

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
TIA GIBSON,)
Employee) OEA Matter No. 1601-0114-07
v.) Date of Issuance: August 29, 2008
D.C. DEPARTMENT OF PUBLIC)
WORKS,)
Agency) ERIC T. ROBINSON, Esq.
) Administrative Judge

Tia Gibson, Employee *Pro Se*
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On August 27, 2007, Tia Gibson (“the Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Department of Public Works (“DPW” or “the Agency”) adverse action of removing her from service. I was assigned this matter on or around November 2, 2007. A prehearing conference was convened on or around December 6, 2007. During this juncture, the parties expressed an interest in pursuing settlement of their differences through the OEA’s mediation and conciliation department. Mediation proved unsuccessful, and given the parties positions as stated in the documents of record as well during the prehearing conference, I determined that an evidentiary hearing was warranted. Accordingly, an evidentiary hearing was held on February 7, 2008¹. The record is closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

¹ During this hearing, Employee opted not to testify on her own behalf.

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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUE

1. Whether Agency’s adverse action was taken for cause. And;
2. If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Summary of Relevant Testimony

Agency’s Case in Chief

Ingrid Jackson

Ingrid Jackson (“Jackson”) testified in relevant part that: she is a Human Capital Administrator/Human Resources Manager with the DPW. Her job related duties include, but are not limited to: employee relations, training, recruitment, and retention. *See generally*, Tr. at 13 – 14. Jackson is not personally acquainted with the Employee. However, in the course of carrying out her job related duties, she reviewed the Employee’s official personnel records kept at the Agency (not with the Department of Human Resources). Jackson recalled that according to her review of the aforementioned personnel records that the Employee, prior to her removal, held the position of Program Support Assistant in the Parking Enforcement Management Administration. *See*, Tr. at 14.

Agency’s Exhibit No. 1 was admitted into evidence through Jackson’s testimony. It is a standard position description for a Program Support Assistant, DS Series 303, Grade 6. This position description is for the Employee’s position of record prior to her removal. To the best of Jackson’s knowledge, this position description accurately reflects the Employee’s job related duties and responsibilities. *See*, Tr. at 16.

Agency's Exhibit No. 2 was admitted into evidence through Jackson's testimony. It is a Standard Form 50 Notification of Personnel Action. This form notes that the Employee was removed from service with an effective date of July 27, 2007.

Jackson testified during cross examination, that most position descriptions will contain the catch all phrase "perform other duties as assigned." Tr. at 25. This means that a District employee may perform other duties that are not specifically listed on their respective position descriptions. The performance of such duties, on a limited basis, is not out of the norm, nor is it generally considered a prohibited practice.

Jackson also described the process of placing an employee on a temporary detail not to exceed 120 days. Generally, a detailed employee is given some sort of written directive that provides a general outline as to their updated job duties and responsibilities. However, a written directive is not given in all circumstances, although, in Jackson's opinion, it cuts down on any confusion the employee may have under said circumstances. *See generally*, Tr. at 26 - 27.

Lastly, Jackson recalled that the Agency's file of the Employee contained, *inter alia*, a number of other adverse and corrective actions. Although, she could not remember with particularity all of the documents contained within said file.

Kathryn Matthews

Kathryn Matthews ("Matthews") testified in relevant part that: she was employed by the Agency from approximately January 2006 through March 2007. Tr. at 38. During this period of time, Matthews was employed as an Acting Assistant Branch Manager. Her on the job responsibilities included assisting the branch manager George Carr "with managing the shift coordinators, supervisors, the customer service office..." Tr. at 38.

For a time, Matthews was the Employee's direct supervisor. She recalled that the Employee's time and attendance were unsatisfactory. In trying to rectify these time and attendance issues, Matthews recalled issuing verbal warnings, written warnings, and placing the Employee on leave restriction.

Agency's Exhibit No. 3 was admitted into evidence through Matthews' testimony. It is a memorandum, to the Employee, dated February 8, 2006. It is a letter of direction leave restriction wherein the Employee's use of leave (annual, sick, and leave without pay) was formally restricted. This document was prepared with Matthews' personal knowledge and input.

Agency's Exhibit No. 4 was admitted into evidence through Matthews' testimony. It is a memorandum to the Employee, dated June 19, 2006. This memorandum was in regards to the Agency's allegations of the Employee failure to follow instructions. It alerted the Employee that she was "in violation of the D.C. Personnel Regulations, 'Inexcusable Neglect of Duty'" Negligence in performing official duties, including

failure to follow verbal or written instructions. This document was prepared with Matthews' personal knowledge and input.

Agency's Exhibit No. 5 was admitted into evidence through Matthews' testimony. It is a voluminous compilation of AWOL notices issued to the Employee. These AWOL notices were prepared with Matthews' personal knowledge and input. Through the issuance of the documents that comprise Agency Exhibits No. 3, 4, and 5, it was hoped, by Matthews, that the Employee would rectify her time and attendance problems. Ultimately to no avail. Matthews further recalled that since no other means were left at her disposal for rehabilitating the Employee, it was decided that removal was the last alternative.

According to Matthews, the Employee's constant tardiness and AWOL created an unnecessary hardship for her department. She explained the difficulties of the situation as follows:

A: Well, [the Employee's] tardiness and her attendance affected my work because her major responsibility was getting calls from the Mayor's Call Center and letters from the Director's Office. And when she was not there or she was tardy, that work would come to me, which took away time I could use with other employees. And it also affected the Director's score card.

Q: Why couldn't the work just wait until she showed up?

A: Because all that work is time sensitive, especially letters that come in from the Director's Office. It's the length of time that [the Employee] or other employees would have to do the investigation and get the letter back to the Director's Office so that they could preview it and then send it on back to the citizen.

Q: So generally,... what would happen when the Agency missed the deadline in responding to a complaint?

A: It would affect the score card... It's how the Mayor evaluates the Director.

Tr. at 46 – 47.

Matthews also explained that the Employee's continued instances of AWOL and tardiness negatively affected the morale of other Agency employees. See generally, Tr. at 47 – 48.

George Carr

George Carr ("Carr") testified in relevant part that: he is employed by the Agency

as a Parking Patrol Manager. His job responsibilities include overseeing the “daily operations of the ticket writing portion of parking control.” Tr. at 54. Carr defined absent without official leave as “when a person doesn’t have the required amount of leave, doesn’t request leave, doesn’t present documentation, and [or] for habitual tardiness.” Tr. at 55. Carr also explained that an employee may be charged with AWOL even if that employee has sick or annual leave to spare. *See*, Tr. at 55.

Carr elaborated that the Employee was one of the subordinates that he was tasked with supervising. According to Carr, the Employee’s stint under his direction began at some point in 2005. Furthermore, the Employee “used a lot of unscheduled leave... And she was tardy a lot and some of the employees brought it to [Carr’s] attention.” Tr. at 56.

Agency’s Exhibit No. 6 was admitted into evidence through Carr’s testimony. It is a letter dated November 29, 2005. It is from Carr, addressed to the Employee, and references the Employee’s alleged time and attendance issues. In it, Carr changes the Employee’s tour of duty to 8:30am to 5:30pm. Furthermore, the Employee is also instructed that she must request and obtain approval for annual leave in advance of its usage.

Agency’s Exhibit No. 7 was admitted into evidence through Carr’s testimony. It is a proposal to suspend the Employee for nine days. Carr testified that this suspension was ultimately rescinded and that the Employee was instead issued a letter of admonition.

Agency’s Exhibit No. 9 was admitted into evidence through Carr’s testimony. It is another proposal to suspend the Employee for nine days based on allegations of the Employee being habitually tardy. According to Carr, this proposal was ultimately upheld and consequently the Employee received a nine day suspension.

Other measures that Carr used in order to rectify the Employee’s time and attendance issues included referring the Employee to employee assistance program counseling (“EAP”), verbal warnings, as well as amending her tour of duty. According to Carr, the Employee’s time and attendance did not improve.

Carr would typically walk past the Employee’s work station in the morning and would discover that she was not present. Also, a sign-in sheet was utilized to record the comings and goings of various employees in his office. The Employee would regularly neglect to sign in. *See generally*, Tr. at 64 – 68.

Like Matthews, Carr indicated that the Employee’s tardiness and absences created a burden for his office staff because he would have to redistribute the Employee’s assignments for others to complete.

Elsie McCray

Elsie McCray (“McCray”) testified in relevant part that: she works for the Agency as a Supervisory Parking Officer, Shift Coordinator. Her job related duties include

making sure that letters of correspondence and other duties are completed in a timely manner. *See, Tr. at 73.* McCray testified that she helped create Agency Exhibit No. 10. It is an internal record reflecting that the Employee wished to participate in EAP. According to McCray, the EAP program is offered to an employee if said employee is experiencing problem(s) or issue(s) that are interfering with the performance of their duties. *See, Tr. at 75.* For an undisclosed period of approximately two months, McCray was the Employee's supervisor. McCray recalled that during this time, the Employee was excessively tardy. *See, Tr. at 78.*

Teri Doke Adams

Teri Doke Adams ("Adams") testified in relevant part that: she is employed by the Agency as Administrator of the Parking Enforcement Management Administration. She has held this position for approximately five years. She manages the District government's public parking enforcement program. Adams was the one who signed Agency's Exhibit No. 13. It is a letter dated April 20, 2007, wherein the Employee was informed of the Agency's proposal to remove her from service, which incidentally, is at the heart of the instant matter.

The Employee's position was primarily customer service oriented with a emphasis on performing the responsibilities of the position in an timely and efficient manner. The Employee's time and attendance issues meant that her work had to be re-distributed to other members of the Agency. This created an unfair work load for the Employee's colleagues. *See generally, Tr. at 84 – 86.*

Adams testified that she reluctantly instituted the adverse action against the Employee. Considering that the Employee was a single mother, she felt that she exercised a good degree of leniency in attempting to rehabilitate the Employee's time and attendance issues. *See generally, Tr. at 86.* Adams reluctantly instituted the instant adverse action. *See generally, Tr. at 91 – 92.*

Joyanna Smith

Joyanna Smith ("Smith") testified in relevant part that: in June 2006, she was employed by the Agency as its ethics and integrity officer. According to Smith her primary duties included serving "as an advisor on corrective and adverse actions within the Administration." Tr. at 95. In the performance of her duties she would typically ask the supervisor of the affected employee to supply her with any number of documents including but not limited to: AWOL notices, performance evaluations, among other documents. After reviewing the documents, Smith would then issue a recommendation on whether the Agency should proceed with the corrective and/or adverse action in question. Smith would then submit her recommendation, along with all supporting documentation to the Administrator, who would then decide on whether to proceed and in what fashion. *See generally, Tr. at 96 – 97.*

Smith reviewed the Employee's documentation while considering whether or not

to remove the Employee from service. She noted that the Employee's time and attendance were unsatisfactory over an extended period of time, particularly during the period outlined in Agency Exhibit No. 13. Further, various other options were used to rehabilitate the Employee's behavior, all to no avail.

Employee's Case in Chief

Wanda Ellis

Wanda Ellis ("Ellis") testified in relevant part that: she was formerly employed by the Agency, initially as the Towing Control Manager and more recently as the Ethics and Integrity Officer. Her duties as an Ethics and Integrity Officer involved making "sure that any situation that involved ethics and integrity was fully investigated... [She] did investigations into employee complaints on disparate and unfair treatment by supervisors." Tr. at 118 – 119.

Ellis recalled one undisclosed date where the Employee and Matthews were "screaming" at each other while in the Employee's office. Ellis asked both of them to stop at which point Matthews left the Employee's office. *See generally*, Tr. at 119 -120.

Thelma Johnson

Thelma Johnson ("Johnson") testified in relevant part that: she works for the Agency as a Program Support Assistant. Her regularly scheduled tour of duty is from 10:00am to 6:30pm Monday through Friday. Her job responsibilities include responding to calls and answering customer queries.

Johnson distinguished her responsibilities from the Employee in that Johnson handled telephone queries while the Employee handled mail correspondence. Johnson testified that she did not have to assume the Employee's responsibilities if the Employee was absent from work. *See*, Tr. at 126.

Findings of Fact, Analysis and Conclusion

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

According to Agency's Exhibit No. 13, the Employee was alleged to have been AWOL as follows:

DATE	TIME	HOURS
9/4/2006	9am – 5:30pm	8
9/5/2006	9am – 5:30pm	8
9/6/2006	9am – 5:30pm	8
9/7/2006	9am – 5:30pm	8

9/8/2006	9am – 5:30pm	8
9/13/2006	9am – 10am	1
9/14/2006	9am – 10am	1
10/2/2006	9am – 10am	1
10/3/2006	9am – 10am	1
10/5/2006	9am – 10am	1
10/6/2006	9am – 10am	1
11/16/2006	9am – 10am	1
11/16/2006	2pm – 3pm	1
11/21/2006	9am – 10am	1
11/22/2006	9am – 10am	1
3/20/2007	9am – 12pm	3
3/26/2007	9am – 10am	1
3/29/2007	9am – 10am	1
4/2/2007	9am – 10am	1
4/3/2007	9am – 11am	2
4/5/2007	9am – 10am	1
4/6/2007	9am – 10am	1

Total hours of alleged AWOL – 60.

On some dates, it was alleged that the Employee did not report for duty at all without first acquiring approval for leave. On other dates, it was alleged that the employee was tardy thereby resulting in her being assessed at least one hour of AWOL.

In order to buttress its allegation that the Employee was AWOL on dates specified *supra*, the Agency presented relevant and credible testimonial evidence from Matthews, Carr, McCray, Adams, and Smith. They each either singularly or collectively noted that the Employee was habitually tardy and that she over used her sick and annual leave. They also testified that the Employee's AWOL's adversely affected the work load of the Employee's colleagues in that her work load would have to be absorbed by other employees. This situation created an unfair working environment for other Agency employees.

The Agency also presented relevant and credible documentary evidence supporting the allegations that have given rise to the instant matter. Including:

1. Agency's Exhibit No. 3, a memorandum to the Employee, dated February 8, 2006. It is a letter of direction leave restriction wherein the Employee's use of leave (annual, sick, and leave without pay) was formally restricted.
2. Agency's Exhibit No. 4, a memorandum to the Employee, dated June 19, 2006. It alerted the Employee that she was in violation of the D.C. Personnel Regulations, "Inexcusable Neglect of Duty" Negligence in performing official duties, including failure to

follow verbal or written instructions.

3. Agency's Exhibit No. 5, a voluminous compilation of AWOL notices issued to the Employee.
4. Agency's Exhibit No. 6, a letter dated November 29, 2005. It is from Carr, addressed to the Employee, in reference to the Employee's alleged time and attendance issues. In it, Carr changes the Employee's tour of duty to 8:30am to 5:30pm. Furthermore, the Employee is also instructed that she must request and obtain approval for annual leave in advance of its usage.
5. Agency's Exhibit No. 9, a proposal to suspend the Employee for nine days, based on allegations of the Employee being habitually tardy. This proposal was ultimately upheld and consequently the Employee received a nine day suspension.
6. Agency's Exhibit No. 13, a letter dated April 20, 2007, wherein the Employee was informed of the Agency's proposal to remove her from service.

The Employee did not present any credible evidence that either explains, exculpates, or mitigates the aforementioned time and attendance problems. In the documents of record, the Employee made a general argument that the instant adverse action was the result of a hostile work environment created by Matthews as well as being under the care of the physician.

The jurisdiction of this Office is expressly limited to performance ratings that result in removals; final agency decisions that result in removals, reductions in grade; suspensions of ten days or more; enforced leave; or reductions in force. OEA Rule 604.1, 46 D.C. Reg. 9299 (1999). I find that this Office does not have jurisdiction over hostile work environment actions. If the Employee wishes to pursue such an action, that must be done before some other judicial or quasi-judicial forum. .

Relative to her assertion that she (or a family member) was under the care of a physician, I find that the Employee did not present any credible evidence, i.e. a doctor's note, for all of the dates and times as outlined in Agency's Exhibit No. 13. Within the documents of record there are a couple of doctor's notes that cover periods of time not listed in Agency Exhibit No. 13.

It is evident from the testimony adduced during the evidentiary hearing that the Agency reluctantly took the instant adverse action in recognition of the Employee's situation of her being a single mother. However, it is also plainly evident to the undersigned that the Agency needs its employees to work during their scheduled tour of duty in order to accomplish its given mission. To do otherwise, would compromise the efficiency and integrity of the Agency and the District government. Accordingly, I find

that the Agency has met its burden of proof relative to the charge of AWOL as outlined *supra*.

I find that the Agency's adverse action was taken for cause. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See, Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ (); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ (). Therefore, when assessing the appropriateness of a 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 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. *See Stokes, supra; Hutchinson, supra; Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ (); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ ().

I CONCLUDE that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing the Employee from service should be upheld.

ORDER

Based on the foregoing, it is hereby ORDERED that the Agency's action of removing the Employee from service is UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge