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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0124-15
TINA DAVIS,)	
Employee)	
)	Date of Issuance: January 31, 2017
v.)	
)	
DISTRICT OF COLUMBIA DEPARTMENT OF)	
MOTOR VEHICLES,)	
Agency)	
_____)	
Gina Walton, Employee Representative)	Arien P. Cannon, Esq.
Milena Mikailova, Esq., Agency Representative)	Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 13, 2015, Tina Davis (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“Office” or “OEA”) challenging the District of Columbia Department of Motor Vehicles’ (“Agency” or “DMV”) decision to suspend her for fifteen (15) days from her position as a Legal Instrument Examiner. This matter was assigned to me on November 20, 2015.

A Prehearing Conference was convened on March 18, 2016. Subsequently, Agency filed a Motion for Summary Disposition asserting that there were no material facts in dispute. After being granted an extension of time to file a response to Agency’s Motion for Summary Disposition, Employee filed her opposition on July 7, 2016. I issued an Order on July 21, 2016, denying Agency’s Motion for Summary Disposition. Subsequently, a telephonic Status Conference was convened on August 31, 2016, with the anticipation of proceeding with an evidentiary hearing. Initially, the evidentiary hearing was scheduled for October 25, 2016. A Consent Motion for a Continuance was filed on October 20, 2016, as a result of the parties’ inability to reach a settlement agreement, and to allow Agency the time to issue an Amended Final Decision. Accordingly, the evidentiary hearing was rescheduled for December 12, 2016.

Prior to the evidentiary hearing, on November 28, 2016, Agency filed a Motion to Dismiss for Lack of Jurisdiction, citing to its newly issued Amended Final Decision, which reduced the fifteen (15) day suspension to a two (2) day suspension. Pursuant to the undersigned's Order on December 2, 2016, Agency's Motion to Dismiss was denied.¹ In a telephonic Status Conference convened on December 5, 2016, Agency asserted that as a result of the Amended Final Decision, which rescinded two of the three original charges against Employee, that there were no material issues of fact in dispute, thus absolving the need for an evidentiary hearing. The undersigned agreed. Accordingly, I determined that this matter can be resolved based on the documents of record.

JURISDICTION

Jurisdiction of this Office is established in this matter pursuant to D.C. Official Code § 1-606.03 (2001).²

ISSUES

1. Whether Agency had cause for adverse action for “[a]ny on duty or employment related act or omission that interferes with the efficiency and integrity of government operations; specifically neglect of duty; and
2. If so, whether a two day suspension was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.³ “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.

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.⁴

¹ D.C. Code § 1-606.03(a) provides that this Office generally has jurisdiction over suspensions of ten days or more. Agency's original penalty was a fifteen day suspension, which was unilaterally amended after Employee filed her Petition for Appeal with this Office, to a two day suspension. As set forth in the undersigned's December 2, 2016 Order, once jurisdiction of this Office has attached, it cannot be divested by an agency's decision to unilaterally amend an imposed penalty, unless the employee consents to such divestiture or unless the agency completely rescinds the action being appeal. *Himmel v. Department of Justice*, 6 M.S.P.R. 484 (June 2, 1981).

² See also Order on Jurisdiction issued on December 2, 2016.

³ 59 DCR 2129 (March 16, 2012).

⁴ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The facts regarding the “neglect of duty” charge, which is the only charge that remains at issue in this matter, are largely undisputed. In the Advance Written Notice of Proposed Suspension of 15 Days, issued on June 23, 2015, Agency asserts that in an e-mail exchange between Employee and a customer, Employee used her personal e-mail address with her official government title. Agency maintains that Employee violated policy set forth in the DMV Employee Handbook, which states:

Employees/Contractors should use the District’s computer systems for official purposes with limited use otherwise. (Guidelines for the official use of computers may be found at www.octo.dc.gov in the “Policies, Guidelines, and Procedures” section.⁵

Agency also relies on the Office of the Chief Technology Officer’s (“OCTO”) Email Use Policy which prohibits “[s]ending email under names or addresses other than the employee’s own officially designated DC government email address.”⁶

Employee does not dispute that an e-mail exchange took place between herself and a customer. Rather, Employee asserts that a customer observed her being mistreated by her supervisor and the customer volunteered to give Employee her information to write a statement on her behalf. As such, the legal issue hinges on whether Employee’s use of her personal e-mail account to contact the customer violates Agency and/or District policy.

The policy in Agency’s Employee Handbook, as set forth above, provides that employees should only use the District’s computer systems for official purposes with limited use otherwise. Although Employee does not dispute contacting a customer with her personal e-mail address, Agency has not established that Employee used the District’s computer system to send the e-mail from her personal account. Thus, Agency has not satisfied its burden in establishing that Employee violated this policy.

Agency further points to the District policy issued by OCTO, which prohibits an employee from sending e-mails under names or addresses other than an employee’s officially designated D.C. government e-mail address. Here, the record indicates that the customer initiated an e-mail thread with Employee’s personal e-mail address on April 5, 2015, and again on April 30, 2015.⁷ Employee responded on May 1, 2015, thanking the customer for writing a letter on her behalf, regarding what is seemingly an issue that arose between Employee and her supervisor.⁸ While the e-mail exchange seems to address a looming personnel action to be taken against Employee, it also seems personal in nature. Undoubtedly, the District policy prohibiting an employee from sending e-mails under e-mail addresses other than an officially designated D.C. government e-mail address, relates to correspondence addressing District government business. Here, the looming personnel action also created a personal interest for Employee to

⁵ See Agency’s Response, Tab 8 (September 16, 2015).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

protect and defend herself in the event that Agency elected to take adverse action against her. Indeed, Agency took adverse action against Employee for this incident, where a customer, who also wrote a letter on Employee's behalf, was present. I find that Employee's response using her personal e-mail address to respond to the customer regarding a personal issue did not violate the District's policy on the use of e-mail, nor rose to the level of neglect of duty.

Furthermore, Agency asserts that Employee violated policy in her May 1, 2015 e-mail by using her "official government title."⁹ At the conclusion of the May 1, 2015 e-mail, Employee provides her name, states that she is a "DC- DMV Employee," provides her officially designated D.C. government e-mail address, and the particular Agency location center where she worked. Nowhere in the e-mail does she provide her "official government title,"--a Legal Instrument Examiner. Therefore, Agency has not met its burden that Employee violated policy by using her "official government title."

Because I find that Agency has not met its burden that it had cause to take adverse action against Employee, I will not address the appropriateness of the penalty imposed.

ORDER

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

1. Agency's two day suspension of Employee is **REVERSED**; and
2. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of her two day suspension; and
3. 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
