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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0115-11
ERIC WASHINGTON,	)	
Employee	)	
	)	Date of Issuance: February 11, 2013
v.	)	
	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
_____	)	Arien P. Cannon, Esq.
Eric Washington, Employee, <i>pro se</i>	)	Administrative Judge
Dionne P. Hayes, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On June 6, 2011, Eric Washington (“Employee”) filed a Petition for Appeal with the Office Employee Appeals (“OEA” or “Office”) challenging the Department of Youth Rehabilitation Services’ (“Agency” or “DYRS”) decision to terminate him. At the time of his termination, Employee was a Youth Development Representative in the Department of Youth Rehabilitation Services.<sup>1</sup> Employee was terminated for “[a]n on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations: neglect of duty, incompetence, and misfeasance;” and “sleeping on the job.”<sup>2</sup> The effective date of Employee’s termination was May 6, 2011. Agency filed a Motion for Enlargement of Time to file its Answer on June 30, 2011; subsequently, Agency filed its Answer to Employee’s Petition for Appeal on July 25, 2011. I was assigned this case on September 10, 2012.

<sup>1</sup> See Agency’s Answer (July 25, 2011).

<sup>2</sup> See Notice of Final Decision on Proposed Removal (April 22, 2011).

Agency's Answer to Employee's petition set forth arguments as to why Employee's removal was appropriate. During a Status Conference held on December 14, 2012, Employee asserted that his removal was not appropriate under the circumstances. Based on the counter-arguments by Employee at the Status Conference, a Post Status Conference Order was issued on December 17, 2012. This Order allowed Employee to submit a written brief countering Agency's contention that the penalty of removal was appropriate under the District's laws and regulations. This Order also allowed Employee to address any other pertinent issues he wished to raise. Employee submitted his brief on January 14, 2013. Agency did not file a response to Employee's brief.

### **JURISDICTION**

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

### **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" 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 629.3 *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**

1. Whether Agency had sufficient cause for disciplinary action.
2. Whether Agency's removal of Employee was an appropriate penalty.

### **FINDINGS OF FACT, ANALYSIS AND CONCLUSION**

Employee received an Advance Written Notice of Proposed Removal on March 2, 2011.<sup>3</sup> An Amended Advance Written Notice of Proposed Removal was issued to Employee on March

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<sup>3</sup> See Acknowledgement of Receipt for Advance Written Notice of Proposed Removal.

10, 2010, which amended the Hearing Officer assigned to conduct the administrative review of the proposed removal action.<sup>4</sup> At this time, Employee was placed on administrative leave.

Agency issued a Notice of Final Decision on Proposed Removal on April 22, 2011. The final decision was made by Agency after a review of the advance written notice and the Hearing Officer's *Written Report and Recommendation*.<sup>5</sup> Employee's removal, which was proposed in accordance with section 1608 of Chapter 16 of the D.C. Municipal Regulations, and was based on the following causes:

1. An on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations: neglect of duty<sup>6</sup>, incompetence<sup>7</sup>, and misfeasance<sup>8</sup>; and
2. An on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: Specifically, any act that might result in or create the appearance of affecting adversely the confidence of the public in the integrity of the government, to include violation of the DYRS Employee Conduct policy, violation of the DYRS policy, "Youth Supervision and Movement," and any other on-duty or employment-related reason for corrective or adverse action that is not "de minimis"—to include sleeping on the job.<sup>9</sup>

More specifically, on October 27, 2010, while making rounds on the first floor of the Youth Services Center, Deputy Superintendent, Charlotte Richardson ("Richardson"), noticed that Employee appeared to be asleep. At the time, Employee was responsible for the supervision of three newly admitted youths who were placed under twenty-four (24) hour observation. Richardson observed Employee for several minutes and did not see him move from his sleep-like position. Richardson contacted Employee's supervisor, Linda Holmes ("Holmes"), who also observed Employee in a sleeping posture for nearly two minutes. While Holmes and another employee of Agency escorted a youth to a room nearby where Employee was working, Employee remained in the same sleep-like position undisturbed, with his eyes closed and head bowed. Holmes also entered Employee's work area and did not observe any reaction from Employee, who remained in a sleep-like position as she approached. Eventually, Employee was awakened by the sound of a child knocking from within his room. Employee was then observed raising his head and opening his eyes, which appeared to be very red, as if he were asleep.<sup>10</sup>

### **Whether Agency had sufficient cause for disciplinary action**

#### **An on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations: neglect of duty, incompetence, and misfeasance.**

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<sup>4</sup> See Advance Written Notice of Proposed Removal.

<sup>5</sup> See Notice of Final Decision on Proposed Removal (April 22, 2011).

<sup>6</sup> D.C. Mun. Regs. Subt. 6-B § 1603(f)(3)

<sup>7</sup> *Id.* at § 1603.3(f)(5)

<sup>8</sup> *Id.* at § 1603.3(f)(6)

<sup>9</sup> D.C. Mun. Regs. Subt. 6-B § 1619.1(7)

<sup>10</sup> See Amended Hearing Officer Advance Written Notice of Proposed Removal (March 10, 2011).

### Neglect of duty

The District's personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.<sup>11</sup> Here, Employee was responsible for the safety and security of three youths who were on twenty-four (24) hour observation watch. Employee was required to perform periodic safety checks on these youths pursuant to the Agency's Suicide Prevention for Youth Policy and Procedure Manual and to remain alert to any safety or security issues. While Employee was asleep, he failed to provide "eyes-on" supervision, make logbook entries, or conduct security checks of the youths and their rooms.<sup>12</sup> Thus, Employee failed to carry out his assigned duties as a Youth Development Representative. Accordingly, Employee's behavior violated Agency's and the District government's policy on safety precautions because he was inattentive and failed to ensure that the three youths under his supervision were safe and secure. Based on the aforementioned, I find that Agency had sufficient cause to take disciplinary action against Employee for neglect of duty.

### Incompetence

The District's personnel regulations provide that incompetence includes careless work performance and serious or repeated mistakes.<sup>13</sup> Here, again, Employee was responsible for the safety and security of three youths who were on twenty-four (24) hour observation watch. Although Employee was required to perform periodic safety checks on the youths under his supervision, he was unable to do so because he was asleep. Given Employee's responsibility as a Youth Development Representative, falling asleep on the job is a serious mistake that demonstrates the incompetence of being able to carry out the responsibilities of the position. It also demonstrates a careless work performance. Accordingly, I find that Agency had sufficient cause take disciplinary action against Employee for incompetence.

### Misfeasance

The District's personnel regulations provide that misfeasance includes careless work performance.<sup>14</sup> By falling asleep while tasked with providing "eyes-on" supervision to youths who were on twenty-four (24) hour supervision exhibits a careless work performance. The ability to provide adequate supervision in an environment such as Agency's is a pivotal aspect of the job. Thus, I find that Agency had sufficient cause to take disciplinary action against Employee for misfeasance.

### **An on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious:**

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<sup>11</sup> See D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

<sup>12</sup> See Amended Hearing Officer Advance Written Notice of Proposed Removal.

<sup>13</sup> See D.C. Mun. Regs. Tit. 16 § 1619.1(6)(e)

<sup>14</sup> See D.C. Mun. Regs. Tit. 16 § 1619.1(6)(f)

**Specifically, any act that might result in or create the appearance of affecting adversely the confidence of the public in the integrity of the government, to include violation of the DYRS Employee Conduct policy, violation of the DYRS policy, “Youth Supervision and Movement,” and any other on-duty or employment-related reason for corrective or adverse action that is not “de minimis”—to include sleeping on the job.**

D.C. Code of Municipal Regulations, Title 16, Section 1619, provides in the Table of Appropriate Penalties that “sleeping on the job” is not “de minimis” and adverse action may be warranted.<sup>15</sup> Also, Section 2 of Agency’s Youth Supervision and Movement Policy requires staff to maintain ongoing visual contact with all youth under their supervision.<sup>16</sup> Here, Employee failed to provide “eyes on” supervision of youths who were on twenty-four (24) hour observation and failed to conduct the require check-ups on the youths. These failures created the potential for serious consequences to the youths under Employee’s supervision.

Employee acknowledges in his Petition for Appeal that he “dozed off” while on duty. During the Status Conference, Employee maintained and accepted responsibility for his actions of sleeping on the job. I find that sleeping on the job is not *de minimis* in nature and adverse action was warranted in this matter. Additionally, I find that the adverse action was not arbitrary or capricious. Accordingly, I find that Agency had sufficient cause for termination on the charge of an on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.

### **Whether the penalty of removal is within the range allowed by laws, rules, and regulations of the District**

Agency has the primary discretion in selecting an appropriate penalty for Employee’s conduct, not the undersigned.<sup>17</sup> This Office may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency’s judgment clearly exceeded limits of reasonableness.<sup>18</sup> When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.<sup>19</sup>

The Merit System Protection Board (MSPB) has outlined twelve factors that assist an agency in determining the appropriateness of a sanction.<sup>20</sup> In applying the factors, the MSPB

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<sup>15</sup> See D.C. Mun. Regs. tit. 16 § 1619.1(7).

<sup>16</sup> See Exhibit 3 in Agency’s Answer.

<sup>17</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

<sup>18</sup> See *Id.*

<sup>19</sup> See *Id.*

<sup>20</sup> See *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). Those twelve factors, which are not exhaustive, 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;

cautioned that “[n]ot 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 [employee’s] favor while others may not or may even constitute aggravating circumstances.” Hence, “[s]election of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case.

In the instant case, Agency considered the relevant factors and the possible mitigating circumstances, including: (1) the seriousness of the offense; (2) Employee’s type of employment; (3) the erosion of supervisory confidence; (4) the notoriety of the offense and potential effect on the reputation of the Agency; and (5) the notice of warnings Employee received about the conduct.<sup>21</sup> A review of Employee’s personnel file revealed the following incidents which occurred prior to the actions concerning the instant matter:

1. On November 5, 2009, Employee was issued a Letter of Admonition as a result of a substantiated Project Hands Report for a violation of the “use of Physical Restraints” policy.<sup>22</sup>
2. On August 11, 2010, Employee was issued a Notice of Final Decision for a nine (9) day suspension based on nineteen (19) days in which Employee was Absent Without Leave (“AWOL”) and two days in which Employee was in Leave Without Pay status.<sup>23</sup>
3. On October 15, 2010, Employee was issued a Letter of Admonition for time and attendance issues.<sup>24</sup>

These revelations demonstrate a pattern of progressive discipline taken by Agency in response to Employee’s actions.

Under the Table of Appropriate Penalties, set forth in D.C. Mun. Regs. Tit. 16 § 1619.1(6), an appropriate penalty for: (1) a first time offense for neglect of duty ranges from reprimand to removal; (2) a first time offense of incompetence is a suspension for five (5) to fifteen (15) days; and (3) a first time offense of misfeasance is a suspension for five (5) to fifteen

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(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 supervisors' 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 offenses;

(7) consistency of the penalty with any applicable agency 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 were 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 the employee or others.

<sup>21</sup> See Agency’s Answer to Employee’s Petition for Appeal (July 25, 2011).

<sup>22</sup> See Agency’s Answer to Petition for Appeal, at 5 (July 25, 2011).

<sup>23</sup> See *Id.*

<sup>24</sup> See *Id.*

(15) days; (4) a first time offense of “any other on duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious,” which includes sleeping on the job, ranges from reprimand to suspension for up to 15 days.<sup>25</sup> Here, Agency charged Employee with the four (4) offenses mentioned above. The first three offenses amount to an on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations. Based on these charges, Agency elected to remove Employee from his position.

In his legal brief addressing the appropriateness of the penalty, Employee asserts that this is his first offense of sleeping on the job. While this may be true, sleeping on the job amounts to neglect of duty since Employee failed to observe safety precautions regarding supervising the youths who were on twenty-four (24) hour observation watch. Considering Employee’s entrusted position in supervising newly admitted youths in the juvenile justice agency, sleeping on the job also demonstrated careless and negligent work habits. As noted above, a first time offense of neglect of duty ranges from reprimand to removal. Here, Agency elected to remove Employee, within the provided guidelines. This Office may not amend Agency’s penalty unless it failed to weigh relevant factors and the penalty exceeded reasonableness.<sup>26</sup> It is clear that Agency took several factors into consideration when issuing its penalty. I find that the removal was reasonable in light of the four charges against Employee and the progressive discipline reflected in Employee’s personnel file. Accordingly, I find that the penalty issued to Employee was appropriate.

#### ORDER

Based on the foregoing, it is hereby ORDERED that Agency’s decision to terminate Employee is upheld.

FOR THE OFFICE:

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Arien P. Cannon, Esq.  
Administrative Judge

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<sup>25</sup> See D.C. Mun. Regs. Tit. 16 § 1619.1(7)

<sup>26</sup> See *Stokes*, 502 A.2d 1006 (D.C. 1985).