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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE,)	OEA Matter No. 1601-0051-23
)	
v.)	Date of Issuance: February 21, 2024
)	
DEPARTMENT OF BEHAVIORAL HEALTH,)	Joseph E. Lim, Esq.
<u>Agency</u>)	Senior Administrative Judge
Employee <i>Pro Se</i>		
Stephan Milak, Esq., and Connor Sherman, Esq., Agency Representatives		

INITIAL DECISION

PROCEDURAL BACKGROUND

On July 24, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Department of Behavioral Health’s (“DBH or Agency”) decision to remove him from his position as a Medical Officer effective, June 23, 2023, for Failure to Follow Instructions and for Neglect of Duty. In response to OEA’s July 25, 2023, Request for Agency’s Answer, Agency submitted its Answer on August 24, 2023. This matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on August 25, 2023. On September 5, 2023, I issued an Order scheduling a Prehearing Conference for September 12, 2023. I held a second Conference on October 24, 2023, to allow the parties to finish discovery and a third Conference on December 5, 2023, to give extra time for Employee to secure counsel.¹ Subsequently, I ordered the parties to submit their legal briefs on the issue of whether Agency’s choice of Employee’s penalty should be upheld. Based on the parties’ December 15, 2023, Consent Motion, the deadline for the final submission of briefs was extended to January 16, 2024. Upon consideration of the parties’ submissions in this matter, I determined that an Evidentiary Hearing was not warranted. 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 Agency had cause to remove Employee from service.
2. If so, whether Agency’s penalty was appropriate under the circumstances.

¹ Although Employee was given ample time to secure legal counsel, he never obtained one.

FINDINGS OF FACT

The following facts are undisputed:

In 1996, DBH hired Employee as a Medical Officer (Psychiatry Department) at Saint Elizabeth's Hospital ("SEH"). In September 2012, SEH revised its Policy Number 602.1-08 to require medical officers to update the assessments notes of their assigned patients in a timely manner.² Specifically, "psychiatric assessment updates shall be completed... at least 30 days from the date of the last note written."³ These notes concern the state of the patients and serve to track as accurately as possible any clinical changes that might indicate the success of or the need to change a treatment plan.

On April 16, 2014, Employee requested accommodation under the Americans with Disabilities Act of 1990 ("ADA"), including a flexible work schedule with a delayed start to his tour of duty, a doze alert device,⁴ additional break time for lunch and rest throughout the day, additional time to complete tasks throughout the day, and a reserved parking space.⁵ On May 25, 2014, Agency granted all of Employee's requested accommodations.⁶

In 2019, the U.S. Department of Health and Human Services ("DHHS") conducted a Conditions of Medicare and Medicaid Services audit⁷ of SEH during which the Hospital's psychiatric assessment records were reviewed for completeness and timeliness. During this audit, DHHS discovered that two psychiatrists, including Employee, were not submitting all their monthly psychiatric assessments as required by SEH Policy Number 602.1-08, and 42 Code of Federal Regulations ("CFR") 482.61.⁸ As a consequence of this failure to submit, SEH could have lost its ability to participate in the Medicare and Medicaid programs.

On September 13, 2019, Agency verbally counselled Employee for his failure to timely submit his monthly psychiatric assessments.⁹ On January 16, 2020, Agency issued Employee a Memorandum of Counseling for his continued failure to timely submit his monthly psychiatric assessments.¹⁰ On March 10, 2020, Agency, suspecting that Employee may need further ADA accommodations given his repeated failure to submit his monthly psychiatric assessments, sought to update Employee's ADA accommodations. To that end, Agency directed Employee to submit updated medical documentation by April 10, 2020.¹¹ By May 5, 2020, Employee had still not submitted that updated medical documentation so Agency extended the deadline

2 Policy governing patient medical assessments.

3 Agency Brief, Exhibit 4.

4 A sleep preventative aid worn over the ear.

5 Agency Brief, Exhibit 9; Agency Exhibit 10.

6 Agency Brief, Exhibit 10.

7 These audits are done to ensure compliance with the Conditions of Participation and Conditions of Coverage developed by the Centers for Medicare and Medicaid Services which hospitals must pass to continue participating in the Medicare and Medicaid programs.

8 Agency Brief, Exhibit 3; Agency Exhibit 20.

9 Agency Brief, Exhibit 7.

10 *Id.*

11 Agency Brief, Exhibit 11.

to May 15, 2020.¹² On June 3, 2020, Agency closed its inquiry into possible further accommodations because of Employee's failure to submit his updated medical documentation by the May 15, 2020, deadline.¹³

On June 11, 2020, Agency issued Employee an Advance Notice of Proposed Discipline - Suspension ("First Suspension Notice") for nine (9) days based on: (1) Failure to Follow Instructions, (2) Neglect of Duty, and (3) Attendance Related Offenses.¹⁴ On June 23, 2020, Employee requested (and Agency granted) a one-week extension to submit a response to that First Suspension Notice.¹⁵ On June 29, 2020, Employee requested a "one-to-two-week" extension, but Agency granted him a three (3) day extension instead.¹⁶ On July 5, 2020, Employee again requested a "one-to-two-week" extension, but Agency denied the request.¹⁷ On July 10, 2020, Agency, having never received a response from Employee, issued Employee a Final Decision - Suspension ("First Suspension Decision") for nine (9) days.¹⁸

In August 2020, Employee sought to modify his ADA accommodations due to the COVID-19 pandemic.¹⁹ On August 21, 2020, Agency granted Employee several COVID-19-related accommodations, including the ability to perform many of his job duties electronically.²⁰ Employee was rated as a "marginal performer" in his fiscal year ("FY '20") 2020 performance evaluation.²¹ On September 7, 2021, Agency issued Employee an Advance Notice of Proposed Suspension ("Second Suspension Notice") for twenty (20) days based on: (1) Failure to Follow Instructions, (2) Neglect of Duty, and (3) Attendance Related Offenses. The main issue was, as before, Employee's failure to timely submit his monthly psychiatric assessments.²² At Employee's request, Agency extended his deadline to respond to the Second Suspension Notice from September 17, 2021, to September 30, 2021. At Employee's request, Agency, again, extended this deadline to October 5, 2021.²³

Employee was rated as a "marginal performer" in his FY 2021 performance evaluation.²⁴ On October 12, 2021, Agency issued Employee a Final Notice of Discipline – Suspension ("Second Suspension Decision") for twenty (20) days. Agency determined that none of Employee's mitigating circumstances excused him from timely submitting his monthly psychiatric assessments.²⁵

On May 17, 2022, Agency reduced Employee's caseload to six (6) (down from 10) to

12 *Id.*

13 *Id.*

14 Agency Exhibit 7.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 Agency Exhibit 13.

20 Agency Exhibit 12.

21 Agency Exhibit 15.

22 Agency Exhibit 20.

23 Agency Exhibit 8.

24 Agency Exhibit 16.

25 Agency Exhibit 8.

address his noncompliance with SEH Policy Number 602.1-08.26. Employee was rated as a "marginal performer" in his FY 2022 performance evaluation.²⁷ On October 22, 2022, SEH consulted its Medical Staff Executive Committee ("MedSEC") to determine what, if any, recourse it had for Employee's repeated nonperformance of his job duties.²⁸ The MedSEC ultimately recommended that SEH place Employee on a Performance Improvement Plan ("PIP") with monthly meetings to assess his progress under the PIP.²⁹

By November 9, 2022, Employee was still failing to submit his monthly psychiatric assessments despite having a quarter of the workload of the other psychiatrists at SEH.³⁰ On November 15, 2022, Agency sought to amend Employee's ADA accommodations given his repeated nonperformance of his job duties. To further that end, Agency directed Employee to submit updated medical documentation by December 1, 2022.³¹ Per Employee's request, Agency extended that deadline to December 16, 2022.³² On December 2, 2022, Employee attended a peer review psychiatry meeting during which he was reminded of his need to timely submit his monthly psychiatric assessments.³³ Per Employee's request, Agency again extended Employee's deadline to submit his updated ADA medical documentation to January 30, 2023.³⁴

Anne Garcia ("Ms. Garcia"), SEH's Clinical Quality and Education Coordinator, conducted an audit of Employee's monthly psychiatric assessments given his continued noncompliance. The audit revealed that, although Employee only maintained six (6) patients for all of 2022, he failed to submit monthly assessments for each of those patients every month as required. He only submitted 5 of 6 assessments in January; 1 of 6 assessments in February; 3 of 6 assessments in March; 3 of 6 assessments in April; 1 of 6 assessments in May; 2 of 6 assessments in June; 2 of 6 assessments in July; 2 of 6 assessments in August; 3 of 6 assessments in September; 0 of 6 assessments in October; and 0 of 6 assessments in December.³⁵

On January 13, 2023, Employee attended another peer review psychiatry meeting during which he was again reminded of his need to timely submit his monthly psychiatric assessments.³⁶ Ms. Garcia conducted a follow-up audit of Employee's monthly psychiatric assessments, which revealed that Employee did not submit any of the required assessments for the months of January and February 2023.³⁷ On February 7, 2023, Agency closed its inquiry into possible further accommodations due to Employee's failure to submit his updated medical documentation by the January 30, 2023 deadline.³⁸ Given the recent audits, on February 8, 2023, Agency contacted Employee to inform him of his persistent noncompliance with SEH Policy Number

26 Agency Brief, Exhibit 21.

27 Agency Brief, Exhibit 17.

28 MedSEC has oversight over Agency staff.

29 Agency Brief, Exhibit 14.

30 Agency Brief, Exhibit 13.

31 *Id.*

32 *Id.*

33 Agency Brief, Exhibit 23

34 Agency Brief, Exhibit 13.

35 Agency Exhibit 4. Employee was on leave for all of November.

36 Agency Brief, Exhibit 23.

37 Agency Brief, Exhibit 6 at 30.

38 Agency Brief, Exhibit 13.

602.1-08.³⁹

On March 27, 2023, Agency issued Employee an Advance Notice of Discipline - Removal ("Removal Notice") based on (1) Failure to Follow Instructions and (2) Neglect of Duty. Specifically, Agency accused Employee of continually failing to timely submit the mandatory psychiatric assessments for his patient caseload from October 2022 to February 2023 as required by the Code of Federal Regulations ("CFR"), 42 CFR 482.61. Employee's failure endangered Agency's Centers for Medicare and Medicaid Services certification. The Notice also performed a *Douglas* Factor Analysis that explained Agency's choice of Employee's penalty.⁴⁰ Employee had until March 6, 2023, to respond to that Removal Notice.⁴¹ On April 27, 2023, Employee filed a Response to Notice of Proposed Discipline - Removal ("Response").⁴² On June 1, 2023, a Hearing Officer, after reviewing both Agency's and Employee's evidence, issued a Report and Recommendation finding that Employee's removal was both supported by cause and appropriate.⁴³

On June 14, 2023, Agency issued Employee a Final Decision - Removal ("Removal Decision").⁴⁴ Employee filed a Petition for Appeal of Agency's Final Decision - Removal to OEA. On August 24, 2023, Agency submitted its Response to Employee's Petition for Appeal.⁴⁵ On December 5, 2023, the parties convened for a Prehearing Conference where Employee conceded his misconduct giving rise to Agency's cause to terminate his employment.

39 Agency Brief, Exhibit 22.

40 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;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the 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.

41 Agency Brief, Exhibit 1.

42 Agency Brief, Exhibit 25.

43 Agency Brief, Exhibit 26.

44 Agency Brief, Exhibit 28.

45 Agency Brief, Exhibit 29.

ANALYSIS AND CONCLUSIONS OF LAW

In his brief submitted in three installments, Employee does not deny any of the charges. Instead, he narrated his employment history at the Agency and alleged that his superior, Mr. Candilis, became more hostile towards him since early 2018 after a disagreement regarding the medical treatment of a patient. He also submitted some of his medical records from 2021 to 2023 regarding his episode of a headache and confusion after a bad dream. Employee also attached correspondence during the 1980's regarding a scientific paper he published. Employee also submitted documents regarding his prior suspensions as well as his Annual Performance Documents from October 2021 to September 2022.⁴⁶ However, Employee did not credibly explain their relevance to his poor work performance for the October 2022 to February 2023 period that he was charged.

Because of Employee's admission, there was never any question that Agency had met its burden of establishing cause for taking adverse action. However, at the Prehearing Conference, Employee asserts that his penalty should be overturned and that he should be returned to work. Although Employee complained about his penalty, his brief never addressed his position on how the penalty was improper.

As a result, I find that the only remaining issue is whether the discipline imposed by Agency was an abuse of discretion. Any review by this Office of the agency decision of 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.⁴⁷ 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."⁴⁸ 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."⁴⁹

In Employee's Advance Notice of Discipline-Removal, Agency included its *Douglas* Factor analysis explaining its choice of termination as the penalty.⁵⁰ Although Employee disagrees with the way Agency performed its analysis, there is no requirement that Agency should perform its analysis to Employee's satisfaction. The record shows that Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present.

For the foregoing reasons, I conclude that Agency's decision to select removal as the

46 Employee brief, Plaintiff's Exhibit 3A, Exhibits 4 to 9. In his brief, Employee alternatively labeled his exhibits as either Plaintiff's exhibits or Defendant's exhibits.

47 See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

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

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

50 Agency Brief, Exhibit 1.

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's action of removing Employee is UPHELD.

FOR THE OFFICE:

s/ Joseph Lim, Esq.
JOSEPH E. LIM, ESQ.
Senior Administrative Judge