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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
JOSEPH SMITH	) OEA Matter No. 1601-0015-07
Employee	)
	) Date of Issuance: October 1, 2007
v.	)
	) Lois Hochhauser, Esq.
D.C. DEPARTMENT OF TRANSPORTATION	) Administrative Judge
Agency	)
	)

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

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition for appeal with the Office of Employee Appeals (OEA) on November 13, 2006, appealing Agency's final decision to remove him from his position of Civil Engineering Technician, effective October 27, 2006. At the time of the adverse action, Employee was in permanent career status.

This matter was assigned to me on or about January 3, 2007. A prehearing conference was held on February 21, 2007. The parties then entered into mediation. On or about April 4, 2007, the parties advised me that mediation had not been successful. The matter proceeded to a hearing on May 30, 2007. At the hearing, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence.[1] Employee was present at the hearing and was represented by

[1]Witnesses were sworn and the hearing was transcribed. The transcript is cited as "Tr" followed by the page number. Exhibits are identified as "A" if introduced by Agency and "E" if introduced by Employee, followed by the exhibit number.

Two exhibits were challenged at the proceeding: "E-2" (labor agreement) and "A-9" (unprocessed applications). With regard to E-2, the parties filed a Joint Stipulation on June 7, 2007 in which Agency withdrew its request . Ex E-2 is therefore admitted. With regard to A-9, Mr. Jackson was not certain if those were all the applications, was not certain of the exact number but thought it was more than the ones produced in A-9. Ms. Witkor had testified that applications had been assigned to others. It is unclear therefore, precisely what A-9 is intended to represent. Ex A-9 is not admitted into evidence.

H. David Kelly, Jr., Esq. Agency was represented by Andrea Comentale, Esq., Assistant Attorney General. Closing briefs were submitted on August 26, 2007 at which time the record was closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUE

Did Agency meet its burden of proof in this matter?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On October 20, 2006, Agency issued a notice of final decision in which it removed Employee from his position as Civil Engineering Technician with Agency. (Ex A-6). He began in this position on October 4, 2004. The decision was based on charges of negligence in the performance of duty, dereliction of duty and insubordination as described in the Advanced Written Notice of Proposed Removal dated August 10, 2006 (Ex A-5)[2]:

> You are scheduled to work the front counter on Fridays from 2:00 p.m. to 3:00 p.m. On June 2, 2006, at approximately 2:00 p.m., Mr. Ed Nugent inquired about what he was to do since you were not at your desk to relieve him for lunch. Searches inside and outside of the building failed to locate you. At about 2:20 p.m., a note was left on your computer to see Mr. Marcou as soon as you returned to your desk. At 2:45 you called Mr. Marcou, who asked you to work the front desk. You asked if Mr. Marcou had spoken with the union president about this. He responded he had not and repeated his request for you to work the front counter. You stated that it is not your job to work the front counter and that you had discussed this with Mr. Marcou and Mr. Tyrone Jackson. Mr. Marcou explained that there had been conversations but that until he was told otherwise, technicians would work the front counter as assigned. A few minutes later you called Mr. Marcou and reiterated basically what had already been discussed, adding that it is not your job to do administrative work.
>
> On or about June 28, 2005, after a careful review of the permit data system, it was discovered that you had over 100 applications on your desk that had not been processed for permits. These applications were given to you for processing during the period June 27, 2005 through January 2006. Clearly your conduct constitutes neglect in the performance of your duties. The Standard Operating Procedures of your position state and require that all applications be process for permits in 30 days or less. You failed to inform any supervisor of any backlog. As a result of your dereliction of duty, the District delayed

[2] The charges were upheld by Hearing Officer Sylvestre Yorrick by Memorandum dated October 18, 2006.

collection of thousands of dollars in permit fees, was obliged to reassign two other employees from their regular duties and incurred overtime payments to the reassigned employees.

Further review of the permit data system revealed that you had applications given to you in March 2006, which had not been process for permits. Specifically, there are 23 applications on your desk that are past the 30 day time frame that has been set forth as a reasonable length of time for all techs to process applications. This is in addition to the 100 applications from June, 2005 which were found on your desk in June, 2006.

Additionally, on June 30, 2006, Mr. Tyrone Jackson, Team Leader, asked you to relieve Mrs. Quita Sommerville from the front counter. You stated you were not going to work the front counter, just as you had told him on May 26, 2006. Mr. Jackson advised you that working the front counter is part of the job of all Civil Engineering Technicians. You then told Mr. Jackson that the union said you did not have to work the front counter, and you refused to do so.

While not part of the instant charge and proposed action, a review of your personnel record revealed previous disciplinary actions regarding discourteous treatment of the public, supervisor or other employee, and insubordination for non-compliance with written instructions and direct orders by a supervisor.

Positions of the Parties and Summary of Evidence

Agency's position is that Employee failed to perform two required duties: processing applications in a timely manner, i.e., 30 days, and front counter duty and that he was insubordinate when he refused to obey direct instructions from his supervisor or team leader..

Denise Witkor, Public Space Manager, testified that she was Employee's supervisor when he began his employment at Agency, but at the time of his removal, his direct supervisor was Tyrone Jackson, who was under her supervision. (Tr, 119). She stated that during his probationary period, Employee did well, but that both his performance and his behavior deteriorated after he completed his first year. (Tr, 58). She stated that Employee's duties included review of applications for excavation permits and other duties as assigned. (Tr, 23, 66, Ex A-1). She explained that covering the front counter is included within "other duties as assigned". The witness testified that the position description for a civil engineering technician, Grade 9, applicable to Employee, had an effective date of May 29, 2003, and applied to both surface and subsurface technicians. (Tr, 75). A new position description took effect on December 6, 2005, but the only change was that counter duty was explicitly stated. (Tr, 68, Ex A-3).

The witness noted that there were two units, surface and subsurface, and that it was "purely random" that Employee was assigned to the subsurface unit. Employees in the surface unit cover the counter 40 hours a week every third week. (Tr, 67). The technician covering the front counter finalizes

permits so individuals can pay for and then obtain their permits (Tr, 61). Each subsurface technician covers the front counter once a week. Technicians are assigned in part because of the need to cover the counter when the person assigned to the counter is at lunch, but also to allow interaction between technicians and the public. (Tr, 25). Ms. Witkor issued a memorandum to staff on January 4, 2006, formalizing the requirement that subsurface unit employees cover the front counter and setting a schedule. (Tr, 34, 80, Ex A-4). She said that she issued the notice in response to Employee's objection to covering the front counter. Ms. Witkor stated technicians, including Employee, had previously covered the front counter and that she wrote the memorandum "to establish that all employees…were to cover the front counter". (Tr, 77). She testified that there were "several occasions" when Employee could not be found during the time he was to cover the counter. (Tr, 36). She stated that Mr. Marcou, had advised her that Employee refused to cover the counter, and finally did so for only about ten minutes instead of a full hour. (Tr, 36).

Ms.Witkor noted two instances when Employee berated clerical staff because he had to cover the front counter. In one instance which she characterized as "quite serious", he yelled at staff that "it was their job to do this, not his". (Tr, 36). As a result of this incident, Employee was suspended without pay between June 19 and June 25, 2006. (Tr, 91-93, Ex A-7). During his suspension, Agency issued a proposed notice for another suspension , but it did not impose a suspension, instead Employee was placed on administrative leave until he was removed. (Tr, 95).

Ms. Witkor testified that while Employee was out on suspension, she was looking for an application in his workstation, and found a pile about eight to ten inches deep of unprocessed emergency applications, some of which were a year old. (Tr, 37-38). According to Ms. Witkor, processing emergency applications is easy since all the work is completed and the reviewer must only ensure that there are standard drawings, a process that should take only a few minutes. (Tr, 38). She stated she did not talk about it with Employee at the time because he was on suspension and that she never asked him for an explanation because "[a]s far she [she] was concerned, applications that were over a year old that were sitting unprocessed there was no explanation that was acceptable". (Tr, 86). She then reviewed the applications of the other technicians and determined that none had a similar backlog. (Tr, 106). She stated that Employee's backlog created not only a financial burden since the Agency is self-funded and relies on permit fees, but also that other employees to work had to work overtime to process the backlogged applications. In some instances, according to the witness, Agency did not collect inspection fees because the applications were so old. (Tr, 112).

