THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
JOHN W. BOYD	)	
	)	OEA Matter 1601-0058-00
Employee	)	
	)	Date of Issuance: May 16, 2005
v.	)	
	)	Blanca E. Torres, Esq.
CHILD AND FAMILY SERVICES AGENCY	)	Administrative Judge
Agency	)	

Karl W. Carter, Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On December 27, 1999, Employee, a Social Worker, DS-12, Step 4, filed a timely petition for appeal. Employee appeals from Agency's final decision removing him from government service for failing to discharge his duties and failure to follow work instructions to address deficiencies in his work performance.

A hearing was held on March 27, 2003, May 14, 2003, May 15, 2003 and July 24, 2003. The record closed upon submission of briefs. This decision is based on the evidence presented at the hearing and the documents of record.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2000).

ISSUES

1. Whether Agency's action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

UNDISPUTED FACTS

- Employee has worked as a Social Worker for over nine (9) years with Agency. After September 1998, he was not assigned any new cases.

- On February 9, 1999, Employee received a memorandum concerning his unacceptable work performance.

- On February 9, 1999, Employee's supervisor, Shirley Thompkins and Program Manager Laverne Lucas, met with Employee to address a corrective action plan to assist him with meeting time frames and deadlines in order to complete his work assignments.

- Employee agreed to a stated time frame in order to improve his performance in the following areas: supervisory meetings; documentation of his case action notes for each of his case records; submission of court reports according to the agency policy; and completion of home visits on his assigned caseload that were not completed since the time of the case assignment.

- Employee's progress was to be reassessed in March and May 1999.

- Another conference took place on May 5, 1999. Employee had failed to provide a court report and the judge brought this to the attention of Supervisor Shirley Thompkins. This was discussed at the May 9 conference and Employee expressed that he would not be able to complete the requirements of the performance improvement plan.

- On May 25, 1999, Employee, Ms. Thompkins and Ms. Lucas met to discuss that Employee had not met the tasks identified in his performance improvement plan. New goals and dates were established for improvement in deficient areas.

- On July 14, 1999, Employee's supervisor devised a new plan which included meetings with Employee on a daily basis. Employee did not attend the meetings.

- Employee was removed for failure to perform the essential functions of his job (incompetence), and for insubordination in that he failed to comply with the directives of his superiors regarding the performance improvement plan.

- On September 8, 1999, Agency gave Employee a Notice of Proposed Adverse Action stating that on February 3, 1999, he was instructed to complete the tasks in the corrective action plan in a stated time frame and to improve his performance in the following areas: supervision (weekly meetings); documentation of his case action notes for each of his case records; submission of court reports according to the agency policy; and completion of home visits on his assigned caseloads. Because Employee failed to meet these goals his removal from service was proposed.

- On November 2, 1999, Employee appealed his case before Karen Kushner, Disinterested Designee. Ms. Kushner found that Agency had cause for the removal.

- On November 23, 1999, Agency gave Employee notice that his removal would be effective December 3, 1999.

TESTIMONY OF THE WITNESSES:

AGENCY'S WITNESSES

Adina Fuller worked as a Social Worker for Agency at the time in question. She worked with Employee at the end of 1999/beginning of 2000. Five (5) of employee's cases were reassigned to her. She testified that Employee made status reports based solely on telephone conversations, instead of home visits. She stated he did not schedule his court appearances all in one day and therefore he was constantly in court and had no time to conduct home visits.

Ms. Fuller further testified that Employee failed to intervene in a situation concerning B.H. where there was alleged physical abuse of the child; that he failed to provide financial assistance to B.H.'s family to send the child to camp; and that these failures resulted in the uncle giving up custody of the child. Ms. Fuller also testified that Employee generally did not follow-up with the proper paperwork in a timely manner.

Regarding another case where there was alleged child abuse of Z.P., the grandmother told Ms. Fuller that she reported the abuse to Employee and he did not act on her report. Further, several requests for an air conditioner to help with the grandmother's lupus and the grandson's asthma were ignored. Ms. Fuller testified that Employee carried twelve (12) cases during one year while other Social Workers carried more. She carried 25 cases during the same year. Ms. Fuller gave hearsay testimony that Ms. Thompkins performed much of the work that was left undone by Employee on cases involving interstate compact cases. These are cases where the children are moved to another state.

Leila Hurd was a program manager in the Kinship Care program. She has worked for Agency since 1997. She and Ms. Lucas each supervised five (5) of the ten (10) units that comprised the program. She testified that Employee was often missing even though he was under restriction. She stated that Employee did not avail himself of computer training. He was delinquent in preparing court reports and case plans and he did not attend meetings with his supervisor. Ms. Hurd testified that Ms. Thompkins had to assign Employee's work to others or do it herself, including writing his court reports, making home visits, and showing up for court.

Ms. Hurd testified that the average caseload was 22-23 cases per social worker. Agency tried to conform to the low case requirements set forth in the *LaShawn* court case, but Employee had a large number of cases that he failed to close or transfer. This made it appear that he had a large number of cases, but actually, he was not receiving new cases. He simply was not able to close the cases he already had. Ms. Hurd testified that Employee did not perform at a level commensurate with his experience.

Velda Cross was employed by Agency in March 1999. She testified that four (4) to six (6) of Employee's cases were reassigned to her. She stated that he had not done the necessary work on these cases. The necessary case notes covering six (6) months to a year were not in the files. She and Ms. Thompkins

had to reconstruct the notes from post-its on which Employee had written and there was inadequate documentation. She received complaints from guardians ad litem, attorneys and foster parents or relatives, concerning things Employee failed to do.

In one case involving C.W., the foster parent had been taking the child back and forth from the District to Georgia and was collecting benefits from both jurisdictions due to the lack of oversight by Employee. Further, the child had not been receiving the necessary services. In the case of S.M., the guardian ad litem wanted a new worker assigned to the case due to Employee's failures. For example, Employee had not done a case plan or referred the child for court-ordered therapy. In another case, Employee had a social services assistant, who is not a licensed social worker, conduct his home visits.

Ms. Cross denied ever telling Employee that Ms. Thompkins was out to get him. She testified that she never observed any hostility by Ms. Thompkins towards Employee. Ms. Cross testified that Employee appeared to be sick, losing weight, unhappy and unmotivated.

Evelyn Boyd has worked for Agency for approximately fifteen (15) years. She supervised Shirley Thompkins, while Ms. Thompkins supervised Employee. She and Employee had a good relationship. They are not related. Ms. Boyd was aware that Employee failed to meet with Ms. Thompkins to keep her informed of his casework. Ms. Thompkins took Employee out of case rotation, which meant that the other social workers had a heavier caseload and he was not assigned new cases. She testified that Employee's lack of performance put children at risk on more than one occasion, such as when he failed to act on allegations of sexual abuse. He often did not do court reports and case plans, and failed to prepare for administrative reviews as required. Also, he failed to meet with his supervisor, as required. She discussed with Employee complaints from clients, attorneys, judges and foster parents regarding his inability to get court reports in on time.

Ms. Boyd testified that Employee failed to follow agency policy to make monthly home visits and did not visit the children for as long as one year. She stated that Employee failed to enter case notes in his files, despite repeated warnings. He was a veteran social worker and should have known when to report sexual or physical abuse, and when to remove a child from the premises. He was beginning to slip, putting children at risk. Employees' failure to have

case plans and administrative reviews for most of his cases was in violation of the law. His supervisor, Ms. Thompkins, documented her attempts to have Employee complete his work, after she received an e-mail from the Receiver to address Employee's poor performance. Ms. Boyd testified that Employee did not make monthly home visits on seven (7) of his cases. Employee typically did not provide court ordered services, such as in the H. case, where he did not provide a medical card for the caregiver, and did not request camp for the children.

Ms. Boyd testified that Employee did not make the necessary effort to improve his performance within six (6) months and failed to seek the assistance of his supervisor. He never sent Ms. Boyd memos asking for more time to turn in past due work and said that Shirley Thompkins told Velda Cross she was out to get him.

Supervisor Shirley Thompkins testified by sworn deposition that the allegations in the notice of proposed adverse action were accurate. However, she was not the person who initiated the adverse action. She has since been removed from service by the Agency.

Ms. Thompkins stated that in 1998, Employee was placed on field restriction on the recommendation of the program manager. This meant that he had to remain in his office to complete the paperwork on his cases.

Ms. Thompkins stated that social workers were required to make at least one home visit per month on each case. Employee did not make home visits in the majority of his cases. In some instances, he made no home visits for ninety days. Caregivers and foster parents complained that Employee had not been to see the children. Court reports were due ten (10) days prior to a court hearing. Employee submitted nineteen (19) late court reports. Judge Beck complained that Employee missed making a case report entirely. Employee submitted untimely court reports from February 25 to June 10, 1999. Ms. Thompkins received complaints from the guardians ad litem, foster parents, and caregivers regarding Employee's failure to keep up with his cases.

Further, Employee failed to appear for administrative reviews of his cases and Ms. Thompkins had to appear in his place on five (5) or six (6) occasions. An administrative review was a meeting involving several other parties besides Employee, such as the guardian ad litem, the foster parents, the parents, the

caregivers, medical personnel and/or the attorney representing the child. They would review the child's case together. Employee did not make case plans for the families and did not document the work done on the cases in a timely manner. Therefore, the files were not ready for transfer to other social workers.

Ms. Thompkins removed Employee from case rotation and had no new cases assigned to him. He had about 22 or 23 cases on his case list. She also initiated a plan in February 1999, where Employee had a reasonable time to complete his work. His progress was reviewed on a periodic basis. Because Employee was unable to meet the original timeframes, new timeframes were set for July 1, 1999. On July 14, 1999, she met with Employee and Ms. Lucas to revise the corrective action plan because Employee was unable to complete the tasks, as initially planned.

EMPLOYEE"S WITNESSES

Deborah Cason Daniel testified on behalf of Employee. She stated that she worked on one case with Employee concerning C.D. She stated that Employee submitted his court report on time and visited the children at home. However, she also stated that she had no personal knowledge of whether Employee made home or school visits to the children, or that agency policy required Employee to submit his court report ten (10) days in advance.

Vickie Guion, was a social services assistant for Agency and a union representative. She testified that she once heard Ms. Thompkins yelling at Employee. Therefore, she concluded that Ms. Thompkins did not like him and gave him a hard time. Ms. Guion did not know when the conversation took place or what was said.

Employee, John Boyd, argued that his supervisor was out to get him and that he overheard when she made that remark to a co-worker, Velda Cross. Employee also testified that he told another supervisor, Ms. Boyd, about the remark.

Employee further testified that he made case notes on his cases but they were stolen from his office while he was erroneously suspended. He also testified that his supervisor told him that she would remove four (4) cases from his assignment by transferring them to someone else, but she never made the transfers. Employee believed the supervisor was going to prepare the cases for

transfer but she never did so. Employee did not remember missing meetings with his supervisor to discuss his work, except when his supervisor was not available. Employee stated that he handed in his court reports on time but his supervisor kept them and then said that he did not submit them. He testified that Judge Beck thanked him for a court report he submitted. According to Employee, he sometimes spent more than 30 hours a week in court.

Employee testified that he asked for help by requesting an extension of time to complete the work on his cases, but he did not do so in writing. He needed help because the time frame was not realistic, he was in a crisis and needed his supervisor's assistance and cooperation. At a meeting in May 1999, the deadline for the completion of his work was extended to July 1999. Employee argued that his caseload of 28 or more cases was too heavy, in violation of the *LaShawn* court case wherein the court stated that social workers should be assigned no more than 12 cases.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

I find that Employee's argument that Ms. Thompkins was out to get him is not substantiated by the record. His testimony that he overheard her make this comment to a coworker, Velda Cross, is not corroborated by the coworker. His testimony that he told another supervisor, Evelyn Boyd, that he overheard the alleged conversation is not corroborated by Ms. Boyd. It is insufficient that Vickie Guion heard Ms. Thompkins yelling at Employee, absent any information concerning the contents of what she heard. Further, Employee has given no possible motive explaining why his supervisor would be out to get him. In addition, it is undisputed that Ms. Thompkins did not initiate adverse action against Employee. Thus, I find that Employee has not shown that his supervisor was out to get him fired for some unfounded reason.

Employee testified that he wrote case notes in his files and they were stolen. However, this is wholly unsubstantiated. Several witnesses who worked on cases previously assigned to Employee testified that his files lacked case notes, that he did not make monthly home visits. I find that Employee failed to document his cases as required.

Employee's court reports from February 25 to June 10, 1999, were not submitted ten (10) days prior to the court date. Thus, I find that Employee did not submit his court reports according to Agency policy.

Ms. Thompkins and Ms. Boyd stated that Employee did not report for weekly meetings with his supervisor. Employee offers excuses as to why he was unable to meet with Ms. Thompkins, alluding to her unavailability. I credit the testimony of Ms. Thompkins and Ms. Boyd over Employee's version of the facts. Therefore, I find that Employee failed to report for weekly meetings with his supervisor after February 1999. I am not persuaded by Employee's argument that his failures were due to an excessive caseload. There is no substantive evidence that he raised this argument with Agency. Rather, Employee stated that he needed help because the time frame was not realistic, he was in a crisis and needed his supervisor's assistance and cooperation.

Based on the above testimony and credibility determinations, I find that Employee failed to properly document his cases by making timely case notes, did not complete home visits on his assigned cases, did not submit court reports according to agency policy and did not meet with his supervisor on a weekly basis between February and July 1999.

In an adverse action, this Office's rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance' is defined as "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." OEA rule 629.1, 46 D.C. Reg. 9317 (1999). Further, "when assessing the appropriateness of a penalty, this Office will leave Agency's penalty undisturbed when it is satisfied, on the basis on the charges sustained, that the penalty is appropriate to the severity of the employee's actions and is clearly not an error of judgment." *Vincent J. Tate v. Department of Corrections*, OEA Matter No. 1601-0140-00 (February 1, 2005), ____ D. C. Reg. ____ ( ).

Prior to October 21, 1998, there were 22 statutory cause for which an employee in the Career Service could be subjected to adverse action. *See* D.C. Code Ann. § 1-617.1(d) (1992 repl.). Two of these causes were those set for the herein: inefficiency and insubordination. However, effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124 (OPRAA), modified sections of the Comprehensive Merit Personnel Act, D.C. Law 2-139 (CMPA) in pertinent part by eliminating the 22 stated causes, although language remained mandating that an employee could only be disciplined for "cause". Further, OPRAA delegated to the Mayor the task of promulgating new rules defining cause.

On May 21, 1999, the Mayor, through the D. C. Office of Personnel, Promulgated emergency rules regarding adverse and corrective actions. *See* 46 D. C. Reg. 4659(1999).

Section 1603.3, *id.*, set for the new definitions of cause.[1] Additionally, these rules were made retroactive to the effective date of OPRAA, October 21, 1998. The rules were published as final on September 10, 1999. *See* 46 D.C. Reg. at 7208.

Of specific relevance to this matter is § 1601.13 of the new regulations, 46 D.C. Reg. at 7210. That section reads in part as follows:

> No employee may be subjected to a corrective or adverse action under this section for an act or omission committed prior to its adoption under a notice of final rulemaking unless the employee also could have been subjected to the same adverse or corrective action under the applicable regulations that existed prior to October 21, 1998.

The facts of this case began in February 1999 and continued to July 1999, after the adoption of OPRAA, and thus is governed by its provisions. However, it occurred before the emergency publication of the new regulations defining cause, and that is why the savings clause of §1603.13 is important. That section provides that an employee may be subjected to an adverse action under the new regulations only if the employee could have been subjected to the same adverse action under "applicable regulations" that existed prior to the adoption of the new regulations.[2]

Here, I have found that Employee failed to properly document his cases by making timely case notes, did not complete home visits on his assigned cases, did not submit court reports according to agency policy and did not meet with his supervisor on a weekly basis between February and July 1999. Under the applicable regulations that existed prior to the adoption of the new regulations, these actions formed the basis for the charges of insubordination (because Employee did not do as he was instructed to do) and incompetency

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1 In pertinent part, these definitions are as follows:

[A]ny on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

2 The prior "applicable regulations" governing adverse actions are found at 34 D.C. Reg. 1845 91987), and amended at 37 D.C. Reg. 8297 (1990). Of specific relevance is the previous "Table of Appropriate Penalties", 34 D.C. Reg. at 1861 *et seq.*

(because he did not perform his assigned duties). Thus, I conclude that Agency has proven cause under the "old regulations' for subjecting Employee to an adverse action. Under the previous regulations, removal was contemplated for both a first offense of insubordination and incompetency. Thus, by previous law, Agency's removal of Employee was reasonable and should be upheld.

It is undisputed that under the post-OPRAA regulations, Employee could also have been subjected to an adverse action for insubordination and incompetence as a result of his actions. At §§ 1603.8 and 1603.9, 46 D.C. Reg. at 7209-10, the post OPRAA regulations provide that "Removal is not mandated . . . in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate." I have concluded that removal was reasonable under the previous regulations. My rationale continues to apply under the current regulations. Here, Employee has not established any mitigating circumstances that would cause me to conclude otherwise. Because Employee could have been removed under the pre-OPRAA regulation, he can also be removed under the current regulations.

ORDER

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

FOR THE OFFICE:

Blanca E. Torres, Esq.
Administrative Judge