

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections may be made prior to publication. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
COLLINS THOMPSON) OEA Matter No. 1601-0219-04
Employee)
)
v) Date of Issuance: February 13, 2006
)
DC FIRE & EMS DEPARTMENT) Muriel A. Aikens-Arnold
Agency) Administrative Judge
_____)

Andrea G. Comentale, Assistant Attorney General
Emory C. Crawford, Employee's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 15, 2004, Employee, a Support Services Assistant, DS-303-6, filed a Petition for Appeal of Agency's action to remove him effective August 21, 2004 for: Incompetency; Failure to Perform an Essential Function of [his] Position. On October 15, 2004, this Office notified Agency regarding this appeal and instructed Agency to respond no later than November 15, 2004. Agency responded as instructed.

This matter was assigned to the undersigned Judge on April 19, 2005. On June 2, 2005, an Order Convening a Prehearing Conference was issued

scheduling said conference on June 28, 2005. On June 9, 2005, Agency's representative filed a request to postpone the prehearing conference for business reasons.¹ On June 16, 2005, an Order to Continue the Prehearing Conference was issued rescheduling said meeting on July 12, 2005. That meeting was held during which issues were identified, stipulations were made, witnesses were discussed, and a date for an evidentiary hearing was set. On July 13, 2005, an Order Convening a Hearing was issued scheduling said hearing on October 4, 2005.² The hearing was held as scheduled and a written transcript was produced.³ On November 15, 2005, an Order Closing the Record was issued notifying the parties that the record in this matter would close effective at close of business on December 5, 2005.⁴ Accordingly, the record is closed.

JURISDICTION

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

ISSUES

- 1) Whether the agency action was taken for cause; and
- 2) If so, whether the penalty was appropriate under the circumstances.

¹ Employee's representative made no objection.

² Employee's representative subsequently made a verbal request that the Fire Chief appear as a witness to testify regarding his decision to remove Employee.

³ On or about 10/31/05, the parties were notified to pick up their individual copies of the transcript no later than 11/4/05 after which both parties were given 30 days to submit closing arguments.

⁴ Both parties filed closing arguments as directed.

FINDINGS OF FACT

Statement of Charges.

Employee was notified by letter dated February 9, 2004 of a proposal to remove him from his position based on the following cause and specifications:

Incompetency: Failure to perform an essential function of your position.

The details in support of this proposed action are as follows:

As a Support Services Assistant, you are primarily responsible for driving a Department vehicle on a predetermined mail route to collect and deliver mail to D.C. government offices and agencies throughout the city. However, the Department suspended your driving privileges on August 18, 2003 because of excessive accidents. As a result, you have been unable to perform an essential function of your position.

A review of your driver safety record was ordered to determine whether the Department should restore your driving privileges. The review was completed on January 15, 2004. The report found that you have been involved in seven accidents since your hire on February 14, 2000, six of which were preventable and caused by your negligence. It is also found that you were issued four tickets and had your driver's license suspended for nonpayment of a ticket. Your driver safety record is enumerated below:

[Six vehicle accidents and one moving violation, for which Employee was issued tickets by the MPD, were cited in the notice of charges. Further, Employee's driver's license was withdrawn (for failing to pay a ticket issued in one of the six accidents), but was subsequently restored.]⁵

⁵ See Agency Exhibit #3. The vehicle accidents, which occurred on 4/25/00, 12/20/00, 2/2/02, 3/14/02, 9/4/02, and 8/18//03, were cited in paragraphs numbered 1, 2, 4, 5, 7 and

The report also indicated that after each accident, your driving privileges were suspended and you were sent for driver re-qualification training at the Department's Training Academy. After successfully completing the course, you were reinstated to driving. However, after your last accident on August 18, 2003, which could have resulted in serious injury or death to the occupants, you were denied recertification pending a review of your driver safety record.

The report concluded that you have consistently failed to make improvements in operating a Department vehicle in a safe manner during the performance of your duties and recommended that you be removed from driving permanently.

Based on the evidence of record, you have demonstrated that you are incapable of operating a government vehicle in a safe manner. Your lack of driving skills is [a] very serious offense in that it has a direct relationship to the performance of your duties as a messenger. Because of your high accident rate and potential liability to the Department, the Department no longer has the confidence in your ability to perform your assigned duties. Thus, your removal is proposed.⁶

8. Based on the stipulation made between the parties, prior to the hearing, that Employee was involved in six (6) vehicle accidents, this Judge found it unnecessary to repeat the specifics herein. (See Hearing Transcript, hereinafter referred to as "Tr." at pp. 7-8.) In addition, as cited in paragraph number 2, Employee was issued a speeding ticket on 8/21/00 and received 3 points against his license; and paragraph number 6 reflects that Employee's driver's license was withdrawn on 5/2/02 for failing to pay a ticket he received on 3/14/02.

⁶ The remainder of the proposed notice is omitted as it contains procedural rights that are not at issue herein.

On August 6, 2004, a Final Decision was issued by Adrian H. Thompson, Fire and EMS Chief to remove Employee effective August 21, 2004.⁷

Employee's Position.

In his closing argument, Employee asserts: 1) that although Employee had six (6) accidents, the training instructors repeatedly reinstated him to driving status; 2) following his placement in a non-driving status after the third or fourth accident, someone from Chief Thompson's office called the training instructors to reinstate Employee to a driving status; and 3) that Agency failed to show when the charges were initiated other than its receipt of " . . . the history of his driving record from the office of risk management some five months after his last accident." Further, Employee contends that "the agency must take responsibility for their actions by ordering [Employee] to drive after all parties involved other than the office of the Fire Chief saw a problem with his driving skills. Mr. Thompson was seen as a valued employee and would do a better job in a non-driving status . . ." Therefore, Agency should reinstate Employee in a non-driving status.

Agency's Response.

Agency asserts that its action to remove Employee was taken for cause and it was the appropriate penalty under the circumstances. Specifically, Agency cites hearing testimony from the proposing and deciding officials as well as Employee's witness, Lieutenant Robert Washington (formerly Chief of Risk Management), all of whom (Agency contends) support its position.⁸

⁷ Chief Thompson stated, in his decision, that he had reviewed the documents pertaining to Employee's adverse action (including a written response filed on Employee's behalf by Mr. Crawford) as well as the findings and recommendation of the Hearing Officer, Alicia Washington, Esq.

⁸ See Agency Brief (hereinafter referred to as "AB") at pp. 1-2; Agency states that all three witnesses testified regarding the fact that Employee's position requires driving a department vehicle and that his accident history warranted his removal from driving duties.

Summary of Relevant Testimony.

Agency's first witness was Kenneth Ellerbe, Deputy Fire Chief, who testified that Employee's position requires, among other things, that he drive a department motor vehicle to pick up and deliver mail, office supplies, and personnel; and that, based on a department report detailing Employee's driving record, including a high number of vehicle accidents in three years, he recommended Employee's removal.⁹

On cross-examination, Deputy Chief Ellerbe testified that he did not know whether the Chief had any idea when officials initiated the removal based on Employee's accident record as reflected in the January 15, 2004 memorandum.¹⁰

Agency's second witness was Chief Adrian Thompson, who testified: 1) that, as part of his essential duties, Employee was required to drive to pick up and deliver mail throughout the department; and 2) that he made the final decision to remove Employee based on the record which included the hearing officer's report, the numerous accidents, and the fact that Agency and the city were at great liability.¹¹

On cross-examination, Chief Thompson testified that, at some point after having an unspecified number of accidents, Employee was placed in a non-driving position "until we get the issue about his accidents resolved to some degree."¹²

⁹ See Agency Exhibits 1, 2, and 3; also Tr. at pp.20-23.

¹⁰ See Tr. at p. 27, Agency Exhibit 2, and Employee's Closing Argument. Employee's representative argues that Agency cannot show when the removal charges were initiated, but for, receipt of the aforementioned memo "some five months after his last accident." and that Agency, therefore, is at fault for "ordering [Employee] to drive after all parties involved other than the office of the Fire Chief saw a problem with his driving skills." The latest vehicle accident was on 8/18/03.

¹¹ See Tr. at pp. 30-31; Employee initially requested Chief Thompson, who first testified as the deciding official. Employee was then given the opportunity to question him.

¹² See Tr. at pp. 32-33.

Agency's third witness was William Fitzgerald, Assistant Fire Chief, who testified that he previously served as the Chief, Office of Risk Management. He explained: 1) procedures for accident investigations; 2) that remedial training is provided depending on the severity of the accident; and 3) that, through cooperation with the Safety Office, ". . . the Risk Management chief will sign off on that to bring the person back up to driving status." He further testified, based on his familiarity with Employee's essential job duties (which required him to deliver mail to department locations throughout the city) and Employee's driver safety record, that Employee should not be driving a Department vehicle.¹³

On cross examination, Assistant Chief Fitzgerald testified that he had no recollection of anyone being terminated due to driving accidents.¹⁴

Lieutenant Robert Washington testified (on Employee's behalf) that when he was the Administrator for Agency's driver training program, he recertified Employee ". . . a couple of times . . ." for driving; however, he also recommended removing Employee from driving ". . . to cover me and the driver training program . . ."¹⁵

On cross-examination, Lieutenant Washington testified that he was the Administrator between February 2002 and July 2004.¹⁶

Employee testified that, when his mail clerk position was reassigned

¹³ See Tr. at pp. 35-38.

¹⁴ See Tr. at p. 39.

¹⁵ See Tr. at pp. 42-43. This witness stated that he received phone calls from the Fire Chief after which he made said recommendation "in lieu of that and the fact that we had accidents involving department vehicles as well, and they were, you know, what are you going to do about this; we need to reduce the accident rate. And so, like I say, to cover me . . . I made that recommendation." For clarification, it is noted by the Judge that this witness did *not* testify regarding any specific instruction or otherwise, given by the Chief. Rather, the witness implied that he wrote that recommendation to protect himself.

¹⁶ See Tr. at p. 44.

to the Support Services Assistant position, additional tasks were assigned in different areas so that he was performing more than driving duties; and when he had more than one accident, he was not allowed to drive, and another employee was assigned to drive him around so that he could perform his [mail delivery] duties.¹⁷ Employee next testified that his supervisor, Gary Garland sent him to work at the warehouse and told Robert Morton to keep him there due to his driving record; “[M]y ability to work and paint and do all the other things I was good at, but driving wasn’t one of them.”¹⁸

Employee further testified that, while on detail after the third accident, Chief Thompson ordered him back [to his driving duties] “. . . even with my record, liability and all,” even though several officials signed a memorandum, written by Lieutenant Washington, to remove Employee from driving duties.¹⁹ Employee had no knowledge of any employee being terminated for having driving accidents.²⁰

On cross-examination, Employee testified that, as a mail clerk, he was required to drive every day.²¹

¹⁷ See Tr. at pp 46-47. Employee referred to several department officials who, at various times, assigned him to non-driving duties.

¹⁸ See Tr. at p. 51. Robert Morton was listed as a witness for Employee, but he did not appear.

¹⁹ See Tr. at pp. 52-53. Employee stated that this happened between March and May, 2002.

²⁰ See Tr. at pp.53, and 69-70; Agency File at Tab 15. Employee also disputed the infraction cited in paragraph 6 regarding the suspension of his driver’s license. However, there was no testimony from agency witnesses thereto. Thus, paragraph 6 will *not* be considered in the determination of cause.

²¹ See Tr. at pp. 64 and 68; and footnote 5. Employee testified on redirect examination that Chief Miller’s written evaluation for the rating period 4/1/02 to 3/31/03 reflects improvement in Employee’s driving record and that he is a valued employee. Nevertheless, the record reflects, conversely, that Employee was involved in a vehicle accident on 9/4/02 during the aforementioned rating period and that accident was one of the six (6) to which the parties stipulated prior to the hearing .

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Such regulations were published at 47 D.C. Reg. 7094 *et seq.* (September 1, 2000).²² Here, Employee was removed for Incompetence which is one of the causes set forth therein.

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. R g. 9317 (1999).

The agency's burden of proof is met when an employee admits to the factual allegations underlying the charge. Here, Employee admits his involvement in the six (6) vehicle accidents cited in paragraphs numbered 1, 2, 4, 5, 7 and 8.²³ Therefore, Agency's action was taken for cause.

²² Section 1603.3 set forth the new definition of cause which, in pertinent part, is as follows: [A]ny 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. This definition includes, without limitation . . . incompetence. . .

²³ There was no testimony presented by Agency regarding the speeding ticket cited in paragraph numbered 3 and the license withdrawal cited in paragraph numbered 8. Therefore, those allegations were *not* supported by the evidence and *not* considered in the determination of cause. However, based on the prominence of the at-fault vehicle accidents, the proof of those latter allegations is far less significant and make no difference in Agency otherwise meeting its burden of proof in this matter.

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.” *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). 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.” *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

The Support Services Assistant position, to which Employee was assigned, required, among his major duties, that: 1) he drive the Department’s motor vehicle to provide transportation for the staff and to provide delivery services to and from other District Government offices and agencies; and 2) pick up office supplies and equipment and deliver them to other offices in the Department. Such work is performed both in an office setting and outside of the office while driving, delivering, and distributing mail, materials, and equipment.²⁴

The underlying bases of Employee’s arguments are that he is a “valued employee” and should be reassigned to a position that does *not* require him to drive in the performance of his duties. From Employee’s perspective, “. . . Agency must take responsibility for their actions by ordering [Employee] to drive after all parties involved other than the office of the Fire Chief saw a problem with his driving skills.”²⁵ As will be explained below, Employee’s contentions are without merit.

In response to Employee’s arguments, this Judge finds the following. First, the fact that Employee was repeatedly reinstated to driving duties after completing remedial training was, under the circumstances, a means of affording Employee an opportunity to improve his driving record and

²⁴ See Agency Exhibit 1, Position Description.

²⁵ See Employee’s Closing Argument.

consistent with department procedures.²⁶ Second, the implication that Chief Thompson (or someone from his office) directed officials to reinstate Employee to driving duties following several accidents, even if that were true, does not invalidate the fact that Employee's unsafe driving record ultimately warranted his removal. Moreover, the documentary record reflects that a consensus existed among department officials, after the sixth accident, that Employee should no longer perform driving duties. Even Employee testified that driving was not one of the tasks he performed well.²⁷ Third, Employee does not show that the initiation of the adverse action approximately five (5) months after Employee's last accident was, in any way, procedurally harmful, prejudicial, or unreasonable. Nor does this Judge otherwise find it so.²⁸

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Agency, to no avail, repeatedly attempted to correct Employee's behavior, which did not improve after remedial driver training. Moreover, Agency has a right to expect that its employees operate department vehicles safely on city streets. Based on a review of the entire record, this Judge concludes that Agency met its burden of proof, that the penalty is appropriate to the seriousness of Employee's actions, and is clearly not an error in judgment. Therefore, this Judge concludes that Agency's action to remove him from his position should be upheld.

²⁶ See footnote 13 which cites Chief Fitzgerald's testimony.

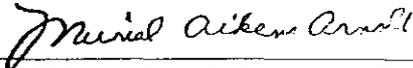
²⁷ See footnote 18.

²⁸ See Agency Exhibits 2 and 3. In fact, Chief Damian Wilk, Professional Standards Officer (PSO) opined, in his 1/15/04 memorandum (regarding Employee's 8/18/03 vehicle accident) that remedial driver training will *not* correct the situation and that Employee "clearly should not drive District vehicles." The PSO further indicated that he had spoken with several Department officials and reviewed written reports from the Safety and Risk Management offices, as well as, the Training Academy (including Employee's five-year driving record). As a caveat, Chief Wilk stated that Employee was assigned to the Professional Standards Office in 7/03 and that he (Wilk) was assigned to that office in 11/03 after which he spoke with Employee and Battalion Fire Chief Stephen Dove, who was Employee's supervisor at the time of the 8/18/03 accident.

ORDER

It is hereby ORDERED that the removal is UPHELD.

FOR THE OFFICE:



MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge