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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JOHN BARBUSIN JR.,)	
Employee)	OEA Matter No. 1601-0090-18
)	
v.)	Date of Issuance: January 15, 2020
)	
D.C. DEPARTMENT OF GENERAL)	
SERVICES,)	
Agency)	MICHELLE R. HARRIS, ESQ.
)	Administrative Judge
_____)	
Talon R. Hurst, Esq., Employee Representative)	
C. Vaugh Adams, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 14, 2018, John Barbusin Jr. (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of General Services’ (“Agency” or “DGS”) decision to terminate him from service from his position as a Supervisory Special Police Officer. The effective date of the termination was September 7, 2018. Agency’s filed its Answer on October 17, 2018. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on December 5, 2018. On December 12, 2018, I issued an Order convening a Prehearing Conference in this matter for January 15, 2019. Prehearing statements were due on or before January 8, 2019. On December 28, 2018, Agency filed a Motion for an extension of time to respond to discovery. I issued an Order granting Agency’s Motion and rescheduled the Prehearing Conference to February 4, 2019.

On January 31, 2019, Employee filed a Motion for Sanctions against Agency for failure to comply with discovery request. On February 4, 2019, a Prehearing Conference was held in this matter. A Post Prehearing Conference Order was issued the same day and parties were required to complete all outstanding discovery as discussed during the Prehearing Conference. Amended Prehearing Statements were due on or before March 8, 2019, and a Status Conference was scheduled for March 15, 2019. During the March 15, 2019 Status Conference, the undersigned determined that an Evidentiary Hearing was warranted in this matter. As a result, on March 15, 2019, I issued an Order Convening an Evidentiary Hearing for June 4, 2019. On April 30, 2019, Employee filed a Motion to Compel Discovery. On May 16, 2019, Agency submitted its Opposition Motion. As a result, on May

17, 2019, I held a Telephonic Status Conference to address the issues noted in the parties' submission. On that same day, I issued an Order on Employee's Motion to Compel and required Agency to respond accordingly. The Evidentiary Hearing was held on June 4, 2019. On June 26, 2019, I issued an Order requiring the parties to submit their closing arguments on or before July 31, 2019. On July 8, 2019, Employee filed a Motion for Corrections to the hearing transcript. On July 22, 2019, I issued an Order granting Employee's Motion. On July 31, 2019, Agency filed a Motion for an extension of time in which to file closing arguments. Employee did not oppose Agency's request. On August 1, 2019, I issued an Order requiring closing arguments be submitted on or before August 5, 2019. Both parties complied with this Order. 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 Agency had cause to take adverse action against Employee; and
2. If so, whether the penalty of termination was appropriate under the circumstances and administered in accordance with all applicable laws, rules and 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 TESTIMONY

An Evidentiary Hearing was convened in this matter on June 4, 2019. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during this matter to support their positions. I was able to observe and make credibility determinations for witnesses.

*Agency's Case-In-Chief*Joseph Brown ("Brown") Tr. Pages 38 – 80

Brown works at Agency as a Captain in the Protective Services Division and has been with Agency approximately nine (9) years. Brown explained that some of his responsibilities include working assisting the training division if there were issues with scheduling. Brown testified that the Protective Services Division is the security and law enforcement section for Agency, and its mission is to enforce laws and provide security in District government buildings.

Brown explained that during the time of the incident with Employee that Greer Gillis was the director of Agency. Brown indicated that communications in the Patrol Services Division ("PSD") were done through email and that all officers had "dc.gov" email accounts. Brown testified that Employee had an email account in 2018. Brown explained that in an email sent in February 2018 to all PSD officers, he explained the process and approval chain for members to sign up for training. Brown said he sent the email because there had been some confusion about the process. Brown testified that he consulted with Robert Carter, who was the acting associate director of PSD at the time, and that Carter approved this email. Brown said he had reason to believe that the email was received because they received submissions from members after it was sent. Brown explained that for training approval a member had to notify their immediate supervisor because that supervisor was responsible for scheduling work hours. After that, the supervisor was to forward the request for training to the captain of the section. At this time, Brown explained that the captain was Paula Preston. Brown said that he was not aware of any policy that allows a PSD officer to disregard an instruction from a supervisor sent by email.

Brown testified that at the time of the February 22, 2018 email, he was located at the PSD 64 New York Avenue (PSD Headquarters) office, and that Employee was also working at that location. Brown explained that Lieutenant Mark Smith was the training lieutenant and his role was to assist with training at PSD. Brown testified that it was his understanding that Mark Smith did not have authority to approve training for Employee. Brown testified that Captain Preston asked him if he had approved training for Employee and he said "no." Brown could not recall if he knew anything about the training Employee had attended.

On cross-examination, Brown testified that he was familiar with the chain of command at PSD. Brown stated that PSD officers' chain of command would be that a sergeant would seek approval from a lieutenant, a lieutenant would then seek approval from a captain and a deputy chief. Brown explained that officers must follow assignment given by supervisors in their chain of command. Brown testified that the Agency had written policies and that copies were given to employees and the employees must sign to acknowledge receipt of policies. The form that tracked receipt of issued documents include the name, badge, signature, and issuing official. In November 2015, a memorandum was issued by Mr. Anthony Fortune, the associate director of security. Brown recalled that this memorandum was issued to inform PSD members know that certain documents would be changed. Brown testified that he remembered documents issued at PSD that had protocols and directives and indicated that employees were provided a copy of this document.

Brown explained that policy changes were issued via email and via hard copy at PSD. Brown stated that policy changes were authorized by the associate director and then it would go to the general counsel and the director for final approval. Brown cited that emails were standard operating procedure and that Associate Director Carter had authorized him to send the February 22, 2018 email regarding

training. Brown sent the email to Associate Director Carter to get his approval before sending to other officers. Brown acknowledged that the emails he sent on February 17, 2018, to Carter did not contain the same language as the February 22, 2018 email about members communicating training to their immediate supervisor. That email also did not include that supervisors were required to forward to a captain of a section. Brown testified that he did not know whether Employee read the February 22, 2018 email and he did not train Employee on these procedures. On redirect, Brown testified that it was not typical for him to have employees sign off on the receipt of an email. Brown indicated that he did not believe that his February 22, 2018 email required someone to sign off to prove receipt.

Bonnie Rock (“Rock”) Tr. Pages 86 – 113

Rock was formerly employed at Agency as a training specialist. Rock testified that her primary responsibilities included conducting agency-wide assessments to create training plans for all six divisions and identify needs and resources. She stated that she received training requests from PSD. Rock testified that in February and March of 2018, she was the training specialist for PSD and did interact with PSD employees. Rock explained that in a March 2018 email she explained to Employee what was required in a training request packet. Rock testified that the email was also sent to Captain Brown, Johnetta McCrae and Jerome Fletcher. Rock explained that this email was in response to a training at National Rifle Association (NRA) for tactical rifle course. Rock said that she told Employee that his request needed to be submitted and matched for the state, name and location of the training and that a brochure for the course and copy of the webpage that explained the course and the cost would need to be submitted with the training request. Additionally, information for any vehicle reimbursement would need to be included.

Rock told Employee that once complete, the packet would need to be submitted to Johnetta McCrae for review and then it would be sent back to Rock for processing. Rock cited that this was the process that was used for all training and that she did request that Employee get approval from his immediate supervisor. Rock testified that she did not approve or disapprove of any training, but just ensured that documentation was correct. Rock did not know if this course was ever finalized and did not receive any documentation about a driving enforcement class.

Rock testified that she later understood that the driving enforcement class in April 2018 was one that Captain Preston had asked about. Rock explained that she knew who Lieutenant Mark Smith was and that he was not an official trainer or administrator for training, though she believed he assisted on some matters. Rock testified that she did not have any interaction with Lieutenant Mark Smith regarding Employee’s training class for the Federal Law Enforcement Training Course in April 2018. Rock explained that in a training and travel request dated March 14, 2018, she did not see Employee’s signature. Rock also explained that without a signature, she would have returned it and requested the supporting documentation and signature. Rock testified that on April 4, 2019, she received an email from Captain Paula Preston asking about whether she was aware of officers scheduled for upcoming training that had been created by Mark Smith.

Rock explained that she told Preston that she was not aware, and she shared that information with Associate Director Craig Samtmann via email. Rock further stated that after this, she was copied on an email to Lieutenant Smith and Sergeant Foster inquiring about who had approved Employee’s two-week absence to attend training. Rock indicated that she shared this information with Associate Director Samtmann because she was concerned about who had approved this absence and she didn’t have any documentation for approval for it. Rock did not know who approved the payment if it was

paid for. Rock recalled a brief discussion she had with Employee about the documentation for the rifle training and that the training would not be appropriate because rifles were not used at PSD.

On cross examination, Rock asserted that the March 2018 training document signed by Mark Smith did not go through her for processing. Rock iterated that she did not know who had prepared the document and stated that Employee did not submit the document to her. Rock testified that she does not have any police officers under her chain of command and did not know who Employee's immediate supervisor was on March 2018. Rock stated that Employee did do training, but that he did not report to her. On redirect Rock explained that Employee was in the training section and was a certified instructor.

Paula Preston ("Preston") Tr. Pages 116 -185

Preston was employed at Agency from August 2017 through October 2018 and was a Captain in the Protective Services Division. Preston oversaw the mobile patrol division, which was the division responsible for all uniformed units that responded to calls for service. Preston explained that she was with Employee in mobile patrol. Preston said that she proposed separation for Employee because he failed to follow protocol for a training class he attended. Preston also inquired about Employee's training with Captain Collins and Lieutenant Mark Smith. Preston explained that she emailed Lieutenant Mark Smith and asked if he approved Employee for training, but that she did not get a response. Preston ultimately went to Lieutenant Mark Smith directly and asked him about it, and he said that he had approved for Employee to attend training and that it was verbal, and he did not have Employee come to see her to sign off on attendance. Preston also explained that she had Lt. Mark Smith give her a written statement.

Preston testified that she conducted an investigation by verbally asking for statements from all persons involved. Preston indicated that the May 24, 2018 investigation went to Brittney Wright in Human Resources. Preston investigated both Employee and Lt. Mark Smith. Preston testified that she found that Employee should be cited for three separate charges. The failure to follow instructions was due to him not following protocol for the training, which Preston explained was the "lightest" of the three charges as that could have been dealt with much less than termination and could have been counseling. Preston cited that Employee made it worse in the way that he handled the matter. Preston also said that Employee did not follow the protocol in going through the process of going through Captain Brown for approval. Preston also said that Lt. George Smith should have been the person to sign off on training for employee because that was his mobile patrol lieutenant. Preston said that Lt. Mark Smith was the training lieutenant and it probably would have been "OK" if he had signed off and then brought it to her for her signature. Preston explained that she also found that Employee had made false statements, in that he put in his paperwork that Lt. Mark Smith was his supervisor, but George Smith was his supervisor. Employee was also charged with neglect of duty and Preston explained that because Employee was a sergeant in PSD, he held a position of leadership and supervision, so for him to circumvent protocol was not good.

Preston testified that Employee's written statement in response to the investigation was disrespectful and had no admission that he had made a mistake. Preston said that she felt that Employee directly disrespected her in his response and that there was no reason for that because they had no negative interactions. Preston cited that the fact that Employee put her position title in quotation marks was a sign of disrespect and that is why she felt termination was warranted. Preston explained that Employee's written response had statements that were disrespectful and not expected for someone in his position. Specifically, Preston explained that Employee indicated that his training was approved

prior to February 22, 2018 and that prior protocols were employed. Further, Preston indicated that Employee concluded his statement by indicating that the investigation was a waste of time and that he accused her of entrapment. Preston also testified that she had previously sent out emails to staff regarding insubordination, disrespect and unprofessionalism and that any issues would be addressed accordingly.

Preston also investigated Lt. Mark Smith and received a statement from him. Preston also spoke to Bonnie Rock and Lottie Morris. Preston did not know whether Employee used email on a regular basis, but indicated that she used email to communicate with staff. Preston said that she found that Employee's failure to follow training protocol was aggravating factor in her Douglas Factor review because of the leadership position that Employee held. Preston also considered past corrective actions as mitigating factors in her review. Preston also found the clarity of notice to Employee to be an aggravating factor based on Employee's knowledge of Captain Brown's February 22nd email regarding training protocols. Preston testified that Employee never acknowledged his mistake and that he was sarcastic in his written statement. She also found that Employee had reported false statements on his travel request form.

On cross examination, Preston testified that Lieutenant Christopher was not in charge of an investigation into this matter. Preston indicated that she never interviewed Employee in person, and only had written statements. Preston said she was not present when Employee prepared the travel and training form and did not ask Employee who prepared the forms. Preston said she determined that Employee had given the forms to Mark Smith, because she got them from Mark Smith. Preston did not think that Employee had filled out the form, but that Lieutenant Mark Smith filled out the form for the FLETC training because his signature was on the form. Preston noted that she determined that Employee's statements were disrespectful based on a personal managerial standard. Preston averred that in her experience with the police department she knows how people should speak to someone in a professional manner and that Employee's statements were insubordinate, especially his putting her title in quotation marks.

Employee's Case-In-Chief

Mark Smith ("Smith") Tr. Pages 190 – 239 (via telephone testimony)

Smith currently resides in Indiana but was previously employed at Agency as a Lieutenant in the Protective Services Division for approximately two (2) years. Smith said he started in the training program and some of his responsibilities included putting together training for officers. Smith testified that Employee was one of the sergeants that worked in the training division while he was there. Smith explained that Employee was one of the training personnel and cross-trained and worked in patrol. Smith noted that as a trainer, Employee was under his chain of command. Smith said that he was not aware of an established written policy regarding training requests. He said that there was a training travel document that was required, but outside of that he could not recall a policy. Smith said he received assistance from Lottie Morris with completing the travel documents and having it forwarded to the correct chain of command.

Smith testified that during his time at Agency, he submitted documents for training travel. He also indicated that he worked with others in the training division to try to coordinate a training curriculum with MPD. Smith said that he was familiar with the advanced driving instructor training in Glynco, Georgia. Smith said that the document held an electronic signature and that he signed as Employee's supervisor on this document because he was Employee's immediate supervisor at the time.

Smith said that after he signed it, he forwarded it to Ms. Jackson at DGS. Smith testified that no one raised any issues with what he had done and that the request was approved by the Agency, but ultimately Employee was unable to attend the training. Smith was also familiar with the training and documents for Employee to attend at Tactical Shoot Instructor Development school. Smith explained that Employee was the range instructor and this type of training was needed for certification. Smith said that this training was approved by Agency and that he had signed the document without any issues.

Smith also testified that he spoke with Captain Brown on many occasions and that he recognized an email that he put together to send to officers regarding the chain of command for training requests. Smith also explained that during his time with Agency that he assisted with the plans for training. Smith recalled that Rob Carter, who was an associate director, discussed finding enough training programs for PSD. Smith stated that there was an Office of the Investigator General (OIG) report that indicated that PSD was lacking in training. Smith said that his focus was to coordinate training to protect the Agency. Smith testified that he submitted the training packet to the Captain, and included the cost of the training program etc. Smith testified that he received an email on February 27, 2018, from Carter which indicated that some PSD officers had “turned down going to training.” Smith testified that he enrolled Employee in the Advanced Driver instructor course in March of 2018.

Smith explained that he wanted three sergeants to attend. Smith further explained that he filled out the traveler request form for Employee for this training and that he signed as his supervisor because he was his immediate supervisor. Smith said that at the same time, there was chaos at Agency regarding how money was to be spent at Agency. Smith indicated that following conversations with Director Carter, they started putting officers in programs so that they could show that they were using their budget to complete training. Smith explained that because of the chaos, there was no associate director or deputy chief for him to forward the documentation for this training. Smith said that he told Employee that he was approved to attend the training. Smith indicated that Employee completed the training and stayed in contact with him throughout the time and kept him abreast of what was going on.

Smith testified that there came a time wherein there was an investigation into this matter and that the investigation was conducted by Captain Preston. Smith explained that Preston sent him an email inquiring and asking him to complete the information. Smith was never personally interviewed by anyone at the agency regarding this matter. Smith said that he was terminated due to this incident and that he explained that Director Carter had given him permission to place people in training.

On cross-examination, Smith indicated that he was once a watch commander on the shift he worked on for mobile patrol at PSD and that the other Lieutenant was George Smith. Smith testified he was Employee’s supervisor because Employee held two roles, one as a trainer and the other was in the mobile patrol. Smith said he could not say which division took “precedence” over the other in terms of supervisory roles, but that when it was required to train someone, that those sergeants were removed from their mobile duties, to conduct training. Smith explained that at the time PSD was trying to put people through training, Director Greer and Associate Director Rob Carter asked him to put people in training so that they could show that they were spending budgeted monies appropriately. Smith testified that Employee was to be trained for the driving class so that he could train other PSD officers. Smith said that he was Employee’s immediate supervisor at the time and didn’t know whether Captain Preston was working when he had enrolled Employee in that class, and PSD was in a state of emergency. Smith indicated that things were very chaotic at the time and that he didn’t even recall that he had registered Employee for the course until Employee reminded him of the training. Smith

maintained that he was following orders in scheduling training for employees because there was a state of emergency regarding the budget and how it was to be spent.

John Barbusin Jr., (“Employee”) Tr. Pages 258 - 330

Employee had been employed at Agency for 13 years before he was removed from his position. Employee said he was a Patrol Sergeant and a Training Sergeant. His chain of command in patrol was Lieutenant George Smith and Captain Preston and he served in patrol for approximately six or seven years. In the training division, his chain of command was Lieutenant Mark Smith and Captain Joe Brown. Employee explained that during his time with Agency, there were written policies that were given by hard copy and that they were required to sign for them acknowledging receipt. Employee testified that Agency did not provide any training on the training request protocols. Employee indicated that during his tenure with Agency, he submitted training request and indicated that there were various procedures for approval. Employee testified that he completed the training travel request for from the driving course scheduled for February 2018 in Glynco, Georgia. Employee said he completed and gave it to Lt. Mark Smith because he was in charge of training and was his immediate supervisor for training. Employee did not attend the training because there was a conflict. Employee explained that he also completed a form for an NRA firearms training and gave that to Lt. Mark Smith.

Employee said he did not attend this training because it was later determined that this involved a rifle and Agency did not have one. Employee said that he found out he was enrolled in a FLETC that was scheduled for April 2018. He learned about his enrollment from Lt. Mark Smith. Employee indicated that he did not request the course, but Lt. Mark Smith wanted him to attend. Employee attended this training. He did not handle any of the paperwork and was told by Lt. Mark Smith that he was approved to attend. Employee indicated that when he returned from the training on May 2, 2018, there was an incident with Associate Director Samtmann wherein he called Employee in for a meeting. Employee explained that during this time, Samtmann told Employee to leave his phone and Employee refused and at some point Samtmann grabbed Employee’s arm and pulled him toward the door. Employee said that he returned to a training room and told Lt. Raphael Christopher “Lou” that he needed to talk to him. He told him what happened and was advised to put it in a PD-119. Employee said that only Lt. Raphael Christopher interviewed him about this incident. Employee testified that he called 911 to report an assault and MPD came down and took a statement. The next day Employee was told he was on administrative leave.

Employee testified that Captain Preston investigated the training attendance, but he was not personally interviewed by anyone at Agency. Employee explained that Preston asked him to answer questions for a PD-119 and that he answered them to the best of his ability. Employee emailed Preston because he didn’t know what was going on at first. Employee did not believe he had done anything wrong at that time. He later received a proposed separation and his attorney submitted a written response on his behalf. Employee iterated that he did not prepare the travel and training form, but rather, it had been completed by Lt. Mark Smith. Employee testified that he did not prepare the training document for which he was charged for failing to follow the directions of Bonnie Rock. Employee explained that Lt. Mark Smith prepared the document and told him he had done so. Employee also stated that he did not receive any hard copies of procedures that were referenced in the February 22, 2018 email. Employee also said that he did not sign any acknowledgement saying that he had received any procedures. Employee indicated that Bonnie Rock was not in his chain of command. Employee recalled an email from Rock that was about his NRA training. Employee thought that Rock’s email was about his having submitted for two trainings at the same time. Employee did not attend the training because he did not obtain a patrol rifle. Employee testified that he did not complete or submit the

training request form for the FLETC training, and he had no intent to deceive or mislead Agency. Employee stated that he attended this training because the Agency authorized him to do so. Employee explained that he did not know about the training until Lt. Mark Smith told him about it.

Employee testified that his understanding of being charged with unprofessionalism and insubordinate statements was that he called Captain Preston names or had cursed, which he did not. Employee explained that Preston asked him to submit a statement in a PD-119 about the investigation for the training. Employee said that he had no intention for his statement to be disrespectful, unprofessional or insubordinate. Employee testified that his intent was to answer in one sentence. Employee also prepared a statement on April 24, 2018 because Preston sent him an email indicating that he had to change his one statement submission and answered the questions. Again, Employee stated that he had no intention of being insubordinate, unprofessional or disrespectful. Employee said that following the submission of the statement, the hearing officer recommended a dismissal of the charges against him. Employee explained that Agency did not take the hearing officer's recommendation and terminated him.

On cross examination, Employee explained that his answer in his statement regarding a harassing and hostile work environment were not disrespectful or insubordinate. Employee was asked if he would have wanted an insubordinate to respond like he did in his statement to Captain Preston. Employee explained that he would not. Employee said that he had a weapon and handcuffs on him when he was assaulted by Samtmann. Employee explained that he did not arrest Samtmann because it would have resulted in a big investigation that would have to be completed by MPD. Employee said that MPD did not press charges against Samtmann. Employee indicated that his statement about the training was submitted on April 24, 2018, before the incident with Samtmann occurred. Employee said that he used the PSD Sergeants' email address to send emails. Employee testified that he did not check his email on a daily basis. He said he had a work phone and that it had access to email.

Employee recalled the email regarding the chain of command for training. He said he was interested in the driving class after it was given to him. Employee testified that he replied to an email from Captain Preston regarding disciplinary issues. Employee indicated that he replied because he was doing an investigation on an officer. Employee testified that he did not try to inform Captain Preston that he was attending the driving training. Employee explained that he talked to Lt. George Smith approximately two weeks before and told him he was authorized by Lt. Mark Smith to take the course and asked Lt. George Smith if he could go and he said "okay". Employee said he didn't approve or disapprove, but just said okay. Employee maintained that Lt. George Smith did not tell him that he could not go to the driving training, nor did he question who authorized his attendance. Employee testified that his statement regarding entrapment was because he was authorized to attend the training and then was being disciplined for attending.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as Supervisory Special Police Officer with the Protective Services Division (PSD) with the Department of General Services.¹ In a Final Written Notice dated September 7, 2018, Employee received final notice of Agency's decision to terminate him from service for violation of the following: DPM §1607.2(d)(2)—“Failure to follow instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions”; DPM § 1607.2(B)(4)- “False Statements: Knowingly and willfully reporting false or

¹ Employee's Petition for Appeal (September 14, 2018).

misleading material information or purposely omitting material facts to any superior”: and DPM § 1607.2(B)(4) “Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position.” The effective date of the termination was September 7, 2018.

ANALYSIS

Whether Agency had cause for Adverse Action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. (*Emphasis added*).

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. In the instant matter, in a Final Agency Decision dated September 7, 2018, Agency notified Employee that it was separating him from service for the following causes of action:

- (1) ***DPM §1607.2(d)(2) - “Failure to follow instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.*** Agency found that on March 14, 2018, Employee “failed to follow either directions of Bonnie Rock, Training Specialist DGS, and/or the established PSD protocols, by taking the Training and Travel form directly to Lieutenant Marc [sic] Smith for approval; effectively circumventing Ms. Rock and established protocols which were given to every member of the Protective Services Division by Captain Brown on February 22, 2018.
- (2) ***DPM § 1607.2(b)(4)- “False Statements: Knowingly and willfully reporting false or misleading material information or purposely omitting material facts to any superior.”*** Here, Agency found that on March 14, 2018, Employee “willfully reported false information on your Training and Travel Request Form to attend training class at FLETC.
- (3) ***DPM § 1607.2(b)(4) “Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position.”*** Agency found that on April 27, 2019, Employee “submitted a written statement regarding your attendance at the Federal Law Enforcement Training Center that was replete with disrespect, unprofessionalism, and insubordinate statements.”

The Hearing Officer's Report/Recommendation dated August 7, 2018, found that Agency had not met its burden by preponderance of evidence and that termination was not an appropriate penalty under the circumstances. However, Agency's Deciding Official found that the recommendations of the Proposing Official and supporting evidence were sufficient to sustain the causes of action against Employee and removed him from service effective September 7, 2018.

Failure to Follow Instructions

Agency asserts that Employee failed to follow instructions regarding its training protocols. Specifically, Agency avers that Employee took a travel form to Lt. Mark Smith, instead of Lt. George Smith for approval and as a result, did not follow protocols as prescribed in an email sent by Captain Brown on February 22, 2018. Further, Agency argues that Employee also failed to follow the instructions issued on March 9, 2018, via email from Bonnie Rock. Employee maintained that he did not refuse to follow instructions, and followed the protocol in the emails because Lt. Mark Smith was his supervisor in the training division and approved his attendance for the FLETC training.² During the Evidentiary Hearing held before this Office, Captain Brown testified that he sent the email to all PSD personnel regarding the chain of command for approvals for training. While the evidence submitted suggests that Employee had access to his email during this time, I find that this cause of action for failure to follow instructions cannot be sustained. It was shown through testimonial evidence that Employee *did not* submit the form in question, rather, Lt. Mark Smith submitted the Travel and Training Request Form for the FLETC training, which was approved and paid for by Agency. Lieutenant Mark Smith testified that he completed and submitted the form for the FLETC training.³ Additionally, Captain Preston testified that she knew that Employee had not submitted the form because his signature was not on the form, and that only Lt. Mark Smith's signature was included on the form.⁴

It appears to be uncontroverted that Employee served in both the patrol division, which was supervised by Lt. George Smith, and was also a training official in the training division. Agency asserts that Employee failed to follow instructions regarding its training protocols. Specifically, Agency avers that Employee took a travel form to Lt. Mark Smith, instead of Lt. George Smith for approval and as a result, did not follow protocols as prescribed in an email sent by Captain Brown on February 22, 2018. Further, Agency argues that Employee also failed to follow the instructions issued on March 9, 2018, via email from Bonnie Rock. Employee maintained that he did not refuse to follow instructions and did follow the protocol in the emails because Lt. Mark Smith was his supervisor in the training division and approved his attendance for the FLETC training.⁵ During the Evidentiary Hearing held before this Office, Captain Brown testified that he sent the email to all PSD personnel regarding the chain of command for approvals for training. While the evidence submitted suggests that Employee had access to his email during this time, for the same reasons outlined above regarding the charge of false statements, I find that this cause of action for failure to follow instructions cannot be sustained.

Based on the testimonial evidence presented during the Evidentiary hearing, it was clear that Employee *did not* submit the form in question, but instead, Lt. Mark Smith submitted the Travel and Training Request Form for the FLETC training. During the Evidentiary Hearing, Lt. Mark Smith

² Employee's Closing Argument at Page 17 (August 5, 2019).

³ Evidentiary Hearing Transcript at Pages 236 - 237 (June 4, 2019).

⁴ Evidentiary Hearing Transcript at Page 172-173 (June 4, 2019).

⁵ Employee's Closing Argument at Page 17 (August 5, 2019).

testified that he completed and submitted the form for the FLETC training for Employee to attend.⁶ Additionally, Lt. Mark Smith testified that he was Employee's supervisor in the training division. Assuming *arguendo* that Employee had completed and submitted the travel/training form in question, I find that Agency has not adequately shown that an approval by Lt. Mark Smith would have been unwarranted based on the February 22, 2018, or March 9, 2018 emails because it has not shown that Lt. Mark Smith was not also a supervisor for Employee. Consequently, I find that Agency has not shown any malicious or deliberate attempt by Employee to refuse instructions. Accordingly, I find that Agency has not met its burden of proof regarding this cause of action.

False Statements

Agency also argued that Employee willfully reported false information regarding the training request form for the FLETC training. Agency asserted that Employee submitted false information by listing Lieutenant Mark Smith as his immediate supervisor on the FLETC form. Agency argued that Lt. Mark Smith was not Employee's supervisor, and that Employee should have ascertained approval from Lt. George Smith for the travel/training form. Employee testified during the Evidentiary Hearing that he did not complete the travel form for the FLETC training. Employee further explained that he was told by his training division supervisor, Lt. Mark Smith, that he and others were to attend this FLETC training. Lt. Mark Smith, testified during the Evidentiary Hearing that he completed and submitted the form for Employee's training for FLETC.⁷ Additionally, Captain Preston testified that during the course of her investigation, she knew that Employee had not submitted the form, but that Lieutenant Mark Smith had completed the form.⁸ Preston indicated that Employee's signature was not on the form and there was no other indication that Employee had submitted the paperwork. Preston testified that "I don't think Sergeant Barbusin put any information on here because Lieutenant [Mark] Smith filled this out." When asked how she knew that, Preston cited that Smith's was the only signature on the document.⁹

OEA has held that to sustain a falsification charge, an "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency."¹⁰ In the instant matter, Employee did not submit the form for which he was disciplined, and based on the testimony presented during the Evidentiary Hearing, it was clear that Agency officials, including the proposing official, Captain Preston, were aware of this. Consequently, based on the testimonial and documentary evidence presented in the record, I find that Employee did not submit the Travel and Training Request form at issue. As a result, the undersigned finds that Agency has not met its burden of proof regarding this cause of action for false statements.

Neglect of Duty

Agency argues that a written statement completed by Employee on April 27, 2019, related to the FLETC training, "was replete with disrespect, unprofessionalism, and insubordinate statements."

⁶ Evidentiary Hearing Transcript at Pages 236 - 237 (June 4, 2019).

⁷ Evidentiary Hearing Transcript at Pages 236-237 (June 4, 2019).

⁸ Evidentiary Hearing Transcript at Page 172-173 (June 4, 2019).

⁹ *Id.* at Page 174.

¹⁰ *Charis Toney v. Department on Disability Services*, OEA Matter No. 1601-0053-16 (February 21, 2018). Citing to *John J. Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); *See also Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

Agency asserts that during the investigation into the issue with the FLETC training, Employee provided a written statement to Captain Preston that “reflected a blatant disregard for her authority, was in defiance of written instruction from his supervisor, was disrespectful, unprofessional and insubordinate.”¹¹ Specifically, Captain Preston testified that Employee’s written statement was “far beneath what any official or any person of leadership or supervision would provide to their supervisor or to their manager.”¹² Preston indicated that Employee had shown direct disrespect to her and her position when he put her position in quotation marks.¹³ Preston went on to describe that Employee initial statement submitted was not satisfactory, so she requested he submit another statement. Preston said that Employee’s statement indicating that Mark Smith was his supervisor was false. Additionally, Preston said that Employee indicated in his written statement that the investigation was a waste of time and that she felt that it was not a waste of time because DGS has a process for personnel to attend training.¹⁴

Preston also testified that Employee accused her of entrapment in his written statement. Preston testified that Employee’s statement was “unnecessary and it just made what was not even a serious situation far worse than it had to be.”¹⁵ Preston went on to say that Employee’s “failure to follow protocol could’ve been handled in a less than termination way.”¹⁶ However, Preston indicated that when Employee submitted this written statement and exhibited what she felt was a disregard for the investigation, that the situation was made worse. Preston also testified that during her tenure, she sent out emails to employees indicating that insubordination, disrespect and unprofessionalism would not be tolerated.¹⁷ Preston further testified that her assessment of Employee’s insubordination regarding his statements was based on her experience and her “managerial standards.”¹⁸ Preston cited that there was not an Agency policy in place that she referred to at the time to make this determination.¹⁹ Agency asserts that in order to sustain an action with regard to neglect of duty that it must prove than an employee had an actual duty and that it was neglected and that the neglect was inexcusable.²⁰ Additionally, Agency provides that insubordination is defined by “Black’s Law Dictionary (5th Ed., 1979) as the refusal to obey some order which a superior officer is entitled to give and have obeyed.”²¹

Employee asserts that Agency failed to provide notice in the proposed action of how his performance or conduct did not meet appropriate standards.²² Further, Employee argues that Agency has not provided sufficient evidence to demonstrate that his statements were disrespectful, unprofessional or insubordinate. Employee avers that he answered all the questions as directed and did not disobey an order. Further, Employee asserts that Preston “merely believed the tone of the written statement was insubordinate.” Employee further asserts that Preston arbitrarily made these considerations as the proposing official because she did not like how he questioned the Agency’s

¹¹ Agency’s Closing Argument at Page 12 (August 5, 2019).

¹² Evidentiary Hearing Transcript at Page 130 (June 4, 2019).

¹³ *Id.* at 131.

¹⁴ *Id.* at 138.

¹⁵ *Id.* at 139.

¹⁶ *Id.*

¹⁷ Evidentiary Hearing Transcript at Page 141 (June 4, 2019).

¹⁸ *Id.* at Pages 175-176.

¹⁹ *Id.*

²⁰ Agency Closing Argument at Page 11 (August 5, 2019).

²¹ *Id.*

²² Employee’s Closing Argument at Page 21 (August 5, 2019).

motive for the investigation.²³ Employee maintains that he did not engage in insubordinate behavior or that he neglected his duty.

The District of Columbia's personnel regulations provide that an employee can be charged with "neglect of duty" when the employee: fails to follow instructions or observe safety precautions, fails to carry out assigned tasks, or has careless or negligent work habits. Further, the regulations provide that an employee can be charged with "insubordination" if the employee refuses to comply with a direct order, accept an assignment or refused to carry out assigned duties and responsibilities.²⁴ In the instant matter, Employee was charged with "*neglect of duty- failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position*" based on his April 27, 2018 written statement in response to the investigation for the FLETC training. Employee answered and submitted the statement as required by Captain Preston during her investigation. Agency avers that Employee's statements were disrespectful and insubordinate. However, the undersigned finds that Agency has not provided sufficient evidence to support this contention. Further, the undersigned notes that Captain Preston did not conduct an in-person interview with Employee about this issue, but only relied on the written statement. While Preston cites that she was directly disrespected because Employee put her position in quotation marks, the undersigned finds that there is no evidence to suggest that this action met the level of insubordination to suggest neglect of duty that would warrant termination. Accordingly, I find that Agency has not met its burden for this cause of action for neglect of duty.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency's action was not taken for cause, and as such Agency cannot rely on these charges in its assessment of disciplinary actions against Employee. As a result, I further find that Agency's penalty of removal was not appropriate under the circumstances.

ORDER

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

1. Agency's action of terminating Employee from service is hereby **REVERSED**.
2. Agency shall reinstate Employee to his position of record, and Agency shall reimburse employee all pay and benefits lost as a result of his removal.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge

²³ *Id.* at Page 30.

²⁴ *Dwayne Covington, v. District of Columbia Department of Motor Vehicles*, OEA Matter No. 1601-0029-16 (February 28, 2018).