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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JOSHUA FULLER)	OEA Matter No. 1601-0016-08
Employee)	
)	Date of Issuance: December 29, 2008
v.)	
)	Lois Hochhauser, Esq.
D.C. FIRE AND EMERGENCY MEDICAL)	Administrative Judge
SERVICES DEPARTMENT)	
Agency)	
_____)	
Donna Williams Rucker, Esq., Employee Representative		
Ross Buchholz, 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 21, 2007, appealing Agency's final decision to remove him from his position as a Firefighter, effective October 27, 2007. At the time of the adverse action, Employee was in permanent career status.

This matter was assigned to me on December 28, 2007. At the status conference held on February 11, 2008, the parties agreed the matter was governed by *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002). They also agreed to enter into mediation. On or about August 29, 2008, the matter was returned to me after mediation efforts proved unsuccessful. The parties submitted briefs and the record closed on October 22, 2008.¹

JURISDICTION

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

¹ Employee was given an extension of time to file his submission. The Administrative Judge and the parties communicated extensively by telephone and e-mail.

ISSUES

Was Agency's decision supported by substantial evidence? Did Agency commit any harmful procedural error? Was Agency's decision reached in accordance with law or applicable regulations?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On August 3, 2007, Agency issued a proposed action to remove Employee from his position based on the following:

Charge 1 Failure to notify the Department of your arrest.

Specification 1 In that Firefighter Joshua Fuller, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department, did, nevertheless, fail to report your arrest to the agency.

On Sunday, May 20, 2007, the agency was notified of your arrest when Sergeant Edwin Lehan, the deputy fire chief administrative aide, received a call from Lieutenant Anthony Madora, with the fifth District Metropolitan Police Department, stating that you were under arrest for gun possession.

Your failure to report your arrest is in violation of Article 6, Section 4 of the D.C. Fire and EMS Order Book. It states in part:

"All employees of the Department shall immediately notify their appropriate bureau head, through the chain-of-command, giving full details that they have been:

1. Arrested
2. Indicted
3. Convicted of, or pled guilty to, a felony
4. Convicted of, or pled guilty to, a misdemeanor for conduct that would adversely affect the employee's or the agency's ability to perform effectively
5. Under investigation for criminal/illegal activity".

As a result of your arrest, you were placed on administrative leave effective Sunday, May 27, 2007, and subsequently you were placed on enforced leave. This is documented in Engine 13's company journal.

Charge 2 Violation of Article 7, Section 2.4: “Any conviction of a crime (including a plea of no contest) regardless of punishment, when the crime is relevant to the member’s position, job duties or job activities.”

Records from the Metropolitan Police Department indicates that on May 20, 2007, Officer Fabian Ferra, of the Fifth District Metropolitan Police Department, heard a gunshot in the area of the 1400 block of Rhode Island Avenue, N.E. Officer Ferra observed the vehicle that you were driving racing away from the area where the gunshot was heard and he observed you committing a moving violation.

A traffic stop was initiated and Officer Ferra asked you for consent to search the vehicle. During the discussion, you stated that there is “a gun in the car”. Officer Ferra found an unregistered firearm and ammunition on the front passenger floor board inside your car. At this time, you were placed under arrest and charged with CPWL, unregistered firearm and unregistered ammunition. You were arrested and transported to the Fifth District Metropolitan Police Department for processing.

Subsequently, you were found guilty on June 22, 2007 in the Superior Court of the District of Columbia Criminal Division of three misdemeanor charges: attempt to carry a pistol without a license, unlawful possession of a firearm and unlawful possession of ammunition. You received a suspended sentence by the court of 180 days for each offense, and nine months of unsupervised probation to run concurrently. Case Number is 07 CF2 11537.

As a public safety official, your duties and responsibilities includes you obeying the laws of the District of Columbia. Obviously, your pleading guilty to possession of an unregistered firearm and ammunition contradicts this edict. Your behavior and judgment in this situation compromises the mission of the agency and violates the public’s trust.

A Trial Board Disciplinary Hearing (Trial Board) took place on September 18, 2007. Employee was represented by counsel, and had the opportunity to present testimonial and documentary evidence, as well as to cross-examine witnesses. Employee entered a plea of “not guilty” to each charge. The Trial Board concluded that Employee was guilty of both charges. It recommended that Employee be terminated. On October 16, 2007, Dennis Rubin, Agency Chief, issued the final Agency notice removing Employee from his position effective October 27, 2007.

Positions of the Parties and Summary of Evidence

With regard to the first charge, Agency maintained that the fact that Employee notified the arresting officer of his employment and the officer confirmed his employment with Agency

did not relieve Employee of the responsibility of immediately notifying Agency as required, and that he failed to do so. At the Trial Board hearing, Captain Donald Martin, Employee's superior officer, testified that although he did not recall talking with Employee on May 24, 2007, he made a journal entry which reflected that Employee telephoned close to midnight and informed him that he would be returning to full duty from POD.² Captain Martin testified that if Employee had told him of the arrest, his journal entry would have included that information. (TB, 129-131).

Agency argued that the second charge should be sustained because Employee pled guilty to a crime that is directly related to his position in that the illegal possession of firearms and ammunition are public safety issues. It maintains that Employee knew or should have known that he was engaging in criminal acts. (TB, 17-20).³ Agency witnesses testified that Agency does not "condone or tolerate" an employee who breaks the laws of the District of Columbia which involves a weapon and impacts on safety. Agency's position is that if an employee does not obey the laws of the District of Columbia, Agency cannot be certain the employee will abide by Agency's rules and regulations. (TB, 33). Agency witnesses also stated that Employee's conviction of the charges in this matter could jeopardize the cohesiveness of the unit in which Employee serves because members of the unit might not feel safe with Employee due to the illegal weapons charge. This, Agency asserts, also presents a "very important safety issue". (TB, 34). Agency contends that by Employee "having an illegal weapon in his possession and by having the discharge of that weapon goes to his judgment as to how he operates on an emergency scene in making split decisions when serving the public and citizens and when assisting his colleague at the scene of emergencies". (TB, 38).

Employee's position is that he handled the matter "as best as he felt he should at that given moment". (TB, 23). He testified at the Trial Board that about midnight on May 20, 2007, he was with a friend who showed him a revolver he had just bought, and that Employee "grabbed at [the weapon] and snatched it and it fired". He said he did not know if the weapon was registered or if it was loaded when he grabbed it from his friend. After it fired, he put the weapon in his car, intending to turn it in at the police station because he did not want his friend to get in trouble". (TB, 217). He said that he did not explain this situation to the arresting officer or to the officers who questioned him at the station because he "was afraid" since the arresting officer had cursed at him. (TB, 255, 256). Employee testified that after he was arrested, he "heard someone state that the Department had been notified, that they had just spoken with the Fire Department" (TB, 221). He stated he was aware Agency had to be notified of arrests, but thought that since he was on POD, he was not under that obligation. (TB, 222). He said he was released on May 21, and he reported to the Police and Fire Clinic on May 24. At the Clinic, he was asked if he had gotten into trouble over the weekend, and said that he had. He was asked if he had notified Agency, and said he had not. He was advised that he only had several days in which to notify Agency, so after he left the Clinic, he telephoned Captain Martin and notified him "that I was placed back to full duty from POD and that I was arrested over the weekend". (TB, 224).

² "Performance of duty" leave

³References to the transcript of the Trial Board proceeding are cited as "TB" followed by the page number.

Employee argued that the punishment of removal was punitive. (TB, 25). He contended that the penalty of removal was harsher than the penalty imposed by Agency on employees who had engaged in similar misconduct. Specifically, he alleged that another firefighter, who was “charged with assault with a deadly weapon when he threw dishes at two firefighters, hitting them on the head”, and injuring them was demoted and required to attend anger management classes, although removal had been proposed. (Employee’s Brief, p. 3). Employee had been with Agency for over two years, and had not been subject to any adverse action prior to this matter. Employee also presented character witnesses who described him as an asset to Agency and someone with whom they would have no problem working, despite the charges.

Analysis, Findings and Conclusions

This case is governed by *Pinkard*, 801 A.2d at 92, in which the D.C. Court of Appeals concluded that OEA has a limited role in cases in which a Trial Board has issued a decision, once certain conditions are met. In this case, those conditions have been met. First, Employee, a member of the D.C. Fire and Emergency Medical Services Department, was the subject of an adverse action. Next, the parties agree that they are governed by a collective bargaining agreement that contains language similar to that found in *Pinkard*. Finally, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law and recommended disciplinary actions to the deciding official. Therefore OEA serves only as a reviewing authority in this matter. As stated by the Court:

The OEA may not substitute its judgment for that of an agency. Its review of the agency decision...is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency’s credibility determinations.

Agency has the burden of proof in cases of adverse actions. In cases governed by *Pinkard*, the burden is one of “substantial evidence”⁴ which is defined as “such relevant evidence as a reasonable mind might accept as adequate to support to support a conclusion”. *Davis-Dodson v. District of Columbia Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. District of Columbia Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)). Based on a careful review of the record and the arguments presented by the parties, the Administrative Judge concludes that Agency met its burden by substantial evidence. She further concludes that there was no evidence of harmful procedural error, and no evidence that the decision violated any law or regulation. In reaching this decision, the Administrative Judge carefully reviewed the proceeding before the Trial Board. She found that the parties had full opportunity to present testimonial and documentary evidence, and that the parties did so. Employee’s representative was a vocal advocate at the hearing and was vigorous in her efforts to ensure that Employee’s substantive and procedural rights were protected.

⁴ This is an exception to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) which states that the party with the burden of proof must meet that burden by “a preponderance of evidence”.

Employee's case was fully presented to the Board, and his counsel had the opportunity to, and did in fact, cross-examine witnesses and challenge evidence. The Administrative Judge also found that the Trial Board was actively engaged at the hearing, asking questions and raising concerns that were pertinent and relevant. The Board did not appear to favor one side over the other when the parties raised objections or concerns:⁵

The arguments that Employee raises on this appeal, i.e., that although he pleaded guilty to the charges, he actually was a being a good Samaritan when he took the gun from his friend; that he had informed Captain Martin of his arrest when he telephoned on May 24, and that he was the victim of disparate treatment, were raised at the proceeding. The Trial Board considered those arguments at the proceeding, and the record contains questions and comments by Trial Board members on each of these matters. (*See, e.g.*, TB, 43, 116-122, 240-244, 257-260, 276-283). However, in its decision, the Board rejected Employee's arguments. There was ample documentary and testimonial evidence in the record to support the Trial Board's decision on each of these issues. The Trial Board stated in its report that in reaching its decision it considered the *Douglas* factors.⁶ The Trial Board made credibility determinations, and there was sufficient evidence in the record to support those determinations.

In *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review*, ____ D.C. Reg. ____ (), the OEA set out what was required to establish disparate treatment:

A number of factors are important in determining whether a penalty is reasonable. Among these factors is whether or not the agency has meted out similar penalties for similar offenses.

However, the principle of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity or perfect consistency regardless of variations, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where genuinely similar cases are presented...The employee must show that the circumstances surrounding the misconduct are substantially similar.

⁵ For example, in order to better understand how Employee had grabbed the weapon, Fire Chief Kenneth Crosswhite, Panel member, asked that Employee demonstrate where he was and what he did in relation to the person with the gun, because he felt there was some confusion on that issue. Battalion Fire Chief Paul Jones, Panel Chair, agreed, stating:

I mean I'm sitting here listening to the young man and believe me you know I want to give everybody the benefit of the doubt and I want to make sure that I understand it when I have to sit here. (TB, 242).

⁶ In *Douglas v. Veterans Administration*, 5 MSPR 313 (1981), the Merit Systems Protection Board identified criteria or factors that an employer should consider before imposing a penalty.

There was substantial evidence in the record to support the Trial Board's conclusion that Employee was not similarly situated to the individual who threw the plates, despite the fact that the plate thrower injured others, while Employee did not; and the plate thrower was on duty, while Employee was not. The argument was raised and discussed during the proceeding.

With regard to the penalty imposed by Agency, it is well-settled that this Office will not substitute its judgment for that of an agency imposing the penalty, provided that "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Once the charge is sustained, the Office will not disturb the penalty provided it is "within the range allowed by law, regulation or guidelines and is clearly not an error of judgment". *Employee v. Agency* OEA Matter No. 1601-0158-01, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Order

It is hereby ORDERED that Agency's action is UPHELD.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge