

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
VENDORA GREEN)	OEA Matter No. 1601-0137-06
Employee)	
)	
v.)	Date of Issuance: February 26, 2007
)	
DEPARTMENT OF TRANSPORTATION)	Joseph E. Lim, Esq.
Agency)	Senior Administrative Judge

Andrea Comentale, Esq., Agency Representative
H. David Kelly, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On August 16, 2006, Employee, a Motor Vehicle Operator with the District Department of Transportation (DDOT), Street and Bridge Maintenance Division, filed a petition appealing her August 14, 2006 removal by the agency for inexcusable absence without leave (AWOL) and insubordination. A disinterested designee reviewed the case and recommended removal, despite dropping a discourteous treatment charge.

The matter was assigned to the undersigned judge on October 10, 2006. I held a prehearing conference on October 30, 2006 and a hearing on December 11, 2006. I closed the record at the conclusion of the hearing.

JURISDICTION

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

ISSUES

1. Whether Employee was guilty of the acts with which she was charged.
2. Whether these acts, if proven, constitute cause for taking an adverse action.
3. If so, whether Agency's penalty was appropriate under the circumstances.

CONTENTIONS OF THE PARTIES

The agency contends that Employee was guilty of insubordination and inexcusable absence without leave. Agency alleges that on May 22, 2006, Employee exhibited odd behavior, nodding off

while driving, cursed her supervisor, disobeyed orders, and abandoned her post. Then from May 30 through June 2, 2006, Employee was absent without leave (AWOL). Agency also alleges that Employee failed to follow proper procedures for approval of leave.

Employee denies the agency's charges and alleges that the penalty was unwarranted.

EVIDENCE

1. Roland Thompson (transcript pages 9 - 99)

Roland Thompson, an asphalt foreman, was Employee's supervisor in 2006. Employee was the motor vehicle operator in the DDOT. Thompson described Employee as disrespectful and uncooperative and her work attendance as unsatisfactory, as evidenced by the letter of warning (Agency Exhibit 2) and leave restriction memo (Agency Exhibit 3) handed to Employee in 2006.

On the morning of May 22, 2006, he ordered Employee to back up her asphalt laden truck to the paver for dumping. Thompson noticed as he was signaling to guide Employee that Employee had trouble driving her 10-wheel truck, and thought he observed her asleep at one point. When he opened her truck door and asked Employee if she was alright, Employee uttered profanities at him, told him to get away from her, and drove off without dumping her load of asphalt. Thompson described Employee's appearance as unkempt.

Thompson notified Superintendent Romanus who informed him that Employee will be back with her load of asphalt. Employee came back around 45 minutes later but parked two city blocks away. Thompson used hand signals and his radio to order Employee to dump her asphalt. However, Employee simply drove away again. He informed his boss, Romanus, of the incident.

Later that afternoon, Thompson saw Employee back at the work yard. When he asked Employee for the truck keys so that he could dump the asphalt, Employee refused. Thompson then told Employee she was off the clock, to which Employee responded with profanities and refused to turn in her radio. The next day, Thompson observed Employee refusing to follow Superintendent Charles Stewart's order.

Thompson also indicated that Employee was AWOL for seven hours on May 25, 2006 and for eight hours on May 26, 2006. Employee was also AWOL for a whole week from May 29 through June 2, 2006. (Agency Exhibit 4). At no time did Employee ask for leave or inform anyone about her absence. Later when he tried to serve those documents, Employee refused to sign for them.

Previously, Thompson had recalled Employee reporting she was ill but then showing up on the job site. Employee also asked for a different supervisor as she told Thompson she did not like him. Thompson had suspicions that Employee abused drugs but admitted that he did not report his suspicions to management.

2. Michelle Pourciau (transcript pages 99 - 104)

Agency Director Michelle Pourciau was the deciding official who endorsed Employee's removal for insubordination and unexcused absences. She believed that this sort of behavior cannot

be tolerated in a public service agency. In view of the inherent dangers in operating heavy machinery, Pourciau felt that removal was appropriate for an employee who handles equipment recklessly.

3. Romanus Onyeama (transcript pages 105 - 126)

Superintendent Romanus confirmed Thompson's account of May 22, 2006. Thompson had complained to him about Employee's behavior and he had ordered Employee to go back to the job site to dump her load of asphalt. Romanus found out later that Employee still had her now useless asphalt in her truck. He explained that once the heated asphalt had cooled off before being used, it becomes worthless.

4. Charles Stewart (transcript pages 127 - 144)

Roadway Maintenance Superintendent Stewart testified that on May 25, 2006, he ordered Employee to drive for a particular crew. Employee balked and said she only drove ten-wheel trucks. Stewart tried to explain to her that her job description states that her duties extended to more than just driving ten-wheel trucks and again Employee refused the order and rudely began walking away. Stewart informed her that she would be placed on AWOL but Employee retorted that the union had said that she should get leave without pay.

Stewart confirmed Thompson's account that Employee was AWOL for several days and that Employee never requested leave. He added that when Employee came back she never explained her absences.

5. John Deatrick (transcript pages 144 - 152)

John Deatrick, deputy director and chief engineer of Agency, was the proposing official who requested Employee's removal from her position after consulting with his team. He testified that he chose that penalty because he considered Employee's offenses to be serious.

6. Employee (transcript pages 153-220)

Employee asserted that on May 22, 2006, Thompson told her to sit with her asphalt for about 3-4 hours. After Thompson ordered her to back up her truck, he jumped to the side of her truck and complained that she was backing up incorrectly. They got into an argument and she yelled at Thompson to "get the hell off" her truck as he was obstructing her view. Employee claimed that Thompson then ordered her to "get the f__ out" of the job site. Employee then reported the incident to Romanus who ordered her to return to the job site. When she returned, Thompson again ordered her away.

Employee said she turned the truck key over only to Jones instead of to Thompson because she was responsible for them. She admitted that she simply walked out on Thompson when he tried to talk to her. Employee said she told Jones and Romanus that Thompson had ordered her away the first time. She admitted that she did not report the second incident when Thompson ordered her to leave the second time.

Employee confirmed Superintendent Stewart's testimony that she had disobeyed an order to drive a truck for a different crew. She explained her action by saying she felt driving a truck smaller than a ten-wheeler was a demotion. Employee added that she thought it was just a request, not an order.

On May 25, 2006, she also requested sick leave or leave without pay from Stewart. Stewart replied that the only way Employee could get leave without pay was to go AWOL. They argued a bit before Employee went home. Employee said she was paid for that day.

The next day on May 26, 2006, without informing anyone, Employee drove to North Carolina to see her ailing brother. Employee also confirmed that she was AWOL from May 29 through June 2, 2006 as she was attending to her brother. When she went back to work for Mr. Ferrell's crew, Employee said she did not tell anyone why she was absent. (transcript p. 187, 206)

Employee explained her poor attendance record by testifying that she suffered several deaths in her family and that her prior supervisor allowed her to take as much leave as she wanted. As for her alleged pattern of absences and leave abuse, Employee attributed this to Thompson's animus towards her because she had reported him for harassment on May 17, 2006. However, she was later informed that the charge was improperly filed.

To the AWOL charges, Employee explained that she was ill and that her brother was dying. She had tried to call several officials to ask for leave but couldn't reach any of them. However, on cross-examination, Employee said the one person she reached, Mr. Jones, told her he had nothing to do with her leave. She then added that she did not attempt to call anyone else because she believed she had no supervisor. Employee also claimed she was never made aware that she was under a leave restriction. She also insisted that the regular practice for requesting leave was to either submit a leave request or simply call in or even inform them after her return to work. On cross-examination, Employee conceded that the practice was to ask for leave in advance or on the first day of absence. (Transcript p. 215)

Employee also claimed Thompson never presented her with the AWOL papers nor did anyone inform her that she would be charged AWOL. When questioned about the January 30, 2006 letter of warning (Agency Exhibit 2) that she signed for, Employee claimed she only got the second page. (Transcript p. 209). When queried as to why she would sign a document that was so obviously incomplete, Employee testified that she did not bother reading it as she trusted Mr. Jones. No one ever told her Thompson suspected her of illegal drug use or that there was a problem with her work performance. Employee denied ever being a danger to anyone while she was driving the truck. Lastly, Employee claimed both Thompson and Stewart lied on the stand when they testified that she was insubordinate and discourteous.

6. Chris Hawthorne (transcript pages 220 - 236)

Motor Vehicle Operator Hawthorne testified that on May 22, 2006, he witnessed the interaction between Employee and Mr. Thompson. Thompson jumped on the side of Employee's truck and accused her of being high on drugs or drunk. The two then cursed each other. According to Hawthorne, Thompson twice told Employee to leave the job site without unloading her load of asphalt. He overheard Thompson telling Romanus over the radio that he did not want Employee there at the job site. Hawthorne did not notice Employee being incapacitated.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The following findings of fact are based on the witnesses' demeanor during testimony and on the documentary evidence of record. In general, I find Agency's witnesses to be far more credible than Employee. Agency's witnesses all testified in a forthright and direct manner. Employee presented nothing to show that they had any reason to lie. At times, Employee contradicted herself with her answers under cross-examination.

1. Whether Employee was guilty of the acts with which she was charged.

Insubordination: Failure or refusal to comply with written instructions or direct orders by a superior.

Employee is accused of twice disobeying Thompson's lawful orders to dislodge her load of asphalt. It is undisputed that Employee never dumped her asphalt at the job site. Employee claims that it was Thompson who ordered her to leave without dumping the asphalt on both instances. However, this does not make sense since Thompson called Superintendent Romanus to help him deal with Employee. Romanus confirms Thompson's account that he was called to order Employee to return to the work site. On the other hand, fellow crewmember Hawthorne supports Employee's account that it was Thompson who ordered Employee not to unload her asphalt. On this point, I find Hawthorne to be more credible than Thompson and therefore find that Agency failed to prove by a preponderance of the evidence that Employee was insubordinate to Thompson.

Next, Employee is accused of disobeying Stewart's order to drive a smaller truck. For this charge of insubordination, Employee freely admits to such behavior. She excuses her refusal by claiming she thought it was a mere "request" as opposed to an order by her superior. However, I find that the real reason was her second rationale, which was that she thought it was a demotion for her to drive anything less than a ten-wheeler.

The testimony and documentary evidence establishes that Employee had a duty to obey Stewart's lawful order, that the duty was a major duty of her position, that she purposefully and defiantly failed to obey the order, and that her failure constitutes insubordination.

Inexcusable absence without leave.

For the charge of inexcusable absence without leave, Employee admits that she failed to obtain authorization from any of her superiors for any of her absences. For this failure, she offers a variety of excuses: that she couldn't reach any one; that the one person she did reach, Mr. Jones, told her he did not want to be involved; that she had family emergencies; that it was common practice for employees to ask permission only after their return from their absence. However, she later contradicts herself by admitting that she had to get permission first before being absent. She also did not present Mr. Jones or anyone else to support her version. I therefore find that Employee was inexcusably absent without leave for almost seven days.

2. Whether Employee's acts constitute cause for taking an adverse action.

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 uncontroverted 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.¹ Here, Employee was removed for "insubordination and inexcusable absence without leave (AWOL)." Unauthorized absence and insubordination are causes set forth in § 1603.3. The dishonesty charge is subsumed under the "any knowing or negligent material misrepresentation on a... document given to a government agency;" while the discourteous treatment charge is included under the "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" causes set forth in § 1603.3.

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).

¹ 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 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.

The testimony and documentary evidence establishes that Employee's actions constitute insubordination and unauthorized absence. Accordingly, I conclude that the agency has met its burden of establishing cause for taking adverse action.

3. Whether Agency's 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 simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."² 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."³

Here the sustained charges are based on several instances of inexcusable absence without leave and an instance of insubordination. All point to the appropriateness of Agency's penalty of removal. Furthermore, the penalty is not clearly an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

It is hereby ORDERED that Agency's action is upheld.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

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

³ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).