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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

ILBAY OZBAY,)	
Employee)	OEA Matter No. 1601-0073-09-R-11
)	Date: June 4, 2013
v.)	
)	Rohulamin Quander
DISTRICT OF COLUMBIA)	Administrative Judge
DEPARTMENT OF TRANSPORTATION,)	
Agency)	
)	
Clifford Lowery, Employee Representative		
Melissa Williams, Esq., Agency Representative		

AMENDED INITIAL DECISION
(On Remand From The OEA Board)

Background

Ilbay Ozbay (Employee) was hired by the D.C. Department of Transportation (the Agency) in December 1987, and was serving in the position of Civil Engineer DS 12, Step 10 on November 21, 2008, the effective date of his termination. Agency based its separation action upon a charge of unsatisfactory job performance. On January 22, 2009, Employee filed his Petition for Appeal with the D.C. Office of Employee Appeals (the Office or OEA), challenging Agency's decision and denying the allegation. Employee's initial Notice of Final Decision letter, dated November 18, 2008, and attached to Employee's Petition for Appeal, failed to state an effective date for Employee's termination, contained no appeal rights information, and did not advise Employee that an appeal must be filed within 30 days of the effective date of Agency's action.¹

Agency, through counsel, did not deny the deficiency of the initial termination notice, nor did it contest the AJ's decision to allow Employee to file his Petition for Appeal beyond the 30 days of the effective date of Agency's actions. Having heard the proffers of both parties, the AJ

¹ Although Agency claims to have reissued the letter on or about December 4, 2008, but using the same November 18, 2008, date of issuance in the amended notice of termination, Employee questioned Agency's claimed corrective actions at the Pre-hearing conference, stating that he did not receive the updated letter until sometime in January 2009.

determined that Agency's notice procedure was defective, and held that the 30-day time frame for the Employee to file his Petition for Appeal, must be waived.²

On or about December 20, 2007, Agency allegedly conducted and completed an unscheduled/unofficial interim performance evaluation (interim evaluation) for the period April 1, 2007 - March 31, 2008, which asserted that Employee's job performance was deficient in several areas of his job enumerated responsibilities. *Agency Exhib. #1 & #2* The interim evaluation yielded a rating of "Unsatisfactory." In addition, Employee was purportedly issued a letter of warning (the letter), likewise dated December 20, 2007, which further advised Employee how his job performance failed to meet the minimum requirements of his position. However, the purported letter document was not signed by anyone nor was it dated. During his subsequent sworn testimony, Employee denied that he was ever given such a letter, and claimed to have never seen the document until after he was terminated.

The matter was assigned to this AJ on August 19, 2009. Although a Prehearing Conference was convened on September 10, 2009, the convening of the evidentiary hearing was postponed until October 7, 2010. Employee requested a postponement of the hearing because he had to leave the country for several months on personal business. The *Initial Decision*, which upheld Agency, was issued March 18, 2011.

In his *Initial Decision*, the AJ found that Agency had shown, by a preponderance of the evidence, as supported by sworn testimony and documents, that Employee was appropriately terminated for unsatisfactory work performance. The AJ further found that the Office has maintained that it is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised. See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). He noted that the Office has also held that it will leave the Agency's penalty undisturbed when "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. 2915, 2916 (1985). The AJ then concluded that the penalty of removal was warranted for the charge of unsatisfactory performance, as specified and sustained Agency's actions.

The issues that were considered by the AJ during the evidentiary hearing, both of which were answered in the affirmative, were:

1. Whether the evidence presented would support a finding that, pursuant to D.C. Personnel Regulations § 1608, General discipline, the Agency had sufficient basis to remove Employee for cause based upon proof of neglect of duty, an act which constituted unsatisfactory job performance as defined by the D.C. Personnel Regulations §1603.2.
2. Whether the Agency gave sufficient consideration to both the mitigating and aggravating factors and circumstances that have been determined to exist, as deemed appropriate, consistent with the provisions of DPM § 1603.8.

² The *D.C. Official Code* § 1-606.03, provides that any appeal shall be filed within 30 days of the effective date of the appealed agency action.

A timely *Employee Petition For Review* was filed with the Board of OEA on April 22, 2011. In his appeal, filed through counsel, Employee alleged several errors that were committed by the deciding AJ, as follows:

1. The proper procedures for the issuance of the alleged Letter of Warning to the Employee were not followed, and additionally, was neither executed by any supervisor nor dated, and thus, under D.C. Personnel Regulations, was invalid on its face.
2. There was no indication that Employee was ever served a Letter of Warning, whether executed or not.
3. The AJ failed to determine if Agency adhered to the requirements of Part II, Implementing Guidelines, Chapter 14, Performance Evaluation (Performance Evaluation), Sub-parts 2.5(C) and (G), prior to issuing a valid Letter of Warning.
4. Agency was unable to prove through proper documentation that it ever utilized progressive discipline before it elected to terminate Employee for alleged unsatisfactory performance.
5. In evaluating the steps utilized prior to Employee's being terminated, the AJ applied the Performance Management Program (PMG) standards instead of the Performance Evaluation System (PES) standards, the latter set of which still applied to Employee. The effect of using the wrong set of D.C. government Personnel Regulations as a component of his decision, may well have adversely affected the final outcome in the *Initial Decision*.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states³:

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.

OEA Rule 629.3 *id.* states⁴:

³ OEA rules have since been amended. However, the above cited section of the rules was the correct citation that was in effect on the date the *Initial Decision* was issued. As well, there was no change in the burden of proof language under the new rules.

⁴ *Ibid.*

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES ON REMAND

The OEA Board, having considered Employee's list of alleged errors, remanded this matter to the AJ, with instructions to consider additional questions, and based upon his Findings on Remand, to decide how best to proceed. The issues to be considered on remand are:

1. Whether the purported Letter of Warning that was allegedly issued to Employee was in compliance with D.C. government Personnel Regulations.
2. If Agency failed to following said regulations, does Part II, DPM Chapter 14, Subpart 2.5(G) apply.⁵
3. If Agency is found to have complied with the mandated notice requirements, does the evidence presented support a finding that, pursuant to D.C. Personnel Regulations § 1608, General discipline, Agency had sufficient basis to remove Employee for cause based upon proof of neglect of duty, an act which constituted unsatisfactory job performance as defined by the D.C. Personnel Regulations §1603.2.⁶
4. Prior to Agency's decision to terminate Employee, was sufficient consideration given to both the mitigating and aggravating factors and circumstances that have been determined to exist, as deemed appropriate, consistent with the provisions of DPM § 1603.8, and as condition precedent to Agency prevailing on the merits.
5. The AJ shall apply the PES standards when measuring Employee's job performance notice requirements for termination in making his determination whether the outcome of his *Amended Initial Decision* varies from the decision made in the original *Initial Decision*.

STATEMENT OF THE CHARGE

The single charge upon which this case is based is that the overall quantity and quality of Employee's work has been unsatisfactory and below the acceptable standard enumerated in the job description for a Civil Engineer, DS 12, Step 10.⁷

⁵ Part II, DPM Chapter 14, Subpart 2.5(G) provides, "If the forgoing procedures in either case [unsatisfactory performance rating process] are not followed precisely prior to March 31, the employee's official rating will automatically become Satisfactory."

⁶ Implied in this query is also the sub-question, to wit, If Agency is found to **not** be in compliance with the mandated notice requirements, can any of the evidence that Agency presented during the hearing be withstanding sufficient to support Agency's efforts to terminate Employee for alleged poor job performance?

⁷ See *Agency Exhib. #1*, Employee's official job description.

Agency's Case

Agency presented three witnesses, to wit:

1. Zahra Dorriz (Dorriz), a Supervisory Civil Engineer with Infrastructure Project Management Administration (the PMA), who was Employee's immediate supervisor from approximately 2005 through 2008, including at the time of his termination.
2. Ali Shakeri (Shakeri) a Program Manager at the Agency, employed with IPMA since April of 2004. Although he was not Employee's immediate supervisor, the Employee worked as a civil engineer under Shakeri's direction. There were two supervisors under Shakeri who worked directly with Employee, to wit, Sylvester Okpala and Zahra Dorriz.
3. Kathleen Penney (Penney), the Chief Engineer for the Agency at the time of Employee's termination, and Agency's deciding official.

Agency also presented 11 exhibits, some multi-part or multi-page, to wit:

1. Employee's Civil Service Position Description.
2. Employee's interim unsatisfactory Performance Evaluation (an unscheduled and unofficial rating, completed on December 20, 2007) for the rating period of April 1, 2007 to March 31, 2008.
3. An unsigned Performance Evaluation Letter of Warning, dated December 20, 2007, but listing at Item #4, Rating Period, that the rating period in question was April 1, 2003 to March 31, 2004.
4. A formal complaint electronic mail filed by Phyllis Barbett, timekeeper, against Employee, dated February 8, 2008.
5. An electronic mail from Employee to Zahra Dorriz, replying to her daily diaries request, dated May 8, 2008.
6. An annual Performance Evaluation System, Report of Performance Rating, dated May 14, 2008, listed as "Unsatisfactory."
7. 7a. 2007 Bridge Inventory Report, dated November 8, 2007.
7b. Reconstruction Defects Report, dated December 5, 2007.
8. Advanced Written Notice of Proposed Removal, dated September 2, 2008
9. E-mail from Employee to Ali Shakeri, dated May 15, 2008.
10. Notice of Final Decision of Termination, dated November 18, 2008.

In their respective turns, Dorriz, Shakeri, and Penny each offered sworn testimony that was adverse to Employee. Without the need to restate the details of their respective testimonies as initially detailed in the *Initial Decision*, the essence of all three of the testimonies was that:

1. Employee was defective in his job performance in several areas, and should be independently able to handle more than one project at a time, as were other engineers employed by the Agency.

2. Employee neglected to prepare task orders for the contractors, to reflect whether contractors had satisfactorily completed certain components of their contractual obligations, and failed to complete field reports and to maintain a mandated diary or to prepare and submit daily reports of construction activities on his assigned projects on a scheduled and regular basis.
3. Employee failed to personally go out to the field to manage, inspect, and monitor construction activities and to confer with construction managers in addressing and directing construction-related issues as needed.
4. Employee refused to continue performing his duties, creating an atmosphere where his overall job performance was viewed as unsatisfactory.
5. Employee was deficient in observing established working hours, was often late, and sometimes signed in a time earlier than his actual arrival. Attempts at counseling on this issue did not meet with success.
6. As the Agency deciding official, Penney relied upon her subordinate supervisors, Ali Shakeri, and Zahra Dorriz, in making the final decision to terminate Employee. She felt that, considering the interim evaluation of unsatisfactory performance and the Letter of Warning, neither of which resulted in an improvement by Employee, the termination was justified.

Employee's Case

Employee presented two witnesses, to wit:

1. Sylvester Okpala (Okpala), the Deputy Program Manager assigned to Employee's work area, and also Dorriz's immediate supervisor.
2. Ilbay Ozbay, the Employee.

In their respective turns, Okpala and Employee each offered sworn testimony that was mostly adverse to Agency's position. Without the need to restate the details of their respective testimonies as initially detailed in the *Initial Decision*, the essence of their testimonies was that:

1. Okpala was the Deputy Program Manager assigned to Employee's work area, and also Dorriz's immediate supervisor. He supervised approximately 22 to 24 employees.
2. Okpala denied having ever seen Agency's Exhibit #3, the unsigned letter of warning which accompanied the interim performance rating, adding that his job duties would have included meeting with the Employee had an alleged poor job performance been brought to his attention.
3. He questioned whether any such meeting(s) or efforts to convene such meetings ever took place, as he was never informed of such, nor was he included in such a meeting.
4. He was unaware that Employee had been previously subjected to a 90-day directive to improve or face termination, noting that it would have been appropriate for him, as the supervisor, to have reviewed and discussed the then proposed documents with Shakeri, his own supervisor, or Dorriz, the witness's subordinate.
5. At the end of the 90-day period, Shakeri presented him with Employee's annual performance evaluation and directed him to sign it. Uncertain about the propriety of the document or the circumstances, he questioned Shakeri about what was then occurring, but got no satisfactory answer, only a directive to sign the form.

6. As an MSS (Management Supervisory Service) employee with the Agency, with family responsibilities which required him to keep his job, he believed that he could have been himself terminated without cause himself had he not followed his supervisor's directive. He felt that he was in no position to challenge what was occurring at that time, adding "I was forced to sign it."⁸
7. Ilbay Ozbay, the Employee, denied all of Agency's allegations concerning the quality of his job performance.
8. Employee also denied: a) ever being served the Letter of Warning about his job performance, *Agency Exhibit #3*, claiming to having only seen the document after he had been separated from employment; or b) that Agency initiated any plan of action to assist him in improving his performance, but admitted that he got into a dispute and sustained a five-day suspension around February 2008, as a result of being cited for discourteous treatment of a co-worker.
9. There was little communication between Dorriz and Employee during this alleged 90-day improvement period, and none that addressed his job performance or anything of a disciplinary-related nature

OEA Board Considerations

When the OEA Board remanded this matter to the AJ, it provided four questions for the AJ to consider and determine and then, based upon his Findings on Remand, decide how best to proceed. Further, the Board noted that the AJ erroneously applied the Performance Management Program (PMP) standards for evaluating Employee's dismissal, instead of the older Performance Evaluation System (PES) standards, which were applicable in measuring Employee's job performance and notice requirements.⁹

The Office provided the AJ with an undated copy of a document issued by the D.C. Office of Personnel (DCOP) which compared the similarities and differences between the older PES standards, issued in 1979, and the newer PMP standards, issued in 2000. The PMP standards anticipate the creation of a Performance Plan when needed, while the older PES enumerated standards does not specifically refer to or include such a plan.

Conclusions of Law

A. Burden of Proof

Pursuant to 16 DPM § 1603.9, Agency bears the burden of proving, by a preponderance of the evidence that its actions were taken for cause, as defined in the DPM. Agency maintains that the facts demonstrate that Employee failed to perform his job-related duties in a satisfactory manner and was therefore terminated for cause. Conversely, Employee denies the job performance allegations. Employee then took the offensive position, arguing that even if Agency

⁸ See remark on Tr. P. 261, line 8.

⁹ On July 7, 2000, the D.C. Office of Personnel issued a Notice of Final Rulemaking, codified at 47 DCR 5560, as Chapter 14, Performance Evaluation. At § 1401, Exclusions, it states in § 1401.1(c) that the provision of the new regulations shall not apply to unionized employees in the Career Service. Employee was a unionized employee in the Career Service.

wished to cite his job performance, and then subsequently to terminate him, Agency committed several procedural errors which operated as a legal bar to removing him under the plan of action that Agency employed.

B. Analysis

Agency's evidence consisted of the sworn testimony of three supervisory witnesses and disciplinary action related documents. The objective was to weave a story underscoring Employee's alleged job performance deficiencies, to wit: a) a pattern of not personally visiting the job sites; b) neglecting to keep a daily work diary; c) a failure to create work-related reports as directed; and d) frequent tardiness and abuse of the sign-in records.

In applying Part II, DPM, Implementing Guidelines and Procedures, Chapter 14, Performance Evaluation, which are the components of the PES standard, the AJ must also consider the Agency's Letter of Warning to Employee, pursuant to Subpart 2.5(C) and determine whether Agency adhered to the requirements of providing a *valid* Letter of Warning to Employee, pursuant to Part II, DPM, Subparts 2.5(D) and (E)(1) and Subpart 1.10(C)(1). These subparts must be read in conjunction with the DPM Instructions, titled "Completing the Letter of Warning Template Instructions," which is issued to all supervisory personnel in the D.C. government.

The Guidelines and Procedures, at Subpart 2.5(G), also mandate that if the foregoing procedures for the letter of warning with a postponement of rating are not followed precisely prior to March 31, the employee's official rating will automatically become Satisfactory.

The Template Instructions provide that, "Since an unsatisfactory rating may carry negative consequences, including ... removal ..., it is essential that a supervisor who decides to begin this process follow the procedures outlined in Part II of Chapter 14 of the DPM very closely." The Instructions also underscore that an additional purpose(s) for the Letter of Warning ". . . is to ensure that the employee whose job performance fails to meet the minimum requirements of the position is given a fair opportunity to improve his/her performance before the employee receives an 'Unsatisfactory' rating [which] may carry negative consequences, including demotion, removal, or a delayed salary step increase." The section again underscores the need for the rating supervisor to follow the Template's Instructions and procedures, as outlined in Part II of Chapter 14 of the DPM very closely.

The enumerated Instructions are as follows:

After you have completed the unofficial performance evaluation, you are ready to draft the *Letter of Warning*. In order to produce a valid *Letter of Warning*, you must complete each of the following steps:

1. Complete the employee information section at the top of the page so that it matches the unofficial *Report of Performance Rating* (P.O. Form 12).
The AJ's Comment - The information enumerated in the *Letter of Warning* did not fully match the performance rating, as the cited period in question was April 1, 2003

- to March 31, 2004, which was not the job performance rating period that led to Employee's ultimate termination. *Em-ee Exh. #6*
2. Next to "Date Issued," provide the date that the *Letter of Warning* will be given to the employee.
The AJ's Comment – The date was listed as December 7, 2007.
 3. In the "Which specific job requirements are not being met satisfactorily" column, highlight each factor that was rated "Unsatisfactory" on the unofficial *Report of Performance Rating* (P.O. Form 12).
The AJ's Comment – This was done.
 4. In the "What can the employee do to bring his/her performance up to Satisfactory level" column, explain in detail what the employee can do to bring his/her performance up to a satisfactory level.
The AJ's Comment – This was done.
 5. In the "What efforts will be made to assist the employee to improve his/her performance" column, explain what types of assistance will be provided to the employee to help him/her to improve performance.
The AJ's Comment – This was listed, but is disputed by the Employee as to what assistance, if any, was provided.
 6. Sign the *Letter of Warning*.
The AJ's Comment - The only Letter of Warning that was ever entered into this record was an unsigned and undated document, which listed December 20, 2007, as the date on which the document was completed. Although Agency's witnesses testified that the official Letter was signed, the burden of providing such a document for the record rests with Agency, which did not produce such a document. Further, in this hotly contested issue concerning whether a signed Letter of Warning ever existed, this AJ takes evidentiary notice that under the provisions 16 DPM 1603.9, an unsigned letter cannot serve as a basis for establishing notice of poor performance and basis for discipline. Likewise, pursuant to DPM 14, Part II, Subpart 2.5(G), if the procedures have not been followed precisely prior to March 31, of the year in question, the effort is invalid, and the employee's rating will automatically become Satisfactory.
 7. Photocopy the unofficial *Report of Performance Rating* (P.O. Form 12) and the *Letter of Warning* for your records.
The AJ's Comment – The record does not contain a copy of an executed Letter of Warning.
 8. Meet with the employee so that you may provide him/her with the unofficial *Report of Performance Rating* (P.O. Form 12) and the *Letter of Warning* and discuss performance expectations.
The AJ's Comment - During the evidentiary hearing, Clifford Lowery, Employee's union representative, argued that Agency, operating in violation of the governing Collective Bargaining Agreement (the CBA) never met with Employee for the purpose of according Employee any progressive discipline, such as leave restrictions, a training plan, or exercising closer supervision, prior to issuing the Report of Performance (Unsatisfactory) and the Letter of Warning.

Lowery underscored that, pursuant to D.C. Official Code, § 1-616.51 et seq. (2001 ed.), Agency was mandated to apply progressive discipline and to likewise consider

the mitigating factors against the value of the alleged offenses, before it took the actions which resulted in Employee's ultimate termination. Such action on Agency's part was also a violation of the CBA, Article 10, § C. Em-ee Exhib. #4 Lowery cited a D.C. Court of Appeals case, Brown v. Watts, 993 A.2d 529, 534 (D.C. 2010) for the court's determination that OEA has jurisdiction over a D.C. government employee's claim that he was terminated in violation of his CBA-accorded pre-termination discipline rights.

The Board noted in its Remand Instructions to the AJ, that if the AJ determines that Agency failed to follow the Letter of Warning Instructions, then the AJ must decide if Part II, DPM Chapter 14, Subpart 2.5(G) applies.

In evaluating the sworn testimony of Agency's three witnesses, I believe that the record correctly reflects that Employee's overall job performance was not up to par at the time that Dorriz, his supervisor, most probably in conjunction with Shakeri, initiated or followed through with the process to cite him for poor performance and then caused Employee to be terminated. There was credible, but disputed testimony from each of Agency's witnesses concerning difficulties that they allegedly encountered in working with Employee. These difficulties could well serve as the underlying basis for the initiation of some Agency-initiated disciplinary action.

The interim notice can also serve as a component step towards the potential issuance of an unsatisfactory performance rating for the entire annual rating period. Therefore, the elements mandated in the Letter of Warning are critically significant and must be fully adhered to.

I find that although Agency created an interim Performance Evaluation Rating, which characterized Employee's job performance as of December 20, 2007, as "Unsatisfactory" in the rating areas of Quantity of work, Quality, Personnel Relations, and Adaptability, *See Agency Exhibit #2*, Agency failed to establish that it also served Employee with a proper and compliant Letter of Warning, the effect of which also rendered Agency's record as incomplete.

Although Employee allegedly refused to sign the accompanying interim Performance Evaluation, dated December 20, 2007, such refusal does not erase or negate the seriousness of Agency's underlying failure to prove that a valid Letter of Warning was issued.

CONCLUSION

Based upon the evidence presented at the evidentiary hearing, and the documents in the record, I conclude that Agency failed to comply with the mandate of Part II of the Guidelines and Procedures, Chapter 14, Performance Evaluation, Subpart 2.5(G), which states, "If the following procedures . . . are not followed precisely prior to March 31, the employee's official rating will automatically become Satisfactory."

ORDER

The foregoing having been considered, it is,

ORDERED that Agency's action of terminating Employee is VACATED for not being in compliance with D.C. government personnel regulations at the time that Employee was separated from service; and it is

FURTHER ORDERED, that Employee's performance rating of "Unsatisfactory" must be upgraded to "Satisfactory"; and it is,

FURTHER ORDERED, that Agency reinstate Employee, with restitution of all back pay, date of serve, and relevant benefits, minus any offset and mitigations allowed under the law; and it is,

FURTHER ORDERED, that Agency is directed to advise the Office, within 30 days, that the Agency is in compliance with the directives of this ORDER.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Administrative Judge

Cc:

Melissa D. Williams, Esq., Agency's Representative
Clifford Lowery, Employee's Representative in the Petition for Appeal
James L. Kestell, Esq., Employee's Representative in the Petition for Review