

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
Tiombe Johnson	)	OEA Matter No. 1601-0134-15
Employee	)	
	)	
v.	)	Date of Issuance: January 13, 2017
	)	
D.C. Fire & Emergency Medical Services	)	Joseph E. Lim, Esq.
Agency	)	Senior Administrative Judge
_____	)	
Nada Paisant, Esq., Agency Representative	)	
Tiombe Johnson, Employee <i>pro se</i>	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

Tiombe Johnson (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on September 4, 2015, challenging the District of Columbia Fire & Emergency Medical Services’ (“Agency”) decision to remove her from her position as a Telecommunications Specialist, effective August 14, 2015. Employee’s removal was based on the following causes: (1) Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include: insubordination and neglect of duty. Agency filed its Answer on October 7, 2015. This matter was assigned to me on January 20, 2016.

A Pre-Hearing Conference was held on April 4, 2016. After a postponement request by the parties, an Evidentiary Hearing was held on October 24, 2016. 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 the penalty of removal 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 October 24, 2016, 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.

#### Undisputed Facts

On April 10, 2015, Agency served Employee, a Telecommunications Specialist, an Advance Written Notice of Removal based on three cases. Case No. C-15-015 carried the charge of "Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include Neglect of Duty." The specification stated that Employee failed to complete an assignment to obtain Virtual Private Network (VPN) access for Deputy Fire Chief Robert Callahan despite having ample time to do so. Case No. C-15-025 carried the charge of "Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include Neglect of Duty." The specification stated that Employee failed to set up VPN access and training to Equal Employment Opportunity (EEO) and Diversity Manager Gitana Stewart-Ponder. Case No. C-15-034 carried the charge of "Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include Neglect of Duty." The specification stated that Employee made multiple errors to the Fixed Cost Management System (FCMS). Case No. C-15-034 also carried the charge of "Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include Insubordination." Its specification stated that Employee failed to submit a special report by February 25, 2015.

Agency also noted that Employee had four prior charges against her in 2013 and one in 2015. Based on these specifications and after a *Douglas* Factor<sup>1</sup> analysis, Agency removed Employee effective August 14, 2015, based on the causes of neglect of duty and insubordination.

### Summary of Hearing

*Robert Callahan (“Callahan”) Tr. 10-39.*

Deputy Fire Chief Callahan testified that on December 23, 2014, he requested access to the VPN from his home in order to work from home. Chief Information Officer Edward Leonard then instructed Employee to assist Callahan. However, despite his follow-up of the matter, Callahan testified that Employee never set up his access nor did she give him any training on its use. Instead, he finally obtained VPN access and training from someone else.

*Edward Leonard (“Leonard”) (Transcript pp. 40-166)*

Chief Information Director Leonard supervised Employee, a Telecommunications Specialist. Leonard described Employee’s duties as managing and maintaining Agency’s telecom

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<sup>1</sup> In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth “a number of factors that are relevant for consideration in determining the appropriateness of a penalty.” Although not an exhaustive list, the factors are as follows:

- 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;
- 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;

inventory of internet lines, cellphones, and VPNs. He characterized Employee's work performance as exemplary 50% of the time and unsatisfactory the rest of the time.

Leonard drafted the charges and specifications against Employee.<sup>2</sup> The first case, Case No. C-15-015 involved Employee's neglecting her duty to implement a VPN for Callahan. Leonard described the process and pointed out that this task should only take 48 hours to implement. Instead, he had to follow up several times with Employee. When more than two weeks passed with little being done by Employee, Leonard stepped in and did the job himself in three hours on a Saturday. Leonard expressed his disappointment that not only did Employee fail to act on his order, Employee also failed to update their client, Callahan, on the progress of the task.

Case No. C-15-025 involved Employee's neglecting her duty to properly set up VPN access and training for Equal Employment Opportunity (EEO) and Diversity Manager Gitana Stewart-Ponder. Leonard explained that Employee used the wrong software and thus was not successful. Also, Employee did not bother to train the client. So Leonard stepped in and again did the work himself. Leonard also noted the inappropriate tone that Employee took with their client in their email exchanges.<sup>3</sup>

The third and last case, Case No. C-15-034, involved Agency's FCMS database. Employee neglected her duty to continuously assure that the FCMS database for the entire city's telecom network was at least 95 to 97% certified accurate. Employee's multiple errors involved the inclusion of dead phone lines in the system, thereby incurring unnecessary bills for Agency. Leonard explained the financial ramifications of erroneous data. Leonard testified that when he edited the database, he quickly saw multiple obvious errors present for an extended period of time that Employee should have corrected. Agency had a handbook on the procedure for maintaining the FCMS.<sup>4</sup>

Leonard also testified that the insubordination specification stemmed from Employee's failure to timely submit a special report explaining the errors in the FCMS despite being granted a requested extension. He characterized his work relationship with Employee as difficult and strained. Leonard also detailed the numerous occasions when he counseled Employee on the steps needed for her to do her job effectively but gave up after two months when he began to feel that it was not effective. He talked about his difficulties with Employee's use of leave and adherence to dress code policy.

*Fire Chief Gregory Dean ("Dean") (Transcript pp. 167-175)*

Fire Chief Dean made the final decision on the penalty for Employee. After reviewing the adverse action documents and finding that he agreed with its findings and conclusions, he signed his approval.

*Gitana Stewart-Ponder ("Ponder") (Transcript pp. 177-192)*

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<sup>2</sup> See Agency's Exhibit D.

<sup>3</sup> See Agency Exhibit D, Tab 11.

<sup>4</sup> See Agency Exhibit D, Tab 12.

EEO and Diversity Manager Ponder testified that although Employee handed her an iPad to work from home, Employee could not successfully set up her VPN access. Employee never called her, but simply corresponded via email.<sup>5</sup> In frustration, Ponder tried to return the iPad and other related equipment. Upon her return to work the next week, Ponder mentioned her problem to Leonard. Leonard quickly connected her to the VPN.

Ponder testified that she felt Employee put her in the middle of the back and forth emails between Employee and Leonard.<sup>6</sup> Ponder also felt irritated that Employee was attempting to blame her for the failure to access the VPN.

*Tiombe Johnson (“Employee”) (Tr. 193-286)*

Telecommunications Specialist Employee testified that she did not neglect her job duties by pointing out that Callahan did obtain VPN access within the timeframe OCTO<sup>7</sup> had allowed and that her supervisor did not specify a timeframe for completion. Employee stated she was not neglectful in working with Ponder as she did try to make the VPN access work. Employee explained the technological aspects as to why she could not make it work.

Employee admitted that it took her three business days to act on Leonard’s request to work on Callahan’s VPN access, and only after Leonard followed up with her. But she pointed out that she had other work to do and that Leonard never informed her it was a priority. Employee admitted that she never informed Leonard that she was working on other things. Employee blamed Leonard for not immediately signing his approval for OCTO to process the request. Employee admitted that she never updated Callahan on the progress or lack thereof on his VPN request.

As for Ponder, Employee admitted that two weeks after handing Ponder her iPad, Employee still had not helped her set up VPN access, but blamed it on OCTO. When asked if she tried calling Ponder during all that time, Employee could not definitively refute Ponder’s accusation that Employee never called her.

As for the FCMS database, Employee denied that Agency incurred overcharges because of the errors in FCMS. Employee said that she could talk to OCTO to transfer the money back to Agency’s account. She also pointed out that she had a year to audit the assets in the FCMS system and that she was within the time frame. Employee admitted that the database contained errors, but she distinguished them as clerical errors.

With regards to the accuracy of the FCMS, Employee admitted on cross-examination that five to six months after being instructed to do so, she failed to transfer the phone lines to the Office of Unified Communications (OUC). Employee acknowledged that this was her responsibility but dismissed it as clerical errors.

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<sup>5</sup> See Agency Exhibit D, Tab 8.

<sup>6</sup> See Agency Exhibit D, Tab 10.

<sup>7</sup> OCTO is the Office of the Chief Technology Officer, the agency in charge of all D.C. Government technology.

Under cross-examination, Employee admitted that she was previously disciplined for neglect of duty regarding the FCMS, which resulted in a suspension.

Employee complained that Leonard had never wrote her up or placed her in any performance improvement plan. Employee highlighted that before Leonard became her supervisor, she had a clean record. She accused Leonard of always harassing her. Employee asserted that Leonard begrudged her need to take leave to take care of her sons who has special needs.

## 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. Employee’s termination was based on Sections 1603.3(f)(3) and 1603.3(f)(4): any on-duty or employment related act or omission that interferes with the efficient and integrity of government operations; specifically, neglect of duty and insubordination.<sup>8</sup>

Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty and insubordination.

### Neglect of Duty

The District’s personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure by a supervisor to investigate a complaint; (3) failure to carry out assigned tasks; or (4) careless or negligent work habits.<sup>9</sup>

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<sup>8</sup> D.C. Personnel Regulations, Ch. 16, Section 1603.3 (August 27, 2012).

<sup>9</sup> See D.C. Mun. Regs. tit. 16 § 1619.1. Table of Appropriate Penalties.

Agency's first cause for neglect of duty stems from the Agency's Case No. C-15-015, which accused Employee of failing to complete an assignment to obtain VPN access for Deputy Fire Chief Robert Callahan despite having ample time to do so.<sup>10</sup> It is not disputed that Employee failed in this assignment. Employee excuses her conduct by deflecting the blame to anything and anyone other than herself. First, she said that her supervisor failed to inform her of its urgency. Next, she describes the task as technologically complex. She did not, however, explain why her supervisor was able to accomplish the same task in three hours nor did she dispute Callahan's assertion that Employee failed to train him or assist him in any way. I therefore find by a preponderance of the evidence that Employee neglected her duty.

Agency's second cause for neglect of duty stems from the Agency's Case No. C-15-025, which accused Employee of neglecting her duty to properly set up VPN access and training for Ponder. Employee did not deny Ponder's and Leonard's accusations that she used the wrong software and failed to train the client. Again, Employee made excuses that I do not find credible. Employee likewise did not explain why she did not redouble her efforts to assist Ponder even after Ponder expressed frustration and wanted to return the iPad. Instead, Employee simply agreed to take the equipment back. I find this as evidence that Employee was blasé about her work duty, and thus neglected her duty.

Agency's third cause for neglect of duty stems from the Agency's Case No. C-15-034, which accused Employee of neglecting her duty to maintain the accuracy of the FCMS. Employee did not deny the accusation, but excused herself by claiming that Agency incurred no unwarranted costs for her failure, and that in any case, those were just clerical errors.

Based on the evidence presented, I therefore find that Employee neglected her work duty in all the specifications listed by Agency.

### Insubordination

Insubordination includes an employee's refusal to comply with direct orders, accept an assignment or detail; or refusal to carry out assigned duties and responsibilities.<sup>11</sup> Further, insubordination is defined as a refusal to comply with direct orders, accept an assignment or detail; and carry out assigned duties and responsibilities.<sup>12</sup> Agency's removal of Employee was also based on the cause of insubordination. Specifically, Agency's cause for Insubordination stems from the Agency's Case No. C-15-034, which accused Employee of failing to submit a special report by February 25, 2015. Employee offered no credible defense against this specification. Accordingly, I find that Employee was insubordinate.

### Appropriateness of penalty

As discussed above, the charges of Neglect of Duty and Insubordination were upheld. 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

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<sup>10</sup> See Agency's Exhibit D, Advance Written Notice of Proposed Removal.

<sup>11</sup> See D.C. Mun. Regs. tit. 16 § 1619.1(6)(d). Table of Appropriate Penalties.

<sup>12</sup> *Id.*

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.

DCMR § 1619.1(6) (Table of Appropriate Penalties) provides the range of penalties for the charge of “Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations.” The penalty for the first offense of Insubordination ranges for a reprimand to a ten (10) day suspension. The penalty for the first offense for Neglect of Duty ranges from a reprimand up to removal. Based on the record, this is Employee’s second offense for any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations.<sup>13</sup>

I do not find that Agency exceeded the limits of reasonableness with the penalty imposed against Employee. Accordingly, in light of the testimony and evidence presented, I find that Agency’s penalty of removal was appropriate based on the neglect of duty and insubordination.

**ORDER**

Accordingly, it is hereby ORDERED that Agency’s removal of Employee is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.  
Senior Administration Judge

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<sup>13</sup> See Agency’s Exhibit A.