

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ARMELL GAINES)	OEA Matter No. 1601-0138-06
Employee)	
)	Date of Issuance: March 12, 2007
)	
v.)	
)	Joseph E. Lim, Esq.
DEPARTMENT OF TRANSPORTATION)	Senior Administrative Judge
Agency)	

Kevin Turner, Esq., Agency Representative
David Kelly, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On August 16, 2006, Employee, an Asphalt Worker assigned to the Street and Bridge Maintenance Division of the Agency, filed a petition for appeal with this Office challenging Agency's final decision to terminate him from employment effective August 14, 2006 for drunkenness on duty.

The matter was assigned to the undersigned judge on October 10, 2006. I held a prehearing conference on October 30, 2006 and a hearing on January 19, 2007. I closed the record at the conclusion of the hearing.

JURISDICTION

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

ISSUES

1. Whether Agency's action to terminate Employee was taken for "cause", as that term is defined by the D.C. Office of Personnel (DCOP) Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000).
2. If so, whether Agency's penalty was appropriate under the circumstances.

Contentions of the Parties

The agency contends that Employee was guilty of drunkenness on duty. Specifically, Employee was charged with sitting in a government vehicle with an open container of beer as well as exhibiting drunken behavior at work. Employee denies the charges.

EVIDENCE

1. Robert Morris testified as follows: (Transcript pgs. 8 – 65)

Mr. Morris is employed by the DC Government as an asphalt worker foreman. Although they had never worked together before, he was Employee's supervisor on May 13, 2006. The members of Morris' crew were Michael Jackson, Antoinette Burno, Douglas Young, and Employee. That morning, Morris instructed his crew to meet him at Georgia Avenue for breakfast before proceeding to their work site. The crew loaded into the truck after obtaining their carryout food. Mr. Morris noticed Employee with a paper bag with what appeared to be a green beer bottle in it. Aware of Employee's past record of drinking on the job, Morris asked Employee to step out of the truck and follow him. Employee immediately poured out the bottle on the ground. Because of Employee's unsteady gait and the smell of alcohol on his breath and clothes, Morris suspected that Employee was probably under the influence of alcohol and ordered him off the job.

Morris told Employee that he suspected him of drinking on the job. However, he never asked or saw what was in the bottle as he thought the best course was to take Employee back to see his supervisors, Charles Stewart and Nathaniel Jones. Management had trained him to get the opinion of other supervisors if he suspects drug or alcohol use among the crew. Mr. Morris then prepared a memorandum regarding the event (Agency Exhibit 2) and a Reasonable Suspicious Checklist (Agency Exhibit 1) and gave them to his supervisor, Charles Stewart. However, his separate handwritten report (Employee Exhibit 1) made no mention of any physical sign of drunkenness of Employee other than the presence of a beer bottle.

2. Employee testified as follows: (Transcript pgs. 65 - 104.)

Employee was an asphalt worker with Agency since 2001. On the morning of May 13, 2006, he found out that his supervisor for that day was Mr. Morris. He called Morris and asked if he could first buy a t-shirt from the market. Morris refused, and the two of them had words. Although his regular foreman was Mr. Bryant, Employee had worked under Morris on several other occasions.

Employee denied drinking or drugging on the job or of even holding a beer bottle that day. When Morris summoned him, he asked both Morris and his fellow co-workers, "What did I do?" He never received an answer. He began arguing with Morris when he was told to go home. Employee also said he could not get an answer from Mr. Jones as to why he was being sent home.

Employee believes that Morris was mad at him because he had two daughters with a fellow worker that Morris used to date. When asked about "priors," Employee said he had previously settled for a reduced 3-day suspension for being under the influence of alcohol while at work. Although he admitted that several supervisors had smelled alcohol on him, Employee insisted he was innocent.

3. Antoinette Burno testified as follows: (Transcript pgs. 105-119.)

Asphalt Laborer Burno corroborated Employee's account that Supervisor Morris simply ordered Employee out of the truck to take him out of the crew. She denied seeing a bottle in Employee's hand or of smelling alcohol on Employee. Bruno said she and the rest of the crew were surprised that Morris was sending Employee home. However, Bruno admitted that Employee's breath

stunk that day.

4. Douglas Young testified as follows: (Transcript pgs. 119-128.)

Asphalt Laborer Young also claimed that he did not smell alcohol on Employee nor did he witness any beer bottle. Together with the rest of the crew, he did not understand why Morris took Employee out of the job assignment.

5. Michael Jackson II testified as follows: (Transcript pgs. 129-135.)

Truck Driver Jackson also denied smelling alcohol or seeing Employee with a beer bottle. He likewise was puzzled as to why Morris took Employee out of the truck.

6. Nathaniel Jones testified as follows: (Transcript pgs. 138-169.)

Assistant Street Supervisor Jones testified that on May 13, 2006, Employee came to him complaining about being taken off the job by Mr. Morris on suspicion of drinking. Jones corroborated Employee's account of wanting to discuss the matter further, but he ordered Employee to wait until the next working day as he was busy at the time. He described Employee as talking faster than usual and leaning back and forth. He did not consider Employee to be fit for work that morning and suspected he might be under the influence of alcohol. However, when pressed as to whether he personally would have put Employee to work that morning, Jones said yes.

FINDINGS OF FACT

This Office's Rules and Regulations provide that an agency's action must be supported by a preponderance of the evidence, which is defined as "that degree of relevant evidence which a reasonable mind, considering the matter as a whole, would accept as sufficient to find a contested fact more probably true than untrue."¹

Agency's charge against Employee rests mainly on the testimony of Mr. Morris. Agency's other witness, Mr. Jones, wasn't positive that Employee was intoxicated. In fact, he testified that he himself would have put Employee back to work that morning. Agency regulations mandate that another supervisor verify the condition of an employee suspected to have been drinking. Jones failed to do that or to take the concerns of either Morris or Employee seriously.

As for Mr. Morris, he failed to ascertain that his suspicions regarding Employee's suspected intoxication were accurate. He never questioned Employee as to whether he actually had a beer bottle in his hand. He never directly asked Employee if he was drunk. He failed to demand that Employee hand to him the beer bottle or to visually check the alleged bottle. He failed to fully document his observations of Employee's condition in his handwritten statement other than to say he believed he saw a bottle in Employee's hand. His suspicion that Employee had been drinking stemmed mostly from his knowledge that Employee had a history of being drunk on the job.

¹ OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

Arrayed against the weak evidence of the Agency are the three fellow workers of Employee who all testified credibly that Employee was not drunk or acting suspiciously. One witness even stated that Employee had bad breath that morning but did not smell of alcohol.

I therefore find that Agency failed to meet its burden of proof by a preponderance of the evidence that Employee was intoxicated or drunk on the job. Because of my finding, Agency's action against Employee was not taken for cause and must be reversed.

ORDER

It is hereby ORDERED that:

- 1) Agency's action removing Employee is REVERSED;
- 2) Agency reinstate Employee and reimburse him all pay and benefits lost as a result of the removal; and
- 3) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge