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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ANTHONY J. AUGUSTI)	
Employee)	
)	OEA Matter No.: 1601-0151-99
v.)	
)	Date of Issuance: November 28, 2006
D.C. FIRE AND EMERGENCY MEDICAL)	
SERVICES DEPARTMENT)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Anthony Augusti (“Employee”) was a paramedic with the D.C. Fire and Emergency Medical Services Department (“Agency”). On December 24, 1998 Employee and his partner were dispatched to the scene of an emergency. While Employee was in the process of writing the patient care report, his partner noticed that Employee seemed to have gone to sleep and was not able to complete the report.

When they arrived at the hospital with the patient, Employee was supposed to give the patient report to the triage nurse. Realizing that he was not able to do that, Employee’s partner ended up giving the report to the nurse while Employee went back to

the ambulance. Employee's partner then returned to the ambulance. She could not readily get in because the doors were locked. She banged on the window several times in an effort to awaken Employee so that he could unlock doors. When Employee failed to awaken, she climbed through the back door and got in that way. She could see that Employee was breathing so she knew that he was not dead.

Once she was back in the ambulance, Employee's partner called their platoon captain and asked her to meet them at the fire station. The platoon captain arrived and observed that Employee appeared unkempt and unshaven and that his hands were swollen. Further the platoon captain thought that Employee appeared "high" on something. The platoon captain documented her observations in a written report and allowed Employee to take sick leave for the rest of his shift.

On December 30, 1998, the EMS captain returned to work and was informed as to what had occurred on December 24th. The EMS captain met with the platoon captain and Employee's partner and, based on the information gathered during that meeting, the EMS captain arranged for Employee to report to the Police and Fire Clinic ("PFC") for a fitness-for-duty exam. The exam was scheduled for December 30th at 4:45 p.m. The EMS captain told the paramedic supervisor to go to Employee's station, instruct Employee that he was being ordered to take a fitness-for-duty exam, and then accompany Employee to the PFC for the exam.

When Employee got the orders, he told the paramedic supervisor that he was not going to take the exam. Employee asked to speak to the EMS captain and when she got on the phone, she verbally ordered Employee to take the fitness-for-duty exam. Again Employee stated that he was not going to submit to the exam.

The next day, December 31st, Employee, along with the union representative, met with the EMS captain. She told them both that Employee would have to take the fitness-for-duty exam before he could be returned to a full duty status. In the meantime, she gave Employee a written order to report to his station for administrative duty and she told him that she would contact him there to let him know when he was to report to the PFC for the exam.

Employee never reported to the station for administrative duty. Subsequently, the EMS captain made several attempts to contact Employee to let him know that the exam had been rescheduled to January 7, 1999. Because Employee had not reported to the station and further because none of the telephone numbers listed for Employee worked, the EMS captain was not able to make contact with Employee. Employee did not return to the station until January 26, 1999.

As a result of these events, on March 4, 1999 Agency issued to Employee a proposed notice to terminate him for the causes of insubordination and absence without leave (“AWOL”). After a review of the record, including the testimony of witnesses at the hearing, the Disinterested Designee assigned to the case agreed that Employee should be terminated for the cause of insubordination. With respect to the AWOL charge, however, he concluded that because Employee had been in a non-pay status since January 1999, he had suffered enough and should not receive discipline for that charge. The Fire Chief accepted that recommendation. Thus on June 12, 1999 Employee was terminated.

On June 30, 1999 Employee filed a Petition for Appeal with the Office of Employee Appeals. The Administrative Judge conducted an evidentiary hearing on July 10, 2002. At the beginning of the hearing both parties stipulated, and the Administrative

Judge accepted, that the only charge which Agency had to prove was the insubordination charge. Nevertheless, in an Initial Decision issued March 21, 2003, the Administrative Judge found that Agency had proven by a preponderance of the evidence both charges. Moreover, the Administrative Judge recognized that according to the table of penalties, removal was an available penalty for both charges. In view of that, the Administrative Judge upheld Agency's action.

On April 25, 2003 Employee filed a Petition for Review. Agency filed a response to the petition on May 30, 2003. Employee's first argument is that the Administrative Judge erred when he sustained the AWOL charge. Clearly the Administrative Judge was wrong for making any finding with respect to the AWOL charge. As mentioned earlier the parties, in the judge's presence, acknowledged that the AWOL charge would not be considered. We agree nevertheless with Agency that the judge's finding on this charge is not cause for a reversal. According to the Administrative Judge, Agency also proved its insubordination charge. Removal was an allowable penalty for that charge. Therefore had the Administrative Judge sustained only that charge, Agency could have lawfully imposed removal. For this reason we find that the Administrative Judge's error is harmless.

Employee's next argument is really two-fold. First he claims that because Agency did not follow the proper procedures when it ordered him on December 30, 1998 to submit to a urinalysis, the order was invalid. Secondly, Employee claims that because the order was invalid, he was justified in not following it. Based on this reasoning, Employee asserts that he was not insubordinate.

In 1998 Agency was operating under two competing provisions that governed the testing of employees who appeared impaired for duty. The first provision was titled “Procedures for Substance Abuse Testing” and was contained within a Memorandum of Understanding (“MOU”) negotiated between Agency and the local union to which Employee belonged. It required the agency, upon a reasonable suspicion of substance abuse, to immediately notify the employee that he or she was to report for immediate testing and to also notify the union representative so that he or she could accompany the employee to the drug testing site. Further, under this provision, the agency was required to give the union representative a period of time in which he or she could observe the employee performing his or her duties so that the union representative could determine whether a reasonable suspicion existed. The second provision was contained within Agency’s own rules and regulations. Admittedly its requirements were less stringent and cumbersome in that it permitted the agency to order an employee to report for a medical evaluation whenever there was a direct question about the employee’s continued capacity to meet the requirements of the position.

Even though both provisions were in effect at the time Agency took its action, the EMS captain ordered Employee to take a fitness-for-duty exam rather than take a drug test. She testified at the hearing before the Administrative Judge that she “wasn’t there on the 24th when it happened” but based on the information she received upon her return on December 30th, she “felt that to protect not just himself but the other employees and the patients,. . .[Employee] needed to have a fitness-for-duty physical.”¹ She further testified that during the December 31, 1998 meeting with Employee and the union representative wherein they discussed rescheduling the physical exam, neither one of

¹ Transcript at 172-173.

them insisted that she follow the procedures outlined in the MOU. In fact, when asked whether Employee or the union representative made any reference at all to the MOU during that meeting, the EMS captain replied “[n]o, they did not.”² Both Employee and the union representative agreed that Employee would take the exam in exchange for a reduced penalty such as a reprimand. Moreover, when the EMS captain was asked whether she used the agency’s procedures as an attempt to circumvent the MOU, she replied, “[n]o, I wasn’t trying to circumvent the union’s MOU.”³ Lastly, the EMS captain testified that it was “well after the fact” when “either [Employee] or [the union representative] . . . said something about . . . a drug problem, [that] he was addicted to some sort of painkillers.”⁴

It seems to us that Agency acted lawfully when it ordered Employee to submit to the fitness-for-duty exam. The EMS captain was not present on December 24, 1998 to personally observe Employee’s behavior. At the time when she issued the order, she had only the information gathered during the meeting with the platoon captain and Employee’s partner. She had not seen either person’s written report by that time.⁵ Having not personally observed Employee’s behavior, it would have been impossible for the EMS captain to form a reasonable suspicion that Employee had a substance abuse problem on December 24th. However, based on the information she obtained from the platoon captain and Employee’s partner, she did have enough information to determine that a direct question existed as to Employee’s capacity to perform his duties. We believe

² *Id.* at 191.

³ *Id.* at 185.

⁴ *Id.* at 201.

⁵ *Id.* at 214.

that Agency, through the EMS captain, issued a lawful order to Employee. Employee refused that order. Such refusal constitutes insubordination.

Employee's last argument is that the penalty of removal was excessive. We have consistently held that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency. This Office's role is to simply ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). We will leave the penalty undisturbed when it is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment. The Administrative Judge noted that removal was within the range of penalties allowed for even a first offense of insubordination. While the penalty of removal may seem harsh to Employee, it is allowable and we cannot say that it is an error of judgment. For these reasons, Employee's Petition for Review is denied.

ORDER

Accordingly, it is hereby **ORDERED** Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Keith E. Washington

Barbara D. Morgan

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.