

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Tracy Hudgens)	Matter No. 1601-0153-09
Employee)	
)	Date of Issuance:
v.)	October 15, 2010
)	
Department of Public Works)	Senior Administrative Judge
Agency)	Joseph E. Lim, Esq.

Ross Buchholz, Esq., Agency Representative
David Branch, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 8, 2009, Employee, an Engineering Equipment Operator, WS 5401-11/01, with the D.C. Department of Public Works (the “Agency”), filed a Petition for Appeal with the D.C. Office of Employee Appeals (the “Office” or “OEA”), challenging Agency’s final decision, effective June 19, 2009, which separated him from a career service position, based upon allegations of neglect of duty and malfeasance. This matter was assigned to me on January 11, 2010. After funding was available, I conducted an Evidentiary Hearing on August 4, 2010, where sworn testimony was received from several witnesses, and documents were admitted into the record as formal exhibits. The record is now closed.

JURISDICTION

Pursuant to *D.C. Official Code* § 1-606.03(a) (2001), the Office has jurisdiction over Employee’s claim.

ISSUE

Whether Agency’s action separating Employee from Government service was conducted in accordance with applicable law, rule and regulation.

BURDEN OF PROOF

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

Positions of the Parties

Charges: 1) Neglect of Duty: failure to follow instructions or observe precautions regarding safety, and 2) Malfeasance: concealment of the incident by failing to immediately report it to your supervisor.

Agency alleges that on March 5, 2009, Employee accidentally swept up his fellow worker, Ms. Stackhouse, with his heavy equipment loader and then dumped her twenty feet below into a trash trailer and then attempted to conceal the accident by pressuring and attempting to bribe the injured Ms. Stackhouse not to report the accident. It was another employee, Mr. Davenport, who rescued Ms. Stackhouse from the trash bin. Agency also alleges that Employee failed to report the accident until he was confronted.

The following elements were also enumerated in the Advanced Written Notice of Proposed Removal, dated April 13, 2009, as being a component of the consideration to terminate the Employee:

1. August 17, 2006 – Counseling regarding repeated unsafe operation of equipment.
2. September 29, 2006 – Letter of Reprimand for concealing an accident.
3. November 11, 2006 – Dumping a load of recycling trash on a fellow employee.
4. May 29, 2007 – Failure to observe precautions regarding safety when operating an equipment, resulting in a 30-day suspension.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Agency's Case in Chief

Testimony of William Howland (Transcript pgs. 26-56): Howland testified in his capacity as the Director of the Department of Public Works (Agency), stating that in addition to the Douglas Factors,¹ he looked at Employee's prior record of similar transgressions, the facts of the

¹ In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

- 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;

current incident, and duties of an equipment operator as stated in the job description, before coming to the decision of terminating Employee's employment. He was especially concerned with the fact that Employee had previously been disciplined for another cover-up of misconduct. Howland's primary concern was the safety of his employees who worked with Employee, especially after he had previously ordered Employee to undergo safety and defensive driving training. He also pointed out that he had put out a memo instructing employees how to report incidents.

Howland admitted that he did not discipline the other two employees involved in this incident. He felt that even though Ms. Stackhouse did not report the incident for two days, she

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- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
 - 3) the employee's past disciplinary record;
 - 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
 - 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
 - 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 - 7) consistency of the penalty with any applicable agency table of penalties;
 - 8) the notoriety of the offense or its impact upon the reputation of the agency;
 - 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 - 10) potential for the employee's rehabilitation;
 - 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 - 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

was the victim and had suffered injury. He also decided not to discipline Mr. Davenport for not reporting the accident because he had no prior disciplinary record.

Testimony of Lloyd Brown (Transcript pgs. 57-74): Lloyd Brown was Employee's direct supervisor since 2002. He testified that Ms. Stackhouse reported her injuries to him a few days after the accident, explaining that she had not reported earlier for fear of getting fired. Ms. Stackhouse also claimed that Employee had offered her \$1,000 to keep quiet. Brown then brought Ms. Stackhouse to the hospital. When he confronted Employee, Employee initially denied any incident before finally admitting culpability. On a separate occasion, Employee had lied to him about a prior incident whereby Employee had injured another fellow employee.

Testimony of Charlene Stackhouse (Transcript pgs. 57-117): Ms. Stackhouse was a newly hired controller operator whereby she directed the dump trucks and controlled the tipping floor. On March 5, 2009, she had just finished cleaning the floor of the trash facility when she got picked up by a huge front end loader that Employee was operating. She screamed as she was dumped into a trailer full of trash. Employee dumped more trash on top of her. She dug her way out of the trash and was shaking when Employee finally noticed her. Employee threw her a piece of carpet to grab, but she could not reach it. Mr. Davenport then lowered the grapppler arm to enable her to hold on to it. She was then retrieved and placed back on the tipping floor.

Employee asked her if she was alright. Stackhouse replied that she did not know. Employee then warned her that the last person who had an accident got fired. He then gave her his uniform so that he could wash her soiled uniform before the end of the shift. Although she tried over the counter medication, she continued to be in pain. Not wanting to lose her job, she continued to report to work the next two days. Employee again asked her if she was alright. She replied that she was in pain. Employee assured her that she would be alright and again warned her not to report the incident or she would lose her job.

Stackhouse denied extorting or threatening Employee. She also stated that ever since the accident, she has made other injury claims as she could not pull or lift the Supercan.

Testimony of Peter Mitchell (Transcript pgs. 119-138): Peter Mitchell is the Associate Director for the Agency's Solid Waste Disposal Division. When he questioned Employee about the accident, Employee admitted his offense and explained that he was scared to report the accident because he had gotten in trouble before. Mitchell also indicated that Employee had a history of carelessness in using equipment such as the loader and grapppler. He added that Employee had injured other fellow workers before. One instance where an accident occurred, Employee denied being asleep at the controls but admitted reading a magazine while operating a loader. Despite reprimands and mandated safety training classes, Employee continued to be careless in operating Agency equipment.

Testimony of Terrance Davenport (Transcript pgs. 140-172): Mr. Davenport is also a heavy equipment operator for Agency and witnessed the accident. He testified that Employee's operation of the front end loader did cause Ms. Stackhouse to be scooped up and thrown seven feet into the trash bin below. Davenport had to use the grapppler to pull out Ms. Stackhouse. When asked, Ms. Stackhouse said she was okay. From his conversation with Employee, it was

apparent that Employee did not realize he had pushed Ms. Stackhouse into the trash. They all agreed not to report the accident. Later on, Employee told him that Ms. Stackhouse was demanding money from him. (*Tr., Pp. 152-157*)

Testimony of Daniel Harrison (Transcript pgs. 173-190): As the occupational safety and health manager, Mr. Harrison investigated the accident by interviewing the witnesses. He concluded that Employee and the others tried to cover up the incident. Ms. Stackhouse informed him that Employee had offered her money to keep silent.

Harrison stressed that Employee had received safety training because of prior accidents, and that employees are duty-bound to report all unusual incidents, regardless of whether or not someone got injured.

Testimony of Joseph Pluckin (Transcript pgs. 264-269): Mr. Plunkin, a fellow heavy equipment operator, denied ever being part of any conversation about Ms. Stackhouse's alleged extortion.

Employee's Case in Chief

Testimony of Employee (Transcript pgs. 191-262): Employee, a heavy equipment operator, testified that while working his front-end loader, he spied Mr. Davenport waving his hands. He looked down and saw Ms. Stackhouse walking in the empty truck. Before that, he never saw Ms. Stackhouse while operating his loader. When he asked her how she ended in the truck, Ms. Stackhouse replied that she had jumped in the truck and that she was fine. When Mr. Brown, Employee's supervisor, began approaching them, Employee testified that he asked Ms. Stackhouse if she wanted to report the incident. Ms. Stackhouse said they should just keep it among themselves.

Employee denied ever lending his clothes to Ms. Stackhouse or offering her a ride home. He said Ms. Stackhouse never exhibited any signs of being injured. The next day, fellow workers Joe Plunkett and Mr. Davenport informed him that Ms. Stackhouse wanted \$600 or she would send her boyfriend to beat him up. He then talked to Ms. Stackhouse, who reiterated her demand for \$600 and threatened retribution if he did not pay up.

Later his supervisor asked him for a statement on the accident. When asked why he never reported the incident beforehand, Employee reasoned that he did not know there was an incident he should report. He denied pushing or throwing Ms. Stackhouse into the trash with his machine and repeated that Ms. Stackhouse herself jumped into the trash.

During the Agency's investigation, Employee admitted he did not inform Mr. Harrison, the safety officer, about Ms. Stackhouse's attempted extortion. He claimed that he did inform Peter Mitchell but that Mitchell cut him off, saying he did not believe him. Employee said he informed his union rep, Angie Pringle, of the extortion attempt but the union said it did not matter.

Employee admitted that he had prior accidents operating heavy machinery. When asked why Mitchell's testimony contradicted his, Employee claimed Mr. Mitchell disliked him because he had previously reported Mitchell's misconduct. He also denied admitting to Mitchell that he had caused the accident. Employee also said that Mr. Brown's testimony contradicted his because Mr. Brown did not like him either. When asked why Davenport's testimony contradicted his, Employee insisted it was because they were all afraid of Mr. Mitchell.

Employee admitted to agreeing to cover up the incident. At the stand, he agreed that he did have a duty to report the incident.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Findings of Fact

I based my credibility determinations upon the witnesses' demeanor on the stand, the inherent plausibility of their account, and their possible motives for testimony. From the outset, I note that much of Employee's testimony is inconsistent with the credible testimony of multiple Agency employees. There were three eyewitnesses to the March 5, 2009, incident - Ms. Stackhouse, Mr. Davenport, and Employee.

Ms. Stackhouse testified most credibly how Employee carelessly scooped her up with a front-end loader and then unceremoniously dumped her into a trash bin several feet below. She also testified credibly how Employee intimidated her into agreeing to a cover-up of the incident by stoking her fear of losing her new job.

Mr. Davenport backed up Ms. Stackhouse and testified credibly that Employee did indeed cause Ms. Stackhouse's injuries by tossing her seven feet into a trash bin with his front-end loader. There is no demonstrated motive for Mr. Davenport to be less than truthful.

On the other hand, I find Employee's account that he did not cause Ms. Stackhouse's injury, but that Ms. Stackhouse herself jumped into the trash bin to be incredible. Employee's own version, that he did not see Ms. Stackhouse until after she was already in the trash bin, attests to the fact that he was negligent in operating his heavy machinery by failing to check whether the path was clear before he scooped up the trash. I also do not credit his account that it was Ms. Stackhouse who tried to intimidate him and extort money from him. His assertion that Ms. Stackhouse suffered no injury is inconsistent with the fact that he threw Ms. Stackhouse at least seven feet down into a bin and that Ms. Stackhouse did seek and received medical attention.

Lastly, all the other witnesses testified credibly that during their investigation, Employee admitted causing the accident. The written statements submitted by the eyewitnesses all support Agency's charges against Employee. I therefore find that by failing to follow instructions and observe safety precautions, Employee neglected his duty to operate heavy machinery safely.

With regards to the charge of Malfeasance, I note that Employee admits to trying to conceal the incident by failing to immediately report it to his supervisor. He also admitted to conspiring with the other eyewitnesses to engage in cover-up. I also find that he coerced Ms.

Stackhouse to participate in the cover-up. Lastly, Employee's prior record of numerous safety violations provide ample motive for his concealment. Therefore, I find that Employee is guilty of malfeasance.

As to Employee's imposed penalty of termination, Director Howland and Associate Director Mitchell both credibly testified that they had carefully considered Employee's past performance, the nature of the offense, length of service and previous disciplinary actions, and the serious nature of Employee's actions.

OEA's review of a penalty is limited to whether the agency's managerial discretion has been legitimately invoked and properly exercised. *See Douglas v. Veterans Admin.*, 5 M.S.P.B. 280 (1981). This means that OEA will sustain an agency decision unless: 1) it is unsupported by substantial evidence; 2) there was harmful procedural error; or 3) it was not in accordance with law or applicable regulations. *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010. The Merit Systems Protection Board (the "MSPB"), the federal counterpart to OEA, established criteria that supervisors must consider in determining the appropriate penalty to impose for an act of employee misconduct. In *Douglas, supra.*, the MSPB established that there must be an adequate relationship or "nexus" between the misconduct and the efficiency of the service. *Id.* at 302. To determine what penalty would then be appropriate, Agency was mandated to consider all relevant mitigating and aggravating factors. Agency considered the criteria established in *Douglas* in determining the appropriateness of this penalty. The factors of greatest significance were the seriousness of Employee's actions, Employee's disciplinary history, and the consideration of any mitigating factors.

I note that Employee had previously been disciplined for this same behavior on several occasions. Therefore the next progressive disciplinary action was removal. The record shows that 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). Thus, I conclude that the penalty imposed in this case was appropriate.

ORDER

Therefore, it is hereby ORDERED, that Agency's action of removing Employee is UPHeld.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge