

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JANET P. BOSWELL)	OEA Matter No. 1601-0155-06
Employee)	
)	Date of Issuance: June 4, 2007
vs.)	
)	Joseph E. Lim, Esq.
D.C. FIRE AND EMERGENCY)	Senior Administrative Judge
MEDICAL SERVICES DEPARTMENT)	
Agency)	
_____)	

Thelma Brown, Esq., Agency Representative
Alan Lescht, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On September 26, 2006, Employee, a Paramedic, DS-699-9 in the Career Service, filed a petition for appeal from Agency's final decision removing her for inability to satisfactorily perform one or more major duties of her position. This matter was assigned to me on November 6, 2006. I conducted a Prehearing Conference on December 15, 2006, and a Status Conference on February 16, 2007. I held an evidentiary Hearing on April 18, 2007. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Agency's action was taken for cause.
2. Whether the penalty was appropriate under the circumstances.

UNDISPUTED FACTS

The following facts are undisputed:

Employee's position as a Paramedic with the D.C. Fire and Emergency Medical Services

Department required her to perform emergency preliminary medical care for critically ill or injured patients in twelve-hour shifts. She is required to assess, evaluate and stabilize a patient's condition at the site of the emergency. Among other things, a paramedic may initiate advanced life support treatment, monitor an electrocardiogram, draw blood samples, administer medications, file verbal and written medical reports, drive a medic unit to the emergency site, and work twelve-hour shifts. The medical emergencies include automobile accidents, heart attacks, drowning, childbirth, gunshot wounds, drug overdose, and mentally unstable patients.

Employee suffers from diabetes and hepatitis C. After experiencing two documented episodes of hypoglycemia while in the performance of her duties as a paramedic, Agency placed Employee on limited duty on August 9, 2006.

Diabetes is a disease in which the body does not produce or properly use insulin. Insulin is a hormone that is needed to convert sugar, starches and other food into energy needed for daily life. The human body constantly monitors and maintains the blood glucose level by producing needed levels of insulin. In people suffering from diabetes, this natural function is impaired. Hypoglycemia, or abnormally low blood glucose, is a complication of several diabetes treatments. It may develop if the glucose intake does not cover the treatment.¹

The brain is dependent upon glucose to function. Without adequate blood glucose levels, the patient may become agitated, sweaty, and have many symptoms of sympathetic activation of the autonomic nervous system resulting in feelings similar to dread and immobilized panic. Consciousness can be altered, or even lost, in extreme cases, leading to coma and/or seizures, or even brain damage and death. In patients with diabetes, this can be caused by several factors, such as too much or incorrectly timed insulin, too much exercise or incorrectly timed exercise (exercise decreases insulin requirements) or not enough food (actually an insufficient amount of glucose producing carbohydrates in food). In most cases, hypoglycemia is treated with sugary drinks or food. In severe cases, an injection of glucagon (a hormone with the opposite effects of insulin) or an intravenous infusion of glucose is used for treatment, but usually only if the person is unconscious. In a hospital, intravenous dextrose is often used.²

Diabetics whose blood glucose gets too high suffer the symptoms of diabetic ketoacidosis and must seek medical attention or inject themselves with insulin. The process is not immediately incapacitating. But when the blood glucose gets too low, the person is immediately incapacitated.³

In accordance with Agency practice, employees with medical illnesses which interfere with

¹ National Center for Chronic Disease Prevention and Health Promotion.

² Ibid.

³ Transcript, p. 79.

the performance of their duties are placed in a limited duty assignment not to exceed 180 days. Prior to the conclusion of her limited duty assignment, employee requested reasonable accommodation for her illness under the Americans with Disabilities Act (ADA). Specifically, she requested a modified work schedule of eight hours a day. She submitted documentation from her treating physician, who prohibited her from working more than eight hours a day and required that she check her blood glucose without restriction because she takes insulin.

Employee's case was referred to the Agency's ADA panel. The Diversity/EEO (Equal Employment Opportunity) Manager, Detria Hutchison, issued a report stating that Employee's medical condition did not qualify her for reasonable accommodation under the ADA.

In addition, Agency found her medical condition incompatible with her duties as a paramedic. Dr. Rosenthal, Medical Director of the Police and Fire Clinic Associates, opined that Employee should not return to full duty status because the performance of her duties as a paramedic would impact her ability to check her insulin as needed in the course of a normal twelve-hour work shift. Rosenthal further opined that it would be unsafe for Employee to return to work with her history of two documented hypoglycemic episodes in the recent past.

Agency issued Employee a notice of proposed removal on July 10, 2006. A hearing officer found that the medical evidence substantiated that Employee could not perform the essential functions of her position and recommended removal. There are no light-duty positions within the Agency available to Employee. Employee was separated from service effective September 2, 2006.

Evidence on Disputed Issues

1. Chief Greg Blalock testified (Tr. p. 9 - 46) as follows.

Deputy Chief Blalock is in charge of Emergency Medical Services (EMS) in the Agency. When Employee's co-workers reported to him that Employee suffered a hypoglycemic episode where she appeared disoriented, Blalock ordered a fitness for duty physical. The results revealed that Employee suffered from insulin-dependent diabetes that rendered her unfit for paramedic duty. He explained that diabetics suffering from hypoglycemic episode become unresponsive and could lose consciousness. Thus a diabetic would not be able to provide emergency medical care to clients.

Blalock further stated that a paramedic had to be alert throughout her shift as she could be driving an ambulance or carrying a patient. A paramedic feeling ill due to low blood sugar levels would endanger herself and others. He added that if the replacement does not arrive, then paramedics would have to work beyond their shifts. Blalock testified that DC Personnel Regulation Chapter 20B, Section 2049.13 mandates removal of an employee who can no longer satisfactorily perform her job.

2. Michelle Smith-Jefferies testified (Tr. p. 46 - 97) as follows.

Dr. Michelle Smith-Jefferies is the Medical Director of the Police and Fire Clinic who replaced

Dr. Rosenthal. She testified that, like Dr. Rosenthal, she is board-certified in internal medicine and occupational medicine. As such, she is trained to disease process in the workplace. She also wrote the medical requirements for D.C. paramedics and emergency medical technicians (EMT) based on the NFPA (National Firefighters Professional Association) Standard 1582. This is the industry standard for their certification.

She concurs with Dr. Rosenthal's medical conclusion that Employee is medically unfit for duty. Based on the industry standard for paramedics, someone like Employee who suffers from diabetes mellitus with insulin or hypoglycemic agent and had at least one incapacitating episode of hypoglycemia in the past five years is unfit for paramedic duty. Analyzing Employee's medical records, Dr. Jefferies pointed out that Employee needed insulin to control her blood sugar, requiring her to check and monitor her sugar levels throughout the day. All these interfere with her duties as a paramedic and could jeopardize the medical treatment and safety of patients. She pointed out that Employee had at least two hypoglycemic episodes which proved that Employee's body is unable to control her blood sugar. Dr. Jefferies pointed out that it is a predictor for future hypoglycemic episodes and immediate incapacitation when that happens.

Asked to differentiate Employee's condition from that of a person suffering from allergies and migraine headaches, Dr. Jefferies testified that unlike the hypothetical person, Employee's hypoglycemic episodes come without warning and results in immediately passing out. Such episodes are life-threatening emergency situations needing immediate medical intervention. In addition, Employee's use of interferon to treat her Hepatitis C results in side effects such as nausea, vomiting, rashes, arthralgias, and joint pains.

Dr. Jefferies disagreed with Employee's treating endocrinologist, Dr. Argento, that Employee can return to work without restriction. She pointed out that even Dr. Argento warned that Employee needed to be able "to check her blood glucose without restriction when she feels the need to do so." Due to the nature of a paramedic's job, there would be inherent restrictions on being able to check ones glucose at any given time. She differentiated Employee from other diabetics who needed to monitor their blood glucose only twice a day, in the morning and in the evening, as their disease is mild.

3. Employee testified (Tr. p. 100 - 112) as follows.

Employee testified that every twelve hours, she draws blood and puts it in the glucose monitor machine. She hooks it up to her glucometer and injects a sensor into her abdomen. A glucometer is a device that measures a person's blood sugar by analyzing their blood sample. The machines continuously informs her what her blood sugar level is. With preset parameters, the device beeps to inform her when her blood sugar level exceeds the safe range so that she could take corrective action.

Employee also talked about the two incidents of hypoglycemia which occurred in 1999 and 2005. She indicated that when she started feeling woozy, she checked her blood sugar level, drank some juice, and within 15 minutes she felt fine. Employee also indicated that she has recovered from hepatitis. Dr. Argento is her current doctor.

4. Nicolas Argento testified (Mar. 28, 2007, deposition) as follows.

Dr. Nicolas Argento, board certified in endocrinology and diabetes, testified that he has been Employee's treating physician for type 1 insulin-dependent diabetes since October of 2005. He stated that because Employee's body does not produce any insulin, Employee has to continuously monitor her blood sugar and then inject herself with insulin five times a day. The usual way of monitoring was to do a finger stick to draw a blood sample and have a glucose meter read the patient's glucose level.

Employee was fitted with a continuous glucose monitor called Dexcom. A small sensor injected subcutaneously under the abdomen skin is attached to a transmitter which estimates Employee's glucose level every five minutes. Once the sugar level goes above or below the acceptable range, the device beeps an alarm to alert the patient. This minimizes the risk of hypoglycemia where the patient, or Employee, becomes incapacitated from performing her job as a paramedic. Finger stick monitoring is done only twice a day, essentially to calibrate the device for Employee. With this device, Dr. Argento opined that Employee should be able to perform her job. He also testified that this is an expensive new device and that few medical insurers cover its cost.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

1. Whether Agency's action was taken for cause.

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes", *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The Agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id.*, provides that the sections covering general discipline "apply to each employee of the District government in the Career Service who has completed a probationary period." It is undisputed that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken.⁴ Here, Employee was removed for "Incompetence".

⁴ The entire list of causes in § 1603.3 is as follows:

[A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of

“Incompetence” is one of the causes set forth in § 1603.3. Incompetency is defined as the physical inability to satisfactorily perform the major duties of his or her position. It is well-settled that such an inability constitutes incompetency.⁵

In an adverse action, this Office’s Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. “Preponderance” is defined as “that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.” OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

THE INCOMPETENCE CHARGE.

The legal issue that has to be decided here is whether Employee is incompetent to perform her paramedic job. The factual issue is whether Employee’s medical condition renders her incompetent. Of necessity, such an issue can only be answered by medical experts.

Here we have two competing expert testimonies. Employee’s treating doctor, an expert on diabetes, opines that with the Dexcom device, Employee should be able to monitor her glucose level reasonably well, and therefore, should be able to work as a paramedic.

Agency’s expert, an expert on occupational medicine, is of the firm opinion that Employee could not perform her paramedic duties without the risk of endangering herself and her patients. When asked if the existence of a glucometer device that automates the monitoring of a patient’s blood sugar could make a diabetic employee competent, Agency’s expert answered, “...she could

punishment) at any time following submission of an employee’s job application when the crime is relevant to the employee’s position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; 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. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

⁵ See, e.g., *Employee v. Agency*, OEA Matter No. 1601-0207-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 4406, 4408 (1985); *Chara v. Department of Public Works*, OEA Matter No. 1601-0288-94 (December 22, 1994), _ D.C. Reg. __ (); *Wineglass v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0061-95 (September 18, 2001), _ D.C. Reg. __ ().

possibly, depending on the device.”⁶ But then she goes on to say that it takes time to get a blood sample and then obtain a reading of the blood glucose level. And because of the time requirements, her expert opinion is that Employee is incompetent. Her opinion is also backed up by occupational medicine industry standards.

Employee argues that because she now has this new device, she should now be allowed to work as a paramedic, driving an ambulance and treating or carrying critically sick or injured patients. However, there are two counts against her argument. First, her medical expert is not an expert in occupational medicine. Here the question is whether Employee’s medical condition renders her incompetent in the context of performing her occupation. The occupational medicine expert firmly says “yes!”; due to the time required not just to monitor Employee’s blood glucose level, but to bring it back to normal. Employee herself admits in her testimony that it takes at least 15 minutes to bring up her glucose level to safe levels after ingesting a source of glucose.

To allow Employee to work again as a paramedic would mean that she would require time to stop her work so that she could take steps to prevent or correct another highly probable instance of hypoglycemia. In short, Employee would have to stop driving her ambulance or drop a patient she was lifting or stop rendering emergency medical measures to a critically ill patient so that she could take care of her own uncontrolled blood sugar. Such a scenario poses serious medical and legal risks to herself, the Agency and the people she is supposed to assist. I therefore conclude that Employee’s medical condition rendered her incompetent as charged, and that Agency acted appropriately in taking adverse action against her for that charge.

2. Whether the penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.” *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency’s penalty “undisturbed” when “the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment.” *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Here, I have upheld the charge of Incompetence. While there is no specific penalty table or range of penalties, there is also no prohibition in law, regulation or guideline that bars Agency from removing Employee for the sustained charges. See *Buckman v. Department of Human Services*, OEA Matter No. 1601-0215-04 (March 14, 2006), ___ D.C. Reg. ____ ().

ORDER

It is hereby ORDERED that Agency’s action removing Employee is UPHeld.

⁶ Transcript, page 67.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge