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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 1601-0013-13
CHERYL WILKINS,)	
Employee)	
)	Date of Issuance: March 4, 2015
v.)	
)	
DEPARTMENT OF PUBLIC WORKS,)	
Agency)	
)	
)	Arien P. Cannon, Esq.
)	Administrative Judge

Gina Walton, Employee Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 19, 2012, Cheryl Wilkins (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) challenging the Department of Public Works’ (“Agency”) decision to suspend her for fifteen (15) days. At the time of the suspension, Employee was a Parking Enforcement Officer with Agency. Employee was charged with violating the District Personnel Manual, Section 1603.3(g): Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; specifically, arguing and rude behavior. Agency filed its Answer on November 5, 2012. This matter was assigned to me on January 21, 2014.

A Status Conference was convened in this matter on March 26, 2014. A Post Status Conference Order was subsequently issued, which required the parties to brief the issues in this matter. Upon consideration of the briefs filed by both parties, it was determined that an Evidentiary Hearing was warranted. As such, an Evidentiary Hearing was convened on December 3, 2014, where both parties presented testimonial and documentary evidence. Both parties submitted written closing arguments. The record is now closed.

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the fifteen (15) day suspension was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That 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.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

On December 3, 2014, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr."), which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their positions.

Agency's Case-in-Chief

Willie Partin ("Partin") Tr. 13-42

Partin has been with Agency for thirty (30) years and has served in the capacity of a Motor Vehicle Operator Supervisor for eighteen (18) years. Partin supervises a staff of about 29 people. His staff enforces all parking laws and restrictions in the District, which include booted vehicles and abandoned cars that have to be taken off the streets.

In July of 2012, Partin and a colleague, (Administrator) Keith Cross ("Cross"), were traveling on the 1300 block of Kenyon Street, Northwest, which is a long one-way west bound street with cars parked on both sides of the street. Partin was driving Cross to a meeting when they encountered Employee in the 1300 block of Kenyon Street. As they were driving, Partin had to go around Employee's vehicle because traffic was congested as a result of Employee's vehicle being in the street. Employee was outside of her vehicle on the left side of the street. As

Partin approached Employee's vehicle, Mr. Cross, who was on the passenger side of the car, leaned across Partin and told Employee not to double park and asked her to move her car. Employee replied that she was not double parked, but rather she was talking to a citizen. Partin described Cross' demeanor as nothing out of the ordinary. Employee's demeanor was also "fine" during her initial encounter with Cross and Partin.¹

As Partin and Cross proceeded past Employee on Kenyon Street they were stopped at a traffic light. While stopped, Partin observed Employee approaching Cross's side of the car. Employee continued to try and explain to Cross that she was not double parked and that she was talking to a citizen. During this encounter, Employee's demeanor was different.² Employee was "a little louder" and shaking her finger while talking to Cross.³ Employee appeared to be upset that Cross confronted her about being double parked in the street. Cross responded to Employee that he wanted her to move her vehicle, but also appeared to be taken aback by Employee crossing the street to repeat what she had previously told him. Although Employee was a little aggressive with Cross during the second encounter, Cross's expression never changed. It was evident to Partin that Cross and Employee had previous encounters before because Cross knew Employee by name.

Although Partin was a supervisor with Agency, Employee was not under his supervision. Partin believed that a subordinate who acted in the same manner as Employee was being rude because there was no justification for a person to act in the manner that Employee acted.⁴

Partin explained that he did not report Employee was aggressive in his written statement (Employee's Exhibit 1) because he did not feel there was a need to do so and he was not asked specifically about Employee's demeanor during her encounter with Cross.

Partin also testified that the Kenyon Square condominium building was on the left side of the road.

Michael Carter ("Carter") Tr. 51-90

Carter is currently employed by the City of New Haven, Connecticut as a Chief Administrative Officer. He has held this position since April 7, 2014. Prior to working for the City of New Haven, Carter was the Deputy Director for Operations for Agency. Carter held this position from February 2006 through March 2014. While with Agency, Carter was responsible for labor relations and he also wrote the policy and procedures on employee conduct that was consistent with the DPM and other union agreements. Employees were made aware of these policies through orientation and training. In addition, Labor Relations representatives would go out to various administrations to work with employees on regulations and codes of conduct.

Whenever the Agency believed there was a need to restate certain policies, memos were issued from the Director's office. Carter drafted the Employee Code of Conduct, which included

¹ Tr. at 20.

² Tr. at 22.

³ Tr. at 23.

⁴ Tr. at 25-26.

an amendment that was introduced as Agency's Exhibit 1. Carter testified that item number 5 prohibits discourteous treatment of superiors. This item was an important issue because there had to be continuity and positive movement of the organization, respect of the employees and supervisors needed to be consistent, and that discipline was required so that everyone can work together without disruption in delivery of services to customers. The Standard Operating Procedures for Parking Officers were introduced as Agency's Exhibit 2.

Carter was the Deciding Official with regard to Employee's proposed fifteen (15) day suspension. In the Advanced Written Notice of Proposed Suspension, which was introduced as Agency's Exhibit 3, Employee was charged with "Any other on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations—arguing and rude behavior." The Advanced Notice also indicated that Employee had been reprimanded for similar conduct in the past. After reviewing all relevant documents, Carter issued his Final Decision sustaining Employee's fifteen (15) day suspension.⁵

Carter further explained his process for sustaining the suspension. Carter considered a statement from a non-agency employee (Marshall) who was an eyewitness to the second encounter between Employee and Cross. While Carter considered Marshall's statement, he did not feel that Marshall was close enough to be in the conversation and/or confrontation and gathered that she was a "neutral observer far back, removed from the interaction."⁶ Carter also reviewed Partin's written statement, which led him to believe Employee was rude and insubordinate and failed to provide good customer service.

Agency's Standard Operating Procedures for Parking Officers require that Agency Parking Officers be courteous to supervisors, managers, and superiors.⁷ Carter testified that Employee's behavior on July 16, 2012, was detrimental, and was serious in relation to her position, duties, and responsibilities. Carter further testified that the penalty imposed against Employee was appropriate and was pretty lenient compared to other places he has been.⁸ He explained that Employee and other Parking Officers have great exposure to the public when performing their duties, and are continuously reminded of the responsibility to be the ultimate professional as they interact with the public on a daily basis. Carter felt that Employee's behavior towards Cross was disrespectful and violated the chain of command. In assessing the appropriateness of the fifteen (15) day suspension, Carter testified that Employee's discipline is consistent within the parameters of the District Personnel Manual. Carter also stated that it would be bad for employee morale if other employees see that an employee gets away with misconduct and there are no consequences.

⁵ Agency's Exhibit 5.

⁶ Tr. at 69.

⁷ See Agency's Exhibit 2, p. 27, Section 18.57.

⁸ Tr. at 73.

Employee's Case-in-Chief**Jennifer Marshal ("Marshall")** Tr. 91-104

Marshall is currently employed at Kenyon Square Condominiums as a Concierge. Kenyon Square is located at 1390 Kenyon Street, Northwest, Washington, D.C. On July 16, 2012, while outside on a cigarette break, Marshall witnessed a government van pull up beside Employee's vehicle and beep the horn. Marshall stated that Employee did not notice the government van until it beeped the horn, at which time Employee proceeded to walk to the van and have a conversation with the occupants of the van. Marshall testified that she could not hear the conversation. Marshall described Employee's demeanor as "professional" and "not in any way combative or argumentative."⁹ Marshall also did not see Employee make any gestures while conversing with the occupants of the van.

Marshall provided a written statement regarding the incident.¹⁰ Marshall's written statement indicated that Employee was waving her hand to get the van's attention. After getting the driver's attention, Employee walked over to the passenger side of the vehicle.

Marshall explained her vantage point as she observed the incident. Marshall was standing on the same side of the street as Kenyon Square Condos, and saw Employee talking to the occupants of the government van to her left. Marshall indicated that Kenyon Street is a one-way street and that Employee walked to the passenger side of the van, on the opposite side of the street where she (Marshall) was standing.

Cheryl Wilkens ("Employee") Tr. 105-129

Employee worked as a Parking Enforcement Officer since 2005. Prior to this incident, Employee had been with Agency since 2005. Employee testified that on July 16, 2012, she observed vehicles parked on Kenyon Street about 15 minutes before street cleaning was over. As Employee was telling a gentlemen that it was still street sweeping time, she heard loud honking so she turned around and saw Partin and Cross in vehicle, at which time Cross told Employee to move her vehicle. Employee responded to Cross and explained that she was trying to enforce parking and explain to a citizen that he could not be parked on the side of the street because it was still street cleaning hours. Employee's observation of Cross's body language looked like he did not want to hear what Employee had to say.

Employee followed Cross's instructions and moved her vehicle and went over to explain again that she was enforcing street sweeping hours. When Employee approached the car, the windows were rollup and so she gestured to have the windows rolled down to restate her position that she was not illegally parked or doing anything wrong, but rather enforcing street cleaning. Employee testified that when Cross rolled the window down and she explained to him what she was doing, he responded and said he just did not want her to block traffic.¹¹ At this point,

⁹ Tr. at 94-95.

¹⁰ See Employee's Exhibit 2.

¹¹ Tr. at 107-108.

Employee just walked away.¹² Employee testified that she never shouted at Cross and was not aggressive towards him.

On Cross examination, Employee testified that when she was initially told by Cross not to block traffic, she advised him that she was not blocking traffic and went ahead and moved her vehicle. When asked why she felt the need to approach Cross after she had moved her vehicle, Employee stated that she wanted to let him know that she was enforcing the block because he does not know the operations of parking enforcement. In Employee's written statement she stated that she approached Cross again and asked him whether he wanted to talk to her about her enforcement of the 1300 block of Kenyon Street.¹³

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency's adverse action was taken for cause

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1603.3 of the District Personnel Manual ("DPM") sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Here, Employee was suspended under Section 1603.3(g): Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious, specifically: arguing and rude behavior.

Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious, specifically: arguing and rude behavior.

This charge is a "catchall phrase." To sustain a charge under this cause, an investigation must be able to show that an employee's actions were not *de minimis*.¹⁴ Here, on July 16, 2012, Employee encountered Partin and Cross while she was enforcing parking regulations on the 1300 block of Kenyon Street, Northwest. Partin was driving Cross to a meeting when they came upon Employee and her vehicle, which was parked along the 1300 block of Kenyon Street. Employee

¹² *Id.*

¹³ See Agency's Exhibit 6.

¹⁴ See D.C. Mun. Regs. tit. 16 § 1619.1(7), Table of Appropriate Penalties.

was outside of her vehicle on the left side of Kenyon Street, which is a one-way street. As Partin approached Employee's vehicle, Cross, who was on the passenger side of the car, leaned across Partin and told Employee that he needed her to move her vehicle from the street because it was causing traffic congestion. Employee replied that she was not double parked and was trying to tell a citizen that he could not be parked on the side of the street because street cleaning hours were still in effect. During the initial encounter, Cross and Employee's demeanors were both normal.

After this encounter, Partin and Cross proceeded on Kenyon Street in route to their destination. While Partin and Cross were stopped at a light on Kenyon Street, Partin observed Employee approaching the vehicle on the passenger side. As Employee approached the car, she noticed that the windows were rolled up so she gestured to have Cross roll down his window.¹⁵ Employee proceeded to restate her position that she was not illegally parked and was trying to enforce parking in the street sweeping area. Partin testified that during this encounter Employee was a "little louder" and shaking her finger while talking to Cross. Partin further testified that Employee appeared to be upset that Cross confronted her about being double parked in the street. However, Employee stated that she never shouted nor was she aggressive towards Cross during the second encounter. After restating her position during the second encounter, Employee asserts that she "just walked away."¹⁶ Partin averred that Cross's demeanor did not change during this exchange. Partin further expressed that it was evident to him that Cross and Employee had previous encounters because Cross knew Employee by name.

I find that Agency had cause to take adverse action against Employee for arguing and rude behavior. While Employee maintains that she never shouted nor was she aggressive towards Cross, Agency contends that Employee was arguing and rude with Cross during their encounter on July 16, 2012. Based on the testimonial evidence, I find Agency's position, that Employee was arguing and exhibiting rude behavior to Cross, more credible. Marshall, who works as a concierge at the Kenyon Square condominiums, provided testimony that while outside in front of her building on a cigarette break, she observed Employee having a conversation with the occupants inside the government vehicle. Because Employee went to the opposite side of the street to talk with Cross, Marshall was unable to hear the conversation. Marshall described Employee's demeanor as "professional" and "not in any way combative or argumentative."¹⁷ Despite Marshall's testimony that Employee was professional and not argumentative, I find Partin's explanation of events more plausible. When Employee was asked on cross-examination why she felt it was necessary to approach Cross again after their initial encounter, she restated her need to let Cross know that she was enforcing parking on the block. In Employee's written statement, she stated that she approached Cross after the initial encounter to ask him whether he wanted to talk to her about enforcing parking.¹⁸ Neither Employee's written explanation nor testimonial explanation provide a rational reason to confront Cross after their initial encounter. Thus, I find Partin's testimony that Employee's behavior towards Cross during the second encounter was rude more plausible than Employee's version of events.

¹⁵ See Tr. at 107-108

¹⁶ Tr. at 108.

¹⁷ Tr. at 94-95.

¹⁸ See Agency's Exhibit 6.

Accordingly, I find that Agency has satisfied its burden of proof that it had cause to take adverse action against Employee for arguing and rude behavior.

Appropriateness of penalty

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.¹⁹ This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.²⁰ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.²¹

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was 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 is a clear error of judgment by agency. Here, Carter testified regarding an amendment to the Employee Code of Conduct, which was more comprehensive than the original Code of Conduct. Item five (5) of the memorandum, prohibits employees from discourteous treatment of superiors.²² Furthermore, Agency's Standard Operating Procedures for Parking Officers requires that Agency Parking Officers be courteous to supervisors, managers, or superiors.²³ Based on the testimonial and documentary evidence provided, I find that Employee's conduct constituted discourteous and rude treatment of a superior.

Carter was the Deciding Official with regard to Employee's proposed fifteen (15) day suspension. When considering the final decision, Carter noted that Employee had been reprimanded for similar conduct in the past, which was set forth in the Advance Written Notice. On January 18, 2011, Employee was issued an Official Reprimand for "use of abusive or offensive language."²⁴ The Table of Appropriate Penalties, as set forth in Chapter 16 § 1619.1(7), of the District Personnel Manual, provides that the appropriate penalty for a first time offense under the "catchall" provision ranges from a reprimand to a fifteen (15) day suspension. Here, the undersigned finds that Employee exhibited argumentative and rude behavior towards Administrator Cross on July 16, 2012. Unfortunately, for Employee, this is her second offense under the "catchall" provision. Accordingly, I find that the penalty imposed against Employee was appropriate and that Agency did not exceed the limits of reasonableness with the fifteen (15) day suspension it imposed against Employee.

¹⁹ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

²⁰ See *Id.*

²¹ See *Id.*

²² Agency's Exhibit 1.

²³ See Agency's Exhibit 2, p. 27, Section 18.57.

²⁴ See Agency Answer, Tab 4 and 5 (November 15, 2012).

ORDER

Accordingly, it is hereby **ORDERED** that Agency's decision to suspend Employee for fifteen (15) days is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge