

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
HENRY MC COY)	OEA Matter No. 1601-0008-09
Employee)	
)	Date of Issuance: June 10, 2010
v.)	
)	Rohulamin Quander, Esq.
D.C. DEPARTMENT OF)	Senior Administrative Judge
YOUTH REHABILITATION SERVICES)	
Agency)	

Henry McCoy, Employee, *pro se*
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On October 21, 2008, Employee, a former Youth Development Specialist (Correctional Officer), DS-007-06, with the D.C. Department of Youth Rehabilitation Services (the “Agency” or “YSA”), filed a petition for appeal with the Office of Employee Appeals (the “Office” or “OEA”), challenging Agency’s final decision and electing to remove him from his position. Dated September 20, 2008, the termination letter,¹ alleged that, while on duty, Employee, who was in the Career service status, committed various forbidden employment related acts in violation of the D.C. District Personnel Manual (the “DPM”). Chapter 16, § 1603.² As an underlying basis for the termination action, Agency enumerated several prior instances of disciplinary action that were imposed, concluding that the cumulative effect of Employee’s behavior over time, fully justified taking the current action of termination.

The final action, which resulted in the herein proposed termination, was allegedly committed sometime between the dates of November 25, 2007, and December 15, 2007, when Employee failed to file an incident report in violation of YSA policy and mandate of Regulation § 1.14, Reporting Unusual Incidents. According to Agency, had Employee compiled the mandated report, it would have reflected an altercation that occurred between an imprisoned

¹ Agency’s Final Decision Letter was dated September 20, 2008, but lacked a statement indicative of the effective date of Agency’s action. However, Employee filed his appeal on October 21, 2008, within 30 full days of his notice of termination, thus obviating any issue of whether his appeal was filed in a timely manner.

² Agency’s proposed action was based upon the following enumerated causes: (1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; (2) Neglect of Duty; and (3) Incompetence.

youth and one of the unit managers, a member of the YSA staff. In addition to not writing up the incident report, Employee is further accused of not following both written and verbal instructions with regard to this same incident. Employee's conduct was deemed to be an act of gross negligence, which jeopardized the safety and well being of this facility, and all of the youthful residents who would normally be placed under his care.

I convened a Prehearing Conference on April 10, 2009. Each party was present and enumerated their respective positions on the record. Both parties filed Prehearing Statements. Agency is represented by Ross Buchholz, Esq. Employee is *pro se* at this time. However, during most of the prior components of this matter, including during the Prehearing Conference and early attempts at mediation, Employee was represented by Ardra M. O'Neal, Esq., who has since withdrawn as counsel. At the conclusion of the Prehearing Conference, I advised the parties that I would take the matter under advisement, evaluate the record created to that date, and pursuant to OEA Rule 625, determine whether an Evidentiary Hearing was necessary.³ Upon evaluation of the record, I have determined that there are no facts or other outstanding or unresolved matters at issue. Therefore, no evidentiary hearing will be held. On June 3, 2010, I issued an Order to the parties, formally noting the closing of the record.

JURISDICTION

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

ISSUE

The issues to be decided are:

1. Whether Employee's actions constituted cause for adverse action;
2. Whether the penalty of removal was appropriate under the circumstances.

BURDEN OF PROOF

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).

³ OEA Rule 625.2, provides, "If the Administrative Judge grants a request for an evidentiary hearing, or makes his or her own determination that one is necessary the Administrative Judge will so advise the parties ..." This provision has likewise long been interpreted to mean that the discretion of whether a hearing is needed, lies with the AJ, and that, if there are no outstanding factual issues that remain to be decided, then it is unlikely that there will be a hearing.

CONTENTIONS OF THE PARTIES

In response to Employee's appeal, Agency filed a comprehensive *Agency's Answer to Employee's Petition for Appeal*, supplemented by 24 Tabs. It is Agency's contention that, although Employee had proven to be a valued staff member at one time, there were several incidents of recent violation of Agency rules and policies, which justified the imposition of progressive discipline, and eventual termination. Among the referenced documents were several stated as follows:

1. June 2006, Employee was suspended for five (5) days for an act of negligence (leaving his post) and a failure to follow verbal and written instructions.⁴
2. July 17, 2007, Agency imposed leave restrictions for three (3) months, due to numerous unauthorized absences from work.⁵
3. December 28, 2007, negligence (discovered away from assigned duty post, without permission).⁶
4. January 17, 2008, post abandonment (cleaning snow off a personal vehicle, and failure to return to post for the remainder of the tour of duty).⁷
5. April 3, 2008, An investigative report substantiated that Employee failed to file an incident report reflecting an altercation between a youth resident and a staff member that occurred sometime between November 25, 2007, and December 15, 2007, in violation of YSA 1.14, "Reporting Unusual Incidents."⁸
6. July 3, 2008, Final Notice Letter, imposing a 30-day suspension for numerous violations, including several counts of negligence in the discharge of work-related duties, i.e., failure to properly monitor youth movements, failure to follow verbal and written instructions, in violation of the security and protocol procedures of the Oak Hill Center facility, as enumerated in YSA 9.3, "Youth Supervision and Movement" policy.⁹
7. August 20, 2008, having the benefit of two investigative reports, each of which addressed Employee's conduct with regard to his failure to follow Agency's established regulations and policies, Agency issued an Advance Written Notice of Proposed Removal letter. Employee's appeal rights were disclosed, including the option of presenting his response to an Administrative Hearing Officer for review.¹⁰

Agency also asserted that prior to termination, Employee was accorded all of his legally mandated appeal rights, including the opportunity to present his case to Toni Michelle Jackson, the duly appointed Administrative Hearing Officer. Employee, through counsel, responded to the proposed termination. On September 16, 2008, Jackson issued her Recommendation *In the Matter of Henry McCoy*, which document recommended that Agency's proposed termination was fully supported by the record, and could be implemented.¹¹ Agency further asserted that the

⁴ See Tabs 8, 9, 10, & 16; including Project Hands Investigative Report 07-OHYC-153.

⁵ See Tabs 11, 12, & 13, including Project Hands Investigative Report 07-OHYC-153.

⁶ See Tab 14.

⁷ See Tab 15.

⁸ See Project Hands Investigative Report, #08-OH-178, Tab 18.

⁹ See Project Hands Investigative Report, #07-OHYC-153, Tab 19.

¹⁰ See Tabs 20.

¹¹ See Agency Tab #22.

decision to terminate Employee was incrementally decided, as he had been given the benefit of several applications of progressive discipline in lieu of termination, but now termination was the remedy, as the prior disciplinary actions had not resulted in a long term improvement in Employee's long-term job-related performance.

In reply to Agency's termination-related assertions, Employee, through his legal counsel, countered the allegations. He seeks to be reinstated, and awarded back pay and benefits. He maintained that Agency's termination actions were taken without just cause, incorporating baseless grounds. Further, he challenged the validity of the previously imposed disciplinary actions, arguing that Agency could not use those allegations as an underlying support for its ultimate decision to terminate him, because in each instance of his alleged misconduct, the scope of the incident was such that Agency mischaracterized the nature of what occurred, as well as misplaced the blame, which should have been placed against other staff, including Agency, for consistently ignoring established informal practices and procedures that had been well known and in place for a substantial period of time.

Employee placed great emphasis upon what he characterized as multiple mitigating factors, to include:

- The relatively innocuous nature of his offenses, which pale by comparison with Employee's duties, position, and responsibilities, including whether the offenses were intentional, technical, inadvertent, or committed maliciously or for personal gain.
- Employee's type of employment, including his supervisory and fiduciary roles, and contacts with the public.
- Employee's past work record, including his length of service, general performance on the job, ability to get along with co-workers, and overall dependability, which included working double shifts, when needed.
- Consistency of the penalty imposed with the established Table of Penalties and other staff similarly situated for the same range of offenses.
- The offenses in question's relative innocuous impact upon Agency's reputation.
- The clarity, or lack thereof, of what employees were on notice of or been warned about, regarding existing rules that may have been violated.
- Employee's potential for rehabilitation.
- Extenuating circumstances surrounding the offenses, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others, with a possible personal design against Employee.

However, as the deciding AJ, I note that Employee presented nothing in his reply for my consideration that amounted to a timely challenge to Agency's 2006 to 2008 allegations. He presented nothing to reflect that he took particular and timely issue with the allegations in the prior disciplinary matters, such as an indication that he pursued the appropriate legal forum in search of official relief from the now alleged inappropriate and inaccurate allegations. For example, there is no evidence that, at the time the prior incidents occurred, he challenged Agency's proposed disciplinary actions, either *pro se*, or with the backing and support of a union-generated grievance filed against the Agency. Conversely, the record reflects that, despite how he may now belatedly react to prior disciplinary actions, there is no indication that he at

least contested and challenged Agency's imposed five (5) disciplinary actions over the immediate past two (2) years.

FINDINGS OF FACT

Undisputed facts

The following facts are undisputed:

1. For approximately 17 years, Employee served as a Career Employee Youth Development Specialist (Correctional Officer), DS-007-06 at the D.C. Department of Youth Rehabilitation Services, and its predecessor juvenile services institution. Agency's mission is to improve public safety by helping court-involved youth become more productive citizens by building on the strengths of youth and their families in the least restrictive, homelike environment consistent with public safety.
2. Employee is a member of the Fraternal Order of Police (FOP). His job-related behavior is governed by the collective bargaining agreement (CBA) between the Government of the District of Columbia Department of Human Services and the Fraternal Order of Police/Department of Human Services Labor Committee (FOP CBA). *Tab 5*. Article 27 § 1 of the CBA states that "[c]orrective and adverse actions as defined in Personnel regulations, may be imposed on employees only for cause, in accordance with the provisions of the Comprehensive Merit Personnel Act (CMPA, *D.C. Official Code* § 1-601.01 et. seq.), as amended and the DPM." *FOP CBA. Article 27*.
3. The DPM defines "Cause" in pertinent part, as any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include neglect of duty, and incompetence *DPM* § 1603.3. Neglect of duty is defined, in part, as a "failure to follow instructions" or "observe precautions regarding safety", "failure to carry out assigned tasks," or "careless or negligent work habits." *DPM* § 1619.1. Additionally, incompetence is defined as "careless work performance," or "serious or repeated mistakes after given appropriate counseling or training," or "failure to complete assignments timely" *id*.
4. A critical aspect of a youth rehabilitation facility, such as the one in which Employee worked, is to maintain order and safety. One important mechanism for achieving order and safety is the timely documentation of all unusual incidents, especially allegations of abuse involving youth residents. The guidelines for providing this type of documentation are included in the Agency's Reporting Unusual Incidents Policy, YSA 1.14. *Tab 4*. The policy also requires that unusual incidents be reported in a timely manner because the effective and efficient operation of the Agency depends on accurate communication of information regarding incidents involving both youth and staff. Therefore, failure to timely report an incident or not report an incident at all, compromises the effective and efficient operation of the Agency and the Agency's ability to trust employees to competently perform their duties.
5. As recently as May 8, 2008, and June 19, 2008, respectively, Employee was fully aware of the Agency's reporting unusual incidents policy. Further, on those dates he received

periodic training on the Rules for Handling Youth Conduct Policy, YSA 11.1A and Suicide Prevention for Youth in YSA Facilities, YSA III.4-008. *Tab 2 and Tab 1, respectively*. All of these policies identify the types of unusual incidents to be reported and the importance of documenting these incidents in Agency facilities. As a result, Employee knew or reasonably should have known the requirements for, and conditions under which an incident report is required.

6. On April 3, 2008, a Project Hands Investigative Report, substantiated a finding that Employee failed to document an incident that occurred between a DYRS youth resident and an adult unit manager. *Tab 18*. This failure was a violation of the above-referenced Reporting Unusual Incident policy. *Tab 4*.
7. Employee's failure to complete a required incident report cast serious doubt upon his suitability to continue to perform the job's assigned duties, and had an adverse effect upon the Agency's operations.
8. Employee's final failure to follow an Agency policy, which prompted Agency's ultimate decision to terminate him, was not an isolated occurrence. Rather, Agency evaluated Employee's work history over the prior two (2) years, and upon receipt of a second investigative report, 08-OHYC-178, determined that Employee's inability to follow established oral and written regulations, instructions, and policies, is evidence of a neglect of duty and incompetence.
9. Further, Employee's conduct compromised the Agency's ability to investigate allegations, maintain order in the facilities, and affected the efficiency and integrity of government operations.

ANALYSIS AND CONCLUSIONS OF LAW

Whether Employee's actions constituted cause for adverse action

Based upon my evaluation of the substantial written record in this matter, I find that the facts in this case are undisputed, and are as essentially set forth in Agency's letter to Employee, dated August 20, 2008, issued by David Muhammad, Chief of Committed Services, and the Proposing Official. *Tab 20*. Agency's proposed action was based upon several enumerated causes: (1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; (2) Neglect of Duty; and (3) Incompetence. Further, Agency's letter recited five (5) specific instances where some form of discipline was imposed, i.e., July 17, 2007, December 28, 2007, January 22, 2008, April 3, 2008, July 3, 2008, the cumulative effect of which led to Agency's ultimate decision to terminate Employee.¹²

Prior to the final recommendation for termination, Toni Michelle Jackson, Esq., the designated Administrative Hearing Officer, conducted an administrative review of Agency's proposed termination. *Tab 22*. Ms. Jackson issued her *Recommendation in the Matter of Henry*

¹² The noted dates are not necessarily the dates of the referenced infractions, but rather represent a date which is significant in each disciplinary action.

McCoy on September 16, 2008. In her Report, Jackson noted that Employee was represented by legal counsel at that time, and that said counsel had been accorded the opportunity to respond to Agency's allegations of misconduct, and did so in a correspondence dated September 5, 2008. Jackson found that the history of this matter reflected that, beginning in 2006, to the present, Employee had been cited for six (6) incidents of misconduct, five (5) of which were a part of the record before this AJ. Jackson concluded and so recommended, that the accumulated record of Employee's conduct constituted just cause for termination, both under the provisions of the extant CBA and the DPM, Chapter 16, § 1603.3. She concluded further that removal was the appropriate remedy under the circumstances.

On September 22, 2008, Vincent Schiraldi, then Agency Director, issued a Final Notice letter to Employee, the effect of which adopted Jackson's recommendation and placed Employee's termination into effect. *Tab 23*. Although the termination letter advised Employee of his right to appeal to OEA, as previously noted above, the letter failed to recite the effective date of Employee's termination. However, since Employee filed his appeal within 30 days of the issuance date of the termination letter, the potential issues of proper legal notice and the timely filing of the Petition for Appeal are not before me.

Whether removal was the appropriate penalty

When assessing the appropriateness of a penalty, "OEA is not to substitute its judgment for that of the agency," but "simply to insure that managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*. 502 A.2d 1006, 10 to (D.C. 1985). In *Employee v. Agency*,¹³ 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.

In the instant case, the Agency made a finding of cause based on a preponderance of the evidence, DPM. § 1619.1. The table of appropriate penalties provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense for neglect of duty is reprimand to removal. The penalty for a first offense for incompetence is suspension for 5 to 15 days; a second offense is suspension of 20 to 30 days; and for a third offense is suspension for 45 days to removal. The Agency had cause to remove Employee based on his latest offense of failing to complete an unusual incident report, a violation of the Reporting Unusual Incidents Policy, and instituted the appropriate penalty after considering the circumstances. This was not the first incident where the Agency found that this Employee neglected his duties or was incompetent in his duties. Employee was disciplined several times prior to this offense and two of those penalties resulted in suspension. Viewed in concert, Employee's conduct constituted an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations.

Mitigating or aggravating circumstances

¹³ OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

"Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense;" *Douglas v. Veterans Admin.* 5 M.S.P. B. 280, 304 (1981). *Douglas* also noted, that "an adverse action such as a suspension should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate." *Id.* Further, "[a]gencies should give consideration to all factors involved when deciding what penalty is appropriate, including not only the gravity of the offense but such other matters as mitigating circumstances, the frequency of the offense, and whether the action accords with justice in the particular situation." 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."¹⁴ *Id.*

In the instant removal action, Employee offered no mitigating circumstances for his failure to write an unusual incident report regarding an incident between a youth resident and an adult unit manager. Nor did he establish a basis for his incidents of neglect of duty. Conversely, the Agency identifies several aggravating factors that served as a supportive base for taking the actions that resulted in Employee's removal. Over the period of two (2) years, Employee was disciplined five (5) times for misconduct. The discipline included two (2) suspensions, a reprimand, placement on leave restriction, and counseling. All of these incidents of misconduct, when viewed in conjunction with Employee's latest offense, are aggravating grounds to support the penalty of removal. Employee was suspended in 2006 and again in 2007. Therefore, the penalty of suspension is inappropriate for the instant misconduct because it would not adequately address Employee's continued actions of neglect of duty, incompetence, and on-duty employment related acts or omissions that interfere with the efficiency and integrity of Agency operations.

The Agency considered the following aggravating factors in determining Employee's latest penalty:

1. Cause - Neglect of Duty and Incompetence: Employee failed to comply with security and control protocols.

On December 17, 2007, Project Hands Investigative Report, 07-OHYC-J53, *Tab 13*, substantiated a finding of neglect for Employee's failure to comply with the security and control protocols of OHYC. On June 6, 2007, Employee escorted a resident to another unit without supervisory approval or documentation in the logbook and an attack between resident youth resulted. The YSA policy on "Youth Supervision and Movement," YSA 9.3, states in pertinent part, " ... Staff shall escort or provide sight supervision on individual youth movement from one point to the next If a youth leaves the assigned unit/location within the facility for any reason, this fact must be communicated to the Officer of the Day, the Control Center, and recorded in the unit log book." *Tab 3*. Employee violated the policy when he did not request authorization to escort a resident to a unit and failed to record the movement in the unit logbook. The penalty imposed on Employee was a thirty-day suspension for: 1) negligence in documenting youth movement; 2) negligence in "eye's on supervision" of youth; 3) incompetence in failing to obtain supervisory approval for youth movement; and 4) failure to follow verbal or written instructions

¹⁴ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *supra*.

with regard to youth movement. The Agency provided Employee advance notice of suspension on February 1, 2008, and final notice on July 3, 2008. *Tab 16 & Tab 19.*

2. Cause - Neglect of Duty, Absence without Official Leave, and Incompetence: Employee failed to obtain permission to leave his post.

On January 17, 2008, the Employee abandoned his assigned post when he left the facility to clean snow off his personal vehicle and never returned. It is a violation of the DPM to be absent without official leave. *DPM § 1619.1.* The Agency relies on employees to be at their posts to monitor youth and to ensure that the facility operates smoothly. Any gap in coverage by an employee leaving their post compromises the security of the facility and burdens fellow staff. Employee received a reprimand on January 22, 2008 for absence without leave (AWOL) and was charged one hour of leave without pay regarding his "Post Abandonment." *Tab 15.* Employee's disregard for the security of the youth and the facility was a failure to follow instructions, observe precautions regarding safety, and carry out assigned duties and responsibilities,

3. Cause - Neglect of Duty and Incompetence: Employee brought contraband into the facility and accepted contraband from a resident youth.

On December 28, 2007, Employee used monies given to him by a youth to purchase Chinese food. *Tab 14.* It is against the Agency's Contraband (Confiscation and Chain of Custody) Policy, YSA 9.19, to bring outside food into the facility for youth without approval from supervisory staff. *Tab 6.* Moreover, taking money from youth is not permitted. Employee violated Agency policy, and his behavior showed a flagrant disregard for Agency rules and policies, The Agency counseled Employee for his failure to follow rules and policies.

4. Cause - Neglect of Duty, Insubordination, and Incompetence: Employee's excessive tardiness adversely affected Agency operations.

After several counseling sessions, on July 17, 2007, the Agency placed Employee on a three (3) month leave restriction due to excessive tardiness during the period January 2007 to July 2007. *Tabs 11 & 12.* Employee's behavior was a violation of Chapter 16 of the DPM. *DPM § 1619.1.* Employee's tardiness adversely impacted his co-workers, and the overall operation and effectiveness of the facility. Further, it evidenced a refusal to comply with direct orders.

5. Cause - Neglect of Duty and Incompetence: Employee failed to follow verbal and written rules.

On June 18, 2006, Employee left his assigned unit without authorization. His absence resulted in the unit not being in compliance with mandated staffing levels. Subsequent to his departure, a fight broke out. *Tab 7 & 8.* Employee failed to follow instructions and observe precautions regarding safety in an on duty act that interfered with the efficiency and integrity of government operations. *DPM § 1603.3.* Further, Employee violated the Agency's "Youth Supervision and Movement Policy, YSA 9.3, which states in part, "Staff shall escort or provide sight supervision of individual youth movement from one point to the next, escort all group movement from point to point.. ... " *Tab 3.* Employee's actions were a lack of "eyes on

supervision." Specifically, his actions amounted to negligence in performing official duties, inexcusable neglect of duty, and failure to follow verbal or written duties. As a result of his actions. Agency provided employee a 15-day advance proposal for a 5-day suspension and notice of final decision for a 5-day suspension on March 12, 2007. *Tabs 9 & 10.*

CONCLUSION

In accordance with Chapter 16 of the District of Columbia Personnel Regulations. I conclude that the Agency had sufficient cause to remove Employee. Employee's removal was based upon a series of violations, including his failure to file an incident report, a serious and potentially life threatening breach of the Agency's operational mandate, as well as a violation of Reporting Unusual Incidents Policy, YSA 1.14. The Agency decided on removal based upon the fact that, viewing the *Douglas' Factors*, there were no particular mitigating factors to Employee's benefit, for this series of offenses.¹⁵ On the other hand, the Agency did find numerous aggravating factors in support of the proposed removal of Employee. Over the course of two years, Employee was disciplined five (5) times for actions that in some manner jeopardized the efficiency of Agency's operation, the integrity of an Agency's facility, and demonstrated negligence and incompetence toward his duties. As well, Employee's earlier suspensions and counseling for his offenses constituted appropriate progressive discipline, as efforts were made to impress upon Employee the need to correct and permanently realign his job-related behavior.

I am satisfied that Agency has properly exercised its managerial discretion and that its chosen penalty of removal 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:

/ S /
ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge

¹⁵ *Douglas v. Veterans Admin.*, 5 MS.P.B, 280, 304 (1981).