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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0046-12R15
WILLIE PORTER,)	
Employee)	
)	Date of Issuance: September 8, 2015
v.)	
)	
DEPARTMENT OF MENTAL HEALTH,)	
Agency)	
_____)	
)	Arien P. Cannon, Esq.
)	Administrative Judge
Willie Porter, <i>Pro se</i>		
Eric Adam Huang, Esq., Agency's Representative		

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

An Initial Decision (“ID”) was issued in this matter by the undersigned on December 24, 2013, upholding Agency’s decision to remove Employee from his position as a Psychiatric Nurse. Employee filed a Petition for Review on February 4, 2014, with the Office of Employee Appeals’ (“OEA”) Board, asserting that new and material evidence became available. Agency filed its Opposition to Employee’s Petition for Review on June 27, 2014. Employee filed a Response to Agency’s Opposition on July 30, 2014. While Employee’s Petition for Review was pending before the OEA Board, he submitted additional filings to supplement his Petition for Review. On September 9, 2014, Employee submitted a filing which contained a Settlement Agreement between himself and the Department of the Army as an attachment. Agency filed a Motion to Strike Employee’s Submission on September 25, 2014. Employee again submitted a filing on October 15, 2014, addressing the arguments in support of his Petition for Review.

On January 8, 2015, the Department of the Army submitted a letter addressed to the undersigned on behalf of Employee. This letter was forwarded to OEA’s General Counsel’s Office. The letter corroborates Employee’s assertion that he voluntarily resigned from the Federal Service with the Department of the Army, rather than being involuntarily removed from his position. On April 14, 2015, the OEA Board issued an Opinion and Order on Petition for

Review, which remanded this matter to the undersigned to consider the merits of the case based on new evidence presented by Employee. Agency filed a Motion to Reconsider Opinion and Order on Petition for Review on April 29, 2015. On May 11, 2015, Employee submitted a response to Agency's Motion to Reconsider.

A Status Conference was held on May 15, 2015, in order to address the appropriate issues based on the OEA Board's remand. Following the Status Conference, an Order was issued which required Employee to submit documents supporting the new and material evidence presented to the Board. Agency was also given the opportunity to submit a response to Employee's submission. Both parties provided their submissions accordingly.

JURISDICTION

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

ISSUES

1. Whether Agency had sufficient cause to take adverse action (termination); and
2. If so, whether Agency's removal of Employee was the appropriate penalty under the circumstances.

ANALYSIS

On September 16, 2010, Employee applied for a position as a Psychiatric Nurse with Agency. Employee asserts that he resubmitted his application on October 6, 2010, upon Agency's request because the initial application was not properly entered into the computer.¹ The first Employment Application, or DC 2000 form, *did not* provide Employee's work experience with Walter Reed Army Medical Center ("Walter Reed").² The second application *did* provide Employee's work history with Walter Reed (emphasis added). Employee provided his previous work history under item number 9 entitled, "Work Experience...List paid or unpaid work experience relevant to the position for which you are applying," on both applications.³

Employee was subsequently hired in a Career Service appointment as a Psychiatric Nurse with Agency as a result of his Employment Application. Employee's official date of hire was January 18, 2011. On or about April 1, 2011, Agency's Human Resource department received a copy of Employee's Official Personnel File ("OPF").⁴ The OPF revealed that there was

¹ See Agency's Brief at Attachment 12 (October 30, 2013). Agency maintains that it relied upon the September 16, 2010 application in offering Employee his position. It should also be noted that Agency questions whether or not Employee actually submitted a second application on October 6, 2010. See Agency's Reply Brief (December 9, 2013).

² Throughout the record, and for purposes of this Decision, Walter Reed Army Medical Center is also referred to as the Department of the Army and Dewitt Army Hospital in Fort Belvoir, Virginia.

³ See Agency's Brief, Attachment 1 (October 30, 2013).

⁴ See Agency's Brief (October 30, 2013).

information regarding Employee's previous employment history that was not contained in his first Employment Application, submitted on September 16, 2010. Specifically, it was revealed that Employee was previously employed and worked as a Clinical Nurse at Walter Reed from September 19, 2005 through June 12, 2006. According to the Standard Form 50-B ("SF-50"), dated June 12, 2006, Employee was removed from his position at Walter Reed for "sleeping on the job, AWOL, failure to follow orders, discourtesy, [and] negligent discharge of duties."⁵ Based on the discovery of this information, Agency elected to remove Employee from his position. Specifically, Employee was terminated for "[a]ny knowing or negligent material misrepresentation on an employment application." The specification of this charge provided that Employee knowingly omitted information on his D.C. Employment Application regarding his past employment that would have precluded an appointment to his position with Agency. In a December 24, 2013 Initial Decision, the undersigned upheld Agency's decision to terminate Employee. Subsequently, Employee filed a Petition for Review.

In Employee's Petition for Review, he raises the argument that new and material evidence became available supporting his contention that he was not removed from his position with Walter Reed, rather he voluntarily resigned. The new evidence was provided in Employee's September 9, 2014 submission, where he attached a Settlement Agreement and General Release, indicating that his former employer, the Department of the Army, the umbrella of Walter Reed, "accept[s] [Employee's] voluntary resignation from Federal service, effective [June 12, 2006]." The OEA Board held that the evidence provided by Employee, "establishes that the SF-50 relied upon by Agency to remove [Employee] was inaccurate."⁶ Although the Settlement Agreement submitted with Employee's September 9, 2014 submission only contained Employee's signature, a copy containing both parties' signature was submitted on June 5, 2015.

The OEA Board also considered a letter submitted by Bradley E. Eayrs ("Eayrs"), an Attorney for the Department of the Army, as new and material evidence. In addition to Employee's June 5, 2015 submission of the signed Settlement Agreement, he also provides a Declaration from Eayrs. The declaration provides that Employee's record with Walter Reed "did not include a decision memorandum chronicling an actual decision by the deciding authority to terminate [Employee's] employment." Mr. Eayrs further acknowledges that the records of the Department of the Army indicate that it received a hand-written memorandum from Employee, dated April 20, 2006, resigning from his position. Mr. Eayrs also points out that the date of removal on Employee's SF-50, relied upon by Agency, was June 12, 2006, well after Employee submitted his resignation to Walter Reed. Moreover, the Declaration by Eayrs provides that the Department of Army's records "reflect that [Employee] resigned his position and that resignation was for the purpose of obtaining non-federal employment."⁷

⁵ See *Id.* at Attachment 3, Notification of Personnel Action (October 30, 2013).

⁶ *Porter v. D.C. Department of Mental Health*, OEA Matter No. 1601-0046-12, Opinion and Order on Petition for Review, at 6 (April 14, 2015). The SF-50 relied upon by Agency to support its cause to remove Employee is dated, June 12, 2006, which states in the remarks section, that Employee was removed for "sleeping on the job, AWOL, failure to follow orders, discourtesy, [and] negligent discharge of duties." (Agency's Brief at Attachment 3 (October 30, 2013)).

⁷ See Declaration of Bradley E. Eayrs (June 5, 2015).

The new and material evidence presented by Employee, the signed Settlement Agreement and the Declaration from Attorney Eayrs, supports Employee's position that he voluntarily resigned and was not removed on the basis of any adverse action.⁸ While Agency argues that the new evidence presented by Employee did not negate cause for it to take adverse action, it has been determined that the documents it relied upon were inaccurate. Thus, in the interest of justice, I must find that Agency did not have cause to take adverse action against Employee for "any knowing or negligent material misrepresentation on an employment application."

Whether the penalty of removal was appropriate under the circumstances

Because I have found that Agency did not have cause to take adverse action against Employee, I will not address the appropriateness of the penalty.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

⁸ *Porter v. D.C. Department of Mental Health*, OEA Matter No. 1601-0046-12, Opinion and Order on Petition for Review (April 14, 2015).