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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CHRISTOPHER LEE)	
Employee)	
)	OEA Matter No.: 1601-0045-07
v.)	
)	Date of Issuance: November 23, 2009
D.C. DEPARTMENT OF)	
TRANSPORTATION)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Christopher Lee (“Employee”) worked as a Support Services Assistant with the D.C. Department of Transportation (“Agency”). On January 16, 2007, Agency suspended Employee without pay for 15 days based on the charges of inexcusable neglect of duty and insubordination. At the time of the adverse action, Employee was in permanent career status.

Agency supplied Employee with a government-owned vehicle and government-owned cell phone, both of which were to be used by Employee to carry out his duties. As

part of his duties as a Support Services Assistant, Employee was required to be available by cell phone to receive instructions from his supervisor regarding the transportation of various people and the delivery of documents. On Friday, December 1, 2006 Employee's supervisor called him at approximately 12:30 p.m. on the cell phone and left him a message stating that he was to return to the office, pick up a package, and deliver it to another agency. When Employee did not respond to that message, the supervisor continued to call him and left four additional messages with the same instructions. This went on until approximately 3:00 p.m. Moreover, Agency's Chief of Staff also telephoned Employee on that same and left him a message stating that he was to be on standby in anticipation of receiving another call that would instruct him on the delivery of this package. Employee never answered any of the phone calls, did not return any of the messages, and never returned to the office to pick up and deliver the package.

On that following Monday, December 4, 2006, Employee's supervisor called him to her office so that she could discuss with him the events of that previous Friday. When the supervisor asked Employee to explain why he never returned to the office to pick up and deliver the package, Employee informed her that she was not his mother and that his whereabouts were none of her business. At that point, Employee left her office. With respect to this incident, Agency charged Employee with insubordination and with inexcusable neglect of duty for the December 1, 2006 incident.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 30, 2007. On June 20, 2007, the Administrative Judge conducted an evidentiary hearing. Based on the record as a whole, including the evidence gathered from the evidentiary hearing, the Administrative Judge concluded that Agency had not

considered the December 4, 2006 incident when it made its final decision to suspend Employee. For this reason, the Administrative Judge did not sustain the insubordination charge. However, before issuing her final decision, the Administrative Judge remanded the appeal to Agency for it to determine whether the 15-day suspension was still the appropriate penalty in view of the fact that only the inexcusable neglect of duty charge was being sustained. After considering Employee's prior disciplinary record, Agency determined that the penalty was in fact appropriate under the circumstances. Therefore in an Initial Decision issued November 30, 2007, the Administrative Judge upheld Agency's inexcusable neglect of duty charge and the 15-day suspension it imposed as the penalty.

Subsequently, Employee timely filed a Petition for Review. Employee argues in his petition that the Administrative Judge failed to address a material issue of fact and that the Administrative Judge lacked substantial evidence to find that Agency had properly exercised its managerial discretion with respect to the penalty. For these reasons, Employee asks us to vacate the Initial Decision and order Agency to restore to him all pay and benefits he lost as a result of the suspension.

The essence of Employee's first argument is that the Administrative Judge failed to require that Agency prove that Employee had in fact neglected his duty on December 1, 2006. Employee would have us to believe that the only way Agency could have proven this charge was by introducing into evidence the phone records of the government-issued cell phone used by Employee on that date. According to Employee, the phone records would have shown whether he received the calls made by his supervisor, the telephone number from which the calls originated, and the length of each call. By not producing these phone records, Employee contends that the Administrative

Judge should have drawn the inference that Employee's supervisor either did not make the calls or that Employee did not receive the calls.

An inexcusable neglect of duty charge can only be sustained when an agency has proven by a preponderance of the evidence that an employee had an actual duty, that the employee neglected that duty, and that the neglect was inexcusable. In this appeal, it was undisputed that Employee had an actual duty to answer the cell phone, retrieve messages, and follow instructions given to him by his supervisor. What is disputed, however, is whether Employee neglected that duty.

Based on the testimony given by Employee's supervisor at the hearing, the Administrative Judge concluded that Employee had neglected his duties. The Administrative Judge found that the testimony given by Employee conflicted with the testimony given by his supervisor. Specifically, Employee claimed that he did not receive on the cell phone any calls or messages from his supervisor on December 1, 2006. Conversely, Employee's supervisor testified that she called Employee several times on that date and left him a message each time with the instruction that he was to return to the office to pick up and deliver a package.

The Administrative Judge resolved this conflict by finding that Employee's supervisor was a credible witness and that Employee was not credible on "the issue[] of whether he received voice-mail messages . . ." from his supervisor.¹ During the evidentiary hearing, the Administrative Judge carefully observed the demeanor and character of each witness. Based on these observations, the Administrative Judge was able to make her credibility determinations. Hence, we give great deference to the credibility determinations made by the Administrative Judge who was the fact finder.

¹ *Initial Decision* at 7.

Contrary to what Employee states, it was not necessary for Agency to produce the cell phone records in order to meet its burden of proof. Agency met this burden when its witness credibly testified as to what happened on December 1, 2006. Therefore, we cannot reverse the Initial Decision for this reason.

Concerning Employee's argument regarding the penalty, the Administrative Judge held that "Agency [was] not prohibited by law, regulation, or guidelines" from imposing the 15-day suspension "despite the reversal of one of the charges. . . ."² In fact in Agency's response to the remand order issued by the Administrative Judge, Agency stated that it had considered the *Douglas* factors and found that the seriousness of Employee's actions, Employee's prior disciplinary record, and the mitigating circumstances, if any, were the relevant factors in this case. As the Administrative Judge stated "Agency has [the] primary responsibility for managing its employees [and may] determine[e] the appropriate discipline to impose."³ Moreover, the D.C. Court of Appeals has stated that "[t]he 'primary discretion' in selecting a penalty 'has been entrusted to agency management, not to the [OEA].'" *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (citing to *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981)). "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *WMATA v. D.C. Dep't of Empl. Servs.*, 926 A.2d 140, 147 (D.C. 2007)(quoting *Ferreira v. D.C. Dep't of Empl. Servs.*, 667 A.2d 310, 312 (D.C. 1995)). Unfortunately for Employee, we are not persuaded by his arguments on this issue. Rather, based on the foregoing standard of review, we conclude there is substantial evidence in the record to uphold the Administrative Judge's findings on the

² *Id.* at 10.

³ *Id.* at 9.

issue of the appropriateness of the penalty. Thus, we are compelled to deny Employee's
Petition for Review and must uphold the Initial Decision.

ORDER

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

FOR THE BOARD:

Sherrí Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

Hilary Cairns

Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.