

Evidence on Disputed Issues

a. Gregory Wells testified (Transcript Pg. 20-117, pgs. 206-209) as follows.

Wells was the investigator for the Metropolitan Police Department's Office of Professional Responsibility, Internal Affairs Division. His investigation revealed that a Blue Plains Impoundment Branch employee witnessed both Employee and Sergeant Pair use a third party named Officer Hill, to bid at the Agency's car auction on their behalf. However, Hill denied bidding for Employee.

Based on the auction sheets, Employee's successful bid for a 1994 Honda Accord on September 29, 1998 was \$3,000. Agency Exhibit 1 & Employee Exhibit 1B. The after-auction report dollar amounts correspond to Agency's adding machine tally of the monies collected. Agency Exhibit 2 & Employee Exhibit 1C. Employee showed vehicle receipt for \$1,800 in obtaining title. It is against Agency policy for anyone to presign vehicle titles. Susan Smith, working under Employee, had an unofficial document that showed Employee paid \$8,400 for the 1994 Honda Accord on September 28, 1998. Employee Exhibit 1. However, there was no car auction held on that date. Smith had a grudge against Employee and reported Employee's alleged fraud around June 22, 1999.

Under Agency rules, auction documents may be destroyed only after three years or after an audit of such records, whichever occurred first. Wells said that the relevant auction documents were destroyed under Employee's direction. His investigation also revealed that no audit was conducted. Wells also determined that the time lapse before the auction documents were destroyed was just one year, instead of the required three years.

Yet Wells admitted that the Inspector General had conducted audit of Evidence Control Department on November 4, 1999 but there was no indication as to what was audited. According to the investigative report of the Office of Internal Affairs, Employee was the Property Clerk at the Agency's car auction and that Sergeant Pair and Employee destroyed all auction records dated September 1998 and before due to space concerns. Employee Exhibit 4.

b. Abraham H. Parks testified (Transcript Pg. 141-177) as follows.

Parks was the Commander of the Property Division in charge of vehicle auctions. Employee was his Deputy Director and thus had the authority to destroy vehicle records after three years or after an audit. He said looking at the bid sheets he could not tell which is the authentic one other than that one had the correct date of the auction. There was a discrepancy between the receipt for 1994 Honda bought for \$1,800 and the auction bidder sheet because the number of the buyer is different. He was aware that Susan Smith did not like Employee.

c. Edward Pair testified (Transcript Pg. 179-205) as follows.

Sergeant Pair told investigators from Internal Affairs that the auction records for September 1998 had been destroyed on Employee's orders after an audit of all vehicle auctions prior to late 1999. He was the overall manager at the September 29, 1998 auction. Pair signed the District of Columbia Certificate of Title for Employee's 1994 Honda as a supervisor of the auction process even before the purchase price was recorded on the title. He said it was permissible for members of the police force or their representatives to purchase vehicles at the Agency's auction so long as they are not in police uniform.

Pair testified that Susan Smith, allegedly the source of many of the auction documents used to charge Employee, was a member of his staff who he did not find credible. The After-Auction Report does not go to the D.C. Government Department of Treasury as it is an internal report. The only auction reports that go to the Treasury were a Form 196 and a SOARS report.

Pair also admitted being terminated for the same type of September 29, 1998 auction charges that Employee faces. To support his contention that there was an audit of the auction documents performed, Pair presented Employee Exhibit 7. However, Employee Exhibit 7 was not an auction audit report, just a phone note.

c. Employee testified (Transcript Pg. 209-259) as follows.

Employee was a Lieutenant and commander with the D.C. Police Force. As the manager of the property division, she had the authority to destroy auction documents after an audit by the D.C. Auditor's Office.

Employee insisted she paid only \$1,800 cash for her 1994 Honda Accord at the auction. She has no idea where her staff member Susan Smith supposedly came across a title of her Honda with a \$3,000 price tag. Employee stated that there was animosity between her and Susan Smith after she gave Smith a bad performance evaluation.

#### FINDINGS OF FACT

Agency alleges that Employee committed two main offenses in this matter. First, that Employee used her position as manager of the property division to alter the actual price that she paid for her vehicle at the Agency's vehicle auction and then used official documents with the fraudulent price in registering her vehicle. This action is said to help Employee reduce the tax that she paid for the vehicle.

Agency's second main allegation is that Employee improperly ordered the destruction of the September 1998 auction records to conceal evidence of her alleged wrongdoing. I will take up these allegations one by one.

Did Employee misrepresent the purchase price of the Honda Accord she bought at auction?

The following facts are uncontested:

1. Employee worked for Agency as a police officer for twenty-two years. The Property Division was in charge of vehicle auctions where seized vehicles were disposed of.
2. Agency held an automobile auction on September 29, 1998. Employee was the manager of the Property Division on that date and Sergeant Pair worked under her supervision.
3. This auction had fifty vehicles up for bid. Forty-nine vehicles were sold for a total net profit of \$34,672.30. Employee prepared the After Action Report Relative to the Property Division Automobile Auction dated October 8, 1998. Agency Exhibit 2 & Employee Exhibit 1C
4. Sergeant Pair pre-signed all fifty certificates of titles prior to the auction in preparation for it.
5. Employee had someone bid on a 1994 Honda Accord for her. This action is permissible under the General Orders of the Metropolitan Police Department. Her bid was successful and Employee became the owner of the Honda.
6. Employee had a receipt of purchase of this Honda for \$1,800.00. Employee then signed a certificate of title for the Honda on September 29, 1998, indicating the vehicle's purchase price as \$1,800.00.
7. Employee presented these documents to the Maryland Department of Motor Vehicles to register the car.
8. Under Employee's orders, Sergeant Pair destroyed the auction records of September 1998. This fact hindered Agency's subsequent investigation of the incident.
9. Employee had no prior disciplinary record.
10. A Trial Board Panel was held May and July 2005. The Board recommended Employee's removal. Employee was issued a final notice of removal effective September 30, 2005.

Agency's case essentially consists of Investigator Wells' report, along with the documentary evidence submitted by both parties. Thus there was no first hand testimony apart from Employee and Sergeant Pair. Employee denied all wrongdoing. I did not give any credence to the documentary evidence that Employee alleges was submitted by a biased staff member named Susan Smith, as she did not testify.

Thus, in addition to the above-mentioned testimony, the only credible evidence to deduce what happened would be the documents that both parties submitted and agreed upon as representative of the original. These are:

- (1) The auction sheets dated September 29, 1998. Agency Exhibit 1 & Employee Exhibit 1B.
- (2) The after-auction report with its accompanying adding machine tally of the monies collected. Agency Exhibit 2 & Employee Exhibit 1C.
- (3) Certificate of Title to the Employee's Honda. Employee Exhibit 1E.

I also include as evidence Employee's submission of:

- (4) The sales receipt for the Honda which indicates the price paid as \$1,800.00. Employee Exhibit 1D.

Employee asserts that she paid only \$1,800 for her vehicle while Agency believes that amount to be much higher, at least \$3,000. The question of what price Employee actually paid for her vehicle could be gleaned from Employee's own after-auction report and its accompanying adding machine tally of the monies collected (Agency Exhibit 2 & Employee Exhibit 1C) as well as the September 29, 1998 auction sheet. (Agency Exhibit 1 & Employee Exhibit 1B.) The auction sheet indicates that the winning bid for the 1994 Honda purchased by Employee was \$3,000. This amount corresponds to the amount recorded on the adding machine tally. Even more significant is the fact that the total net proceeds of the vehicle auction, \$34,672.30, is correct only if the amount actually paid for the 1994 Honda is \$3,000, not \$1,800. I note that Employee never explained this discrepancy. I also note that Employee herself made the after-auction report and affixed her signature to it, thereby attesting to its veracity. Indeed, Employee never claimed that her report was erroneous or less than accurate.

Logically and rationally deducing from these documents submitted by Employee, I therefore find by a preponderance of the evidence that the actual amount paid by Employee for her vehicle was \$3,000 and not \$1,800. Thus the amount written on the sales receipt was fraudulent. Because Employee had the position and power to influence what was written on the sales receipt, I find that Employee caused a fraudulent amount to be written on her car's sales receipt.

It is undisputed that Employee used this sales receipt and attested on the Certificate of Title for her vehicle that the amount she paid was only \$1,800, thereby reducing the taxes she paid to the Maryland Motor Vehicle Administration. I therefore find that Employee did misrepresent the purchase price of the Honda Accord she bought at auction.

Did Employee improperly order the destruction of the September 1998 auction records to conceal evidence of her alleged wrongdoing?

Agency's allegation against Employee concerning this issue is that Employee had no legitimate reason for ordering the destruction of the September 1998 auction records. Agency asserts that the only legitimate reasons for destroying any auction records is if an audit of the records have been conducted or if three years have passed since the auction. It is undisputed that Employee did order the destruction of the auction records before three years had passed. What Agency needed to prove was that no audit of the records had occurred that would justify their destruction.

However, Agency's only evidence concerning this allegation was its investigative report. Agency did not present any witness nor did it introduce any document that would prove that no audit of the auction records had occurred. Since Agency failed to meet its burden of proof, this allegation must fail. I therefore find that Agency did not prove that Employee improperly ordered the destruction of the 1998 auction records.

### ANALYSIS AND CONCLUSIONS

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

As noted above, Agency charged Employee with four charges: (1) Violation of General Order Series 1202, Number 1, part I-B-7, which provides: ... any offense in which the member .... is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction; (2) Violation of General Order Series 1202, number 1, Part I-B-12, which provides: Conduct unbecoming an officer, including acts detrimental to good discipline...or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia; (3) Violation of General Order Series 1202, number 1, Part I-B-17, which provides: Fraud in securing appointment or falsification of official records or reports; and (4) Violation of General Order Series 1202, number 1, Part I-B-20, which provides: Misuse of official position or unlawful coercion an employee for personal gain or benefit. All of these violations are defined as causes in §1603 of the D.C. Personnel Manual.

I have found that the actual amount Employee paid for her vehicle that she obtained at the auction was \$3,000, not the \$1,800 that she claims. I have also found that Employee used her position as manager of the Property Division to obtain a sales receipt that reflected an amount less than what she actually paid for her vehicle. It is uncontroverted that Employee then used this sales receipt to obtain a Certificate of Title for her vehicle with the misrepresentation that she paid only \$1,800 for her vehicle, thereby reducing the taxes she paid to the Motor Vehicle Administration.

All of these acts of using her position to falsify a sales receipt, use these misleading documents to register her vehicle and pay less than the right amount of taxes denote police conduct that is fraudulent, a misuse of her official position for personal benefit, and conduct unbecoming an officer. Such conduct of not paying the right amount of taxes is also an act which would constitute a crime whether or not a court record reflects a conviction. Therefore I conclude that Agency has met its burden of establishing cause and that it acted appropriately in taking adverse action against

Employee.

2. Whether Agency's penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office will leave Agency's penalty undisturbed when it is satisfied, on the basis of the charges sustained, that the penalty is appropriate to the severity of the employee's actions and is clearly not an error of judgment.

Here, Employee's actions involved not just a crime of tax evasion, but also her betrayal of public trust by the use of her government position to illegally alter or cause to alter government documents for her own benefit. The seriousness of her actions points to the appropriateness of Agency's penalty of removal. This is true notwithstanding any conclusion that Agency did not prove that she improperly ordered the destruction of the 1998 auction records. Accordingly, I conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.  
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Mark James	)	OEA Matter No. J-0003-08
Employee	)	
	)	Date of Issuance: January 11, 2007
v.	)	
	)	Joseph E. Lim, Esq.
Office of the Chief Technology Officer	)	Senior Administrative Judge
Agency	)	

Robert Deso, Esq., Employee Representative  
Christina Fleps, Esq., Agency Representative

**INITIAL DECISION**

PROCEDURAL BACKGROUND

On October 4, 2007, Employee appealed Agency's decision to reprimand him on August 8, 2007, for five instances of misconduct from January 2007 through August 2007. The matter was assigned to the undersigned judge on November 19, 2007. After Employee asked for and was granted an enlargement of time to respond to Agency's motion to dismiss, both parties submitted their legal briefs on the issue of jurisdiction. The record closed on December 20, 2007.

JURISDICTION

Jurisdiction over this appeal has not been established.

ISSUE

Whether Employee's appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

Based upon the documents submitted on the record, the following facts are undisputed:

1. Employee is an Information Technology Project Manager, DS 2210-16, in the competitive service.

2. Early in 2007, Employee was assigned to serve as Agency's liaison to the Metropolitan Police Department (MPD). In May 2007, then Interim Agency Director Robert LeGrande II ended the assignment because of Employee's alleged unsatisfactory performance.
3. On August 8, 2007, Agency gave Employee an advance written notice of an Official Reprimand due to insubordination, incompetence, inexcusable neglect of duty, and unreasonable failure to assist fellow employees in the performance of their official duties.
4. Agency immediately placed Employee on paid administrative leave because of his combative behavior.
5. On September 20, 2007, Agency notified Employee of its final decision to reprimand him and directed him to attend an anger management course. The notice informed him that he may contest the action in a disciplinary grievance to the human resource project coordinator within ten days.
6. On October 4, 2007, Employee appealed Agency's decision to this Office.
7. Employee alleges that this Office has jurisdiction over his appeal under the District of Columbia Whistleblower Amendment Act of 1998, contending that Agency retaliated against him because he was a whistleblower exposing inefficiencies, waste, incompetence, and abuse of authority.

### ANALYSIS AND CONCLUSION

#### BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. at 9317 states:

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 629.2, *id.*, states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."

#### **Whistleblower Act**

The Employee has argued that this Office should exercise jurisdiction over his appeal through the Whistleblower Act. This Act encourages Employees of the D.C. government to "report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal." D.C. Official Code § 1-615.51.<sup>1</sup> To achieve this objective, the Whistleblower Act provides that "a supervisor shall not threaten to take or take a prohibited personnel action or otherwise retaliate against an employee because of the employee's protected disclosure or because of an employee's refusal to comply with an illegal order." D.C. Official Code § 1-615.53. Furthermore, § 1-615.54(a) states that:

An employee aggrieved by a violation of § 1-615.53 may bring a civil action before a court or a jury in the Superior Court of the District of Columbia seeking relief and damages, including but not limited to injunction, reinstatement to the same position held before the prohibited personnel action or to an equivalent position, and reinstatement of the employee's seniority rights, restoration of lost benefits, back pay and interest on back pay,

---

<sup>1</sup> The full text of Title 1. Government Organization, Chapter 6. Merit Personnel System. Subchapter XV-A. Whistleblower Protection for Employees of Contractors and Instrumentalities of the District Government. §1-615.51 is as follows:

Findings and declaration of purpose.

The Council finds and declares that the public interest is served when employees of the District government are free to report waste, fraud, abuse of authority, violations of law, or threats to public health or safety without fear of retaliation or reprisal. Accordingly, the Council declares as its policy to:

- (1) Enhance the rights of District employees to challenge the actions or failures of their agencies and to express their views without fear of retaliation through appropriate channels within the agency, complete and frank responses to Council inquiries, free access to law enforcement officials, oversight agencies of both the executive and legislative branches of government, and appropriate communication with the public;
- (2) Ensure that acts of the Council enacted to protect individual citizens are properly enforced;
- (3) Provide new rights and remedies to guarantee and ensure that public offices are truly public trusts;
- (4) Hold public employees personally accountable for failure to enforce the laws and for negligence in the performance of their public duties;
- (5) Ensure that rights of employees to expose corruption, dishonesty, incompetence, or administrative failure are protected;
- (6) Guarantee the rights of employees to contact and communicate with the Council and be protected in that exercise;
- (7) Protect employees from reprisal or retaliation for the performance of their duties; and
- (8) Motivate employees to do their duties justly and efficiently.

compensatory damages, and reasonable costs and attorney fees. A civil action shall be filed within one year after a violation occurs or within one year after the employee first becomes aware of the violation...

It is evident from the foregoing that the D.C. Superior Court has original jurisdiction over Whistleblower Act claims. This Office was not granted original jurisdiction over such claims. Rather, the original jurisdiction of this Office was established in §1-606.03 of the D.C. Official Code:

(a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]. . . .

Based on the preceding language, some causes of action under the Whistleblower provisions may be adjudicated by this Office. However, this does not mean that *all* causes of action pertaining to the Whistleblower Act may be appealed to this Office.<sup>2</sup> Based on §1-606.03, reprimands and other grievances are not within the jurisdiction of this Office. This Office has previously held that when it lacks jurisdiction to adjudicate the merits of an employee's petition for appeal, this Office is unable to address the merit(s) of the Whistleblower claim(s) contained therein. *See, Rebecca Owens v. Department of Mental Health*, OEA Matter No. J-0097-03 (April 30, 2004), \_\_\_ D.C. Reg. \_\_\_.

However, if an aggrieved employee has a matter with OEA that may otherwise be adjudicated by this Office, said employee may include, as part of his Petition for Appeal, any pertinent Whistleblower violations.

I find that since this Office does not have jurisdiction over the Employee's appeal of his reprimand, consequently this Office does not have the jurisdiction to adjudicate the merits of his Whistleblower Act claims that were filed with the Office as a component of his complaint. As a result, these matters must likewise be dismissed for lack of jurisdiction.

---

2 It bears noting the relevant language contained in § 1-615.56 of the Whistleblower Act:

Election of Remedies

(a) The institution of a civil action pursuant to § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals...

(b) No civil action shall be brought pursuant to § 1-615.54 if the aggrieved employee has had a final determination on the same cause of action from the Office of Employee Appeals...

ORDER

It is hereby ORDERED that Agency's Motions to Dismiss for lack of jurisdiction are GRANTED, and that these matters be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.  
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____	)	
In the Matter of:	)	
	)	
KELVIN JOHNSON	)	OEA Matter No. 1601-0002-06
Employee	)	OEA Matter No. 1601-0053-06
	)	
v.	)	Date of Issuance: February 8, 2008
	)	
OFFICE OF PROPERTY MANAGEMENT	)	Muriel A. Aikens-Arnold
Agency	)	Administrative Judge
_____	)	

Dia Khafra, AFGE Local 631  
Pamela L. Smith, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On October 11, 2005, Employee, a Pipe Insulator, filed a Petition for Appeal (PFA) of Agency’s action to suspend him from duty for fifteen (15) days effective September 26 through October 10, 2005 for Inexcusable Absence Without Leave.<sup>1</sup> On April 18, 2006, Employee filed a second Petition for Appeal of Agency’s action to remove him effective March 19, 2006 for: Inexcusable Absence Without Leave and Incompetence.

Both matters were consolidated and assigned to this Judge as of June 20, 2006.<sup>2</sup> On August 1, 2006, an Order Convening a Prehearing Conference was issued scheduling said conference on August 22, 2006. Due to various requests from the parties, that meeting was postponed and ultimately held on December 5, 2006, at which time an evidentiary hearing was scheduled. The evidentiary hearing was held on February 20, 2007, in Employee’s absence; and the Hearing record was closed.<sup>3</sup> On February 23, 2007, this Office received a written request

<sup>1</sup> This appeal (1601-0002-06) was previously assigned to Administrative Judge Sheryl Sears, who scheduled a Prehearing Conference on 4/26/06; however, due to a family emergency, Employee was unable to attend and the meeting was not held.

<sup>2</sup> See OEA Rule 612.1 which permits consolidation of two or more appeals with adjudication as one action.

<sup>3</sup> Prior to the hearing, the Union represented that Employee was “on the way.” However, Employee did not arrive; nor communicate with anyone regarding his absence.

1601-0002-06

1601-0053-06

Page 2

from Employee requesting an “emergency continuance” due to a conflicting court date. On March 30, 2007, an Order Denying a Continuance and Closing the Record effective May 7, 2007, was issued.<sup>4</sup> Following a number of requests from the parties to extend the deadline for submission of Closing Arguments, the record was closed effective September 18, 2007.

### JURISDICTION

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

### ISSUES

- 1) Whether Agency’s action to suspend Employee for 15 days was taken for cause; and If so, whether the penalty was appropriate under the circumstances;
- 2) Whether Agency’s action to remove Employee was taken for cause; and If so, whether the penalty was appropriate under the circumstances.<sup>5</sup>

### PROCEDURAL HISTORY, STATEMENT OF CHARGES, AND PARTY POSITIONS

By memorandum dated August 31, 2005, Employee was notified of a proposal to suspend him for 15 calendar days based on a charge of Inexcusable Absence Without Leave and Violation of Leave Restriction. Employee failed to maintain regular attendance and to report to work at the proper time. Specifically, since being placed on leave restriction, Employee accumulated 14 days of unexcused absences. On September 16, 2005, a final decision was issued sustaining the 15-day suspension.<sup>6</sup>

By memorandum dated February 1, 2006, Employee was notified of a notice proposing to remove him for Inexcusable Absence Without Leave. Specifically, Employee failed to maintain regular attendance and to report to work at the proper time, even while on leave restriction, from October 11, 2005 through January 27, 2006. Elements of prior disciplinary action, including,

---

<sup>4</sup> Employee’s request was forwarded to his Union representative, who filed a written response. The Union represented that Employee met with representatives the day before the hearing to prepare his case; that Employee did not inform them regarding any emergency or conflicting court date; that the Union had no contact with Employee thereafter; and that an investigation into this matter disclosed that Employee was previously served a summons to appear in the District Court of Maryland the same day, but failed to do so.

<sup>5</sup> See OEA Rule 629.1 which provides that the burden of proof with regard to material facts shall be by a preponderance of evidence.

<sup>6</sup> See Joint Exhibits (hereafter “Jt. Ex.”) 1A (proposal) and 1B (decision), neither of which cite specific dates of unexcused absences. Employee’s 9/6/05 response to the notice denied the charges.

1601-0002-06

1601-0053-06

Page 3

*inter alia*, two (2) suspensions from duty without pay, were also cited. Further, Agency tried other means, such as counseling, to no avail. Employee failed to improve his attendance and failed to consistently communicate with the office and the union regarding his personal status on days that he did not come to work. On March 6, 2006, a final decision was issued affirming Employee's removal effective March 19, 2006.<sup>7</sup>

*Employee's Position.*

First, Employee contends that Agency's action to suspend him for 15 days was invalid based on the following: 1) Agency erroneously cited 14 days of unexcused absences during the period July 13, 2005 and August 31, 2005 when Employee had only 8 days of unexcused absences; 2) The July 12, 2005 Memorandum of Direction-Leave Restriction, cited as the underlying basis for the period of unexcused absences charged was invalid as follows: a) did not contain a specific time period of its duration; b) erroneously cited a "four-week period of irregular attendance," prior to issuance of said memorandum, which was subsequently approved as a disability claim; and c) the aforementioned four-week period should have been reflected as LWOP (leave without pay) rather than AWOL (absence without leave) on the supervisor's time and attendance sheets while the disability claim was pending. Since the basis for the Leave Restriction was invalid, so was the suspension.<sup>8</sup>

Second, Employee contends that, in the Advance Written Notice of Proposed Removal, absences using approved annual and sick leave were erroneously cited since those absences were *excused*. Further, the leave restriction letter, also cited therein, was invalid for the reasons outlined above. As stated by Employee, "[S]ince this violation of Leave Restriction was utilized by Agency . . . to demonstrate their adherence to the principle of progressive discipline and as a basis for termination . . . and since the Leave Restriction was indeed invalid, then the termination itself must be invalidated."<sup>9</sup>

*Agency's Position.*

Agency contends that Employee could not perform the major responsibilities of his job due to numerous inexcusable absences without leave, which adversely affected the daily scheduling and performance of emergency maintenance and other services for the District government, the completion of assigned work as scheduled, and employee morale. Despite

---

<sup>7</sup> See Jt. Ex. 1D and 1E (day-to-day time & attendance sheets covering the period from 11/5/04 to 1/26/06 were attached). The charge of Incompetence was cited in the Final Decision, but was not previously cited in the proposed notice, and will not be considered by the Judge in evaluating the merits of the removal action.

<sup>8</sup> See Union's Post-Hearing Brief (UPB) at pp. 6-8.

<sup>9</sup> See UPB at pp. 10-12.

1601-0002-06

1601-0053-08

Page 4

attempts to rehabilitate Employee's poor time and attendance through other forms of discipline, Agency maintains that both adverse actions were appropriate in this case. Further, the 15-day suspension and termination were supported by a preponderance of the evidence, and the penalties were within the range allowed by law, regulation, or guidelines and clearly not errors of judgment.

### SUMMARY OF MATERIAL TESTIMONY

#### Mickael Claggett, Supervisor, Construction Department

Mr. Claggett testified that he supervised Employee from October 2004 until February 2006. Due to poor attendance, Employee was placed on leave restriction, several times, whereupon he was required to provide medical evidence whenever he was out on sick leave.<sup>10</sup> During the periods from July 13, 2005 and August 31, 2005; and from October 11, 2005 and January 25, 2006, Employee's attendance was poor, and he did not bring in doctor's notes to support his sick leave absences. Although Employee was required to request annual leave 24 hours in advance, he failed to do so. Most of the time, a family member or friend would call in after Employee's reporting time, to request annual leave the same day. When Employee's leave ran out, he was charged AWOL (absence without leave).<sup>11</sup>

Employee's unexpected absences resulted in shifting around employees to fill in, to hold people over or reorganize the whole day's activities. Even though Employee was counseled, issued letters of warning, and suspended from duty, he failed to improve his attendance. Management officials had discussions with Employee and union representatives regarding ways to motivate Employee to improve his attendance, to no avail.<sup>12</sup>

Employee indicated that he wished to request leave under the Family and Medical Leave Act, but when the paperwork was received, the forms were not completely filled out and were not signed by Employee or a physician.<sup>13</sup>

#### Henry Edwards, General Construction Foreman (Proposing Official)

Mr. Edwards testified that, after management officials had numerous conversations with Employee regarding his irregular attendance, he issued the proposed 15-day suspension dated

---

<sup>10</sup> See Transcript (hereafter referred to as "Tr.") at p. 60. When questioned by the Judge, Mr. Claggett testified that Employee was issued a letter dated 7/12/05 placing him on leave restriction;

<sup>11</sup> See Tr. at pp. 23-27, 50. This witness affirmed the accuracy of the day-to-day attendance sheets (attached to Jt. Ex. 1E) which he prepared.

<sup>12</sup> See Tr. at pp. 32-34.

<sup>13</sup> See Tr. at pp. 41,44.

1601-0002-06

1601-0053-06

Page 5

August 31, 2005. Employee's tardiness and absences adversely affected day-to-day operations in providing city services.<sup>14</sup>

Mr. Edwards did not recall the dates of absences on which the 15-day suspension was based, but stated that the absences occurred subsequent to the July 12, 2005 leave restriction letter. He also stated that he did not recall the duration of the leave restriction. However, he was aware of Employee's unexcused absences, as he was in contact with Mr. Claggett on a daily basis.<sup>15</sup>

David L. Wellington, Branch Chief, Field Activity Division<sup>16</sup>

Mr. Wellington testified regarding the 15-day suspension, the proposed removal notice, and the Agency's efforts to work with Employee over a period of two to three years to improve his attendance. After four (4) placements on leave restriction, numerous discussions with Employee, and two (2) suspensions from duty without pay, he did not improve his attendance, resulting in the termination. Employee's unreliability affected the morale of other employees and seriously impacted the ability of Agency to perform its work in a timely manner.

The Leave Restriction letter, dated July 12, 2005, did not reflect a period of time within which it was effective. Nor did the proposed notice of 15-day suspension specify the 14 days of unexcused absences since "being placed on leave restriction." Nevertheless, whether or not Employee was on leave restriction, absences wherein the Employee failed to report or call would trigger an adverse action. There were a combination of things that led to Employee's eventual removal.<sup>17</sup>

When a claim for disability is pending, an Employee's absence from work is charged to sick leave, annual leave, or leave without pay. When such claim is approved, that person is paid by the Claims Office for those absences. Although Mr. Wellington was aware that Employee was absent due to disability for a period of time, he was *not* aware that Employee's work-related injury claim, from April 27, 2005 to July 12, 2005, was subsequently granted.<sup>18</sup>

---

<sup>14</sup> See Tr. at pp. 50, 69-70.

<sup>15</sup> See Tr. at pp. 72-84; see Employee Exhibit (hereafter referred to as "EE") 7.

<sup>16</sup> He was the Deciding Official on the 15-day suspension and the Proposing Official on the Advance Notice of Proposed Removal.

<sup>17</sup> See EE-7; Tr. at pp. 89-94; 101-106; 113-117. During the two periods of absence, on which the suspensions were based, Employee was not granted approved leave under the Family and Medical Leave Act.

<sup>18</sup> See JE-1E with attached time & attendance sheets: Item #65 (5/5/05, 8 hrs AWOL-Injury Compensation claim not yet approved) through Item #111 (7/11/05, 8 hrs AWOL-Has not reported or called; JE-1C (Compensation Order dated 7/12/05); also Tr. at p. 111-113.

1601-0002-06

1601-0053-06

Page 6

### ANALYSIS AND CONCLUSIONS

#### *Whether Agency's Action Was Taken For Cause.*

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq.* (September 1, 2000).<sup>19</sup>

In an adverse action, this Office's Rules and Regulations provide that an 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).

Based on a review of the entire record, this Judge concludes that Agency's actions, in both matters, were supported by a preponderance of the evidence. First, Employee does not dispute unscheduled absences charged to AWOL on July 20, 2005, July 26, 2005, August 5, 8 and 9, 2005, August 12, 2005, August 16, 2005, and August 18, 2005 when he either failed to report or call in or failed to submit medical evidence to cover purported sick leave absences. Nor does he dispute the AWOL's on October 20, 2005 October 26, 2005, November 1, 2005, November 3-4, 2005, November 9, 2005, and November 16, 2005. Moreover, Employee argued (and consequently admitted) that "[O]nly in 3 AWOL instances (10/14/05; 10/18/05; and 12/02/05) did he request sick leave without providing a doctor's slip."<sup>20</sup>

Second, this Judge had the opportunity to listen to the testimony of witnesses, who presented persuasive testimony. Relative to the 15-day suspension, Mr. Claggett's time and attendance records reflect that Employee incurred eight (8) 8-hour AWOL (absence without leave) absences, one (1) 8-hour LWOP (leave without pay) absence and three (3) 8-hour sick leave absences annotated "APPROVED" between July 20, 2005 and August 31, 2005. Even though Mr. Edwards did not recall the specific dates of unexcused absences on which the 15-day suspension was based, he clearly stated that Employee "... was supposed to call in and he didn't

---

<sup>19</sup> Section 1603.3 sets forth the definition of cause for which a disciplinary action may be taken. Here, Employee was suspended from duty without pay for fifteen (15) days and subsequently removed from service for "Inexcusable Absence Without Leave" which is one of the causes set forth therein.

<sup>20</sup> See UPB at p. 14; and Tr. at p 25 where the Union argues that Mr. Claggett's testimony that Employee *did not consistently* bring in doctor's notes to cover sick leave, during the period 10/11/05 and 1/26/06, was in error.

1601-0002-06

1601-0053-06

Page 7

call like he was supposed to. He was supposed to call to me and he did not call and that's what I remember."

Relative to the removal action, Employee does not dispute ten (10) AWOL absences between October 11, 2005 and December 2, 2005, a period of less than two (2) months. Nor does Employee dispute eleven (11) days of absences due to illness during that same period of time. Rather, Employee argues that the "sick leave" was approved, and therefore, should not be counted against him. Contrary to Employee's assertion, "approved sick leave" does not mitigate the removal in this matter. If anything, those sick leave absences reflect Employee's marginal value to the agency because of his unreliable attendance. Moreover, Employee was previously placed on leave restriction, suspended for five (5) days, and suspended for fifteen (15) days based upon failure to improve his attendance.

In spite of Employee's various arguments regarding errors in witness testimony and errors in letters to him, the record reflects that he failed to maintain regular attendance and incurred inexcusable absences. The fact that the most recent leave restriction letter did not, *inter alia*, reflect a specific period of time during which it was effective, does not excuse the fact that Employee failed to improve his attendance after notification thereof. Nor does the erroneous citation of the period of disability which was coincidentally *granted* on the same date that the leave restriction letter was issued, excuse subsequent AWOL and sick leave absences incurred. Even if Employee did not receive said letter, as he claims, the record reflects a number of personal discussions with him, over a period of time, in attempts to improve his attendance; and Employee sometimes provided medical evidence, as he knew he should, to cover sick leave absences.

Based on the foregoing and Employee's nine (9) years' service, it is reasonable to believe that Employee was fully aware of his responsibility to report to work on time every day; and that failure to do so would lead to further disciplinary action. This Judge, therefore, concludes that the 15-day suspension and the removal action were each supported by a preponderance of the evidence.

*Whether the Penalty Was Appropriate Under the Circumstances.*

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held 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." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

An employer is entitled to require its employees to be present for work and on time.

1601-0002-06

1601-0053-06

Page 8

Unauthorized absences from duty by their very nature disrupt the efficiency of the operation. In this instance, the testimony by management officials reflects that Employee's failure to maintain regular attendance adversely impacted Agency's ability to perform required services in a timely manner and lowered the morale of other employees whose schedules were unexpectedly shifted around. Further, there is no evidence that Employee's rehabilitation is a viable option.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the totality of circumstances, this Judge concludes that: 1) the 15-day suspension was an appropriate penalty for Inexcusable Absence Without Leave; 2) removal was the appropriate penalty and promoted the efficiency of the service, and 3) both adverse actions were within the parameters of reasonableness, were not errors of judgment, and should be upheld.

ORDER

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

FOR THE OFFICE:

\_\_\_\_\_  
MURIEL A. AIKENS-ARNOLD, ESQ.  
Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHERMAN LANKFORD	)	OEA Matter No. 1601-0147-06
Employee	)	
	)	Date of Issuance: March 26, 2007
v.	)	
	)	Joseph E. Lim, Esq.
METROPOLITAN POLICE DEPARTMENT	)	Senior Administrative Judge
Agency	)	
	)	

Louis Fireison, Esq., Employee Representative  
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On August 30, 2006, Employee appealed his removal by the agency for Conduct Unbecoming an Officer. Specifically, Employee was accused of removing a binocular from a crime scene without authorization.

The matter was assigned to the undersigned judge on September 27, 2006. After several postponements requested by the parties, I held a prehearing conference on January 17, 2007. No hearing was held, as there were no material facts in dispute. I closed the record after the parties submitted their final briefs on the issues.

JURISDICTION

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

ISSUES

Whether Agency’s termination of Employee should be overturned due to its violation of its former forty-five (45) day rule when it served its Final Notice of Adverse Action on Employee on July 20, 2006.

Position of the Parties

Employee argues that Agency has no legal ground to terminate him, as the agency had violated its own 45-day rule as laid out in General Order 1202.1. Employee asserts that the agency’s July 20, 2006 removal action was invalid as it was done more than 45 days after March 2, 2006, the date Agency issued a Notice of Proposed Adverse Action to Employee.

Agency counters that it did not violate the 45-day rule as General Order 1202.1 provides exceptions to the rule, such as “when hearings are held, by the chairperson in the interest of due process.” In this case, Agency argues that since a hearing was held by a Chairperson, then the 45-day rule did not apply.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following facts were presented by the parties and are undisputed:

1. Employee was a career police officer with the D.C. Metropolitan Police Department since March 18, 1985. He attained the rank of Lieutenant, Grade 5/ Step 4.
2. At the scene of an arrest on July 26, 2005, Employee picked up a pair of binoculars from an automobile being searched and handed said binoculars to another officer before leaving the scene.
3. On July 27, 2005, Agency commenced an investigation of the incident.
4. On January 30, 2006, Agency concluded an internal investigation of Employee’s action. It decided to charge Employee administratively with misconduct, i.e. improper handling of evidence.
5. On March 2, 2006, Agency issued a Notice of Proposed Adverse Action to Employee and charged him pursuant to General Order 1202.1. General Order 1202.1 states that the “Administrative Services Officer shall decide the case and issue a Final Notice of Adverse Action to the affected employee within 45 days of the member’s receipt of the proposed notice, unless extended by the employee personally or through applicable agreement.” It is undisputed that Employee did not consent to any extension. However, said Order did not state any remedy for a violation of this 45-day requirement.
6. Said Order also states that “Members shall be given a written decision and the reasons therefore within forty-five (45) days of the date that charges are preferred, except when extended by the employee personally or by contract, or, when hearings are held, by the chairperson in the interests of ‘due process.’” It is also undisputed that the chairperson did not issue any extension.
7. On April 13, 2006, General Order PER 120-21 replaced General Order 1202.1. The new Order did away with the 45-day requirement. However, the new General Order does not have a retroactive provision for pending disciplinary actions.
8. On May 4, 2006, Agency held an evidentiary hearing before a three-member Adverse Action Panel, which recommended that Employee be terminated. The Panel was composed of Commander Cathy Lanier, Chairperson; Captain Victor Brito, Member; and Captain LaMar F. West, Member.
9. On July 20, 2006, Agency served its Final Notice of Adverse Action on Employee, terminating him effective September 1, 2006.

10. Thus, the Final Notice was given to Employee 140 days after the date the Notice of Proposed Adverse Action was given and 77 days after the Panel hearing.

Whether Agency violated the "45-day rule" provision of General Order 1202.1 when it served its Final Notice of Adverse Action on Employee on July 20, 2006.

Agency's General Order 1202.1 Part I H. 4 Decisions states:

Members shall be given a written decision and the reasons therefore within forty-five (45) days of the date that charges are preferred, except when extended by the member personally or by contract, or, when hearings are held, by the chairperson in the interest of "due process."

A corrective or adverse action is deemed to have commenced when an employee is formally notified of the proposed action.<sup>1</sup> Here, it is abundantly clear that Agency violated its own 45-day rule when the Final Notice was given to Employee 140 days after the date the Notice of Proposed Adverse Action was given.

Whether Agency's termination of Employee should be overturned due to its violation of its former forty-five (45) day rule when it served its Final Notice of Adverse Action on Employee on July 20, 2006.

Agency's General Order 1202.1 "45-day rule" is similar to, and indeed was made to conform to, the former D.C. Code § 1-617(b-1)(1) (1992) (repealed 1998), which states: "Except as provided in paragraph (2) of this subsection, no corrective or adverse action shall be commenced pursuant to this section more than 45 days, not including Saturdays, Sundays, or legal holidays, after the date that the agency knew or should have known of the act or occurrence allegedly constituting cause, as that term is defined in subsection (d) of this section."

Although the above § 1-617 has been repealed since 1998, Agency did not repeal its own General Order 1202.1 until April 13, 2006, when it was replaced by General Order PER 120-21. Nor does Agency argue that the new General Order, which did away with the 45-day rule, is applicable to the instant matter; as it does not have a retroactive provision that would cover pending adverse actions.

The foregoing provision has been construed both by the D.C. Superior Court<sup>2</sup> and this Office<sup>3</sup> as mandatory, requiring reversal of the corrective or adverse action if the provision is violated. In its

---

<sup>1</sup> *Byron A. Scott v. Dep't of Housing and Community Development*, OEA Matter No. 1601-0078-91 (August 21, 1992), D.C. Reg. ( ).

<sup>2</sup> *Metropolitan Police Dept v. Public Employee Relations Board*, MP 92-29, (D.C. Sup. Ct. Aug. 5, 1993), 122 DWLR 29 (January 6, 1994).

<sup>3</sup> See *Scott, id.*, at pp. 9 and 10.

1601-0147-06

4

review, the Court concluded that the purpose of this provision is to limit the time in which an employee is faced with uncertainty about when he or she may be subjected to disciplinary action. The word "shall" in General Order 1202.1 further bolsters its original intention that this rule is mandatory.

Faced with this situation, Agency now argues that because a hearing has been held, its own 45-day rule no longer applies in this matter. Agency's argument is misplaced because it omits one important detail in the wording of the General Order. They neglect to mention that there is a comma after the word "when hearings are held." The language "when hearings are held, by the chairperson in the interest of 'due process'" clearly indicates that holding a hearing is not enough to do away with the 45-day rule; the Order requires the chairperson to extend the 45-days. It is undisputed that this was not done by the chairperson.

The only appropriate and meaningful remedy for the violation of a mandatory statute or regulation is reversal of the Agency's action.<sup>4</sup> Therefore, I conclude that Agency's action against Employee for violation of General Order 1202.1 must be reversed. In light of this decision, I need not reach the merits of Agency's action, nor Employee's other procedural arguments.

### ORDER

It is hereby ORDERED that:

1. The agency action removing Employee be REVERSED;
2. The agency shall restore to Employee all pay and benefits of which he was deprived as a result of the adverse action;
3. The agency shall expunge Employee's Official Personnel Folder of all documents and references to the above charges;
4. The agency shall file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.  
Senior Administrative Judge

---

<sup>4</sup> *Metropolitan Police Dep't District of Columbia v. PERB, supra.*

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:
MICHAEL NELSON
Employee
v.
DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY
Agency
OEA Matter No. J-0041-07
Date of Issuance: March 19, 2007
Joseph E. Lim, Esq.
Senior Administrative Judge

Stephen Cook, Agency Representative
Michael Nelson, Employee pro se

INITIAL DECISION

INTRODUCTION

On January 9, 2007, Employee filed a petition for appeal from Agency's final decision removing him from his position of Industrial Equipment Mechanic, effective November 1, 2006, for inexcusable absence without leave and for violating a Last Chance Agreement. The matter was then assigned to this administrative judge on February 26, 2007.

By Order issued February 27, 2007, the undersigned required Employee to meet his burden of proof on the issue of jurisdiction by March 12, 2007. Agency was to submit its response, if any, by March 19, 2007. Although Agency submitted its response; Employee failed to do so. Because the matter can be decided based on the documents of record, no proceedings are necessary. The record is now closed.

JURISDICTION

As will be explained below, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter must be dismissed for lack of jurisdiction.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Subchapter VI of the Comprehensive Merit Personnel Act (CMPA), D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.* (2001), establishes this Office and sets forth its appeal procedures. That subchapter reads in pertinent part as follows:

(a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]. . . .

D.C. Official Code §1-606.03(a). Thus, an employee of an agency covered by Subchapter VI of the CMPA has a right to appeal to this Office, among other things, an adverse action for cause that results in removal. However, Agency is exempt from the requirements of Subchapter VI.

Effective April 18, 1996, D.C. Law 11-111 (the “Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996”) established Agency as an independent authority of the District government. D.C. Official Code §34-2202.02(a). Its enabling statute sets forth the laws to which Agency is subject:

Except as provided in §§ 34-2202.14 and 34-2202.15, [Agency] shall be subject to all laws applicable to offices, agencies, departments, and instrumentalities of the District government, and shall be subject to the provisions of the District of Columbia Home Rule Act, approved December 24, 1973.

D.C. Official Code §34-2202.02(b). Therefore, Agency is subject to all laws applicable to the District government, with two (2) exceptions. Of specific relevance here, Section 34-2202.15 (“Merit personnel system inapplicable”) reads as follows: “(a) Except as provided in this section and in § 34-2202.17(b), no provision of [the CMPA] shall apply to employees of [WASA] . . . .” That section provides that Subchapter V (Public Employee Relations Board), Subchapter XVII (Labor Management Relations Act), and the pension rights provisions of the Act are still applicable to Agency. Section 34-2202.17(b) (“Transition provisions”) reads as follows: “Until the Board [of WASA] establishes a personnel system . . . [the CMPA] and implementing rules and regulations shall continue to apply to [WASA].” Under this section, all subchapters of the CMPA, including Subchapter VI, were to continue to apply to Agency until it established a personnel system.

Effective November 21, 1997, Agency established its personnel system and published the rules and regulations governing that system. *See* 44 D.C. Reg. 7144 *et seq.* (1997). Section 5209 of those rules and regulations (44 D.C. Reg. at 7158 *et seq.*) sets forth Agency’s disciplinary system, including the causes for which an employee may be disciplined, and Section 5210 (“Grievance Process”) (44 D.C. Reg. at 7163 *et seq.*) establishes, *inter alia*, the procedures by which an employee of Agency can appeal a disciplinary action taken against him. In particular, Section 5209.8 (44 D.C. Reg. at 7162) reads as follows:

Employees may appeal disciplinary actions through the grievance process established herein. The decision of [Agency's] General Manager represents [Agency's] final administrative review. The notice of final agency decision shall include a statement of the employee's right to bring an action in the D.C. Superior Court seeking judicial review of the final administrative decision by the General Manager.

Thus, as of November 21, 1997, when Agency established its personnel system, it was no longer statutorily required to comply with most of the requirements of the CMPA, including the appeal procedures of Subchapter VI.<sup>1</sup> Further, the disciplinary system Agency established does not give an employee a right to appeal to this Office. Rather, an employee may bring an action in the Superior Court.

Here, Employee appealed his removal to this Office on January 9, 2007, long after his right to do so had ceased. Since an employee of WASA can no longer appeal a final decision effecting an adverse action to this Office, the undersigned concludes that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.  
Administrative Judge

---

<sup>1</sup> Since that time, the undersigned notes that, pursuant to H.R. Conference Report No. 106-1005, which accompanied the District of Columbia Appropriations Act of 2001, P.L. 106-5222, WASA is covered by D.C. Official Code § 1-624.08, pertaining to RIFs for Fiscal Year 2000 and beyond. The Conference Report also states that "while the conferees agree that [§ 1-624.08] applies to [WASA], it does not change [WASA's] general exemption from coverage under the CMPA or [WASA's] independent legal status within the District Government." Conference Report at 64. Section 1-624.08 provides limited appeal rights to this Office for employees who have been separated as a result of a RIF. Thus, it appears that employees of WASA may now appeal RIFs to this Office. Nevertheless, the instant matter does not involve a RIF, and thus any putative appeal rights to this Office by an employee of WASA who has been rified are inapplicable here.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ADJELEY OSEKRE	)	OEA Matter No. 1601-0003-01
Employee	)	
v.	)	Date of Issuance: March 12, 2004
	)	
DEPARTMENT OF HUMAN SERVICES	)	Joseph E. Lim, Esq.
Agency	)	Senior Administrative Judge
	)	

John Dodge, Esq., Agency Representative  
 William Howard, Esq., Employee Representative

**INITIAL DECISION**

INTRODUCTION

On October 19, 2000, Employee appealed from Agency's final decision suspending her for 30 days for inexcusable neglect of duty and insubordination. Specifically, Employee, a Social Worker at Agency's Youth Services Administration, was accused of disobeying her superior's instructions and orders regarding the performance of her duties as a social worker. Employee denied the charges. This matter was assigned to the undersigned judge on February 10, 2003. I held a prehearing conference on March 24, 2003 and a hearing on May 5 and June 16, 2003. The record closed at the conclusion of the hearing.

JURISDICTION

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

ISSUES

1. Whether Agency has proven, by a preponderance of the evidence, that Employee committed the acts of which she is accused.
2. Whether Employee's actions constitute cause for taking an adverse action.
3. If so, whether Agency's penalty was appropriate under the circumstances.

## BACKGROUND

### Agency's Allegations

Agency accuses Employee, a Social Worker at the Agency's Youth Services Administration, of inexcusable neglect of duty and insubordination. Specifically, Agency alleges that Employee defiantly and deliberately failed to follow her supervisor's instructions regarding the performance of her job, such as not answering phone messages, not preparing case transfer summaries, and appearing in court without an approved court report.

Employee denied all the charges and asserts that the penalty was unwarranted.

### Evidence on Disputed Issues

a. Valerie Boykin testified (5/5/2003 Tr. p. 9 - 99) as follows.

Deputy Administrator Boykin oversaw the Agency's Bureau of Court and Community Services Division, which provides case management services for juvenile delinquents and juvenile wards of the District. As part of her duties, Boykin supervised social workers and case managers. Boykin testified that Employee, a social worker, was responsible for providing case management services for youth committed to the agency. Her duties were to develop case plans for each juvenile client through home visits, interviews, and individual counseling. Social workers are also required to prepare and present court ordered reports on each client in court hearings.

Boykin related that management had perceived problems with Employee's job performance. Employee failed to follow her supervisor's instructions and admonitions, was deficient in the timely submission of court-ordered case histories of clients, and in some cases, failed to submit these reports to the court. Boykin further testified that Agency received complaints regarding Employee's work from her clients' parents, attorneys, and judges and that Employee failed to respond when she was paged for work-related emergencies by her superiors, even after she was issued a cellular phone.

When Employee was offered assistance from the Employee Assistance Program (EAP) by her supervisor, Ms. Riley, Employee defiantly refused the EAP and instead referred her supervisor to the program.<sup>1</sup> When asked why management referred Employee to EAP, Boykin indicated that they had concerns about Employee's work performance, attitude, strange behavior and personal hygiene.

Boykin related that she witnessed that Employee failed to answer her official phone yet was quick to answer her personal phone calls. Boykin also said that Employee refused her suggestion to

---

<sup>1</sup> See Agency Exhibit 4.

obtain help from the EAP and that Employee indicated that she did not perceive any problems with her work performance. Many times, Employee appeared in court without the required approved case history reports.<sup>2</sup>

Boykin indicated that Employee had a history of two prior disciplinary actions involving the same offense.

b. M. Riley testified (5/5/2003 Tr., pgs. 100- 229) as follows:

M. Riley was the Case Management Division Chief and was Employee's direct supervisor. Riley testified that she has had problems with Employee's work performance from the very beginning and that she discussed with Employee the work performance deficiencies in her job as a social worker – unresponsiveness to phone calls from clients and superiors, untimely submission or non-submission of court ordered client reports, the submission of reports of unacceptable quality, and Employee's obstinate refusal to heed management directives. Because of these problems, she let Employee handle only two-thirds of a social worker's usual caseload.

Riley indicated that Assistant Corporation Counsel Zirpoli also documented Employee's non-submission of court ordered reports on juvenile delinquents and runaways assigned to her caseload.<sup>3</sup> Riley also received complaints from several judges regarding Employee's handling of cases in court. One judge even complained that Employee absolutely refused to testify in court and had to be physically brought back to court by marshals after she ran away from the courtroom.

To assist Employee with her problems, Riley gave her an EAP application form. Instead of availing herself of EAP's services, Employee defiantly crossed out her name and instead put her Supervisor Riley's name on the form and sent it back to her.<sup>4</sup> In addition, Employee made and submitted a performance rating report of her supervisor, Ms. Riley.<sup>5</sup> Riley found Employee's behavior insubordinate and very disrespectful. Many times, Riley felt she was not getting through to Employee in that Employee would stay silent or be indifferent when she was talking to her about her work performance and still Employee would continue to do as she pleased.

c. Employee testified (6/16/2003 Tr. p. 236 – 319) as follows.

Employee testified that according to her job description and as a licensed social worker, she was free to perform her tasks as she saw fit, and that she was to consult with her supervisor only when she needed assistance.

---

<sup>2</sup> See Agency Exhibit 6.

<sup>3</sup> Agency Exhibit 10.

<sup>4</sup> See Agency Exhibit 12.

<sup>5</sup> See Agency Exhibit 13.

With regards to Riley's charges that Employee failed to return her calls, Employee denied that Ms. Riley left her any messages. Employee admitted receiving a message from Riley on August 25 but that day she was busy in court. Employee also claimed that the next time she met with her supervisor, she was not asked about any communication problems. Employee also claimed that she answered all phone messages the same day she got them in the office. She also testified that she was never trained on how to access her messages from outside the office.

As to the August 10 memo that Agency claimed she did not respond to, Employee claimed that Riley would put memos in her in box when she left, was in court, or was otherwise unavailable. Employee claimed that she responded to her memos as soon as she came back to the office. As for the timeliness of her case reports, Employee asserted that she followed office procedures.

As to charges that she failed to submit court reports as ordered by the court, Employee claimed that these were instances when the judge convened emergency hearings or when there was a report previously submitted less than 30 days old or when her supervisor did not give her enough time to make a report. In such instances, Employee claimed that she was not required to submit written case reports. Employee asserted that either she did submit timely reports on the other dates alleged by Agency or that her supervisor was late in approving her reports in time for her to present them in court.

Employee admitted disregarding her superiors' recommendation that she seek help from the EAP. She also admitted applying white-out on her name on the EAP referral form and writing in her supervisor's name instead and then deliberately sending it to her supervisor. When asked why she did that, Employee replied that she felt it was her supervisor who needed help, not her. Employee admitted typing and submitting a negative performance report on her supervisor. Employee related that her supervisor Ms. Riley's job performance was horrible, that Riley seemed obsessed with her on one issue, shook whenever they talked, and discussed personal family problems with subordinates.

#### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Prior to October 21, 1998, there were twenty-two (22) statutory causes for which an employee in the Career Service could be subjected to adverse or corrective action. *See* D.C. Code Ann. § 1-617.1(d) (1992 repl.). Two of these causes were that set forth herein: Insubordination and Inexcusable Neglect of Duty. *See* D.C. Code Ann. § 1-617.1(d) (4) and (5) (1992 repl.).

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 twenty-two (22) stated causes. However, 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 forth the new definition of cause.<sup>6</sup> 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.

One of the causes that Agency charged Employee with, Inexcusable Neglect of Duty, no longer exists as a cause based on the above new rules. However, if Agency's charge against Employee is proven, then Employee's action would still constitute cause as either "negligence" or "any other on-duty . . . reason for corrective or adverse action that is not arbitrary or capricious," and thus her action would still be subject to disciplinary action. Insubordination is still listed as a valid cause for adverse action.

Whether Agency has proven, by a preponderance of the evidence, that Employee committed the acts of which she is accused.

On virtually every aspect, Employee's version of events that led to Agency's charges of inexcusable neglect of duty and insubordination differs sharply from that of Agency's witness. For every instance that Agency cited as an example of Employee's neglect of duty and insubordination, Employee had a ready excuse and explanation.

Unfortunately for Employee, the quality and preponderance of the evidence weighs heavily in Agency's favor. Employee could not shake the forthrightness and consistency of the testimonies of Agency's witnesses. In addition, Employee's own admitted written reports and belligerent testimony point to the fact that Employee had problems accepting her supervisors' authority. In addition, Employee did not and could not deny that it was not just her supervisors who were dissatisfied with her work performance and attitude, because even judges and attorneys in the juvenile cases she handled found her work unsatisfactory. Indeed, Employee did not deny the charges that she did not submit required court-ordered reports on her clients. She simply excused her behavior by giving numerous unsubstantiated excuses.

---

<sup>6</sup> 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.

Employee had no witnesses and only her own self-serving assertions to back up her contention that she was not neglectful or insubordinate, but that her superiors were simply incompetent. Therefore, based on the witnesses' demeanor during testimony and the documentary evidence of record, I find Agency's witnesses to be far more credible than Employee.

The following findings of fact are based on the witnesses' testimony and the documentary evidence of record.

1. On several occasions, Employee deliberately disregarded her supervisor's instruction to answer her official calls on her telephone, cell phone and pager.

2. Employee also inexcusably neglected to answer her supervisor's calls to her.

3. Employee deliberately disregarded her superior's orders to submit approved transfer summaries and court-ordered reports on time.

4. Employee defiantly refused her superiors' suggestions that she avail herself of the services of the EAP. In addition, Employee deliberately sought to embarrass and discredit her supervisor by submitting a negative work performance on her.

Whether Employee's actions constitute cause for taking an adverse action.

Based upon the above evidence, I find that Employee's conduct amounted to insubordination and a negligence regarding her job-related duties. I therefore find that Agency had met its burden of proof on all specifications. Accordingly, I conclude that the agency has met its burden of establishing cause for taking adverse action.

If so, whether Agency's penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office will leave Agency's penalty undisturbed when it is satisfied, on the basis of the charges sustained, that the penalty is appropriate to the severity of the employee's actions and is clearly not an error of judgment.

Here, Employee's negligence in submitting timely reports of her juvenile clients in court and her failure to promptly answer calls from her clients and superiors all impact negatively on the administration of justice. This points to the appropriateness of Agency's penalty of a 30-day-suspension. Further, the penalty is clearly not an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.  
Senior Administrative Judge



### ISSUES

1. Whether this Office has jurisdiction over this matter.
2. Whether Agency's penalty was appropriate under the circumstances.

### BACKGROUND

District of Columbia law, Title 2 D.C. Code § 2-3305.1 (1994 Repl. Vol. & Supp. 1999), requires that all social workers must be licensed. Criminal penalties of fines up to \$20,000 and jail terms up to five years await anyone doing social work without a license. Title 2 D.C. Code § 2-3310.1 and 2-3310.7 (1994 Repl. Vol. & Supp. 1999). Employee does not deny that she lost her social worker license in 1996. Her only defense was to claim disparate treatment. She maintains that other social workers without the required license were not fired.

#### Evidence on Disputed Issues

- a. Employee testified as follows: (Tr. Pg. 23 – 43)

Employee, a DS-11-06 Social Worker, admitted that she lost her social worker's license but claimed that Branch Chief Patricia Wisdom had informed her in a letter that she was being reassigned as a social service representative until she could get her license back. Employee claimed that the position of Social Worker Representative did not require a license. However, Employee did not produce any evidence of a reassignment. Employee alleged that her termination was improper because she had suffered injuries in a car accident and thus she could not take the license exam.

Employee claimed that there were three other social workers who were not terminated despite not having their licenses – Angela Peters, Shirley Thompkins, and Charelia Basemore. She introduced a document that purports to show that Ms. Peters had no license to practice Social Work in the District of Columbia and another document to show that Ms. Basemore got her license on November 24, 1997 with an expiration date of July 31, 2001. *See* Employee Exhibit A.

Employee indicated that there are four levels of social workers' licenses. The highest is Licensed Independent Clinic Social Worker (LICSW) which requires passing an examination and possessing two years of work experience.

- b. S. Wills testified as follows: (Tr. Pg. 46 – 65)

Wills works in the D.C. Department of Health Professional Licensing. As a Health Licensing Specialist, she is responsible for licensing all social workers in the District of Columbia. She explained that there are four levels of social worker licenses. The first or lowest level is the Social Work Associate which requires a Bachelors degree in Social Work and a passing grade in the basic

social work examination. The second level, Licensed Graduate Social Worker, requires a Masters or Doctoral degree in Social Work and a passing grade in the intermediate social work examination. The third level, Licensed Clinical Social Worker, also requires a post-graduate degree as well as 3,000 hours of experience at the second level. The highest level is the Licensed Independent Clinic Social Worker which requires 2 years work experience at the third level and passing the clinical examination with at least a 75% score.

Agency introduced Agency Exhibit 1 that showed Ms. Basemore was terminated from her position on October 22, 1996 and Agency Exhibit 2 that showed that Ms. Peters had a valid license from October 21, 1996 through July 31, 1999. Agency Exhibit 3 showed that Ms. Thompkins got her temporary license for the period of October 28, 1994 through October 28, 1995 and her social worker license on June 17, 1997 with an expiration date of July 31, 2003. Wills indicated that it may be that Thompkins had a license from a different jurisdiction between 1995 and 1997, which would not be reflected in the D.C. record.

#### FINDINGS OF FACT, ANALYSIS AND CONCLUSION

##### Whether this Office has jurisdiction over this matter.

Agency has moved to dismiss this appeal for lack of jurisdiction. Agency alleges that the Office lacks jurisdiction because the receiver was court-appointed. More specifically, Agency argues that the Office has no jurisdiction over this matter because:

(1) The receivership was ordered by a federal court and an action by a federal court takes precedence over that of a local administrative agency; (2) the federal court granted the receiver plenary power with regard to employment matters; and (3) thus, the receiver was acting as an arm of the court and had absolute judicial immunity for her actions.

Agency relied on the court order found in a court action against the Agency, *LaShawn a. v. Williams*, C.A. No. 89-1754 (D.D.C.), wherein the court order of August 24, 1995, provided:

The Receiver shall have direct control and line supervisory authority over all activities and tasks relating to members of the *LaShawn* class, including but not limited to:

12. creation and management of an independent personnel function with responsibility for hiring, retention, and other personnel actions.

(emphasis in original)

Here, the receivership which resulted from the *LaShawn* case lasted almost six (6) years and ended on May 22, 2001.

Agency cited *Fantasia v. Office of the Receiver of the Commission on Mental Health*, Civ. Action No. 01-1079-LFO (D.D.C. Dec. 21, 2001). In *Fantasia*, the court held that the Receiver in that case was entitled to absolute judicial immunity from a civil claim by the person who previously served as the Director of the Commission on Mental Health, Saverio Fantasia. Mr. Fantasia alleged wrongful discharge by the Receiver. The Receiver replaced Fantasia, performing the duties that Fantasia had previously performed. The court distinguished between judicial functions and administrative functions. The court noted that Fantasia's termination was integral to carrying out the court's order, and was indeed the type of order a judge might give in the absence of a receiver to manage the administration of the Commission (judicial function).

In view of the court's decision, I find that *Fantasia* is not on point with the facts of this case because it concerns the wrongful discharge of Mr. Fantasia, an at-will employee who was the Director at the time the Receiver was appointed. In that case, the Receiver could not function as the court-appointed Director without first discharging Mr. Fantasia from his duties. The case before me concerns an appeal by a subordinate employee whose employment is subject to the due process protections set forth in the CMPA, a local statute.

Agency also cited *Drew v. Baktash*, Civ. Action No. 00-1661 (D.D.C.) in support of its position. In *Drew*, the federal court dismissed a *pro se* complaint brought by a non-custodial parent against Child and Family Services Administration (CFSA) managers in an attempted assertion of a civil damages claim. The judge found that the Receiver had absolute judicial immunity when carrying out the functions of the court in an adoption case and, thus, was immune from suit. The court stated that neither the General Receiver nor the employees of the Receivership, could be held liable in that matter. The court further held that a private entity contracted by the Agency to provide foster care, adoptive homes and other services to children and families, was not a state actor. Nor were the adoptive parents state actors. Thus, they were not liable. Nonetheless, I find that *Drew* is not on point with the facts of this case because, again, *Drew* pertained to a claim for civil damages on the issue of adoption, and not to the appeal of an employee who was dismissed by the Receiver and who is entitled to the protection of the CMPA. According to the court's findings in the *Drew* case, the result here might be different if Ms. Smith was being sued in a civil action by a party outside of the Agency claiming damages because of her actions and holding her liable as an employee of the Agency.

Agency also cited *Jennings v. District of Columbia, et al.*, Civ. Action No. 02-314 (D.D.C. Dec. 10, 2002) in support of its position. In *Jennings*, the federal court dismissed a complaint brought by a mental patient against the Commission on Mental Health Services (CMHS) residential facility managers in an attempted assertion of a civil damages claim. The judge found that where the D.C. Agency had been placed under full receivership and that the District has thus lost all authority over CMHS, the District cannot be responsible for the actions of the Receiver. The Court also held that as the General Receiver had absolute judicial immunity when carrying out the functions of the court, he was immune from suit. Nonetheless, I find that *Jennings* is not on point with the facts of this case because, again, *Jennings* pertained to a claim for civil damages on the issue of mental facility

mismanagement, and not to the appeal of an employee who was dismissed by the Receiver and who is entitled to the protection of the CMPA.

I find that this Office has exclusive jurisdiction over personnel claims arising against the District of Columbia under the CMPA and that the D.C. Court of Appeals has ruled that the determination of whether OEA has jurisdiction is Aquintessentially a decision for OEA to make in the first instance. See *Taggart-Wilson v. District of Columbia*, 675 A.2d 28, 29 (D.C. 1996). In addition, the Receiver meant to act in keeping with the CMPA because she gave the Employee appeal rights to this Office in the notice of adverse action and also submitted a response to this Office regarding the Employee=s appeal.

The removal of the Employee by the General Receiver was an administrative function and therefore not protected by judicial immunity according to the decision in *Fantasia*. In *Grillo v. District of Columbia*, 384 A.2d 383, 386 (D.C. 1999), the D.C. Court of Appeals held that where a substantial question arises as to whether the CMPA applies, the Act=s procedures must be followed and the claim must be initially submitted to the appropriate District agency. A substantial question arises unless the injury is clearly not compensable under the CMPA.

Based on my analysis, I find that Agency has not shown that this Office lacks jurisdiction over Ms. Smith=s petition for appeal. The *LaShawn* order specifically provided that:

The receiver will make reasonable efforts to exercise its authority in cooperation with District of Columbia officials and *in a manner consistent with local law whenever possible*. However, to the degree that local law governing lines of authority, budgeting, governmental structure and organization, procurement and personnel *unreasonably interfere* with the Receiver=s discharge of its responsibilities, local law is superseded by the Receiver=s authority.

(emphasis added.)

The CMPA (local statute) provides employees procedural due process and protection from being removed from service without cause. Agency now claims that it is relieved of this duty. However, there is no showing that the CMPA *unreasonably interferes* with the discharge of the Receiver=s responsibilities. Further, by advising Employee of her appeal rights to this Office, the receiver “exercised its authority in a manner consistent with local law.”

With regard to the cases cited by Agency, this case is distinguishable because this is an employment matter, not a civil case against the Receiver involving money damages or imputing personal liability to him/her. In conclusion, this Office has jurisdiction over this matter.

Whether Agency's penalty was appropriate under the circumstances.

The Comprehensive Merit Personnel Act provides that a permanent employee in the Career

Service may only be suspended for cause as defined therein.<sup>1</sup> Among the causes defined in the statute is incompetence.<sup>2</sup> This Office's Rules provide that an agency's action must be supported by a preponderance of the evidence, which is defined as "that degree of relevant evidence which a reasonable mind, considering the matter as a whole, would accept as sufficient to find a contested fact more probably true than untrue."<sup>3</sup>

The evidence establishes that Employee's license was suspended and that she failed to take the necessary steps to reinstate her license, a statutory requirement of her position. That Employee was ill at the time and thus could not take the examination does not obviate the necessity of possessing a license to do social work. Thus, Agency proved Employee's incompetence and established cause for her removal.

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."<sup>4</sup>

In complaining that the agency should have also removed other social workers whose licenses have been suspended or expired, Employee is alleging disparate treatment. As this Office has stated in the matter of *Huntley v. Metropolitan Police Department*,<sup>5</sup> the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to Agency, not this Office. Our scope of review as to the appropriateness of a penalty is limited to a determination of whether the penalty is within the range allowed by law, regulation and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors, and whether there has been a clear error of judgment by the agency.

A number of factors are important in determining whether a penalty is reasonable. Among these factors is whether the agency has used similar penalties for similar offenses.<sup>6</sup> The principle of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity or perfect consistency regardless of variations, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where

---

<sup>1</sup> D.C. Code Ann. ' 1-617.1(b) (1992 repl.).

<sup>2</sup> D.C. Code Ann. ' 1-617.1(d)(2) (1992 repl.).

<sup>3</sup> OEA Rule 629.1, 46 D.C. Reg. 4317 (1991).

<sup>4</sup> *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

<sup>5</sup> OEA Matter No. 1601-0111-91, *Opinion and Order* issued March 18, 1994, \_\_D.C. Reg. \_\_ ( ).

<sup>6</sup> See *Giacobbi v. United States Postal Serv.*, 30 M.S.P.R. 39 (1986); *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

genuinely similar cases are presented.<sup>7</sup> Employee bears the burden of showing that the circumstances surrounding the misconduct are substantially similar to the circumstances in the cases being compared.<sup>8</sup> In order to show disparate treatment, the employee must show that he or she worked in the same organizational unit as the comparison employees and that they were subject to discipline by the same supervisor within the same general time period.<sup>9</sup>

Employee claimed that there were three other social workers who were not terminated despite not having their licenses – Angela Peters, Shirley Thompkins, and Charelia Basemore. Agency has shown that Ms. Basemore was terminated from her position on October 22, 1996 and that Ms. Peters had a valid license from October 21, 1996 through July 31, 1999. Thus, Employee cannot claim disparate treatment with respect to these two employees.

As for Ms. Thompkins, Employee has failed to meet her burden of proof in showing she was similarly situated to Thompkins. Employee failed to affirmatively show that Thompkins did not have the required license for the relevant period or that they possessed the same level of social worker license. Nor did she show that she and Thompkins had the same supervisor or belonged to the same organizational unit.

Thus, Employee has not shown that she was similarly situated to the other named employees and that therefore the Agency treated her disparately from them.

The range of penalties for a first offense of incompetence as defined herein (revocation or suspension of state or District of Columbia permit or license required to perform part or all of the employee's duties) is reduction in pay to removal.<sup>10</sup> Agency's penalty of removal is within the range allowed by the Table 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.

---

<sup>7</sup> See *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 306-307 (1981); *Hutchinson v. District of Columbia Fire Dept.*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), \_\_\_ D.C. Reg. \_\_\_ ( ).

<sup>8</sup> See *Bess v. Department of the Navy*, 46 M.S.P.R. 583 (1991).

<sup>9</sup> See *Carroll v. Department of Health and Human Services*, 703 F.2d 1388 (Fed. Cir. 1983); *Kuhlmann v. Department of Health and Human Services*, 10 M.S.P.R. 356 (1982); *Mille v. Department of the Air Force*, 28 M.S.P.R. 248 (1985); *Huntley supra*.

<sup>10</sup> DCOP Rule ' 1618.2(b), 34 D.C. Reg. 1865 (1987).

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.  
Senior Administrative Judge

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:
SELENA WALKER
Employee
v.
D.C. FIRE AND EMERGENCY MEDICAL
SERVICES DEPARTMENT
Agency

OEA Matter No.: 1601-0133-06

Date of Issuance: October 5, 2007

OPINION AND ORDER
ON
PETITION FOR REVIEW

Selena Walker ("Employee") began working for the D.C. Fire and Emergency Medical Services Department ("Agency") in 2001 as an Emergency Medical Technician ("EMT"). During the course of her tenure she received Advanced EMT training and, because of this certification, she was eventually placed in the position of Ambulance Crewmember in Charge. Employee was assigned to Ambulance 18 which is housed at 414 8th Street, S.E.

On the night of January 6, 2006 Employee and her partner, Michael Deems, received a call to respond to a "man down" on Gramercy Street, N.W. At the time that the call came in Employee and her partner were at Providence Hospital. Employee was driving Ambulance 18 that night and they arrived at Gramercy Street approximately 23 minutes after receiving the call. When they arrived, other firefighter/EMT's and police officers were already on the scene attending to the patient, David Rosenbaum.

After Deems performed a basic examination of Rosenbaum, it was determined that he would receive a Priority 3 designation (low priority) and be transported to Howard University Hospital ("HUH"). Employee then drove the ambulance to HUH where

1 Employee occupied this position despite having a prior disciplinary history that included several suspensions and a reprimand.

2 Sibley Hospital was the closest hospital to the scene of the incident.

Rosenbaum was eventually admitted. Unfortunately two days later, on January 8, 2006, Rosenbaum died as a result of the injuries he sustained on January 6, 2006.

As part of the agency's internal operating procedures, Employee was required to submit a memorandum that summarized this particular incident. Thus on January 6, 2006 Employee submitted a brief statement to Agency's Medical Director. The memo simply stated that after she and her partner arrived at Gramercy Street, they loaded Rosenbaum onto the ambulance and that based on her partner's assignment of the priority 3 designation, she drove the ambulance to HUH.

On January 10, 2006, Employee submitted another memorandum regarding this same incident. This memo was directed to Fire Chief Adrian Thompson. It too was very brief and simply stated that she never assessed Rosenbaum and that there was no particular reason for transporting him to HUH rather than to Sibley Hospital. The memo went on to state that her partner assessed Rosenbaum.

The next day, January 11, 2006, Employee submitted another memorandum regarding this incident. This particular memo was directed to an Assistant Fire Chief and stated that because Rosenbaum was deemed a low priority, protocol dictated that he be transported to HUH. Employee concluded the memo by stating that her partner made no suggestions as to which hospital Rosenbaum was to be transported to.

On January 18, 2006 Agency convened a panel of several agency officials for the purpose of interviewing all of the agency employees who responded to the January 6, 2006 incident. A report memorializing the outcome of this interview was prepared on January 24, 2006. Of significance to this appeal are the interviews given by Employee and her partner.

With respect to Employee's partner, the report states that Employee told him prior to arriving on the scene that they would be transporting the patient to HUH because she needed to go to the ATM and to her house. Furthermore when Employee's partner told a police officer on the scene that they would be transporting Rosenbaum to Sibley Hospital, Employee spoke up and said that they were taking him to HUH. The report goes on to state that Employee's partner stated that it was Employee who made the final decision to assign the priority 3 designation and that after they left HUH, Employee drove the ambulance to an ATM and then to her house.

Concerning Employee the report states that she denied any involvement in assessing or caring for Rosenbaum and that it was her partner who assigned the priority 3 designation. The report goes on to state that Employee decided to transport Rosenbaum to HUH after "checking hospital status." According to the report, Employee also stated during the interview that she did not know and did not remember why she chose HUH, that she could not remember what other hospitals were open and that she did know how to get to Sibley or Georgetown Hospital from upper northwest. Moreover, when asked during the interview whether she had told her partner prior to arriving on the scene that they would be transporting the patient to HUH, Employee replied that she did not recall

that conversation. Lastly, according to the report, Employee admitted that she probably went to an ATM after leaving HUH but that she did not recall going to any other destinations.

Because of the media attention and public outcry resulting from this incident, then-Mayor Anthony Williams asked Agency and the D.C. Metropolitan Police Department ("MPD") to submit to an investigation to be conducted by the D.C. Office of the Inspector General ("OIG"). The OIG investigation was very comprehensive and included interviews of the resident who placed the emergency call on January 6, 2006, as well as interviews of the 911 call taker and dispatcher and all MPD and Agency employees who responded to the incident. As noted earlier, of significance to this appeal are the interviews given by Employee and her partner.

On June 15, 2006 the OIG released to Agency a report that detailed the information gathered from having interviewed Employee and her partner. The following is an excerpt from the OIG report:

[Employee] did not assess the patient. . . .Before driving away, [Employee] waited for [her partner] to finish his assessment of the patient. [Her partner] told her the patient was a "[Level] 3." [Employee] radioed Communications that she had a "[Level] 3 to 5 [Howard]."

....

The OIG team asked [Employee] why they did not take the patient to Sibley Hospital. [Employee] stated, "We can go where we want to go. [Howard] was available, and he was deemed a low priority." When asked if she wanted to go to Howard, [Employee] initially said "No," then changed her answer to "Yes" and said she knew the way to Howard from Gramercy Street.

....

When asked what Ambulance 18 did after leaving Howard, [Employee] initially stated that they went back to the firehouse. [Employee] then stated that she thought that she drove the ambulance to her house to get money for dinner and then went to the firehouse on 8<sup>th</sup> Street, S.E.

OIG Report at 40.

In summarizing its findings, the OIG report went on to conclude the following:

The decision to transport Mr. Rosenbaum to Howard rather than Sibley, however, was not based on his medical needs or an assessment that he was a trauma patient who required a trauma center such as Howard. Mr. Rosenbaum was transported to Howard based on personal reasons, which delayed the emergency hospital care that would have been available minutes earlier.

OIG Report at 48.

Based on the foregoing information, on June 16, 2006 Agency issued to Employee a Proposed Removal Notice. Agency charged Employee with any on-duty or government-related act or omission that interferes with the efficiency or integrity of government operations. The notice stated that this charge was based on the OIG report which found that Employee had decided to transport Rosenbaum to HUH for personal reasons so that she could retrieve something from her house. This decision, according to Agency, was “in violation of the emergency medical protocols which require that patients be transported to the nearest appropriate hospital” unless compelling circumstances dictate that a patient be transported to a more distant emergency department.<sup>3</sup> Thereafter, on July 14, 2006 the removal action took effect.

On August 10, 2006 Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). The threshold issue on appeal was whether Agency commenced the removal action in a timely manner. According to D.C. Official Code §5-1031(a) Agency had 90 days from the date it knew or should have known of the act constituting cause within which to commence an adverse action against Employee. Specifically, that section provides the following:

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

In an Initial Decision issued June 26, 2007 the Administrative Judge reversed Agency’s action. He held that Agency had not complied with the 90-day time limitation. Specifically the Administrative Judge found that “all of the elements of the underlying cause of action came into existence on January 6, 2006, as the Employee responded to the

---

<sup>3</sup> Proposed Removal Notice.

medical call and allegedly violated Agency's rules regarding where to transport the patient under said circumstances."<sup>4</sup> He went on to find further that "at the very least, [Agency] *should have known* of the act or occurrence that supported its adverse action against the Employee on January 18, 2006, when the Interview Panel concluded its interview of all Agency personnel who responded to the [scene of the incident]."<sup>5</sup> Using January 18, 2006 as the date on which Agency knew or should have known of the act or occurrence allegedly constituting cause, the Administrative Judge concluded that Agency should have initiated the adverse action no later than May 26, 2006. Because Agency waited until June 16, 2006 to commence the adverse action, the Administrative Judge ordered that its action must be reversed.

Agency filed a Petition for Review on August 6, 2007 and Employee responded on September 4, 2007. In its Petition for Review Agency essentially argues that it did not know, nor could it have known, of the act or occurrence allegedly constituting cause until the OIG concluded its investigation and issued its report. We disagree.

On January 6, 2006 Agency had available to it the information contained within the memorandum that Employee submitted to Agency's Medical Director. Furthermore at the conclusion of the January 18, 2006 interview, even though Employee's version of the events conflicted with her partner's version, Agency still had enough information upon which to commence an adverse action. The OIG report, while being very thorough, did not in any significant way change the substance of the information which Agency had previously elicited from Employee during the January 18, 2006 interview. We believe that it was at the conclusion of this interview that the 90 days began to run. Because Agency did not commence its action within the requisite time frame, we are compelled to deny its Petition for Review and uphold the Initial Decision.

### ORDER

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

FOR THE BOARD:

Brian Lederer, Chair  
Horace Kreitzman  
Keith E. Washington  
Barbara D. Morgan  
Richard F. Johns

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.

---

<sup>4</sup> Initial Decision at 10.

<sup>5</sup> *Id.*