THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the matter of:	)	
	)	
HAROLD MILLS,	)	OEA Matter No. 1601-0001-09
Employee	)	
	)	Date of Issuance: July 6, 2010
v.	)	
	)	Rohulamin Quander, Esq.
DISTRICT OF COLUMBIA	)	Senior Administrative Judge
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	

Kevin Turner, Esq., Agency Representative
Barbara Milton, Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee was a towing operator, Grade 9, with the Department of Public Works ("Agency" or "DPW"). On December 28, 2007, Harold Mills ("Employee") was allegedly involved in an automobile accident while on-duty. Purportedly, in the course of towing a trash packer, Employee backed the packer into a parked truck, causing it to collide with another vehicle. He allegedly left the scene without notifying his supervisors or the police.

An Advanced Notice of Proposed Removal was issued to Employee on February 14, 2008 ("original notice"). Employee was cited for a violation of Agency's accident/incident notification protocol, for allegedly leaving the scene, and for failing to notify a supervisor of an accident/incident. Employee was also charged with violating District Personnel Manual ("DPM") § 1603.3, for conduct which he "knew or should have reasonably known is a violation of law." The original notice was amended on March 28, 2008, and referred to *D.C. Official Code* § 50-2201.05: fleeing the scene of an accident. On June 2, 2008, the original notice was dismissed without prejudice. A notice was reissued on June 19, 2008 ("final notice"), again citing DPM § 1603.3 and *D.C. Official Code* § 50-2201.05 in regard to the December 2007 accident. On September 9, 2008, Agency issued a "Notice of Final Decision," having resolved to remove Employee. The proposed effective date of removal was September 12, 2008.

Employee objected to the removal. Agency then assigned Theresa Cusick, Esq. ("Cusick") as Hearing Officer ("HO") to conduct an administrative review of his case. Employee argued that Cusick was an unsuitable HO because she was party to the original notice that was dismissed.[1] *See Employee Exhibit 9*. On July 21, 2008, Marie-Claire Brown was assigned as the successor HO to Employee's case. As HO, Ms. Brown recommended to uphold Agency's decision to remove Employee. *See Employee Exhibit 10*.

On October 1, 2008, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office"). The appeal was initially assigned to Administrative Judge Lois Hochhauser on January 7, 2009, and then re-assigned to Judge Rohulamin Quander on October 7, 2009. An Evidentiary Hearing was conducted on December 2, 2009. Both parties were directed to file Proposed Final Orders. The record was formally closed on February 22, 2010.

JURISDICTION

The Office has Jurisdiction pursuant to *District of Columbia Official Code* § 1-606.03 (2001).

CHARGES AND SPECIFICATIONS

Charge:

Violation of District Personnel Manual, Chapter 16, § 1603.3 (e): Any on-duty or employment-related act or omission that an employee knew or should have reasonably known is a violation of law.

Specification:

On December 28, 2007, Employee's alleged negligence in the operation of Agency's vehicle resulted in property damage. The incident occurred at Elliot/Wilson, a truck repair facility in Prince George County, Maryland. Employee was assigned to tow and deposit a trash packer truck on the Elliot/Wilson lot. Employee reversed the packer into a parking space on the premises. It should be noted that the vehicles, tow truck and packer, are approximately twenty-eight feet in length each. In the course of reversing the trash packer into the parking space, the packer allegedly struck a parked truck (called alternately scrap or stake truck), which became fixed on the trash packer's "hopper" (the garbage compartment). The stake truck was pulled forward in the process, causing the stake truck to collide with a 1996 Camry, owned by an Elliot/Wilson employee. Agency was contacted by an Elliot/Wilson employee who claimed he witnessed the accident.

Agency's main concern regarding the occurrence of December 28, 2007, was Employees' alleged failure to report the accident, which is a violation of Agency policy.

[1] An HO must have no direct knowledge of the case before her, with the exception of hearsay. DPM § 1612.2.

Agency policy requires employees to report accidents/incidents immediately to the police and their supervisors, and to refrain from moving the vehicles, if possible. *See Agency Exhibit 1*.[2]

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 the 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

Whether Agency's decision to remove Employee was:

1. Supported by substantial evidence;
2. Without harmful procedural error; and
3. In accordance with applicable laws and regulations.

CONTENTIONS OF THE PARTIES

Agency's Case:

Agency's position is that: 1) Employee's own statements conceded his awareness that he sideswiped the truck[3]; 2) Employee failed to get out of his truck and inspect the damage; 3) Employee did not attempt to notify the owner; 4) Employee failed to contact his supervisor - contrary to Agency policy; and, 5) Employee left the scene of an accident.

Agency points to Employee's written statement of December 28, 2007, which states that he "brushed truck pushed it on a car…left not knowing the extent of the damage [sic]." *Employee Exhibit 5*. Although Employee recanted the statement, Agency

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[2] DPW's Accident Incident Notification Procedures: accident is defined in as "any property damage, vehicular damage, or personal injury." *Agency Exhibit 1*.

[3] *See Employee Exhibit 5* (Employee's handwritten statement), and *Employee Exhibit 8, page 4* (Employee's Affidavit).

maintains that it is consistent with the report Employee gave to his supervisor, Frank Hagans ("Hagans"), upon Hagans' arrival on the scene. This statement is also consistent with the Elliot/Wilson employee's account of the accident. If it is true that Employee did not believe the statement might be used in a disciplinary action against him, as he testified, it is more likely that prior statement was more accurate. Agency argues that Employee must have known that, at the very least, he had "brushed" another vehicle. As such, he was obliged to get out and fully inspect the area.

It is Agency's position that although the responding officer did not cite Employee, this does not change the fact that he broke the law. Nowhere in the language of 6 DCMR § 1603.3(e) does it require that an employee be convicted of a crime. Further, Agency proffers, it is untenable to believe that Employee was unaware that fleeing the scene violated Maryland law, as it is common knowledge that fleeing the scene of an accident is illegal in most states.

Agency argues that even allowing for the mitigating *Douglas Factors* ("DF"), the seriousness of Employee's conduct warranted his removal.[4] Agency maintains that all of the *Douglas Factors* were considered. Agency based its decision to terminate Employee most notably after considering how Employee's conduct violated DFs # 1, # 5, # 6, # 7, # 8, # 9, and # 12. Re DF # 1 - Employee knowingly and willfully fled the scene of an accident, in violation of both Agency policy and Maryland law; Re DF # 5 - His superiors can no longer entertain full confidence in Employee; Re DF # 6 - Employee was not singled out for disciplinary action; Re DF # 7 - His punishment was consistent with Agency policy; Re; DF # 8 - His actions threatened the integrity of Agency; Re DF # 9 - Employee was put on notice of Agency protocol; and Re DF # 12 - With Employee's training and knowledge, progressive discipline should not be necessary to educate Employee of basic protocol in the event of an accident.

Agency points to incidents occurring in 2005, 2006, and 2007, which Employee failed to report, in violation of Agency policy. It is Agency's contention that Employee

[4] The *Douglas Factors* may be referenced in a governmental agency's determination of the appropriate penalty to impose upon an offending employee. They include: "(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offense; (7) consistency of the penalty with the applicable table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment; harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by employee or others." *Douglas v. Veterans Admin.* 5 M.S.P.B. 313, 333, 5 M.S.P.R. 280, 306 (MSPB,1981).

was made aware of its policy to report accidents/incidents on each of these prior occasions. Additionally, Agency submits that Employee was put on notice via DPW's Accident/Incident Notification Procedures memorandum, which was circulated to all employees and was posted on the bulletin board in DPW's office. The memorandum outlined Agency protocol for accidents/incidents.

Agency asserts that Director Howland reviewed and applied the appropriate *Douglas Factors* under the circumstances. In addition, the fact that Employee was involved in similar incidents was taken into consideration in the Director's decision to remove Employee. Moreover, the Table of Appropriate Penalties, DPM § 1619.1, allows for penalties ranging from suspension up to removal for first time offenses of violations of law, or offense which an employee should reasonably have known was a violation of the law. Therefore Employee's removal was appropriate.

Witness Testimony of William O. Howland, Jr.

Mr. Howland ("Howland") is the director of DPW. He is ultimately responsible for managing the work force. Howland determined that Employee should be terminated, and considered the mandates of the *Douglas Factors* in making that decision. He was primarily concerned with the seriousness of the offense of a hit-and-run and its impact upon the integrity of the department. Further, he considered Employee's past disciplinary record in making the determination to terminate Employee. Howland was questioned about another employee (Lynn McGill) who was not terminated after his involvement in an accident which resulted in approximately $100,000.00 worth of damage. Howland stated that "even though the amount was significantly more, the nature of the incident wasn't as severe as the [December 28, 2007] incident." *TR: 31 – 34*.

Witness Testimony of Frank Lee Hagans, Sr.

Hagans is the supervisor of Tire and Towing Shop Three, DPW, Fleet Services/Administration, and former supervisor to Employee. Hagans received the call regarding the incident on December 28, 2007, from the Elliot/Wilson employee and was DPW's agent who responded to and investigated the incident. *TR: 93 – 94*.

Although initially informed by the Elliot/Wilson employee that five Elliot/Wilson trucks were damaged by Employee, he determined that only the packer, the stake body truck, and the Camry were involved in the accident. The orange paint of the packer was visible on the rear of the stake body truck, and visibly absent from the left side of the packer. He then radioed Employee and requested him to return to the scene and instructed the Elliot/Wilson employee to contact the police. He also took photographs of the vehicles. *See Agency Exhibits 4 a) – 4 d).* He determined that the hopper was caught on the left rear body of the stake truck. Noting the tire marks, indicating it was dragged forward, causing the front end of the stake truck to impact the rear left panel of the Camry, he concluded that the damage was the result of Employee's negligent operation of the vehicles. *TR: 95 – 103*.

Hagans maintains that an operator, under the circumstances, would have felt the "jerk pull" of the packer engaging the stake truck. Hagans submitted that Employee should have been watching the rearview mirrors during the process and should have seen the stake truck being dragged by the packer. Moreover, the damage would have been noticeable to a reasonable person in Employee's position, if he alighted the truck and "walked all the way back behind the packer." *TR: 106 – 144*.

There were also prior occurrences in which Employee was involved in accidents and left the scene without notifying Agency. Hagans recalls discussing agency notification procedures with Employee after a similar incident in 2005. *TR: 116*.

***Employee's Case*:**

Employee asserts that Agency failed to meet its burden of proof showing cause. Employee maintains that he had no knowledge of the accident, thus could not have willfully violated Agency's policy of reporting accidents/incidents. Additionally, Employee avers that Agency discriminated against him and violated his *Weingarten Rights.*[5]

Employee also takes exception to several procedural issues, including an additional charge levied by Agency.[6] Employee argues that Ms. Cusick, the original HO, did not provide a report and recommendation.[7] Employee notes that the report took into account his record over a period of three years prior to the matter at issue, in violation of DPM § 1601.7 [sic][8]

Finally, Employee contends that Agency failed to consider the *Douglas Factors* in making its decision to remove him, including failure to implement progressive discipline and consideration of the seriousness of the offense; the employee's position; length of service and prior work record; disparate treatment; consistency with agency penalty guide; the potential for rehabilitation; mitigating circumstances; and, adequacy and effectiveness of alternative sanctions.

Witness Testimony of Romeo Frazier

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[5]Employee's assertion that the Weingarten rights are "[t]he right of an employee to have union representation present during investigatory interviews" is not entirely accurate. The court in *Weingarten,* held "**the right arises only in situations where the employee requests representation**. In other words, the employee may forgo his guaranteed right." *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 257, 95 S.Ct. 959, 963 (U.S. 1975). (Emphasis supplied). Employee does not argue that he requested representation during the investigation. As well, Employee's argument regarding age discrimination will not be addressed by this AJ, as it falls outside of the parameters of OEA Jurisdiction. *See* OEA Rule 604.3 *supra*.

[6]*See Employee Exhibit 11, page 4*: "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations."

[7] Employee cites no case law supporting his contention that Agency violated DPM 1612.10 when HO Cusick failed to issue a written report and recommendation, although she never had opportunity to hear Employee's case, after she was replaced by HO Brown by Agency at Employee's behest.

8 Employee cites DPM § 1601.7. However, the correct section is DPM § 1601.6, which states, '… the final decision notice on a corrective or adverse action shall remain in the employee's Official Personnel Folder (OPF) for not more than three (3) years from the effective date of the action."

Mr. Frazier is a tow operator with DPW. He testified that he was charged with hitting a guard rail and leaving the scene, for which he received a fifteen day suspension. Mr. Frazier also testified that in his eighteen years of service under DPW, this was the only accident/incident that he was involved in.[9] *Tr:* 25 – 30.

Witness Testimony of Harold M. Mills (Employee)

Mr. Mills worked for DPW fleet service for 10 years. Employee stated that he did in fact get out of the truck to inspect the chains between the tow truck and the packer (which bind the vehicles together for towing purposes) and he had no knowledge of the accident or damage. He "got out and looked down the line of [his] truck and the vehicles that was parked to the side. [He] saw no damage at all." Employee spent approximately fifteen to twenty minutes unhooking the chains, leaving ample opportunity for the Elliot/Wilson employee to confront him. He was watching his mirrors the entire time that he was parking the vehicle. As to his statements acknowledging the accident, Employee stated that he was reluctant to contradict his superior and he did not believe the statement would be used in an adverse action against him. *TR: 152 – 162*.

FINDINGS OF FACT

1. Employee was hired on March 30, 1998, as a Mobile Equipment Servicer, Grade 5. Employee was promoted to Motor Vehicle Operator, Grade 6 in 2003, and Towing Operator, Grade 9, in 2006. *Agency Answer,* p. 1 (November 6, 2008).
2. Since 2005, Employee received exemplary ratings on his performance reviews and productivity, except in the area of safety, in which it was advised in one performance report that Employee needed improvement in the area of observing rules, including safety. *Employee Exhibit 12.*
3. In 2005, Employee was involved in a traffic accident. Employee was instructed by an Agency representative not to leave the scene until authorized by a supervisor. *TR*: *116*.
4. In 2006, Employee towed a broken down trash packer from an alleyway. The packer hit a residential fence. The resident witnessed the accident, and attempted to catch Employee's attention. Employee maintained that he was unaware of the accident, and did not notice the resident. Employee was identified by his truck number. An Agency's representative explained to Employee the accident/incident notification protocol. *TR*: *117 – 120*.
5. In 2006, Employee was involved in an accident in which he was towing a street sweeper and was cut off by a civilian motorist. Employee did call the police. He was subsequently instructed by the police to move from the intersection where the accident occurred. Employee was again instructed by Agency not to leave the scene of an accident until a DPW supervisor came to the scene to investigate. *TR*: 120 - 121.

[9] Although neither Frazier nor Counsel argues a discrepancy in DPW's management of employees (in this particular witness' testimony), it is implied that Frazier was called to testify in relation to Employee's claim of disparate treatment.

6. On December 28, 2007, Employee was involved in an accident while on duty at Elliot/Wilson in Maryland. Employee was towing a trash packer, and while attempting to back the packer into a parking space, the hopper on the packer became engaged with a scrap, or stake truck. The stake truck was pulled forward, causing it to collide with another vehicle. *TR*: *101 – 103*.
7. After the accident, Employee left the scene, without reporting the incident to Agency, contrary to Agency policy. *TR*: *160*.
8. William Murphy, an Elliot/Wilson employee, stated that he witnessed the incident and attempted to get the attention of the driver before he left the scene. Murphy then contacted DPW and spoke with Hagans. Murphy told Hagans that a DPW employee hit five vehicles in the Elliot/Wilson lot. *Agency Exhibit 6*.
9. Hagans immediately went to Elliot/Wilson to investigate. Upon inspection, Hagans determined that three of the vehicles Murphy alleged were damaged by Employee were in fact damaged some time prior to the incident. Hagans noted that the damaged areas of these three vehicles had rusted over. Murphy agreed with Hagans' findings. The stake truck was still impinging upon the Camry when Hagans investigated the accident. The orange paint was grazed off of the packer's hopper and orange paint visible on the rear of the stake truck. Hagans determined by the angle of the tire marks that the stake truck was dragged forward causing it to collide with the Camry. Hagans concluded that the damage was a result of Employee's conduct. *TR*: *94 – 103*.
10. Hagans took photographs of the scene and instructed Murphy to call the police. *TR: 96 – 97*.
11. Hagans then called Employee and instructed him to return to Elliot/Wilson. Hagans instructed Employee to complete a written statement concerning the incident and submit it to DPW's office by the end of the workday. *TR*: *107- 108*.
12. Employee told Hagans at the scene that he was unaware of the damage to the Camry. *TR*: *112*.
13. The police arrived on the scene but did not issue a citation to Employee. *TR*: *140*.
14. Employee signed a sworn affidavit on February 28, 2008, stating "[a]s I was pulling off to proceed to the parking spot, the Packer truck brushed the rear of a truck which was sitting on the lot. I got out of my truck and looked at the truck and saw no damage to the truck [sic]." *Employee Exhibit 8*
15. Employee later recanted his testimony, stating that he was simply basing his statements on Hagans' conclusions. *TR*: *162*.
16. On September 9, 2008, HO Brown issued a "Report and recommendation [sic] on Fifteen (15) Days Advance Written Notice of Proposal to Terminate Employment of Harold Mills." The report considered, *inter alia*, documentation from Employee's Official Personnel File ("OPF") dating from March 9, 2000; October 23, 2000; April 14, 2006; Arch 20, 2006; May 3, 2007; June 7, 2007; September 20, 2001; March 23, 2006; and July 22, 2006. The report also stated that the charges were based on "an on-duty employment related act or omission that the employee knew or should reasonably have known is a violation of the law." The report also includes the language "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." *Employee Exhibit 11*.

17. Agency, acting on the report issued by HO Brown, issued a notice of termination on September 9, 2008, with effective date of termination being September 12, 2008. *Agency Exhibit 3*
18. The following Exhibits were presented for consideration and admitted into the record:
    a. *Agency Exhibit 1*: Accident/Incident Notification Procedures, dated March 28, 2005.
    b. *Agency Exhibit 2*: Advance Notice of Proposed Removal, dated June 19, 2008.
    c. *Agency Exhibit 3*: Notice of Final Decision: Proposed Removal, dated September 9, 2008.
    d. *Agency Exhibit 4 a)*: Photograph of white tow truck.
    e. *Agency Exhibit 4 b)*: Photograph of orange packer truck's hopper.
    f. *Agency Exhibit 4 c)*: Photograph of packer truck.
    g. *Agency Exhibit 4 d)*: Photograph of damage/accident, showing stake truck impinging upon white Camry.
    h. *Agency Exhibit 4 e)*: Photograph of damage/close-up of stake truck's front right end impinging upon Camry's rear left panel.
    i. *Agency Exhibit 5*: Handwritten statement of Harold Mills, dated December 12, 2007 and statement of Frank Hagans, dated December 31, 2007.
    j. *Agency Exhibit 6*: Statement of [Elliot/Wilson employee] William Murphy, dated February 4, 2008.
    k. *Employee Exhibit 1*: Notice of Final Decision: Proposed Suspension [of Romeo Frazier], dated April 9, 2008.
    l. *Employee Exhibit 2*: Notice of Final Decision: Proposed Removal [of Lynn McGill], dated March 20, 2008.
    m. *Employee Exhibit 3*: Advanced Notice of Proposed Removal, dated February 14, 2008.
    n. *Employee Exhibit 4*: Advanced Notice of Proposed Removal – Amended, dated March 28, 2008.
    o. *Employee Exhibit 5*: Objection to the Proposed Removal, dated March 13, 2008.
    p. *Employee Exhibit 6*: Letter dismissing March 28, 2008, proposal of removal, without prejudice, dated June 2, 2008.
    q. *Employee Exhibit 7*: DC Personnel Regulations, Chapter 16.
    r. *Employee Exhibit 8*: Objection to the Proposed Removal, dated July 21, 2008.
    s. *Employee Exhibit 9*: Letter Re: June 19, 2008 Proposed Notice to Remove, dated July 2, 2008.
    t. *Employee Exhibit 10*: Letter Re: Harold Mills (appointing Ms. Brown as HO), dated July 21, 2008.
    u. *Employee Exhibit 11*: Report and Recommendation of Fifteen (15) Days Advance Written Notice of Proposal to Terminate Employment of Harold Mills, dated September 8, 2008.
    v. *Employee Exhibit 12*: Report of Performance Rating, dated May 17, 2007; Report of Performance Rating, dated June 22, 2006; Report of Performance Rating, dated June 23, 2005.
    w. *Employee Exhibit 13*: Initial/Incident Report, dated April 14, 2006, and statement of Harold Mills, dated March 21, 2006.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The agency must show by a preponderance of evidence that Employee committed "[a]ny on duty or employment-related act or omission that employee knew or should reasonably have known is a violation of the law."[10] The "burden of proof for removal is solely upon agency; however, agency need only prove that Employee *should have reasonably known* he was in violation of a law, to a degree, a reasonable mind would find more probably true than not.[11] This AJ is satisfied that Agency has met this threshold.

Hagans presented compelling testimony that his investigation yielded a conclusion that Employee was responsible for the accident. Hagans testified that Employee should have felt the "jerk pull," or resistance of the stake truck engaged with the packer. He also testified that Employee would have noticed as much if he had been watching out of his mirrors, as was Agency policy. Finally, Hagans testified that if Employee had dismounted the vehicle and checked the surrounding area, as Employee testified he did, he would have seen the damage to the vehicle. In Employee's own affidavit he affirms that he felt that "he might have brushed the 1964 Stake Body [sic]."[12] As a Tow Operator, Grade 9, with a Commercial Driver's License, Employee possessed the ability to safely operate such a vehicle, including a conscious awareness of his surroundings. OEA is satisfied that Agency has produced sufficient evidence to show that Employee most likely caused the accident, and should have been aware of the damage incurred as a result.

Additionally, Employee has been involved in several similar incidents within the past three years.[13] In these incidents he failed to either remain at the scene, or he failed to report the incident entirely. These past accidents go to establish a pattern of conduct on the part of Employee. Employee was made aware of Agency's policy for reporting all accidents/incidents by DPW's agents after each time he was involved in such an accident and through the memorandum circulated within the Agency. Given Employee's training, expertise, and ten years of experience working for the DPW, he should have known that fleeing the scene of an accident violated the law. Hence, Employee should have known that he was in violation of Agency policy.

Agency committed some procedural errors. Unless such errors have a "harmful" effect on Employee's position, OEA will not overturn the agency's decision. Harmful errors cause substantial harm or prejudice to the employee's rights, while "harmless"

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[10] DPM § 1603.2 I"… disciplinary actions may only be taken for cause." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 the 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.

[11] *Id.*

[12] *Employee Exhibit 8, page 4*

[13] See Findings of Fact ¶ 3, ¶ 4, and ¶ 5. *Supra*.

errors do not significantly affect the agency's final decision to take the action.[14] In this case, the AJ finds the errors committed by Agency to be harmless.

The notable errors committed by Agency are: 1) the HO considered the original notice, which was dismissed[15]; 2) The HO reviewed Employee's records as far back as 2000, in violation of DCPR 1606.2[16]; and, 3) The HO's report included the language, "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations."[17]

Despite these oversights, I conclude that the errors were not harmful because: 1) The original notice did not contain any information that was not included, or supplemented by the final notice; 2) Of the eight instances considered in Employee's record, only three were inadmissible because they were not within three years of the date of adverse action; consequently the cumulative effect of inadmissible incidents was not determinative; and, 3) Agency always maintained that Employee's conduct threatened the integrity of DPW.[18] The charges itself did not weigh in favor of or against Employee. Upon review, these errors' overall effect is insignificant.[19]

An agency may be called upon to prove that it considered the *Douglas Factors*, or considerations that must be deliberated in merit-based governmental employment actions.

> Not all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case.[20]

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[14] "[T]he Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean: Error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." OEA Rule 632.4 D.C. Reg. 9317 (1999).

[15] *See Employee Exhibit 11, page 2*, under "Evidence in Support of Removal," ¶ 3.

[16] See *Employee Exhibit 11, page* 2-3, ¶ 9, ¶ 10, ¶ 14, citing incidents in 2000 and 2001. Consideration of these incidents is disallowed under DPM § 1606.2, which states, in an agency's determination of an appropriate disciplinary penalty, prior adverse actions "may be considered for not longer than three (3) years from the effective date of the action."

[17] *Employee Exhibit 11, page 3. See also* DPM 1603.3(f) in which the language of the additional charge can be found, and footnote 4 *supra*.

[18] Note Douglas Factor (8): the notoriety of the offense or its impact upon the reputation of the agency. *Douglas v. Veterans Admin.* 5 M.S.P.B. 313, 333, 5 M.S.P.R. 280, 306 (MSPB,1981).

[19] Employee's contention that the amendment to the original notice added a criminal charge to the original notice is immaterial because the addition of the sentence stating "leaving the scene of the accident, you violated D.C. Official Code § 50-2201.05, Fleeing the scene of accident," merely specified what law Employee either knew or should reasonably have known he violated. Regardless, the argument is irrelevant because the original and amended notices where summarily dismissed.

[20] *Douglas v. Veterans Admin. Supra.*

William O. Howland, Agency's Director, responsible for the decision to release Employee, testified that he considered essentially all of the *Douglas Factors*. Howland stated that he weighed, among other things, the seriousness of the offense, the integrity of the department and the district government, and Employee's past disciplinary record. *TR*: *34*. This AJ finds that Agency did not err in balancing the appropriate factors in considering Employee's removal.

In review of Agency's decision to terminate Employee, OEA may determine the appropriateness of the penalty the employee underwent. This court will not substitute its judgment for that of the agency if it finds the basis of the charges(s) sustained, that the penalty is within the range allowed by law, regulation, or guideline, and is not clearly an error of judgment.[21] In such cases, OEA may look to the Table of Appropriate Penalties ("the Table"), 6 DCMR, Chapter 16 of the DPM, General Discipline and Grievances.

The Table sets out the suitable adverse action under the circumstances. Employee's negligent operation of a government vehicle falls under DPM 1619.1(5)(b), for 'misuse of resources or property.' The penalty for a first time offense ranges from a thirty-day suspension up to removal. In *Douglas*, the court held "certain misconduct may warrant removal in the first instance." In considering the nature of Employee's offense, especially one regarding public safety, this AJ finds Agency acted within the confines of the law, regulations, and employed sound judgment in its determination to remove Employee.

When assessing Agency's judgment, OEA will uphold an agency decision unless it is unsupported by a preponderance of the evidence, there was a harmful procedural error, or it was not in accordance with law or applicable regulations.[22] In this case, Agency was able to establish cause by a preponderance of the evidence. The procedural errors did not have a substantial affect on Agency's decision to impose adverse action, and the penalty enacted by Agency is in accordance with the applicable laws and regulations. For the aforementioned reasons, Agency's decision should be upheld.

ORDER

This matter having been fully considered, it is hereby ORDERED that Agency's action of removal for cause is UPHELD.

FOR THE OFFICE:

/ S /
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

[21] OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).
[22] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 -1010 (D.C.,1985).