The witness stated that there is a "mayoral mandate" that requires applications, including emergency applications, to be processed in no more than 30 days, and that this requirement is also stated in the Agency handbook that is provided to employees and to the public. (Tr, 24-27, Ex A-2). The only exception to the rule if where there is "a complicated permit that required extensive review". (Tr, 29-30). Ms. Witkor stated that Employee was also notified at training that this 30 day limit was a "firm and fast rule". (Tr, 46, 48.) She stated that although Employee never told her he was not adhering to deadlines, she had been aware of a problem with him completing applications in a timely manner. However, because the office was "short of technicians…there was some leeway for a permit here and there falling through the cracks or getting lost". (Tr, 49). She stated that she considered Employee a professional and that she did not micromanage her staff. She testified that she "personally

communicated" with Employee her concerns about how he was handling applications, i.e., his failure to "look at them when they came in" because she felt he was not aware of which applications were marked for priority treatment. (Tr, 54-55). The witness stated that she and Mr. Jackson met with Employee prior to his suspension about Employee's concern that "emergencies were weighing him down". As a result, they did not assign him any more emergency applications and reduced his workload. According to the witness, Employee "never indicated at that point that he had this tremendous backlog" even though she met with him a number of times. (Tr, 43).

Matthew Marcou was manager of Agency's Public Space Management Administration during the relevant time period. He recalled the June 2 incident, stating that he received a telephone call from the technician working the front counter who told him that Employee was scheduled to relieve him but when he went to Employee's desk, Employee was not there. Mr. Marcou testified he looked for Employee without success for about ten minutes and then asked another technician to take Employee's place. He left a note on Employee's desk asking Employee to contact him upon his return. When Employee contacted him, he asked him to work the front counter as listed on the schedule, but Employee told him it was not part of his job description. (Tr, 124). Mr. Marcou stated he told Employee it was a duty assigned to him by Ms. Wiktor and Mr. Jackson, and again asked him to work the front counter. Employee went to the front counter, and then called Mr. Marcou about five minutes later again telling him that he should not be working the counter. He worked for a total of about ten or fifteen minutes instead of the one hour he was assigned. (Tr, 124). Mr. Marcou notified Ms. Wiktor and Mr. Jackson of the incident. (Tr, 125, Ex A-8).

Tyrone Jackson, Employee's direct supervisor, testified he was aware that Employee was having problems with his workload and talked with Employee about how to prioritize his review of permits. He did not order Employee to change the way he handled applications, but suggested he review the process. (Tr, 143). Mr. Jackson stated there was a mandate that all permits be processed within 30 days. He testified that when Ms. Wiktor found the backlogged applications on Employee's desk, she directed Mr. Jackson to review all the applications at Employee's workstation. Mr. Jackson stated he found more than 60 permits that had not been processed, some of which were more than a year old. (Tr, 135). He found between 20 and 30 applications that Employee had started, but had not obtained information from the applicant that was needed to complete the review. Mr. Jackson said he made a list of the permits and thought he submitted the list to Ms. Wiktor. (Tr, 147). He also assigned some of the applications for larger jobs to another technician. Mr. Jackson stated that he found 23 late applications in addition to the ones that Ms. Wiktor discovered the month before. (Tr, 169-170).

Mr. Jackson recalled an incident after Employee returned from his suspension, when he asked Employee to relieve the person at the front counter so the individual could go to lunch and Employee refused, stating it was not part of his job description. (Tr, 139. Ex A-11). The witness stated that although Employee told him the Union had advised him that working the counter was not part of his duties, no other employee had made that representation, and no one from the Union had contacted him about technicians working the counter. (Tr, 164).

Employee's position is that because he was not certain that his position required him to cover the counter, he consulted with his Union representative, and that he understood the "matter was still

under discussion and review with the union". He considered the matter a misunderstanding, rather than insubordination. (Tr, 13). With regard to the timely processing of applications, Employee contended that there was no 30 day rule. (Tr, 222). According to Employee, the "30 day rule" applied only if all the necessary information was provided by the applicant. (Tr, 177). He testified that he had never been advised that he was expected to complete applications in that time period. (Tr, 179). Employee stated that the 30 day time period was a guideline, and that he routinely did not meet the timeline. (Tr, 180). He maintained that the 30 day goal did not apply to emergency applications. (Tr, 224).

Employee described his primary responsibility as reviewing applications for permits for subsurface utility work . (Tr, 173). He received a position description electronically in December 2005 or January 2006, but until then was familiar with his position only by reviewing the vacancy announcement. (Tr, 174-175). Employee stated that he never met with Mr. Jackson about how to prioritize his work. (Tr, 184). He testified that assignments were placed on his desk, and that he would receive e-mails or verbal instructions if the assignment was to be processed out of order. (Tr, 188, Ex E-5).

Employee testified that he did not believe he was responsible for covering the front desk and other duties as assigned, even though they appear on his job description, because "it was never brought to [his] attention when [he] was hired". (Tr, 233, Ex A-3). He stated he relied on the vacancy announcement's description of his duties and that if a duty assigned to him was not listed there, he would ask the Union representative for guidance. (Tr, 242, 246, Ex E-7). He stated that he did not cover the front counter every Friday between 2:00 p.m. and 3:00 p.m. , his assigned time, after receiving the January 2006 memorandum. (Tr, 235). Employee testified that he complained about being assigned to the front counter because he did not consider it his responsibility, i.e., that there were administrative staff who could relieve other administrative staff. (Tr, 191). He stated he complained to the Union and to management, and that he was told by the Union that it was not his responsibility to answer the telephone. (Tr, 192). He stated that the Union did not tell him of any action it would be taking and he did not follow up with the Union. (Tr, 194).

With regard to the incident involving Mr. Marcou, Employee recalled that he was at lunch and when he returned and read Mr. Marcou's note, he telephoned and told Mr. Marcou that it was not his responsibility to perform administrative duties. He said Mr. Marcou again directed him to work the front counter, and he did so. (Tr, 203). Employee recalled the incident on June 30 when Mr. Jackson directed him to cover for Ms. Sommerville at the front desk. He testified he told Mr. Jackson that it was not his responsibility to work as an administrative employee and asked him if he had spoken with the Union president. (Tr, 204). Employee agreed that he refused to work the front counter on that day, explaining that "it was not part of [his] duties". (Tr, 205). He testified he had previously worked the front counter, "[o]n a volunteer basis". (Tr, 205).

With regard to the unprocessed applications, Employee testified that no one in management had expressed any concern to him that he was not processing applications in a timely manner. (Tr, 206). He testified that neither Ms. Wiktor nor Mr. Jackson ever spoke with him about his workload. (Tr, 225. With regard to the unprocessed applications introduced by Agency as the ones found on his desk,

Employee stated he did have some emergency applications on his desk. (Tr, 213). He did not know the number of applications or when they had been assigned to him. (Tr, 214, 239).

Analysis, Findings and Conclusions

This Office has jurisdiction to hear this matter pursuant to Section 101(d) of The Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. D.C. Official Code § 1-616.51 (2001) (Code herein) provides that the Mayor "issue rules and regulations to establish a disciplinary system that includes…1) a provision that disciplinary actions may be taken for cause… [and]… 2) A definition of the causes for which a disciplinary action may be taken" for those employees of agencies for whom the Mayor is the personnel authority. Agency is under the Mayor's personnel authority.). In this instance, Employee is charged with insubordination and neglect of duty. Both negligence and insubordination are included as "causes" for which an employee can be disciplined. *See,* Section 1603.3, 46 D.C. Reg. 7096.

The neglect of duty charge relates to Employee's failure to process his cases in a timely manner, his failure to advise his supervisors of his extensive backlog and his failure to reduce his backlog. In order to make findings, the Administrative Judge had to assess credibility of the witnesses since some facts were in dispute.. Agency witnesses testified that Employee had been notified of the requirement to process applications within 30 days, Employee testified he received no such instruction. Employee denied the assertions of Agency witnesses that they specifically counseled Employee regarding his caseload and backlog. In resolving issues of credibility, the Administrative Judge considered the demeanor and character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army,* 35 M.S.P.R. 453 (1987). Because of the conflicting testimony, the Administrative Judge adhered to these considerations carefully, particularly reflecting on the demeanor of witnesses while they testified. *See, e.g., Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 496 (1951). The District of Columbia Court of Appeals has emphasized the importance of credibility evaluations by the individual who sees the witness "first hand". *Stevens Chevrolet Inc. v. Commission on Human Rights,* 498 A.2d at 440-450 (D.C. 1985). Based on these considerations, the Administrative Judge found Ms. Witkor and Ms. Jackson to be credible witnesses. She did not find Employee to be credible on this issue. The Administrative Judge found the following facts: Agency instructed technicians, including Employee, that they were expected to process applications within a 30 day period, that this requirement was also included in written material available to Employee; that Employee was aware of this responsibility; that during his probationary period, Employee processed his cases in a timely manner; that supervisory staff found in excess of 60 applications that exceeded the 30 days, and that some of these had exceeded one year. The Administrative Judge further finds that even if the 30 days was a guideline and not a rule, and even if it was not always adhered to, Agency established its expectation of the amount of time it considered reasonable for processing applications and that it presented evidence that this expectation was reasonable. If Employee had experienced only minor delays and had attempted to adjust his method of processing cases, the result might not have been the same, but the delays were extensive and had a negative impact on Agency. Agency also established that when it became aware that Employee was having problems processing

his cases, it stopped assigning him work so that he could eliminate his backlog. Employee did not offer any reason for the extensive backlog and delay in processing cases. To establish that Employee neglected his duty, Agency must prove that Employee had an actual duty, that he neglected the duty, and that the neglect was inexcusable. *Richardson v. Department of Corrections*, OEA Matter No. 1601-0095-95 (December 11, 1995), _______D.C. Reg._____ ( ). Based on these findings, the Administrative Judge concludes that Agency met its burden of proof that Employee had an actual duty, that he neglected the duty and that the neglect was inexcusable. Therefore, Agency met its burden of proof on this charge.

The insubordination charge relates to Employee's failure and/or refusal to cover the front desk on June 2 and June 30, despite direct instructions to do so from supervisory staff. Credibility assessments were not as important on this issue, because Employee's position was that he was not obligated to cover the front counter because it was not within his job description and therefore the instruction was not lawful, that someone from the Union advised him that covering the counter was not part of his duties, and that therefore he was justified in refusing to adhere to the schedule or the directives. In reaching her decision on this charge, the Administrative Judge found the following facts: that it was reasonable and lawful for supervisors to direct and schedule technicians to cover the front counter during specific times; that the assignment was part of their duties and included within "other duties as assigned"; that technicians were directed to do so and were provided with a schedule for coverage; that Employee was aware of this responsibility; that Employee was listed in the schedule and was aware of his specific assignment. Even if someone from the Union told him it was not part of his duties; during the time at issue, Employee was required to adhere to these directives. No evidence was presented that the Union took any steps to challenge this assignment, despite the advice that Employee stated he received from Union representatives. The Administrative Judge further finds that supervisory staff had specifically directed Employee to cover the counter as instructed and responded to his concerns about Union involvement, but nevertheless, in direct violation of these instructions, Employee failed and/or refused to cover the counter during the assigned periods on June 2, 2006 and June 30, 2006.

The Code does not provide a definition of insubordination, therefore the common law meaning applies. *See, Davis v. District of Columbia Fire Department, MPA* 94-0015 (D.C. Super. Ct. September 26, 1995). Black's Law Dictionary (5th Ed., 1979) defines insubordination, in pertinent part, as the "[r]efusal to obey some order which a superior officer is entitled to give and have obeyed. The term imports a *willful or intentional disregard* of the lawful and reasonable instructions of the employer". (emphasis added). The Administrative Judge concludes that Employee refused to obey lawful and reasonable instructions from supervisory staff to cover the counter during specific times. On June 2 he covered the front counter for only a small portion of his assigned time after not appearing at his scheduled time, and on June 30, he refused to cover it at all despite being directed to do so by his supervisor. His actions were intentional and willful. The Administrative Judge concludes that Agency met its burden of proof that Employee's conduct constituted insubordination.

Agency has the primary responsibility for managing its employees. Part of that responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18,

1994), ____ D.C.Reg. ____ (   ). This Office will not substitute its judgment for that of an agency when determining if a penalty should be sustained. Rather this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it comes "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 (1985). Agency established that it considered relevant factors in determining the penalty and that the penalty was within the range of appropriate penalties under the circumstances presented.

Based on a careful review of the testimonial and documentary evidence and on the findings and conclusions as discussed herein, the Administrative Judge concludes that Agency met its burden of proof in this matter and that the petition should be dismissed.

ORDER

It is hereby

ORDERED: This petition for appeal is DISMISSED.

FOR THE OFFICE: ______________________________

LOIS HOCHHAUSER, ESQ.
Administrative Judge