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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
CHRISTOPHER LEE)	
Employee)	
)	OEA Matter No.: 1601-0076-08
v.)	
)	Date of Issuance: January 26, 2011
D.C. DEPARTMENT OF)	
TRANSPORTATION)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Christopher Lee (“Employee”) began working for the District of Columbia Department of Transportation (“Agency”) as a Support Services Assistant. On March 14, 2007, Agency informed Employee that he was being detailed to the roadway operation patroller branch in the transportation operations division to serve as a Transportation Assistant/ROP Operator. The detail was to take effect on March 19, 2007 and was to last no more than 30 days. While serving in this detail, Agency informed Employee that he was to report to the division’s Roadway Operations Manager.

Even though the detail was to have expired within 30 days, Agency renewed it several times. Thereafter, on July 13, 2007, Agency informed Employee that it was promoting him, albeit temporarily, to the position of Transportation Assistant/ROP Operator. All Transportation Assistants/ROP Operators were required to work a schedule that rotated every three months and that included some weekends. The promotion was to take effect on July 23, 2007 and was scheduled to end no later than July 22, 2008. At the expiration of the temporary promotion Employee was to return to his permanent position as a Support Services Assistant.

On August 14, 2007, as Employee was working as a Transportation Assistant/ROP Operator, he asked an agency employee for the personal contact information of his fellow co-workers. As justification for this request, Employee claimed that he was a Lead Operator, which is a supervisory-type position, and was therefore entitled to the information. The agency employee from whom Employee had sought the information, informed an Agency official of Employee's request and of the reason Employee had given for wanting the information.

Thereafter, Agency posted the new work schedule for all of the ROP Operators. The schedule reflected that Employee's tour of duty for that period was the night shift which began at 10:00 p.m. and ended at 6:30 the following morning. Prior to that, Employee had been assigned to work the morning shift which was from 6:30 a.m. to 2:00 p.m. Employee's supervisor contacted him on August 15, 2007 and told Employee that he was scheduled to work the night shift on August 17, 2007. Employee informed his supervisor that he could not work that shift because, according to Employee, his wife was terminally ill and his son was in trouble. Employee went on to state that he was a Lead

Operator and as such, he would only work the morning shift. Employee failed to report to work on August 17, 2007, August 21, 2007 and again on August 22, 2007. Moreover, Employee did not seek permission to be absent on those days.

On August 24, 2007, Agency issued to Employee as advanced written notice of its intention to remove him. Agency charged Employee with dishonesty for the August 14, 2007 incident, insubordination for refusing to work his assigned shift, and with being inexcusably absent without leave for failing to report to work on August 17, 21, and 22, 2007. After completion of the appeal process at the agency level, Employee was removed effective April 11, 2008.

Employee timely filed a Petition for Appeal with the Office of Employee Appeals. The Administrative Judge conducted a three-day evidentiary hearing during which both Agency and Employee put forth witnesses and introduced exhibits into the record. At the conclusion of all of the proceedings, the Administrative Judge issued an Initial Decision on July 21, 2009. She held that Agency had proven the charges brought against Employee.

Employee then filed a Petition for Review. Employee's initial arguments in his petition can be generally categorized as mistakes he believes Agency made when it proposed and effectuated the removal. Specifically, Employee contends that Agency committed reversible error by not providing him with the documents it relied upon to form the basis of the adverse action and by not granting Employee's request for additional time to respond to the notice of proposed adverse action. As a result,

Employee believes that he “was severely prejudiced”¹ and that his due process rights were violated. Furthermore, Employee believes that Agency’s hearing officer relied on evidence that should not have been used to form the basis of its action. According to Employee “another clear infirmity and deficiency in the Agency’s process in affecting”² his removal is the fact that the final agency decision provides that Employee was being removed from the position of Support Services Assistant while the hearing officer’s report provides that Employee was being removed from the position of Transportation Assistant. Employee also argues that the final agency decision lacks any discussion of the *Douglas* factors. The balance of Employee’s petition sets forth his claim that the Administrative Judge misinterpreted the applicable law and regulations by allowing Agency to ignore the personnel regulations when it removed Employee. For these reasons, Employee asks us to reverse the Initial Decision.

Except for jurisdictional issues, an agency is required to prove the charges it brings against an employee. According to OEA Rule 629, the agency bears the burden of proof with regard to material issues of fact. An agency must prove its case by a preponderance of the evidence. Because there was a dispute regarding material issues of fact, the Administrative Judge deemed it necessary to conduct an evidentiary hearing. At the hearing, which lasted three days, both Agency and Employee had the opportunity to call witnesses and to examine and cross-examine those witnesses. Furthermore, both Agency and Employee introduced exhibits into the record and had an opportunity to ask the witnesses questions pertaining to those exhibits. Once the Administrative Judge closed the record and reviewed all of the evidence in the record, she determined that

¹ Employee’s Petition for Review at pg. 3.

² *Id.* at pg. 6.

Agency had proven by a preponderance of the evidence the charges it had brought against Employee. Even if Employee is correct and Agency did indeed fail to adhere to the applicable regulations when it proposed and effectuated the adverse action, Employee, nonetheless, was given a full and fair opportunity to defend against and rebut the charges brought against him. Unfortunately for Employee, he was not able to overcome the evidence that was presented against him. Therefore, Employee's claim that he was "severely prejudiced" and had his due process rights violated is without merit.

Also without merit are Employee's claims pertaining to the discrepancy in various documents that listed the position from which he was being removed and the lack of any *Douglas* factors discussion. Regardless of the position that Employee was serving in at the time of the removal, his official position of record remained that of a Support Services Assistant. He was removed from the Support Services Assistant position. Moreover, the fact that the final agency decision lacks any discussion of the *Douglas* factors does not amount to reversible error. Even without such a discussion, the Administrative Judge concluded "that Agency's decision to remove Employee was not an abuse of discretion or arbitrary."³

We believe there is substantial evidence in the record to uphold the Initial Decision. "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *WMATA v. D.C. Dep't of Empl. Servs.*, 926 A.2d 140, 147 (D.C. 2007)(quoting *Ferreira v. D.C. Dep't of Empl. Servs.*, 667 A.2d 310, 312 (D.C. 1995)). Accordingly, Employee's Petition for Review is denied.

³ *Initial Decision* at pg. 20.

ORDER

Accordingly, it is hereby **ORDERED** Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Barbara D. Morgan

Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.