THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
HERMAN HUNTER	) OEA Matter No. 1601-0050-05
Employee	)
	)
v	) Date of Issuance: June 1, 2007
	)
D.C. DEPARTMENT OF TRANSPORTATION	) Muriel A. Aikens-Arnold) Administrative Judge
Agency	)
	)

Jonathan L. Gould, Esq., Employee's Representative
Ross Buchholz, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 12, 2005, Employee, a Risk Management Specialist, filed a Petition for Appeal of Agency's action to remove him from his position effective April 15, 2005 for: 1) Failure to comply with reasonable and official instructions; and 2) Failure to assist and/or provide information during an ongoing investigation of misconduct. On May 23, 2005, this Office notified Agency regarding this appeal and instructed Agency to respond within thirty (30) days. After an extension was granted by this Office, Agency filed its Answer to Employee's Petition For Appeal (PFA).

This matter was assigned to this Judge on October 4, 2005. On December 19, 2005, an Order Scheduling a Prehearing Conference on January 17, 2006 was issued.[1] On March 6, 2006, an Order Convening a Hearing was issued scheduling said hearing on April 14, 2006. The hearing was conducted as scheduled and completed on May 26, 2006. On August 29, 2006, an Order Closing the Record was issued giving both parties an opportunity to submit closing

[1] On 12/30/05, Employee requested a postponement to, among other things, seek new counsel as his representative withdrew from this matter. That request was granted and the prehearing conference was rescheduled and held on 2/21/06 with Jonathan L. Gould, Esq. representing Employee.

statements no later than October 16, 2006.[2] Closing arguments were submitted and the record was closed effective at close of business on November 13, 2006.[3]

JURISDICTION

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

ISSUES

1) Whether the Agency action was taken for cause; and

2) If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT

Statement of the Charges

By memorandum dated March 14, 2005, Employee was notified of a proposal to remove him from his position of Risk Management Specialist in the District Department of Transportation (DDOT) for Insubordination. Employee, on two (2) occasions, failed to report to the Office of General Counsel, as instructed, for an interview regarding alleged misconduct of a DDOT employee and failed to provide proper certification/justification as to his failure to do so. He was further charged with failure to provide information or answer questions regarding said investigation. His actions were in violation of the District Personnel Manual (DPM), Chapter 18, § 1803.10 which states "An employee shall not interfere with, or obstruct an investigation by a District or federal agency of misconduct by another District employee or by a person dealing with the District." On April 8, 2005, a final decision was issued accepting the recommendation of removal from the Hearing Officer and, therefore, upholding the proposed removal action.[4]

Agency's Position.

Agency contends that it has met its burden of proof that "Employee was insubordinate in refusing to follow a lawful order to cooperate in an investigation into employee misconduct in

[2] The written transcripts were delayed approximately 3 months by the reporting service due to staffing shortages.
[3] Agency filed several requests for additional time, for business reasons, which were granted.
[4] See Joint Exhibits (hereinafter referred to as "JE") 1 and 2. The Hearing Officer conducted an administrative review and submitted a written report to the deciding official.

the risk management area." Employee's initial refusal to be interviewed "at the advisement of his attorney . . . and his characterization of Agency's investigation as . . . witch hunts to persecute another employee(s) demonstrate his willful and intentional disregard of Agency's lawful order that he answer questions in the course of an investigation."[5]

Agency further asserts that Employee's claim that Agency's order was illegal because he was on medical leave and physically unable to comply lacks merit. Employee never requested an accommodation for medical reasons; and was "only bedridden from mid to late April through mid May 2005" which "directly contradicts" his prior sworn statement contained in the Amended EEOC Charge (that he was released to return to work on March 14, 2005).[6]

Employee's testimony that he relied upon his attorney to respond to Agency's second request for an interview does not mitigate or excuse his failure to respond. Last, Employee's testimony that his wife sent a letter on his behalf, to Mr. Tangherlini requesting an accommodation, is not supported by credible evidence that it was sent by certified mail or received by the addressee. In sum, Employee committed the charged acts of misconduct and Agency should be given proper deference in its choice of removal as the appropriate penalty.[7]

Employee's Position.

Employee contends that, under the circumstances of this case, removal was "unreasonable and overly severe" as he was not insubordinate in failing to report to an interview while he was absent on medical leave. He was treated for anxiety and related complications, such as hypertension and aggravation of his arthritis and osteoporosis. "DDOT could not require him to come to work to be interviewed while he was physically unable to do so and was out on medical leave . . . [I]n the alternative, the Judge should mitigate the removal to a warning or, at worst, a short suspension."[8]

Employee first argues that Agency failed to prove it had cause to remove Employee as he had legitimate medical documentation for his absences from work and the interview. "[U]nder these circumstances, DDOT's charge of insubordination was equivalent to the charge of absenteeism without leave (AWOL) which can never constitute cause for removal when the employee has supplied medical justification for his absence." *Hines v. D.C. Department of Transportation*, OEA Matter No. 1601-0116-05 (August 22, 2006).

Second, Employee contends that removal was an unreasonable and excessive punishment

[5] See Agency's Closing Brief (hereafter "ACB" at pp. 6-7 and JE 5.
[6] See JE 5, Employee's 2/14/05 response and ACB at p. 8.
[7] See ACB at p.9.
[8] See Employee's Closing Statement and Post Hearing Memorandum (hereinafter referred to as "ECS") at pp. 1-2.

in view of Employee's seventeen (17) years' service with no prior discipline, and his past record of participating and cooperating in other agency investigations. Further, Employee did not intentionally fail to respond to Ms. Gregory's second interview request based on his mistaken belief that the attorney who initially represented him, had contacted Ms. Gregory in a timely manner.[9]

Summary of Material Testimony

Daniel M. Tagherlini (former Director, DDOT)

Mr. Tagherlini, the deciding official, testified that he reviewed the Hearing Officer's report and the facts that had been presented and concluded that removal was the appropriate penalty based on the circumstances herein. Employee's unwillingness to participate in an investigation or make himself available to answer questions, after being given multiple opportunities to respond, sends the wrong message to other employees and makes it difficult to maintain the highest level of order (within the agency) and public trust. The Hearing Officer did not recommend alternative sanctions and there were no comments from Employee regarding the materials provided to him. Despite Employee's tenure, Mr. Tagherlini saw no rehabilitative potential in alternative discipline.[10]

On cross examination, Mr. Tagherlini testified that he didn't personally receive a letter, from Employee's attorney, responding to the issues in the proposed removal prior to issuing his decision; but, he now knows it exists. The ongoing investigation involved improper use of Government vehicles, improper use of overtime and allegations of harassment related to the staff and operation of Risk Management. However, Mr. Tagherlini was not free to publically discuss the details of said investigation.[11] Mr. Tagherlini testified that he did not recall being aware that Employee made a request for accommodation prior to the proposed removal or his return to work.[12]

On redirect, Mr. Tagherlini testified that Employee did not request any accommodation to attend the interview as requested. He further testified that there was no documentation reflectingAgency's willingness to accommodate Employee because he did not know that was an issue. Nevertheless, it was Agency's custom and practice to respond and address all needs if they are raised.

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[9] See ECS at pp. 8-9. The previous attorney is identified as Mindy Farber, who Employee assumed had contacted Brender Gregory, Chief of Staff, albeit late.

[10] See Transcript of hearing held on 4/14/06 (hereinafter referred to as "TR-VOL.1") at pp. 36-40 and JE1.

[11] See TR-VOL.1 at pp. 43-46.

[12] See TR-VOL.1 at p. 58.

Natalie Jones-Best (Emergency Preparedness Risk Manager)

Ms. Jones-Best testified that she supervised Employee and initiated the removal action against him for failing to cooperate in an investigation when required to do so. Her review of related documentation reflected that Employee refused to come in to assist in the investigation and did not communicate a reason why he could not come in. Ms. Jones-Best next testified that, "I think towards the end, it may have been at the advice of his attorney . . ."[13]

On cross-examination, Ms. Jones-Best testified that, at the time she proposed removal, she had reviewed letters "[N]ot necessarily in support of accommodation . . . either from the physician or his conversation with his physician . . . every couple of weeks or every month . . . a letter saying: I'm not able to come back to work based on my doctor's advice."[14]

On redirect-examination, this witness testified that, there was nothing in Employee's file (relative to the interview) that "led me to believe or supported the fact that there needed to be a special accommodation . . . the letter . . . specifically just said that Mr. Hunter could not . . . come to work due to . . . medical reasons." There was no medical documentation in his file reflecting that he could not be interviewed. This witness further stated that Employee requested a medical accommodation on the job " . . . in his first letter, which would have been February 25th . . ."[15]

Brender Gregory (Chief of Staff)

Ms. Gregory testified that she became aware of an investigation of misconduct in her area in the Fall of 2004, after which she sent Employee a letter (dated February 11, 2005) advising him to cooperate in that inquiry and to report for an interview on February 18, 2005. She received a response (dated February 14, 2005) from Employee refusing to cooperate with the official investigation under the advice of his attorney. Ms. Gregory next testified, "I didn't get from this letter that he had any physical malady that would prohibit him from speaking or answering questions . . . the response we got was that basically, I'm insulted and I'm perplexed and I'm not coming."[16] After sending the second letter (February 25, 2005) to Employee, advising him to appear for an interview in accordance with DPM regulations, no response was received.[17]

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[13] See TR-VOL.1 at pp. 64-67 and JE 2.

[14] See TR-VOL.1 at pp. 70-71.

[15] See TR-VOL.1 at p. 76. There is no evidence in the record regarding said request and the witness was unsure of the date.

[16] See TR-VOL.1 AT PP. 90, 92, 94; 100-101; JE 4; and JE 6, which reflects that Ms. Gregory received Employee's response on 2/17/05.

[17] See TR-VOL.1 at pp. 107-108; and JE 6. DPM regulations in Chapter 18 prohibit an employee from interfering with an official investigation.

On cross examination, Ms. Gregory testified that, prior to his medical leave, Employee assisted in other investigations involving employees in the Risk Management area. Prior to sending the two interview letters, she was aware Employee was on sick leave but, did not receive any request for medical accommodation. Nor did she recall reviewing any medical documentation or receiving any request for accommodation between February 25, 2005 and issuance of the proposed removal on March 14, 2005. Last, Ms. Gregory stated that she spoke with Employee's attorney [Mindy Farber] sometime between March 14 and April 15, after the specified time frame and referred her to the instruction in the letter [proposed removal] and advised that the response should have gone to the Disinterested Designee.[18]

Herman Hunter (Employee)

Employee testified that he received two (2) letters from Ms. Gregory, to attend interviews, on different dates, but was physically unable to attend either of those interviews due to medical complications for which he had been on medical leave since December 3, 2004. Specifically, he "had uncontrolled high blood pressure. [M]y rheumatoid arthritis, the joints were swelling and preventing me from -- I was pretty much bedridden during the entire time. I was not able to physically move around and to go to the interview."[19] On February 25, 2005, Employee's doctor released him to return to work on March 14, 2005, with restrictions. However, based on further visits to his doctor, Employee's leave was extended until May 2, 2005.[20]

Relative to his February 14, 2005 response regarding his failure to attend the interview on February 18, 2005, Employee testified (on cross examination) that he was bedridden when his previous attorney (Mr. Myers) came to his home and drafted said response for Employee's signature. Employee confirmed that said response reflects, *inter alia*, that he would not be interviewed regarding a DDOT employee due to a conflict of interest, *not* that he was bedridden " . . . but it does state that I was out [on leave]." Contrary to that testimony, Employee further testified there was no conflict of interest. Rather, his failure to participate in the interview was due to his belief that " DDOT did not have the authority to request me to do it, only the Office of

[18] See TR-VOL.1 at pp. 113-114, 117-120; 131-133.

[19] See Transcript of hearing on 5/26/06 (hereinafter referred to as "TR-VOL.2") at pp. 31, 47-49; JE 4; JE 5, and JE 6. JE 5 is Employee's 2/14/05 response stating that, on the advice of his attorney [who was Mr. Myers], he would not come in to answer any inquiries, regarding a DDOT employee, due to a conflict of interest in two complaints filed with Agency.

[20] See TR-VOL.2 at pp. 50-51; Employee Exhibit (hereinafter referred to as "EE") 5 includes a 3/15/05 request for advanced sick and annual leave from 3/14/05 until 3/28/05, which was disapproved on 3/29/05; a medical certificate dated 3/14/05 which states that Employee will be able to return on 3/28/05; and a 3/14/05 letter from Employee requesting leave without pay (LWOP) until he is able to return to work; EE 14 (medical certificate dated 3/25/05 extending his leave until 4/8/05); and EE 15, a medical certificate dated 4/7/05 extending his leave until 5/2/05).

Risk Management."[21]

Nevertheless, Employee testified that he did not report to the second scheduled interview "[B]ecause I was still bedridden and still physically unable to do that . . . from December 2004 to May 2005." When confronted with various documents regarding the expectation that he was able to return to work on March 14, 2005, Employee maintained his previous position, but confirmed that he had no medical documentation reflecting that he was bedridden and physically incapable of answering questions, specifically, on February 18, 2005 and March 7, 2005.[22]

When questioned about the March 14, 2005 return to work date, Employee stated that his doctor asked him if he had someone to drive him to work "[B]ecause of the medications that I'm taking are narcotics . . ." Next, Employee abruptly changed his testimony stating "[H]e tells me don't go to work. Don't go to work" notwithstanding his prior testimony that his doctor gave him conditional clearance to return to work on March 14, 2005 and that he sent a letter to Mr. Tangherlini, in advance of his return, requesting reasonable accommodations.[23]

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. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq*. (September 1, 2000).[24]

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of

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[21] See JE 5; TR-VOL.2 at pp. 76-87. Employee differentiates the DDOT and the Office of Risk Management; however, he admits (on cross examination) that he signed off on performance evaluations prepared by DDOT supervisors.

[22] See TR-VOL.2 at pp. 99-108.

[23] See EE 4; and TR-VOL.2 at pp. 109- 113. Employee's letter, dated 3/11/05, sought: 1) a low stress and light duty environment, including restricted or no driving responsibilities; 2) the use of handicapped parking; and 3) flexible work environment, ie. early and late arrivals as required by his medical condition.

[24] Section 1603.3 set forth the 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. Insubordination is included in the definition of cause.

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 629.1, 46 D.C. Reg. 9317 (1999).

Based on a review of the entire record, this Judge concludes that Agency met its burden of proof by a preponderance of the evidence. Agency's witnesses presented persuasive testimony that Employee was insubordinate in his failure to cooperate in the investigation of misconduct of another District employee. Conversely, Employee's testimony and written submissions were full of inconsistencies and, therefore, untrustworthy.

First, Employee testified that he was "bedridden" and physically unable to attend either of the required interviews; whereas, his initial written response, dated February 14, 2005, reflected his refusal to be interviewed due to a conflict of interest. Contrary to that statement, Employee further testified there *was* no conflict of interest. Instead, he distinguished DDOT as "not having the authority" to direct him to be interviewed, even though he admitted signing off on performance evaluations prepared by DDOT supervisors.[25]

Second, Employee did not present any evidence to support the fact that he was so physically ill, that he was unable to leave his bed, much less his home; or, in the alternative, to request an accommodation such as a telephonic interview. Moreover, in a letter dated May 12, 2005, Employee's doctor stated that he (Employee) was "not bedridden until mid to late April" and that a previous medical note "was not meant to imply that the patient was bedridden for the course of time from 12/2004 until the present."[26] That document was presented and admitted as Employee Exhibit 16.

Third, Employee's initial response, referenced above, stated in part, " . . . upon my return to work, at my attorney's counsel, I will not attend any meetings or interviews not directly related to the performance of my duties." Yet, he testified (on cross-examination) that he was more concerned with his health problems than anything related to his job.[27]

Fourth, more conflicting testimony occurred when Employee stated that his doctor gave him conditional clearance to return to work on March 14, 2005. Then, Employee abruptly changed his story and asserted that his doctor told him *not* to go to work. Nevertheless,

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[25] Employee claimed that he worked under the Office of Risk Management, not DDOT. That assertion is not plausible considering a number of factors: (a) Employee's letter of appointment, dated 9/18/02, to the Risk Management Specialist position; (b) his signed Appointment Affidavit dated 10/7/02; and (c) his Personnel Action Form 1, all of which reflect DDOT as the employing agency. Moreover, when he challenged his placement in the wrong evaluation system, DDOT corrected their mistake; and Employee testified that he was paid through DDOT (See TR-VOL.2 at p.62).

[26] See EE 16.

[27] See JE 5; and Tr-VOL. 2 at p. 92.

Employee claimed to have sent a letter, dated March 11, 2005, to Mr. Tangherlini requesting reasonable accommodations, in expectation of his return to work.[28]

Last, uncontested testimony by Ms. Gregory regarding Employee's prior cooperation in other investigations involving employees in the Risk Management area, puzzles the Judge as to why he refused to cooperate this time. Employee's assertion that he did not intentionally fail to respond to the second interview letter based on his assumption that his previous attorney already did so, in a timely manner, is not a valid excuse. Employee remains personally responsible for monitoring the progress of his case. As demonstrated by his behavior, he did not care enough to do.[29] Based on the record, this Judge finds that Employee's failure to comply with official instructions and failure to assist and/or provide information during an ongoing investigation was deliberate and cannot be tolerated.

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).

An agency is entitled to expect its employees to respect the authority of supervisors as well as rules and regulations. Employee's insubordinate attitude interfered with Agency's investigation and, therefore, violated DPM regulations for which he was warned of the possibility of further action. In spite of Employee's length of service and lack of prior discipline, a lesser penalty would send the wrong message to other employees who may choose to be uncooperative in Agency investigations or fail to otherwise follow official instructions. Moreover, Employee's inconsistent testimony was considered a significant factor.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the totality of circumstances, this Judge finds no reason to disturb the penalty which was within the parameters of reasonableness, was not an error of judgment, and should be upheld.

[28] See footnote #23.
[29] See footnote #9.

ORDER

It is hereby ORDERED that Agency's removal is UPHELD.

FOR THE OFFICE: _____
MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge