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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
BERNICE ROBERTS)	OEA Matter No. 1601-0127-03
Employee)	
)	Date of Issuance: October 14, 2005
v.)	
)	Lois Hochhauser, Esq.
DEPARTMENT OF HEALTH)	Administrative Judge
Agency)	
_____)	

Ross Buchholz, Esq., Agency Representative
Robert Deso, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on August 5, 2003, appealing Agency's final decision to remove her from her position as a Program Specialist with Agency's Environmental Health Administration, Bureau of Food, Drug and Radiation Protection, Office of Certification, Licensing and Registration. The effective date of the removal was July 7, 2003. At the time of the removal, Employee was in permanent, career status and had been employed at Agency for approximately sixteen years.

The Hearing took place on January 18, January 19 and January 26, 2005. At the Hearing, the parties were given full opportunity, and did in fact, present testimonial and documentary evidence and arguments in support of their positions. The record closed following submission of post-hearing briefs on April 11, 2005. An Order was issued on May 23, 2005 which included findings of fact and conclusions of law. The parties were advised in the Order that the findings of fact and conclusions of law reached in the Order would not be revisited, but rather would be incorporated when the Initial Decision was issued.

Employee had been charged with repeatedly failing to notify her supervisor when she planned to be absent from work or was going to be late and was also charged with missing required specific meeting. The Administrative Judge reversed the first charge and sustained the second. She then remanded the matter to Agency to determine a penalty based on the fact that only one of the two charges that formed the basis for the removal was sustained. Agency was directed to provide specific rationale for its decision.

Agency submitted "Agency's Decision on Appropriate Penalty Pursuant to Remand Order of May 23, 2005" on June 28, 2005. Employee filed "Employee's Response to 'Agency's Decision on Appropriate Penalty Pursuant to Remand Order of May 23, 2005'" on July 25, 2005. On August 15, 2005, the Administrative Judge issued an Order directing Agency to submit an affidavit from the Agency official responsible for its decision to sustain the penalty. Employee was given an opportunity to respond. The parties were notified that the record would close on September 23, 2005 and the record was closed on that date.

JURISDICTION

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

ISSUE

Did Agency meet its burden of proof regarding its removal of Employee?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The advance notice of Agency's proposal to terminate Employee was based on "insubordination - failure to follow instructions" in that Employee was charged with failing to notify Helen Jordan, Acting Program Manager and Employee's supervisor when she was going to be late or absent and failed to attend required meetings. Employee had previously been suspended on October 3, 2002 for five days on a charge of insubordination based on similar conduct. In his report following an administrative hearing, the hearing officer sustained the charges that Employee willfully disobeyed instructions to attend meetings on December 11, 2002, January 30, 2003 and March 12, 2003; and the charge that she repeatedly violated instructions to telephone Ms. Jordan when she was going to be absent or late. He concluded that "these sustained charges, taken together, establish a pattern of insubordination on the part of Employee to her supervisor", and recommended that the proposed removal be approved. Agency issued its "Notice of Final Decision: Removal Due to Insubordination - Failure to Follow Instructions" from James Buford, Agency Director on July 1, 2003. The Agency Director accepted the hearing officer's recommendation and removed Employee, effective July 7, 2003. In the notice, Agency Director Buford noted that Employee had "established a

pattern of insubordination”, referring to her disciplinary record of the five day suspension in October 2002 for “the same offense of failing to meet with your Supervisor”.

In “Agency’s Decision on Appropriate Penalty Pursuant to Remand Order of May 23, 2005”, Agency stated that upon consideration of relevant factors including those cited in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), it concluded that the removal should be sustained, notwithstanding the fact that one of the two charges that formed the basis for the removal was reversed by the Administrative Judge. Employee argues in “Employee’s Response to ‘Agency’s Decision on Appropriate Penalty Pursuant to Remand Order of May 23, 2005’” that no evidence was presented to support the removal since the Agency Director had not testified at the proceeding and the Agency official who was responsible for sustaining the removal after remand, did not submit an affidavit. She further argued that the *Douglas* analysis was “serious flawed” and not supported by evidence. Employee argued that Ms. Jordan had testified Employee had attended most meetings, that she completed her assignments and that her absence from meetings did not negatively impact on her performance or the operations of the Bureau. Employee pointed out that the purpose of the December 11 meetings was to plan for the upcoming Christmas holiday, and that she had told Harold Monroe, bureau chief and Employee’s second-line supervisor, that she did not plan to celebrate Christmas or take leave. She testified that Mr. Monroe approved her request to be excused. With regard to the January 30 meeting, Employee argued that she had been ill that day and reported to work at lunchtime. She testified she asked Mr. Monroe if she could be excused from the meeting scheduled for that afternoon since she was ill, and Mr. Monroe approved. With respect to the March 12 meeting, Employee concurred with Mr. Monroe that he had reminded her of the meeting, but stated she became physically ill and could not attend. Employee pointed out that there was contradictory evidence as to whether she was excused from attending two meetings, and mitigating reasons why she had not attended the third. Employee concludes that the case “arose from the unique dysfunctional relationship among Mr. Monroe, Ms. Jordan and Employee”. She notes that her failure to attend three meetings “did not involve misconduct of dishonesty or moral turpitude or hostile defiance”. Employee’s Response, p. 13.

The Administrative Judge directed Agency to submit an affidavit from the official responsible for the decision to leave the penalty unchanged. Agency had not been required to do so when the matter was remanded, but the Administrative Judge considered Employee’s concern, and determined that the record should be supplemented with the affidavit.

The affidavit was submitted by Monica Lamboy, Agency’s Chief Operating Officer (COO). In the document, Ms. Lamboy identifies herself as the deciding official who determined that the penalty should be unchanged after remand. She stated she considered the *Douglas* factors and reviewed them. She noted that part of the responsibility of the Office of Certification, Licensure, and Registration Bureau of Food, Drug and Radiation Protection,

where Employee worked as a program specialist, was to process applications for controlled substances certificates, hearing aid devices, radioactive materials, food vendor permits, medical and dental equipment and swimming pool permits. She pointed out that, among other things, meetings were used to keep staff informed of new policies, share information and respond to questions. She noted that Employee not only missed three meetings, but did so despite warnings, reminders and prior discipline, thereby establishing a pattern of refusing Ms. Jordan's supervision and undermining the chain-of-command.

Ms. Lamboy stated that Agency's policy with respect to employees who "show a pattern of willful acts of insubordination is to terminate the employee". (Affidavit, p. 6). She asserted that Agency spent considerable time and effort counseling Employee to attend the meetings. Ms. Lamboy stated that the mitigating factors raised by Employee "failed to provide a reasonable and justifiable rationale for her failure to attend regularly scheduled meetings". (Affidavit, p. 6). The COO asserted that Employee's conduct undermined Agency's ability to carry out its mission.

After carefully considering all of the evidence, documentary and testimonial, and all of the arguments of the parties, before and after the remand, the Administrative Judge concludes that Agency met its burden of proof by a preponderance of the evidence and that the removal should be sustained.

The Administrative Judge is not going to review or revisit the findings and conclusions reached prior to issuing the Order. She notes, however, that in order to sustain the charge of insubordination based on Employee's absence from three meeting, she made credibility determinations, based on presentation and demeanor, prior to concluding that the testimony of Ms. Jordan was more credible than that of Employee, Mr. Monroe or Employee's witnesses.

The Administrative Judge has reviewed Employee's arguments. She previously found Employee was absent without being excused from three meetings and that finding will not be disturbed. The conclusion that Agency met its burden that these absences constituted insubordination similarly will not be revisited. Insubordination is not defined in the D.C. Code. "In the absence of a statutory definition, the common meaning of insubordination controls". *Davis v. District of Columbia Fire Department*, MPA 949-0015 (D.C. Superior Court, 9/26/95). *Black's Law Dictionary* (5th ed.), defines "insubordination" as the "state of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed." The term conveys a "wilful or intentional disregard of the lawful and reasonable instructions of the employer". The Administrative Judge considers it irrelevant that the meetings in question were not substantive. Such is not required to sustain a charge of insubordination. The directives were lawful and reasonable. Employee had been counseled and previously disciplined for the same charge.

Although Employee testified as to mitigating circumstances, Agency considered those representations in reaching its decisions.

This Office defers to agencies in matters of discipline. Agency is the entity with the primary responsibility for managing its employees. Within that responsibility is the decision regarding the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ___ D.C. Reg. ___ (). This Office has long held that it will not substitute its judgment for that of the agency when determining if a penalty should be sustained. Its review is limited to determining that "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it comes "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. 2915 (1985). The Administrative Judge concludes that in this instance managerial discretion was legitimately invoked and properly executed. There are no ranges imposed by law, and no prohibition in law, regulation or guideline that bars Agency from removing Employee. Agency has presented sufficient evidence to establish that its decision was not an error of judgment.

ORDER

It is hereby ORDERED that Agency's action removing Employee is UPHELD.

FOR THE OFFICE:

Lois Hochhauser / DH
LOIS HOCHHAUSER, Esq.
Administrative Judge