met its burden that Employee engaged in employment-related conduct that interfered with the integrity of government operations.

Agency does not dispute that Employee was a productive and reliable worker but these attributes, while commendable, are not relevant. Employee does not seek to be reinstated to his position, but asks to be demoted and contends that Agency has done so to similarly situated individuals in the past pursuant to the Master Agreement between Agency and AFSCME Local 2091, AFL-CIO. Employee does not provide any specific information regarding individuals he considers similarly-situated, and in making this assertion he is required to offer more than a mere allegation.

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[3] The Administrative Judge does not know the procedure used to select Employee for a position requiring a drivers license since he lacked a license at the time of his appointment and accepts his representation that he did not hide the fact from Agency. This is not the first matter this Administrative Judge has heard in which Agency was unaware that an employee required to possess a license was unlicensed. It is the first time, however, that she heard a case where the individual did not have a license at the time of his appointment to a position which required a license. She urges Agency to review its hiring procedures, and at a minimum, to require proof of a valid driver's license before hiring an unlicensed individual to a position that requires a driver's license.

Employee also asserts but does not provide specificity that the contractual provision in the Master Agreement entitles him to a demotion.[4] This Office has long held that an agency's decision to promote, and by analogy to demote, "is discretionary… unless it can be shown that a failure to [do so] violates some mandatory duty". *See, e.g., Employee v. Agency,* OEA Matter No. 1601-0063-84, 36 D.C. Reg. 6458 (1989). Employee did not allege or establish that Agency violated a mandatory duty by deciding not to demote him, but rather to terminate him from his position

Agency has primary responsibility for managing its employees and part of that responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ______ D.C.Reg. ____ ( ). D.C. 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).

This Office will not substitute its judgment for that of an agency when determining if a penalty should be sustained. An agency has considerable discretion in determining the penalty it selects and OEA will not usurp managerial responsibility in determining a penalty, but it will ascertain if the penalty reflects a responsible balancing of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). Our review is limited to ensuring that "managerial discretion [is] legitimately invoked and properly exercised". *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be reversed unless the conclusion is reached that an agency has not considered relevant factors in reaching its decision, 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). A penalty that comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment" will not be disturbed. *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985). The Administrative Judge concludes that Agency considered the relevant factors, i.e., that Employee lacked a valid driver's license and that he could not perform essential duties of his position which required a valid driver's license. She further concludes that Agency did not abuse its discretion in reaching the decision to terminate Employee from his position. The evidence did not establish that Agency was required to demote Employee or that he was treated differently than similarly-situated individuals.

For these reasons, the Administrative Judge concludes that Agency met its burden of proof in this matter, and that its action should be upheld.

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[4] Employee states that the Master Agreement provides that "employees have the right under Article 13 Seniority…"change to a lower grade". Employee did not submit any specific information or argument regarding this provision that would reasonably lead to the conclusion that it required Agency to demote Employee.

ORDER

It is hereby

ORDERED: Agency's actions are sustained. This petition for appeal is DISMISSED.

FOR THE OFFICE: ______________________________
LOIS HOCHHAUSER, ESQ.
Administrative Judge