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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
CHRISTOPHER SCURLOCK,)	OEA Matter No. 1601-0055-09
Employee)	
)	Date of Issuance: October 3, 2011
)	
)	
D.C. ALCOHOLIC BEVERAGE)	
REGULATION ADMINISTRATION,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Christopher Scurlock (“Employee”) worked as a Compliance and Investigative Specialist with the D.C. Alcoholic Beverage Regulation Administration (“Agency”). On November 21, 2008, Employee received a final notice of removal from Agency.¹ On December 2, 2008, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He argued that he was wrongfully terminated and requested back pay, attorney’s fees, and reinstatement to his position.

Specifically, Employee reasoned that the neglect of duty charge should be reconsidered

¹ The notice provided that Employee was removed from his position as the result of his neglect of duty for failing to timely report a missing government vehicle. Additionally, Agency alleged that Employee engaged in a fight with his supervisor, David Bailey, while on duty and provided misleading or inaccurate information to management regarding the incident. Employee was also accused of incompetence as a consequence of his careless work performance and serious repeated mistakes. Finally, Agency removed Employee for insubordination because he refused to comply with direct orders or instructions.

because Agency lacked a written policy on the necessary steps employees should take when a government vehicle is missing. He explained that he exerted due diligence to locate the car on his own before reporting it missing.² As for the remaining charges, Employee claimed that they were without merit and Agency lacked substantial evidence to justify them.³

Agency countered by arguing that Employee was negligent by not reporting the missing vehicle. Agency also gave Employee specific instructions on how best to perform his job responsibilities. It highlighted Employee's own admission that he failed to follow its directives and acknowledged his insubordination. Furthermore, Employee did not dispute the decline of his work productivity and error-ridden written reports. Agency alleged that over a six-month period Employee consistently ignored direct orders from his supervisors as outlined in his October 2, 2008, Mid Year Performance Evaluation. Consequently, Agency requested that Employee's Petition for Appeal be denied by the OEA Administrative Judge ("AJ").⁴

After conducting an evidentiary hearing, the AJ issued her Initial Decision on April 12, 2010. She held that although there were no written Agency policies and procedures for reporting a missing vehicle, Employee had a professional responsibility to report the car missing without delay. The AJ further reasoned that the length of time to report the car missing was a matter of common sense, and by waiting even for one day, Employee neglected his duty to timely report the missing vehicle.⁵

The AJ went on to rule that Agency failed to prove that Employee committed the act of

² According to Employee, he last saw the vehicle in question on Monday, October 6, 2008 at 5:30. When he arrived to work on Tuesday around noon, he noticed that the vehicle was missing. He spent the balance of the day searching for the car and checking with co-workers as to the whereabouts of the vehicle. On the morning of October 8, 2008, Employee then reported to management that the vehicle was indeed missing.

³ *Petition for Appeal*, p. 8-9 (December 2, 2008).

⁴ *Agency's Answer to Employee's Petition for Appeal*, p. 2-3 (January 16, 2008).

⁵ *Initial Decision*, p. 10 (April 12, 2010).

assault. She found the Employee to be more credible than Agency's witnesses on the details of the alleged fight. Hence, she concluded that Employee did not commit any act of unprovoked assault as alleged, and his failure to truthfully report the incident did not amount to misfeasance.⁶

As it pertains to Employee's work performance, the AJ was convinced by Agency's assertions that it was inadequate. Employee's supervisors testified in detail of his failure to devote adequate attention and time to his assignments. The Judge also noted that Employee acknowledged a decline in the quality of his work product. Thus, Agency's charges of incompetence and insubordination were sustained.⁷

Finally, in her assessment of Agency's penalty of removal, the AJ held that OEA 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. She found that although Employee did not commit all of the acts for which he was charged, the charges of neglect of duty, insubordination, and incompetence were upheld. Although Agency had the option to put a performance improvement plan into place, it was not obligated to do so. She found that Employee was on notice that his work was unacceptable. Consequently, his failure to remedy the problem with his work, resulted in Agency's proper removal of him.⁸

On May 13, 2010, Employee filed a Petition for Review. He argued that the AJ's determination that he neglected his duty to report the car missing was not based on substantial evidence. He contended that the AJ's assertion that a one day delay amounted to neglect is arbitrary and capricious. Employee also declared that the AJ misinterpreted the evidence and

⁶ *Id.* at 11.

⁷ *Id.*

⁸ *Id.* at 12.

improperly held that he was previously suspended for two weeks without pay. He provided that he was suspended from parking in the garage for two weeks, not from his position. Finally, Employee requested that this matter be remanded to the AJ to consider the evidence of the penalty imposed.⁹ Agency filed its Opposition to the Petition for Review and requested that the Initial Decision be upheld.¹⁰

Employee contends that the neglect of duty charge was not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹¹ Therefore, this Board must determine if a reasonable mind would accept the Agency and AJ's assessments that a one day delay in reporting a missing government vehicle is adequate to support a neglect of duty charge.

The record is void of any written Agency policies regarding reporting missing government vehicles, but this Board believes a delay of nearly twenty-four hours is unreasonable and neglectful. According to Employee, he last saw his government-issued vehicle on Monday, October 6, 2008, at 5:30 p.m. He arrived at work around noon the next day, and it was then that he noticed that the vehicle was not where he left it the night before. Employee then launched his own investigation to locate the vehicle. Unfortunately, his investigation only involved asking his fellow co-workers if they had seen the vehicle and checking the garage and surrounding areas. It was not until Wednesday while asking other co-workers if they had seen the vehicle that his

⁹ *Petition for Review* (May 13, 2010).

¹⁰ *Agency's Opposition to Petition for Review* (June 22, 2010).

¹¹ *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

supervisor was made aware that the car was missing.¹²

Under the circumstances, a reasonable person would have immediately informed their supervisors of a missing car after a pre-cursory search of the garage on Tuesday. Furthermore, Employee's supervisor, Craig Stewart testified that although there is not a written policy regarding missing vehicles, it was the office's practice for employees to send out a mass email to the staff to locate vehicles.¹³ Employee also neglected to engage in this common office practice. Accordingly, the AJ and Agency's neglect of duty determination were based on substantial evidence.

Employee also argues that his removal was not an appropriate penalty for the charges against him. In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).¹⁴ According to the Court in *Stokes* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.

Penalty Within Range Allowed by Law, Regulation, or Applicable Table of Penalties

Chapter 16 of the District Personnel Regulations ("DPR") outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The DPR clearly lists that the penalties for a neglect of duty charge ranges from a reprimand to removal for

¹² *Petition for Appeal*, p. 8-9 (December 2, 2008).

¹³ *OEA Hearing Transcript*, p. 135-135 (November 20, 2009).

¹⁴ *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); and *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010).

the first offense. Hence, removal was an appropriate penalty for Employee's failure to report the missing vehicle in a timely manner.

As for the charges of incompetence and insubordination, the range for penalties is less severe. For a first offense of incompetence, the range of penalties is suspension for five to fifteen days. The range of penalties for a first offense of insubordination is reprimand to suspension for up to ten days. In his Petition for Appeal, Employee admitted that he reasoned that if he performed his job on an unsatisfactory level, then the Chief would assess the situation and assign him to different supervisor. He acknowledged that "after evaluating [his] poor judgment, [he] now know[s] that low-productivity is not the approach to resolving issues related [sic] a hostile working environment."¹⁵ As a result of these statements, he conceded to insubordination and incompetence.

Penalty Based on Consideration of Relevant Factors

In assessing whether the penalty is based on a consideration of relevant factors, OEA relies on *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).¹⁶ The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- (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

¹⁵ *Petition for Appeal*, p.17-18 (December 2, 2008).

¹⁶ *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); and *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010).

- 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 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.

As provided in its October 16, 2008, Notice of Proposed Removal, Agency considered all relevant factors when imposing its penalty against Employee. The Agency determined that removal was appropriate because of the nature and seriousness of the offense, and its relation to the Employee's duties. It considered Employee's past work record and dependability. Employee's past disciplinary record was also considered.¹⁷ Agency felt that there were no mitigating factors or alternative sanctions to deter similar conduct from Employee in the future. Therefore, he was removed.¹⁸

¹⁷ It must be noted that the AJ improperly suggested that Employee was previously suspended for two weeks without pay (*See Initial Decision*, p. 7). As Employee presented in his Petition for Review, he was merely suspended from parking in the garage for two weeks. However, this misquote by the AJ does not negate the fact that Employee was properly removed on the neglect of duty charge.

¹⁸ *Agency's Answer to Employee's Petition for Appeal*, Tab #3 (January 16, 2008).

No Clear Error of Judgment by Agency

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was within the range of penalties for the neglect of duty charge, as evidenced in Chapter 16 of the DPR. Moreover, the penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Accordingly, Employee's Petition for Review is DENIED.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is
DENIED.

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.