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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JOHN HART)	OEA Matter No. 1601-0210-09
Employee)	
)	Date of Issuance: December 14, 2010
v.)	
)	
)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF TRANSPORTATION)	Administrative Judge
Agency)	
_____)	
John Hart, Employee, <i>pro se</i>)	
Melissa Williams, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION

John Hart, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 17, 2009, appealing the final decision of the D.C. Department of Transportation, Agency herein, to terminate his employment with Agency, effective July 17, 2009. At the time of the removal, Employee was in career status and had been employed with Agency as a Staff Assistant for 18 months. The matter was assigned to this Administrative Judge on or about July 10, 2010.

The prehearing conference took place on August 24, 2010.¹ At the proceeding, Employee stated that he had engaged in the charged conduct that resulted in his termination, but presented argument as well as documents to support his position that removal was too severe a penalty. Agency's position was that removal was the appropriate penalty under the circumstances.

¹ The prehearing conference was initially scheduled for 9:30 a.m. on August 13, 2010. Employee was present but the Agency representative, who was James Fisher, Esq., at the time, contacted the undersigned at about 9:50 a.m., and told her that as a result of an error at Agency, he was not notified of the matter until several minutes earlier. He asked for, and was granted, additional time to arrive at OEA. However, at about 10:40 a.m., Employee advised the undersigned that he had an airline reservation scheduled to depart at noon. Given the circumstances, the Administrative Judge excused Employee and allowed him to choose the date of the rescheduled prehearing conference. He provided several dates on which he was available, and the matter was scheduled for one of those dates.

Employee and Agency agreed that an evidentiary hearing was not needed and that the decision would be rendered based on the written and oral arguments presented as well as the documents submitted. The parties were invited to participate in mediation, and on August 24, 2010, an Order was issued directing Agency to notify the Administrative Judge of its decision by September 2, 2010. Agency declined mediation. On September 27, 2010, the parties were ordered to submit any additional arguments to support their positions by October 20, 2010. The record was closed on that date.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Did Agency meet its burden of proof in this matter? If so, is there a basis for disturbing the penalty imposed by Agency?

POSITIONS OF THE PARTIES, FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Agency's position is contained in its Advanced Written Notice of Proposed Removal issued on June 23, 2009. Agency stated that it was proposing to remove Employee based on two charges. The letter, signed by Ali Shakeri, Supervisory Civil Engineer, provided the allegations and rationale for Agency's decision:

Cause 1: Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious, pursuant to DPM §1603.3(g).

Specification: On May 13, 2009, you informed Mr. Ali Shakeri, that you would be absent from your position as Staff Assistant in order to perform service as a juror beginning May 22, 2009 through June 8, 2009. The District of Columbia permits employees to be absent...to serve as juror or witness...Therefore you may only request leave from your position equal to the amount of time you spent in jury...service. If you are not required to serve as a juror...you may not request court leave and you must arrange to attend your normal tour of duty (emphasis in original).

You were absent from your tour of duty from May 25, 2009 through June 8, 2009. According to your time reports, you entered annual leave for May 22, 2009, and then court leave from May 25, 2009 through June 8, 2009. Pursuant to DPM §1263.9, the agency "may require the employee to certify to, or submit written evidence of the dates and, if possible, the hours of the jury or witness service performed". On June 9, 2009, I asked you to provide documentation that confirm[ed] that you served as a juror during your absence. In an email to me dated June 10, 2009, you responded to my request stating that you were unable to provide confirmation of your service as a juror due to "confidentiality constraints" surrounding the homicide case on which you served as juror. The information you provided is not consistent with the jury service records provided by the United States District Court.

Official documentation issued by the United States District Court, the Advanced Jury Information System (AJIS) Juror Profile Report, confirms that you were not required for jury duty during the period May 22 through June 8, 2009. According to the AJIS system “your jury questionnaire was not received in time to process. Therefore, you are not required to report and no penalty will be imposed against you.” Your jury summons notification instructed you to call the automated phone system to obtain reporting instructions. You knew, or should have known, that you were not required to appear for jury service on the days you claimed to have served on a jury. You entered seventy-two (72) hours of jury duty into PeopleSoft for the period Tuesday, May 26 through Friday, June 5. You attempted to defraud the government of the District of Columbia of seventy-two (72) hours of salary and benefits. Falsification of time and attendance records is cause for adverse action pursuant to DPM §1603.3(g).

Cause 2: Absence without official leave, pursuant to DPM §1603.3(f)(2)

Specification 1: Official documentation issued by the United States District Court [AJIS] indicates that you were not required for jury duty during the period May 22 through June 8, 2009. You entered 72 hours of jury duty into PeopleSoft for the period Tuesday, May 26 through Friday, June 5 even though you were not on jury duty for this period. You did not report to your tour-of-duty during this period, therefore you have recorded a status of absence without official leave (AWOL) for nine (9) consecutive working days. As a means of explaining your absence, you have subsequently alleged that you were required to sit in on the entire trial as an alternate juror. Your statement contradicts documentation provided by the United States District Court. Your absence without official leave of nine (9) consecutive dates is cause for adverse action pursuant to DPM §1603.3(f)(2).

Agency provided its justification for the proposed discipline by stating that removal is within the range of penalties for a first offense for an “on-duty or employment-related act or omission that interferes with the integrity and efficiency of government operations, including absence without official leave (AWOL).” The letter stated that “the sum of [Employee’s] actions [was] egregious enough to warrant removal.” It noted Employee had “provided several false statements in an attempt to obtain monetary gain through fraud.”

On July 16, 2009, Hearing Officer Jeffrey Marootian issued his Report in which he concluded that Agency had established Employee had demonstrated cause for removal. He recommended, after considering the mitigating factors, that the termination be upheld. On July 16, 2009, Agency issued its Notice of Final Decision removing Employee based on the charges stated in the advance notice.

Employee's position is that although he engaged in the charged conduct, there were mitigating circumstances, and that the penalty is "too severe for a first time offense."² Employee concedes that the charges are "seemingly warranted, and the details spelled out precisely in the corrective action for [his] termination may appear to be justifiable. He states that "the impression" he gave that he was going to serve on a jury "was the original intent of [his] absence." His conduct "was not done by any means to deliberately defraud the system". Instead, he stated, that at the time he was scheduled to report for jury service he was "faced with a family emergency." He explained that his father, a "chronic alcoholic substance abuser [who suffers from paranoid] schizophrenia and is subsequently homeless, experienced some health challenges, which required that [Employee] come to his aid." Employee stated that his father "had finally agreed to accept the life lines that he and his siblings had been presenting him for years."

Employee stated that he had explained his father's condition with Mr. Shakeri when Mr. Shakeri became his supervisor, and that Mr. Shakeri had told him that if Employee needed to take be absent, he should notify Mr. Shakeri who would grant him leave. However, Employee stated that after working with Mr. Shakeri for a period of time, he noticed "several attributes of his character that began to cause [Employee] to question the validity of [Mr. Shakeri's] character, while additionally evoking fear." The characteristics he noted was that "Mr. Shakeri had a reputation...for possessing a no-nonsense attitude, had a low tolerance for mistakes and excuses and even had been known for terminating employees without warning." He agreed that this did not "excuse [his] failure to communicate," but argued that it should be considered in determining the appropriate penalty.

Employee stated that upon his return to the office, he asked Mr. Shakeri if he could use annual leave, but that Mr. Shakeri told him that it would not be fair to him to use leave while on jury duty. He asserted that at the time Mr. Shakeri knew he had not been on jury duty. Employee also stated that although he "failed to report to work during normal business hours...[he came] in during the evenings, weekends, and even called the office on multiple occasions having spoken directly with Mr. Shakeri" in order to ensure that his work load "wasn't backed up."

Employee also noted that he had been employed by the District of Columbia for ten years, and had received "multiple" commendations, including the Mayor's Customer Service Award in 2003. He also provided his performance appraisals for 2003-2008 in which he had received ratings ranging from "satisfactory" to "excellent." Finally, Employee submitted letters from Curtis Edwards who had supervised him five years earlier at another agency. He noted that Employee was a "reliable team player" and would be "an invaluable asset." He also submitted a letter from Dr. Clifford Galanis who was familiar with Employee's difficult family situation. He characterized Employee as "impressive" and asked that the punishment be reconsidered. His brother, Jonathan Hart, also submitted a letter asking that his past record be taken into account and to allow him to continue his work. Paulette Franklin and Angelique Massey, co-workers, also wrote letters of support, praising Employee's performance.

² Employee's position is taken primarily from his Employee Explanation, which he submitted with his petition for appeal.

Agency is required to prove its case by a preponderance of evidence. “Preponderance” is defined as “that degree of relevant evidence which the 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. Reg. 9317 (1999).

D.C. Code §1-616.51 (2001) requires that the Mayor “issue rules and regulations to establish a disciplinary system [for agencies over which he has personnel authority] that includes...1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken.” The Mayor has personnel authority of Agency. The D.C. Office of Personnel, the Mayor’s designee for personnel matters, published regulations entitled “General Discipline and Grievances” that meet the mandate of §1-616.51 and apply to all employees in permanent status. *See* 47 D.C. Reg. 7094 *et seq.* (2000). The definition of “cause” includes “any 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.” 47 D.C. Reg. 7096. The charges that Employee had acted dishonestly and was AWOL are undisputed. Agency met its burden of proof that Employee engaged in the charged misconduct.

Employee contends, however, that the penalty of removal is too severe. He provided evidence of his laudable performance and reputation prior to this incident and the fact that he had not previously engaged in any misconduct. However, Agency retains the primary responsibility for managing its employees and part of its responsibility is to determine the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), _____ D.C.Reg. ____ (). This Office will not substitute its judgment for that of an agency when determining if a penalty should be sustained. Rather it will limit its review to determining that “managerial discretion has been legitimately invoked and properly exercised.” *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). Agency has considerable discretion in determining the penalty and its decision will not be disturbed unless the Administrative Judge concludes that Agency failed to consider relevant factors or that the imposed penalty constitutes an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

The Administrative Judge sympathizes with the difficult situation that Employee was experiencing with his father during this period. However, the situation does not explain why Employee chose to lie about the reason for his absence and lie about his failure to submit documentation, particularly in light of his statement that he had previously discussed the situation with Mr. Shakeri who had told him that he would be granted leave if needed. Employee stated that he had come to doubt Mr. Shakeri’s word, but offered no reason that distrust caused him to engage in dishonest conduct and to be absent from work without leave. He did not explain why, given the ample leave he said was available to him, he did not request leave from someone other than Mr. Shakeri in his chain-of-command. Agency is not prohibited by law, regulation or guidelines from imposing the penalty of removal for a first offense of this nature. Agency determined that

Employee's conduct was so "egregious" that it warranted removal. Based on the facts presented in this matter, Agency's conclusion is not unreasonable. The appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment." *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). The Administrative Judge concludes that Agency did not abuse its discretion or act in an arbitrary or capricious manner in this matter. The Administrative Judge therefore concludes that there is no basis to disturb the penalty.

ORDER

It is hereby

ORDERED: This petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge