

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
Zane Gray) OEA Matter No. 1601-0043-07
Employee)
)
v.) Date of Issuance: February 25, 2009
)
) Sheryl Sears, Esq.
D.C. Fire and Emergency Medical) Administrative Judge
Services Department)
Agency)

Lathal Ponder, Esq., Employee Representative
Sandra Little, Hearings Representative

INITIAL DECISION

INTRODUCTION

Zane Gray (“Employee”) was Lieutenant of Truck Company Number 2. On June 21, 2006, Michael Marsico, his Captain, was conducting the Company’s daily lineup when he noticed that Employee had not reported to work. Employee was contacted at home and reported for duty one hour late.

Captain Marsico cited Employee for violation of Order Book Article VII, Section 2 (6) which prohibits “Any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious.” In so doing, Marsico noted Employee’s record of infractions during the previous three years as follows.

DATE	INCIDENT	PENALTY
January 24, 2006	Sleeping on an incident and altering reports	One hundred and twenty (120) duty hour suspension
July 11, 2005	Conduct unbecoming an officer	Letter of reprimand
February 2, 2005	Absence without leave (AWOL)	12 hour suspension
April 16, 2004	Absence without leave	Letter of reprimand

	(AWOL)	
September 11, 2003	Unsafe act	Letter of reprimand

On the same day, Employee presented a memorandum to Adrian H. Thompson, then Chief of Fire and Emergency Medical Services. He explained that he was late because an electrical outage in the neighborhood caused his alarm clock to malfunction. Employee said that he slept through a second alarm clock. Deputy Fire Chief Thomas I. Herhily concurred with Marsico's recommendation.

By memorandum dated July 13, 2006, Douglas L. Smith, Assistant Fire Chief in charge of Operations, notified Employee that he was charged as follows:

Charge 1

Absence without official leave (AWOL)

Specification 1

In that said Lieutenant Zane Gary, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department did, nevertheless, on the 21st day of June 2006, fail to report for duty at the proper time. Lieutenant Gray admitted in his special report dated June 21, 2006, that he overslept. He assumed duty at 0800 hours and was charged one (1) hour of AWOL. His AWOL status is documented on his time and attendance sheet for the pay period ending June 24, 2006.

On July 17, 2006, Douglas L. Smith, Assistant Fire Chief of Operations, advised Employee that the charges against him would be considered by the Fire Trial Board. Agency sought the maximum penalty of termination. The Trial Board issued a report on October 29, 2006, finding Employee guilty of violating Order Book Article VII, Section 2, "Any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious."

In determining the penalty, the Trial Board considered those of the *Douglas* factors¹ that were deemed applicable. The Board assessed the "nature and seriousness of

¹ In the matter of *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 5 M.S.P.R. 280 (April 10, 1981), the Merit Systems Protection Board considered the appeals of several employees removed by their agencies upon charges of job-related misconduct. The Board held that it has authority to mitigate agency-imposed penalties when Board determines that penalty is clearly excessive, disproportionate to sustained charges, or arbitrary, capricious, or unreasonable. While noting every agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, the Board stated its responsibility to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

the offense and its relation to the employee's position, duties and responsibilities, including whether the offense was intentional . . . or was frequently repeated." In so doing, the Board found that, while unintentional, the offense was a serious one that Employee had repeated. The Board also considered that the offense could impact Employee's "supervisor's confidence in the employee's ability to perform assigned duties" because Employee could not be counted on to come to work on time. In determining the "consistency of the penalty with those imposed upon other employees for the same or similar offenses," the Board decided to impose a penalty that was less than that of others who were similarly situated in view of "mitigating factors working in the employee's favor." While the Board noted that Employee had not been in trouble during the year previous to this incident, there were several other infractions on his record of

Referencing a history of court decisions and issuances by the Office of Personnel Management and the Civil Service Commission, the Board identified several factors as relevant for consideration in determining the appropriateness of a penalty. While noting that the list was not exhaustive and that every factor might not apply to every circumstance, the Board set forth these as guidelines:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

twenty five (25) years. The penalty selected was a suspension for one hundred and forty four (144) hours.

Adrian H. Thompson, then Chief of Fire and Emergency Medical Services, issued a letter dated December 13, 2006, notifying Employee that he was adopting the recommendation of the Fire Trial Board. The suspension was imposed from 7:00 a.m. on January 7, 2007 until 7:00 a.m. on January 28, 2007. Employee filed an appeal of the suspension seeking an order from this Office for Agency to reverse the action, expunge his record and restore his lost wages and other benefits.

JURISDICTION

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

APPLICABLE LAW AND BURDEN OF PROOF

In *District of Columbia Police Department v. Elton L. Pinkard*, 801 A.2d 86 (2002), the D.C. Court of Appeals reversed a ruling of the D.C. Superior Court upholding a decision of this Office based upon a *de novo* hearing. The Court concluded that the evidentiary hearing before OEA was precluded by provisions of a collective bargaining agreement between the Metropolitan Police Department and the Fraternal Order of Police in conjunction with applicable provisions of the D.C. Comprehensive Merit Personnel Act (CMPA), D.C. Code 1.606.1 *et seq.* (1999). The Court defined the scope of this Office's authority to review such an appeal as appellate in nature describing it as follows:

[The Office of Employee Appeals'] review of an agency decision - in this case, the decision of the trial board in MPD's favor - is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. [Citations omitted]. The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations.

This Office has held that "pursuant to *Pinkard*, an AJ [Administrative Judge] of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely upon the record created below, when all of the following conditions are met:

1. The appellant (Employee) is an employee of either the Metropolitan Police Department, to the D.C. Fire & Emergency Medical Services Department;
2. The employee has been subjected to an adverse action;

3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, i.e.: “[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., PTB [Police Trial Board]] has been held, any further appeal shall be based solely on the record established in the Departmental hearing”; and
5. At the agency level, Employee appeared before a PTB that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against the employee.” *See Rosetta B. Davis v. DC Metropolitan Police Department*, OEA Matter No. 1601-0123-96R02, (December 3, 2003).

There is no dispute that the conditions were met in this matter.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” In accordance with OEA Rule 629.1, *id.*, the applicable standard of proof is by a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat 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.” In accordance with the ruling in *Pinkard*, Agency has the burden of proving that Employee committed the acts alleged, that they constitute the charges cited and that the penalty imposed was reasonable and is supported by substantial evidence, free from harmful procedural error and in accordance with applicable, laws and regulations.

FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS

The Office, in a matter governed by the ruling in *Pinkard* is charged with what amounts to an appellate review. It is the task of this Judge to review the actions of the Fire Trial Board, the fact finding body, and determine whether the Agency’s determination that Employee committed an act of AWOL that warranted a suspension for 144 hours is supported by substantial evidence in that record. It is not within the authority of this Office to conduct a *de novo* hearing or make independent factual findings in a matter governed by *Pinkard*.

Employee testified that he suffers from “sleep apnea.” According to a polysomnogram (sleep study) report presented by the Georgetown University Hospital Sleep Disorders Center, Employee suffers from “severe snoring and significant sleep

disordered breathing with recurrent arousals and sleep fragmentation.” The concise diagnosis was “obstructive sleep apnea syndrome.” In laymen’s terms, it is an interruption of breathing during sleep that awakens the sufferer.

Dr. Anne O’ Donnell recommended that Employee undergo a continuous positive airway pressure (CPAP) titration study with a view toward home use by the employee. The CPAP is a device that contains a mask that slowly delivers air to the patient. Employee was prescribed a CPAP machine. More conservative therapies were also suggested such as weight loss, body position modification, treatment of nasal congestion, if present, and avoiding alcohol and sedative hypnotic agents.

A co-worker, Lt. Dennis Blackwell, testified that Employee talked to him about the condition saying that he would sometimes fall asleep without knowing it and have trouble waking up. Blackwell said that he knew about it from the time he first met Employee.

Employee testified that he uses three or four alarm clocks and his cell phone to wake him up from his deep sleeps. He acknowledged that he does not always use the CPAP because it is hard to rest with it on and it is hard to use at the firehouse because it requires cleaning and maintenance. According to a letter from Johnnie Mae Durant of Oasis Realty Service, the property manager for Employee’s residence, there was a power outage at Employee’s residence on or about June 21, 2006. It turned off Employee’s electric alarm clock.

However, Employee’s supervisor, Captain Marsico, testified that Employee did not tell him about his condition until some time after the incident. And he did not see any information about it when he reviewed Employee’s personnel file in preparation to initiate action adverse action. Marsico acknowledged that he never had any problems with Employee until that date. However, he did take note of Employee’s prior disciplinary record.

Employee admits that he was one hour late to work on the day in question. Agency’s practice is to charge a full hour to an employee who is late for any increment of an hour. Thus, Employee was charged with absence without leave (AWOL). In that Employee was undisputably late for work without having requested leave in advance or been granted at the time in question, he was AWOL. “Cause” is defined in DC Government Personnel Regulations, Section 1603.3 (Chapter 16, Part I), *inter alia* as . . . *unauthorized absence.*” Thus, Agency has met its burden of proving that Employee committed an act that constituted legal cause for adverse action.

However, Employee has challenged the suspension on the grounds that he had a disability, sleep apnea, of which Agency was aware but failed to accommodate. There is no evidence in the record that Employee gave official notice to any Agency authority of his condition before this event. And there is no evidence of a request for an accommodation of the condition as a disability. Employee has not described, in any detail, the accommodation that he sought other than to be excused when he was late to work.

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that “managerial authority has been legitimately invoked and properly exercised.” See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must be based upon a consideration of relevant factors. See *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an 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.” *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Employee had served for 25 years at the time of these events. Overall, it seems, he was a good worker. The record contains a Certificate of Valor (Bronze Bar) issued to Employee on September 2, 1992. It could easily be said that his absence for one hour of work was a minor matter in the context of his career. But when one takes into account the seriousness of his position as a Firefighter and the need for his Captain to have a fully manned station, it is not. Additionally, several infractions, including previous AWOL charges, pepper his work record. Taking all of the circumstances into account, it is the conclusion of this Judge that Agency acted lawfully and reasonably in choosing the 144 hour suspension as the penalty for Employee’s inexcusable absence without leave.

ORDER

It is hereby ORDERED that Employee’s suspension is UPHeld.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE