THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
SHARON EPPS	) OEA Matter No. 1601-0081-07
Employee	)
	)
v	) Date of Issuance: July 11, 2008
	)
D.C. DEPARTMENT OF THE ENVIRONMENT	) Muriel A. Aikens-Arnold) Administrative Judge
Agency	)
	)

Glenna Barner, Esq., Assistant Attorney General for the District of Columbia
Barbara Milton, President, AFGE Local 631, Employee Representative
Dia Khafra, AFGE Local 631, Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 30, 2007, Employee, an Energy Program Clerk, filed a Petition for Appeal (PFA) of Agency's action to summarily remove her from her position effective January 9, 2007 based on a charge of committing any on-duty or employment related act or omission that the employee knew or should reasonably have known is a violation of the law, conduct that threatens the integrity of government operations, to wit: you conspired with applicants to receive fraudulent energy benefits and accepted monetary payments from the applicants.[1]

This matter was assigned to this Judge on July 13, 2007. On September 5, 2007, an Order Scheduling a Prehearing Conference on October 5, 2007 was issued. After a series of

[1] On 4/24/07, after an administrative review and recommendation by a hearing officer, a notice of final decision was issued. OEA Rule 604.2, 46 D.C. Reg. 9299 (1999) requires that an appeal, to this Office, must be filed within 30 days of the effective date of the appealed action. Under the circumstances herein, the 30 days must reasonably start, either on 4/24/07 or the date of receipt of said notice. Employee, in item 20 of her PFA, represents that she received the final decision on 5/1/07. She also attached a copy of the envelope, addressed to her, reflecting a postmark of 4/30/07. Agency's final decision located at Tab 4 of its adverse action file (AAF) has no mailing receipt. Nor does Agency dispute Employee's claim. Therefore, this Judge concludes that said appeal was timely filed.

postponements for various reasons, a Status Conference was held on November 30, 2007. On December 6, 2007, an Order Convening Hearing was issued scheduling said Hearing on January 11, 2008. After a postponement, the evidentiary hearing was conducted on January 24, 2008. On March 10, 2008, an Order Closing the Record was issued. Following the submission of Closing Briefs, the record was closed effective April 7, 2008.

JURISDICTION

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

ISSUES

1) Whether the Agency action was taken for cause; and
2) If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT

Statement of the Charges

By Notice of Summary Removal, dated January 9, 2007, Employee was notified that, effective the same day, she was removed from her position as Energy Program Clerk in accordance with the provisions of § 1616.1 of the District Personnel Manual (DPM). That action was based on a charge of committing any on duty or employment-related act or omission that the employee knew or reasonably should have known is a violation of the law, conduct that threatens the integrity of government operations, to wit: conspiring with applicants to receive fraudulent energy benefits and accepted monetary payments from the applicants. The notice continued as follows:

> On January 4, 2007, the District Department of the Environment/Energy Division received a report from the Office of the Inspector General, Office of Investigation, in which you admitted to coordinating with the applicants: (1) to defraud the Low Income Energy Assistance Program (LIHEAP) by either instructing applicants not to report their correct total household income or to report an incorrect household size or both. This resulted in applicants receiving benefits not due them or applicants receiving an increased benefit amount. In this report, you also admitted to accepting monetary payments from applicants.[2]

[2] See Joint Exhibits (hereinafter referred to as "JE") 1-A through 1-D. The remainder of the Notice reflects Employee's procedural rights which are not necessary to repeat.

Employee responded to the Notice before a Hearing Officer, who made a recommendation to the deciding official. A final decision was issued, on April 24, 2007, sustaining the summary removal action.[3]

Agency's Position.

Agency contends that it met its burden of proof that Employee's removal was for cause and that the penalty was appropriate under the circumstances. Based on Employee's interview, hand-written statement and testimony, she admitted to defrauding LIHEAP and receiving money for advising applicants to report inaccurate household size and income. As a result of her actions, the energy assistance program, which receives its money from a federal grant, was unable to provide benefits to some qualified applicants. Employee's conduct threatened the integrity of government operations.[4]

Employee's Position.

Employee contends that there was no "just cause" to terminate her employment and is seeking reversal of the removal. First, Employee was denied her right to union representation during the investigative interview with Larry Carr, Office of the Inspector General. Mr. Carr subsequently intimidated, coerced and manipulated Employee when he obtained documents from her during said interview.[5] Employee's written statement, dated August 4, 2005, reflects what Mr. Carr told her to write, rather than what she explained to him were her duties.[6]

Second, there was a 16-month delay in submission of the report from the Office of the Inspector General, which demonstrates that the allegations were not, among other things, a threat to the integrity of government operations, or an immediate hazard to the agency. Third, Agency violated the DPM, § 1617.1 and § 1603 as no investigation was conducted to determine whether the offense actually occurred and, if so, to determine the severity of the offense. Fourth, there was no evidence, offered by Agency, to show that applicants were not entitled to benefits. Nor was there evidence that Employee received money related to her employment.[7]

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[3] See JE 1-E through 1-G.

[4] See Agency's Closing Argument (ACA).

[5] See Employee's Post Hearing Brief (EPHB) at pp. 4-9 citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (public employee's right to union representation during investigatory interview that could result in discipline; and *Garrity v. New Jersey*, 385 U.S. 495 (1967) (Fifth Amendment applies to interrogations of public employees). Also, Joint Exhibit (JE) 1-A, (Warning and Assurance to Employee) which Employee claims she did not sign.

[6] See EPHB at pp. 5-6, 9; JE-1B.

[7] See EPHB at pp. 15-16.

Summary of Material Testimony

Larry Carr (Special Agent, Office of the Inspector General)

Mr. Carr testified that he investigates issues of waste, fraud and abuse related to the District government. An outside law enforcement agency provided information that Employee assisted persons to receive increased energy assistance benefits. Employee was contacted and interviewed at the Office of the Inspector General, in the presence of a second agent. Employee was advised of her rights and given a form to read and sign that she understands her rights. The door, to the interview room, was closed, but not locked. As a safety issue, the door to the interview room is never locked due to the need of the agent posted outside the door to assist other agents in the room, if necessary. Employee was not in custody and told that she was free to leave the room. Mr. Carr assumed that Employee was upset and cried because she was accused and admitted to committing program fraud. There was a pause in the interview when Employee became emotional. Use of the term "program fraud" was Mr. Carr's assessment of Employee's wrongdoing. He did not recall Employee's exact words, but she explained that she told people to either increase the number of household dependents or decrease their documentation that shows their income amount.[8]

During the interview, Employee verbally admitted to receiving money for allowing people to receive increased energy assistance benefits, not due. Mr. Carr testified that he did not tell Employee what to write in her statement, that she gave it willingly, and that he did not threaten to arrest her or make promises to her.[9]

Employee was not advised that she was the subject of the investigation; rather, that the Energy Office was being investigated. One other person, who was a manager, was interviewed. The door to the interview room had a key lock, but Mr. Carr did not possess a key. He did not recall whether he had advised Employee that she was the subject of the investigation at the time she signed the form waiving her rights. Nor did he recall accusing her of lying. When questioned about the outside referral of allegations regarding Employee, Mr. Carr testified that he received verbal information and a "standard referral write-up" naming Employee.[10]

Shannan Martin (Special Agent, Office of the Inspector General)

Ms. Martin testified that she was present during Employee's investigatory interview, that she did not recall whether Employee said she did not know what to write in her statement or

[8] See Transcript (hereafter referred to as "Tr.") at pp. 16-26; 47-48; 62; 65.
[9] See Tr.. at pp. 26; 31.
[10] See Tr. at pp. 35-37, 43-48. Agency did not present any documentary evidence reflecting the "standard referral write-up."

whether Mr. Carr gave Employee any assistance. Ms. Martin did not tell Employee what to write.[11]

Corey Buffo (Director, Office of Policy and Sustainability)

Mr. Buffo testified that he received information that Employee assisted people she knew in erroneously filling out applications to obtain greater benefits than they would otherwise be entitled to and that Employee also received money for that assistance. He summarily removed Employee for said misconduct which violated DPM regulations and undermined the credibility and integrity of Agency's operations.[12]

Despite the Hearing Officer's recommendation for suspension, Mr. Buffo determined that removal was warranted based on Employee's confession, and possible repeat of the misconduct. He did not interview Employee or the other persons involved; and was alarmed about the time lapse between the offense in 2005 and his receipt of the investigative report in January 2007.[13]

Keith Anderson (Chief, Energy Assistance Division)

Mr. Anderson testified that he was Employee's direct supervisor. The LIHEAP and utility discount programs were the major programs, in his division, to help low-income residents of the District meet rising costs of home energy. Energy assistance is determined by household size, household income, type of dwelling and heating source. Employee's duties, which were at the front desk, included screening applicants for required documentation they needed to apply for energy assistance. She also keyed in applications (received via mail or through hosted events) into the computer system, to determine eligibility.[14]

In late 2006, he received a letter from the Office of the Inspector General relative to fraudulent activities admitted by Employee in a sworn statement. Employee's activities may have adverse effects on the District's ability to obtain Federal money for these programs and on eligible citizens who cannot obtain such benefits because, historically, the programs ran out of money halfway through the fiscal year. Such behavior breaks the trust between management and the employee.[15]

Although Employee screened applicants, she did not key in information in the computer from applications brought into the office. Following the screening, an energy assistance

[11] See Tr. at pp. 72-74.
[12] See Tr. at pp. 77-79.
[13] See Tr. at pp. 80-88; JE-1D, JE-1E, and JE-1G. Mr. Buffo also considered second-hand information received after the proposed removal was issued.
[14] See Tr. at pp. 90-92.
[15] See Tr. at pp. 93-95; JE-1B and JE-1C.

representative would key in the customer's information into the data base. Mr. Anderson did not conduct an investigation.[16]

Sharon Epps (Energy Assistance Clerk)

Employee testified that, prior to the interview, Mr. Carr advised that other people in her office were also coming to be interviewed. After checking around the office, Employee found that she was the only one called for an interview and became nervous and scared. When she asked if she could bring someone with her, Mr. Carr said "No. Don't bring anyone. You come alone." When Employee arrived for the interview, Mr. Carr led her to a room, entered, and locked the door. Mr. Car then accused her of stealing computers and lying about it. Employee cried and became hysterical.[17]

Employee next explained her duties regarding applicant questions. At that point, Mr. Carr gave her a piece of paper to write a statement and stated "Your (sic) write, I, Sharon Epps, committed program fraud." Employee did not verbally make that statement. Mr. Carr accused her of taking money from applicants who she assisted, which she denied. Employee listened to what Mr. Carr said and wrote it down because she was scared. Employee referred to the two names as examples of people who tried to give her tokens for helping them. She did not conspire with the applicants to provide information in return for pay. Employee contends that the waiver form was not discussed with her and she did not sign it.[18]

Prior to notification that she would be terminated, Employee did not report that she had been forced into making the written statement because Mr. Carr told her not to say anything to anyone about that interview.[19]

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

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. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq*. (September 1, 2000).[20]

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[16] See Tr. at pp. 102-105.
[17] See Tr. at pp. 111-116..
[18] See Tr. at pp. 117-121; JE-1A; JE-1B.
[19] See Tr. at pp. 124-125.
[20] Section 1603.3 set forth the 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

In an adverse action, this Office's Rules and Regulations provide that an 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).

Based on the testimonial evidence presented, the absence of any other evidence to demonstrate that applicants received energy assistance benefits to which they were not entitled; the lack of evidence that said benefits were provided as a direct result of Employee's actions; and the absence of proof that Employee "conspired" with applicants to receive fraudulent energy benefits, this Judge is not convinced that the alleged misconduct occurred.[21] Here, Agency confuses proof and allegations. Agency proffered no documentary evidence except Employee's written statement, as a confession of misconduct, which, under the circumstances, is, in and of itself, unreliable.[22] Statements by an appellant made outside a hearing setting, although made voluntarily and in a setting that is noncustodial, may not satisfy even a substantial evidence standard, in part because the psychological motivation prompting a confession after the fact is an unknown factor. See *Roberts v. Dept. of Treasury,* 8 MSPR 674, 8 MSPB 323 (1981). Further, neither Mr. Buffo or Mr. Anderson testified that the details in the proposed notice were true. In fact, both witnesses testified that they did not investigate the facts beyond Agent Carr's investigative memorandum.

Although Mr. Carr appeared forthright in his testimony, his limited recall of events signified unreliability. Rather than a firm "yes" or "no", Mr. Carr replied that he did not recall pertinent facts, implying that he was unsure. In evaluating the totality of circumstances, including the lack of additional corroborative evidence, this Judge concluded that Mr. Carr's testimony was unreliable and therefore, was found less than credible.[23] The following illustrate

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not arbitrary or capricious.

[21] Conspire is defined as "To engage in conspiracy. Term carries with it the idea of agreement, concurrence and combination, and hence is inapplicable to a single person or thing, and one cannot agree or conspire with another who does not agree or conspire with him." *See Black's Law Dictionary,* Fifth Edition.

[22] Employee's written statement reflects misspellings, grammatical errors, and phrasing that was not, based on witness testimony, in her own words. This perspective is based on the totality of circumstances, including, but not limited to, witness testimony regarding the investigatory interview of Employee, who recants her statement.

[23] Agent Martin, who testified that she was present during Employee's investigatory interview, did not support Agent Carr's version of events. In light of, *inter alia,* the testimony of the investigating agents, this Judge found Employee's testimony credible. Employee had no burden to disprove the charges against her.

this point. Agent Carr did not recall:

> -whether he used the word "warrant" when asking Employee whether she had "outstanding issues";
> -specific words Employee used to describe the allegation;
> -specifically what Employee said when explaining her role and responsibilities;
> - who drew the "X" on page 2 of Employee's statement;
> - any specific questions Employee posed regarding her statement;
> -whether Employee advised that she did not know what to write; and
> -whether he advised Employee, when he gave her the waiver form, that she could face discipline and/or criminal charges,
> -whether he raised his voice and stated that Employee was lying,[24]

Agency must submit a well-developed record to prove its case by a preponderance of the evidence. See *Hill v. Dept. of the Air Force*, 3 MSPB 506 (1980); *Barnett v. Dept. of Interior*, 6 MSPR 4, 6 MSPB 19 (1981). Here, in addition to the foregoing discussions, Agency did not identify the source of the allegations against Employee. nor did it present any evidentiary proof that the allegations were true. Assuming *arguendo*, that Employee advised applicants how to obtain increased benefits, there is no evidence to demonstrate that said benefits were provided to clients in exchange for money.[25]

After carefully considering the evidence presented, all of the arguments of the parties, and the lack of independent corroborating evidence to support the removal action, this Judge concludes that Agency failed to meet its burden of proof by a preponderance of the evidence and Agency's action should be reversed.

ORDER

It is hereby ORDERED that:

1) Agency's action removing Employee is REVERSED;

2) Agency reinstate Employee and restore to Employee all pay and benefits lost as a result of its action; and

3) Agency file with this Office documents signifying compliance with the

[24] See Tr. at pp. 48-49, 52, 57, 59-60.
[25] See Tr. at p. 67. Although Mr. Carr testified that he presented Employee's statement to the Office of the Attorney General for D.C., "probably sometime in 06", there is no evidence of any further investigation. Moreover, Mr. Anderson testified that he received a report regarding Employee's misconduct in late 2006; while Mr. Buffo testified that he received said report in January, 2007.

terms of this Order within thirty (30) days from the date this decision becomes final.

FOR THE OFFICE: _____
MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge