

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
RASHID JONES)	OEA Matter No. 1601-0176-08SJ
Employee)	
)	Date of Issuance: May 8, 2009
)	
v.)	Sheryl Sears, Esq.
)	Administrative Judge
OFFICE OF THE CHIEF)	
MEDICAL EXAMINER)	
Agency)	

Othello G. Jones, Jr., Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION
RULING GRANTING AGENCY’S MOTION
FOR SUMMARY JUDGMENT IN PART
AND
ORDER SETTING A DEADLINE
FOR BRIEFS ON THE PENALTY

Introduction

These are the relevant and undisputed facts of this matter:

Rashid Jones (“Employee”) was a full time Autopsy Assistant for the Office of the Chief Medical Examiner (“OME” or “Agency”). On July 25, 2007, and October 2, 2007, Agency officials met with Employee to discuss allegations that he was also working at Diener’s Autopsy Services, Inc., (“DASI”). Agency alleged that, on May 22 and June 5, 2007, Employee called in sick to OME and worked for Diener’s at Children’s Hospital National Medical Center.

In October of 2007, the Office of the Inspector General (“OIG”) began an investigation of Employee’s alleged outside employment with DASI. According to the Investigator, Teddy Clark, DASI, a Maryland corporation, refused to honor a subpoena

from OIG. As a result, OIG was unable to gather evidence to support the allegations of dual employment. Agency also determined that Employee did not use any leave at Agency on May 22 or June 5, 2007. Agency generated no charges and the investigation was closed in February of 2008.

On October 17, 2007, Employee attended an ethics training conducted by Thorn Posen, Ethics Counselor of the Office of the Attorney General. He was advised against working a second job that would conflict with the interests of the D.C. government or his scheduled tour of duty. Employee was also advised that D.C. government employees are prohibited from engaging in any outside employment during working hours unless that employee is on approved annual leave. In addition, Employee was informed that D.C. government employees may not work at another job while on sick leave or during any regularly scheduled period of work thereafter until returning to work for at least one full tour of duty.

On April 9, 2008, Employee’s brother was killed. On April 10, 2008, Employee suffered a trauma when he entered his work site to find his deceased brother positioned for an autopsy. Employee was granted sick leave for a period thereafter (April 11 – May 6, 2008) and went into counseling for post-traumatic stress disorder.

While employed by the Agency, Mr. Jones also undertook a position with the DC Department of Parks and Recreation as a Swimming Instructor. According to the records of Richelle West Marshall, Chief Administrative Officer, Employee started working for that agency before the incident described and continued to do so while he was on sick leave. According to Ms. Marshall’s records, Employee worked the following hours for Parks and Recreation while he was on sick leave:

April 13 to April 19, 2008 (48 hours)
April 27, 2008 to May 3, 2008 (48 hours)

Agency removed Employee effective on August 23, 2008, pursuant to Chapter 16, Section 1608 of the District Personnel Manual (DPM) setting forth cause as follows:

Charge Number 1

An on duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law (DPM Section 1602(3)(e). (Working at Parks and Recreation and taking tours of duty there while on sick leave from OME).

Charge Number 2

An on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (DPM Section 1603(3)(f) (Absence significantly impacting the operations of the mortuary unit).

Discussion and Ruling

Office of Employee Appeals Rule 616.1 “Summary Disposition” provides as follows:

If, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal fails to state a claim upon which relief can be granted, the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.

Agency has moved for a summary judgment sustaining the removal of Employee. Agency contends that there are no material and genuine issues of fact because Employee admits that he maintained employment with two DC government agencies at the same time. Employee also admits that he worked for Parks and Recreation while on sick leave from OME. However, Employee maintains that his behavior is not actionable because he was not designated as a “full-time” employee at Parks and Recreation. According to him, because of the agency’s unique personnel system and seasonal operations, he was a “part-time” Employee. This argument strikes this Judge as disingenuous because, whether or not he worked during the entire year or was designated, according to that Agency’s records as part time, he was working a full time schedule. The records provided by that Parks and Recreation show that, during several weeks, starting in February, 2008, Employee worked there for forty (40) plus hours.

Agency contends that, even if this Judge finds, as a fact, that Employee worked only part-time, his admission that he did so while on sick leave would be sufficient to find him in violation of applicable legal provisions. This Judge agrees. On this point, the distinction Employee urges is one without a difference. There is no factual dispute that, while maintaining full-time employee with OME, Employee undertook a job with the DC Department of Parks and Recreation. As an employee there, he worked shifts while he was on sick leave from OME.

Agency maintains that it is entitled to a decision as a matter of law because Employee committed an on duty or employment-related act or omission that the employee knew or should reasonably have known was a violation of law. The District Personnel Issuance Number I -18-1, “Outside Employment and Dual Pay and Dual

Employment”, prohibits any DC government employee from working full-time for two government agencies at the same time. And the District Personnel Manual, Chapter 18, Subpart 2, § 2.5 prohibits engaging in outside employment while in a leave status as follows:

Engaging in Outside Employment While in A Leave Status

A. Conditions to be met by employee. A District employee may not engage in any kind of outside employment, private business venture, or other financial undertaking, whether or not for compensation :

1. During regular working hours unless the employee is on annual leave or leave without pay which has been approved in advance in accordance with applicable leave regulations; or
2. While on sick leave for all or part of a regularly scheduled workday, nor during the entire 24-hour period of any regularly scheduled workday thereafter until the employee has returned from sick leave and performed at least one full tour of duty.

By working for Parks and Recreation forty (40) hours or more per week while employed by Agency and working shifts there while on sick leave, Employee did commit acts that he had reason to know were unlawful Agency is entitled to a ruling in its favor that Employee committed acts constituting this cause for adverse action.

Agency also charged Employee with on duty or employment-related act or omission that interfered with the efficiency and integrity of government operations by leaving Agency short-staffed when he took sick leave. Having granted the sick leave, Agency cannot now argue that, by using it, Employee interfered with the efficiency or integrity of its operations. Agency is not entitled to a summary ruling on this point.

It is hereby ORDERED that Agency’s motion for summary judgment is granted in part and DENIED in part. This Judge finds that Employee committed acts constituting Charge Number 1. This Judge finds that Employee did not commit the acts constituting Charge Number 2.

**Order Setting Deadline for Briefs
On the Penalty**

The sole remaining question is whether the penalty of removal is appropriate for the charge sustained. Employee had a good record with Agency that included no unsatisfactory performance evaluations and one commendation.

The record is clear that, in fashioning the penalty, Agency relied, at least in part, upon the allegations that Employee worked at Diener's without authorization from Agency. According to Agency's oral argument at the pre-hearing conference, Employee's actions showed him to be unethical and disregarding of Agency policy. However, Agency has, to date, set forth no law, rule or regulation that would prohibit

Employee from performing autopsy work at a private company unless his actions violated some other applicable provision (like working there while on leave). Even more important, these allegations were never proven. Therefore, Agency cannot rely upon them to shore up the penalty against Employee. While it may be tempting for Agency to punish Employee for both real and suspected offenses, it is not lawful.

Agency also cites a claim by Employee that he was forced to work twenty-four (24) hour shifts in violation of the law as untrue and evidence of Employee's lack of compliance with Agency rules. According to Agency, Employee actually worked overtime without authorization. Employee complaint that he was forced to work excessive hours would be the proper subject of an agency level grievance. However, Employee did not file one. And Agency did not take any official action against this purported misconduct. No matter which perspective is based in truth, it is not relevant to this appeal. It will not be considered either as a mitigating factor in defense of Employee or an aggravating one in support of Agency.

Agency has not disputed Employee's claim of post-traumatic stress disorder. Employee maintains that, under the circumstances, his actions were not egregious. He claims that, during this time, swimming was a more comforting endeavor than going back to conducting autopsies. While this is likely true, Agency maintains that Employee was presented with several options to address his challenges with doing his job but availed himself of none.

Employee seeks reinstatement to his former position. Agency has the burden of proving that the removal was proper. However, Employee has the obligation to convince this tribunal of his defense that he should be entirely excused for his unlawful behavior because he was suffering the aftermaths of a trauma.

The record will remain open for written argument and documentary evidence on the question of the penalty.

It is hereby ORDERED that the parties submit written briefs accompanied by copies of any provisions of law and documentary evidence relied upon no later than June 17, 2009.

The issues to be addressed are set forth below:

- I. Whether the penalty imposed upon Employee was commensurate with the offense.

A. Whether Employee's violation was *de minimus*.

B. Whether the penalty imposed upon Employee was in accordance with applicable laws, rules, regulations and guidelines.

C. Whether Agency abused its discretion in selecting the penalty.

SHERYL SEARS, ESQ.
Administrative Judge
202-727-1810