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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 1601-0057-15
JERRY STRICKLAND,)	
Employee)	
)	Date of Issuance: March 2, 2016
v.)	
)	
D.C. DEPARTMENT OF GENERAL SERVICES,)	
Agency)	
)	
)	
)	Arien P. Cannon, Esq.
)	Administrative Judge

Jerry Strickland, Employee, *Pro se*
Charles Brown, Jr., Esq., Agency Representative
C. Vaughn Adams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Jerry Strickland (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals on March 27, 2015, contesting the District of Columbia Department of General Services’ (“Agency”) decision to impose a thirty (30) day suspension from his position as a Lead Special Police Officer.¹ Agency filed its Answer on May 1, 2015. I was assigned this matter on July 13, 2015.

A Prehearing/Status Conference was convened on August 28, 2015. Subsequently, a Post Prehearing Conference Order was issued, which required the parties to submit briefs to address the issues in this matter. Both parties submitted their briefs accordingly. Upon consideration of the briefs submitted by the parties, a Telephonic Status Conference was convened on December 22, 2015, to further address the legal issue that Employee raised in his brief regarding being on

¹ At the time Agency took adverse action, the effective date of Employee’s suspension was undetermined. In its Final Decision on Proposed Suspension, Agency states, “As of today, you are in an alternate leave status with pay. Therefore, the dates of your thirty (30) day suspension will be determined upon your return to work.” See Agency Answer, Tab 3 (May 1, 2015).

break at the time of the alleged neglect of duty. Agency was ordered to submit a sur-reply brief for the limited purpose of addressing Employee's argument that he was on break. Agency submitted its sur-reply brief accordingly. Subsequently, Employee submitted a number of e-mails further addressing his assertion that he was on break at the time of the alleged neglect of duty. These e-mails were eventually submitted to this Office and accepted as supplemental filings. Upon consideration the filings submitted by the parties, I determined that an Evidentiary Hearing was not warranted. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether a thirty (30) 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.² "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.³

Agency's position

Agency asserts that it rightfully suspended Employee for thirty (30) days from his position as a Lead Special Police Officer for "[a]ny on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carryout assigned tasks and careless and negligent work habits."⁴ Agency also based its adverse action on "[a]ny other on-duty or employment related reason for corrective adverse action that is not arbitrary or capricious: sleeping on the job."⁵ Agency maintains that on October 14, 2014, at approximately 5:30 a.m., two Lieutenants observed and recorded Employee sleeping in his patrol car while on duty.⁶ Agency avers that a nearly six (6) minute video

² 59 DCR 2129 (March 16, 2012).

³ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

⁴ DPM § 1603.3(f)(3).

⁵ DPM § 1603.3(g).

⁶ Employee maintains that the incident occurred on October 23, 2014, as indicated on a statement he provided to

recording showed Employee maintaining the same position: seated in the driver's seat of the vehicle, with a black and white blanket covering his chest with his eyes closed. After making this observation, one of the Lieutenants contacted the midnight watch commander, who then approached Employee's vehicle and also observed Employee sleeping. The watch commander tapped on Employee's window and Employee opened the door and said, "what's up."⁷ Employee was then instructed to complete a Complaint/Witness Statement (PD 119) for sleeping on the job.

Agency noted that this was not Employee's first offense of "Neglect of Duty." It asserts that on September 23, 2014, Employee was suspended for a neglect of duty incident that occurred on June 10, 2014, when he left his post at the D Street entrance of the John A. Wilson building unattended with no other security officer present. Based on the aforementioned, Agency elected to suspend Employee thirty (30) days.⁸

Employee's position

Employee argues that because of injuries he received while on the job, his doctor ordered him to take pain medicine four (4) times daily, as needed. Employee asserts that this medication caused him to become sleepy. Employee further states that after he submitted his paperwork to his supervisor around 5:00 a.m. on the day of the incident, he asked if he could remain in the substation because it was cold outside and his assigned car did not have heat. Employee contends that he was instructed to monitor activities in the parking lot until 6:30 a.m., when the day shift officers would be reporting to the substation. Employee states that around 5:05-5:10 a.m. he took a break because he had not taken one during his regular tour of duty. Employee further asserts that he was covered with his blanket because his midnight supervisor assigned him to a vehicle without working heat.

Employee states that when he took a break, he closed his eyes to figure out where his pain was coming from and cites to the working conditions in the Protective Services Division Substation which caused him to have an allergic reaction. Because of this allergic reaction, Employee took a Benedryl allergy pill in conjunction with the medication prescribed by his doctor, which caused him to become drowsy. Employee asserts that Agency was aware of his medical conditions and violated his doctor's advice not to place him in a patrol capacity.⁹

Agency, which is attached with Employee's Petition for Appeal. Statements provided by Captain Joseph Brown and Supervisory Police Officer, George Smith, also indicate that the incident occurred on October 23, 2014. (See Agency's Brief Regarding Petitioner's Appeal, Attachments (September 30, 2015)). The discrepancy over the date on which the actual incident occurred is immaterial to the outcome of this case.

⁷ See Agency Answer, Tab 1, p. 2 (May 1, 2015).

⁸ Although in Agency's brief, submitted September 30, 2015, it asserts that Employee's suspension is for fifteen (15) days, the Notice of Final Decision on Proposed Suspension provides that Employee's suspension is for thirty (30) days. Because Employee was in alternate leave status with pay at the time the Notice of Final Decision was issued, the dates of the thirty (30) day suspension were to be determined upon Employee's return to work. See Agency's Answer, Tab 3 (May 1, 2015).

⁹ See Employee's "Letter of Response" (treated as Employee's brief), Attachment dated 8/28/2013 from Capitol Hill Orthopedics; See also Attachment of evaluation from George Washington Medical Faculty Associates, dated 6/18/14 (shows that the injury existed and Employee was prescribed pain medicine.) (October 27, 2015).

Employee also contends that the PD 119 form he used in describing the incident surrounding this adverse action is a form that is generally used by the Metropolitan Police Department and Agency is improperly attempting to use the form to take disciplinary action against him.

Employee further argues that Agency is improperly taking adverse action against him while he was out on workers' compensation and that he should not be contacted about disciplinary actions. Employee describes Agency's action in this regard as "harassment and inconsiderate."

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee does not dispute that he was sleeping in his car on October 14, 2014.¹⁰ The circumstances surrounding Employee being asleep in his vehicle are at issue. Employee offers several arguments addressing the incident, including: being on medication as a result of an on duty injury he suffered, being on break at the time he was found asleep, and that Agency improperly took adverse action against him while he was out on worker's compensation.

Any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty (failure to carryout assigned tasks and careless and negligent work habits).

The District's personnel regulations provide, in part, that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.¹¹ Agency's neglect of duty charge stems from its assertion that Employee was sleeping while on duty. On October 14, 2014, two Lieutenants with Agency's Protective Services Division observed Employee sleeping in his patrol car around 5:30 a.m. Employee does not deny that he was asleep; rather, he sets forth arguments defending his actions.

Employee's contention that he was on medication as a result of an on the job injury which caused him to become drowsy, does not negate the fact that Employee was sleeping while on duty. In a written statement by Employee regarding the incident, he states, "[i]t was never my intent to fall asleep while on duty; however my inability to properly read the medications I ingested contributed to becoming restless while on-duty. I sincerely apologize for my actions and offer no excuse for my actions. I take full responsibility and I am hopeful that my explanation can clear all confusion surrounding this incident."¹² Although Employee initially accepted responsibility for sleeping while on duty, he attempts to offer a defense for the incident after Agency took adverse action and he filed a Petition for Appeal with this Office. Employee's decision to take medication because of an illness cannot alleviate him of his responsibilities while on duty. Furthermore, Employee's argument that the working conditions of Agency caused him to have an allergic reaction, which prompted him to take Benadryl in conjunction

¹⁰ See Employee's "Letter of Response" (treated as Employee's Brief), p. 2 (October 27, 2015).

¹¹ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

¹² See Agency's Brief Regarding Petitioner's Appeal, Attachment Employee's Complainant/Witness Statement/PD119 (September 30, 2015).

with his prescription medicine, cannot excuse him of his responsibilities while on duty. Employee opted against using sick leave in spite of his contention that he was suffering from an allergic reaction. Employee offers no reason for not using sick leave. Although Employee seems to argue that he was unaware that the medication he ingested would cause him to become drowsy, this argument is also without merit.

Employee asserts that after he submitted his paperwork for his shift to his supervisor, George Smith, around 5:00 a.m., he asked if he could stay in the substation until the end of his shift because his patrol car did not have heat and it was cold outside. Employee was advised that his shift was almost over and the day shift patrol officers would be reporting shortly. Employee was then instructed to monitor activities in the parking lot until 6:30 a.m. Employee argues that he took a break around 5:05 a.m. since he had not taken a break during his shift. Employee contends that he took a break, despite being instructed to monitor the parking lot until the end of his shift. In a document titled, "DC Protective Services Division Roll Call," submitted by Employee, it instructs "when calling off, notify the CCC and the Supervisor or OIC on Duty."¹³ Despite this instruction, Employee does not mention that he informed his supervisor that he was going off duty. Rather, Employee maintains that he was instructed to "monitor activities in the parking lot until 6:30 a.m."

Employee attempts to offer an audio recording of himself with the Office of Unified Communication "attempting to call off duty."¹⁴ The undersigned is unable to identify Employee's voice on the recording and Employee does not draw the undersigned's attention to a particular minute marker. Furthermore, after reviewing the recording in its entirety, the undersigned is unable to ascertain any portion of the recording where any individual indicates that they are going on break.

Employee maintains that Agency acted improper when it elected to take adverse action although he was out of work on workers' compensation and that this amounted to "harassment." Employee does not cite any rule, statute, or regulation that prevents an agency from taking adverse action against an employee who is out from work while on a workers' compensation claim. It is noted that Employee does not claim retaliatory action, rather, he states that Agency's action was "inconsiderate."

Employee's conflicting positions regarding sleeping while on break and his apologetic tone used in his written statement about sleeping after taking medication discredit his argument that he was in fact on break when he was sleeping in his patrol car. Accordingly, I find that Employee neglected his duty when he was sleeping in his patrol car, failed to carry out his assigned task, and exhibited negligent work habits.

¹³ See E-mail thread, Attachment "DC Protective Services Division Roll Call" for Oct. 14, 2014 (February 1, 2016).

¹⁴ See e-mail thread, p. 2; (January 29, 2016).

Any other on-duty or employment related reason for corrective adverse action that is not arbitrary or capricious: sleeping on the job.

This charge is a “catchall” phrase which includes activities for which an investigation can sustain is not *de minimis*.¹⁵ Because I have found that Agency had cause to take adverse action against Employee for neglect of duty and sleeping on the job, I must also find that Agency’s catchall charge be sustained.

Appropriateness of penalty

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.

Agency has the primary discretion in selecting an appropriate penalty for Employee’s conduct, not the Administrative Judge.¹⁶ The undersigned may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency’s judgment clearly exceeded limits of reasonableness.¹⁷ 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.¹⁸ In the instant case, I find that Agency has met its burden with regard to both charges against Employee: (1) “[a]ny on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carryout assigned tasks and careless and negligent work habits”; and (2) “[a]ny other on-duty or employment related reason for corrective adverse action that is not arbitrary or capricious: sleeping on the job.” In considering the *Douglas* factors, Agency appropriately considered each relevant factor when reaching its decision to take adverse action.¹⁹

DCMR § 1619.1(6)(c) (Table of Appropriate Penalties) provides the range for the charge of any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty. The penalty for the first offense for this charge ranges from reprimand to removal. The penalty for the second offense of this charge ranges from suspension for fifteen (15) days to removal. Based on the record, this is Employee’s second offense for this charge.²⁰ As such, I find that the thirty (30)-day suspension was within the range allowed by the Table of Appropriate Penalties²¹ and that managerial discretion was properly invoked.

¹⁵ 6-B DCMR § 1619.7, Table of Appropriate Penalties.

¹⁶ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

¹⁷ See *Id.*

¹⁸ *Id.*

¹⁹ Agency’s Answer, Tab 5 (May 1, 2015).

²⁰ *Id.*, Tab 5.

²¹ DCMR § 1619.1.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's thirty (30) day suspension of Employee is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge