THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ERIC BUCKNER,	)	
Employee	)	OEA Matter No. 1601-0153-06
	)	
v.	)	Date of Issuance: May 23, 2008
	)	
D.C. DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Barbara B. Hutchinson, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Eric Buckner ("the Employee") is employed by the District of Columbia Department of Transportation ("Agency" or "DDOT") as a Civil Engineering Technician and has worked for the Agency for approximately 20 years. The Employee's thirty (30) day suspension stemmed from allegations, by the Agency, of the Employee's inexcusable neglect of duty, insubordination, and willful disobedience. As a result, on September 21, 2006, the Employee filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting said adverse action. After convening several conferences, I decided that an evidentiary hearing was necessary. Accordingly, an evidentiary hearing was held on April 12, 2007. The Employee elected not to testify on his own behalf during said evidentiary hearing. The sum and substance of this Initial Decision is based in whole upon the documentary and testimonial evidence as presented by the parties during the pendency of this matter. The record is closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

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

2. If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Summary of Relevant Testimony

John F. Deatrick

John F. Deatrick ("Deatrick") testified in relevant part that: he is the Deputy Director and Chief Engineer of DDOT. Deatrick is responsible for the design, construction and maintenance operations of DDOT. Deatrick supervises Samuel Olatunji ("Olatunji"), among others. Olatunji, in turn, supervises the Employee. Olatunji's job responsibilities include both designing and overseeing various construction projects as an engineer.

Relative to the instant matter, Deatrick was the one who ultimately decided to suspend the Employee for 30 calendar days. Agency's Exhibit No. 1 is the advanced notice of a proposed suspension of ten (10) days or more addressed to the Employee. This exhibit was admitted into evidence, without objection, through the testimony of Deatrick. The circumstances that give rise to the instant matter are outlined within Agency's Exhibit No. 1. According to this exhibit, the Agency levied three charges against the Employee: Inexcusable Neglect of Duty; Insubordination, and Willful Disobedience.

Olatunji, Sylvester Okpala, and Ali Shakeri, all of whom who are in the Employee's chain of command, went to Deatrick complaining about the Employee's job performance. Specifically, the Employee was allegedly absent from his assigned work site on February 16, 2006. These complaints regarding the Employee's performance issues subsequently led to the Inexcusable Neglect of Duty charge against the Employee. Deatrick explained that on this date, the Employee was required to inspect and oversee asphalt paving done by a contractor. Given the Employee's job duty in this regard, the Employee's absence can be particularly troubling because poor workmanship on the part of the contractor can be effectively concealed if no one is present to monitor the contractor throughout the process of asphalt paving.

Deatrick related that if the asphalt was not at a proper temperature when it was laid, it would result in a shoddy product. Also, the contractor could lie about the amount of asphalt used on the project. Both of these scenarios have happened in the past and some DDOT employees were removed from service over similar allegations. *See generally*, Tr. at 26. Given this, the Employee's presence on the job site is integral to insuring that DDOT is not defrauded (whether intentionally or otherwise) during the process of asphalt paving. Deatrick also testified that if the Agency is unable to keep its employees on the job, this would set a bad example for the contractors it hires. *See generally*, Tr. at 26.

According to Deatrick, the Willful Disobedience charge stemmed from the Employee's allegedly making a disparaging racial remark to a colleague. From that, as part of the Agency's investigation into the alleged incident, the Employee was instructed to attend a meeting with the Agency on April 27, 2006. The Employee was absent from this meeting. A subsequent meeting was scheduled for May 3, 2006, so that the Employee could cooperate in the investigation. According to Deatrick, the crux of this charge does not deal with whether the Employee actually made the disparaging remark but rather the Employee's alleged refusal to comply with the Agency's investigation of this incident in spite of direct orders requiring the Employee to actively participate.

Employee's Exhibit No. 1 is an Inspector's Daily Report dated February 16, 2006. This one page document is the form that is generally used by DDOT to track the work that is being done at a given work site. Specifically, it will list the type and quantities of materials used at a given worksite, with receipts of said items to be affixed to this Daily Report. This exhibit references the date and work in question in the instant matter. I note that John Reese and the Employee are the inspectors listed on this form. However, I further note, that John Reese's signature is the only one present on this form. Deatrick further explained that normally both inspectors would sign the Daily Report. *See generally*, Tr. at 68.

According to Deatrick, he relied on Olatunji's emails and daily logs, Employee's Exhibit No.1, as well as Olatunji's opinion on the matter in sustaining the Employee's suspension.

Ronnie Edwards

Ronnie Edwards ("Edwards") testified in relevant part that: he is currently employed by DDOT as a civil rights/ EEO manager and that he has held this position for approximately four years. His job responsibilities include investigating instances of alleged discrimination at DDOT. Edwards's investigation into an alleged incident will generally include evidence collection as well as the interviewing of witnesses. *See generally*, Tr. at 94. For his part in the instant matter, Edwards related that the Employee allegedly made disparaging remarks to a fellow colleague. Subsequently, Edwards was assigned to investigate this alleged incident. Edwards was first alerted to this incident by Deatrick who then had Juan Amaya, the alleged victim in said incident, send an email to Edwards detailing his recollection of the incident. This email was reproduced for the instant proceedings and was admitted as Agency's Exhibit No. 4.

According to Edwards, a week or so after this incident, an initial meeting was set up with the Employee. In attendance were Edwards, Deatrick, the Employee, Retta Sanders ("Sanders") and Clifford Lowery ("Lowery"), a union representative. After Lowery arrived, he allegedly wondered why a meeting was scheduled for this matter since there were other more pressing concerns that should be addressed. With that, Lowery left with the Employee in tow. Edwards was unable to conduct a full interview with the Employee prior to his abrupt departure. Edwards attempted to reschedule the meeting with the Employee. He had Sanders coordinate the date, time, and place of the interview. Agency's Exhibit No. 6 is an email to the Employee instructing him to appear for a meeting with Edwards at his office on April 27, 2006, at 3:30pm. I note that Lowery was copied on this email. A follow-up meeting reminder, which was admitted into evidence in the instant matter as Agency Exhibit No. 7, was sent to the Employee, among others. According to Edwards, the Employee never attended the April 27, 2006, meeting. A follow-up meeting reminder, which was admitted into evidence as Agency's Exhibit No. 8, was sent to Employee, among others. Through this meeting reminder, the meeting which was previously scheduled for April 27, 2006, that the Employee missed, was rescheduled for May 3, 2006, at 10:00am. Furthermore, according to this exhibit, the Employee was warned that his failure to attend would result in his being charged with willful disobedience/unjustified refusal to answer proper questions in an official District government investigation. On May 3, 2006, Edwards sent a memorandum to Lowery stressing the importance of the Employee's cooperation in this investigation. *See generally*, Agency Exhibit No. 9. After all of this, Edwards recalled that the Employee did not attend the meeting scheduled for May 3, 2006.

Samuel Olatunji

Samuel Olatunji ("Olatunji") testified in relevant part that: he is a supervisory civil engineer with DDOT. He is currently charged with supervising five inspectors and two engineers. The Employee is one of the inspectors that he is charged with supervising. Olatunji described the Employee's job duties and responsibilities, while on a work site, as follows:

> As an inspector, he is responsible to cover certain work being done by contractors. Not only he has to be there physically, but he's responsible for the safety of the work environment, he's to secure the measurements and quantities of operations being done on projects. He can terminate the operations of the contractor if he's not doing as specified in the contract by appropriate communication to immediate supervisors.
>
> Tr. at 133.

As was stated previously, Olatunji is, in part, responsible for supervising the Employee, among others. One method of accomplishing this responsibility is for him to physically visit the various work sites that he is supervising. This enables him to check on the progress of repairs being done. Usually, Olatunji's visit to a work sites are brief in nature seemingly because he is tasked with overseeing, contemporaneously, a multitude of projects. On February 16, 2006, the Employee was scheduled to oversee asphalt paving at a work site on Benning Road.

During Olatunji's work related travels on that date, he went to an alley on Sixth and Chesapeake in Southeast, Washington, DC. While en route, his vehicle passed by the Benning Road work site on or around 1:15pm. He did not see any DDOT employees present. He noted this concern because DDOT employees are required to wear very distinctive vests and hats while on a work site. These vests and hats would make a DDOT employee very recognizable to himself, the contractor, or the general public. Without stopping the vehicle, Olatunji then proceeded to the aforementioned alley.

After completing his inspection of said alley, Olatunji then proceeded back to the Benning Road work site where the Employee was supposed to be stationed. Olatunji recalled that he arrived at said work site at or about 2:00pm. Olatunji further recalled that he then noticed that the Employee was still not present at the Benning Road work site to which he was assigned for that day. Olatunji then questioned the work site superintendent, a contractor, named Mike Harris and inquired as to the whereabouts of the Employee. Olatunji recalled that Harris told him that no DDOT inspector has been at that work site since that morning. *See generally*, Tr. at 148.

After hearing this, Olatunji then contacted the Employee via radio, in an attempt to locate him. After three attempts, Olatunji was able to contact the Employee through the radio. According to Olatunji, the Employee related to him that he was at the Benning Road work site and was walking towards a nearby service station in order to use the restroom. At the time, Olatunji did not believe the Employee's story because, from where he was situated at the work site, he had a clear vantage point to the service station and was unable to see the Employee. When he related this to the Employee, Olatunji testified that the Employee then stated over the radio that he did not know that Olatunji was contacting him from the work site. Olatunji further noted that the Employee's demeanor quickly changed and that radio contact with the Employee was then severed,

allegedly by the Employee. After that, Olatunji waited three to five minutes for the Employee to return to the Benning Road work site. The Employee did not return within that timeframe. Olatunji further noted that the contractor had provided for restroom facilities at the Benning Road work site. Further, per the agreement entered into by DDOT with the contractor, the Employee was free to use those facilities when nature called. In following up with this incident, Olatunji reported the Employee's absence to Deatrick. Of note, relative to Employee's Exhibit No. 1, Olatunji testified that John Reese generated that document, not the Employee. See generally, Tr. at 202 – 203.

Clifford Lowery

Clifford Lowery ("Lowery") testified in relevant part that: he is currently employed by DDOT as a civil engineer technician and is also the current president of the American Federation of Government Employees ("AFGE") Local 1975. Employee's Exhibit No. 4 was introduced into evidence through Lowery's testimony. This exhibit is a letter dated August 3, 2006, sent by AFGE on the Employee's behalf regarding the Agency's proposal to suspend the Employee for 30 days. Lowery testified that he caused this document to be created and it is his signature which appears at the end of same. Regarding the initial Agency interview of the Employee regarding the EEO matter, Lowery asserted that the reason why the AFGE and the Employee did not actively participate in the investigation, was that the charges were not in writing. Also, Lowery further asserted that he only happened across this meeting by chance and that he had not been invited. Considering these circumstances, Lowery decided that the best course of action would be for the Employee to deny the charges and leave the meeting. He further requested that the charges be reduced to writing before the AFGE or the Employee would respond to the Agency's investigative efforts. *See generally*, Tr. at 220 – 223. Lowery testified that he no prior knowledge of Agency's Exhibit Nos. 4 or 5.

John Reese

John Reese ("Reese") testified in relevant part that: he is employed by DDOT as a civil engineering technician and that he and the Employee are co-workers. Reese indicated that he was once asked by DDOT management to supervise the Employee. Reese refused and explained that he could not comply because AFGE rules prohibit AFGE members from supervising one another. Referencing Employee's Exhibit No. 1, Reese testified that it is his signature that appears at the bottom of this exhibit. Reese further explained that on February 16, 2006, he was not at the work site that is indicated on Employee's Exhibit No. 1. Reese was in class that day. *See*, Tr. at 231. Reese also indicated that on this date, the Employee called him and informed him that he was at the work site and that the contractors were pouring concrete. Reese indicated that he received the Employee's telephone call at some point between 10:00am and 11:30pm. Reese testified that he created Employee's Exhibit No. 1. *See*, Tr. at 234 – 235.

Reese explained that while he was not at the work site on the date indicated on the report, he was able to fill out this report based on the tickets submitted by the contractors and the account of the day's events as provided by the Employee. *See generally*, Tr. at

235 – 236. During cross examination, Reese explained that the tickets that are submitted by the contractors may be given to the DDOT employee present before the contractor starts working. *See generally*, Tr. at 241 – 242. Reese clarified that he has on occasion taken the Employee to various work sites in the course of working together. However, this practice was not a regular occurrence. He further asserted that he did not take the Employee to the Benning Road work site on February 16, 2006.

Thomas Bell

Thomas Bell ("Bell") testified in relevant part that: he is employed by DDOT as an engineering equipment operator. Bell also serves as Vice President of AFGE Local 1975. After initially receiving Employee's Exhibit No. 4, Bell attempted to set up a meeting with the Employee and Olatunji. However, Olatunji appeared at the meeting with Sylvester Okpala and Ms. Dunbar. According to Bell, the presence of these other persons had not been previously agreed to, so nothing substantive occurred at that meeting. Bell justified ending the meeting because the past practice in this type of matter has generally included first meeting solely with the aggrieved employee's immediate supervisor. Bell further indicated that he made an overture to Olatunji to reschedule this meeting. However, Bell asserts that Olatunji never responded to this request.

Findings of Facts, Analysis and Conclusions of Law

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office. As was stated previously, based on charges of inexcusable neglect of duty, insubordination, and willful disobedience, the Agency suspended the Employee for 30 days. Each charge shall be discussed in turn *infra*.

Inexcusable Neglect of Duty

The imposition of this charge arose from the allegation that the Employee was not present at his scheduled work site for his full tour of duty on February 16, 2006. In support of this allegation, the Agency presented the testimony of Olatunji who testified, credibly, that he was physically present at the Benning Road work site on February 16, 2006, at two distinct time periods and did not see the Employee present.

On the date in question, the first time Olatunji was present was when he was driving by in a vehicle while en route to another work site. During this drive by, Olatunji did not see the distinctive hat or vest that is supposed to be worn by all DDOT employees while at a work site. During the second visit, Olatunji physically stopped at the work site and inquired as to progress of the work being performed as well as the Employees whereabouts. According to Olatunji, the Employee was not present during his impromptu visit to the work site. However, Olatunji was able to raise the Employee via radio. Olatunji contends that when he queried the Employee as to his whereabouts, the Employee indicated that he was going to a nearby service station in order to relieve himself. Olatunji did not believe the Employee because at the time of this conversation,

Olatunji had a clear vantage point to the said service station and he was unable to see the Employee. Olatunji also contended that the work site had portable restrooms that were available to the Employee for use. In Olatunji's opinion, the Employee's alleged use of other facilities led further credence to his doubting the Employee's claim of his then current location. Olatunji also testified that after his conversation with the Employee was abruptly ended, he then spoke with Mike Harris, the contractor's work site superintendent, who allegedly told Olatunji that no one from DDOT had been at the Benning Road work site since that morning.

Reese was the only person to testify on the Employee's behalf, to the effect that the Employee was present at the Benning Road work site on the date in question. However, Reese could only corroborate the Employee's presence at the work site based on a telephone conversation that he had with the Employee. Reese, who was not at the work site on the date in question, was unable to give an eyewitness account of the Employee's whereabouts on February 16, 2006. Both Olatunji and Reese testified that Reese generated Employee's Exhibit No. 1. This document was touted by the Employee as proof positive that he was present at the work site on the date in question. I disagree.

In the instant matter, the Agency has the burden of proof as to material issues of fact. The salient fact that is at issue relative to the instant charge is whether the Employee was present, at his assigned work site, for his entire tour of duty, on February 16, 2006. The Agency has presented first hand testimony attesting to the Employee's absence for, at least, part of his assigned work day. During the evidentiary hearing convened in this matter, the Employee did not present one eyewitness who could refute the Agency's allegation in this regard, not even the Employee himself. Further, the one document that ostensibly would buttress the Employee's generalized contention that he was present on the date in question, Employee' s Exhibit No. 1, was not created or signed by the Employee. Rather, this document was created by Reese, albeit, with the Employee's alleged input. Further, according to the testimony of Reese, the information contained within this exhibit, including the asphalt tickets that were affixed thereon, could have been gathered without the Employee being physically present the entire day. Based on the evidence adduced during the evidentiary hearing in this matter, it seems more likely than not that the Employee reported for duty at the beginning of his shift but subsequently left the work site without properly notifying his superior(s) or obtaining authorization from same.

I find that on February 16, 2006, the Employee was not at his assigned work site for his entire tour duty. Accordingly, I further find that the Agency has met its burden of proof relative to the charge of inexcusable neglect of duty.

Insubordination

The imposition of this charge arose from the allegation that on February 17, 2006, the Employee failed to follow a direct order from Olatunji requiring the Employee to attend a meeting regarding his then alleged absence from his assigned work site on February 16, 2006. Deatrick testified that in sustaining this charge he relied on the daily

log of Olatunji as well as Olatunji's personal recount of events, both of which indicated that the Employee missed a scheduled meeting with Olatunji on February 17, 2006. The intended purpose of this meeting was to question the Employee regarding his whereabouts on February 16, 2006. Olatunji corroborated Deatrick's rendition of events. According to Olatunji, the Employee allegedly refused to meet with him in order to discuss his alleged absence on February 16, 2006.

The Employee presented evidence through cross examination of Deatrick and Olatunji that the alleged reason for the Employee's refusal to meet was to arrange for a Union representative to be present.

The evidence presented by both parties relative to this charge was in short, sparse. However, I find the testimony of Deatrick and Olatunji both credible and persuasive. Through this testimony, it is disturbingly obvious to the undersigned that the Employee's conduct, relative to his willingness to attend scheduled meetings or submit to questioning, is dubious at best and contumacious at worst. Such conduct cannot be allowed, especially when it hampers an Agency's seemingly diligent efforts to investigate an alleged violation of employee conduct. Accordingly, I find that the Agency has met its burden of proof relative to the charge of insubordination.

Willful Disobedience

The imposition of this charge arose from the allegation that the Employee failed to participate in several investigatory meetings and answer questions thereof regarding an allegation that the Employee made a racially disparaging remark to a fellow employee. Primarily, the Agency presented the testimony of Deatrick and Edwards in order to buttress this allegation during the evidentiary hearing. Edwards credibly testified that as DDOT's civil rights/ EEO manager, he was tasked with investigating Juan Amaya's complaint against the Employee relative to his alleged remarks. Edwards testified that a meeting was set up with the Employee on several dates, including April 27, 2006, and May 3, 2006, among others. Edwards contended that the Employee appeared for the first meeting but subsequently stopped participating after Lowery appeared. For the other times scheduled, the Employee simply failed to appear.

Olatunji testified that he was tasked with making sure that the Employee was informed of the aforementioned meetings that were being coordinated by Edwards in this matter. Edwards also noted that various notices sent to the Employee, introduced into evidence as Agency Exhibit Nos. 6, 8, 9, and 15 informed the Employee of the meetings requiring his presence. I further note that for most of the aforementioned exhibits, the Employee was duly notified that his participation in this investigation was critical and that he may have a representative appear with him. Of further note, relative to Agency's Exhibit Nos. 6, 8, and 9, Lowery, AFGE president, was a named addressee of all of these documents.

The Employee presented testimonial evidence from Lowery and Bell who both testified that it was their suggestion that the Employee not participate in Edwards'

investigation. They both proffered several reasons, either singularly or in conjunction to one another for their not participating, including:

1. The charges against the Employee not having been reduced to writing prior to these meetings;

2. The number of management personnel present at these meetings somehow violating established protocol; And,

3. That the AFGE was not properly informed by the Agency that these meetings had been scheduled.

During the evidentiary hearing, I had the opportunity to observe the demeanor, poise, and credibility of Deatrick, Edwards, and Olatunji. I find their testimony relative to the charge of willful disobedience to be more credible and persuasive than the Employee's rendition of events as presented by Bell and Lowery. It is plainly evident to the undersigned that the Employee's behavior during Edwards' investigation was both guileful and contumacious. Accordingly, I find that the Agency has met its burden of proof relative to the charge of willful disobedience.

In a nutshell, I find that the Agency's adverse action was taken for cause. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See, Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ ( ). Therefore, 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 an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes, supra*; *Hutchinson, supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ ( ).

I CONCLUDE that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of suspending the Employee for 30 days should be upheld.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of suspending the Employee for 30 days is hereby UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge