THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LYNETTE HOLCOMB	)	OEA Matter No. 1601-0052-08
Employee	)	
	)	Date of Issuance: July 1, 2008
v.	)	
	)	
	)	Lois Hochhauser, Esq.
DCPS DEPARTMENT OF TRANSPORTATION	)	Administrative Judge
Agency	)	
	)	

Lynette Holcomb, Employee
Brian Hudson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Employee filed a petition with the Office of Employee Appeals (OEA) on March 6, 2008, appealing Agency's final decision to remove her from her position as Bus Attendant, February 26, 2008. At the time of the removal, Employee was in career status and had been employed with Agency for eight years.

The prehearing conference took place on June 6, 2008. At the proceeding, Employee stated that she had engaged in the conduct that resulted in her removal. However, she explained that she had been under a great deal of stress due to family problems. She said her conduct did not jeopardize the health and safety of students. She stated that she regretted her conduct and that she needed her job, and asked for a "second chance". Agency's position was that removal was the appropriate penalty under the circumstances.[1] At the close of the prehearing conference Employee and Agency agreed that an evidentiary hearing was not

[1] Agency filed a motion to dismiss the matter on April 7, 2008 and renewed the motion at the proceeding, arguing that the remedy available to Employee pursuant to a collective bargaining agreement was exclusive. After considerable discussion, the motion was denied. Agency noted it had filed an interlocutory appeal with the Board on another appeal involving the same issue. Given the outcome of this proceeding, the ruling on the motion will not be discussed further.

needed and that a decision could be rendered based on the arguments presented and the documents already submitted. The record was therefore closed.

JURISDICTION

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

ISSUES

Did Agency meet its burden of proof in this matter? If so, is there a basis for disturbing the penalty imposed by Agency?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On February 25, 2008, Agency issued the following notice to Employee:

> This letter is to inform you of [the] immediate termination of your employment as a Bus Attendant with the Division of Transportation for cause, based on findings that you submitted an altered doctor's note when you were attempting to come back to work.
>
> On February 13, 2008, you came to the Penn Center to be returned to work. When you met with the Human Resources Director, you submitted a doctor's note excusing you from work from November 2, 2007 – November 27, 2007. The original notice that you provided had the appearance of being altered. When you were questioned about the document, you stated that you had been under the doctor's care for those dates. You never provided a reason why you did not return to work on November 28, 2007. The Human Resources Director informed you that she had to …verify your doctor's notice. On Friday, February 21, 2008, your doctor's office verified that you had altered your doctor's note. You attempted to give the Division of Transportation a falsified document.
>
> As you are aware, the Division of Transportation expects all employees to conduct themselves, at all times, in such a manner as to reflect favorably on the Division and the requirement of replacing absent employees disrupts the Division's operations and interferes with our ability to transport children to and from schools in a safe and effective manner. Your deceptive actions unacceptably interfered with our ability to transport our children in a safe and efficient manner.
>
> In reviewing your file, it is noted that you were counseled regarding your attendance and then place[d] on leave restriction on March 12, 2007 for 60 days.

> Under the current collective bargaining agreement between your union and the Division of Transportation, you may have the right to file a grievance with your union. You may also have the right to appeal this action to the District of Columbia Office of Employee Appeals. Attached to this notice are copies of the applicable Personnel Regulations, the rules of the Office of Employee Appeals, and a copy of an OEA Petition for Appeal. You have the right to representation by a lawyer or other authorized representative in connection with any appeal of this matter.

Employee concedes that she falsified the medical excuse she submitted to Agency. The letter stated that Employee was discharged to return to work on November 27, 2007. The original note issued by Employee's physician stated that she was cleared to return to work on November 5, 2007. Employee concedes that she changed the "5" to "27". She regrets her action and notes that she was under a great deal of stress at the time.

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).

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). 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. Employee's conduct falls within this definition of "cause". It was an employment-related action that interfered with the efficiency and integrity of government operations. Agency met its burden of proof in this matter.

Agency has primary responsibility for managing its employees. 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. ____ ( ). This Office 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. This Office will not reverse Agency's decision unless the Administrative Judge concludes that an agency has 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). While the Administrative Judge may sympathize with Employee because of the stress she was under at the time she falsified the medical note, the stress she was experiencing does not excuse or mitigate the misconduct. Agency is not prohibited by law, regulation or guidelines from imposing the penalty of removal. The OEA Board has long recognized that 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. The Administrative Judge therefore concludes that there is no basis to disturb the penalty.

ORDER

It is hereby

ORDERED: This petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge