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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
Derrick Allen) OEA Matter No. 1601-0110-09R11
Employee)
) Date of Issuance: November 19, 2012
v.)
) Senior Administrative Judge
D.C. Fire & Emergency Medical Services Dept.) Joseph E. Lim, Esq.
Agency)
)

Derrick Allen, Employee *pro se*¹

Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On April 7, 2009, Employee, a Fire Fighter with the D.C. Fire and Emergency Medical Services Department (the “Agency” or “D.C. F&EMSD”) filed a Petition for Appeal with the Office of Employee Appeals (the “Office”), appealing Agency’s action removing him from his position, effective April 6, 2009, for two separate incidents. The D.C. Fire Department Trial Board (the “Trial Board”) conducted an evidentiary hearing from December 2, 2008, to February 12, 2009, in Case # U-08-183 and # U-9-04, and sustained the charge against Employee of “any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations.”

On July 13, 2010, I upheld the Trial Board’s removal of Employee. Employee appealed, and on August 3, 2011, the D.C. Superior Court has remanded this matter to this Office for further proceedings consistent with its opinion. The Court affirmed the findings of guilt as to the charges of case # U-08-183 and reversed the findings of guilt as to the charges of case # U-09-04, holding that the latter charges were not supported by substantial evidence.

The parties thereby made several attempts over several months at mediation and settlement discussions. However, these talks failed to produce an agreement. Thus, I ordered Agency to reconsider its penalty in light of the Superior Court’s decision and

¹ Employee removed Lathal Ponder as his representative after complaining that Mr. Ponder failed to adequately represent him.

submit its decision regarding penalty to this Office. Agency thereby reduced its penalty from termination to a one hundred forty-four (144) duty hour suspension. Employee has submitted his response and indicated that he was accepting his reinstatement.² The record is closed.

JURISDICTION

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

ISSUE

Whether Agency's revised penalty for Employee is reasonable and within the range allowed by law, rules, or regulation in light of the D.C. Superior Court's opinion.

FINDING OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

In its August 3, 2011, Opinion, the D.C. Superior Court found that the Trial Board's findings were supported by substantial evidence as to the charges of case # U-08-183, but not as to the charges of case # U-09-04.³

Case # U-08-183 involved charges where Employee disobeyed a direct order to return to service while working as an Acting Crew Member in Charge ("ACIC") of Ambulance 1, and then lied about it. Case #U-09-04 involved charges that on October 7, 2008, Employee disobeyed an order to undergo a breathalyzer test after appearing drunk at work and then left the work site without permission. For Case #U-09-04, the Court found that Agency had failed to establish that Employee violated its substance abuse policy since Employee was not on duty at the time, an element required in the policy. The Court also found that Employee had already been released by the physicians at the clinic and thus could not be found guilty of leaving the clinic prior to release by the "attending medical provider" as Agency had charged.

The Court also affirmed this Office's findings that there was no harmful procedural error on the part of the Agency. In its conclusion, the Court remanded this matter back to this Office for further proceedings or the determination and implementation of relief consistent with its Opinion.

Thus, I ordered Agency to revisit its penalty. Agency did so by reducing its penalty from a termination to a one hundred forty-four (144) duty hour suspension. The suspension is equivalent to an eighteen (18) day suspension. Agency's final decision is consistent with the

² In his response to Agency's offer of reinstatement, Employee also asked a number of questions that can be construed as a quest for legal advice. The undersigned declined to answer them.

³ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).

Trial Board's recommendation of 144 hours suspension for Case # U-08-183 where it recited its consideration of the "Douglas Factors"⁴ in coming up with its recommended penalty.

Whether Agency's revised penalty for Employee is reasonable and within the range allowed by law, rules, or regulation in light of the D.C. Superior Court's opinion.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to assure that "managerial discretion has been legitimately invoked and properly exercised."⁵ When the charge is upheld, the Office has held

⁴ 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;
- 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.

⁵ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

that it will leave 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."⁶

The penalty for the first offense of "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" involving neglect of duty, misfeasance, and insubordination is reprimand to removal.⁷ Specifically, the penalties for a first offense of neglect of duty is reprimand to removal; a thirty-day suspension to removal for misfeasance; and a reprimand to a ten-day suspension for insubordination. In addition, Employee has not raised any objections to the reduction of his penalty from termination to an eighteen day suspension.

Under the circumstances, I see no basis to conclude that Agency acted capriciously in deciding to suspend Employee for eighteen days. Based upon my review of the record below, I conclude that the penalty was reasonable and should not be disturbed.

ORDER

It is hereby ORDERED that Agency's decision to reduce Employee's penalty from a removal to a one hundred forty-four (144) duty hour suspension is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

⁶ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

⁷ See 6 DCMR, Chapter 16, General Discipline and Grievances, Table of Appropriate Penalties, effective February 22, 2008.