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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DONALD W. LEE)	OEA Matter No. 1601-0009-01
Employee)	
)	
v)	Date of Issuance: October 6, 2005
)	
DC FIRE & EMS DEPARTMENT)	Muriel A. Aikens-Arnold
Agency)	Administrative Judge
_____)	

Theresa Cusick, General Counsel
Donald W. Lee, *Pro se*

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2000, Employee, a Firefighter, filed a Petition for Appeal of Agency's action to suspend him for one hundred and eight (108) duty hours. On January 11, 2001, this Office notified Agency regarding this appeal and instructed Agency to respond no later than February 12, 2001. In its response, Agency filed a Motion to Dismiss based on: 1) Employee's contention that he was not offered reasonable accommodations under the Americans With Disabilities Act which is not under the jurisdiction of this Office; or 2) in the alternative, that the 48 and 36 duty hours suspensions be

dismissed as they were each less than 10 days.¹

An Order to Show Cause was issued on April 7, 2003: 1) directing Employee to show cause why his appeal should not be dismissed for lack of jurisdiction; 2) directing Agency to file a response thereto; and 3) scheduling a prehearing conference on April 29, 2003.² On April 18, 2003, Employee filed his response to the jurisdiction issue, along with a Statement of Facts addressing the charges; Agency filed its response to Employee's submission on August 1, 2003. A prehearing conference was held on April 29, 2003 during which Judge Torres advised that this Office has jurisdiction over the 108-hour suspension reflected in the February 27, 2001 Amended Letter of Decision/Suspension.³

On May 3, 2005, this matter was reassigned to the undersigned Judge who reviewed the record to determine its status.⁴ On June 20, 2005, a Record of Status in this Matter was issued advising the parties of the reassignment and that this Judge would review the record, including

¹ OEA Rule 604.1 provides that any District of Columbia government employee may appeal, *inter alia*, an adverse action for cause that results in a suspension of ten (10) days or more. Agency requested dismissal of the appeal of 192 hours of suspension stemming from four different charges dating back to 12/99.

² Administrative Judge Blanca Torres, who issued the Order, was originally assigned this matter, but is no longer with this Office.

³ Agency did not dispute jurisdiction over the 108-hour suspension during the prehearing conference. Judge Torres determined that the Office did not have jurisdiction to hear the charges other than the 108-hour suspension, but there is no written record thereof; only the record tape that the Judge retained for her personal use.

⁴ On or about 6/16/05, this Judge spoke with Agency's representative to clarify tour shifts in terms of work days and off days. The agency representative faxed Article VIII, Sections 1-10 of the DC Fire & EMS Order Book to this Judge (who directed the agency representative to provide a copy of the same information to Employee). Article VIII, Section 2, Tour of Duty, Fire Fighting Division provides, in part, a "24-hour tour of duty composed of a day shift which starts at 0700 hours . . ." Section 3, Work Week, 42 Hours Average/4 Week Cycle provides, in part, "[T]he four (4) week cycle operates so each platoon will . . . work a 24-hour tour of duty (1 day) from 0700 to 0700 the following day. Upon being relieved from duty at 0700 hours, personnel will be off for 72 hours (3 days), after which they will report back to duty at 0700 hours."

submissions that were previously filed by the parties to support their respective positions. The parties were further advised that the record was closed effective on June 20, 2005 and that a decision was forthcoming.⁵

JURISDICTION

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

ISSUES

- 1) Whether this appeal should be dismissed for lack of jurisdiction, and, if not;
- 2) Whether the Agency action, based on the Fire Trial Board hearing, was supported by substantial evidence, whether there was harmful procedural error, or whether it was otherwise contrary to law or applicable regulations.⁶

⁵ The parties were further advised that since a jurisdiction issue was raised, that issue will first be reviewed; that if it is determined that this Office has jurisdiction, the merits will then be reviewed; and if not, this matter will be dismissed for lack of jurisdiction.

⁶ A DC Court of Appeals decision in *District of Columbia Metropolitan Police Department v Elton L. Pinkard*, 801 A.2d 86 (D.C. 2002) held that this Office erred in conducting a second evidentiary hearing when a Police Trial Board (PTB) hearing had previously been held in a disciplinary matter; and violated the Department's labor agreement which provided *solely* for a review of the PTB record on appeal. The Court remanded Pinkard's appeal to this Office to determine whether Agency's action was supported by substantial evidence, whether there was harmful procedural error or whether it was in accordance with law or applicable regulations. Although *Pinkard* involved an employee of the Metropolitan Police Department covered by a collective bargaining agreement, the holding pertains to employees of Agency, such as Employee herein, who are likewise covered by a collective bargaining agreement. See *Hibben v D. C. Fire and Emergency Services Department*, OEA Matter No. 1601-0138-99 (April 21, 2003), ___ D.C. Reg. ___ (); *Davidson v. D.C. Fire and Emergency Services Department*, OEA Matter No. 1601-0063-99 (November 20, 2002) ___ D.C. Reg. ___ (); *Kelly v. DC Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0023-98 (November 6,

FINDINGS OF FACT

Statement of Charges.

Employee was initially notified by memorandum dated June 21, 2000 to appear before a Fire Trial Board for: Failure or refusal to comply with written instructions or direct orders by a superior; and Use of insulting or threatening language to [an] official superior. On July 25, 2000, Employee was issued a document with five (5) charges and specifications numbered as follows: Charge 1 (U-00-168), Negligence in performing official duties, including failure to follow verbal or written instructions; Charge 2 (U-00-167), Inexcusable absence without leave; Charge 3 (U-00-67), Failure or refusal to comply with written instructions or direct orders by a superior; Charge 4 (U-00-169), Failure or refusal to comply with written instructions or direct orders by a superior; and Charge 5 (U-00-169), Discourteous Treatment of the public, a supervisor, or other employee.⁷ Charges 4 and 5 read as follows:

Charge 4 (U-00-169) Failure or refusal to comply with written instructions or direct orders by a superior.

Specification 1: In that said Firefighter, Donald Lee, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department, did on the 19th day of March 2000, fail to leave company quarters when ordered by Sgt. Gerald Fraley.

2002), __D.C. Reg. __ ().

⁷ The FTB panel read the specifics of Charge 4 and Charge 5 into the record of the hearing and made its recommendation to the Chief for the 108 hours suspension based thereon. The remaining charges were not considered in the final amended decision and will not be repeated here.

According to Sgt. Fraley's report dated March 19, 2000, you arrived at Engine Company 25 to ascertain the status of your special report requesting advance sick leave. Sgt. Fraley alleges that upon learning that your request for sick leave was denied, you became irate and forcefully requested to speak with Battalion Fire Chief (BFC) Patrick Johnson regarding written comments that he (BFC Johnson) made on your request. After you finished speaking with BFC Johnson, you requested a copy of your special report from Sgt. Fraley. Sgt. Fraley reported that he denied your request until he could get approval to release it from the 3rd Battalion. He alleges that you became loud, abusive and threatening. Sgt. Fraley further alleges that at that point, he ordered you to leave the premises, but you refused to do so. Your conduct was witnessed by Firefighters Paul Lucas, Leonard Burkley and Emergency Medical Technician Alphonso Doctor.

Charge 5 (U-00-169) Discourteous Treatment of the public, a Supervisor, or other employees.

Specification 1: In that said Firefighter Donald Lee, 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 19th day of March 2000, use insulting or threatening language toward Sgt. Gerald Fraley.

According to Sgt. Fraley's report dated March 19, 2000 . . . He ordered you to leave the premises, but that you refused to do so.⁸ Sgt. Fraley then contacted BFC Johnson and informed him that

⁸ The same incident was repeated herein except the following.

he was going to have you removed by the Metropolitan Police Department. BFC Johnson advised Sgt. Fraley to give you the report. Before leaving the premises, you continued expressing disrespectful, threatening and menacing comments to Sgt. Fraley. Your conduct was witnessed by Firefighters Paul Lucas, Leonard Burkley and Emergency Medical Technician Alphonso Doctor.

The FTB hearing was conducted on September 20, 2000 and the panel recommended a suspension of 108 hours to Fire Chief Ronnie Few, who made the final decision. The panel found credible testimony from several witnesses to confirm that Employee was given a direct order to leave the firehouse and did not do so. The panel also believed witnesses, including Employee, who testified that he made discourteous statements and used threatening language towards a superior. In addition, the panel considered the Douglas factors in determining the penalty.⁹

Employee's Position.

In his submission received by this Office on April 18, 2003, Employee contends, *inter alia*: 1) that the time for the suspension without pay for one hundred and eight (108) duty hours in Case No. U-00-169, was "broken up by the Fire Department so as to not create a financial hardship"; 2) that he was given appeal rights to this Office; 3) that an agency official advised him that "the Fire Department never contested the one hundred and eight (108) duty hour suspension in their Motion to Dismiss"; and 3) he refers to Agency's Motion to Dismiss where a request was made to dismiss the petition for appeal in its entirety or, in the alternative, to dismiss the "84 duty hours from the other 2 cases . . . [T]here is no mention of Case No. U-00-169 (108 hours) being contested."

⁹ The Merit Systems Protection Board (our Federal counterpart) established a 12-prong test for evaluating the appropriateness of the penalty in *Douglas v Veterans Administration*, 5 M.S.P.R. 280 (1981).

Employee also submitted a "Statement of Facts" in which he presented his side of the incident that occurred on March 19, 2000. In that statement, Employee contends that Sgt. Fraley "invited" him to put his hands on him (meaning Sgt. Fraley) and that he responded that he did not want to "cause I would break you down in 30 seconds."

Agency's Response.

Agency contends that its decision to suspend Employee was supported by substantial evidence and should be upheld.

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).¹⁰

In response to Employee's arguments, this Judge finds the following. First, this Office does have jurisdiction to address the 108 hour suspension which was scheduled for ten (10) days, February 2-10, 2001, February 26, 2001 and March 14, 2001.¹¹ Second, the FTB panel relied upon the evidence of record and the witness testimony, including Employee's admission that he had words with Sgt. Fraley. Based on a review of the

¹⁰ Section 1603.3 set forth the new 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.

¹¹ Agency did not contest the jurisdiction of the 108 hour suspension.

record, this Judge concludes that Agency's action was supported by substantial evidence, there was no harmful procedural error, and the charges were consistent with law and applicable regulations.¹²

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave 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. 1915, 1916 (1985).

In making its recommendation, the FTB panel addressed the *Douglas* factors and their effect upon determination of the penalty.¹³ The panel considered, *inter alia*, the nature and seriousness of the offense, the adverse effect that Employee's behavior had on his supervisor's confidence in his ability to perform his assigned duties, and the suspension should serve as a deterrent to Employee and other employees that such behavior will not be tolerated.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on this Judge's review of the record, Agency met its burden of proof and the penalty was within the parameters of reasonableness and should be upheld.

¹² Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

¹³ See footnote 9.

ORDER

It is hereby ORDERED that the 108-duty hour suspension
is UPHELD.

Muriel Aikens Arnold

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge