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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)
In the Matter of:)
) OEA Matter No. 1601-0029-09
DAWNA WHITTINGTON)
Employee) Date of Issuance: March 25, 2010
)
v.) Sheryl Sears, Esq.
) Administrative Judge
)
D.C. DEPARTMENT OF)
TRANSPORTATION)
Agency)
_____)

Clifford Lowery, Employee Representative
James E. Fisher, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

The D.C. Department of Transportation (“Agency”, “DDOT” or “the Department”) manages the transportation infrastructure of the city by planning, designing, constructing and maintaining its streets, alleys, sidewalks, bridges, traffic signals and street lights. DDOT also manages improvements to the street system to facilitate traffic flow, handles snow and ice removal and coordinates the city’s mass transit services.

Dawna Whittington (“Employee”) was appointed to the position of Street Sign Installer with Agency on July 19, 2005. Employee’s duties were to work as a member of a crew installing, maintaining, repairing, replacing and removing various traffic control signs and other hardware, equipment and flags for parades, special celebrations and other events. She was also responsible for installing traffic control signals and equipment, obtaining supplies and equipment from storage and communicating with other units via two way radio. Employee began to suffer back pain due to medical concerns. To accommodate her, agency officials assigned her to “light duty”.

However, based upon complaints by her supervisors, Employee received a written notice of admonition on August 24, 2007, for her alleged failure to follow instructions on July 19 and August 15, 2007. On December 28, 2007, Agency issued Employee a performance evaluation system letter of warning giving her until the end of the performance rating period to improve her performance. On January 7, 2008, Agency imposed a nine (9) day suspension based upon the charges of unauthorized absence and insubordination. Employee received an unsatisfactory performance rating for the period of April 1, 2007, through March 31, 2008.

By letter dated September 2, 2008, James Burney notified Employee that Agency was proposing to remove her. As cause, he cited the District Personnel Manual (DPM), §1603.3 (f) “Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations . . .” He stated, *inter alia*, as follows:

Management has been very accom[modating] with your circumstances and provided resources for you to improve. However, you have refused to follow the path needed for improvement or take advantage of resources provided. In addition, your position description stipulates possession of a driver’s license to which you have been aware of for over a year, however, you have failed to obtain. Compatible with your work ethics, you failed to take the initiative and obtain your license despite your knowing it is a job requirement. You have been afforded many opportunities to improve and have not made significant progress.

Jeffrey M. Marootian, Customer Service Program Manager, was assigned as the Hearing Officer and conducted an administrative review of the proposed action. Marootian presented a written report dated September 19, 2008. He concluded that Agency established that Employee was “consistently unsatisfactory” and recommended that Agency proceed with the removal.

Agency removed Employee effective on October 10, 2008. Employee filed an appeal on November 3, 2008, with the Office of Employee Appeals (“the Office”). She contends that she “complied with all requirements of her job.” The parties convened for a pre-hearing conference and a full evidentiary hearing. This decision is based upon the documentary and testimonial evidence of record and the parties’ arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Employee failed to perform her job satisfactorily.
 - a) Whether Employee's performance evaluation was properly conducted and may stand as proof that Employee failed to perform her job satisfactorily.
 - b) Whether there is independent evidence showing that Employee failed to perform her job satisfactorily.
- 2) If so, whether her actions or failures to act in the performance of her job constitute on-duty or employment related acts or omission that interfered with the efficiency and integrity of government operations.
- 3) Whether, if Employee is found to have failed to perform her job unsatisfactorily, Agency acted in accordance with applicable laws, rules, regulations and guidelines or abused its discretion in choosing the penalty of removal.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” In accordance with OEA Rule 629.1, *id.*, the applicable standard of proof is by a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat 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.” Agency has the burden of proving, by a preponderance of the evidence, that the penalty of removal was commensurate with Employee's offense.

FINDINGS OF FACT

Initially, this Judge included among the issues in this appeal: 1) Whether Employee is competent to perform her job without a driver's license and 2) Whether Employee was granted a disability accommodation. However, the parties do not dispute that the new duties assigned to Employee did not require her to drive. Therefore, it is the finding of this Judge that Agency, by granting Employee's disability accommodation, eliminated her need for a driver's license for the duration of the accommodation. The issues of fact that remain are whether Employee properly performed her assigned duties and agency officials correctly evaluated her.

Summary of Testimony by Agency's Witnesses

Kim Walker, Acting Program Manager, Traffic Operations Administration (TOA)

Following twenty-four (24) years of military service, Walker undertook his position with DDOT. He became responsible for overseeing the “installation of signs,

traffic signal maintenance, sign fabrication and pavement markings for the city of D.C.” (*Transcript, Page 18, Lines 18 - 21*). He was Employee’s immediate supervisor for about one (1) year. He indirectly supervised her for two (2) years.

Based upon medical documentation from her doctor, Employee was given a “light duty schedule for her so that she could continue to do her job, but in a different manner so that she could remain employed.” (*Transcript, Page 21, Lines 5 - 8*). Her doctor specified that she could not lift heavy weight or be on her feet for an extended time and could not be outside exposed to the elements. She was assigned duties including “administrative type work, in the office, clerical in nature, answer the phones, filing, do some copying of documents . . .” (*Transcript, Page 21, Lines 11- 13*). Walker said that, even though Employee was capable of doing the assigned work, her job performance was lacking.

Walker said that, instead of doing the tasks, she played computer games, read a personal book or went outside to talk on her cell phone. “I’ve noticed her not answering the phone because my office is right outside of the main office where she was sitting. And I would hear the phone ring several times throughout the day. And I look out there just to see if anyone was sitting, and she was there, and she would ignore the phone.” (*Transcript, Page 30, Lines 15 - 20*). He acknowledged that, because of the wiring in the space, the phone was not near Employee. She had to get up to answer it. But, he said, she never complained about that.

Walker found Employee insubordinate when she left a meeting without permission. She was also “frequently absent from reporting for work.” (*Transcript, Page 25, Lines 18 - 19*). And she did not call in to say that she was not coming. He recalled meeting with Clifford Lowery, union official, in 2007, to discuss Employee’s attendance problem in 2007. He also communicated with union representative Dion James. Walker acknowledged that, sometimes, when Employee was absent, she provided medical documentation to justify the absence. However, he said that “there’d be other occasions where she’d take off that was not medical related, and I didn’t get any excuse or explanations.” (*Transcript, Page 73, Lines 7 - 10*). Walker said, “In the 30 years that I have managed people in the military and in civilian life, her performance is the worst I ever came across.” (*Transcript, Page 27, Lines 10 - 13*).

Employee was offered training to improve her skills but did not attend any of the classes. Employee’s behavior was the subject of a letter of admonishment, a notice of suspension and a letter of warning that gave her a chance to improve before the end of her performance rating period. Before issuing the notices to the employee, Walker sought clearance from LaSharn Hamilton, the agency’s human resources official. Despite notations of satisfactory performance in some areas, Employee’s final rating for the relevant period was “unsatisfactory.” Walker acknowledged that he did not advise Employee of her right to appeal her performance evaluation.

James Burney, Engineering Supervisor, Traffic Operations Administration (TOA)¹

Burney manages the sign installation shop, pavement marking shop and the sign fabrication shop. He supervised Employee for about two (2) months as he transitioned into the job Walker had. During that time, Employee worked under the direct supervision of Michelle Rucker, who reported on her performance to him. On one or two occasions, Rucker told him that she was having trouble getting Employee to do her assignments. He only had direct interaction with her a couple of times. Once, he saw her sitting outside on a wall and went to talk to Rucker about it. Another time, he asked Employee to oversee participants in the summer youth program while they cleaned the sign fabrication shop, sign plate room and stock room. He said that she did “okay” with that assignment but, other than that, he saw a “lot of sitting on the wall, smoking, and walking around the property yard.” (*Transcript, Page 105, Lines 16 - 18*).

Burney was the official who proposed the removal of the Employee. It was based upon notes from Kim Walker and Michelle Rucker. “I happened to be in that position as the proposing official at the time it was delivered . . .” (*Transcript, Page 104, Lines 7 - 11*). Burney acknowledged that he did not have firsthand knowledge of Employee’s performance during the period for which she received an unsatisfactory evaluation, April 2007, through March 2008. Burney said that he agreed with the contents of both the advance notice and the final agency decision.

Lasharn Hamilton, Operations Manager, Transportation Operations Administration (TOA)

Hamilton is responsible for overseeing the day-to-day operations for Agency. Her duties include overseeing contracting, budget, HR, training, labor relations, organizational development, and any other matters that may arise in the TOA. She helps guide managers in implementing personnel actions including advising on the severity of the penalty. In doing so, she relies upon statements from the managers and witnesses and consults the Table of Penalties in the District Personnel Manual. Hamilton testified that she was consulted prior to the issuance of the advance notice to Employee and found it to be compliant with provisions of the District Personnel Manual and the Table of Penalties.

Hamilton said that an unsatisfactory performance rating is grounds for removal if the Employee does not improve with a certain time period. She also explained that there is a calculation sheet used for determining an employee’s rating. It takes into account all of the markings including pluses and minuses. She acknowledged that an employee can appeal an unsatisfactory rating.

¹ Although they recited their titles differently, Walker and Burney served, at different times, in the same position at Agency. In that position, they each had supervisory authority over Employee for different periods of time.

Angela Pettus, Program Analyst

Pettus is responsible for administrative and operational support to the staff at Agency. When Employee needed materials, supplies or training to do her work, she came to Pettus. She was working there when Employee was supervised by Walker and Burney. Her only direct involvement with the personnel actions against Employee was to witness the delivery of notices to her. Other than that, she said, "I just may have seen her occasionally in the yard. The supervisor may have asked her to perform a task, and she would go out and make an attempt to make that -- to perform the task, and she would sit around on the wall, smoke cigarettes, and interact with her other colleagues." (*Transcript, Page 144, Lines 20 - 22 and 145, 1-3*).

As a colleague, Pettus offered advice to Employee on improving her performance when Employee complained about being assigned work or training classes. She was not aware of Employee's performance when she was assigned to desk duty.

Stacey Collins, Construction Inspector

Collins testified that, earlier in her tenure, she worked as a Sign Fabrication Foreman overseeing the fabrication of signs for the DC roadways. She supervised Employee for a short time in the summer of 2008 when Employee was working in that shop. Collins said of Employee, "She was a satisfactory employee. She -- she performed the -- the assignments that I had given her. She was slower than some of the other fabricators because of her injury, but for the most part, I necessarily did not have a problem with her." (*Transcript, Page 154, Lines 12 - 16*).

In management meetings, she learned that Kim Walker and Michelle Rucker had problems with Employee. She also heard complaints from co-workers about why Employee was allowed light duty assignments. She was aware of Employee's medical matter but "As a supervisor, I just felt that she could have done more to assist us to assist her find a good fit as far as working." (*Transcript, Page 158, Line 22 and Page 159, Lines 1-2*). She thought that Employee could have been more enthusiastic and taken more initiative and been more consistent.

Summary of Testimony by Employee's Witnesses

Dion James, Sign Installer and Shop Steward, American Federation of Government Employees, Local 1975

James was Employee's partner at work before her accident for about two (2) years. They worked on a truck installing signs under the supervision of Michelle Rucker. He said that her performance was good. "I didn't have to explain anything to Dawna when we were out on the truck and we were working. She pretty much was the preparer, basically, and doing everything that was needed when we go out in the field." (*Transcript, Page 167, Lines 18 - 22*).

James sat in on the meeting Employee is alleged to have left without authorization. He recalled that when Employee asked Walker if the meeting is over, he said, "Shut up," or something like that. She asked again and he said, "Yeah, so." And she got up and she walked away. And in anger, [he] just followed behind her after the meeting." (*Transcript, Page 171, Lines 15 - 19*). He was not present at every meeting between Employee and management because there were many. He did recall discussing with Walker and Employee her signing in and punching the clock at work. James felt they were nitpicking and that Walker had a vendetta against Employee.

He did not recall anyone telling him that Employee had attendance issues. Usually the shop steward is verbally notified and has a chance to work with the employee. She complained to him that she did not have enough work on light duty. She went from the administrative office to fabrication and then to the summer youth program. He asked if she could work with him and she was transferred to the truck for a second time for about a year. He did not recall Employee asking him for help in appealing her performance evaluation.

Dawna Whittington, Street Sign Installer

Whittington worked for the agency for about eight and one-half (8 and 1/2) years. She was injured while at work in 2002. "I was in a lift truck, and the back of the truck dropped into a hole, and it threw my back out, disk out of place." (*Transcript, Page 197, Lines 1 - 3*). "For like the first three months, I needed assistance to walk. I had to wear a back brace for nine months. I was off work for almost 10 months. So it -- it has altered my life tremendously." (*Transcript, Page 197, Lines 5 -8*). She returned to work and was reinjured. Then, the agency put her on light duty. She sat in for a secretary at the Reeves Center, helped the street inspectors by entering information into a computer system for them, did filing in the sign shop and helped with the meters.

Whittington said that, for a while, she was confused about who her supervisor was because both Walker and Rucker required that she report to them and clock in. She did not have enough work to do because "Mr. Walker told me he needed me to answer the phones, but then he told me that I couldn't answer the phone because I didn't have phone etiquette. And, you know, I was a little offended by that, but I said okay." (*Transcript, Page 204, Lines 6 - 9*). He gave her some filing but it only took a few days. She asked around for more work to do.

She was told to go to a class but got notice late on the day before it started. She reported to work the next morning but was given the wrong information about the location of the class. Because she was late when she arrived, she was not admitted. She told Walker what happened. He was angry with her and, as he often did, spoke to her like she was a child. Walker monitored her sign in/sign out behavior closely. According to Employee, he required a higher level of accountability from her than others who were allowed to sign in and out in one entry and then remain on the premises until the end of their tour of duty. If Walker saw her do that, he would say, "You already signed out. You can go home." (*Transcript, Page 210, Line 10*). "I had problems communicating

with Mr. Walker and he had problems communicating with me.” (*Transcript, Page 251 Lines 16 - 17*).

Employee worked in the field between January and March of 2008, a significant portion of the performance evaluation period. She was still under a doctor’s care and receiving morphine. Employee said that she did not recall reading the letter of warning regarding her performance. She just put in her backpack because Walker was issuing documents to her often. She felt the evaluation was unfair. “Everything they gave me, from sweeping up the alley to cleaning the stock rooms, I did it. I cleaned out the stock room, the flag room. I swept up the alleys, and I picked up trash. And I did all of this. And for him to give me this evaluation, it was unjust.”(*Transcript, Page 214, Lines 19 - 22 and Page 215, Line 1*). She said that she was never evaluated before. This was her “first and only” evaluation. (*Transcript, Page 256, Line 18*). Employee did not recall anyone advising that she could appeal the performance evaluation. Employee did not read or respond to the notice of proposed removal.

Findings

The preponderance of the evidence supports a finding that Employee was not a good worker after she was injured. Dion James testified credibly that Employee and he worked well together on the truck before it happened. Stacey Collins also said that Employee was a good worker. However, every account of Employee’s performance after she returned from leave indicates that she had a poor attitude and little motivation. Even after she was assigned light duty, Walker observed her not working. Angela Pettus, with whom Employee had a friendly relationship, observed her to be lacking in motivation.

Employee attributes this to her supervisor, Kim Walker. And this Judge finds credible Employee’s testimony that he was strict in his expectations and harsh in his tone. However, it is a fact of employment life that managers have different styles of leadership. Walker clearly required that his employees come to work on time, stay for the duration of their tour, report absences in a timely and correct manner and work with diligence and good spirit. While his tone in addressing Employee may not have been professional, that concern is not lawfully before this Judge.

As mentioned above, Employee received a performance evaluation for the period from April 1, 2007, to March 31, 31, 2008, from Kim Walker. Employee was assigned to “answer phones, take messages, vendor research, photo copying, etc.” but, “due to her lack of initiative and negative attitude,” she did not complete them. He described the quality of her work as “poor.” He noted that she had “a major problem with attendance and tardiness.” He also noted the acts of insubordination that were the subject of the letters of admonition and suspension. According to the performance evaluation, she “expressed reluctance to take four recommended courses” and “missed at least two subsequent scheduled class appointments.”

Employee challenged the performance evaluation on the ground that she was not advised of her right to appeal it. Following Employee’s argument, if Agency committed

a harmful procedural error by failing to notify her of her right to appeal the performance evaluation, the evaluation cannot stand as proof of her failure to perform satisfactorily. Chapter 14 of the DPM provides, at §1415.4 that “an employee may, within ten (10) calendar days of participating in a performance rating year-end discussion with the supervisor, request a review of the rating by submitting the request for review to the subordinate agency head (or designee).” Agency did not deny Employee this opportunity. She did not seek it. Employee has pointed to no law, rule or regulation that requires Agency to notify an employee, at the time of their evaluation, of their right to appeal it. The performance evaluation will not be disregarded as evidence on the ground set forth by Employee.

Employee sought to justify her complacency by saying that she did not have enough work. However, it was clear that, in her down time, she did not present herself as ready and willing to work. Instead, she smoked and fraternized. Employee testified that she was signed up for classes to improve her skills but did not ask where the class was until the day it was presented. Without the information ahead of time, she could not, of course, make a plan to get there on time. And on the day of the training, she went to work first which made her late. Notwithstanding the Agency’s attempts to address the Employee’s disability, Employee acted as though her medical condition precluded from doing any work, including the light duty to which she was assigned. According to the overwhelming evidence, Employee failed to perform her job satisfactorily.

ANALYSIS AND CONCLUSIONS

Section 1603.3 (f) of the DPM defines cause as “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations.” Surely, Employee’s failure to perform interfered with the efficiency of her Agency. The sole question remaining is whether removal was an appropriate penalty.

The legal standard for the appropriateness of a penalty was established by the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas*, the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

Review of an Agency imposed penalty is to assure that the agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency’s judgment clearly exceeded the limits of reasonableness, is it appropriate . . . to specify how the Agency’s penalty should be amended. *Stokes*, at 1010.

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

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that "managerial authority has been legitimately invoked and properly exercised." See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must be based upon a consideration of relevant factors. See *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an 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." *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

Despite the accommodation of her medical condition, Employee was not cooperative in performing her duties. Agency utilized informal counseling, formal counseling, verbal warnings, written warnings, and a suspension as progressive measures. Employee has not, in any filing with this Office to date, denied that she was the subject of these corrective and adverse actions. And there is no record that Employee challenged the underlying allegations upon which they were based at the time. While such challenges may have been the proper subject of either a grievance at the Agency level or an appeal to this Office, the time for filing any such challenge has long passed.

These progressive attempts to correct the Employee's behavior were unsuccessful. Employee complains that agency officials did not have suggest that she seek disability retirement. While that might have been the best option for Employee under the circumstances, it was not for Agency to initiate that action. It was Employee's responsibility to make a honest assessment of her ability and willingness to work. Unfortunately, Employee failed to address this matter before the final hour by either improving her performance or removing herself from the workplace. There really is no other penalty for an employee who will not do their work than to remove them from duty.

ORDER

It is hereby ORDERED that Employee's removal is UPHeld.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE