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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ANTHONY DYSON)	OEA Matter No. 1601-0079-14
Employee)	
)	
v.)	Date of Issuance: June 10, 2015
)	
D.C. DEPARTMENT OF CORRECTIONS)	Lois Hochhauser, Esq.
Agency)	Administrative Judge
_____)	
Anthony Dyson, Employee, <i>Pro Se</i>)	
Sonia Weill, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION

Anthony Dyson, Employee, filed a petition with the Office of Employee Appeals (OEA) on May 30, 2014, appealing part of the penalty imposed by the District of Columbia Department of Corrections, Agency, resulting from an adverse action. At the time he filed the appeal, Employee was a correctional officer with a permanent appointment and in career status.

The matter was assigned to me on or about August 25, 2014. On September 8, 2014, I issued an Order directing Employee to address a jurisdictional issue. Employee did so in a timely manner.

The prehearing conference took place on January 27, 2015. At the conference, Employee stated that he was not disputing that he engaged in the charged misconduct or the 30 day suspension imposed as part of the penalty. He stated that he was only appealing the portion of the penalty that imposed a demotion. The parties agreed that an evidentiary hearing was not needed and that they would submit written briefs on the issue by February 17, 2015. An Order was issued on January 28, 2015 memorializing the matters discussed at the prehearing conference. The record in this matter closed on February 17, 2015.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUE

Is there a basis for disturbing the penalty imposed by Agency in this matter?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The facts, alleged by Agency, are not disputed by Employee. On the night of January 12, 2014, Employee witnessed an altercation between two inmates, during which one inmate attacked another inmate with a sharp instrument. At the time, Employee, who was on duty, was reading a newspaper. Employee did not follow Agency protocol which required him to take immediate action. Employee does not dispute Agency's contention that he had received training throughout his employment with Agency and was aware of the established protocol for officers under the circumstances. He stated he was also aware that while on duty, he was required to pay full attention to his duties, and was not permitted to read the newspaper. Employee did not approach the inmates and try to stop the attack, as required He eventually left the area.

Agency charged Employee with: "failure to monitor detail inmates, abandonment of post and failure to provide assistance." During the internal investigation, Employee stated he had in fact intervened and that he was not immediately aware of the incident because he had been distracted by another inmate. However, Agency found Employee's description of his actions conflicted with video footage taken at the time. Therefore, Agency also charged Employee with "fail[ure] to accurately report an incident." The specific charges were:

- Neglect of Duty – failure to follow instructions or observe precautions regarding safety;
- Program Statement 2010.9F, Use of Force and Application of Restraints;
- Program Statement 3300.1A, Employee Code of Ethics and Conduct, Section 8(t); and
- Manual of Regulations and Orders, 1.1 Operational Knowledge Required and 1.4 Attention to Duty

(Advance Notice of Proposed Removal, Agency Pre-Hearing Statement at 1, Investigative Report at 1-4).

The Neglect of Duty specification relates to Employee's actions or omissions at the time of the January 12 incident, *i.e.*, his failure to monitor the inmates, his failure to provide assistance and abandonment of his post. The misfeasance specification refers to Employee's failure to give accurate information during the internal investigation of the matter. Agency maintained that in his incident report, Employee had numerous untrue or inaccurate statements, such as asserting that he had grabbed the perpetrator of the assault; and that his attention had been "diverted" by an inmate calling him from the top tier, and as a result he did not "immediately" notice the altercation until he heard a "loud thump" coming from the direction of the fight. Agency noted that the video footage contradicted Employee, and supported the finding that Employee was reading a newspaper while on

duty that evening, in violation of the Manual of Regulations and Orders, which require “full time and attention” of correctional officers while on duty. It further asserted that the video footage also supported the finding that Employee did not enter the module when the fight began or at any time thereafter.

The incident was first investigated by Major Kevin Hargrove. In his Investigative Report, which was forwarded to Agency Director on February 6, 2014, Major Hargrove found that the relevant video footage supported Agency’s charges and did not support Employee’s explanations of the events. (Investigative Report at 1-4). On April 14, 2014, Agency issued the proposed notice, recommending that Employee be removed.

On May 2, 2014, Hearing Officer Michael Stern conducted an administrative hearing. In reaching his decision Hearing Officer considered the entire record, including the evidence presented at the hearing and Employee’s written submission. In his Administrative Review, issued on May 7, 2014, the Hearing Officer concluded that Agency had proven that Employee engaged in the charged misconduct that resulted in two violations of the DPM¹ violations: on-duty conduct or omission that “interferes with the efficiency and integrity of governmental operations by neglect of duty and misfeasance, by failing to provide accurate information during the investigative process. He noted that although it was not clear that Employee actually “abandoned” his post, it was evident that Employee remained outside the module where the fight was taking place, and was “unresponsive to the ongoing disturbance.” He further found that by reading the newspaper while on duty, and by failing to intervene in the altercation, Employee violated Agency directives. The Hearing Officer considered Employee to be credible and forthcoming. After reviewing the penalties, the Hearing Officer recommended “a suspension of at least 30 days and a reduction in grade/position for both offences.” (Administrative Review at 1-4).

On May 20, 2014, Agency issued its official notification of its final decision. In the letter, Deciding Official Director Thomas Faust stated that he had “thoroughly and carefully reviewed” all relevant documents related to the incident, including the Hearing Officer’s report and his recommendations, as well as Employee’s submissions. Mr. Faust stated that he considered the *Douglas Factors*,² particularly Factors 1, 5, 6, and 9. With regard to Factor 1 – the nature and seriousness of the offense and its relation to Employee’s duties and the intentional nature of the action- Director Faust stated that Employee had “compromised the integrity and credibility of the Agency to maintain a safe, secure and humane environment when [he] failed to quell an inmate-on-inmate attack.” He stated that Factor 5, the impact on the supervisor’s confidence in the employee’s ability to perform assigned duties” was applicable, because Employee’s “unpreparedness and inaction could have resulted in the attacked inmate being more seriously injured ...or could have resulted in his death.” The Director stated, with regard to the “consistency of the penalty” for similar conduct (Factor 6), that “[i]n similar circumstances, the penalty has and will always be removal.” Finally, he stated that, consistent with Factor 9, Employee had received training and was aware of the required protocols with regard to the prohibition against reading the newspaper on-duty, and the requirement to intervene when inmates are fighting. He stated that Employee had “23 years of experience and the rank of sergeant” so that he “either knew or should have known that behavior of this nature was

¹ District Personnel Manual

² *Douglas v. Veteran’s Administration*, 5 M.S.P.B. 313 (1981).

intolerable.” The Agency Director concluded that based on his review of the submissions, the Hearing Officer’s recommendation and the application of the *Douglas Factors*, the Employee would receive a 30 day suspension without pay and would be reduced grade/rank. (Final Agency Notice at 1-3). Employee was suspended without pay for 30 days, effective May 23, 2014. He returned to work on June 23, 2014. The demotion took effect on May 26, 2014. (Agency Pre-Hearing Statement, at 2).

The jurisdiction of this Office is set forth in D.C. Official Code §1-606.03(a), which states in pertinent part:

An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more

This Office has jurisdiction to determine whether the imposed penalty: is within the range allowed by law, regulation, and any applicable table of penalties; is based on the relevant factors; and is a clear error of judgment. *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). This Board has made clear that it is the responsibility of the employing agency to determine the penalty. This Office will not disturb a penalty unless it violates the law or applicable regulation; or unless it is arbitrary or an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, Opinion and Order on Petition for Review, 30 D.C.Reg. 352 (1985). A penalty that comes “within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment” will not be challenged by this Office. *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C.Reg. 2915 (1985).

The appropriateness of a penalty “involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment.” *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). Disciplinary action against an employee may only be taken “for cause.” In this matter, the specifications of the charges come within the definition of “cause.” The incident was investigated by Agency before it proposed adverse action, and was thereafter reviewed by the Hearing Officer after an administrative hearing, held prior to the issuance of the final Agency notice. The deciding official reviewed the record and considered the relevant *Douglas Factors*. Employee does not dispute the charges and does not dispute Agency’s contention that he received the requisite training and that he knew or should have known the required protocols and procedures to follow. Agency met its burden of proof when it ascertained the “factual circumstances” in this matter. It also met its burden of proof that Employee engaged in the charged misconduct.

The review of the penalty consists first of determining whether it violates law or regulation. The Table of Penalties provides at DPM Chapter 16, §1619.1 that for a first offense of “on duty conduct or omissions” that interfere with the efficiency or integrity of government operations, ranges from reprimand or removal. The range of penalties for the misfeasance charge provides for a maximum 15 day suspension. Since Agency met its burden of proof regarding both charges, the penalty imposed comes within the permitted range.

The penalty is also reviewed to ensure that it was not arbitrarily imposed, and that Agency considered relevant factors. In support of his position that the penalty of reduction in grade was too

harsh³, Employee argues that he had never before been disciplined and had always received positive performance ratings. He also notes that the Hearing Officer found him to be “forthcoming and sincere.” He argues that Agency was not required to follow the Hearing Officer’s recommendation regarding the penalty and that the penalty violated Employee’s collective bargaining rights and the collective bargaining agreement.⁴

An Agency’s decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion. *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011). The record supports the conclusion that Agency did not abuse its discretion, act arbitrarily or fail to consider relevant factors when it determined the penalty in this matter. This Office is guided by criteria known as the *Douglas* Factors, which provide factors that should be considered by an employing agency when determining the appropriate penalty to impose. An agency is not required to analyze each factor. In the final Agency notice, the Agency Director reviewed and considered the pertinent factors. He noted that Employee’s conduct could have resulted in more serious injury or the death of the inmate being attacked, and that Employee who had been with Agency for 23 years, held the rank of sergeant, and had received the requisite training. He stated that similar misconduct had always resulted, and will continue to result, in termination. Although the Agency Director did not state why he reduced the penalty from removal to a 30 day suspension and demotion; he did note the favorable statements by the Hearing Officer; and was aware of Employee’s longevity and status with Agency. The penalty imposed by Agency in this matter, was less severe than the penalty imposed on other employees who engage in similarly misconduct.

Based on this analysis, the Administrative Judge concludes that Agency met its burden of proof regarding the appropriateness of the penalty. The record supports the conclusion that in determining the penalty, Agency did not violate any law or rules, did not abuse its discretion, did not act arbitrarily and did not fail to consider relevant factors. In sum, the Administrative Judge concludes that there is no basis for this Office to disturb the penalty imposed by Agency in this matter

ORDER

It is hereby

ORDERED: This petition for appeal is dismissed.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

³ The Administrative Judge reviewed and considered all of Employee’s submissions.

⁴ This Office is guided by the DPM and not the collective bargaining agreement when reviewing the appropriateness of a penalty. Further, OEA does not have authority to hear allegations of violations of collective bargaining rights or of collective bargaining agreements.