

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Cecil Herd)	OEA Matter No. 1601-0020-13
Employee)	
)	Date of Issuance: February 9, 2015
v.)	
)	Joseph E. Lim, Esq.
Department of Public Works)	Senior Administrative Judge
Agency)	

Stephen White, Employee Representative		
Rahsaan Dickerson, Esq., Agency Representative		

INITIAL DECISION

PROCEDURAL BACKGROUND

On November 5, 2012, Cecil Herd (“Employee”) filed a petition for appeal with this Office regarding his January 14, 2011, removal as a Solid Waste Inspector by the Department of Public Works (“Agency”) for neglect of duty.

This matter was assigned on January 21, 2014. I held a Prehearing Conference on April 24, 2014, and subsequently concluded that a hearing was not warranted. I ordered the parties to submit their legal briefs on the issue of whether Agency’s choice of Employee’s penalty should be upheld. The record was closed after the parties filed their submissions.

JURISDICTION

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

ISSUE

Whether Agency had proper cause to remove Employee from service.
If so, whether Agency’s penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following facts are undisputed.

1. Employee was a Solid Waste Inspector for the Agency from September of 2002 to October 12, 2012. He was a career service, full-time employee.
2. As a Solid Waste Inspector, Employee was required to identify trash infractions and issue the appropriate tickets to the offender(s).

3. In correspondence dated April 4, 2011, Employee was suspended for nine days for the charge of “Any On-duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations, to wit, failure to carry out tasks; careless or negligent work habits. *See Agency Answer, Tab 8.*
4. In correspondence dated December 15, 2011, Employee was suspended for thirty days for the charge of “Any On-duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operation, to wit, misfeasance-unauthorized use of Government vehicle.” *See Agency Answer, Tab 14.*
5. In a memorandum dated December 27, 2006, the Agency Director advised all employees that improper, careless, negligent, destructive, or unsafe use or operation of vehicles or equipment could result in disciplinary action, up to and including termination of employment. *See Agency Answer, Tab 6.*
6. Notwithstanding the Director’s December 27, 2006 memorandum, on August 12, 2012, Employee, while conducting a routine daily inspection in the rear of 546 Oakwood Street, SE, left his assigned vehicle unattended, unlocked, and running. *See Agency Answer, Tab 18.*
7. When Employee returned from the field inspection, the vehicle was no longer in the spot where Employee left it. *Id.* Agency and the Metropolitan Police Department were notified, and the vehicle was subsequently retrieved. *Id.*
8. On August 29, 2012, Agency hand delivered a thirty (30) day advance written notice of proposal to remove the Employee from his position as a Solid Waste Inspector in the Agency. The cause for the termination was based on the charge of “Any On-duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations, specifically Neglect of Duty, careless or negligent work habits.” Employee was accused of failing to secure the government vehicle by leaving the engine running and the door unlocked. *See Agency Answer, Tab 16.*
9. Employee submitted a written response to the advance written notice. Employee admitted the misconduct in his response. *See Agency Answer, Tab 17, Employee's written incident report.*
10. On September 26, 2012, the Hearing Officer, assigned to conduct the administrative review of the proposed removal action, submitted the required Written Report and Recommendation to the Deciding Official. The Hearing Officer recommended removal. *Id.*
11. In correspondence dated October 5, 2012, Employee was provided with the notice of final decision which sustained the proposed removal for cause. *See Agency Answer, Tab 19.*
12. On October 12, 2012, Employee was removed from his position as a Solid Waste Inspector.

Employee does not deny the charges, but at the prehearing conference, he argued that the ultimate penalty of removal was too severe. In his legal brief, Employee also emphasized that Agency failed to issue to Employee a written work rule requiring him to turn the engine off and

remove the keys during his frequent stops in the course of his workday. In other words, Employee is alleging that Agency's December 27, 2006, memorandum advising employees that "improper, careless, negligent, destructive, or unsafe use or operation of vehicles or equipment could result in disciplinary action..." is not detailed or specific enough to warrant any disciplinary action for losing a government vehicle because of carelessness or negligence.

Employee's latter argument fails because employees are expected to exercise enough sense to safeguard government property when in use. Agency cannot be expected to spell out every single possible negligent action that an employee may do in the performance of his duties. Employee cannot also throw blame to Agency for his own negligence and carelessness. Agency's policies clearly prohibits his action. *See Agency See Agency Answer, Tab 6*. Employee's conduct constituted negligence as contemplated by the District Personnel Manual, Chapter 16, Section 1603.3(f)(3).

Because of Employee's admission, there was never any question that the Agency had met its burden of establishing cause for taking adverse action. However, Employee asserts that his penalty is overly harsh and should be overturned and that he should be returned to work.

As noted above, the only remaining issue is whether the discipline imposed by the agency was an abuse of discretion. Any review by this Office of the Agency's decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ (); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ (). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."¹ 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."²

The record shows that the Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present. Agency noted that the Table of Appropriate Penalties for this misconduct for a first offense ranges from a Reprimand to Removal. *See District Personnel Manual, Chapter 16, 1619.1 Table of Appropriate Penalties (f)(3)*.

For the foregoing reasons, I conclude that the Agency's decision to select removal as the appropriate penalty for the employee's infractions was not an abuse of discretion and should be upheld.

¹ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

² *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

ORDER

It is hereby ORDERED that the agency action removing the employee is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge