

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
Darryl Love,)	OEA Matter No. 1601-0034-08R11
Employee)	
)	Joseph E. Lim, Esq.
v.)	Senior Administrative Judge
)	
Department of Corrections)	Date of Issuance: August 10, 2011
Agency)	

Kevin J. Turner, Esq., and Ross Buchholz, Esq., Agency Representatives
J. Michael Hannon, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On January 14, 2008, Employee appealed from Agency's final decision, effective December 17, 2007, removing him, along with other officers, from their positions as Correctional Officers at the D.C. Jail for "negligence," or "malfeasance." Employees were accused of negligently allowing two prison inmates to escape. Employee denied doing anything improper and insisted that he simply followed standard operating procedures.

I presided over a hearing on December 8, 10, and 12, 2008. On June 22, 2009, I issued an Initial Decision ("ID") which upheld the removal of Employee Darryl Love for neglect of duty. The ID was appealed, and on March 22, 2011, Judge Abrecht of the Superior Court of the District of Columbia, Civil Action No. 2009 CA 006180, affirmed this Office's decision regarding Employee Love's negligence in part and remanded the matter for the Agency's reconsideration of the penalty of termination.

JURISDICTION

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

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

FACTUAL BACKGROUND

After I conducted an evidentiary hearing on December 8, 10, and 12, 2008, I found Employee Darryl Love to be guilty of negligence in the performance of his duty. As a Correctional Treatment Specialist, Officer Love's job required him to conduct a custody reclassification of inmates into custody levels of low, medium, and high. Employee failed to note Inmate Joseph Leaks' history of attempted escapes and misclassified Leaks as medium custody instead of maximum custody. This misclassification allowed Leaks to secure work in an Off Unit Detail, which in turn, made it easier for him to carry out his escape.

The ID was appealed, and on March 22, 2011, Judge Abrecht of the Superior Court of the District of Columbia affirmed this Office's decision regarding Employee Love. Specifically, the Superior Court found that there was substantial evidence in the record to support finding Employee Love negligent in classifying escaped inmate Leaks as medium custody when correct scoring should have resulted in maximum custody in light of Leaks' prison escape history. However, the Court qualified the finding of negligence by stating that Employee Love's proven negligence was far less than initially held, as there was insufficient evidence to show that Employee Love had a duty to locate the inmate's institutional file, a duty to investigate separation orders, or a duty to comment on Leaks' suitability for work detail. The Court also found that because Love had no duty to do these functions, he could not be held negligent in failing to perform them. Rather, Love's negligence lie in his failure to assign five points for Leaks' escape history as he should have according to the Agency's Technical Reference Manual and Deputy Warden Bennett.

Since the Superior Court held that Employee Love's proven negligence was far less than that found by my ID, it remanded the issue of the proper penalty for him back to this Office. The Court asked this Office to reconsider its affirmance of the penalty of termination because the Agency and this Office relied on greater negligence than was proven, and on a greater impact than was proven. The Court reiterated that, "the only negligence supported by substantial evidence is Love's failure to score Leaks as a maximum custody inmate on two occasions by failing to score the escape history properly and, on one occasion, striking a key in error for criminal history. There is no evidence that Love's errors were intentional, malicious, or for gain. Most importantly, substantial evidence does not exist to show that he failed to give proper attention to several functions of his position. The record does not support findings that, in reclassifying Leaks, Love had the duties to review the institutional file, record separation orders, or score the parole violation. Love was not responsible for clearing Leaks for work detail."

The Court goes on to explain that despite the notoriety of the escapes, the impact of Love's negligence is far more tenuous than previously held, as there was no substantial evidence to show that classifying Leaks as maximum custody would have kept him from the work detail that facilitated his escape.

On May 13, 2011, I granted Employee's Motion for Remand to the Department of Corrections and ordered the Agency to reconsider its penalty in light of the Memorandum Opinion of the Superior Court issued on March 22, 2011.

On June 30, 2011, the Agency submitted its "Revised Douglas Factor Analysis." In it, Agency Director Thomas Hoey stated that he performed an additional "Douglas factor"¹ analysis and ultimately concluded that the most appropriate penalty for Employee was still termination. Hoey indicated that he reviewed relevant documents including the employee's personnel files, portions of the records on appeal from the District of Columbia Superior Court including my Initial Decision and Senior Judge Abrecht's Memorandum Opinion and Order, past disciplinary actions at the Agency for similar misconduct, and the District of Columbia Municipal Regulations (DCMR) Table of Penalties.

ANALYSIS AND CONCLUSION

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;
- 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;

¹ For a more in-depth discussion of the Douglas factors, see *D.C. Dep't of Pub. Works v. Colbert*, 874 A.2d 353 (D.C. 2005); *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981).

- 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.

In *Douglas v. Veterans Administration*, the Merit Systems Protection Board (“MSPB”), in the context of federal employment, ruled that an agency must consider specific mitigating and aggravating factors in determining an appropriate penalty. The District of Columbia Court of Appeals has made clear that a D.C. agency must take into consideration the so-called “Douglas Factors” when making a disciplinary determination. *D.C. Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005). The D.C. Court of Appeals in *Colbert* emphasizes the importance of responsibly balancing the relevant factors in each individual case. In its evaluation of the dismissal of a D.C. Department of Public Works employee and subsequent proceedings, the Appellate Court further explained that an agency must consider the Douglas Factors at the onset of termination and in consideration of pretermination protections. *Colbert* at 359. The agency must provide evidence of the Douglas Factors in advance of termination in order to preserve the procedural protections of due process.

In his discussion, Director Hoey listed Douglas Factors 1, 2, 5, 6, 8, 9, 10, and 12 as the aggravating factors that far outweighed the mitigating Douglas Factors of 3 and 4. For Factor 1, Director Hoey listed the seriousness of the offense, coupled with Employee Love’s redundant errors in classifying Leaks. For Factors 2 and 5, the Director cited Employee’s failure to take into account Leaks’ criminal record and escape history plus Employee’s insistence that he scored inmate Leaks properly, made the Director question Employee’s judgment and capability to perform his job. For

Factors 6 and 7, Director Hoey noted that according to the District's Table of Penalties, termination is an appropriate penalty even for a first offense and that it had been consistently imposed upon other employees for the same or similar offenses. For Factor 8, the notoriety of Employee's offense coupled with the highly publicized negative impact on the Agency's reputation is cited. For Factor 9, Hoey noted that Employee was well aware of the Technical Reference Manual which detailed the proper scoring for custody reclassification, and yet failed to follow the Manual. For Factor 10, Hoey noted that the potential for Employee Love's rehabilitation was poor because of Love's insistence that he was not at fault and had made no error in his scoring. There were no mitigating circumstances as listed in Factor 11, and for Factor 12, Hoey concluded that any penalty other than termination would not be adequate or effective to deter such conduct in the future.

In the Director's professional opinion, all these aggravating factors far outweighed Employee's mitigating Factors 3 and 4 of having a good prior work record.

There is substantial evidence that Employee knowingly failed to follow his orders and neglected his duty to properly reclassify an inmate. Given that the Superior Court has found less negligence than this Office did, the issue that remains is whether removal is still the legally valid penalty.

Agency Director Hoey performed a thorough Douglas Factor analysis in Employee's case.² After considering Employee's sole negligent act, including all aggravating and mitigating factors, Director Hoey, in his exercise of managerial discretion, maintains that termination remains the proper penalty in this matter. He noted Employee's unrepentant attitude, the primary importance of strict adherence to orders in a paramilitary organization such as a correctional facility where public safety is paramount, and the notoriety and damage to the Agency's reputation that was caused by Employee's negligence. Although Employee's role should be taken in part and parcel with the negligence and failings of others whose collective actions led to the jail escape, the fact remains that Employee's negligence did play a role. The initial issue here was whether Employee was negligent in performing his job, not whether his role was a major or minor factor in the prisoners' escape. In other words, an employee can still be found negligent even if the prison escape was unsuccessful. The cause of action is not dependent on the skill or luck of the escapees.

According to the Table of Appropriate Penalties, the range of penalties for a first offense of Any On-Duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations (Neglect of Duty: Failure to follow instructions or observe precautions regarding safety...; failure to carry out assigned tasks; careless or negligent work habits.)

² I note that this Office has held that failure to discuss the Douglas factors does not amount to reversible error. Even without such a discussion, Agency's decision to remove Employee is valid so long as it was not an abuse of discretion or arbitrary. See *Christopher Lee v. D.C. Dept. of Transportation*, OEA Matter No. 1601-0076-09, *Opinion and Order on Petition for Review* (January 26, 2011), __D.C. Reg.__ ().

is reprimand to removal.³

When assessing the appropriateness of a penalty, this Office has held that Agency's penalty must be left "undisturbed when it is satisfied, on the basis of the charges sustained, that the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."⁴

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. "Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case. The [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981). Agency's penalty of removal is within the range allowed by the Table of Appropriate Penalties and is not clearly an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

³ See Title 6 of the District of Columbia Municipal Regulations (DCMR), Chapter 16. General Discipline and Grievances, Table of Appropriate Penalties, §1619.1(f)(3), D.C. Reg., Vol. 55 Issue 17 (April 25, 2008) and DPM, § 1619, Table of Appropriate Penalties: Corrective and Adverse Actions, item 6(c).

⁴ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985). See also *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985) (stating that the court's ability to decide the appropriateness of a penalty is limited to ensuring "managerial discretion has been legitimately invoked and properly exercised").