

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
C. Dion Henderson)	OEA Matter No. 1601-0050-09
Employee)	
)	Date of Issuance: March 7, 2011
v.)	
)	Senior Administrative Judge
Department of Consumer & Regulatory Affairs)	Joseph E. Lim, Esq.
Agency)	

Justin Zimmerman, Esq., Agency Representative
David Branch, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On November 25, 2008, Employee filed a petition for appeal with this Office from Agency Department of Consumer & Regulatory Affairs (DCRA)'s final decision removing him effective October 31, 2008, for malfeasance. This matter was initially assigned to Administrative Judge Muriel Aikens-Arnold. The parties then engaged in mediation on September 2009, but they failed to settle their differences. This matter was then reassigned to Administrative Judge Eric Robinson who conducted a status conference on December 3, 2009. After the judge's recusal, I took over this matter on January 19, 2010. I held a status conference on February 26, 2010, where Employee filed a motion for summary judgment, but I denied it after determining that a hearing was necessary. Due to budgetary constraints, a hearing was not held until January 19, 2011. I closed the record at the conclusion of the hearing.

JURISDICTION

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

ISSUE

Whether Employee's actions constitute cause for adverse action, and if so, whether the penalty of removal was appropriate under the circumstances.

BACKGROUND

Parties' Allegations

Agency accuses Employee, a Consumer Protection Investigator, Grade 12, of

malfeasance. Specifically, Employee was accused of taking money from the proprietor of an unlicensed nail salon in exchange for the cost and services of obtaining the proper business license for said salon. Agency also alleges that Employee failed to issue citations to the nail salon for violations of D.C. business licensing laws as was his duty. On the other hand, Employee denies taking any bribes and alleges that his accusers are lying.

Undisputed facts

Employee's job as a Consumer Protection Investigator was to conduct in-depth investigations of the licensure categories administered by the Agency. Among the categories are unfair trade and business practices, unlicensed business activities, occupational and professional licensure, corporations, and consumer protection. The Investigator must then prepare investigative reports of any violations, and issue citations when businesses fail to comply with the District of Columbia (D.C.)'s business laws. Investigators swear out criminal complaints, and testify at criminal trials related to their cases. They develop liaison contacts with other law enforcement agencies, serve subpoenas, suspension/revocation orders, and retrieve suspended or revoked business and professional licenses as required by statute. (Agency Exhibit 8) Employee has been an Investigator with the Agency for more than 23 years, and visits as many as forty businesses a day.

D.C. law provides that a public servant commits the offense of bribery if that person corruptly solicits or accepts anything of value in return for an agreement that the public official will violate an official duty or will aid in committing any fraud against the District of Columbia. D.C. Code § 22-712(a)(2) (2008).

The D.C. Personnel Manual (DPM) provides that D.C. Government employees shall avoid any action that might result in or create the appearance of impropriety on the part of the employee as it relates to their government job. CDCR 6-1803.1(a) (2008). The DPM also prohibits D.C. government employees from interfering or obstructing investigations of misconduct by either another District employee or any person dealing with the District. CDCR 1803.10 (2008)

D.C. law prohibits any person required to obtain a license to operate a business in DC from operating a business without first having obtained a Basic Business License (BBL). DCC 47-2851.02 (2008). Salons, including nail salons, are among the categories of businesses which are prohibited from operating without first obtaining a BBL. CDCR 17-3716.1 (2008)

DCRA Investigators have a positive obligation under DC law to issue a Notice of Infraction (NOI) upon observance of an infraction of any provision of DC law within DCRA's authority and obligation to enforce. CDCR 16-3101.6 (2008). Investigators, however, may give business owners a reasonable amount of time to come into compliance.

Quynh Lee and his wife Hung Thi Luc are the owners and operators of Beau Nails and Super Elegance nail salons, located in the District. Thao Thif Nogoc Nguyen was one of their employees at the nail salons.

Evidence on Disputed Issues

a. Hung Thi Luc testified (Tr. p. 13 - 28) as follows.

Hung Thi Luc testified that one day Employee came into her Super Elegance Nail Salon, bearing business license application papers. Her husband and co-owner of the salon, Mr. Quynh Lee, called her on the phone with instructions to sign the papers. As she defers to the husband on all business matters, she signed the papers.

b. Thao Thif Nogoc Nguyen testified (Tr. p. 28 - 41) as follows.

Thao Thif Nogoc Nguyen testified that Employee came to the Beau Nails Salon where she worked, and asked to see their business license. Nguyen telephoned her employer, Mr. Quynh Lee, and Mr. Lee and Employee talked on the phone. On Mr. Lee's instructions, she handed Employee two hundred dollars, which Mr. Lee would explain later, was for their business license.

The next time she saw Employee, Employee filled out the business license application form and had Mr. Lee sign it. Afterwards, Nguyen agreed to be the resident agent for the business. See Agency Exhibit 3.

c. Quynh Lee testified (Tr. p. 41 - 85) as follows.

Quynh Lee admitted that when Employee first came to his salons, he did not have the required business licenses. Employee asked for money, so he instructed his employee, Ms. Nguyen, to pay \$200 to Employee with the understanding that it was for the application fee for the required license. Mr. Lee said he learned later that the application fee was only about \$175. Lee filled out the application forms (See Agency Exhibits 1 & 2), but said it was Employee who filled out the Trade Name Registration Form for Beau Nails (See Agency Exhibit 4). On Employee's instructions, he and his wife signed the forms around May 2007, and Employee took the documents.

Some time later, a female investigator from Agency (DCRA) named Donna Britt issued a notice of infraction to Beau Nails and informed him that he had to shut down his business because he was operating without a license. The investigator began to fine him \$2,000 for each day that he continued to operate the business without a license. Mr. Lee called DCRA to

complain that there must be a mistake as Employee had already helped him obtain the necessary license. He protested that his employees work on commission and cannot afford to be out of work. When he was informed that he had no license, Mr. Lee said he hired a lawyer to straighten out the mess and have the fines dismissed. Mr. Lee then had to go to Agency to pay all outstanding taxes and then reapply for his business license.

d. Deborah Britt testified (Tr. p. 85 - 98) as follows.

DCRA Investigator Deborah Britt testified that part of her duty was compliance inspections, whereby she checks to ascertain if businesses had the proper licenses, and to issue citations for any infractions. She asserted that investigators are not authorized to assist business owners in obtaining the necessary licenses and permits. Britt emphasized that investigators may not accept money from a business owner. Britt stated that she visited Beau Nails because of a complaint of an unlicensed operator. She visited the salon but could not find the manager. On a follow-up visit on May 27, 2007, Britt informed Mr. Lee that he had to shut down operations because they lacked the proper business license. Mr. Lee complained that he had already paid Employee for the license. She discussed the matter with Annette Tibbs, the program support specialist for DCRA. Back at the office, Employee attempted to talk to her about her investigation, but she cut him off.

e. Annette Tibbs testified (Tr. p. 99 - 114) as follows.

Program Specialist Annette Tibbs testified that on May 23, 2007, Mr. Lee called her to complain about the fact that he was being cited for operating his salon business without a license despite the fact that he had already paid Employee to obtain the license. Mr. Lee said that he had not been able to contact Employee. Tibbs informed Mr. Lee that investigators are not supposed to be issuing licenses. She looked for Employee in the office but could not find him. (Agency Exhibit 6.)

Tibbs conferred with Employee's manager, Ms. Crystal Poindexter, who checked in the office computer but found nothing on Beau Nails. Employee came by and initially denied knowing anything about Beau Nails. Afterwards, Poindexter got into a heated argument with Employee behind closed doors.

When shown the Trade Name Registration Form (Agency Exhibit 4) for Beau Nails, Tibbs identified the handwriting as belonging to Employee as she was familiar with his handwriting for many years in the office. She described Employee's as distinctive in its large, loopy, and straight style.

f. W. Hamilton Kuralt testified (Tr. p. 114 - 147) as follows.

Kuralt was an Agency Internal Affairs Investigator back in 2007 who performed the investigation on the allegations against Employee. (Agency Exhibit 10 and 12) He testified that it was unethical of Employee to assist a business owner in completing a license application form and then promising to process it. His investigation revealed that Employee accepted \$200 to assist Mr. Lee in obtaining a business license for Beau Nails although Employee denied it. Employee admitted attending several ethics training before 2007 and that back in 2004, he also failed to issue citations to Beau Nails for failure to possess the required business license. (See Employees' affidavit, Agency Exhibit 13.) His investigation also revealed that Employee never issued a citation to Mr. Lee in 2007, despite the fact that Beau Nails continued operating without a license. Mr. Lee had informed him that he paid \$7000 in taxes to obtain Beau Nails' license.

g. Employee testified (Tr. p. 149 - 205) as follows.

Employee denied receiving any money from Mr. Lee or of assisting him in filing out a business license application. He also denied that the handwriting on the Trade Name Registration Form (Agency Exhibit 4) for Beau Nails was his. He said his handwriting expert from Texas had also concluded that it was not his handwriting. (Employee Exhibit 1)

Employee had informed Mr. Lee that only Agency staff people called expeditors can assist him in securing the required licenses. When asked why he did not follow up on Beau Nails, Employee explained that he checks on 43 to 51 businesses a day, and that some would just fall through the crack. He also claimed that some business owners would threaten him by claiming that he asked for a bribe. Employee said that previous accusations of improprieties had been leveled against him, but that they have all been found to be baseless.

Employee pointed to his years of exemplary work performance. However, on cross-examination, Agency confronted him with several disciplinary actions for attempting to process licenses for other companies.

h. Kevin Carter testified (Tr. p. 210 - 225) as follows.

Supervisory Investigator Kevin Carter stated that he supervised Employee from 2001 to 2007. He described how he had to give letters of admonition to Employee a couple of times and recommended a suspension of ten days or less because Employee improperly attempted to process a business license application on a few occasions and attempted to interfere with the work assigned to another investigator. However, Carter admitted that Employee was not suspended for any infraction.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Whether Agency has proven, by a preponderance of the evidence, that Employee's actions constitute cause for taking an adverse action.

Agency's charge of malfeasance against Employee rests on its allegations that Employee accepted money from Mr. Lee, a salon owner and operator, who did not possess the proper business license at the time and continued operating said salon for weeks without a license. The end result was that Employee never issued a citation to the salon as was his duty. Employee admits that he never issued a citation to Mr. Lee, but excuses it as due to his huge work load. Agency also alleges that Employee led an unsophisticated immigrant and entrepreneur, Mr. Lee, to believe that he would help him to obtain the requisite business license. Agency maintains that investigators like Employee are not allowed to give this type of assistance.

At the hearing, Employee accused practically everyone of lying under oath. Employee accused them of lying not just on the major issue of what he accepting money from a business owner whose business he was supposed to be regulating; he accused them of lying even on peripheral matters. For example, Employee claimed that his distinctive handwriting on an application form was not his. Then he attempts to buttress his contention by introducing a hearsay statement from an out of state handwriting expert who was never made available for cross-examination. Employee never produced any credible evidence to show why all these witnesses would lie against him. In fact, Agency's witnesses all testified in a forthright and direct manner while Employee was unconvincing and at times evasive.

Based on the witnesses' demeanor during testimony and the documentary evidence of record, I find Agency's witnesses to be more credible than Employee. I therefore find that Employee improperly led Mr. Lee to believe he could obtain his business license for a small fee and then accepted money from Mr. Lee. I also find that Employee failed in his duty to subsequently issue a citation to Mr. Lee for his continuing to operate a business without the required license.

Based upon the above evidence, I find that Employee's conduct amounted to malfeasance, an on-duty or employment related act that interfered with the efficiency or integrity of government operations. Agency's written protocols clearly state that Employee had a duty to ensure that businesses operating in the District possess the proper licenses by citing persistent offenders and he failed to do so. Investigators must also project an image of ethical professionalism by not asking for or accepting money from the businesses he investigates and by not promising to perform tasks that he is not authorized to do, such as applying for their license. Considering the damage to the city's reputation, this dereliction of duty is significant.

Accordingly, I conclude that the Agency has met its burden of establishing cause for taking adverse action.

If so, whether Agency's penalty was appropriate under the circumstances.

As this Office has stated in the matter of *Huntley v. Metropolitan Police Department*,¹ the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to Agency, not this Office. Our scope of review as to the appropriateness of a penalty is limited to a determination of whether the penalty is within the range allowed by law, regulation and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors, and whether there has been a clear error of judgment by the agency.

When assessing the appropriateness of a penalty, this Office will leave Agency's penalty undisturbed when it is satisfied, on the basis of the charges sustained, that the penalty is appropriate to the severity of the employee's actions and is clearly not an error of judgment.

Here, Employee has betrayed the public's trust by engaging in what can only be described as graft and corruption. This factor points to the appropriateness of Agency's penalty of termination. Further, the penalty is clearly not 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

¹ OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review*, (March 18, 1994), __D.C. Reg. __ ().