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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
ELLA CAREY,	)	
Employee	)	OEA Matter No. 1601-0063-11
	)	
v.	)	Date of Issuance: April 10, 2013
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	MONICA DOHNJI, Esq.
_____	)	Administrative Judge
Pierpont Mobley, Employee Representative		
Hillary Hoffman-Peak, Esq., Agency Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 7, 2011, Ella Carey (“Employee”) timely 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 (“DCPL” or “Agency”) decision to terminate her from her position as an Operations Assistant effective February 18, 2011. Following an investigation, Employee was terminated for “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operation, to include Neglect of duty” as outlined in 6 District of Columbia Municipal Regulations (“DCMR”) 1603.3(f)(3).<sup>1</sup> On April 1, 2011, 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 August 8, 2012, I issued an Order Scheduling a Status Conference in this matter for September 12, 2012. During the Status Conference, the parties agreed to submit this matter to mediation. Because this matter could not be resolved based on the documents on record, following the failed mediation attempt, a Prehearing Conference was held in this matter on November 13, 2012. Subsequently, the undersigned on November 14, 2012, issued an Order scheduling an Evidentiary Hearing for January 22 and 23, 2013. An Evidentiary Hearing was held in this matter on January 22, 2013. Both parties were present for the Evidentiary Hearing. Following the Evidentiary Hearing, I issued an Order dated February 13, 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

<sup>1</sup> See also District Personnel Manual (“DPM”) 1603.3(f)(3).

with a schedule for submitting their written closing arguments. The written closing arguments were due on or before March 29, 2013. 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) Harris Bailey (January 22, 2013. Transcript pgs. 11-47).**

Harris Bailey ("Mr. Bailey") is a Terminal Manager for New York Avenue. He has worked with OSSE for about two (2) years. His job entails making sure that all students get to and from school safely; students are picked up and dropped off to a responsible adult; and to make sure that New York Avenue has safety equipment, drivers and attendants. He testified that everyone at the Department of Transportation is trained and understands that children have to go from one responsible adult to another.

According to Mr. Bailey, the duties of an Assistant Terminal Manager ("ATM") include; working with Bus Drivers and Bus Attendants, assign routes, making sure each route has sufficient Drivers and Bus attendants to meet the needs for the day, and take care of employees' time. He further explained that ATMs are trained on all aspects of their jobs, along with a follow up training if needed to keep up with Agency standards and policies. Mr. Bailey noted that ATMs are also trained

on policies and procedures for dealing with children; they are trained on the parent-student handbook; and the standard operating procedures. (Tr. pg. 14). He explained that while ATMs are not required to know the whole procedure, they are however supposed to know certain policies. Mr. Bailey stated that every employee at the Department of Transportation is given an OSSE Policy and Procedure Manual. He also stated that Bus Attendants are trained, tested, and have to meet the standards before they can actually become attendants. (Tr. pg. 15). He further highlighted that OSSE also trained Operational Managers on the duties of the Bus Attendants. (Tr. pg. 15). He explained that, the Bus Attendant's duties include "...delivering children to the designated receiving party, both at school and at the designated drop-off address..." (Tr. pgs. 16-17). Mr. Bailey testified that, as an ATM, Employee would have been trained on the duties of the Bus Drivers and Bus Attendants. (Tr. pg. 24). He stated that because ATMs have to fill in for Drivers and Attendants on a regular basis, they would know what Bus Attendants did. (Tr. pg. 26).

Mr. Bailey noted that Employee had been disciplined in the past (Tr. pg. 19 & 22), and she was also demoted to Operations Assistant. (Tr. pg. 25). According to Mr. Bailey, OSSE investigates any complaints that it receives (Tr. pg. 27). He explained that an investigation of Employee following a parent complaint concluded that Employee failed to deliver a student ("Student L") to a responsible adult as required. (Tr. pg. 28). He also explained that only a Latch-Key child can be dropped off without a responsible adult present. He stated that a Latch-key child is a child who is old enough to carry their house key around their neck. Furthermore, he noted that the trip ticket denotes which students are Latch-Key. (Tr. pgs. 28-30). Mr. Bailey also testified that, an Operations Assistant who volunteers as a Bus Attendant is still responsible to deliver a child to a responsible adult, and if they fail to do so, they are disciplined because they have knowledge of what a Bus Attendant does.

Mr. Bailey highlighted that, the Bus Driver fills out the trip ticket and the Bus Attendant verifies if the information is correct, and then signs the first page. When questioned about the statement that "attendant is not supposed to leave the sight of the driver." Mr. Bailey explained that, there has to be a visual viewpoint where the Bus Driver can see the Bus Attendant when dropping off the student. The Bus Attendant waits at this point for the parent or guardian to come get the student and it must be a hand-to-hand transfer, and the driver is able to see whether the parent has picked up the child. (Tr. pg. 46).

## **2) Tasha Houston (Transcript pgs. 47-59).**

Tasha Houston ("Ms. Houston") is a Bus Driver with OSSE, and she has held this position since October of 2002. Her responsibilities as a Bus Driver include getting the students to school and back home safely, and to make sure that everything on the Bus is safe for the students and the Bus Attendant. Ms. Houston stated that she started off as a Bus Attendant, and then later became a Bus Driver. Ms. Houston testified that Employee was her supervisor, except for the one day Employee was a Bus Attendant on her Bus. (Tr. pg. 49).

Ms. Houston explained that the trip ticket shows the student's name, school, date and time that they are supposed to be pickup or dropped off. She testified that when she first started as a Bus Attendant, she received training whereby, they were told to not go in the building. Ms. Houston testified that on the day Employee acted as a Bus Attendant, she does not remember seeing Student L's parent or legal guardian. She however explained that the practice was as long as the Bus Driver and Bus Attendant saw a student go into the building and into the apartment, she then writes down

the time on the trip ticket, and they proceed with their route. (Tr. pg. 51). She noted that Employee saw and signed the trip ticket when they got finished with their route. (Tr. pg. 57). Ms. Houston explained that while the policy and procedure manual requires that she call dispatch to let them know that a parent is not home to receive a child, this wasn't done here because, they were told not to go into the building when she first started working at Agency as a Bus Attendant. She further explained that, they were "...told just to make sure they get in the house and proceed on." (Tr. pg. 53).

When questioned about the issue of Latch-Key, Ms. Houston testified that she only learnt about the Latch-Key child after Employee was terminated. (Tr. pg. 53). She further testified that she did not understand that children were supposed to be delivered to a responsible adult both at school and at their houses because she wasn't told that in her training. (Tr. pg. 54). She stated that prior to Employee's termination; the policy was basically to make sure that the kid got into their house. (Tr. pg. 55). According to Ms. Houston, after the incident with Student L, she was asked by the investigator assigned to the case to type out a sworn statement about what happened. She noted that she did not feel that Employee's termination was justified.

### **Employee's Case in Chief**

#### **3) Ella Carey (Transcript pgs. 60 – 89).**

Ella Carey ("Employee") is a former employee of Agency. She testified that she had worked with Agency for eight (8) years before she was wrongfully terminated. Employee was an Operations Assistant when she was terminated. She explained that as an Operations Assistant her job was to assist the managers in their work, but she was not aware that she was required to step in as a Bus Driver or Attendant, since these functions are not noted in her job description. (Tr. Pgs. 74-75). Employee testified that since the managers are always short of employees, she regularly volunteered as a Bus Attendant, even as early as 2002 when she started as a Secretary, and she has never had any problems. (Tr. pgs. 67&77). Employee stated that she volunteered to be a Bus Attendant on the date in question. She explained that when she came in to swipe out from her shift, the ATM for that route said she was short of employees and she needed a Bus Attendant for route 251, and she volunteered to go out as a Bus Attendant on that route. (Tr. Pgs. 60-61).

Employee stated that, when they arrived at Student L's drop-of location, she walked him outside his apartment door, which was about 25-30 steps from the Bus, she opened the door which was unsecured, and since Student L lived on the first floor, she watched Student L proceed into the apartment, and then she returned to the Bus. (Tr. pg. 61). She also testified that she has volunteered on several occasions and adults are not always present to get children when they are dropped off after school and even when they are picked up in the morning. (Tr. pg. 62). She stated that, she went above and beyond by walking 25-20 feet to the child's door, and watched him go inside his apartment. She maintained that, employees are told that if a child enters the house, then they are safe. (Tr. pg. 62).

According to Employee, she did not receive a Policy and Procedure Manual while she was working at Agency. However, she testified that she got a copy for herself, but she did not read it. She also testified that only employees and not staff get a copy of the Parent Hand Guide book, and that she was told to give these to employees when they came to pick up the trip tickets. (Tr. pgs. 77-78). Employee maintained that she was not trained on Bus Attendant and Driver's position, and that no managers or Operation Assistants were trained to be Bus Attendants or Drivers. (Tr. pgs. 82-83).

Employee explained that, if she was trained, she would have received a certificate, just like the Drivers and Attendants do. (Tr. pg. 83).

Employee stated that she understood what the protocol was if the parent was not home. She stated that the Bus Attendant is not supposed to leave the eye sight of the driver because they go into drug-related neighborhoods, and they have to be safe. She maintained that the protocol was that, if a child's parent was not home, and the door was locked, she would ask the child to come back to the Bus and re-board the Bus. Thereafter, dispatch and the parent call center are notified to see if they can get in touch with the parent. However, she further explained that, if the door is unlocked, the protocol was to watch the child go into the house and when the door shuts, she then proceeds to the Bus. (Tr. pgs. 69-70; & 79).

Employee testified that she did not see an adult and she did not drop off Student L with a responsible adult. She also stated that she did not call dispatch or ask Student L to re-board the Bus because his door was unsecured, and he entered the house safely. (Tr. pg. 79). Employee further testified that, 85% of the time, an adult does not give the child to the Bus Attendant in the morning nor is an adult outside to receive the child after school, as stated in the policy and procedure book, that's why Bus Attendants have to leave the Bus and walk the child to the door and wait for the child to go into the apartment or house. (Tr. pg. 80). She conceded that she did not turn Student L to a responsible adult on the date in question. (Tr. pg. 81). She also stated that she followed the same procedure utilized by the regular route Bus Attendant, and she did not get any incentive for volunteering to be a Bus Attendant. (Tr. pg. 85-86).

Employee testified that she was terminated unfairly, humiliated, and disrespected. (Tr. pg. 69). She stated that she did not have any problems with management. (Tr. pg. 74). She explained that the incident happened on December 13, 2010, and she received a phone call from the investigator December 15, 2010 stating that a parent called and said that Employee left a child outside and she [the parent] was not home. She was asked by the investigator to write a statement about the incident. (Tr. pg. 73). Employee further stated that the child went into the apartment when she dropped him, however, the child might have waited until she and the driver left, and then came back out, and maybe locked himself out. (Tr. pg. 69). Employee noted that she never met with anyone prior to her termination. (Tr. pg. 72). Employee also noted that her previous disciplinary record did not play a role in her being terminated. (Tr. pg. 64). Employee testified that she has seen Mr. Bailey before, but she does not know him since he's only been with Agency for two (2) years. (Tr. pg. 73).

#### FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

##### ***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. 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 and failed to follow directions as prescribed in § 203.3 – Conduct of the Route, of Agency's Policies and Procedures Manual. Therefore, the undersigned must determine if the evidence that Employee violated § 203.3 of Agency's Policies and Procedures Manual is adequate to support Agency's decision to terminate Employee.

Section 203.3(E) of Agency's Policies and Procedures Manual states as follows:

*Students are to be dropped-off and placed in the care of a responsible adult (designated in the Individualized Transportation Plan). The responsible adult should be in front of the drop-off address ten minutes prior to the scheduled arrival of the Bus. Attendants will exit the Bus and assist students off of the Bus in accordance with the safety procedures described elsewhere in this directive...*

*If the designated adult is not at the designated drop-off location at the prescribed drop-off time, and the attendant can access the door, the attendant will knock at the door of the drop-off address to determine if a receiving person is available. If the designated adult is not contacted at the prescribed drop-off time, a door hanger will be placed on the door of the pick-up address notifying the parent/guardian of the failed drop-off attempt... (Emphasis added).*

Section 203.3 above specifically applies to a Bus Attendant's responsibilities when dropping off a student. However, in the instant case, Employee was an Operations Assistant and not a Bus Attendant when she was terminated. Moreover, while she had volunteered to act on numerous occasions as a Bus Attendant, Employee had never officially held the title of a Bus Attendant. Accordingly, I find that the above-referenced section does not apply to her. Furthermore, despite Mr. Bailey's testimony that everyone acting in a management role was trained on the duties and responsibilities of Bus Attendants and Bus Drivers, Agency has failed to provide this Office with any credible evidence to show that Employee was indeed trained to perform the duties of a Bus Attendant.

Furthermore, Employee explained that if she had been trained as a Bus Attendant, she would have received the same certification Bus Attendants and Bus Drivers received upon completion of their training. Moreover, Employee's job description as an Operations Assistant does not require her to have specific knowledge of the duties of a Bus Attendant. Also, Mr. Bailey was not employed with Agency when the alleged incident occurred. As such, I find that he is incompetent to testify as to whether or not Operations Assistants were trained on the duties of Bus Attendants prior to his employment with Agency. Agency also asserts that Employee knew the protocol and responsibilities of a Bus Attendant. However, although Employee concedes that she did not place Student L in the care of a responsible adult; she explained that she was not aware of this policy. Even Ms. Houston, a former Bus Attendant testified that she was not aware that children were to be delivered to a responsible adult because she wasn't told that in her training. (Tr. pg. 54). She explained that prior to Employee's termination; the policy was basically to make sure that the kid got into their house. And the fact remains that Employee's official position on record was Operations Assistant, and not a Bus Attendant, and when she volunteered for the Bus Attendant position on the date in question, she did

not receive any training or instruction on performing the job she volunteered for. Consequently, I find that, Agency was not justified in subjecting Employee to the same standards as the Bus Attendants. And based on the evidence presented and the analysis above, I further conclude that Agency did not meet its burden of proof and that Employee's removal should be reversed.

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

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).<sup>2</sup> 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 matter, I find that Agency did not meet its burden of proof for the charge of “[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,” and as such, Agency cannot rely on this charge in disciplining Employee. (Emphasis added). Therefore, in accordance with Chapter 16 of the DPM, I conclude that Agency had insufficient cause to remove Employee. I further conclude that Agency has abused its managerial discretion and its chosen penalty of removal is clearly an error of judgment. Accordingly, I find that Agency's action should be reversed.

**ORDER**

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to her prior position of record or a comparable position; and reimburse her all back-pay and benefits lost as a result of her removal; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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MONICA DOHNI, Esq.  
Administrative Judge

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<sup>2</sup> 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).