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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0214-11
BENVENUTO BULLOCK,)	
Employee)	
)	Date of Issuance: October 23, 2013
v.)	
)	
DEPARTMENT OF YOUTH REHABILITATION)	
SERVICES,)	
Agency)	
_____)	Arien P. Cannon, Esq.
)	Administrative Judge

Benvenuto Bullock, *Pro se*
Andrea Comentale, Esq., Agency Representative
Corey P. Argust, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 9, 2011, Benvenuto Bullock (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) challenging the Department of Youth Rehabilitative Services’ decision to terminate him on the basis of two separate incidents. At the time of his termination, Employee worked as a Youth Development Representative (“YDR”). The effective date of Employee’s termination was the close of business on August 12, 2011, according to two Notices for Final Decision on Proposed Removal.¹

I was assigned this matter on June 18, 2013. A Prehearing Conference was held on August 2, 2013. A Post Prehearing Conference Order was subsequently issued and both parties responded accordingly. Based on the record, an evidentiary hearing is not warranted and this matter may be decided on the record. The record is now closed.

¹ See Agency’s Answer at Tab 18 and 19 (November 2, 2011).

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 an adverse action (termination) against Employee.
2. If so, was the penalty of termination appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Agency issued two notices of final decisions which led to Employee's termination. Both notices were issued on August 4, 2011. The first Notice of Final Decision on Proposed Removal was based on several causes related to unemployment insurance fraud. The second Notice of Final Decision on Proposed Removal was based on an incident wherein Agency alleges that Employee provided false or inaccurate information during an investigation of excessive force used against a youth in its care and custody.

First Notice of Final Decision on Proposed Removal

The first removal action was based on unemployment fraud, and was proposed in accordance with section 1608 of Chapter 16 of the District Personnel Manual. Agency cited the following causes:

1. Conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities;
2. Any knowing or negligent material misrepresentation on other document given to a government agency;
3. Any on-duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law;
4. Any act which constitutes a criminal offense whether or not the act results in a conviction; and
5. Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious
 - a. Violation of DYRS' Employee Conduct Policy, DYRS Policy # I.3-004 (Amended November 7, 1996).
 - b. D.C. Mun. Reg. tit. 8 § 1803.1(a)(6)- "An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of the following: (6) Affecting adversely the confidence of the public in the integrity of government."²

² See Agency's Answer at Tab 19 (November 2, 2011).

Specifically, Employee was suspended on September 10, 2007, for thirty (30) days as a result of intimidating and threatening a co-worker and for intimidating other co-workers from reporting future incidents.³ The notice of final decision regarding Employee's suspension stated that he was being suspended for thirty (30) days without pay, which was meant to serve as an adverse action against Employee. During his thirty-day suspension, Employee filed for and obtained unemployment insurance benefits, claiming Agency laid him off for "lack of work."⁴

Additionally, Agency also proposed suspending Employee for nine (9) days in November of 2009, stating that Employee failed to cooperate with an internal investigation. Employee again filed for and obtained unemployment insurance benefits, citing that he had been laid off for lack of work.⁵ Both times Employee was suspended he filed for unemployment benefits and falsely represented that he was entitled to benefits because he was "laid off for lack of work."⁶ After serving his suspensions, Employee returned to work in each instance and continued to obtain unemployment insurance benefits, totaling \$7,956.⁷

Based on this fraudulent misrepresentation, a criminal complaint was filed against Employee and a warrant was issued for his arrest. The complaint stated that Employee had engaged in a scheme and systematic course of conduct with the intent to defraud the District of Columbia for the periods of October 27, 2007 to March 1, 2008, and November 7, 2009 to November 28, 2009.⁸ On September 13, 2010, Employee pled guilty to First Degree Fraud and was sentenced to 90 days incarceration (suspended), 27 months of supervised probation, and payment of the \$7,956 restitution. As a result, Agency issued Employee an advance notice of removal. Employee's proposed removal action was reviewed by a hearing officer who found that the Agency's removal was warranted. Accordingly, Agency's Deciding Official determined that Employee's removal was appropriate and issued a Final Notice of Decision on August 4, 2011.

Whether Agency had sufficient cause for disciplinary action based on the allegations of unemployment insurance fraud.

1. Conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities.

The District's personnel regulations provide that a job-related misdemeanor conviction is "based on conduct that would affect adversely the employee's or the agency's ability to perform effectively, or conduct that is relevant to the employee's position, job duties, or job activities."⁹ Here, Employee entered a guilty plea on September 13, 2010, to one count of First Degree Fraud-Misdemeanor, in connection with receiving unemployment benefits despite being

³ In Employee's response to the Post Prehearing Conference Order (September 26, 2013), Employee states that this suspension was actually reduced to fifteen (15) days. Regardless of if the suspension was thirty (30) or fifteen (15) days, it does not negate the fact that Employee was suspended and then filed for unemployment benefits.

⁴ See Agency's Answer at Tab 2.

⁵ *Id.* at Tab 6.

⁶ *Id.* at Tab 2 and Tab 6.

⁷ *Id.* at Tab 10.

⁸ *Id.* at Tab 9.

⁹ See 6-B DCMR § 1619.1(2), Table of Appropriate Penalties.

employed by Agency. Employee misrepresented in his unemployment insurance application that he had been laid off by Agency due to a lack of work. In fact, Employee was actually serving a suspension without pay imposed by Agency. One of Employee's duties as a YDR was to serve as a role model to the youth in Agency's custody.¹⁰ Employee's dishonesty adversely affects his ability to serve as a role model in his capacity as a YDR. Based on Employee's guilty plea, I find that Agency had cause to take an adverse action against Employee for conviction of a misdemeanor based on conduct relevant to his position.

2. Any knowing or negligent material misrepresentation on other document given to government agency.

The District's personnel regulations defines a knowing misrepresentation on a document given to a government agency as "an intentional false statement or omission with respect to other government documents or making a false entry on a government records which call into question the credibility of the document."¹¹ Aggravating factors include obtaining financial gain as a result of the misrepresentation. Here, Employee filed for unemployment benefits and claimed that he was "laid off due to a lack of work" when in actuality he was suspended without pay. When Employee returned to work, he continued to collect unemployment benefits, totaling \$7,956. Employee's misrepresentation provided him with an unearned financial gain. Accordingly, I find that Agency had cause to remove Employee for knowingly making a material misrepresentation on a document given to a government agency.

3. Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law.

The District's personnel regulations provide that an employee may be disciplined for "engaging in activities that have criminal penalties or are violation of federal or District of Columbia laws and statutes." Here, Employee provided information on a government document and affirmed that the information was "...true and correct, to the best of [his] knowledge." Employee proclaimed that the reason he was filing for unemployment benefits was because he was laid off due to a lack of work. However, Employee was aware that he was suspended from work without pay as evidenced in the notices of final decisions regarding his suspensions.¹² Furthermore, when submitting his claim for unemployment benefits, Employee was aware that providing false information would result in penalties under the law. Despite being aware of this, Employee provided false information. Accordingly, I find that Agency had cause to take an adverse action against Employee for an employment-related act that he know or should reasonably have known was a violation of law.

¹⁰ See Agency Answer at Tab 3.

¹¹ See 6-B DCMR § 1619.1(4), Table of Appropriate Penalties.

¹² See Agency Answer at Tab 1 and Tab 5.

4. Any act which constitutes a criminal offense whether or not the act results in a conviction.

The District's personnel regulations provide that a conviction is not needed to take an adverse action and an agency may act on the arrest if the arrest is related to the job.¹³ Here, Employee misrepresented information on a government document for financial gain. Employee used his suspension as an opportunity to mislead the government into believing he was entitled to receive unemployment insurance benefits. This act constituted a fraud as evidenced by his guilty plea entered on September 13, 2010. Accordingly, I find that Agency had cause to take an adverse action against Employee for his criminal conviction of First Degree Fraud-Misdemeanor.

5. Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.

The District's personnel regulations provide that no employee shall commit an action that adversely affects the confidence of the public in the integrity of the agency.¹⁴ Agency is responsible for the rehabilitation of youth in its care and custody, thus, trust of the public is an integral part of Agency's mission. Employee's dishonesty adversely affects his duties in attempting to rehabilitate the youth in Agency's care. Furthermore, Employee's dishonesty attracted negative publicity and such notoriety diminishes the public's trust in Agency. Accordingly, I find that Agency also had cause to take an adverse action against Employee for an employment-related reason that was not arbitrary or capricious.

Employee argues that Agency's action of terminating him was retaliatory because he testified against Agency in regards to its adverse and unsafe work conditions at a city council meeting in April 2007.¹⁵ Employee also states that his suspensions, which led to him filing for unemployment insurance, were a result of being "targeted by [Agency]" and lacked credible evidence in both cases.¹⁶ However, Employee did not provide anything in the record to support these assertions. Therefore, I find that Agency's decision to terminate Employee for unemployment insurance fraud was not retaliatory.

Second Notice of Final Decision on Proposed Removal

The second removal action which alleged Employee provided false or inaccurate information during an investigation 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- Neglect of Duty;
2. Any Knowing or Negligent Material Representation on a Document Given to a Government Agency; and

¹³ See 6-B DCMR § 1619.1(8), Table of Appropriate Penalties.

¹⁴ D.C. Mun. Reg. tit. 8 § 1803.1(a)(6)

¹⁵ See Petition for Appeal (September 9, 2011); See also Employee's response to Post Prehearing Conference Order (September 26, 2013).

¹⁶ Employee's Response to Post Prehearing Brief (September 26, 2013).

3. Any Other On-Duty or Employment-Related Reason For Corrective Or Adverse Action That Is Not Arbitrary Or Capricious- Violation of the DYRS Employee Conduct Policy and DYRS Reporting Unusual Incidents Policy.

Specifically, Agency states that its Office of Internal Integrity (“OII”) investigated an allegation that excessive force was used against a resident in its custody near the At-Risk Unit of the District of Columbia Superior Court on August 17, 2009. The investigation concluded that Employee’s written incident report and verbal statements provided to the OII investigator “that [a] Resident spit on another [Youth Development Representative (“YDR”)], began running toward that YDR and head butted that YDR,” were not an accurate account of the incident between the resident and the other YDR. Based on various witness accounts and video footage, the OII determined that Employee’s verbal and written statements that a resident charged and head-butted another YDR were not credible. Agency argues that Employee intentionally filed a false report in an effort to alter the outcome of the investigation of another YDR.

Based on Employee’s guilty plea to First Degree Fraud-Misdemeanor, and the analysis discussed above, I find that there was cause to take an adverse action against Employee based on first Notice of Final Decision on Proposed Removal. However, although the second notice of final decision alleges that Employee provided false or inaccurate information during an investigation, there appears to be a material issue of fact regarding these allegations. Assuming *arguendo*, that it is determined that Agency *did not* have cause to terminate Employee based on the second notice of proposed removal regarding Employee providing false or inaccurate information, Employee’s removal would still be sustained based on the first notice of proposed removal involving unemployment insurance fraud.

Whether Agency’s removal of Employee was an appropriate penalty

Agency has the primary discretion in selecting an appropriate penalty for Employee’s conduct, not the Administrative Judge.¹⁷ The undersigned may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency’s judgment clearly exceeded limits of reasonableness.¹⁸ 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.¹⁹

The Merit System Protection Board (MSPB) has outlined twelve factors that assist an agency in determining the appropriateness of a sanction.²⁰ In applying the factors, the MSPB

¹⁷ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

¹⁸ See *Id.*

¹⁹ *Id.*

²⁰ See *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). Those twelve factors, which are not exhaustive, include:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed 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;

cautioned that “[n]ot all of these factors will be pertinent in every case and frequently in the individual case, some of the pertinent factors will weigh in the [employee’s] favor, while others may not, or may even constitute aggravating circumstances.” Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in an individual case.²¹

In the instant case, when assessing the appropriate penalty for each of the adverse actions faced by Employee, Agency considered relevant *Douglas* factors and relied upon the Table of Appropriate Penalties as set forth in the District Personnel Manual (“DPM”), 6-B DCMR § 1619.1. Agency considered the following *Douglas* factors: (1) the seriousness of the offenses; (2) Employee’s type of employment; (3) the erosion of supervisory confidence; (4) the notoriety of the offense and potential effect on the reputation of the Agency; (5) Employee’s past disciplinary record; and (6) consistency of the penalty with applicable tables and the consistency of the penalty for those imposed upon other employees for the same or similar offense.²² All of these factors support Agency’s decision to remove Employee from his position.

Under the Table of Appropriate Penalties, the penalty provided for a “conviction of a misdemeanor based on conduct relevant to an Employee’s position, job duties, or job activities” is removal for a first time offense. Here, on April 14, 2010, Employee submitted a statement to the Office of Inspector General in which he acknowledged that he received unemployment benefits on two separate occasions while employed with the District Government. Employee also entered a guilty plea on September 13, 2010, to one count of First Degree Fraud-Misdemeanor in connection with receiving unemployment benefits despite being employed by Agency. The Table of Appropriate Penalties notes that a guilty plea to a misdemeanor charge shall be *prima facie* evidence of the elements of a misdemeanor.²³ It is undeniable that Employee pled guilty to one charge of First Degree Fraud-Misdemeanor. The only penalty provided under the Table of Appropriate Penalties for the first offense of being convicted for a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities is removal. By Employee claiming that he was “laid off due to lack of work,” he made statements that were directly relevant to his position, job duties, and job activities. Thus, Agency’s decision

(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.

²¹ See *Id.*

²² See Agency’s Answer (November 2, 2011).

²³ See 6-B DCMR § 1619.1(2).

to remove Employee from his position based on his conviction of a misdemeanor relevant to his job position was appropriate and supported by the record.

For reasons discussed above, the undersigned need not address the appropriateness of the penalty for the second Notice of Final Decision on Proposed Removal regarding the allegations that Employee provided false or inaccurate information during an investigation of excessive force used against a youth in its care and custody.

ORDER

Based on the aforementioned, it is hereby **ORDERED** that Agency's decision to remove Employee from his position is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge