

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Darlene Nowlin,)	OEA Matter No. 1601-0019-15
Employee)	
)	Date of Issuance: May 9, 2016
v.)	
)	Joseph E. Lim, Esq.
D.C. Office of Aging,)	Senior Administrative Judge
Agency)	
Daniel Hornal, Esq., Employee Representative		
Lindsey Neinast, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION

On November 19, 2014, Darlene Nowlin (“Employee”) filed a petition for appeal with this Office from D.C. Office of Aging (“DCOA” or “Agency”)'s final decision demoting her for poor job performance.

This matter was assigned to me on March 3, 2015. After several postponements requested by the parties, I held a Prehearing Conference on December 8, 2015, and an Evidentiary Hearing on February 1, 2016. After the parties submitted their closing arguments and legal briefs on April 8, 2016, I closed the record.

JURISDICTION

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

ISSUE

Whether Employee's actions constituted cause for adverse action, and if so, whether the penalty of reduction in grade was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Whether Employee's actions constituted cause for adverse action.

The following facts are undisputed:

1. Employee Darlene Nowlin was hired by the Agency in the position of Public Affairs Specialist in 1988.

2. In 2005, Employee Nowlin's title was changed to Customer & Information Services Specialist. *See* Agency's Exhibit 5.
3. Employee's job duties included coordinating certain internal and external communications issues for the purpose of increasing Agency's communications with key government and community stakeholders.
4. Employee had never been disciplined before this incident.
5. For the period of October 1, 2012, to September 30, 2013, Employee received a work performance rating of "Marginal Performer." *See* Agency's Exhibit 3.
6. For the period of October 1, 2013, to September 30, 2014, Employee received a work performance rating of "Inadequate Performer." *Id.*
7. On October 7, 2014, due to Agency's perception of Employee's sustained poor performance, Agency issued an Advance Written Notice of Proposed Reduction-In-Grade to Employee ("Advance Notice") in accordance with District Personnel Manual ("DPM") §§ 1410 and 1608. *See* Agency's Exhibit 2.
8. The Advance Notice proposed to reduce Employee's grade from Grade 11, Step 7 to Grade 9, Step 10, effective the pay period dated November 2, 2014 through November 15, 2014. *Id.*
9. The Advance Notice stated the following: "On June 30, 2014 you were placed on a Performance Improvement Plan (PIP) and informed that your job performance failed to meet the minimum requirements of the position. At this time, we provided you with an opportunity to improve your job performance in the specific areas described in the PIP. Additionally, your PIP was extended twice to the maximum allowable 90 days. After the 90 day period, you failed to meet the requirements of the PIP [*See* sections 1410 of Chapter 14 and 1603.39f)(5) of Chapter 16 of the regulations]. *Id.*
10. Agency further noted that Employee continued to miss critical deadlines during the PIP performance period and emphasized that the tardiness of these submissions adversely affected the quality of Agency communications with key stakeholders, as well as the overall operations of Agency. *Id.*
11. Thus, Agency cited Employee's inability to perform her duties at its current grade level as incompetence—cause for disciplinary action in accordance with Sections 1410 of Chapter 14 and 1603.3(f)(5) of Chapter 16 of the regulations. *See* Agency's Exhibit 2.
12. Subsequently, on October 20, 2014, Agency issued a Notice of Final Decision on Proposed Reduction-In-Grade, finalizing the proposed reduction in grade. Effective November 2, 2014, Employee's pay grade was reduced from Grade 11, Step 7, at an annual salary of \$63,923, to a Grade 9, Step 10, at an annual salary of \$57,267. *See* Agency's Exhibit 1.

EVIDENCE:

1. Camille Williams “Williams” (Transcript p. 9-78)

Ms. Williams, initially the Special Assistant to the Executive Director until she was promoted to Chief of Staff, oversaw five hundred staff and a budget of \$43 million to make sure that senior citizens in the community obtained services such as meals, recreation, socialization, medical transport, and other health services.

She described Employee’s position as responsible for communicating with external and internal stakeholders using an E-newsletter, the “Beacon”, and other newspapers, as well as planning special senior events. She stressed the importance of Employee’s position as a Customer Service Information Specialist in sending out their outreach communication to their clients. She stressed that deadlines must always be met. Williams testified that Employee did not write the articles in the newsletter other than editing them and putting in the program for Agency’s events.

Williams supervised Employee directly for a year and a half and then indirectly in the chain of command. This period covered the years from 2011 to 2014. She often told Employee to let her know in advance if she was going to have problems meeting the deadlines. Together with Employee’s direct supervisor, Darrell Jackson, and the general counsel, she placed Employee on a Performance Improvement Plan (“PIP”) on June 30, 2014,¹ because Employee continued to miss deadlines, communicated improperly, and continued to contact the Mayor’s office even after admonitions not to do so. Williams explained that she had told Employee to first inform her what her contact with the Mayor’s office was going to be about so that Agency would not get blindsided.

After sixty days on the PIP, Employee’s work performance had not improved. Thus Agency extended the PIP for another thirty days.² Yet despite the PIP, and her continued conferences with Employee, Employee continued to miss deadlines. This resulted in Employee’s work performance rating of “Inadequate Performer” for the period of October 1, 2013, to September 30, 2014.³

As for Darrell Jackson’s name on the PIP as the author, Williams explained that it was incorrect as the computer automatically puts in the name of Jackson instead of her name. Williams testified that Ms. Glendora Meyers and Veronica Butler had no direct knowledge of Employee’s performance. Tony Moreno was Employee’s supervisor for a short period and had expressed concerns about Employee’s work. When asked if she instructed Tony Moreno to lower any of Employee’s performance scores, Williams testified that she merely pointed out that Moreno’s scores were not in alignment with his complaints about Employee’s performance. Williams pointed out that Employee was not the only employee who had trouble with meeting deadlines. Those such as Courtney Williams retired.

1 See Agency Exhibit 3.

2 *Id.*

3 *Id.*

2. Employee (Transcript p. 96-189; 282-298)

Employee testified that she started working at Agency on May 29, 1994, and until recently, had always had either excellent or outstanding performance reviews. By 2008, her pay grade was eleven. Employee described her job duties as being the lead person for communications including press inquiries, newsletters, speeches for the mayor and the director for different events. She also prepared special events such as the Centenarian celebration for the district.

Employee testified that Camille Williams was her supervisor from March 2011 to June 2011 until Lisa Bryant was hired. Employee admitted that she missed a critical deadline but that she did submit the material on time except for one document from another agency. Employee testified that at times Williams would accept her explanations for the delay and sometimes she would not, depending on whether Williams was upset about something else.

Then Tony Moreno took over Bryant's supervisory role from April 2012 to November 2012.⁴ Mr. Moreno told her she was a valued employee but confided that he was told not to grade her performance too high. Darrell Jackson then became her supervisor from April 2014 until November 23, 2015.

Employee admitted that her supervisor Darrell Jackson had discussed with her the matter of missing deadlines several times. On June 30, 2014, Jackson placed her on the performance improvement plan ("PIP"). Employee complained that the PIP did not mention the many things she did right. Employee said she worked long hours and that the deadlines she did miss, she verbally informed her supervisors about the extenuating circumstances.

She signed up for a time management course but was waitlisted. Employee testified that all her negative performance comments were true but not accurate. She explained she had good reasons for missing the deadlines, such as her computer not being returned to her on time, and that no consideration was made for her workload or the work she performed outside her position.

Employee stated that most of the time she could not finish her tasks in 40 hours a week. When Community Outreach Person Courtney Williams and her counterpart Ann Williams left Agency's employ, Employee took over their responsibilities.

Employee stressed that she worked long hours, well beyond the normal 40 hours a week, trying to finish her workload. Although she discussed her heavy workload with Moreno and Jackson, her load was not decreased.

Before Williams' tenure, Employee admitted that she had missed deadlines before but her prior superiors were more understanding. She said that when she missed a deadline on the newsletter and E-blast, it would be no more than an hour but it would still go out the same day. Employee said the missed deadlines occurred due to heavy workloads or because someone else failed to make their submissions. Currently, she still performs the same

⁴ It is unclear how long Moreno was Employee's supervisor as Employee cited different dates such as September 2013 regarding his tenure.

functions after her demotion, but now she has more assistance.

As for her communications with the Mayor's office, Employee stated that it was often the Mayor's office who reached out to her about the scheduling of events, and that such communications were part of her job as the public affairs person at the Agency.

Employee also testified that during a 90 day period, other than those mentioned in her PIP, she did not miss any of the 20 or more deadlines she had. Her superiors did not discuss any alternatives to the demotion that she received.

3. Mr. Antonio Moreno Jr. "Moreno" (Transcript p. 198-233)

Moreno was Agency's strategic planning manager since April 2013, and supervised Employee until November 18, 2013. During a staff meeting with Camille Williams, Chantel Tisdale, Dr. Thompson, and Glendora Mayers, Moreno was informed that they were getting rid of four people, including Employee, and that he could then hire his own staff.

For the October 1, 2012, to September 30, 2013, performance evaluation, Camille Williams instructed Moreno to revise his rating and give Employee a lower score. Moreno said Ms. Williams ruled by intimidation and threat of being fired. When shown Employee's performance evaluation, Moreno testified that he does not recall rating her that low. He recalled rating her from 2.1 to 2.5, which is marginal performance. He could not recall if the remarks on Employee's evaluation were his. Moreno admitted that Employee missed deadlines 30% of the time.

Moreno also explained that because of all the tasks and the revisions on the newsletters, it was not possible for Employee to finish all her tasks in 40 hours per week. Today he would probably rate Employee a 2.9. He was terminated on November 18, 2013, and is currently suing Agency.

4. Ms. Glendora Meyers (Transcript p. 233-281)

Meyers was the Special Assistant to the Executive Director in September 2012 but was later terminated. Although Executive Director Thompson was her immediate supervisor, she reported to Chief of Staff Camille Williams. Because of the harassment and intimidation she received from Thompson and Williams, Meyers had a panic attack at a picnic. She described Williams as favoring her friends and had already decided to terminate certain people, including Employee, when she considered a Reduction-in-Force ("RIF"). Meyers said Williams believed these people could not do their jobs.

Whether Employee's actions constituted cause for a reduction in grade

In its Advance Written Notice of Proposed Reduction-in-Grade, Agency cited sections 1410 and 1608 of the District Personnel Manual, Performance Management and General Discipline and Grievances, as authority to propose reducing Employee's pay grade. In pertinent part, 1410 of the District Personnel Manual, Performance Management states:

1410 PERFORMANCE IMPROVEMENT PLAN

1410.1 The provisions of this section shall apply to all employees described in 1400.1 of this chapter, except for Career Service probationary employees and Senior Executive Attorney Service attorneys' in the Office of the Attorney General.

1410.2 A Performance Improvement Plan (PIP) is a performance management tool designed to offer the employee placed on it an opportunity to demonstrate improvement in his or her performance.

1410.3 The purpose of a Performance Improvement Plan is to offer the employee placed on it an opportunity to demonstrate improvement. A Performance Improvement Plan issued to an employee shall last for a period of thirty (30) to ninety (90) days, and shall:

- (a) Identify the specific performance areas in which the employee is deficient; and
- (b) Provide concrete, measurable action steps the employee needs to take to improve in those areas.

1410.4 A supervisor or, in the absence of that individual, the reviewer, shall complete a PIP when employee performance has been observed by the supervisor as being deficient. The last date on which a PIP may be issued is June 30 of each year.

1410.5 Within ten (10) calendar days of the end of the PIP period, the employee's immediate supervisor or, in the absence of that individual, the reviewer, shall make a determination as to whether the employee has met the requirements of the PIP. If the determination is that the employee has met the requirements of the Performance Improvement Plan, the employee's immediate supervisor, or in the absence of that individual, the reviewer, shall so inform the employee, in writing. If the determination is that the employee failed to meet the requirements of the Performance Improvement Plan, the employee's immediate supervisor or in the absence of that individual, the reviewer, as appropriate, shall issue a written decision to the employee to:

- (a) Extend the Performance Improvement Plan for an additional thirty (30) and not to exceed ninety days total, to further observe the employee's performance;
- (b) *Reassign, reduce in grade, or remove the employee.* (Emphasis added.)

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. Reg. 9317 (1999).

The crux of Agency's case against Employee is that Employee failed to meet important deadlines in its weekly communications to its elderly constituents. In addition, Agency states that

Employee had often communicated with the Mayor's office without first informing her superiors in direct contravention of their instruction.

Employee readily admits that she has indeed been tardy or late in her submissions but attributes it to factors beyond her control, such as waiting for a needed document from another colleague, or her computer being out of commission, or her enormous workload. As for the unauthorized contact with the Mayor's Office, Employee testified that it was part of her job as the public affairs person.

I based my credibility assessments on the courtroom demeanor and consistency of the witnesses. I find Camille Washington to be credible on the issue of Employee's job performance. Although Employee complained of being overworked and not having enough time to finish all her tasks, her own testimony revealed that her workload had stayed steady from when she said she received good job performance evaluations. In other words, it was not an increase in workload that caused her to miss deadlines as her workload remained essentially the same.

Employee admitted that her performance evaluations were true, but attributed her tardiness to circumstances beyond her control. On this score, I find Washington to be more credible than Employee. Employee's claim that her performance evaluation was inaccurate was undercut by her own witness, Mr. Moreno. Her former supervisor testified that he was pressured to lower Employee's performance rating. But when asked what his honest rating of Employee would have been, he replied that he would have given her a score that was only marginally better. In addition, Moreno testified that Employee missed her deadlines one-third of the time. Employee's other witness, Ms. Mayers, had no direct knowledge of Employee's work performance.

I do find credible Employee's assertion that she worked long hours. However, working long hours does not necessarily correlate with work effectiveness. As for Employee's assertion that her delays were due to factors beyond her control, I find Washington's testimony that she was not appraised of those factors in a timely manner to be more credible. I also find credible Washington's testimony that Employee failed to give her a heads up with regard to Employee's communication with the Mayor's Office.

Coupled with Employee's own admission that she was indeed tardy on occasion with regards her deadlines, I therefore find that Employee failed to improve her work performance on the PIP. Accordingly, I conclude that the agency has met its burden of establishing cause for taking adverse action.

Whether the penalty of a reduction in grade was appropriate under the circumstances

The last issue to be resolved is the question of whether the agency's penalty was appropriate. Employee complains that the Douglas factors were not considered in its selection of a penalty.⁵

⁵ 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:

Agency argues that it did consider those factors when it decided on a lesser penalty than the termination option that the DPM allows.

This Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.⁶ Here, I have found substantial evidence to support Agency's action at the evidentiary hearing.

In *Employee v. Agency*,⁷ this Office held that it would leave a penalty undisturbed when it is satisfied on the basis of the charge(s) sustained, that the penalty is within the range allowed by law, regulation, or guideline, and is not clearly an error of judgment.

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."⁸ When the charge is upheld, this Office has held

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;

⁶ See *Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).

⁷ OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

⁸ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

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."⁹

The DPM allows an Agency to reassign, reduce in grade, or remove an employee who has failed to meet the requirements of a Performance Improvement Plan. Agency has chosen the middle penalty of a reduction in grade which is well within the range allowed by regulation. I am satisfied that Agency has properly exercised its managerial discretion and that its chosen penalty of reduction in grade is reasonable and is not clearly an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

It is hereby ORDERED that Agency's action removing the employee is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

⁹ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *supra*.