

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
TIM T. LONG)	OEA Matter No. 1601-0063-07
Employee)	
)	Date of Issuance: October 9, 2008
v.)	
)	Sheryl Sears, Esq.
CHILD AND FAMILY SERVICES)	Administrative Judge
AGENCY)	
Agency)	

Wayne Enoch, Employee Representative
Pamela L. Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Tim T. Long (“Employee”) is a Diligent Search Investigator in the Placement Services Administration (“PSA”) of the D.C. Child and Family Services Agency (“Agency”). On February 8, 2007, Derrick Russell, Employee’s supervisor since October, 2006, issued notice to Employee of a proposal to suspend him without pay for thirty (30) days. Mr. Russell charged Employee with insubordination alleging that he failed to present documents to him for review before filing them in court. Russell also alleged that Employee falsely claimed, in affidavits that he filed in court, that he served legal documents upon a party to a matter when he had not. By letter dated March 16, 2007, Audrey Sutton, Deputy Director of Program Operations, informed Employee of Agency’s final decision to reduce the proposed 30 day suspension to fifteen (15) days effective from March 19, 2007, until April 9, 2007.

On March 26, 2007, Employee filed an appeal with the D.C. Office of Employee Appeals (“the Office”). Employee maintains that he served the papers in question and properly presented all required documents to his supervisor for review before filing them in court. The parties convened for a full evidentiary hearing in this matter on June 1, 2007. This decision is based upon the documentary and testimonial evidence adduced at that proceeding and the parties’ written briefs.

JURISDICTION

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

ISSUES

Whether Employee committed the acts with which he was charged.

If so, whether they constitute legal cause for adverse action.

If so, whether Agency abused its discretion in the selection of the penalty.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” In accordance with OEA Rule 629.1, *id.*, the applicable standard of proof is by a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat 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.” Agency has the burden of proving, by a preponderance of the evidence, that Employee committed the acts in question, that they constitute legal cause to suspend him, and that the 15 day penalty was commensurate with his offense.

FINDINGS OF FACT

At the evidentiary hearing, Agency presented the testimony of Mr. Russell, Employee’s supervisor, and Katherine Heslep, a trial attorney in the Child Protection Section of the Office of the Attorney General through whom Employee filed court papers. Employee delivered his testimony and that of the L.T.H., the party upon whom he was to have made service along with Angela Laster, a Social Worker who is said to have been with him when the papers were delivered.¹ The testimony of all witnesses is summarized below.

Summary of Testimony of Agency’s Witnesses

Katherine Heslep, Trial Attorney in the Child Protection Section of the Office of the Attorney General

Attorney Heslep testified as follows: At the time of the events that gave rise to this matter, she was assigned to Section IV of Child Protection. Her primary job was to file motions to terminate parental rights (TPRs) that would free children for adoption. When someone presents a motion for adoption or guardianship, the Diligent Search Unit of the Child and Family Services serves notice upon the parents. Heslep knew Employee as a Diligent Search Investigator.

¹ Initials are used to protect the privacy of those persons who were parties to the court matters referenced herein, some of whom are juveniles.

A caretaker filed for termination of parental rights in the matter of a sister and brother, both minors, called L.F. and J.F.. On December 11, 2006, the day on which trial concerning L.F. was scheduled to begin, Magistrate Judge Karen Howze, determined that service had not been made upon the parents. Heslep explained, "This was critical. . . In order for both of those matters to be heard together in one proceeding, [the parents] had to have notice of the adoption matter so that they had that ability to defend against it." (*Transcript (Tr.)*, Page 10, Line 8 - 12). Judge Howze decided to proceed on the 11th with the TPR motions for both children and postponed the adoption proceeding for L.F. until December 13, 2006. She sent Employee out to serve the parents with notice.

On December 12th, Employee informed Heslep that he had been able to serve the father, L.T.H., on the 11th but not the mother. Heslep "asked him to make sure he filed the affidavit of service on the father and continued to look for the mother. . . Even though the first trial date was over with, we needed to follow through on the court's directive." (*Tr.*, Page 12, Lines 5-7). On the 13th, the parties reconvened but did not proceed because the parents were not there. On that same evening, at around 7:00 p.m., Heslep received a phone call from Employee reporting that he had finally served the mother. However, it was too late. "It was not effective service because she had no notice of the matter before the matter occurred." (*Tr.*, Page 12, Lines 22-24). Heslep asked Judge Howze if any further efforts at service should be made. Howze said that it was not necessary because, by then, the parental rights had already been terminated.

Heslep said that, later, Mr. Russell asked her for a copy of the affidavit in which Employee attested to service upon the father. She gave him a copy of "Summons and Order Directing Appearance (Adoption)" indicating that Employee made service upon L.T.H. (L.F.'s father) at 1:50 p.m. on December 11, 2006. The order directed the father to appear before Judge Howze at 12:30 p.m. on December 11, 2006, in matter number A-240-06. Heslep acknowledged that the court did not challenge service of the parties in the matter. However, she believed that is because she had a well-established reputation before the Judge and the Judge had a very busy docket at the time.

Heslep also identified, for the record, a copy of a "supplemental affidavit" dated December 12, 2006, in which Employee attested to having made service as indicated above. That affidavit is accompanied by copies of the summons and order that are stamped to indicate receipt by the court. She explained that "when Mr. Long makes service and files it in the court jacket, he gets the copies date-stamped and he gives the parties copies with the blue date stamp on it." (*Tr.*, Page 17, Lines 18-20). "And it says, Central Family Division." (*Tr.*, Page 17, Line 17). Although the document was filed in court, it did not have the initials of Mr. Russell, his supervisor, in the left hand corner.

Derrick Russell, Supervisor of the Placement Service Administration, Diligent Search Unit of Agency

Mr. Russell testified that he supervised nine investigators including Employee. When his office receives orders from the court about a proceeding, it is his job to assign

them to investigators and oversee their efforts to locate absent parents. After an unproductive search, an investigator generates an affidavit of efforts indicating how he or she tried to locate a parent. If the parent is served, an investigator prepares an affidavit of service listing the date, time and location of service and noting any identification presented by the parent. Russell reviews the final affidavits of his investigators for any errors and initials the left-hand corner. He said that he has “indicated on several occasions, even at meetings, that it's imperative that I look at these affidavits for review prior to their being submitted to the court. So everyone knows that that's a policy in the unit.”

When an investigator locates the parents, they interview them, ask for their identification and present them with the gold copy of the summons that gives the location, time and date of the hearing. At the bottom of the summons, the date and time of service are indicated. In the remarks section, there may be notes on how the investigator identified the recipient along with other details. A white copy is presented along with the affidavit to the court. The yellow and pink copies are dispensed to the attorneys. After an investigator files an affidavit with the court, he or she makes a case report and turns the jacket in to Mr. Russell.

Russell reviewed Employee's file in matter number A-240-06. He became concerned when he noticed that, in the remarks section of an affidavit, Employee described a time and date upon which he made service but, in the file, were all four copies of the summons. Moreover, when Ms. Heslep produced a copy of the affidavit Employee presented, it did not have Russell's initials on it. “Normally after they do the affidavit or efforts or affidavit of service, they bring me the affidavits. I review them for error issues, make sure that everything is right in the affidavit. And once I review it, I put my initials in the left-hand corner of the document.” (*Tr., Page 26, Lines 5 – 8*). “[I]t should be reviewed by me prior to filing it with the court unless there's a circumstance where they can't get in contact with the supervisor.” (*Tr., Page 32, Lines 30 - 32*). He did not remember seeing the document before Ms. Heslep gave it to him.

Russell noted other inconsistencies as well. There was another affidavit for service for L.T.H., dated December 21, 2006. While that one did contain Russell's initials in the left corner, it was accompanied by a summons with modifications on it. The “jacket number” entry was scratched out and replaced with “A-240-06.” It also includes a paragraph recounting Employee's efforts to serve L.T.H. that was not a part of the affidavit dated December 12th. The clerks' signatures on the December 12th and December 21st documents differ. Russell concluded that Employee modified the document because the second summons, which was supposed to have been for the mother, was used for the father.

Russell was concerned because the variations raise a question of whether the parent was actually served with notice to appear in court. Such submissions could cast doubt on whether investigators are properly serving parents and impact negatively upon the reputation of his unit and the agency. When Russell asked Employee why the carbons were still there for documents that he had served, Employee indicated that he had

served a different copy upon L.T.H. than the one he presented in the file. Russell did not find this explanation satisfactory. After reviewing the documents, talking with Employee and consulting with agency officials, Russell issued an advance notice of the suspension. His decision was also based, in part, upon Employee's past history. Prior to this case, there were incidents that resulted in his having to counsel Employee about office procedures regarding affidavits sent to him for review.

On cross examination, Russell was asked why, if he believed that the December 21st affidavit was false, he signed it. He recounted that, even though several carbons were attached and the jacket number was scratched out, Employee told him that the correct copies, which had been served, were on his desk. He took Employee's word. Only later, when he reviewed the case jacket, did he see the multiple copies of the summons. "It is impossible to have served the father in this case with a summons to appear in court when the actual summons was still in the jacket." (*Tr., Page 44, Lines 23-25*).

Russell said that he did not recall any conversation with Employee in which Employee told him that he made a mistake in filing the first affidavit in regard to serving L.T. H. and wanted to submit a corrected one. However, he did recall that Wanda Ferguson, another Investigator in the Diligent Search Unit and Team Leader who paired with Employee, sent an email to Russell and Employee on December 19, 2006. She advised that Employee should correct an "amended" affidavit that he submitted in regard to service upon L.F. (the mother). She said that there was no need for an amended affidavit if he already submitted an affidavit of efforts.

Russell conceded that there are no written procedures for investigator handling of a case. However, he said that, before this matter, he was meeting weekly or bi-weekly with Employee.

Summary of Testimony of Employee's Witnesses

L.T.H., Party to Matter Number A-240-06

The testimony of this witness was brief and to the point. He identified Employee as the person who served him with papers in the matter concerning the child, L.F. He could not, however, remember what the documents looked like or identify them from any other documents that were presented to him.

Angela Laster, Social Worker

Ms. Laster testified that one day in December 2006, when she was still new to the agency, she rode with Employee when he went to serve some documents. She was trying to learn more about what investigators do. They arrived at a building in Maryland where

Employee called inside to ask L.T. H. to come out. She waited in the truck and watched from there as Employee handed some documents to an older gentleman. She identified L.T.H. as that man.

Tim Long, Employee

Employee testified that, as an Investigator for the Diligent Search Unit, his job is to go out and locate absent parents for the agency. Upon locating them, he serves them with documents provided by the court about an adoption case or a guardianship. On December 11, 2006, he appeared before Judge Howze on the matter of L.F. to notify the court that he had not located the biological parents of the child. He did, however, have some information from Attorney Heslep about the father's place of employment. Judge Howze excused him to go and meet with L.T.H. there. He went, with Ms. Laster, to the building, gave Mr. H. the gold copy of the summons and asked whether he understood it.

However, Employee explained, he made a mistake when filling out the summons. So, he scratched out the error and corrected it. As Mr. Russell was not available when he returned to the office, he sent an email to him to report service upon the father. He produced that email as evidence. He also explained that he created a supplemental affidavit of service to update the record which had contained only an affidavit of efforts. He acknowledged that the corrected affidavit was neither the one he served upon L.T.H. nor the one he presented in court. On cross-examination, he also acknowledged that there was a requirement that he show all affidavits to his supervisor prior to filing them in court. He explained that he filed the document in court without his supervisor's review so that he could get it in that day. In his view, the court's directive superseded the requirement to report to his supervisor.

Whether Employee committed the acts with which he was charged.

Agency alleges that Employee filed a copy of an affidavit of service with the Court and presented it to Assistant Attorney General Heslep, when he had not made the service indicated. However, L.T.H. testified in a straightforward and concise manner that he received court papers from Employee about a proceeding involving a child in matter number A-240-06. Angela Laster, the Social Worker who went on a "ride-along" with Employee, said that she saw him serve papers upon L.T.H. Therefore, it is a finding of fact that Employee served L.T.H. with notice to appear before Judge Howze at 12:30 p.m. on December 11, 2006 in matter number A-240-06. It is a further finding of fact that Employee did not, therefore, falsify documents in which he attested to having made that service.

Agency also charges that Employee failed to follow office procedures. It is clear from the record that Employee's record-keeping left much to be desired. He generated different affidavits for service upon L.T.H. for the same proceeding, which contained conflicting information. Employee acknowledged that he served one version upon L.T. H. while presenting a different one to his supervisor, Mr. Russell as having been served. On the one hand, Mr. Russell might have been more diligent in his review of Employee's

submission so as to immediately determine that it was accompanied by copies of the summons that were not served.

On the other, Employee was responsible for presenting the proper paperwork to his supervisor. And, while he suggested his own ignorance of office policies by virtue of Agency's failure to put them in writing, Employee acknowledged his responsibility to present affidavits to his supervisor before filing them in court. He explained that he presented an affidavit in question without the signature because the Judge wanted it that day. He said that he believed "being ordered by the judge supersedes my supervisor acknowledgment of this affidavit." (*Tr., Page 71, Lines 35-36*). He explained that, if there was any question about the affidavit he filed, he could have testified in court to resolve it. Employee, however, had an obligation to present documents that were clear on their face and have them approved by his supervisor. This Judge is in agreement with his supervisor's conclusion that these explanations are not sufficient to excuse his failure to follow office protocol. While the Judge ordered that Employee make service, there was surely no direct or implied directive that he circumvent proper procedures for presenting a document in court to report it. It is a finding of fact that Employee wrongly failed to present, for his supervisor's review, the documents that he actually used to complete service upon L.T.H.

ANALYSIS AND CONCLUSIONS

Whether, Employee's behavior constituted legal cause for adverse action.

Agency charged Employee with falsifying a document and acting insubordinately by failing to present it to his supervisor for review. However, agency officials did not, in either the advance or final notice of adverse action, characterize his behavior with reference to the applicable provisions defining cause. These provisions of the D.C. Office of Personnel (DCOP) Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000) comprehend the behaviors with which Employee was charged:

For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows . . .

(d) Any knowing or negligent material misrepresentation on other document given to a government agency;

(f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations to include . . .

(4) Insubordination

This Judge found as a fact that Employee did not falsify a document. Therefore, he is not guilty of any material misrepresentation in the documents he submitted.

Employee did, however, fail to follow established office procedures for review of the document by his supervisor before presenting it to court. Employee explained that he was trying to get the affidavit of service to the court on time when he presented it without his supervisor's signature. Further, he prepared several versions of the affidavit in an effort to update and correct it. While his actions did not result in any bad outcome in the matter before the court, they could have. Court documents become a part of the permanent record of a matter and their accuracy is important.

Employee's actions resulted in a mess of paperwork that raised the question of whether he actually made the service at all. Only by communication between his supervisor and the agency's attorney in the matter was the confusion resolved. Joined with many explanations and excuses is Employee's admission that he did not follow office protocol. While Employee's supervisor stated that he expected to see all paperwork presented to court unless he was unavailable, it is reasonable to expect that Employee would exercise good judgement in deciding to submit documents to court without review. Combined with his supervisor's previous counseling on following office protocol and Employee's failure to properly prepare the paperwork in question, his decision not to seek review of his work was not a wise one.

Black's Law Dictionary (Eight Edition) defines insubordination as a "willful disregard of an employer's instructions" or "an act of disobedience to proper authority." In the matter of *Zirkle v. District of Columbia*, 830 A.2d 1250 D.C., 2003, the Court found that an employee who willfully disregarded his supervisor's instructions was insubordinate. In this matter, Employee exercised his judgement in favor of willfully disregarding his supervisors instructions. Therefore, he was insubordinate.

Whether Agency abused its discretion in the selection of the penalty.

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that "managerial authority has been legitimately invoked and properly exercised." See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must be based upon a consideration of relevant factors. See *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an 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." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

The District Personnel Manual, at § 1619.1, The Table of Appropriate Penalties, recommends a penalty ranging from reprimand to removal for insubordination. While

Agency's penalty of a fifteen day suspension was originally intended to address two violations that Employee was alleged to have committed, it is within the prescribed range for the one offense proven. Moreover, it is reasonable under the circumstances. Employee committed several clerical and administrative errors in the preparation of his paperwork. And he presented it to the court without the requisite review of his supervisor. He did so in violation of Agency rules. Agency's decision to impose a fifteen (15) day suspension was reasonable and, therefore, will not be disturbed.

ORDER

It is hereby ORDERED that Employee's suspension is UPHELD.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE