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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0021-14
MONROE SMITH,)	
Employee)	
)	Date of Issuance: April 24, 2015
v.)	
)	
OFFICE OF THE STATE)	
SUPERINTENDENT OF EDUCATION,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Monroe Smith, Employee, <i>Pro Se</i>		
Hillary Hoffman-Peak, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 15, 2014, Monroe Smith (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Office of the State Superintendent of Education’s (“Agency” or “OSSE”) action of suspending him for fifteen (15) days. Employee, who works as a Motor Vehicle Operator, was charged with “Any on-duty or employment-related act or omission that an employee knew or should have reasonably known is a violation of the law.” Employee’s suspension was effective from October 21, 2013 to November 8, 2013.

I was assigned this matter in June of 2014. On August 20, 2014, a Prehearing Conference (“PHC”) was held for the purpose of assessing the parties’ arguments. During the PHC, the Undersigned determined that there were material facts in dispute, therefore an Evidentiary Hearing was held on November 6, 2014. The parties were subsequently ordered to submit written closing arguments on or before December 22, 2014. Both parties responded to the order. The record is now closed.

JURISDICTION

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

ISSUES

Whether Employee's fifteen (15) day suspension should be upheld.

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 RELEVANT TESTIMONY

The following represents what I have determined to be the most relevant facts adduced from the transcript generated as a result of the Evidentiary Hearing in the instant matter. Both Agency and Employee had the opportunity to present documentary and testimonial evidence during the course of the hearing to support their positions.

Agency's Case-in-Chief

Marinda Smith (Tr. pgs. 8-24)

Marinda Smith ("Smith") works for Agency as a Bus Attendant. Smith is familiar with Employee because they both worked for OSSE at the same time. She described her only interaction with Employee as follows:

I was standing outside of the job after clocking out, and I felt somebody...walk up on me and say something, so when I turned and looked back, it was Mr. Smith. And he whispered in my ear and said that he needed some head. And after that, I turned around and looked at him, and I said, "What?" and he repeated it. And then after he repeated it, I just looked at him with a[n]...upset look. And he just said, "Oh, I'm sorry. You don't do that?" And then he said, "Oh, do you know someone?"

And I...said some words to him and walked off...he kept following me, asking was I going to snitch, was I going to tell on him, was I going to get him in trouble. So I went into the office to inform my manager, but they were busy so I went behind the desk, and he followed me behind the desk, and just stood there looking at me.

So after no one was available at the time, I left to go in the garage to see one of my co-workers. And he kept following me, and I cussed him out. And then that's when I went and wrote him up and took it to my manager because he wouldn't stop following me.¹

Smith was upset because she felt that Employee disrespected her. Although Smith and Employee never official met, Smith knew who Employee was because he was good with computers and helped other employees fix problems from time to time.

Smith identified Agency's Exhibit 1 as the incident report she submitted to Agency on September 5, 2012. After Smith told Employee to stop following her, she entered a manager's office to report what happened. According to Smith, Employee continued to stand around and stare at her. Smith then left the manager's office, and Employee continued to pursue her. She told Employee to stop following her and proceeded to tell another employee, Patricia Foust, what occurred.

On cross examination, Smith stated that she did not recall telling Employee that she was going to attack him prior to the September 5, 2012 incident. Smith testified that she was not instructed to report the incident to anyone, but instead walked directly into the manager's office to report what happened.

Shawn Holland (Tr. pgs. 25-30)

Shawn Holland ("Holland") works as a Bus Attendant for Agency. Holland and Employee worked together on the same route on a few occasions. He also knows Smith because they sit at the same table together in the sitting area at work ("the garage"). On September 5, 2012, Holland was headed back to the garage after his bus route and heard Smith yelling, but thought she was just playing around with co-workers. As Smith was about to clock out, Smith approached him in an upset manner and stated that Employee asked her to give him oral sex. Smith also told Holland that Employee continued to follow her after she rejected Employee's advances. After Smith walked away from Holland, Employee came up to Holland and said, "I was just playing. I didn't think she would get mad." Holland identified Agency's Exhibit 2 as his written statement to Agency following the incident between Employee and Smith.

¹ Tr. pgs. 9-10.

Patricia Foust (Tr. pgs. 31-39)

Patricia Foust (“Foust”) works for OSSE as a bus attendant. On September 5, 2012, Smith approached Foust as Smith was walking into the garage. Foust asked Smith what was wrong because she looked upset. Smith then turned around and stated “You think I’m playing” to Employee. Foust noticed that Employee was still following Smith during the course of their interaction. Smith eventually told Foust that Employee asked Smith for oral sex. Smith identified Agency’s Exhibit 3 as her September 15, 2012 written statement about the September 5, 2012 events.

On cross examination, Foust stated that she could not say for sure whether Employee would or would not make those types of comments Smith alleged him to have said. Foust opined that Employee was a “pretty cool guy,” and often joked back and forth with Foust on occasion.

Kenneth Faunteroy (Tr pgs. 40-55)

Kenneth Faunteroy (“Faunteroy”) is a terminal manager for OSSE’s Fifth Street Terminal. Faunteroy’s duties include supervising a staff of 300 employees, and managing all of the routes that go in and out of the terminal. Faunteroy is also responsible for employee discipline. He was informed of the September 5, 2012 incident and met with Employee before reporting what happened to Human Resources. According to Faunteroy, Employee stated that he was just joking with Smith, but did not deny that he asked Smith for oral sex. After Faunteroy reported the incident to Human Resources, several communications were exchanged regarding whether Employee should be transferred to a different terminal or suspended for a certain number of days.

Faunteroy identified Agency’s Exhibit 4 as the policy and procedure manual for OSSE’s Department of Transportation. The manual is distributed to employees during orientation, and governs all staff and operations for the department. Specifically, Section 703 of the manual requires that each employee be professional at all times. In addition employees must refrain from harassing other employees. According to Faunteroy, communicating sexual comments to another employee violates Agency’s policy manual. The ability of an employee to perform the functions of his or her job becomes impaired if they feel uncomfortable in their work place.

Employee’s Advance Written Notice of Proposed Suspension of Fifteen Days was introduced and admitted as Agency’s Exhibit 5. Faunteroy believed that Employee’s conduct warranted a fifteen (15) day suspension. Faunteroy did not have any further dealings with Employee after his suspension because Employee was transferred to a different terminal so that Smith could feel comfortable in her work environment.

*Employee's Case-in-Chief***Monroe Smith** (Tr pgs. 56-75)

Monroe Smith ("Employee") worked for Agency for seven (7) years. Smith stated that he was always harassed and bullied because he was soft-spoken. He denies the allegations against him, and stated that he heard there was an employee at his work site that was offering oral sex at work. According to Employee, on September 5, 2012, he approached Smith and jokingly said "I heard somebody on the job was doing that." Smith was agitated at Employee's comment, and he attempted to apologize to her. Employee did not believe that his comments were appropriate, but stated that he was agitated at Smith because she was screaming and trying to humiliate him.

Employee admitted that he followed Smith into the manager's office after their encounter in an attempt to stop Smith from reporting the incident. Employee did not believe that he should have been disciplined as a result of his actions.

On cross examination, Employee testified that he apologized to Smith because he saw that she was very agitated by his comments. According to Employee, comments regarding sex are not appropriate, but it is not unusual for discussions regarding sex to occur at the workplace.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

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.

In accordance with Section 1651(1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3(e) of the District Personnel Manual ("DPM") defines cause to include "[a]ny on-duty or employment related act or omission that an employee knew or should have reasonably known is a violation of the law." Specifically, Section 1619 the DPM prohibits incidents of a sexual or ethnic nature involving unwelcome remarks, joking, offensive comments or slurs; and acts of insubordination that are verbally abusive.

Section 703 of Agency's Policies and Procedures Manual states the following in pertinent part:

703.1(a)5—Required Standards of Conduct

Employees shall treat others with respect and conduct themselves, at all times, in such a manner as to reflect favorably on the DOT.

703.3(a)—Dereliction of Duty

Any of the following constitutes dereliction of duty and is cause for disciplinary action:

22. Disrespect or discourtesy towards any person.
26. Conduct prejudicial to good order²

Based on a review of the documentary and testimonial evidence submitted throughout the course of this appeal, I find that Employee made unwelcomed and inappropriate remarks of a sexual nature, while on duty, to Miranda Smith. According to Smith, on September 5, 2012, Employee approached her and requested that Smith perform oral sex on him. After Smith rejected Employee's advances, she immediately went to a manager's office to report the incident. Smith also submitted a written statement to OSSE's Office of Investigations immediately after her interaction with Employee.³ After observing Smith's disposition and demeanor during the Evidentiary Hearing, I find that she provided truthful testimony and there is no *credible* reason to question the veracity of Smith's statements regarding the events which transpired on September 5, 2012. Likewise, I also find the testimony of Holland and Faust to be credible, as their statements during the Evidentiary Hearing were consistent with the written statements they provided to Agency on the day of the incident. In addition, Faunteroy testified that Employee admitted to asking Smith for oral sex in jest, but did not deny that he propositioned her to engage in a sexual act.

Employee states in his closing argument that he should have not been disciplined by Agency because he never asked Smith for oral sex, and stated that:

"...[the] transcript...states that I repeatedly testified that I wasn't asking Marinda Smith for oral sex but was asking her whether another person would be willing to provide oral sex. This recording of my testimony is incorrect and frames me for a guilty verdict of which I did not confirm as most of these statements have been wrongly written. What I have always said is that I asked Ms. Smith if she had heard of someone that was doing so without any

² Agency Exhibit 4.

³ Agency Exhibit 1.

implementation that I was asking for anyone who would provide oral sex.”⁴

I find Employee’s supposition that his testimony during the Evidentiary Hearing was recorded incorrectly in an effort to ‘frame’ him to be wholly incorrect and utterly preposterous. During the hearing, the Undersigned had an opportunity to hear Employee’s testimony first-hand, while observing his overall demeanor and disposition. I find that Employee’s testimony was untruthful and self-serving. Moreover, whether Employee propositioned Smith in jest or in a serious manner is of no consequence. Unwelcomed sexual advances in the workplace are inappropriate and prejudicial to good order. Employee does not deny that he approached Smith and communicated verbal comments of a sexual nature. His behavior violated Agency’s policies and procedures and constituted a dereliction of duty. For these reasons, I find that Agency has cause to take adverse action against Employee for “[a]ny on-duty or employment related act or omission that an employee knew or should have reasonably known is a violation of the law.”⁵

Whether the penalty was appropriate under the circumstances.

With respect to Agency’s decision to terminate Employee, any review by this Office of the agency decision 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.⁶ 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.”⁷ 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.”⁸

⁴ Employee Brief (December 22, 2014).

⁵ Under D.C. Mun. Regs. Title 4, § 199, sexual harassment is defined as: unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when the following occurs:

- (a) submission to such conduct is made either explicitly or implicitly a term or condition of employment;
- (b) submission to or rejection of such conduct by an employee is used as a basis for employment decisions affecting the employee; or
- (c) the conduct has the purpose or effect of unreasonably interfering with an employee’s work performance or creating an intimidating, hostile, or offensive working environment. Sexual harassment may include but is not limited to, verbal harassment or abuse, subtle pressure for sexual activity, patting or pinching, brushing against another employee’s body, or demand for sexual favors.

⁶ 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).

⁷ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

⁸ *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

Agency has the discretion to impose a penalty, which cannot be reversed unless “OEA finds that the agency failed to weigh relevant factors or that the agency’s judgment clearly exceed the limits of reasonableness.”⁹ The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of “[a]ny on-duty or employment related act or omission that an employee knew or should have reasonably known is a violation of the law” is suspension for five (5) to fifteen (15) days.

In this case, I find that Employee’s failure to adhere to the Agency’s required standards of conduct constituted an act which he knew or reasonably should have known is a violation of the law. I further find that Agency acted reasonably within the parameters established in the Table of Penalties. Based on the foregoing, I conclude that Agency's decision to suspend Employee for fifteen (15) days was the appropriate penalty for his actions and was not an abuse of discretion.

ORDER

It is hereby **ORDERED** that Agency's action is upheld.

FOR THE OFFICE:

Sommer J. Murphy, Esq.
Administrative Judge

⁹ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).