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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JAMES JORDAN,	)	OEA Matter No. 1601-0041-09
Employee	)	
	)	Date of Issuance: June 4, 2012
	)	
D.C. DEPARTMENT OF	)	
MENTAL HEALTH,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

James Jordan ("Employee") worked as a Food Service Worker Foreman with the D.C. Department of Mental Health ("Agency"). On November 6, 2008, Agency issued a notice of final decision for summary removal of Employee.[1] Employee was charged with committing an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations and insubordination.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 6, 2008. He argued that Agency's removal action was not supported by the evidence;

[1] *Agency's Submission of Final Agency Decision,* Attachment 1 (August 13, 2009).
[2] On July 4, 2007, Employee had an altercation with a co-worker, Ms. Carry. Agency alleged that Employee was disrespectful, loud, and threatening which resulted in the on-duty or employment-related act of omission that interfered with the efficiency or integrity of government operations charge. In addition to this charge, Employee was charged with insubordination for failing to comply with Agency's mandatory, annual physical examination pursuant to 22 D.C. Municipal Regulations ("DCMR") 2102 and Department of Mental Health ("DMH") Policy No. 716.1.

he did not have a history of prior disciplinary actions; and he was not notified of the charges. Therefore, he requested to be reinstated with back pay.[3]

In its response to Employee's Petition for Appeal, Agency asserted that its removal action was supported by the record and 6 DCMR § 1603. It provided that Employee had a pattern of verbally abusing co-workers which interfered with the efficiency and integrity of government operations.[4] Agency also stated that Employee was insubordinate when he disobeyed a direct order to provide documentation that his annual physical examination was completed.[5] Finally, in response to Employee's claims that he had no history of any prior disciplinary actions and that he was not notified of the charges, Agency argued that Employee's assertions lacked factual basis or legal authority to set aside the removal action. Accordingly, Agency requested its removal action be sustained.[6]

Employee replied to Agency's response on February 6, 2009, and argued that Agency's decision was not supported by the record. He reasoned that one verbal dispute did not warrant summary removal.[7] As for the insubordination charge, Employee argued that he completed the required medical examination and submitted the paperwork, but he was not notified by Agency that it had not received the paperwork until he received the notice of summary removal. Employee believed that if Agency did not receive his documentation, then he should have been

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[3] *Employee's Petition for Appeal,* p. 3 (November 6, 2008).
[4] Agency contended that Employee's behavior toward Ms. Carry was combative, unnecessary, and inexcusable. It reasoned that occasional disagreements are bound to happen in the workplace, but Employee's repetitive angry outbursts compromised effective working relationships.
[5] Agency reasoned that Employee's refusal to provide evidence of his compliance with completing the physical examination was not only insubordinate and neglectful of his duties, but it also jeopardized its regulatory standing, thereby, threatening the integrity of government operations. Agency went on the assert that 22 DCMR 2102 and DMH Policy 716.1 required Employee to obtain an annual physical examination. The policy authorized program managers and supervisors to begin corrective measures if employees failed to get screened.
[6] *Agency's Response to Employee's Petition for Appeal,* p. 4-9 (December 15, 2008).
[7] He noted that he had never been suspended or written up. Employee also argued that Agency's witnesses' statements were inconsistent. Finally, he denied using any profanity or physically touching anyone.

placed on leave until the documentation was provided.[8]

Following an evidentiary hearing, the Administrative Judge ("AJ") issued his Initial Decision on December 8, 2010.[9] With respect to Employee's conduct in the verbal altercation, the AJ found that Employee was unreasonably angry and used profanity with Ms. Carry. He further concluded that Employee was deliberately insubordinate when he disobeyed a direct order and failed to submit evidence proving his compliance with the annual physical examination. In his reasoning, the AJ cited that Employee did not provide documentation or witnesses to support his assertion that Agency's claim was false.[10] Hence, he held that Agency proved by a preponderance of evidence that Employee was guilty of committing an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations and insubordination.[11]

Employee filed a Petition for Review on January 12, 2011. He argued that the AJ's determination that he was unreasonably angry and used profanity not supported by substantial evidence. Employee claimed that the record does not reveal a long history of disciplinary problems. He went on to reason that the penalty of removal was not within the range of penalties

[8] *Employee's Reply to Agency's Answer to the Petition for Appeal*, p. 2-4 (February 6, 2009).
[9] Because there was conflicting testimony, the AJ considered the demeanor and character of each witness; the improbability of the witness's version of events; inconsistent statements of the witness; and the witness's opportunity and capacity to observe the event or act at issue. He found Agency's witnesses to be more credible, providing that unlike Employee, their testimony was consistent and corroborated by documents.
[10] Even though Employee proffered medical documentation as proof that he completed a physical examination, the AJ held that it was insufficient. The documents did not include data regarding his physical condition or laboratory findings. It merely listed the years in which he completed annual physical examinations.
[11] In deciding whether summary removal was appropriate, the AJ concluded that Agency's action was reasonable. He explained that Agency exercised proper managerial discretion and considered Employee's lengthy history of disciplinary issues. Further, the AJ cited to OEA's long holding that it will leave an agency's penalty undisturbed when the penalty is within range allowed by law, regulation, or guidelines, and the penalty is not a clear error of judgment. As a result of these findings and conclusions, the AJ upheld Agency's summary removal action. *Initial Decision,* p. 5-6 (December 8, 2010).

provided in Chapter 16 of the District Personnel Manual ("DPM").[12] He further contended that Agency failed to follow DMH policy 716.1.[13]

Substantial Evidence

Employee claimed that he was not unreasonably angry and did not use profanity, which proves that the charge of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations was not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[14] Therefore, this Board must determine if a reasonable mind would accept the AJ's assessments that Employee engaged in disrespectful and threatening conduct to support an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, neglect of duty charge.[15]

As the AJ provided, there were conflicting testimonies provided during the evidentiary hearing. However, he found Agency's witnesses to be more credible.[16] The record shows that Agency witnesses, who were present during the argument, provided that Employee was

[12] Moreover, Employee also provided that other employees who did not complete their examinations were not removed from their positions.
[13] Specifically, Employee argued that the warning letter provided by Agency failed to warn him of removal; Agency did not place him on administrative leave before removing him; and Agency did not issue a proposal of removal – it simply removed him from his position. *Petition for Review*, p. 2-8 (January 12, 2011).
[14] *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).
[15] There are nine separate causes of actions that fall under the "on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations" subsection listed on the Table of Penalties. Agency chose to use the neglect of duty cause to remove Employee. *Agency's Response to Employee's Petition for Appeal*, p. 4-5 (December 15, 2008).
[16] The OEA Board relies heavily on the AJ's assessment of witness credibility. Because this is a matter of the Employee's word against Agency's witnesses, the case really hinges on whom the fact finder deemed more credible. According to the Court in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), great deference to any witness credibility determinations are given to the administrative fact finder. The Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

disrespectful, loud, and threatening.[17]

It should be noted that only one witness testified that she heard any profanity used by Employee. However, after further questioning, she later provided that because it had been three years since the incident occurred, she could not be sure of what Employee said.[18] More importantly, Ms. Carry confirmed that Employee did not curse at her during the altercation. Therefore, unlike the AJ's determination, we do not believe substantial evidence existed that Employee used profanity during the altercation. However, substantial evidence did exist that Employee was loud, disrespectful, and threatening. As a result of his behavior, he neglected his duties as a supervisor and engaged in an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations.

Prior Corrective Action

Agency claimed that Employee had previous violent outbursts with co-workers. It provided investigatory reports of an incident in July 3, 2005, when Employee alleged that another co-worker hung up the telephone on him. During this altercation, Employee made remarks about his co-worker's sexual orientation. Things escalated and Employee had to be physically restrained from attacking his co-worker. As a result of this incident, Employee was counseled by his supervisor; he and his co-worker were placed on different shifts; and Employee

[17] Witness, Faye Stewart, testified that she heard Employee and Ms. Carry going back and forth. At first, she heard a "bunch of hollering." Then, she heard Employee tell Ms. Carry to "get the hell out of the office." Stewart stated that Ms. Carry was so upset that she was shaking and nervous. *OEA Hearing Transcript*, p. 39-44 (September 10, 2010). Additionally, Sallie Bullard testified that on the day of the incident, Employee came into the office "raving about someone hanging up the phone" on him. She states that he was speaking loudly. Bullard further provided that Employee appeared upset when he came into the office. *Id.*, 54-60. Ms. Carry testified that she was scared and upset because Employee approached her in an aggressive manner. She provided that Employee did scream at her, but he did not call her any names or use profanity. Carry explained that she felt disrespected by the manner in which Employee was speaking to her. At one point, she thought Employee was going to put his hands on her, and she was a "little nervous." Later on in the day, Ms. Carry alleged that she received a threatening message from Employee. This prompted her to contact the police. *Id.*, 68-97.

[18] *Id.*, 28-29.

was required to attend cultural diversity/sexual harassment training.[19]

A few months later, Employee was involved in another incident. On October 8, 2005, an altercation ensued between Employee and a co-worker regarding a set of keys. Employee engaged in a loud exchange with this particular co-worker. According to the incident report, the Metropolitan Police Department was called to take an official report.[20] Based on testimony by Amelia Peterson-Kosecki, Employee was counseled after this incident as well.[21]

According to DPM § 1606.2, Agency could consider these incidents as prior corrective action.[22] Section 1606.2 provides that when "determining the penalty for a disciplinary action under this chapter, documentation appropriately placed in the OPF [Official Personnel Folder] regarding prior corrective or adverse actions, other than a record of the personnel action, may be considered for not longer than three (3) years from the effective date of the action, unless sooner ordered withdrawn in accordance with section 1601.7 of this chapter." The first two incidents occurred in July and October of 2005. The current incident occurred only two years later in July of 2007. Therefore, Agency properly considered the previous corrective actions against Employee.

Appropriateness of Penalty

Employee argues that his removal was not an appropriate penalty for the charges against him. DPM § 1616.1 provides that "an agency head may remove an employee summarily when

[19] *Agency's Response to the Employee's Petition for Appeal,* p. 2-3 and Exhibit #7 (December 15, 2008).
[20] *Id.,* p. 2-3 and Exhibit # 8.
[21] *OEA Hearing Transcript,* p. 98-109 (September 10, 2010).
[22] The DPM defines corrective action as an official reprimand or a suspension of less than ten (10) days. Official reprimand is defined as a final decision letter that is placed in the employee's Official Personnel Folder and that censures an employee. Agency provided a letter from the Director regarding the July 2005 incident. The letter memorializes the incident and provides that the Director spoke with Employee and recommended sexual harassment training. There are incident reports for the October 2005 incident, but Agency does not provide a final decision letter for that incident.

the employee's conduct: (a) threatens the integrity of government operations; (b) constitutes an immediate hazard to the agency, to other District employees, or to the employee; or (c) is detrimental to public health, safety, or welfare of others." In the current matter, Agency removed Employee because his conduct threatened the integrity of government operations. According to Agency, he neglected his duties by failing to follow instructions or observe safety precautions; he was insubordinate; and he engaged in an on-duty or employment-related activity that was not de minimus, such as arguing and using abusive language.[23]

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).[24] 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.

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees.[25] Despite the prior actions outlined by Agency, Employee argues that he did not have any prior disciplinary action taken against him.[26] Assuming arguendo that the current incident was his first offense, the DPM clearly lists that the

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[23] *Agency's Response to the Employee's Petition for Appeal*, p. 4-5 (December 15, 2008).
[24] *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).
[25] Although the incidents which lead to Employee's removal occurred before the Table of Penalties were published, Agency used the Table as a guide to determine if removal was appropriate. Similarly, Employee relied on the Table of Penalties as guidance in this matter. *Petition for Review*, p. 6-7 (January 12, 2011).
[26] *Id.* at 8.

penalties for any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, neglect of duty, ranges from a reprimand to removal for the first offense.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[27] OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[28] Agency's reliance on DPM § 1619(6)(c) is reasonable given the charges. Hence, removal was an appropriate penalty for Employee's conduct of initiating an altercation with another co-worker by being disrespectful, loud, and threatening.

As for the insubordination charge, 22 DCMR 2102 provides that "each individual who is employed or is to be employed in the performance of duties involved in direct patient care shall have a health examination by a physician either prior to his or her employment or within fifteen (15) calendar days after entering on duty and, in either case, *annually* thereafter" (emphasis added). Moreover, DMH Policy 716.1 provided that effective October 21, 2003, "mandatory . . . annual/biannual health screenings are . . . required for individuals who are employed . . . in the Department of Mental Health (DMH) positions involving direct care to DMH consumers."[29] Employee was a food service worker. His position description provides that he was required to

[27] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[28] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).
[29] *Agency's Response to the Employee's Petition for Appeal*, Exhibits # 10 and 12 (December 15, 2008).

observe the preparation and ensure that all patients received meals.[30] Therefore, Employee was in a position involving the direct care of DMH consumers. Consequently, he was required to get an annual physical.

There is no evidence in the record that Employee actually had a physician conduct the exam or complete the required documents. The penalty for a first offense of insubordination is reprimand to suspension for up to 10 days. Thus, if insubordination was the only action taken against Employee, removal would not have been warranted.[31] However, because Agency proved the on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, neglect of duty charge, we cannot reverse Agency's decision to remove Employee.

Letter of Removal

Employee's final arguments were that Agency failed to warn him of his removal; failed to place him on administrative leave before removing him; and did not issue a proposal of removal. DMH Policy 716.1 provides that supervisors shall take corrective measures against employees who fail to have their examinations performed. Section 11 of DMH Policy 716.1 provides the following:

> Supervisors shall:
>
> (1) Determine if there were extenuating circumstances when an employee who has been properly notified fails to complete the scheduled screening.
>
> (2) If there were extenuating circumstances, e.g., unexpected absence or illness that prevented an employee from having the screening, do not penalize the employee.

[30] *Id.*, Exhibit #19.
[31] In his Petition for Review, Employee also made a disparate treatment claim that the AJ failed to address. Again, if insubordination was the only charge, this Board would have been compelled to remand the case to the AJ to consider the disparate treatment claims.

- Allow the employee up to ten (10) workdays to complete the required screening.
- Inform the employee that he/she must personally make arrangements with EHB or a private physician for the screening, and if he/she elects to go to a Private physician, the employee shall be responsible for any associated costs.

(3) If extenuating circumstances did not exist, the employee shall be subject to removal under the emergency provisions of insubordination.
- Give the employee a Letter of Direction for Failure to Complete Mandatory Health Screening (see example in Exhibit # 4), modify the language shown in Exhibit 3 when the employee elected, but failed to complete the screening through a private physician; and
- Give the employee page 2 of the Annual/Biannual Health Screening Notice.
- If, after being given a Letter of Direction for Failure to Complete Mandatory Health Screening, the employee still fails to complete the health screening as Directed, inform the employee that a removal, under the emergency provisions, shall be proposed for failing to keep the health screening appointment. This action should be proposed within ten (10) days of noncompliance, pursuant to the DPM regulations.
- Place the employee on administrative leave immediately.

These actions shall be initiated under the emergency provisions of the Chapter 16 of the DPM and shall result in termination of employment.

Agency gave Employee notice on March 27, 2007, that documentation of his annual health examination was due and an appointment had been scheduled on his behalf at the St. Elizabeth Hospital on April 11, 2007. The letter went on to note that the completed forms were due by April 30, 2007.[32] Employee informed Agency that he would have his physician complete the exam. However, he failed to provide the completed forms. Therefore, Agency started corrective measures.

Because Employee did not have extenuating circumstances, Agency provided a Letter of Warning for his failure to submit the required documents. The letter was dated May 30, 2007, and it provided that after the March 27, 2007 written notice, the Agency director verbally

[32] *Id.*, Exhibit #13.

requested documentation from Employee in April and May of 2007. The letter went on to warn Employee that if he failed to submit the documentation, it would "result in the initiation of disciplinary action."[33] However, Employee still failed to comply.

In accordance with DMH policy 716.1, Agency placed Employee on administrative leave on July 6, 2007.[34] Subsequently, on July 22, 2008, there was a notice of summary removal issued with an effective date of August 1, 2008. Employee was provided with an opportunity to respond to the action before a hearing officer issued her recommendation on October 17, 2008 and before a final decision was issued November 6, 2008.[35] Contrary to Employee's claims, Agency adhered to and provided documentation for each requirement provided by DMH policy 716.1.

Conclusion

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was within the range of penalties for the on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, neglect of duty charge, as evidenced in Chapter 16 of the DPM. Agency properly effectuated summary removal of Employee on the grounds of insubordination in accordance with 22 DCMR 2102 and DMH policy 716.1. Therefore, we must deny Employee's Petition for Review.

[33] *Id.*, Exhibit #17.
[34] *Id.*, Exhibits #1 and 17.
[35] *Id.*, Exhibits #1 and 17 and *Submission of Final Agency Decision*, Attachment #1 (August 13, 2009).

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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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.