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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
DWAYNE REDMOND,)	
Employee)	OEA Matter No. 1601-0203-12R14
)	
v.)	Date of Issuance: December 23, 2014
)	
DEPARTMENT OF GENERAL SERVICES,)	MONICA DOHNJI, Esq.
Agency)	Administrative Judge
_____)	
Matthew August LeFande, Employee Representative)	
C. Vaughn Adams, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 15, 2012, Dwayne Redmond (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Department of General Services’ (“Agency”) decision to suspend him for fifteen (15) days, with five (5) days held in abeyance for violating District Personnel Manual (“DPM”) § 1603.3(f)(4), § 1603.3(f)(6), § 1603.3(f)(8), and § 1603.3(f)(9). On September 19, 2012, Agency submitted its Answer to Employee’s Petition for Appeal, along with other supporting documents.

Following a failed mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on November 22, 2013. On December 2, 2013, I issued an Order scheduling a Status Conference for January 22, 2014. On December 9, 2013, Employee’s copy of the November 22, 2013, Order which was mailed to his address on record was returned to this Office marked “RETURN TO SENDER; NOT DELIVERABLE AS ADDRESSED; UNABLE TO FORWARD.” While Agency’s representative was present at the January 22, 2014, Status Conference, Employee failed to appear. Thereafter, on January 23, 2014, I issued an Order for Statement of Good Cause based on Employee’s failure to appear for the January 22, 2014, Status Conference. Employee had until January 31, 2014, to respond. Employee’s copy of the January 23, 2014, Order for Statement of Good Cause was returned to this Office on January 30, 2014. As a result of Employee’s failure to respond, the undersigned AJ issued an Initial Decision dated February 5, 2014 dismissing Employee’s Petition for Appeal

On June 9, 2014, Employee filed a Motion to Reinstate Petition for Appeal with the OEA Board. In his Motion, Employee argued that attached to his Petition for Appeal was a signed Designation of Representative form. The document provided Employee's representative's contact information and address. However, the AJ never served his attorney with any of the orders. Employee further noted that the orders from the AJ mistakenly listed him as unrepresented, and that OEA cannot dismiss his appeal without properly providing notice and an opportunity to be heard. On June 20, 2014, Agency filed a response to Employee's Motion. On July 24, 2014, the Board issued an Opinion and Order on Petition for Review ("O&O"), remanding this matter to the undersigned AJ for her to consider this matter on its merits.¹

In light of the Board's decision, I issued an Order on July 28, 2014, requiring the parties to attend a Status/Prehearing Conference on August 18, 2014. This Conference was later rescheduled for October 8, 2014. Both parties were in attendance. Thereafter, the undersigned issued an Order dated October 20, 2014, wherein, the parties were required to submit Post-Status/Prehearing Conference briefs addressing the issues raised during the October 8, 2014, Conference. Both parties complied. On December 10, 2014, Agency filed a reply to Employee's brief. The record is closed.

JURISDICTION

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

ISSUE

- 1) Whether Agency's action of suspending Employee was done for cause; and
- 2) If so, whether the penalty of ten (10) days suspension with five (5) days held in abeyance is within the range allowed by law, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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.

OEA Rule 628.2 *id.* states:

¹ *Dwayne Redmond v. Department of General Services*, OEA Matter No. 1601-0203-12, *Opinion and Order on Petition for Review*, July 24, 2014.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was a Protective Service Office with Agency's Protective Services Police Department. On or around November 22, 2011, Employee was given a detail assignment for 1900 Massachusetts Ave, SE (D.C. General Hospital) by his immediate supervisor. He was ordered to be at this location at 5:00 a.m. the following day. At around 4:12 a.m. on November 23, 2011, Employee was asked by Sergeant ("Sgt.") Marshall to respond to an 'Open Door' incident at Wilson High School. Employee notified Sgt. Marshall via iMessage that he was scheduled to be at D.C. General Hospital at 5:00 a.m. and that he was almost there. Sgt. Marshall ordered Employee to take a priority 1 assignment at Wilson High School and that Employee would be covered at D.C. General Hospital until he was done at Wilson High School.

The GPS for Employee's Patrol vehicle put Employee at D.C. General Hospital Campus during this iMessage exchange with Sgt. Marshall. When Sgt. Marshall called D.C. General Hospital to notify them that Employee had been reassigned to Wilson High School, he was notified that Employee was actually still at D.C. General Hospital. The GPS also highlights that Employee was at D.C. General Hospital until 4:43 a.m. The GPS further highlights that Employee arrived at Wilson High School around 5:13 a.m. and departed around 5:17 a.m.

On June 21, 2012, Agency issued an Advanced Written Notice of Proposed Suspension to Employee for the following causes of action and specifications: District Personnel Manual ("DPM") §1603(f)(4),(6),(8)-(9). Employee filed a response to the Advance Written Notice of Proposed Suspension on June 28, 2012. Thereafter, on July 18, 2012, Agency issued its Notice of Final Decision suspending Employee for ten (10) days, with five (days) of the proposed fifteen day suspension held in abeyance.

1) Whether Agency's action of suspending Employee was done for cause

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603(f)(4),(6),(8)-(9), the definition of "cause" includes any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: 1) insubordination, 2) misfeasance, 3) unreasonable failure to assist a fellow government employee in carrying out assigned duties, and 4) unreasonable failure to give assistance to the public. According to the record, Agency's decision to suspend Employee was based on these charges.²

² The parties discussed Neglect of Duty - DPM §1603(f)(3), as a cause of action for Employee's suspension in their submissions to this Office. However, DPM §1603(f)(3), which deals with Neglect of duty is not one of the DPM provisions listed in the Notice of Final Decision dated July 18, 2012. It should however, be noted that the Notice of

A) **Any on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations:**

Insubordination and Misfeasance

Insubordination is defined to include refusal to comply with direct orders, accept assignments or detail; and carry out assigned duties and responsibilities.³ Here, Agency asserts that Employee was insubordinate when he refused to follow a direct order from Sgt. Marshall, a superior, to not return to D.C. General Hospital and respond to a burglar alarm at Wilson High School. Agency further explains that after being ordered to respond to Wilson High School, Employee instead returned to D.C. General Hospital and only responded to the order to go to Wilson High School forty (40) minutes later after he was confronted by another superior. Employee on the other hand argues that, he had a conflict because he was required to be at a detail at 1900 Massachusetts Ave, SE at 5:00 a.m. He does not dispute the fact that he was given an order by Sgt. Marshall to report to Wilson High School. Employee explains that, he did not have the legal authority to respond to the priority 1 call at Wilson High School because he is not a Police Officer.⁴ Employee also maintains that Sgt. Marshall did not have the authority to order him to respond to a Code 1 at Wilson High School. He further explains that absent a lawful order capable of being lawfully obeyed, he cannot be found insubordinate. Employee additionally notes that there were multiple persons on the scene at Wilson High School, and he was not needed there for any reason.

I find Employee's arguments unpersuasive. Employee received the order from Sgt. Marshall to respond to Wilson High School while he was on his way to D.C. General.⁵ When Employee was ordered by his superior to respond to the burglar alarm at Wilson High School, Employee notified Sgt. Marshall via iMessage that he had to be at 1900 Massachusetts Ave. Thereafter, Sgt. Marshall via iMessage notified Employee that he should take the assignment at Wilson High School and his 5:00 a.m. assignment at 1900 Massachusetts Ave would be covered until he was done. Upon receiving this message, Employee should have immediately left the D.C. General Hospital Campus and responded to Wilson High School. Instead, Employee went to D.C. General Hospital Campus, and the GPS record confirmed that Employee's Patrol vehicle was on the D.C. General Hospital campus from 4:00 a.m. – 4:43 a.m. Employee finally left for Wilson High School more than thirty (30) minutes after he was ordered to do so. Irrespective of whether Employee was needed at Wilson High School, Employee still had the responsibility to immediately comply with the direct orders of Sgt. Marshall. Moreover, Employee does not dispute that his Patrol vehicle was on D.C. General Campus until about 4:43 a.m., nor does he dispute that he was informed by Sgt. Marshall via iMessage that his 5:00 a.m. detail to 1900 Massachusetts Ave would be covered and he should proceed to Wilson High School.

Final Decision further highlights in the second paragraph that the proposed action was based on Neglect of Duty, (without listing the corresponding DPM provision). As such, this cause of action will not be addressed.

³ DPM § 1619.6(d).

⁴ D.C. General Hospital and 1900 Massachusetts Ave, SE, are used interchangeably throughout this decision.

⁵ When asked to switch to the Second District channel to take a priority 1 radio assignment for a burglar alarm at Wilson High School at 4:08 a.m., Employee responded via iMessage that "I HAVE TO BE AT D.C. GENERAL AT 5:00 IM ALMOST THERE". See Agency's Brief at DGS Exhibit 2.

Additionally, at no time during his iMessage conversation with Sgt. Marshall did Employee ever mention that he would not respond to the priority 1 call because he was not a Police Officer under District laws, and he did not have the authority to do so. Instead, Employee's only hesitation on the night of the incident was the fact that he had a schedule conflict. And once this conflict was resolved by Sgt. Marshall in the iMessage that stated that Employee's 5:00 a.m. detail to 1900 Massachusetts Ave would be covered, Employee had no other excuse to go to D.C. General Hospital and only respond to the burglar alarm at Wilson High School, about thirty (30) minutes later. Furthermore, as noted by Agency, and as provided in Employee's job description, Employee's duties included responding to, and investigating alarms. There was a burglar alarm at Wilson High School which Employee was ordered to respond to as part of his job functions, but he failed to comply. Employee failed to immediately carry out the direct orders of his superior when he went to D.C. General Hospital instead of immediately responding to the burglar alarm at Wilson High School. Consequently, I conclude that Employee's actions on the night in question support a charge for insubordination.

Misfeasance is defined to include careless work performance, providing misleading or inaccurate information to superiors; and dishonesty.⁶ In the instant matter, Agency highlights that Employee departed D.C. General Hospital for Wilson High School over forty (40) minutes later on the night in question, and he only did so after he was confronted by another superior. Agency further notes that Employee provided inaccurate and misleading information to his superior when he submitted a vehicle trip sheet with time indicating that he was at the assigned location – Wilson High School at 5:00 a.m., when the GPS for his vehicle put him there at 5:13 a.m. Agency also notes that the Protective Service Officer on duty at Wilson High School did not observe Employee at the school.

Employee explains that given the complete absence of a legal authority to demand that he respond to a priority 1 assignment, Agency's claim that Employee provided inaccurate or misleading information was a "typographical error, rounding or approximation, or simply that [Employee's] source of time at the scene was wrong." Employee further explained that Sgt. Marshall did not have the authority to dispatch Employee on a priority 1 assignment, and Employee did not have the authority to respond to such calls.⁷ Although the thirteen (13) minutes discrepancy between the GPS notation and the time Employee actually wrote down may simply be an error on Employee's part, I find that Employee's action constitutes careless work performance. The fact remains that the time Employee wrote on his vehicle trip sheet was inaccurate, and misleading, and it was careless of Employee to not verify the time he put down on his vehicle trip sheet for submission to his superior. Accordingly, I find that Agency had sufficient cause to institute this cause of action against Employee.

⁶ DPM § 1619.6(f).

⁷ It should be noted that Employee was charged with "misfeasance" and not "malfeasance". Accordingly, I will not address the charge of "malfeasance" as raised by Employee in his brief dated November 26, 2014. Malfeasance is defined under DPM § 1619.6(g) as doing *something illegal*. Employee argues that Sgt. Marshall's order was unlawful since he was not a Police Officer, and as such Employee was not obligated to follow them. Employee further explains that absent a lawful order capable of being lawfully obeyed, he cannot be found malfeasant. However, I conclude that since Employee was not charged with malfeasance, I will not address any of Employee's arguments that relates to this cause of action, including the argument with regards to whether the order was lawful.

Unreasonable failure to assist a fellow government employee in carrying out assigned duties and Unreasonable failure to give assistance to the public

DPM § 1603.3(f)(8)-(9), defines cause to include unreasonable failure to assist a fellow government employee in carrying out assigned duties and unreasonable failure to give assistance to the public. Here, Employee was ordered to respond to Wilson High School following a burglar alarm. Agency asserts that by delaying to respond to Sgt. Marshall's directive, Employee failed to assist DCPS Officer Ingram and another Protective Service Officer on the scene. Employee has not provided any information to contradict this assertion nor does he specifically address this cause of action. Instead, Employee argues that by the time Sgt. Marshall gave the order, the Metropolitan Police Department ("MPD") had closed its investigation into the matter over an hour earlier.

According to DPM § 1619.6(h), the refusal of an employee to carry out a directive by a superior to perform a duty that is outside the normal scope of the employee's duties or responsibilities is considered an unreasonable failure to assist a fellow government employee in carrying out assigned duties. Thus, *assuming arguendo* that Sgt. Marshall's directives to Employee were outside the normal scope of Employee's duties or responsibilities as Employee argues, Employee's refusal to carry out this directive is a violation of the above-referenced DPM. Employee was given a direct order to immediately proceed to Wilson High School to assist with a burglar alarm and he failed to comply.

Furthermore, DPM § 1619.6(i) includes a failure to provide assistance when requested. Sgt. Marshall ordered Employee to immediately respond to the burglar alarm at Wilson High School, but he failed to do so. As Agency noted, there was another Protective Service employee, as well as a DCPS Officer at Wilson High School whom Employee failed to assist as a result of his delay. Employee has not provided any evidence to dispute that these individuals in fact needed assistance. Further, Employee does not work for the MPD, so MPD's completion of its investigation into this matter an hour earlier is irrelevant to the fact that Employee's delay in responding to a direct order affected others. Accordingly, I find that Agency had sufficient cause to institute these causes of action against Employee.

2) *Whether the penalty of ten (10) days suspension is within the range allowed by law, rules, or regulations.*

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).⁸ According to the Court in *Stokes*,

⁸ See also *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); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

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. In the instant case, I find that Agency has met its burden of proof for the charge of “[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations to include: insubordination, misfeasance, unreasonable failure to assist a fellow government employee in carrying out assigned duties and unreasonable failure to give assistance to the public, and as such, Agency can rely on these charges in disciplining Employee.

In reviewing Agency’s decision to suspend Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for “[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: insubordination, misfeasance, unreasonable failure to assist a fellow government employee in carrying out assigned duties and unreasonable failure to give assistance to the public are found in § 1619.1(6)(d), (f), (h)-(i) of the DPM. The penalties for a first offense for these causes of action range from reprimand to fifteen (15) days suspension. The record shows that this was the first time Employee violated § 1619.1(6)(d), (f), (h)-(i). Employee’s conduct constitutes an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations and it is consistent with the languages of §§ § 1619.1(6)(d), (f), (h)-(i) of the DPM. Therefore I find that, by suspending Employee for ten (10) days with five (5) days held in abeyance, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.⁹ When an Agency’s charge is upheld, this Office has held that it will leave the agency’s penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of ten (10) days suspension with five (5) days held in abeyance was within the range allowed by law. Accordingly, Agency was within its authority to suspend Employee given the Table of Penalties.

⁹ *Love* also provided that “[OEA’s] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency’s shoes in the first instance; such an approach would fail to accord proper deference to the agency’s primary discretion in managing its workforce. Rather, the [OEA’s] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency’s judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency’s decision should be corrected to bring the penalty within the parameters of reasonableness.” Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

ORDER

Based on the foregoing, it is **ORDERED** that the Agency's action of suspending Employee for ten (10) days with five (5) days held in abeyance is hereby **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge