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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
LEROY WILLIAMS, JR.,)	
Employee)	OEA Matter No. 1601-0038-12
)	
v.)	Date of Issuance: January 7, 2014
)	
DEPARTMENT OF GENERAL SERVICES,)	
Agency)	
)	
_____)	Arien Cannon, Esq.
)	Administrative Judge
William A. Jepson, Jr., Esq., Employee Representative		
C. Vaughn Adams, Esq., Agency Representative		
Charles Brown, Esq., Agency Representative ¹		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Leroy Williams, Jr. (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on December 15, 2011, challenging the Department of General Services’ (“Agency”) decision to impose a fifteen (15) day suspension against him. Employee is a Protective Services Officer with Agency.² Employee’s fifteen (15) day suspension was effective December 7, 2011, through December 28, 2011, which did not include weekends or holidays. This matter was assigned to me on August 9, 2013. A Prehearing Conference was held on October 29, 2013. Subsequently, a Post Prehearing Conference Order was issued requiring both parties to submit briefs on the legal issue presented in this case. Both parties responded accordingly. The undersigned has determined that an evidentiary hearing is not warranted in this matter. The record is now closed.

¹ Mr. Brown’s name was inadvertently omitted as an Agency Representative from the original Initial Decision issued on December 13, 2013. Thus, this erratum decision is being issued to include Mr. Brown’s name. There are no substantive changes to the original Initial Decision. The original December 13, 2013 Initial Decision shall remain in effect. The sole purpose of this issuance is to include Mr. Brown’s name as an Agency Representative.

² Protective Services Police Department falls under the umbrella of D.C. Department of General Services.

JURISDICTION

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

ISSUE

Whether the penalty (15-day suspension) imposed against Employee by the Agency was appropriate under the circumstances.

FINDING OF FACTS, ANALYSIS, AND CONCLUSION

Employee was issued a 15-day suspension based on the cause of: “Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include: neglect of duty, insubordination, and misfeasance, as defined in the DPM § 1603.” In the Advance Written Notice of Proposed Suspension and the Notice of Final Decision, Agency further states: “Specifically, [Employee’s] suspension is based on the following charge: Neglect of Duty.”³ Employee does not deny the specific allegations that were the cause of his suspension. Rather, Employee argues that his 15-day suspension was excessive and should be reduced to a 3-day suspension, which was recommended in the Investigative Report conducted by the Protective Services’ branch of the Agency. Despite the 3-day suspension recommended in the Investigative Report Memorandum, dated August 22, 2011, the Deciding Official, pursuant to § 1613.1 of the District Personnel Manual (“DPM”), elected to issue a 15-day suspension as the Final Agency Decision. The Advanced Written Notice of Proposed Suspension also advised Employee that a fifteen (15) day suspension penalty was being imposed.

Agency has the primary discretion in selecting an appropriate penalty for Employee’s conduct, not the undersigned.⁴ This Office may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency’s judgment clearly exceeded limits of reasonableness.⁵ 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.⁶

The Merit System Protection Board (MSPB) has outlined twelve factors that assist an agency in determining the appropriateness of a sanction.⁷ In applying the factors, the MSPB

³ It is unclear why Agency states that the cause for suspending Employee is based on “neglect of duty, insubordination, and misfeasance” and in the same paragraph state that the cause is based specifically on “neglect of duty.” It is also unclear if the Agency intended to charge Employee with “neglect of duty, insubordination, and misfeasance,” or *just* “neglect of duty.” For purposes of this decision, Employee’s suspension is based solely on the “neglect of duty” charge. Even if Agency intended to charge Employee with insubordination and misfeasance, it would not change the outcome of this decision.

⁴ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁵ See *Id.*

⁶ See *Id.*

⁷ See *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). Those twelve factors, which are not exhaustive, include:

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.”

Agency’s Position

In the instant case, Agency asserts that it considered all relevant *Douglas* factors, such as the severity of the offense and prior disciplinary actions against Employee. Agency also states that it consulted the DPM Table of Penalties, which provides that an appropriate penalty for a first time offense of “neglect of duty” may range from reprimand to removal.⁸

Employee’s Position

Employee avers that Agency did not consider all the relevant *Douglas* factors when imposing its penalty. Employee further asserts that a suspension for one to three days would have been the appropriate penalty imposed in this matter. Employee bases this argument on the fact that the Investigative Report by Sergeant Harry Weeks recommended a 3-day suspension for Employee in accordance with the progressive discipline guidelines set forth in the DPM. Employee also argues that Agency offered no reason for ignoring the recommendation of a 3-day suspension by the command staff at the Protective Services Police Department.

In the Advanced Written Notice of Proposed Suspension, Employee was advised that a 15-day suspension was being proposed for his misconduct and that he had the right to review any material upon which the proposed action was based on. Employee was also afforded the opportunity to prepare a written response within six (6) days of receipt of the Advanced Notice.

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- (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 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.

⁸ See Agency’s Brief Regarding [Employee’s] Appeal (November 12, 2013); See also Agency’s Answer (January 19, 2012).

Employee was advised that if he elected to do so, there would be an administrative review of his case by a Hearing Officer appointed by the Agency's Executive Director.⁹ Employee submitted a response to the Advanced Notice and the Hearing Officer ultimately agreed with the proposed 15-day suspension. In the Notice of Final Decision, the Chief of Police for Protective Services, the Deciding Official in this matter, stated that he was sustaining the Hearing Officer's recommendation of a 15-day suspension pursuant to § 1613.1 of the DPM.

Specifications of Charge

The specifications in the instant case provide that on August 13, 2011, Employee arrested an individual for urinating in public. Employee then performed a search incident to the arrest on the scene and subsequently transported the arrestee to the First District for processing. The arrestee was searched again once he arrived in the cell block at which time a loaded .22 caliber pistol was discovered in the arrestee's pocket. Employee was required to perform a comprehensive search of the suspect while still on the scene of the arrest. This precaution is necessary to prevent any injury to the arresting officer and any other officer who may subsequently come into contact with the suspect. However, Employee failed to detect the loaded gun in the arrestee's pocket prior to bringing him inside the First District Station, exposing fellow officers, the public, and himself to a potentially perilous situation.

Discussion

Agency considered the following *Douglas* factors in the instant case when selecting the penalty to impose on Employee: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities; (2) the employee's past disciplinary record; and (3) consistency of the penalty with any applicable agency table of penalties. Employee's failure to detect a loaded gun in the arrestee's pocket while performing a search incident to the arrest on the scene created a potentially dangerous situation for himself and fellow officers, which is a serious offense. Employee was also issued a Letter of Admonition about a month prior to the instant case for refusing to process a crime scene. Although Employee asserts that the Letter of Admonition was not referenced in the Advanced Notice or the Final Notice of Decision, it was not necessary for Agency to do so. Agency did, however, include the Letter of Admonition in its Answer, which demonstrates it considered Employee's past disciplinary record. Agency also consulted the DPM § 1619.1, "Table of Appropriate Penalties," which provides that the penalty for a first time offense for a "neglect of duty" charge ranges from reprimand to removal.¹⁰ Here, Agency elected not to remove Employee, but rather impose a 15-day suspension, which is consistent with the appropriate penalties under the DPM's Table of Appropriate Penalties.

Employee argues that Agency offered no explanation in the Notice of Final Decision for the sanction it imposed against Employee. Primary discretion in selecting a penalty for an employee's misconduct is entrusted to agency management.¹¹ There is no requirement that Agency explain how it chose to exercise its discretion. Thus, simply by not providing an

⁹ See Agency's Answer, Attachment: Advance Written Notice of Proposed Suspension (January 19, 2012).

¹⁰ See DPM § 1619.1(6)(c), Table of Appropriate Penalties.

¹¹ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

explanation on how Agency reached the penalty it imposed, does not permit the undersigned to disturb Agency's decision. Employee also asserts that "no consideration was given at the central offices of [Agency] to the fact that seven levels of experienced police officers believe that a 3-day suspension was an adequate and effective sanction to deter such conduct."¹² This is in reference to the Investigative Report by Sergeant Harry Weeks that recommended a 3-day suspension and went up the chain of command to the Chief of Police for Protective Services. Agency is not required to adopt the recommendations provided in the Investigative Report. However, Agency may, pursuant to the DPM § 1613, sustain, reduce, or remand the decision of the Hearing Officer. In no event may the deciding official increase the penalty proposed by the *Hearing Officer*. Here, the recommendations in the Investigative Report and by the Hearing officer are different. The Investigative Report recommended a three (3) day suspension, whereas the Hearing Officer recommended a 15-day suspension. Agency's Deciding Official was under no obligation to accept the recommendations set forth in the Investigative Report, however, Agency owed deference to the penalty recommended by the Hearing Officer pursuant to DPM § 1613. The Deciding Official, in this case, the Chief of Police for Protective Services, was not permitted to increase the recommendation of the Hearing Officer. Consequently, Agency elected to sustain the 15-day suspension recommended by the Hearing Officer.

Employee also argues that no consideration was given to Employee's past work record and length of service, or the effect the misconduct had on his ability to perform in the future or the confidence of his supervisors in his work. Although Agency does not explicitly address the length of time Employee has been employed by Agency, the effect the misconduct has on his ability to perform, and the confidence of his supervisors in his work, it can be determined that Agency considered these factors in light of the fact that a 15-day suspension was imposed over a possible removal from service. Agency would have been within the range of appropriate penalties if it elected to remove Employee from service for his first offense of "neglect of duty," pursuant to the DPM Table of Appropriate Penalties. However, considering this was not Employee's first offense for "neglect of duty," Agency opted to impose a much more lenient penalty by suspending Employee for 15 days, which is far less severe than removal.

Moreover, it should also be noted that not all *Douglas* factors will be pertinent in every case.¹³ Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in the individual case.¹⁴ I find that Agency applied a well-balanced consideration of all relevant factors and did not exceed its limits of reasonableness in imposing the 15-day suspension. Based upon the seriousness and nature of Employee's action, his past disciplinary record, and the consistency of the penalty in accordance with the DPM's Table of Appropriate Penalties, I find that the 15-day suspension was appropriate under the circumstances.

¹² See Employee's Reply Brief at 3 (December 2, 2013).

¹³ See *Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

¹⁴ *Id.*

ORDER

Accordingly, it is hereby **ORDERED** that Agency's decision to suspend Employee for 15 days is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge