

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
BEVERLY GURARA,)	
Employee)	OEA Matter No. 1601-0080-09
)	
v.)	Date of Issuance: July 16, 2010
)	
DISTRICT DEPARTMENT OF)	
TRANSPORTATION,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	
Clifford Lowery, Union Representative)	
Angela A. Freeman, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 6, 2009, Beverly Gurara (“Employee”) a Staff Assistant DS-0301-09, filed a Petition for Appeal challenging a suspension from the District Department of Transportation (“DDOT” or “Agency”) with the Office of Employment Appeals (“OEA”). Employee received an advance written notice of proposal of a fifteen day suspension on January 8, 2009. The Notice of Final Decision regarding the proposed suspension was received on February 5, 2009, and became effective on February 9, 2009. I was assigned this matter on or around March 16, 2009. Thereafter, a series of conferences were held to assess the parties’ arguments and to conduct discovery relevant to the matter. After considering the parties’ arguments, I decided that an evidentiary hearing should be conducted. The evidentiary hearing was scheduled for November 19, 2009, but it was rescheduled to November 24, 2009, upon the request of both parties. Both parties have filed their respective written closing arguments. The record was closed on March 12, 2010.

JURISDICTION

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

ISSUES

1. Whether Agency's adverse action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

SUMMARY OF RELEVANT TESTIMONY

Agency's Case In Chief

Lamont Antonio Hinton (See Transcript at 12-95¹)

Lamont Antonio Hinton ("Hinton") testified that he is employed by the Agency, as the Deputy Chief of the Street and Bridge Maintenance Division. Hinton is responsible for planning daily activities, training, repairing potholes, street patching, and some administrative functions. He is also responsible for snow removal and indirectly supervises 110 employees. Hinton directly supervised Employee for two years. In April 2008, Hinton suspended Employee for nine days after charging her with absence without official leave ("AWOL").² In October 2008, Hinton suspended Employee for fifteen days for neglect of duty and AWOL. According to Agency, the incidents leading to the October 2008 suspension were Employee's failure to attend the "City Works training,

¹ Hereinafter, all references to the transcript shall be denoted as "Tr."

² Agency Exhibit #9. This is the advance written notice of proposal to suspend Employee dated December 31, 2008. The letter states in pertinent parts "In April of 2008, you served a nine-day suspension for unexcused absence without official leave. The nine-day suspension was recommended to correct your issues with absenteeism and tardiness. Because of the previous corrective action has not had the desired positive effect on your attendance record, your actions merit adverse action." *See* Tr. at 15.

snow training, and a history of AWOL.” *See Tr.* at 14-15.

Neglect of Duty

According to Hinton, Employee failed to attend the City Works training. This training was held to teach employees how to use a new software system to plan work occurring around the city since the current system was being replaced.³ Hinton sent an email to inform employees about the City Works training being conducted on October 14-16, 2008.⁴ Employee was assigned to work at her regular work site in the morning and then attend the training in the afternoon. However, on October 14 -16, 2008 Employee did not attend the training or contact her supervisor to be excused and rescheduled. Instead, she worked her regular shift on those dates. On October 16, 2008, Employee not only missed the training but also did not report for duty at her normal work station.⁵ Hinton questioned Employee about her failure to attend the training and in her response “she basically said that she just wasn’t going to training.” *See Tr.* at 17-18.

Hinton testified that Employee failed to attend the snow training. He then explained that Employee’s Staff Assistant position duties include participating in all emergency activities such as the snow program.⁶ Hinton notified Employee formally and informally about the snow training during the mandatory staff meetings.⁷ Accordingly, she was expected to attend the snow program training during the first or second weekend in October. Employee did not attend the training at that time.⁸ Employee told Hinton that she was “. . . not going to participate in the snow [training], unless Terry Bellamy sent a car to pick her up” *See Tr.* at 28. Hinton stated that Terry Bellamy is the Associate Director of DDOT.

Absent Without Official Leave (“AWOL”)

According to Hinton, Employee was AWOL on October 27 and 28, 2008. Employee called Hinton to request a leave on October 27 and 28, 2008. Hinton received Employee’s leave request on his answering machine. Hinton recalled that Employee

³ *See Tr.* at 16-17.

⁴ *Agency Exhibit # 1.* Hinton sent an email on October 10, 2008, to the staff assigning times to attend the City Works training on October 14-16, 2008. Hinton specified that if there was scheduling conflict then employees must contact their supervisors.

⁵ *Agency Exhibit # 2.* Hinton identified the exhibit as a sign in sheet used to document staff and supervisor’s attendance. Employee signed in for work on October 14, 2008 and October 15, 2008. However, Employee did not sign in for work on October 16, 2008.

⁶ *Agency Exhibit # 3.* Hinton explained that Employee is an emergency employee based on the job description of a staff assistant. In pertinent parts a staff assistant is “. . . designated as an emergency employee position under the provisions of District Personnel Manual, Chapter 12. As such, Employee was required in emergency situations to perform crucial duties, i.e. snow removal, debris removal, transportation, shelter operation, food distribution and communication. These duties were to be performed when the government [was] closed or when most employees are dismissed early.” *See Tr.* at 24-25.

⁷ *See Tr.* at 26.

⁸ *Agency Exhibit # 4.* Hinton identified the Exhibit as the snow training attendance sheet. Employee did not sign the attendance sheet. Hinton provided that everyone who attended the training signed the attendance sheet.

specifically requested that the leave be considered “use or lose leave.”⁹ According to Hinton, Employee did not properly request the absence. He explained that the use or lose leave is only available when an employee has accumulated an excess of 240 hours of annual leave. This leave must be used before the end of the year and can be requested by submitting a leave slip twenty-four hours in advance.¹⁰ However, unscheduled leave can be requested without advance notice.¹¹ All leave must be approved by a supervisor. When a supervisor cannot be reached employees can leave a message including their contact information, or they can call back.¹² Employee did neither so she did not receive approval for her absence. Consequently, Employee was considered AWOL.

Hinton noted that Employee was tardy for work on October 20 and 22, 2008. Hinton stated that Employee’s work day begins at 7:30am and ends at 4:00pm. Employee signed in to work at 8:30am and signed out at 4:00pm on October 20, 2008.¹³ Also on October 22, 2008 Employee signed in at 8:00am and signed out at 4:00pm. Hinton stated that normally when an employee is going to be late they make the time up instead of taking leave that day. *See Tr. at 37-38.* Hinton explained that when an employee does not make up the time that they were tardy they “. . . should take leave for that time.” *See Tr. at 38.* However, Employee did not stay later to make up for her tardy nor did she request to use her unscheduled or annual leave on either occasion. Therefore, Hinton considered Employee AWOL.

Francesco Pacifico (See Tr. at 96-167)

Francesco Pacifico (“Pacifico”) oversees the daily operations and programmatic functions as the Chief of the Street and Bridge Maintenance Program for the Agency. He has been in this position since August 2001 and supervises approximately 105 to 120 employees. Pacifico testified to being familiar with Employee because he is her secondary supervisor and the proposing officer in her suspension. According to Pacifico, the Agency followed a progressive disciplinary action in suspending Employee.¹⁴

Neglect of Duty

According to Pacifico, Employee had problems with punctuality, attendance, and requesting leave.¹⁵ He also stated that Employee failed to fulfill her job duties in her programmatic functions.¹⁶ One of the programs that Employee failed to attend was the City Works training on October 14-16, 2008. When an employee fails to attend training, the Agency’s policy for reprimand is handled on a case-by-case basis.¹⁷ Normally, employees provide their own transportation to the training sites; however, the Agency

⁹ *See Tr. at 35.*

¹⁰ *See Tr. at 29.*

¹¹ *See Tr. at 30.*

¹² *See Tr. at 29-31.*

¹³ *Agency Exhibit # 7.* Hinton identified the exhibit as a sign-in sheet for the October 19 – 25, 2008.

¹⁴ *See Tr. at 116-117.*

¹⁵ Pacifico described the “use or lose leave” similar to Hinton.

¹⁶ *See Tr. at p. 99.*

¹⁷ *See Tr. at 126*

can provide transportation if requested. Also, Employee could have requested a Metro card from the Agency so that she could attend the program since the training was located near a Metro Rail station.¹⁸

Employee did not attend the aforementioned mandatory snow training. Hinton brought Employee's absence to Pacifico's attention. Thereafter, Pacifico approached Employee for an explanation of her absence.¹⁹ Employee responded to his inquiry by stating that "I'm not working the snow. Somebody's going to have to pick me up if they want me to work snow." *See* Tr. at 107. Pacifico told Employee "You need to show up to snow training. You will be a part of this snow training. It is mandatory. . . [e]veryone in the Street and Bridge Maintenance Division shall work the snow program." *See* Tr. at 135.

Donna Washington (See Tr. at 169-181)

Donna Washington ("Washington") testified that she currently serves on the administrative staff, in the Street and Bridge Maintenance division as a program manager for the Agency. However, in October 2008, she served as a Program Analyst. Washington has been employed by the Agency for six years and is only familiar with Employee as a fellow co-worker.

Washington is considered an essential worker; therefore, she must attend the snow training and be on call any time there is snow. She testified to knowing about the snow training through either email or verbal communication with others. According to Washington, all Street and Bridge Maintenance employees must attend the snow training.²⁰ Washington attended the snow training on October 11, 2008.²¹

Employee's Case in Chief

Beverly Victoria Gurara (See Tr. at 181-216)

Beverly Victoria Gurara ("Employee") testified that she is employed by the Agency as a Staff Assistant under the supervision of Lamont Hinton. She has worked for the Agency for six years and Hinton was her supervisor at the time of the incident in question.

Neglect of Duty

Employee was aware of the City Works Training on October 14, 15, and 16, 2008. Instead of attending the training, she worked her regular eight-hour shift on October 14-16, 2008. Employee claimed that she did not have transportation and therefore was unable to attend the training. However, she did not request transportation

¹⁸ *See* Tr. at 123.

¹⁹ *See* Tr. at 107.

²⁰ *See* Tr. at 171.

²¹ *See* Tr. at 172.

from Agency.²² Employee also stated that “[t]here is no subway going—I mean not from . . . W Street.” *See* Tr. at 185. During a staff meeting, the supervisor stated that employees would be rescheduled to attend the training if they had not previously attended. Employee was rescheduled and attended the City Works training in 2009.²³ She was not written up for insubordination for failure to carry out an order in regards to the City Works training.²⁴

Employee did not attend the snow training on October 11, 2008, because she had something else to do. She was aware of the training and that she was supposed to attend.²⁵ Employee denies telling anyone that she refused to attend the training.²⁶ She did not attend any snow trainings in 2008.

AWOL

Employee admits to being an hour and a half late on October 20-22, 2008.²⁷ However, she was not charged with AWOL at that time and was paid fully for these days. She provided that neither Pacifico nor Hinton counseled or talked to her about being tardy. Additionally, Employee states that she does not have a tardiness problem “no more than anybody else.” *See* Tr. at 191.

Employee admits to not being present for work on October 28, 2008. She testified that on both days she left a voice message since none of the supervisors were available.²⁸ Therefore, Employee left a message on Hinton’s answering machine on both dates.²⁹ Employee states that she followed the proper procedure for requesting time off; she has never received a written policy or departmental policy to request leave.³⁰ Employee requested leave on October 27 and 28, 2008, on Hinton’s voicemail.³¹ Then she admits to being present on October 27, 2008. However, Employee identifies Agency Exhibit 6 as the sign in sheet for the week of October 27, 2008, which indicates Employee did not sign in on the days in question³² Employee did not receive official notice that the time she requested off, was considered AWOL, until she received a reduced paycheck.³³

ANALYSIS AND CONCLUSIONS

²² See Tr. at 184-185.

²³ See Tr. at 202.

²⁴ See Tr. at 186-187.

²⁵ See Tr. at 211.

²⁶ See Tr. at 207.

²⁷ See Tr. at 190.

²⁸ See Tr. at 194 .

²⁹ See Tr. at 212.

³⁰ See Tr. at 208-209.

³¹ See Tr. at 191.

³² See Tr. at 203-204. *See* also Exhibit # 6.

³³ See Tr. at 190.

Under the D.C. Official Code §1-616.51 (2001) the Mayor is responsible for issuing the “rules and regulations to establish a disciplinary system that includes: (1) A provision that disciplinary actions may only be taken for cause; (2) A definition of the causes for which a disciplinary action may be taken.”

The published regulations titled “General Discipline and Grievances” found in 47 D.C. Reg. 7094 et seq., (2000) fulfilled the D.C. Official Code §1616.51. The disciplinary actions “shall apply to District government employee in the Career Service who has completed a probationary period” according to §1600.2 of the D.C. Personal Regulations, 47 D.C. Reg. 7094 (2000). These rules are applicable to Employee.

Section 1603.3 of District Personnel Manual (“DPM”) sets fourth the causes for disciplinary actions. Subsection (f) of §1603.3 states that “Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: (2) Absence without official leave; and (3) Neglect of duty.” Employee was suspended for neglect of duty and AWOL.

Section 1603.4 of the District Personnel Manual (“DPM”) states “the causes specified in §1603.3 of this section shall include but not necessarily be limited to the infractions or offenses under each cause contained in the Table of Appropriate Penalties in §1619 of this chapter.”

Whether Agency’s adverse action was taken for cause

Neglect of Duty

Neglect of Duty is defined in §1619.1 of the DPM as “[f]ailure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; careless or negligent work habits.”

Employee is accused of failing to carry out an assigned task, in this case the City Works training on October 14-16, 2008. It is undisputed that Employee did not attend the training and that she was aware that her attendance was assigned by her supervisor. However, Employee claims that she did not have transportation but was present all day at work October 14-16, 2008. Agency presented testimony that transportation can be provided upon request. Employee admitted that she did not request transportation. Agency’s witness Hinton testified that Employee told him that “. . . she just wasn’t going to training.” *See* Tr. at 17-18. Employee claimed that she never refused to attend the training. After considering the circumstances as presented by the parties and utilizing the opportunity of the evidentiary hearing to hear and assess the parties’ testimony and other evidence, I credit both Hinton’s and Pacifico’s testimony as generally being forthright, honest, and credible. On the other hand, Employee’s testimony was at times inconsistent. Accordingly, I find that DDOT proved that Employee failed to carry out an assigned task; therefore, it was a neglect of duty.

Secondly, Employee is accused of failing to attend a mandatory snow training on October 11, 2008. It is undisputed that Employee did not attend the snow training on

October 11, 2008 or any other snow training that year. However, Employee denies refusing to attend the snow training. Agency presented testimony that Employee stated that she was “not working the snow” after being asked for an explanation for her absence. See Tr. at 107. On this point, I find that the Agency proved that Employee failed to carry out an assigned task; therefore, it was also neglect of duty.

I find that the Agency met its burden of proof relative to the charge of Neglect of Duty based on Employee’s failure to attend the City Works training on October 14-16, 2008 and the snow training on October 11, 2008.

Absence Without Official Leave

On the AWOL charge, Employee admits to being tardy for work on October 20, and October 22, 2008. Employee offers that she was not counseled by her supervisors and that she does not think that she has a tardiness problem. However, Agency’s witness Hinton stated that employees are supposed to follow a procedure to make up the time that they are absent from work. He stated that employees could remain at work later or call into work and request the day off. Employee did not do either instead she arrived at work late and left at her regularly scheduled time. Therefore, I find that Employee was AWOL since she did not follow proper leave procedure.

Employee was accused of AWOL when she failed to receive proper approval for her absence on October 27 and October 28, 2008. Employee called and left a message for her supervisor, but she did not leave contact information in order for her leave request to be approved or denied. Agency’s witnesses Hinton, Washington, and Pacifico, described the leave procedure consistently. However, Employee’s testimony regarding leave procedure was not consistent with the other witnesses. I find that the Agency met its burden of proof relative to the charge of AWOL on: October 20, October 22, October 27 and October 28, 2008.

I find that Employee was properly charged with neglect of duty and AWOL. “An employer is entitled to require its employees to be present for work and on time. Unauthorized absences from duty by their very nature disrupt the efficiency of the operation. Further, when an employee is given specific instructions which are blatantly not followed, that conduct undermines the mission of the agency.” See *Kathy Dennie v. Dep’t of Corr.*, OEA Matter No. 16001-0093-02 (October 4, 2004). Employee received a proposal for a fifteen day suspension on December 31, 2008 and the final notice on February 5, 2009. The Agency has proved by a preponderance of evidence that Employee was properly charged with neglect of duty and absence without official leave.

Whether the penalty was appropriate under the circumstances

Under §1603.8 unless otherwise required by law, in selecting the appropriate penalty to be imposed in a disciplinary action, consideration will be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate.

Agency imposed the appropriate penalty for the charges of neglect of duty and absence without leave. The guidelines for the appropriate penalties can be found in a table under §1619.1 of the DPM. These penalties pertain to “[a]ny on duty or employment related act or omission that interferes with the efficiency and integrity of government operation§1619.1 DPM’s”.

The Agency utilized progressive discipline in this matter. The table of penalties includes degrees of discipline based on the number of time the employee has been remanded for that offense.³⁴ Employee was charged with neglect of duty and it is her first offense. The Agency can implement a disciplinary action that coincides with the penalties listed under the table of penalties in §1619.1 of the DPM. These penalties can range from reprimand to removal.³⁵

Employee was also charged for AWOL for the second offense. Employee served a nine-day suspension issued by Agency in April 2008 for unexcused absence without official leave. Agency issued the suspension to improve Employee’s failure to be punctual and to attend work. Therefore, this was Employee’s second AWOL offense. The penalty for absence without leave under the second offense is suspension for 10-20 days.

Agency followed the recommended penalty as defined under the DPM §1619.1 in suspending Employee for fifteen days. If the penalty is permissible to use by the Agency and they choose so then the decision will not be disturbed by the OEA. *See, Edwina L. Alfred v. Dep’t Human Res.*, OEA Matter No. 1601-0041-08 (September 29, 2008). The role of the OEA is to review a penalty imposed by an agency and only if the agency’s action were unreasonable is it appropriate for the OEA to reverse the penalty. *See, Douglas v. Veterans Admin.*, 5 M.S.P.R. 313, 323-333 (1981); *See also Stokes v. District of Columbia*, 502 A.2d 1006, 1011-1012 (1985). The Agency’s decision to suspend Employee should be upheld based on its consistency with the DPM guidelines and the actions by the Employee that led to the imposition of the action.

ORDER

Therefore, it is ORDERED that the Agency’s action of suspending Employee for 15 days is UPHeld.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge

³⁴ See Tr. at 117.

³⁵ §1619.1 of the DPM table of penalties.