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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ROBERT L. JORDAN)	
Employee)	
)	OEA Matter No.: 1601-0289-97
v.)	
)	Date of Issuance: January 25, 2010
D.C. METROPOLITAN POLICE)	
DEPARTMENT)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW #2

On September 3, 1996 the D.C. Metropolitan Police Department (“Agency”) issued to Robert Jordan (“Employee”) a proposed notice to remove him from his position as a Supervisory Personnel Liaison Officer based on the charge of dishonesty involving the theft of government property. Specifically Agency found that Employee had fraudulently applied for, and received, unemployment compensation while serving a 30-day suspension. Agency had suspended Employee for misusing an agency vehicle.

When Employee appealed Agency’s action to the Office of Employee Appeals, D.C. Code § 1-617.1(b)(1992 supp.) was in effect. That section required an agency to

commence adverse actions within 45 days after the date on which the agency knew or should have known of the act or occurrence allegedly constituting cause. If, however, the act or occurrence constituting cause was the subject of a criminal investigation, the 45-day limit was tolled until the conclusion of a criminal investigation. Because Employee's misconduct gave rise to a criminal investigation, the Administrative Judge had to determine what act during the course of the investigation signaled its conclusion with respect to Employee's alleged misconduct. Once this was ascertained, the Administrative Judge could then determine whether Agency had complied with the 45-day rule.

In the Initial Decision issued November 3, 2000, the Administrative Judge found that Agency had not complied with the 45-day rule. In reaching this conclusion the Administrative Judge set forth the following sequence of events in this case:

6/8/94 Employee filed for unemployment benefits with the Department of Employment Services ("DOES") for time spent serving a suspension.

7/12/94 DOES inquires of the Office of Personnel regarding Employee's eligibility for unemployment compensation.

8/8/94 Agency Report of Investigation regarding Employee's fraud.

8/94-11/94 Agency interviews people having personal knowledge of the events.

12/9/94 Agency requests Inspector General to perform an audit of DOES records with a specific reference to Employee's collection of unemployment benefits.

10/25/94 U.S. Attorney's Office is contacted regarding a review of Employee's case.

5/22/96 Inspector General issues a report to Agency and several other officials regarding the investigation of Employee.

7/18/96 Agency official signs an affidavit seeking an arrest warrant for Employee.

8/8/96 Employee is arrested.

9/3/96 Agency issues Employee a proposed notice of removal.

12/24/96 Agency issues Employee an amended notice of adverse action.

7/5/97 Employee's termination becomes effective.

Even though Agency argued that the investigation concluded with Employee's arrest on August 8, 1996, the Administrative Judge found that the 45-day time limit was triggered "by the Inspector General's investigative report, which was submitted on May 22, 1996."¹ The Administrative Judge believed that the "OIG investigation gave the Agency sufficient awareness of the matters underlying the charges against Employee to decide whether or not to commence an adverse action."² Thus, the Administrative Judge held that because the adverse action was not commenced until September 3, 1996, "which was well beyond the 45-day time limit from which the Agency knew of Employee's alleged misconduct. . . Agency violated the 45-day rule. . . ."³ Therefore, Agency's action was reversed.

In an Opinion and Order on Petition for Review issued June 1, 2001 we upheld the Initial Decision. Moreover in an Order Affirming Respondent's Opinion and Order issued May 21, 2003, the Superior Court of the District of Columbia denied Agency's

¹ *Initial Decision* at 8.

² *Id.*

³ *Id.*

petition for review and affirmed our June 1, 2001 decision. Agency went on to appeal that decision to the District of Columbia Court of Appeals.

On September 15, 2005 the Court of Appeals issued its decision. The Court reversed the Superior Court (which essentially reversed this Office's decisions) and remanded the case to us for further consideration. The Court reasoned that the "natural meaning of the statutory language [of D.C. Code § 1-617.1(b)] . . . is that the 'conclusion of a criminal investigation' must involve action taken by an entity with prosecutorial authority—that is, the authority to review evidence, and to either charge an individual with commission of a criminal offense, or decide that charges should not be filed."⁴ The Court went on to state that while the Inspector General performed "an investigation into the possible occurrence of criminal activity, [he] was not vested with the power to initiate a criminal prosecution against Jordan."⁵ The Court concluded by stating that while it need not decide whether "the arrest warrant or the actual arrest marked the conclusion of a criminal investigation . . . [i]t is clear, however, that in this case the criminal investigation was *at least* ongoing at the time of the issuance of the arrest warrant on July 18, [1996] which would render the MPD's commencement of an adverse action within the forty-five day time period. . . ."⁶ For these reasons the Court reversed the trial court's decision and remanded the case to this Office.

On January 27, 2006, the Superior Court issued an Order that officially remanded the case to this Office. On February 27, 2007, we remanded the case to the

⁴ *District of Columbia v. District of Columbia Office of Employee Appeals and Robert Jordan*, 883 A.2d 124, 128 (D.C. 2005).

⁵ *Id.* at 128.

⁶ *Id.*

Administrative Judge who we believed was in the best position to evaluate the evidence in the first instance and render a decision on the merits.

On December 18, 2008, the Administrative Judge issued an Initial Decision in which she upheld Agency's action. The only argument put forth by Employee was that the penalty of removal was too severe under the circumstances. Employee listed 26 reasons as to why removal was not the appropriate penalty. Agency responded to all 26 reasons. The Administrative Judge evaluated each reason and the corresponding response. The Administrative Judge held that based on the entire record, including the arguments of the parties, the "penalty was appropriate under the circumstances. . . ."⁷

Employee timely filed a Petition for Review. In it he argues that the Initial Decision is not based on substantial evidence. He believes that the Administrative Judge erred by not conducting an evidentiary hearing and he again lists 11 of the 26 aforementioned reasons as to why removal was not the appropriate penalty.

According to OEA Rule 625.1, a party may request the opportunity for an evidentiary hearing. It is within the discretion of the administrative judge to grant or deny such a request. Having the appropriateness of the penalty as the only issue before the Administrative Judge, she must have thought that an evidentiary hearing was not warranted. The Administrative Judge stated that she found "no due process violations[.]"⁸ We agree with the Administrative Judge's reasoning and find that she did not abuse her discretion by making a decision based on the submissions of the parties and the applicable law.

⁷ *Initial Decision (Dec. 18, 2008)* at 7.

⁸ *Id.*

The Administrative Judge addressed all 26 of Employee's reasons, including the 11 reasons Employee lists in his Petition for Review, as to why he believes the penalty of removal is too severe. She concluded by stating that the "[s]election 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 removal was the appropriate penalty, was not an error of judgment, and should be upheld."⁹ Like the Administrative Judge, we are not persuaded by Employee's arguments.

Substantial evidence is defined as any "relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Mills v. District of Columbia Dep't of Employment Servs.*, 801 A.2d 325, 328 (D.C. 2003 (quoting *Black v. District of Columbia Dep't of Employment Servs.*, 801 A.2d 983 (D.C. 2002)). As long as there is substantial evidence in the record to support the decision, the decision must be affirmed "notwithstanding that there may be contrary evidence in the record (as there usually is)." *Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995). Evidence is substantial if it is "more than a mere scintilla." *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 463 (D.C. 2008) (quoting *Office of People's Counsel v. Pub. Serv. Comm'n*, 797 A.2d 719, 725-26 (D.C. 2002)). Based on this standard of review, we find that there is substantial evidence in the record to uphold the Initial Decision. Therefore, we must deny Employee's Petition for Review.

⁹ *Id.* at 8.

ORDER

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

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

Hilary Cairns

Clarence Labor, Jr.

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.