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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
RONALD DUBERRY)	OEA Matter No. 1601-0002-01
Employee)	
)	Date of Issuance: December 21, 2005
v.)	
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF CORRECTIONS)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ronald Duberry (“Employee”) was employed as a Shift Supervisor at the Lorton Maximum Security Facility through the Department of Corrections (“Agency”). On October 17, 2000, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) to rescind a 15-day suspension for an inexcusable neglect of duty action. Agency accused Employee of disobeying his supervisor’s, Deputy Warden Steve Smith, orders to report a power outage at the Lorton facility to Warden Adrienne Poteat and failing to submit an initial report of the occurrence. Employee served his suspension from October 24, 2000 through November 7, 2000.

Employee's petition alleged that he was improperly charged and that he was the victim of disparate treatment. Employee provided that the official who charged him with the neglect of duty offense was not present on the day of the incident. He also provided that Agency was in violation of the Corrective Action 45-day rule; that the charge was in violation of a memorandum issued by the Director of the Agency; and/or he was not afforded due process since a Disinterested Designee was not assigned to his case. As for the disparate treatment claim, Employee provided that there were two other employees, Lieutenants Smith and Diaz, who also failed to adhere to the Agency's guidelines when a power outage took place during their shifts. He asserted that no action was taken against either employee by Agency to reprimand their alleged similar acts of neglect of duty.¹

The Administrative Law Judge ("ALJ") issued an Initial Decision on February 25, 2004. In it, the ALJ determined that Agency proved by a preponderance of the evidence that Employee committed the acts of which he was accused. He also determined that Employee's actions did constitute cause for the adverse action claim filed against him. Finally, he provided that the Agency's penalty was appropriate given the circumstances. Employee filed a Petition for Review on June 2, 2004, disputing the ALJ's decision.

Under D.C. Code Ann. § 1-606.3(a), the 15-day suspension constitutes an adverse

¹ Employee failed to submit any evidence to prove that no action was taken against Lieutenants Smith and Diaz. He also neglected to cross-examine Deputy Warden Smith as to any action or lack of action taken against said employees. *See* Hearing Transcript, p. 151-153 (April 30, 2003).

action against Mr. Duberry.² In adverse action cases appealed to OEA by employees, the agency must prove by a preponderance of the evidence that the employee committed the act he is accused of. Preponderance of the evidence 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.”³

Agency’s Department Order provides that all employees are required to notify and inform appropriate authorities and staff when a significant incident or extraordinary occurrence takes place within their area of responsibility. Extraordinary occurrences are defined as any event, planned or unplanned, which results in loss of life, grievous injury, or poses an imminent threat to the health, safety, or welfare of staff, inmates, or members of the general public. The Department Order list a major utility failure as an example of an extraordinary occurrence. As for notification and reporting, the order provides that when an extraordinary occurrence transpires employees are to promptly notify their supervisors in their chain of command; prepare and fax an initial report of the incident before leaving the facility; and prepare and submit a final report within three business days from the day of the event.⁴ Employee prepared and submitted a final report but did not notify his supervisors as requested, nor did he prepare and fax the initial report before leaving his shift.

² D.C. Code Ann. § 1-606.3(a) provides in pertinent part that “an employee may appeal a final agency decision affecting a performance rating which results in . . . an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more (pursuant to subchapter XXIV of this chapter)”

³ See OEA Rule 629.1.

⁴ See Department Order 1281.1 Sections II, IV(B), and V.

The power outage in question occurred at or around 1:15 a.m. The handwritten phone log for the 11:30 p.m. to 8:00 a.m. shift provided that Employee called Deputy Warden Steve Smith at 1:24 a.m. to inform him of the outage.⁵ According to testimony from Smith, he told Employee to continue to move up the chain of command and notify his supervisors of the power outage. Employee informed Smith that he was unsuccessful in reaching Warden Poteat. Smith told Employee to continue to try to reach Poteat. The phone log then indicates that Employee called Deputy Warden Smith again at 2:45 a.m. Smith provided that Employee did not elude to the fact that he was still unable to reach Warden Poteat, so he assumed Employee was successful in doing so.⁶

At no time did Employee deny that he did not contact Warden Poteat. He instead offered testimony that when he was unable to reach her, he thought that it was more important for himself and others to perform security checks and other duties opposed to assigning someone the responsibility of contacting Poteat.⁷ Employee also provided that he did not fax an initial report to Warden Poteat because the fax machine was inoperable due to the power outage.⁸ Although, Employee provided a compelling argument as to why the report was not faxed, he did not provide an equally compelling argument as to why he did not prepare the initial report. He claims that he simply lacked enough

⁵ See Hearing Transcript, Agency Exhibit #1, p. 53 (April 30, 2003).

⁶ See Hearing Transcript, p. 16-21 (April 30, 2003). It should be noted that the phone log indicates only one call to Warden Poteat from Employee within the period of the power outage; that call occurred at 7:15 a.m. However, Employee provides in his testimony that he attempted to contact Poteat twice himself and had the facility operator to page her. *Id.*, at p. 58-59.

⁷ *Id.* at p. 106-109.

⁸ *Id.* at p. 88.

information to prepare the report.⁹ Employee was the supervisor in charge during most of the outage. Consequently, he possessed all of the information that could have been included in the initial report. All issues that he addressed during the extraordinary occurrence could have been reported. Employee's failure to prepare the initial report demonstrates his disregard for the departmental rules. Employee decided that it was more important to work on the final report over the weekend instead of completing both the initial and final reports by the times designated by the Order.¹⁰

As a result of the testimony provided by Deputy Warden Smith; the handwritten phone log; and Employee's own admission of his failure to contact Warden Poteat and to prepare and fax the initial report, Agency successfully proved by preponderance of the evidence that Employee committed the act of inexcusable neglect of duty.

The aforementioned also clearly establishes cause for Agency taking adverse action against Employee. Under 46 D.C. Reg. 4659, Section 1603.3, cause for adverse action is defined as:

“. . . any 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. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or

⁹ Department Order 1281.1, Section IV(D)(1) provides that an initial report "contains information that is available within one (1) hour after the extraordinary occurrence is discovered and is reported on the 'Official Report of Extraordinary Occurrence' form." Furthermore, supplemental reports can be filed which contain significant additional information that became available after the initial report was issued. See Department Order 1281.1, Section IV(D)(2).

¹⁰ See Hearing Transcript, p. 62-63 (April 30, 2003).

information from the government.”

Employee blatantly neglected his duties and failed to follow the departmental regulations.

When assessing the appropriateness of Agency’s penalty, the OEA Board has historically relied on those factors provided in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). In *Douglas*, the following factors are identified to determine the appropriateness of an agency’s penalty against an employee:

- (1) the nature and seriousness of the offense, and it’s 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 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.

Applying the above-mentioned factors to the facts of this case, it is clear that the Agency's judgment did not exceed the limits of reasonableness.

Employee's offense was of a serious nature and was specifically addressed within the Department of Corrections Order. Employee, although on notice, intentionally ignored his duties to notify his supervisors and prepare and fax the initial report. Because he was a Shift Supervisor, he had the responsibility to adhere to the Department Orders and ensure that those he supervised were also in compliance.

Although Employee was with the Agency for over fifteen years, this was not his first disciplinary action relating to an inexcusable neglect of duty action. He was previously suspended for three days for failure to notify his supervisor of an extraordinary occurrence that happened during a shift that he supervised.¹¹ Since this was the second occurrence, it could be reasonably argued that Mr. Duberry's supervisors may lack confidence in his ability to follow the Department Orders. The rules appear simple — if there is an incident or occurrence, contact your supervisors. Employee's supervisors have been entrusted with the authority to make the difficult decisions that impact the functionality of the Lorton facility; Employee should not deprive them of their responsibilities because he lacks the willingness to see matters through as outline in Agency's Order. It should be noted that Employee testified that there were mitigating circumstances preventing him from notifying Warden Poteat and preparing and faxing

¹¹ See Hearing Transcript, Agency Exhibit #1, p. 46-51 (April 30, 2003).

the initial report, but he neglects to offer any specific reasons as evidence of his failure to perform these duties.¹² Accordingly, we hereby deny Employee's Petition for Review.

¹² See Hearing Transcript, p. 64-65 (April 30, 2003).

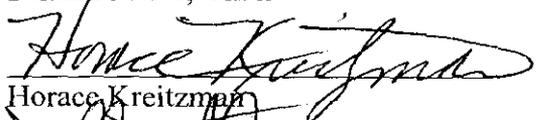
ORDER

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

FOR THE BOARD:



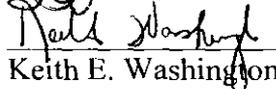
Brian Lederer, Chair



Horace Kreitzman



Jeffrey J. Stewart



Keith E. Washington

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.