THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
DELORES JUNIOUS	) OEA Matter No. 1601-0057-01R04
Employee	)
	)
v	) Date of Issuance: November 10, 2005
	)
D.C. CHILD AND FAMILY SERVICES	) Muriel A. Aikens-Arnold
	) Administrative Judge
Agency	)
	)

Robert E. Deso, Esq., Employee's Representative
Andrea G. Comentale, Esq., Assistant Attorney General, D.C.

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 27, 2004, the Board issued an *Opinion and Order on Petition For Review* granting Employee's Petition For Review and remanding this matter for proceedings consistent with that decision.[1] On

[1] This Judge's Initial Decision (ID) dated 10/7/03 dismissed this matter for failure to prosecute. However, the Board found, based on Employee's contentions coupled with documentary evidence that she provided, that remand was warranted.

October 25, 2004, an Order Convening a Prehearing Conference was issued scheduling said conference on November 16, 2004.[2] On February 1, 2005, the prehearing conference was held and a date was set for an evidentiary hearing.[3] On February 14, 2005, an Order Convening Hearing was issued scheduling said hearing on March 1, 2005.[4] On May 17, 2005, an Order Closing the Record was issued to allow the parties time to file briefs no later than June 10, 2005 at which time the record was closed.

JURISDICTION

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

ISSUES

1) Whether the Agency's 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 memorandum dated February 27, 2001, Employee was notified of an advanced thirty (30) day notice to remove her from the agency. The grounds for the proposed action were as follows:

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[2] Employee, a Social Worker, initially filed a Petition for Appeal, on June 22, 2001, from Agency's action to remove her effective April 20, 2001 based on continuous discourteous treatment of CFSA management staff and in particular [her] supervisor both on the job and away from work, failure to follow agency protocol in filing complaints and misuse of the agency E-mail system.

[3] The prehearing conference was postponed twice based on requests by the parties.

[4] Due to inclement weather, the Judge rescheduled and held the hearing on 3/8/05.

On January 6, 2000, you transmitted an e-mail message to all CFSA staff wherein you characterize your supervisor, Janet Norfleet, as lacking professionalism, problematic, and chaotic. You went on to publish that the described behavior was "endorsed by management." Your use or misuse of the Child and Family Services Agency (CFSA) e-mail system to transmit disparaging remarks about your supervisor and publicly malign her along with the entire CFSA staff constitutes discourteous and disrespectful behavior. Moreover, your message about Ms. Norfleet is clearly libelous and contributes to the low employee morale within CFSA.

In addition to the above infraction, you use (sic) the E-mail system to transmit a leave request to the General Receiver knowing full well that leave requests must be directed to your immediate supervisor or program manager during your immediate supervisor's absence. Your obvious disregard for office protocol is a further example of the disrespect you show to the supervisory and management staff within the Intake Administration.

CFSA has no place for the type of unprofessional and harmful behavior you exhibit. Having been informed in the past that all formal complaints must be documented and directed to the member of management with the authority to address them, you continue to direct all complaints to the General Receiver. You continue to defy your supervisor and refuse to perform your job duties as assigned.

Most recently, on February 23, 2001, your supervisor requested all staff present for an emergency meeting to apprise staff of the new procedure for handling delinquent cases sixty days and older. Rather than taking a seat as requested, you refused to find a seat and advised your Supervisor in a hostile tone, "I don't want to sit down." This behavior comes in the wake of two suspensions

> within the past six months, and many oral and written admonitions.
>
> This most recent infraction combined with your acerbic and defaming e-mails to persons throughout the Agency regarding your Supervisor along with your voice mail message to your Supervisor's field practicum instructor outside this Agency all serve as the basis for this proposed action. The Agency can no longer tolerate these behaviors, a it is abusive and disrespectful to the Supervisor and has affected the morale and climate with the existing staff. The Agency's attempt to assist you has been to no avail and the decision to terminate cannot be avoided. All documents referenced (sic) this action are enclosed for your review.[5]

On April 16, 2001, a Notice of Final Decision was issued affirming the removal effective April 20, 2001.

Agency's Position.

Agency contends that the removal was taken for cause and that the penalty was appropriate under the circumstances. Specifically, Agency contends that Employee's "conduct was clearly discourteous, disrespectful, and damaging to the morale of both the Intake Unit and the entire agency" and that, while Employee's witnesses " . . . testified that they do not recall hostility or threatening behavior by Ms. Junious, their recollection of other specifics of the (February 23, 2001) meeting were widely divergent" and thus unreliable. Agency further contends that " . . . while the witnesses disagreed about the tone of the exchange between [Employee] and Ms. Norfleet during the February 23, 2001 staff meeting, there was clearly an exchange that disrupted the meeting"; and that "[W]hile her recurrent criticisms of management in general could be tolerated, her e-mail

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[5] See Joint Exhibit (hereinafter referred to as "Jt. Ex.") 7; the remaining information regarding Employee's appeal rights is omitted as it is not material to the charges.

transmission of disparaging remarks about Ms. Norfleet to the entire Agency is indefensible."[6] Last, Agency argues that Employee's misconduct herein occurred "in the wake of two suspensions in the previous six months."[7]

Employee's Position.

Employee contends that Agency's action was unfair and should be reversed as she refutes the charges as written. Specifically, Employee argues: that there was no evidence that the comments in the January 6, 2001 e-mail, or the circumstances of its transmission, constituted cause for adverse action; that Mr. Lewis, as the proposing official, had no first hand knowledge of any of the matters set forth in the Notice of Proposed Action; that management did not respond to employees who wrote and/or signed the October 21, 2000 and October 27, 2000 letters, through initiation of disciplinary action against them or otherwise; that Employee was issued a Letter of Admonition just prior to the Notice of Proposed Action citing two of the same offenses for which she was also removed which resulted in double jeopardy; that Agency presented no proof that Employee submitted a leave request by e-mail to the General Receiver; that Agency presented no credible evidence that Employee acted in a threatening and hostile manner towards Ms. Norfleet at the February 23, 2001 meeting; and that there was no Agency testimony regarding the reasonableness of the penalty.[8]

Summary of Material Testimony

Emma Jean Norfleet, Employee's former supervisor, testified that: 1) on January 6, 2001, Employee sent an E-mail message, throughout the agency, which contained derogatory statements about her (meaning Ms. Norfleet); 2) on February 23, 2001, Employee reported to a staff meeting, refused to sit down, responded in an acerbic tone when asked to sit down,

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[6] See Agency's Closing Argument (hereinafter referred to as "ACA") at pp. 1, and 3-4.
[7] See ACA at p. 4 and Joint Exhibit 7 which includes the documents for two prior suspensions.
[8] See Employee's Post Hearing Brief (hereinafter referred to as PHB) at pp. 24-28;32-34.

but eventually moved over by the door; 3) "[I]n order not to disrupt the whole process of the actual meeting . . . [she] just kind of conceded, allowed her to stand and . . . went on with the meeting"; and 4) contrary to office protocol, Employee sent one (1) e-mail request for leave to the General Receiver rather than to her immediate supervisor. This witness further testified that Employee's conduct was disrespectful, that Employee's resistance to following protocol impacted the supervisor's ability to manage, and that it caused problems with the morale of the unit because it would be necessary to take other workers out of their rotation to cover cases when Employee failed to come to work on time. Ms Norfleet also testified that she did not remember the date of the latter e-mail transmission; that although she did not think the e-mail request was approved, sending the leave request via the e-mail system rather than giving it to her meant that workers would "continue to get cases, more cases than they should if she's not there . . ." [9]

On cross examination, when asked: 1) whether Employee and other employees had previously complained to management in writing about her management style, Ms. Norfleet responded affirmatively[10]; and 2) whether higher level management officials showed her and discussed the October 20, 2000 letter[11] and whether Employee was charged with misconduct for the allegations she made in said letter addressed to management officials, Ms. Norfleet testified that she had no knowledge concerning whether management responded to that letter; and that her supervisor, Keith Lewis, had a discussion with her regarding that letter, as well as similar concerns contained in the October 27, 2000 letter addressed to the same management

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[9] See transcript (hereinafter referred to as "Tr.") at pp. 15-18, 20, 22-28, and 56 (where it was noted for the record that the January 6, 2000 date in the proposed adverse action was incorrect; that the year was actually 2001.) This witness further testified that Employee initially wanted to stand behind her which made her uncomfortable, and when asked to take a seat, refused to do so, but Employee eventually moved over by the door.

[10] See Tr. at p. 34.

[11] See Jt. Ex. 3-1, addressed to several management officials from Employee; Subject: Ongoing Harassment and Retaliatory Behavior by Ms. Emma Jean Norfleet, LICSW, Supervisory Social Worker, Midnight Intake, reflecting copies sent to Keith Lewis and Debra Courtney, President, AFSCME Local 20.

officials and signed by six (6) employees including Ms. Junious.[12] Ms. Norfleet initially testified that she did not know what the Workers Council was, but subsequently stated that there was a Workers Council in the agency, that they published a newspaper, that Employee was the newspaper's editor and wrote articles, some of which the witness read. Ms. Norfleet further testified that Employee wrote articles that were critical of the agency and its management and that she was disciplined by this witness for that.[13]

On further cross examination, Ms. Norfleet testified that she did not know where the leave request transmitted to the General Receiver through the e-mail system was; and that she could not give a time frame for the length of the staff meeting at issue.[14]

Keith Lewis, the proposing official, testified: 1) that he was familiar with the e-mail transmission Employee sent, throughout the agency, regarding Ms. Norfleet and believed it was unprofessional; 2) that protocol requires employees to submit leave requests through the chain of command (i.e., the immediate supervisor); 3) that Ms. Norfleet had good leadership style and excellent judgment; and 4) that he spoke with workers on the midnight shift who complained about Ms. Norfleet and advised them to adjust to her particular style and that he supported her.[15]

On cross examination, Mr. Lewis testified: 1) that he worked the day shift but had supervisory oversight for the midnight shift; 2) that the information set forth in the proposed adverse action was submitted by Ms. Norfleet directly to the Human Resources Department rather than to him; 3) that he did not recall whether, before signing the proposed adverse action,

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[12] See Jt. Ex. 3-2, Subject: Request for Immediate Removal of Ms. Emma Jean Norfleet; and Tr. at pp. 36-38. This letter also reflects copies sent to Keith Lewis and Debra Courtney.

[13] See Tr. at pp. 32-33; and 36-42. This witness testified that Employee was suspended twice while under her supervision.

[14] See Tr. at pp. 18-19, 42-43, and 45. This witness previously testified that this particular meeting lasted an hour and that she allowed Employee to stand.

[15] See Jt. Ex. 7; Tr. at p. 48 where Mr. Lewis testified that he supervised Agency's evening shift, specifically Ms. Norfleet; and Tr. at 49-52.

he was provided statements from any of the people who were at the February 23, 2001 meeting nor did he verify the accuracy of what Ms. Norfleet said happened at that meeting[16]; 4) that he read the e-mail referenced in the first charge, but did not see the response from Mary Montgomery[17] or see the series of e-mails that were involved; 5) that he did not see Employee's e-mail request for leave or know its whereabouts; and 6) that he had no specific knowledge regarding the facts and circumstances surrounding the allegations in the notice of proposed action.[18]

Ifeoma Umeadi, Social Worker, testified (on behalf of Employee) regarding the February 23, 2001 meeting as follows: 1) that she did not remember that Employee was standing behind Ms. Norfleet even though Ms. Norfleet remarked that Employee was standing behind her; 2) that Employee stated she had no chair; and 3) that the two of them (meaning Employee and Ms. Norfleet) "went back and forth" and the meeting ended. Ms. Umeadi further testified that Employee did not do anything threatening, nothing to disrupt the meeting, and that she did not remember whether there *was* a meeting.[19]

On cross examination, Ms. Umeadi testified that the tone of the exchange between Employee and Ms. Norfleet (on February 23, 2001) was normal.[20]

Everette Myles, Social Service Representative, testified (on behalf of

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[16] See Tr. at p. 57.

[17] See Tr. at pp. 58; and Jt. Ex. 3-3 (reflecting an additional e-mail sent 1/10/01 from Employee to Mary Montgomery [Director, Human Resources] and includes a prior response from Ms. Montgomery dated 1/8/01 at 11:38:31 AM which reads "Delores-Thank you for your comments. I couldn't however figure oput(sic) if you were raising a formal complaint along with offering recommendations for improvements. Please advise." The message below that one is Employee's 1/6/01 e-mail message). Please note that Jt. Ex. 7 contains a different copy of Employee's 1/6/01 e-mail message which does *not* include Ms. Montgomery's response.

[18] See Tr. at pp.61-62.

[19] See Tr. at pp. 66-69.

[20] See Tr. at pp. 69-70.

Employee): 1) that he signed the aforementioned February 27, 2000 letter and that Barry Moore promised to meet with the group, but did not do so; 2) that no one in the chain of command otherwise responded; 3) that he attended the February 23rd meeting and observed Employee standing; and that he did not recall Employee saying anything except that she did not want to sit down and had no chair on which to do so.[21]

On cross examination, Mr. Myles testified that he did *not* recall the following: where Ms. Norfleet was located in the office during the aforementioned meeting; whether or not Ms. Norfleet was seated behind her desk; whether or not *he* was seated next to Employee; and that he was unsure whether anyone else stood through the meeting.[22]

A'bdulai Jalooh, Social Worker testified (on behalf of Employee) that, on February 23, 2001, Ms. Norfleet called a meeting in her office; that Employee came in and sat on the heating unit beside Ms. Norfleet; that Ms. Norfleet advised Employee that "she didn't want her to sit, to come around her . . . more in front where we were sitting" and Employee proceeded to move around; but he did not recall whether Employee "got a chair or sat on the side . . . of the cabinet." Nor did this witness recall Employee say or do anything threatening to Ms. Norfleet. In fact, this witness testified that he did not recall *any* exchange between Employee and Ms. Norfleet.[23]

However, his subsequent testimony contradicted the previous statements regarding the *exchange or lack thereof.* Specifically, Mr. Jalooh stated that Ms. Norfleet did not want Employee "to sit where she was sitting . . . that she wasn't comfortable and then . . . Ms. Junious, I think, made the statement that . . . others have sat there before and there has been no problem . . ."[24]

When questioned by this Judge, and directly contrary to earlier testimony,

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[21] See Tr. at p. 73-79.
[22] See Tr. at pp. 81-82.
[23] See Tr. At pp. 87-89.
[24] See Tr. at pp. 88-89, 96-97.

Mr. Jalooh then testified as follows: that Ms. Norfleet " . . . asked her [Employee] to move away from where she was sitting to sit facing her . . [S]he sat on that file cabinet, if I can remember vividly."[25]

Employee testified that she was a member of the Workers Council which was a group of front-line supervisors and employees who addressed issues, such as staffing, resources, foster care and others; and that she published monthly articles in their newspaper, as did the General Receiver, and was not disciplined for her criticism of management therein.[26] She further testified that she received no response, in the form of discipline or otherwise, from any management officials to whom the October 20 and 27, 2000 letters (critical of Ms. Norfleet) were addressed.[27]

Relative to having transmitted a leave request to the General Receiver, Employee denied doing so.[28] Regarding the February 23, 2001 staff meeting, Employee denied having any hostile exchange with Ms. Norfleet.[29] Employee further testified that, prior to being served with the notice of proposed removal, Mr. Lewis did not speak to her regarding the matters therein.

On cross examination, Employee testified that her criticism of management published in the union newsletters was general in nature; and did not specifically identify any manager; whereas, her January, 2001 e-mail

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[25] See Tr. at pp.93-94.

[26] See Tr. at p. 99-103; 120-122; also see Joint Exhibit 7 which contains the instant Notice of Proposed Action with prior letters of warning, letters of direction, letters reflecting a 2-day suspension and a 10-day suspension; all for various work performance offenses. Employee stated that staff retention and poor supervision were issues that were studied and addressed; and that she was never advised by any management official that her criticism was inappropriate in any way. Specifically, Ms. Norfleet did *not* advise Employee (prior to her removal) that publishing the 1/6/01 e-mail was considered misconduct.

[27] See Tr. at pp. 106-108, 110. Employee gave uncontested testimony that no disciplinary action was taken against her or any of the other signatories to the October 27, 2000 letter.

[28] See Tr. at p. 127.

[29] See Tr. at p. 134.

specifically identified the midnight supervisor. She then testified that the October 20, 2000 memorandum to Barry Moore was, among other things, in response to a suspension she received.[30]

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. Such regulations were published at 47 D.C. Reg. 7094 et seq. (September 1, 2000).[31]

In an adverse action, this Office's Rules and Regulations provide that, except for issues of jurisdiction, the agency must prove its case by a preponderance of the evidence.[32] "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."[33]

Factual conflicts in testimony and evidence mandate that the Judge make credibility determinations. However, a conflict in one portion of a witness's testimony does not necessarily mean that the witness is untrustworthy as to other testimony. Here, the Judge evaluated a number of

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[30] See Tr. at p. 138.

[31] 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 not arbitrary or capricious.

[32] See OEA Rule 629.3, 46 D.C. Reg. 9317 (1999).

[33] See OEA Rule 629.1, Id.

factors in making credibility determinations, including, but not limited to, the witness's opportunity and capacity to observe the event in question, contradiction or consistency of testimony by other evidence, and the witness's demeanor.[34] For example, the individual recall of events, or lack thereof, and contradictions between witness versions of events and other evidence, gave pause to this Judge regarding various portions of the overall testimony.[35]

Relative to Employee's *use or misuse of the e-mail system to transmit disparaging remarks about her supervisor*, the evidence does *not* support that allegation. The evidence of record reflects that the e-mail at issue shows that Mary Montgomery, the Director, Human Resources responded to Employee requesting clarification thereof.[36] Ms. Norfleet testified regarding said response stating that she did not know whether or not Ms. Montgomery found Employee's e-mail improper; and the proposing official testified that he saw the e-mail that was the subject of the first allegation but did *not* see Ms. Montgomery's response. Thus, there is a strong presumption that Ms. Montgomery found Employee's e-mail to be positive rather than negative or "disrespectful behavior."[37] Even though Mr. Lewis

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[34] *See Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458-462 (1987).

[35] See Tr. at pp. 106, 109-110. A portion of Ms. Norfleet's version of events was directly contradicted by Mr. Lewis, who denied any knowledge of the October 20 and 27, 2000 letters, but admitted being aware that Employee had accused Ms. Norfleet of ineffective management in the past. Further, Employee's testimony that she personally delivered those letters to him, coupled with Ms. Norfleet's testimony, leads this Judge to believe it is more probable than not that he knew about those letters. The significance of this contradiction, along with other testimony goes to the amount of weight given to the evidence presented by Agency witnesses to support the removal action taken. Mr. Lewis had frequent memory loss throughout his testimony, while Ms. Norfleet had almost complete memory loss and depended on a reading of the notice of proposed action to answer questions on direct examination. Relative to the 2/23/01 staff meeting, the testimony given by Employee's witnesses was divergent and inconsistent. Nevertheless, the burden of proof rests with the agency.

[36] See footnote 17; Jt. Ex. 7-3; and Employee's PHB at p. 26.

[37] See footnote 17; also Jt. Ex. 7. Although Ms. Norfleet testified that Employee had previously been disciplined for publishing articles (in the union newsletter) that were critical of management, there is no evidence in the record to support that representation.

testified that the instant e-mail was "unprofessional", he did not see Ms. Montgomery's response thereto, and gave no elucidation to support Agency's charge of discourteous and disrespectful behavior.

The charge of *improper use of the e-mail to transmit a leave request* to the General Receiver was *not* supported for the following reasons:

a) there is no evidence regarding the date of the purported leave request; and the actual e-mail document was not presented as evidence;
b) Ms. Norfleet's conflicting testimony regarding whether the instant leave request affected the work unit was confusing; she initially testified that Employee's submission of the e-mailed leave request caused morale problems due to the rotation of other employees when Employee was not at work; but, she subsequently testified that Employee's submission of her leave request by e-mail to someone else violated protocol, but the e-mail transmission, itself, did *not* affect any other workers[38];
c) Even if Ms. Norfleet's testimony regarding morale problems was valid, Employee was not charged with an attendance violation as a result of submitting the instant e-mail leave request; rather she was charged with her *disregard of office protocol*[39]; and
d) Mr. Lewis testified that he did not see said e-mail request nor did he know of its whereabouts.

The allegation of Employee's misconduct in regard to the February 23, 2001 staff meeting was *not* supported for the following reasons: 1) the proposing official had no specific knowledge about the allegations and did not investigate the facts and circumstances surrounding such allegations; and 2) there was no credible testimony regarding Employee's alleged misconduct nor any disruption of the work place or how and why employee morale was adversely affected as a result of Employee's alleged misconduct.

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[38] See Tr. at pp.26-29.
[39] The *disregard of office protocol* is not an issue since the basis of that offense was not supported by the evidence.

Further, a careful review of Mr. Lewis's testimony reflects that he did *not* conduct an investigation to determine whether the charges set forth in the proposed adverse action were supported by any evidence. As the proposing official, he had a responsibility to have full knowledge of the facts and circumstances surrounding the offenses on which the action was based. Thus, this Judge concludes that, based on the testimony and evidence of record, Agency was negligent in its conduct of an investigation and, therefore, knew or should have known *not* to take the action.

Based on a review of the record evidence and testimony at the hearing, this Judge concludes that Agency's action was not supported by a preponderance of the evidence. Therefore, this action should be reversed. Given this conclusion, it is not necessary to address the appropriateness of the penalty.

ORDER

It is hereby ORDERED that:

1) Agency's action removing Employee is REVERSED;

2) Agency reinstate Employee and reimburse her all pay and benefits lost as a result of the removal; and

3) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

Muriel Aikens Arnold

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge