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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
MICHAEL JACKSON,)	
Employee)	
)	OEA Matter No.: 1601-0034-11
v.)	
)	Date of Issuance: March 29, 2016
DISTRICT OF COLUMBIA)	
DEPARTMENT OF)	
GENERAL SERVICES,)	
Agency ¹)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Jackson (“Employee”) worked as a Project Manager with the D.C. Department of General Services (“Agency”). On August 27, 2010, Agency issued an Advance Written Notice of Proposed Removal to Employee, charging him with “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: neglect of duty, insubordination, incompetence, and misfeasance.” The notice provided that Employee’s proposed removal was based on the following: 1) a four (4) day suspension for failure to adhere to the Construction Division’s procedures for entering projects into Agency’s Project Management Information System (“PMIS”) and failing to submit invoices for payment

¹ This agency was formerly known as the Department of Real Estate Services.

in a timely manner; 2) the receipt of a Marginal Performer rating during his mid-year performance review on April 21, 2010; and 3) failing to improve his performance after being placed on a Performance Improvement Plan (“PIP”) on May 24, 2010. Agency issued Employee a Notice of Final Decision on Proposed Removal on November 1, 2010, sustaining the charges against him. The effective date of Employee’s termination was November 5, 2010.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on December 3, 2010.² In his appeal, Employee argued that Agency utilized a subjective and impartial application of the *Douglas Factors* in rendering its decision to terminate him. Employee requested that this Office reinstate him with back pay. Agency filed an answer to the Petition for Appeal on January 25, 2011, arguing that it established, by a preponderance of the evidence, that Employee was terminated for cause.³ According to Agency, Employee’s failure to pay invoices in a timely manner and update the PMIS had an adverse effect on its ability to operate efficiently. Agency further contended that it applied the *Douglas Factors* in a manner consistent with the applicable District laws and regulations.

The matter was assigned to an Administrative Judge (“AJ”) for adjudication on July 26, 2012. A Prehearing Conference was held on December 20, 2012 for the purpose of assessing the parties’ arguments. An evidentiary hearing was subsequently held on April 25, 2013, wherein the parties were afforded the opportunity to present documentary and testimonial evidence in support of their positions.

The Initial Decision (“ID”) was issued on July 18, 2014. The AJ held that Agency met its burden of proof on the charge of inexcusable neglect of duty, incompetence, and misfeasance.⁴ He reasoned that Employee’s poor performance and failure to complete assigned duties in a

² *Petition for Appeal*, p. 3 (December 3, 2010).

³ *Agency Answer to Petition for Appeal*, p. 9 (December 10, 2010).

⁴ *Initial Decision*, p. 8 (September 8, 2014).

timely matter served as a basis for Agency's decision to take adverse action against him. With respect to the charge of insubordination, the AJ stated that there was insufficient evidence in the record to support a finding that Employee willfully refused to perform his job.⁵ Moreover, the AJ concluded that Agency attempted to afford Employee, through progressive discipline, several opportunities to improve his job performance within a reasonable amount of time. Employee's performance did not improve after the initial sixty (60) day PIP, or the subsequent thirty (30) day extension. The AJ, therefore, determined that removal was within the penalties allowed under the Table of Appropriate Penalties and upheld Employee's termination.

Employee disagreed with the AJ's decision and filed a Petition for Review with OEA's Board on August 22, 2014. In his petition, Employee argues that the AJ's decision was based on an erroneous interpretation of D.C. Municipal Regulation ("DCMR") § 1410 as it relates to the implementation of Employee's PIP.⁶ Employee further believes that the AJ's findings were not based on substantial evidence because it failed to meet its burden of proof in showing that Employee's job performance was at the Marginal Performer level. Employee also believes that his supervisor, Gerrick Smith, had a personal vendetta against him.⁷ In addition, Employee states that Agency failed to refute his contention that other individuals contributed to the invoicing problems at DRES. Lastly, Employee argues that his termination was arbitrary and capricious because Agency improperly applied the *Douglas Factors* as a basis for terminating him. He, therefore, asks this Board to grant his Petition for Review.

Agency filed a Brief in Opposition to Employee's Petition for Review on September 25, 2014. It believes that the Initial Decision is supported by substantial evidence in the record.

⁵ *Id.* at 9.

⁶ *Petition for Review* (August 22, 2014).

⁷ *Id.* at 8.

Therefore, it requests that this Board uphold the AJ's decision to sustain Employee's termination.⁸

For clarity purposes, the events which served as a basis for Employee's termination are summarized as follows:

1. On March 8, 2010, Agency issued Employee an Advance Written Notice of Proposed Suspension for four (4) days based on a neglect of duty charge. The notice provided that Employee failed to enter projects into the PMIS and submit invoices in a reasonable timeframe. Specifically, Agency alleged that Employee submitted an invoice over five (5) weeks past the deadline and also caused a vendor not to be paid because of his failure to submit an invoice.⁹
2. On April 21, 2010, Agency sustained the neglect of duty charge against Employee. His four (4) day suspension without pay was served from May 4, through May 7, 2010.¹⁰
3. As a result of Employee's unsatisfactory performance, Agency placed him on a Performance Improvement Plan, effective May 14, 2010. The PIP, which lasted for a period of sixty (60) days, was implemented to allow Employee an opportunity to improve his performance. Employee was also informed that if he was unable to improve his performance by July 14, 2010, Agency would consider alternative actions, including suspension and/or termination.¹¹
4. As part of the PIP, Employee and his supervisor participated in weekly meetings to evaluate his performance and compliance with the performance plan.¹²
5. Employee's original PIP ended on July 14, 2010; however, Agency extended the period for an additional thirty (30) days, from July 24, 2010 through August 23, 2010. Employee acknowledged receipt of the notice on August 3, 2010.¹³

⁸ *Agency Brief in Opposition to Employee's Petition for Review* (September 25, 2014).

⁹ *Agency Answer to Petition for Appeal*, Exhibit 3.

¹⁰ *Id.*, Exhibit 4.

¹¹ *Id.*, Exhibit 6.

¹² *Id.*, Exhibit 7.

¹³ *Id.*, Exhibit 8.

6. On August 27, 2010, Agency issued the results of Employee's PIP. The notice stated that Employee failed to meet the goals that Agency required within the initial sixty (60) day period, and the subsequent thirty (30) day extension. Thus, Agency recommended that further action be taken against Employee.¹⁴
7. Agency subsequently issued an Advance Written Notice of Proposed Removal, charging Employee with "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: neglect of duty, incompetence and misfeasance." Employee was given an opportunity to respond to the charges against him.¹⁵
8. On November 1, 2010, Agency issued Employee a Notice of Final Decision on Proposed Removal, sustaining the charge and specifications against him. Employee's termination became effective on November 5, 2010. He subsequently filed an appeal with this Office.

Performance Improvement Plan

Under D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. District Personnel Manual ("DPM") §1603.3(e) defines cause to include any on-duty employment related act or omission that interferes with the efficiency and integrity of government operations (neglect of duty, insubordination, incompetence and misfeasance).

A PIP is a performance management tool designed to offer an employee the opportunity to demonstrate improvement in his or her work performance.¹⁶ Under DCMR § 1410.4, a supervisor or other reviewer is required to complete a PIP when an employee's "performance has been observed by the supervisor as being deficient." A PIP must last at least thirty (30) days, but cannot exceed ninety (90) days.¹⁷ DCMR § 1410.3 further provides that a PIP must: 1) identify specific performance areas in which an employee is deficient; and 2) provide concrete,

¹⁴ *Id.*, Exhibit 20.

¹⁵ *Id.*, Exhibit 11.

¹⁶ DCMR § 1410.2.

¹⁷ DCMR § 1410.3.

measurable actions steps which the employee needs to take to improve the identified areas of deficiency. Within ten (10) calendar days of the completion of the PIP period, the employee's supervisor must make a determination as to whether he or she has met the requirements of the PIP.¹⁸ If the employee has failed to meet the requirements, § 1410.5(a) allows the supervisor or reviewer the option of extending the PIP by thirty (30) days. In the alternative, § 1410.5(b) states that the affected employee may be reassigned, reduced in grade, or removed. DCMR § 1410.6 provides that the failure of the supervisor or reviewer to issue a written decision within the specified time period “will result in the employee's performance having met the PIP requirements.”

According to Employee, the AJ's finding that Agency properly implemented the PIP was an erroneous interpretation of Section 1410 of the DCMR. Contrary to Employee's assertion, the AJ considered and summarized each witness's testimony that was adduced during the April 25, 2014 evidentiary hearing. Employee's former supervisor, Donald Eischens, provided testimony relevant to the process for creating and implementing the PIP. According to Eischens, Employee was having problems fulfilling his responsibilities as a Project Manager in 2009 and 2010.¹⁹ After serving a four (4) day suspension for poor work performance, Eischens stated that he decided to place Employee on a performance plan because his performance was still not improving.²⁰ After the sixty (60) day period passed, Eischens testified that he asked to have Employee's PIP extended for another thirty (30) days. In support thereof, Employee's August 2, 2010 Performance Improvement Plan—30 Day Extension notice was received and admitted into evidence as Exhibit 19. Eischens further provided testimony regarding the Results of Performance Improvement Plan memorandum that was issued to Employee on August 27,

¹⁸ DCMR § 1410.5.

¹⁹ OEA Hearing Transcript, p. 29-30 (April 25, 2013).

²⁰ *Id.*, 40-42 and Agency Exhibit 17.

2010.²¹ In his Initial Decision, the AJ stated that “I conclude that there was no credible evidence of a procedural error in the implementation of the PIP.” Based on a review of the record, this Board concludes that the AJ properly considered and addressed the procedural requirements for the implementation of Employee’s PIP under the relevant regulations.

Employee next argues that the total time period of his PIP lasted over ninety (90) calendar days, in violation of DCMR § 1410.4. The effective date of Employee’s original PIP was May 24, 2010. Including the thirty (30) extension, the PIP spanned a total of ninety-two (92) days. While the Board concedes that Employee’s PIP exceeded the time period provided in § 1410.4, we find Agency’s error to be *de minimus*, as it did not result in substantial harm or prejudice Employee’s rights.²² The overwhelming amount of evidence in the record supports a finding that Employee’s work performance failed to improve over the course of time, even after Agency afforded him multiple opportunities to correct the communicated deficiencies. Moreover, there is no indication that Agency’s failure to adhere to the ninety (90) day time period significantly affected its final decision to terminate Employee.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ’s decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.²³ In *Baumgartner v. Police and Firemen’s Retirement and Relief Board*, the D.C. Court of Appeals held that if administrative findings are supported by substantial evidence, then it must be accepted even if

²¹ *Id.* at 73 and Agency Exhibit #20. The original PIP ended on July 24, 2010 and Employee received written notice of his failing performance in a memorandum dated August 2, 2010. Likewise, the thirty (30) extension period ended on August 23, 2010, and Employee received notice of his performance results on August 27, 2010. Both notices were issued within a ten (10) day calendar period as required under DCMR § 1410.5.

²² See OEA Rule 631.3, 59 DCR 2129 (March 16, 2012).

²³ *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

there is substantial evidence in the record to support a contrary finding.²⁴ Employee believes that the AJ's findings were not based on substantial evidence because it failed to meet its burden of proof in showing that Employee's job performance was marginal. Employee also believes that his supervisor, Gerrick Smith, had a personal vendetta against him. In support thereof, he cites to an email dated February 26, 2010 wherein Smith stated, "The action I want to take is firing [Employee]. Can I do that? He is not term. If not what is the hardest thing I can do?"²⁵

In this case, the Board finds that the Initial Decision was based on substantial evidence. The AJ provided a thorough analysis of the testimonial and documentary evidence presented by the parties during the course of this appeal. After reviewing the record, the AJ determined that Agency met its burden of proof in establishing that Employee was terminated for cause. The Initial Decision addressed Employee's argument that he was not solely responsible for the invoicing problems that Agency was experiencing during the relevant time period.²⁶ However, the AJ stated that "...apart from his own testimony, Employee failed to present evidence to support his contention that his allegedly timely processing of invoices at the end of his workday prevented the financial administrator from working on the payments."²⁷ Furthermore, the AJ surmised that Employee was not terminated because of a personal vendetta; rather, Agency's frustration with his continuous poor work performance and his failure to complete assigned duties in a timely fashion. The Initial Decision further addressed the specifications levied against Employee as follows:

1. Specification Number 1: On 4/21/10, you were suspended for 4 days due to your failure to adhere to the Construction Division's procedures regarding the entering of projects in the PMIS system along with the submission of invoices in the required timeframe.

²⁴ 527 A.2d 313 (D.C. 1987).

²⁵ OEA Hearing Transcript, Employee Exhibit #8 (April 25, 2013).

²⁶ *Initial Decision* at 8.

²⁷ *Id.*

The AJ held that this specification was simply a recitation of a prior disciplinary action taken against Employee and did not consider its merits.²⁸

2. Specification Number 2: on 4/26/10, in your mid-year review with your Cluster Leader (Donald Eischens), you were informed that your mid-year performance in several areas was at the Marginal Performer Level, due to your continued failure to adhere to the requirements identified in Specification Number 1. The AJ did not find Employee's testimony that his alleged poor work performance was never discussed with him. He further stated that the timely processing of invoices into the PMIS system was essential to Employee's job functions, and his failure to do so served as a basis for Agency rating him as a marginal performer.²⁹
3. Specification Number 3: On 5/24/10, you were placed on a sixty (60) day Performance Improvement Plan (PIP) due to your unsatisfactory performance as a Project Manager...On July 24, 2010, you were given a thirty (30) day extension of the PIP. At the end of the extension, it was determined that you have not improved your performance on a consistent basis enabling you to meet the minimum requirements of your position. The AJ concluded that Employee failed to dispute that he failed to process invoices in a timely manner. He also found Employee's testimony regarding this specification to be unpersuasive.³⁰

There is also substantial evidence in the record to support Agency's charge 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, incompetence, and misfeasance."³¹ Neglect of duty includes the failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; and careless or negligent work habits.³² The evidence shows that, despite being given several opportunities,

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ *Id.*

³¹ The Board will not address the charge of Insubordination, as the AJ held that Employee did not willfully refuse to perform his duties.

³² District Personnel Manual §1619(6)(c).

Employee failed to improve in the areas identified in his PIP.³³ As a Project Manager, Employee was responsible for planning, directing, and managing the design and construction of various projects for the District of Columbia.³⁴ Employee's position, albeit cumbersome, required a mastery of the Agency's processes as they relate to the timely processing of invoices in the PMIS.³⁵ His failure to execute the duties required of a Project Manager adversely affected Agency's ability to pay its vendors on time and hindered the overall efficacy of operations.³⁶ The Board, therefore, finds that the AJ's findings of fact and conclusions of law flowed rationally from the evidence presented. Accordingly, Agency has met its burden of proof in establishing that Employee's termination was taken for cause.³⁷

Douglas Factors

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.³⁸ Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."³⁹ When the

³³ *Initial Decision* at 8. Employee argued that the timely processing of invoices only constituted approximately fifteen (15) percent of his work load; however, this duty was germane to his position as a Project Manager.

³⁴ See generally, Agency Exhibit 2, Position Description, Project Manager CS-0801-14.

³⁵ *Id.*

³⁶ DCMR §1606.4 enumerates the circumstances under which a nexus may be established. These reasons include, but are not limited to: a) that the agency is less able to carry out its assigned function; b) that the employee is unable or unsuitable to perform his or her assigned duties; c) that other employees refuse to work with the employee who engaged in the misconduct; d) that the conduct has been publicized or has gained notoriety which has a deleterious effect on the operations of the agency; or e) that there is otherwise an adverse effect on the operation of the agency.

³⁷ Misfeasance includes careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources for other than official business. See Table of Appropriate Penalties.

³⁸ See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

³⁹ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

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."⁴⁰ In *Douglas v. Veterans Administration*,⁴¹ the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or 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;

⁴⁰ *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

⁴¹ 5 M.S.P.R. 280, 305-306 (1981).

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.

In considering the aforementioned factors, Hearing Officer Heath Scott, included a checklist with Agency's Advance Written Notice of Proposed Removal.⁴² In his analysis, Scott determined that Factors 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 were "relevant in determining the appropriate disciplinary action."⁴³ He emphasized the importance of Agency's ability to pay vendors in a timely manner and stated that the reports that Employee was responsible for generating were central to his role as a Project Manager. Smith further reasoned that the absence of such reports "jeopardized the timely payment and subjected the District to possible penalties and higher costs as a result of late payments."⁴⁴ Employee's inability to successfully perform the duties of his position demonstrated incompetence in the execution of work assignments and diminished his supervisor's confidence in Employee's ability to carry out the functions of his job.

⁴² *Agency Answer to Petition for Appeal*, Exhibit 22.

⁴³ *Id.* The Hearing Officer noted that he did not consider *Douglas Factor* number 2 in his analysis.

⁴⁴ *Id.* at 2.

Lastly, Employee argues that his removal was “arbitrary, capricious, and wrongful” because Agency blatantly failed to consider any mitigating circumstances in its analysis of the *Douglas Factors*. However, the record reflects that, on September 30, 2010, the reviewing Hearing Officer clearly identified which factors he determined to be relevant in evaluating Agency’s proposed removal action against Employee. In reviewing the record, this Board believes that Agency adequately considered the *Douglas Factors* in choosing the appropriate penalty to levy against Employee and that the Hearing Officer did not abuse his discretion in performing an analysis of the aforementioned factors.

Agency has the discretion to impose a penalty, which cannot be reversed unless “OEA finds that the agency failed to weigh relevant factors or that the agency’s judgment clearly exceed the limits of reasonableness.”⁴⁵ DPM §1619 provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of Neglect of Duty is reprimand to removal. The penalty for a second offense is suspension for fifteen (15) days to removal.⁴⁶ In this case, Agency has established that Employee’s actions constituted a neglect of duty; thus, removal was within the range of penalties allowed under DPM §1619. Based on the foregoing, Employee’s termination must be upheld.

⁴⁵ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

⁴⁶ See the Table of Appropriate Penalties. A first offense of Incompetence may range from suspension for five (5) to fifteen (15) days). A first offense of Misfeasance may result in a penalty of suspension for up to fifteen (15) days. The Neglect of Duty charge carries the most severe penalty in this case; thus, sustaining this charge against Employee is sufficient to uphold his termination.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.