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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ALBERT E. MONTGOMERY	)	OEA Matter No. 1601-0008-01
Employee	)	
	)	
v	)	Date of Issuance: June 14, 2005
	)	
DC FIRE & EMS DEPARTMENT	)	Muriel A. Aikens-Arnold
Agency	)	Administrative Judge
	)	

Lathal Ponder, Esq., Employee Representative
Theresa Cusick, General Counsel

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 21, 2000, Employee, a Firefighter, filed a Petition for Appeal from Agency's action to suspend him from duty without pay for 120 duty hours effective November 28, 2000 based on Discourteous Treatment of a Supervisor. Agency was notified by this Office regarding this appeal on December 4, 2001 and directed to respond by January 4, 2002. Agency filed its response on January 30, 2002 after being granted an extension of time.

This matter was assigned to Judge Blanca Torres on February 19, 2003. On September 12, 2003, an Order Scheduling a Status Conference

was issued. Following the status conference, an Order to Make Submissions was issued on October 8, 2003. Employee was directed to *address with specificity* the allegations raised in his petition for appeal concerning the Fire Trial Board (FTB) hearing. Agency was ordered to subsequently respond.[1]

On May 3, 2005, this matter was reassigned to the undersigned Judge who reviewed the record to determine its status.[2] Since the record reflected that submissions were made by the parties to support their respective positions in compliance with the October 8, 2003 Order issued by Judge Torres, the record was closed for review effective May 31, 2005.[3]

JURISDICTION

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

ISSUES

Whether the Agency action, based on the Fire Trial Board hearing, was supported by substantial evidence, whether there was harmful procedural error, or whether it was otherwise contrary to law or applicable regulations.[4]

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[1] The DC Fire and EMS Department's collective bargaining agreement with its firefighters contains an alternative disciplinary process including provisions for a trial board hearing and an appeal to this Office solely on the record. Accordingly, the parties were given the opportunity to argue their respective positions through briefs. Employee filed his brief on 11/18/03; Agency filed its response on 12/11/03.

[2] Administrative Judge Blanca Torres who was originally assigned to this matter is no longer with this Office.

[3] Employee was then and continues to be represented by Lathal Ponder, Esq.

[4] A DC Court of Appeals decision in *District of Columbia Metropolitan Police Department v Elton L. Pinkard*, 801 A.2d 86 (D.C. 2002) held that this Office erred in conducting a second evidentiary hearing when a Police Trial Board (PTB) hearing had

FINDINGS OF FACT

Statement of the Charges

By memorandum dated July 19, 2000, Employee was notified to appear before a Fire Trial Board. The following charge and specification were attached:

Charge 1: Discourteous Treatment of a supervisor; use of insulting language toward an official.

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previously been held in a disciplinary matter; and violated the Department's labor agreement which provided *solely* for a review of the PTB record on appeal. The Court remanded Pinkard's appeal to this Office to determine whether Agency's action was supported by substantial evidence, whether there was harmful procedural error or whether it was in accordance with law or applicable regulations. Although *Pinkard* involved an employee of the Metropolitan Police Department covered by a collective bargaining agreement, the holding pertains to employees of Agency, such as Employee herein, who are likewise covered by a collective bargaining agreement. *See Hibben v D. C. Fire and Emergency Services Department*, OEA Matter No. 1601-0138-99 (April 21, 2003), __ D.C. Reg. __ ( ); *Davidson v. D.C. Fire and Emergency Services Department*, OEA Matter No. 1601-0063-99 (November 20, 2002) __ D.C. Reg. __( ); *Kelly v. DC Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0023-98 (November 6, 2002), __D.C. Reg .__ ( ).

Specification 1: In that said Firefighter Albert Montgomery, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department, did nevertheless, on the 10th day of February 2000, use insulting language to your commanding officer Lt. Terry D. Sneed.

According to Lt. Terry Sneed's report dated February 10, 2000, at approximately 0650 hours, on the date in question, he heard a loud noise at the front door that sounded like someone trying to break it down. Firefighter John Hayman proceeded to the front door, opened it and you entered. Lt. Sneed then asked you why were you kicking the front door in such a violent manner; you became loud and disruptive and began yelling profanity in his face, stating that you had rung the door bell for five minutes, nobody opened it, so you started kicking it, hoping someone would open the door. At this point, Lt. Sneed backed away. Lt. Sneed further alleges that you then disrespected his authority by contacting the Battalion Fire Chief's Office without first obtaining his permission. He also reported that you were issued a door key to the firehouse on June 13, 1995.[5]

Based on the evidence and testimony presented, the FTB panel found Employee guilty of discourteous treatment of a supervisor and recommended suspension without pay for one hundred twenty (120) duty hours to the Chief, who made the final decision. After reviewing the evidence, testimony, and the Board's recommendation, Fire Chief Ronnie Few issued a final decision, on November 9, 2000, to suspend Employee as stated above.[6]

Employee's Position.

Employee contends that Agency's action should be reversed based on

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[5] See Agency's adverse action file at Tab #8.
[6] See Agency's adverse action file at Tabs #10 and 11.

the following: lack of a fair hearing; Employee was not guilty of the charges; disparity in the discipline imposed; and the discipline imposed was excessive. Specifically, Employee argues, *inter alia*,: a) that as a result of *racial animus* (Employee being an African American firefighter), the FTB did not allow him to properly question witnesses to challenge their credibility; b) that "similarly situated firefighters *not* in Firefighter Montgomery's protected group committed similar acts but was (sic) not charged with any offense or a lesser offense"; c) that FTB members provided testimony for witnesses which was later used to justify the Board's Findings and Recommendations; d) that the Department's EEO Officer, who *could have testified* regarding inconsistent charges and penalties brought against African American males versus white males, was disallowed as a witness which "appears to be retaliation" for Employee having filed an EEO complaint; and e) that the penalty imposed violated the District of Columbia Personnel Manual.[7]

Agency's Position.

Agency contends that Employee's suspension from duty without pay was supported by substantial evidence in the record, there was no harmful procedural error, and Employee has presented no basis for overturning that action. Specifically, Agency asserts that: the record reflects witness testimony that Employee committed the offense charged; the FTB members followed the hearing procedures outlined in the Trial Board Handbook and dealt equally with witness questioning; discrimination issues are not within the jurisdiction of this Office; and the penalty was within the range of penalties set forth in §1618.1 of the D.C. Personnel Regulations.[8]

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

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[7] See Employee's Brief at pp. 6-17; Employee argues that he should have received a reprimand pursuant to the Table of Penalties for a first offense instead of a 120 day [duty hour] suspension.

[8] See Agency Brief at pp. 7-9 and 11-12.

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Such regulations were published at 47 D.C. Reg. 7094 et seq. (September 1, 2000).[9]

The FTB panel relied upon the evidence of record and the witness testimony, including Employee's admissions that he participated in a loud confrontation with Lt. Sneed and that he was offended by Lt. Sneed's questions. In response to Employee's arguments, this Judge finds the following. First, this Office does not have jurisdiction to address Employee's allegations of discrimination. Second, in order to show disparate treatment, the employee must show that he worked in the same organizational unit as the comparison employees and that they were subject to discipline by the same supervisor within the same general time period.[10] Employee has not shown that Agency treated him differently from other similarly situated employees. In fact, Employee's related argument regarding the disallowed witness constitutes speculation of what the testimony might have been. Thus, that argument has no merit.

Third, Employee's contention that the FTB's Chair improperly commented about a witness's use of the acronym "MF" before the witness (Lt. Sneed) gave testimony is a moot issue as that witness testified that he did *not* remember exactly what Employee said. Yet, he remembered Employee's words were threatening and insulting.[11] Fourth, the hearing testimony cited in Employee's brief reflects a reasonable procedure

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[9] Section 1603.3 set forth the new definition of cause which, in pertinent part, is as follows: [A]ny on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious.
[10] *See Carroll v Department of Health and Human Services*, 703 F.2d 1388 (Fed. Cir. 1983)
[11] See Transcript (hereinafter referred to as "Tr.") at p. 25.

(explained by the Chair) by which to examine witnesses by Agency and then allowing Employee an opportunity to cross examine those witnesses.[12]

Fifth, one of the FTB panel members, while questioning Employee, pointed out that Employee unnecessarily raised his voice during the hearing which, in part, led to the Board members' inability to believe Employee's blanket denial of the charges. As indicated in Agency's brief, Employee testified " . . . and my voice may have been raised . . . more than it normally is because of the insinuations by the lieutenant which I did take offense at."[13] During Employee's last statement made at the FTB hearing, he conveyed his appreciation for the courtesy extended and the latitude given to him in asking questions of witnesses.[14] Based on a review of the record, this Judge concludes that Agency's action was supported by substantial evidence, there was no harmful procedural error, and the charge was consistent with law and applicable regulations.[15]

Whether the Penalty Was Appropriate Under the Circumstances.

Discourteous treatment of the public, a supervisor, or other employees constitutes cause under previous adverse action regulations which also contained a Table of Penalties. That Table of Penalties provided, *inter alia*, reprimand to 15 day suspension for the first offense of discourteous treatment of a supervisor, specifically use of offensive and insulting language to an official superior.[16] However, said Table of Penalties was inapplicable at the time Employee was suspended and the argument that he should have been given a reprimand, therefore, has no merit.

When assessing the appropriateness of the penalty, this Office is not

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[12] See Employee's Brief at pp. 6-7.
[13] See Tr. at pp. 95 and 116-117; and Agency's Brief at p. 6.
[14] See Tr. At p. 170.
[15] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
[16] Vol. III, DPM, Chapter 16, §1618.11 (d) and (f), 34 D.C. Reg. 1868 (1987).

to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). 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." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

In making its recommendation, the FTB panel addressed the *Douglas* factors and their effect upon determination of the penalty.[17] The panel considered, *inter alia*, the nature and seriousness of the offense, the adverse effect that Employee's behavior had on his supervisor's confidence in his ability to perform his assigned duties safely and effectively, and alternative sanctions. Further, the FTB panel noted that the maximum penalty (suspension of 15 days) was not justified and that the 120-duty hours (5 days) appropriately served as a deterrent to Employee and others that such behavior is not tolerated.[18]

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on this Judge's review of the record, Agency's action was supported by substantial evidence, there was no harmful procedural error, and it was consistent with law and applicable regulations. Therefore, this Judge concludes that the penalty was within the parameters of reasonableness and should be upheld.

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[17] The Merit Systems Protection Board (our Federal counterpart) established a 12-prong test for evaluating the appropriateness of the penalty in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

[18] See Agency's adverse action file at Tab #10. It is noted that jurisdiction was not previously raised even though Agency recognizes this action as a 5-day suspension over which this Office normally has no jurisdiction. However, this Judge reviewed this matter due to its age, the uniqueness of the Fire Department's 24-hour shifts, and the fact that the conversion of those shifts to suspension days (normally 8 hours for other agencies) has not been addressed by this Office.

ORDER

It is hereby ORDERED that the 120-duty hour suspension is UPHELD.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge