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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ELLSWORTH W. COLBERT)	OEA Matter No. 1601-0063-98R05
Employee)	
)	Date of Issuance: October 3, 2005
v.)	
)	Senior Administrative Judge
DEPT. OF PUBLIC WORKS)	Joseph E. Lim, Esq.
Agency)	
)	
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William Earl, Esq., Agency Representative		
Charles A. Ray, Jr., Esq., Employee Representative		

INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On February 9, 1998, Employee filed a petition for appeal with this Office pursuant to D.C. Code Ann. § 1-606.3(a) (1992). The employee appealed his January 30, 1998 removal by the agency for discourteous treatment of the public, a supervisor, or other employee, insubordination, and inexcusable neglect of duty.

Administrative Judge Barbara P. Beach held a hearing on February 16, 1999 and issued an Initial Decision on March 1, 1999. Judge Beach dismissed the cause of discourteous treatment of the public, a supervisor, or other employee. The Administrative Judge reasoned that Agency had violated D.C. Code § 1-617.1(b-1)(1) by not commencing the adverse action within 45 business days of the act which formed the basis for the discourteous treatment charge.¹ As for the other two charges, the Administrative Judge sustained them but remanded the appeal to Agency for it to reconsider the penalty in view of the fact that only two charges had been upheld.

In "Agency's Decision on Remand," Agency again determined that Employee's conduct during the period from June 16, 1997 through July 24, 1997 and on July 21, 1997 warranted removing him from his position as an Electronics Mechanic. Agency argued that because removal was within the range of penalties for the sustained causes, it did not abuse its discretion by imposing that penalty. Agency also reviewed Employee's historical work record and found that it "reflect[ed]."

¹ The Administrative Judge found that the incident which formed the basis for this charge occurred on June 3, 1999; however, Agency did not propose Employee's removal until August 7, 1997- 47 business days after the incident.

. [Employee's] disregard [for] established policies and procedures of the Agency." *Agency's Decision on Remand* at pg. 4. Thus Agency reaffirmed its decision to remove Employee. Again Employee appealed this action claiming that the penalty was too severe.

In a second Initial Decision issued on May 24, 1999 the Administrative Judge reversed Agency's action and ordered Agency to reimburse Employee for lost pay and benefits as a result of its original action. Even though the Administrative Judge recognized that "[r]emoval [was] a permitted penalty for both violations," she, nevertheless, determined that it was an inappropriate penalty in this case. The Administrative Judge reasoned that because Agency's consideration of Employee's prior work record was not within the bounds permitted by section 1608.2 of Chapter 16 of the District Personnel Manual, it had abused its discretion. Further the Administrative Judge found that Agency had failed to consider certain factors, commonly known as the Douglas factors,² when it evaluated the appropriateness of the penalty. Therefore, the Administrative Judge ordered Employee back to work. Subsequently, Agency filed a Petition for Review.

On February 25, 2000, the OEA Board was not able to conclude that Agency had fully evaluated its penalty in light of the Douglas factors. Thus the Board remanded the appeal to Agency to consider each of the Douglas factors as they may relate to Employee's case and to reconsider the penalty in this case in light of those factors.

In its report on remand Agency concluded that ten of the twelve Douglas factors are relevant in this case and asserted that the penalty of removal was still appropriate.

Looking at the evidence in its totality, the Board agreed and found that the penalty of removal was still warranted and on May 18, 2000, issued an Opinion and Order upholding Agency's action.

Employee then filed a petition for review in the Superior Court of the District of Columbia. That court reversed the Board's decision finding that it was clearly erroneous for several reasons.

Thereafter, Agency appealed to the District of Columbia Court of Appeals. In a decision rendered May 5, 2005, the court remanded the appeal to the OEA Board so that it may reconsider the Administrative Judge's "decision within the established scope of review and limited to the evidentiary record presented to the [Administrative Judge]". The court held that the Board erred in considering the documents pertaining to Employee's historical work record that Agency submitted in its Report on Remand. The Board took this to mean that because the Administrative Judge had not admitted those documents into evidence before the record was closed, it was without authority to consider them. Also, the court had suggested that the Board remand the appeal to the Administrative Judge so that he or she may consider "DPW's Agency Report on Remand applying the *Douglas* factors, including the additional evidence supplied by DPW and Colbert."

Taking the position that the documents pertaining to Employee's historical work record are relevant to the appeal, the Board reassigned this Matter to me on September 8, 2005, since Judge Beach was no longer in our employ. Thus, as per instructions from the D.C. Court of Appeals and the Office of Employee Appeals Board, I reopened the record in order to admit Employee's historical work records as well as Employee's response to Agency's report into the record. I also afforded the

² See *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). The factors will be set forth later in this decision.

parties an opportunity to make additional submissions to the record. The record was officially closed on September 16, 2005.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Code Ann. § 1-606.3 (1992 *repl.*).

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

On August 7, 1997 Agency informed Employee of its intention to remove him from his position as an Electronics Mechanic, RW-2604-11, based on the charges of discourteous treatment of the public, a supervisor, or other employee, inexcusable neglect of duty, and insubordination. The discourteous treatment charge involved a fight that Employee had with his superior on June 3, 1997. Because Agency failed to commence the adverse action within 45 business days of the June 3, 1997 act which formed the basis for the discourteous treatment charge, that first cause was dismissed. Thus we are concerned only with the remaining charges of inexcusable neglect of duty, and insubordination.

The inexcusable neglect of duty charge was based on Employee's failure to perform certain tasks and comply with certain Agency rules during the period of June 16, 1997 to July 24, 1997. Specifically, as an Electronics Mechanic assigned to the Traffic Signal Maintenance Branch, Employee was responsible for the performance of work involving the maintenance, installation, repair, and overhaul of all traffic signal equipment. Employee was also required to insure that the coordination between intersections corresponded to traffic engineering specifications and to prepare daily work reports of regular field repair work performed.

On June 26, 1997, Employee was issued a memorandum memorializing his duties and assignments that he and his attorney had earlier discussed with his supervisor on June 6, 1997. Employee was required to make complete operational checks of the conflict monitors in the traffic signal controllers at 125 signalized intersections and to ensure that each conflict monitor operated properly. In addition, Employee was required to make complete operational checks of the intersections that received mast arms and to ensure that all work was done correctly, the proper lenses were installed, and that paperwork was completed.

During the period June 16, 1997 through July 24, 1997, Employee inspected only 32 of the 125 intersections required in his assigned tasks and only completed repairs at 4 of the 32 intersections he visited. Employee also failed to submit employee work reports for all the days he worked.

In addition, because of the altercation he had with his superior, Employee was instructed to remain off the premises of 1338 G Street, S.E. (where his superior worked) for the duration of his detail. The insubordination charge was based on a July 21, 1997 incident in which Employee

appeared at the G Street work site in violation of this direct order not to do so.

Employee does not deny any of the charges, but he argues that the ultimate penalty of removal is too severe for his actions. Because of Employee's admission, there was never any question that the agency had met its burden of establishing cause for taking adverse action. However, Employee asserts that his penalty should be overturned and that he should be returned to work.

As noted above, the only remaining issue is whether the discipline imposed by the agency was an abuse of discretion. Any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ (); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ (). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."³ When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."⁴

There are twelve (12) factors that have been recognized as relevant when evaluating the appropriateness of a penalty. These factors are commonly referred to as the "Douglas" factors because they were first enunciated in the case of *Douglas v. Veterans Admin.*, *supra*.⁵ The twelve Douglas factors are:

- 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
- 2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) The employee's past disciplinary record;
- 4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

³ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

⁴ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

⁵ See also *Brown v. Metropolitan Police Dep't*, OEA Matter No. 1601-0001-88, *Opinion and Order on Petition for Review* (July 22, 1994), __ D.C. Reg. __ ().

- 5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- 6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) Consistency of the penalty with any applicable agency table of penalties;
- 8) The notoriety of the offense or its impact upon the reputation of the agency;
- 9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) Potential for the employee's rehabilitation;
- 11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on part of others involved in the matter; and
- 12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Not all of the Douglas factors must be considered by the agency. However the role of this office is to ensure that the agency has considered the relevant factors and any mitigating factors identified by the employee.⁶

In its report on remand Agency considered all of the Douglas factors and concluded that ten of the twelve factors are relevant in this case.⁷ Specifically Agency found that the following Douglas factors were applicable:

1. The nature and seriousness of the offense and its relation to Employee's duties;

With regard to the first Douglas factor, Agency noted that Employee's failure to ensure that the traffic signals were functioning properly posed a serious threat to the health, safety, and welfare of the citizens of and visitors to the District of Columbia. Additionally, Employee's failure to make

⁶ See *Colbert v. Department of Public Works*, OEA Matter No. 1601-0063-98P99, *Opinion and Order on Petition for Review* (May 18, 2000) __ D.C. Reg. __ () citing *Brown v. Metropolitan Police Dep't*, *supra*.

⁷ Agency found that the Douglas factor regarding the notoriety of the offense was insignificant to Agency's decision to terminate Employee and that Employee's past disciplinary record could not be considered in light of section 1608.2 of the District Personnel Manual which governs admonitions, reprimands, and prior corrective adverse actions.

complete operational checks of the traffic signal equipment and make any necessary repairs placed the District's traffic signal maintenance operations at risk. Furthermore, Employee's failure to prepare daily work reports of regular field repair work performed created a void in the official record of each traffic signal. This failure to properly document the work performed exposed the District to potential civil liability since without such records the District will be unable to prove in a court of law that a particular traffic signal was properly inspected and maintained.

Employee alleges that some of the days covered were periods of bad weather. His job description, however, indicates that his job is to be performed in all kinds of weather. In his reply, Employee attempts to re-litigate the issue of his culpability, when in fact that issue had already been conceded. The only issue is the appropriateness of the penalty.

2. Employee's past work record, including length of service, performance on the job, ability to get along with co-workers, and dependability;

With regard to the second Douglas factor, Agency submitted several documents, including letters to Employee, personnel action forms, performance rating reports, and an affidavit of Employee's supervisor, to support its claim regarding the appropriateness of the penalty chosen in this case. Agency showed that a review of Employee's record revealed that he consistently failed to get along with his co-workers and he also failed to perform his assigned duties. Agency cited incidents dating from May 19, 1989 through March 20, 1996.

However, in light of section 1608.2 of the District Personnel Manual, only prior corrective or adverse actions not older than three (3) years, reprimands not older than two (2) years, and admonitions less than a year old can be considered. Thus, only two priors could be properly considered by Agency. On September 7, 1995, Employee was reprimanded and reassigned from the Traffic Signal Maintenance Branch to the Traffic Signal Construction Branch because of discourteous treatment of others on August 24, 29, 30, 31, 1995, and September 4, 1995. On March 20, 1996, the Agency was forced to call the D.C. Metropolitan Police Department (MPD) because Employee harassed Mr. Thomas Jackson and refused to leave his office. Employee's supervisors indicated that Employee was a low job performer, undependable, and unable to get along with his co-workers.

Despite Employee's contention, these latter two incidents were properly considered by Agency, because they occurred within the appropriate time frame.

3. The consistency of the penalty with the table of penalties applicable to this case;

With regard to the third Douglas factor, the range of penalties for a first offense of insubordination (failure or refusal to carry out assigned duties and responsibilities) is reprimand to removal.⁸ The range of penalties for a first offense of inexcusable neglect of duty (negligence in

⁸ DCOP Rule § 1618.5(c), 34 D.C. Reg. 1865 (1987).

performing official duties, including failure to follow verbal or written instructions) also ranges from reprimand to removal for a first offense.⁹

4. Employee's job level and type of employment;

With regard to the fourth Douglas factor, Agency stated that as an Electronics Mechanic, Employee was responsible for maintaining the proper functioning of traffic signal equipment and his failure to perform duties assigned to him posed a threat to the health, safety and welfare of the public. Employee's failure to obey an order of a superior which had been issued due to an altercation between the Employee and his supervisor, clearly interfered with work production and had the potential for affecting discipline of other employees.

Employee disagrees with the characterization of his work performance. Again, Employee is attempting to re-litigate the issue of his culpability – an issue that has already been settled by Judge Beach and admitted to by Employee.

5. The effect of the offense upon Employee's ability to perform satisfactorily;

Agency stated that Employee's inexcusable neglect of duty and insubordination had an adverse effect on his ability to perform at a satisfactory level since Employee frequently and repeatedly failed to: 1) complete his work on schedule; 2) complete the amount of work assigned; 3) comply with work instructions; and, 4) observe rules.

In his reply, Employee again attempts to re-litigate the issue of his culpability by stating that he did not really mean to admit to the acts that led to his dismissal.

6. The potential for Employee's rehabilitation;

Based on Employee's poor prior work record, Agency determined that the possibility of his rehabilitation did not exist based upon the fact that Agency had issued a number of reprimands and had taken corrective action in the past against him to no avail.

Employee's reply centered on his being a "great technician" and should thus be allowed back to work. Even if true, this is legally insufficient to abrogate his penalty.

7. The absence of mitigating circumstances surrounding the offense;

Agency determined that there were no mitigating circumstances in this case as Employee had been informed both verbally and in writing what his duties and assignments were. Nevertheless, Employee failed to perform them. Employee also deliberately disregarded the order not to go to the premises of the Traffic Signal Branch.

⁹ DCOP Rule § 1618.4(a), 34 D.C. Reg. 1865 (1987).

Employee states that he was under stress because of his father's death, his new detail, and alleged smaller pay. His other contention centers on his troubles with the disinterested designee. None of his arguments provide legally sufficient reasons for not performing his job.

8. The adequacy and effectiveness of alternative sanctions;

Agency states that from a review of Employee's personnel record, all attempts at counseling and progressive discipline proved fruitless. Further, Employee's tour of duty and duty station had been changed several times due to Employee's failure to perform his assigned duties.

Employee wants this Office to adopt the disinterested designee's recommended penalty of a 15-day suspension. However, he cannot cite a legal obligation for Agency to adopt the disinterested designee's recommendation.

9. The consistency of the penalty with those imposed upon other employees for the same or similar offense;

A review of Agency's Bureau of Traffic Services' personnel records did not reveal a comparable situation. As stated earlier, Agency imposed a penalty that was consistent with the Table of Penalties, which is used as a guide for all District agencies.

Again, Employee wants this court to adopt the disinterested designee's recommended penalty of a 15-day suspension, but provides no legal basis for overruling Agency's choice of penalty.

10. The clarity with which Employee was on notice of any rules which were being violated.

The duties and assignments as well as the direct order not to visit his supervisor's office were discussed and agreed upon on June 6, 1997 by Employee, his attorney, and the chief of the Traffic Signal System Division. Employee also received a memorandum memorializing the agreement. Thus, there is no question that Employee had notice of the rules.

In his reply, Employee basically wants to re-litigate the issue of his culpability, a matter already conceded and decided.


The record shows that the agency's decision was based on a full and through consideration of the relevant Douglas factors. The factors considered by the agency are apparent from the Agency's Report on Remand. Those documents show that the agency considered the severity and continuing nature of the employee's infractions and the fact that he was an Electronics Mechanic with a job that directly impacted upon public safety. The agency noted that at the time of his termination, the employee had committed serious infractions of employment rules, including performing the work he was supposed to do, not keeping the required work records, and disregarding a direct order. Among other things, the agency also considered his key role in ensuring traffic signals work properly for the safety of the public, the adverse effect these offenses had upon the employee's ability to perform his duties, and the employee's resistance to management attempts at rehabilitation. Thus, I conclude that the agency properly considered the relevant Douglas factors.

Here, the sustained charges are based on several instances of insubordination and inexcusable neglect of duty. For the foregoing reasons, I conclude that the agency's decision to select removal as the appropriate penalty for the employee's infractions was not an abuse of discretion and should be upheld.

ORDER

It is hereby ORDERED that the agency action removing the employee is UPHeld.

FOR THE OFFICE:



JOSEPH E. LIM, ESQ.
Senior Administrative Judge