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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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|--|---|-------------------------------|
| _____ |) | |
| In the Matter of: |) | |
| |) | |
| VERNARD WARD, |) | |
| Employee |) | OEA Matter No. 1601-0036-14 |
| |) | |
| v. |) | Date of Issuance: May 8, 2015 |
| |) | |
| DISTRICT DEPARTMENT OF |) | |
| TRANSPORTATION, |) | |
| Agency |) | Arien P. Cannon, Esq. |
| |) | Administrative Judge |
| _____ |) | |
| Clifford Lowery, Employee Representative |) | |
| Michael F. O’Connel, Esq., Agency Representative |) | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Vernard Ward (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on December 19, 2013, challenging the Department of Transportation’s (“Agency”) decision to remove him from his position as a Traffic Control Officer (“TCO”). The effective date of Employee’s termination was December 9, 2013. Agency filed its Answer on February 28, 2014. I was assigned this matter on June 16, 2014.

A Prehearing Conference was convened on September 8, 2014, where the parties presented their witness lists and documents they intended to introduce at the Evidentiary Hearing. An Evidentiary Hearing was held on November 19, 2014. Both parties filed their respective written closing arguments. 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 (termination) against Employee.
2. If so, whether the penalty of removal 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.¹ “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.²

SUMMARY OF TESTIMONY

An Evidentiary Hearing was held before this Office on November 14, 2014. 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 position.

Alice Kelly (“Kelly”) Tr. 13-25

Kelly is the Manager of the Policy Branch with Agency, and has held this position for approximately five (5) years. In this capacity, Kelly is sometimes tasked with serving as a Hearing Officer in disciplinary matters. Kelly served as a Hearing Officer in the instant matter. Kelly produced a written report regarding the allegations set forth in this case. She testified that the incident took place on July 4, 2013, where there were large crowds of people on the National Mall. A resident attempting to cross the street noted that there were two TCOs who were not effectively assisting pedestrians cross the street.

The citizen approached the TCOs and said something to them about the safety of pedestrians and assisting them as they cross the street. Employee’s response was “hostile and agitated.” The resident who approached the TCOs happened to be an employee of Agency. Kelly’s written report included quotes from Employee, which included, “Who the ‘F’ are you to tell us what we are supposed to be doing? We are doing our work.”³ Kelly’s report also states that the resident asked for Employee’s name, which he declined to provide. As the situation appeared to escalate, the other TCO came and told Employee to calm down, while Employee

¹ 59 DCR 2129 (March 16, 2012).

² OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

³ Tr. at 19.

continued to yell at the top of his voice. At this point, the resident indicated to the TCOs that he worked for Agency and would let his supervisor know about his behavior.⁴

On cross-examination, Kelly testified that the only evidence considered in her review of this matter were those documents listed on page two, section B of the Hearing Officer Report.

Beverly Hooks (“Hooks”) Tr. 35-46

Hooks is currently employed by Agency and serves as a Traffic Control Officer. In 2013, Hooks also served as a TCO. Hooks described TCO’s duties, which include, writing citations, controlling intersections, walking pedestrians across the street, responding to car accidents, and helping school children cross the street with crossing guards.

Hook was Employee’s co-worker and was working with him on July 4, 2013. Hooks testified that they were working at 7th Street and Pennsylvania Avenue during the July 4th festivities. At the time, Hooks and Employee were directing pedestrians and traffic, and answering questions since a lot people were confused and lost because of the amount of people in the area, and they were unable to get on the highway. Hooks further testified that a lot of people approached her and Employee while they were working on July 4, 2013. Hooks was unaware of any incidents involving Employee and a member of the public that were confrontational on this day. She stated that if Employee was involved in a confrontation with a member of the public, then she was not paying any attention to it as she was trying to handle pedestrians and direct traffic.⁵

Hooks and Employee were the only two TCOs at the intersection when the incident took place. Hooks was working on one corner of the intersection and Employee was working the other corner of the intersection. Hooks stated that it was possible for Employee to have had an interaction with a citizen and she would not know about it.⁶

On cross-examination, Hooks stated that a supervisor never came out to speak with either herself or Employee on July 4th, 2013, regarding the performance of their duties.

Vernard Ward (“Employee”) Tr. 46-54

Employee worked at Agency for eleven (11) years. On July 4, 2013, Employee was a TCO with Agency. Employee testified that on July 4, 2013, he and Hooks were approached in an aggressive manner by a citizen. Employee did not know the citizen, nor did the citizen ever identify himself as an employee of the District of Columbia. Employee further stated that his supervisor did not call on the day of the alleged incident regarding his duties, nor did Agency ever request a written statement from Employee regarding the alleged confrontation.

Employee testified that, on the day in question: Hooks asked Employee to assist her in giving directions to another citizen and he left his corner of the intersection to help in giving

⁴ Tr. at 20.

⁵ Tr. at 42.

⁶ Tr. at 43-44.

directions, at which time the complaining citizen approached Employee while he and Hooks were giving directions to a citizen. Employee denied using abusive or offensive language during this encounter. On cross-examination, Employee stated that initially, he only knew the complaining citizen was a member of the public, and the citizen later stated that he was a D.C. government employee and that he was going to report him to Ms. Hamilton. Although Employee could not remember Ms. Hamilton's exact title, he stated that she was one of the "higher ups" in the Traffic Control Office who was over the TCO's supervisors.⁷ Employee stated that the citizen first approached Hooks and then at some point later, approached him and told them both that they were not doing their job.⁸

Employee acknowledged he was disciplined for sleeping on the job a couple of years prior to this incident, although he stated that he was not actually sleeping. Employee indicated that he was written up for the allegations of sleeping on duty.

On cross-examination, Employee further acknowledged that he was suspended on a prior occasion for being "rude to a citizen."⁹

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, Sections 1603.3 and 1619.1 of the District Personnel Manual ("DPM") set forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Here, Employee was a Career Service employee and his termination was based on (1) any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations; specifically: neglect of duty and unreasonable failure to give assistance to the public; and (2) any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious;

⁷ Tr. at 53.

⁸ Tr. at 52.

⁹ Tr. at 51.

specifically for use of abusive or offensive language.¹⁰

Any on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations; specifically: neglect of duty and unreasonable failure to give assistance to the public

Neglect of Duty

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 for its assertion that Employee was "inappropriately offensive, unprofessional, and antagonistic towards an employee of the [Agency]."¹² The incident giving rise to Employee's removal happened on July 4, 2013, as crowds were leaving the 4th of July festivities around the National Mall. Agency maintains that a citizen, who also happened to be an Agency employee, witnessed Employee and another TCO speaking with a motorist, while crowds of people attempted to navigate the crosswalk with difficulty. In Agency's Advance Written Notice of Proposed Removal, it sets forth in detail the allegations of the exchange between Employee and the citizen.

Kelly, who served as the Hearing Officer in the instant matter, testified regarding her written report and recommendation. Based on the notice of proposed removal, the union's response to the notice of proposed removal on Employee's behalf, the complaining witness' statement, and Employee's previous disciplinary record, Kelly concluded that Agency had cause to remove Employee from his position. Kelly's written report makes credibility determinations based solely on written documents submitted by the complaining witness and on behalf of Employee. It is noted that Hooks, the other TCO working the shift with Employee, did not provide a written statement, but did testify at the Evidentiary Hearing.

Hooks testified credibly. Hooks stated that if Employee was involved in a confrontation with a member of the public, then she was not paying it any attention since she was trying to handle pedestrians and direct traffic.¹³ Although Hooks was unable to speak directly to any confrontation between Employee and a citizen, I found her testimony to be credible. Hooks and Employee were the only two TCOs at the intersection when the alleged incident took place. Given the volume of people in the area because of the July 4th festivities, it is reasonable that Hooks did not hear every conversation Employee had with members of the public.

Employee provided testimony of what gave rise to the encounter between himself and the complaining citizen. Hooks asked Employee to assist her in giving directions to a citizen. When Employee left his corner of the intersection, he stated that a citizen approached him as he was talking to another citizen and complained that he (Employee) was not doing his job. At some point during the encounter, the citizen informed Employee that he was also an employee of

¹⁰ Agency's Answer, Exhibit 5 (February 28, 2014).

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

¹² Agency's Answer, Exhibit 2 (February 28, 2015).

¹³ Tr. at 42.

Agency and that he was going to report him to Ms. Hamilton. Employee could not remember Ms. Hamilton's exact title; however, he stated that she was one of the "higher ups" in the Traffic Control Office who was over the TCO's supervisors.¹⁴

Agency provided a written statement by the complaining witness, Eric Ampedu, in its Prehearing Statement; however, Mr. Ampedu was not called to testify at the Evidentiary Hearing.¹⁵ Employee was not given an opportunity to cross-examine the complaining witness. When asked by the undersigned if it was Agency's intention to forego calling Mr. Ampedu, Agency's counsel stated that Mr. Ampedu had a scheduling conflict and Agency was relying on the documents already a part of the record in its Answer and Prehearing Statement.¹⁶ It is noted that despite Agency being aware that the complaining witness had a "scheduling conflict," that a continuation of the Evidentiary Hearing was never requested by Agency. The undersigned was unable to make any credibility determinations regarding the complaining witness' written statement in Agency's Prehearing Statement.

The burden is on the Agency to prove by a preponderance of the evidence that it had cause to take adverse action for allegations levied against an employee.¹⁷ Here, the allegations against Employee are based on a complaint by a citizen, who also happens to be an employee of Agency. The undersigned does not find that the written statement submitted by the complaining witness outweighed the credibility of the testimony provided by Employee at the Evidentiary Hearing. Furthermore, Agency seems to argue that because Employee had prior disciplinary issues, that his credibility regarding his rendition of the facts surrounding the instant matter should be discredited. I disagree. The written statement alone provided by the complaining witness is not enough for Agency to satisfy its burden that it had cause to remove Employee from his position as a TCO.

Unreasonable Failure to Give Assistance to the Public

The District's personnel regulations provide, in part, that there is an unreasonable failure to give assistance to the public in the following instances: (1) discourteous treatment of the public; (2) violation of department customer service standards; and (3) failure to offer assistance when requested. Here, Agency applies the same facts applied in its "neglect of duty" charge to support its charge of "unreasonable failure to give assistance to the public." The only evidence Agency offers to support its assertion that Employee unreasonably failed to give assistance to the public is in the statement by Mr. Ampedu attached with its Prehearing Statement. This statement was never authenticated and Employee did not have the opportunity to cross-examine the complaining witness about his written statements. Additionally, the written statement provides that Employee was talking to someone inside of a truck who was in the median of the street. Ironically, this assertion supports Employee's testimony that he was providing directions to a member of the public. Employee was adamant that he was not discourteous to the complaining witness during their exchange. Again, the complaining witness' written statement alone does not satisfy Agency's burden that it had cause to take adverse action against Employee for

¹⁴ Tr. at 53.

¹⁵ See Agency's Prehearing Statement, Attachment (September 8, 2014).

¹⁶ See Tr. at 60.

¹⁷ OEA Rule 628.1, 59 DCR 2129 (March 16, 2012).

“unreasonable failure to give assistance to the public.”

Any On-Duty or Employment-Related Reason for Corrective or Adverse Action that is not Arbitrary or Capricious; Specifically for use of Abusive or Offensive Language

The facts set forth in the previous two charges also apply for Agency’s charge of “use of abusive or offensive language.” Employee adamantly testified that he did not use abusive or offensive language. Agency offered no reliable evidence, other than Mr. Ampedu’s written statement, attached with Agency’s Prehearing Statement, which directly contradicts Employee’s testimony. As discussed above, the complaining witness’ statement alone does not satisfy Agency’s burden that it had cause to take adverse action against Employee. Accordingly, I must find that Agency has not met its burden that it had cause to take adverse action against Employee.

Appropriateness of penalty

Because I have determined that Agency did not have cause to terminate Employee for the causes set forth above, I will not address the appropriate of the penalty.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency’s termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse him all back-pay and benefits lost as a result of his removal; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge