



matter. Agency asserted that Employee's claims regarding any grievances are not under the jurisdiction of OEA. Further, Agency argued that if Employee avers that he was not employed, then OEA would not have jurisdiction over this matter. Based upon the parties' statements during the Conference, and upon review of the submissions filed to date, the undersigned determined that briefs were required to address the jurisdiction issue raised. Employee's brief was due on or before March 28, 2022. Agency had the option to submit a response on or before April 11, 2022. Employee filed his brief on March 31, 2022. Employee also filed two supplemental submissions on April 4, 2022, and April 21, 2022. Agency filed its response on April 14, 2022, and an updated Prehearing Statement on April 22, 2022.

On April 28, 2022, following briefs submitted by both parties, the undersigned issued an Order finding that OEA had jurisdiction in this matter. Discovery was extended through May 20, 2022, and a briefing schedule was established.<sup>2</sup> Following the receipt of requests for subpoenas by both parties, the undersigned communicated to the parties that there was a need for a Status Conference to address the use of subpoenas and the discovery process. Additionally, Employee filed a Motion to Continue on May 10, 2022. On May 11, 2022, the undersigned issued an Order granting Employee's Motion, in part. It was ordered that a Status Conference would be held on May 20, 2022, and that any extensions for discovery or outstanding issues would be addressed during the Status Conference on May 20, 2022. On the morning of May 20, 2022, Employee sent an email with an attachment of a Motion for a Continuance of the Status Conference, citing recent developments in his case. Due to the timing of this email, the undersigned advised that the Status Conference would proceed as scheduled and that any developments could be discussed at that time. Employee did not appear as required. As a result, an Order for Statement of Good Cause was issued to Employee that same day. Employee was required to submit a response by May 27, 2022. Further, the undersigned issued an Order scheduling a Status Conference for June 2, 2022, at 11am.

Employee filed a response as required on May 27, 2022. Employee indicated therein that he did not appear for the May 20, 2022, Status Conference because he had filed for a Temporary Restraining Order ("TRO") against Agency's Representative, Nicole Dillard. On June 1, 2022, Ms. Dillard forwarded a copy of an Order from D.C. Superior Court which indicated that the hearing regarding the request for a TRO had been scheduled for June 21, 2022.<sup>3</sup> On June 1, 2022, I issued an Order cancelling the Status Conference scheduled for June 2, 2022. On June 7, 2022, I issued an Order noting that discovery in this matter concluded on May 20, 2022. Further, this Order required the parties to submit briefs addressing whether Agency had cause for adverse action and if so, whether the penalty of termination was appropriate. Agency's brief was due on or before June 30, 2022. Employee's brief was due on or before July 11, 2022. Agency submitted its brief as required. On July 15, 2022, I issued an Order for Statement of Good Cause to Employee for his failure to submit his brief as required by July 11, 2022. Employee's statement and brief were due on or before July 25, 2022. On July 25, 2022, Employee emailed a courtesy copy of his statement and brief and the official copy for the record was received at OEA on August 2, 2022. On August 8, 2022, Agency filed a Motion to Supplement its Brief. This Motion included a copy of a D.C. Superior Court Order Granting Defendant's (Agency representative) Motion to Dismiss the Complaint or in the Alternative for Summary Judgement which was issued by Judge Heidi Pasichow on August 1, 2022.<sup>4</sup> Upon

---

<sup>2</sup> It was also noted therein that any requests for subpoenas should be submitted to the undersigned by May 6, 2022. Parties were to address whether there was cause for the instant adverse action and whether the penalty of termination was appropriate. Agency's brief was due on or before June 6, 2022. Employee's brief was due before June 20, 2022.

<sup>3</sup> The Order indicated that the TRO request was filed on May 18, 2022. A hearing was initially scheduled for May 31, 2022, but later continued to June 21, 2022. Ms. Dillard forwarded this document via email.

<sup>4</sup> Agency's Motion is granted by and through this decision.

consideration of the record to date and the submissions filed by the parties in the matter, I have determined that an Evidentiary Hearing is not required. The record is now closed.

### ISSUE

1. Whether Agency had cause to take adverse action against Employee; and
2. Whether the action was administered in accordance with all applicable laws, rules, and regulations; and
3. If so, whether termination was an appropriate penalty under the circumstances.

### JURISDICTION

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

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

D.C. Code § 1-606.03(a) sets forth the jurisdictional limits of OEA. It provides that:

“An **employee** may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.”<sup>5</sup> (Emphasis Added)

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction.” Further, pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), the burden of proof is by a preponderance of the evidence which is defined as “[t]hat 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.” This Office has no authority to review issues beyond its jurisdiction.<sup>6</sup> Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.<sup>7</sup>

### FINDINGS OF FACT, ANALYSIS AND CONCLUSION OF LAW

Employee was employed as teacher at DCPS. On October 15, 2021, a Notice of Termination was issued, separating Employee from service effective November 1, 2021. Employee was

<sup>5</sup> See also. OEA Rule 604, 59 DCR 2129 (March 16, 2012).

<sup>6</sup> See *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>7</sup> See *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

terminated for violation of 5-E DCMR Section 1401.2 (b) Grave Misconduct; and 5-E DCMR Section 1402. (i) Dishonesty. These causes of action arose out of an investigation that determined Employee maintained simultaneous employment with DCPS and Prince George's County Public Schools (PGCPS).

### Agency's Position

Agency avers that it has cause to terminate Employee from service for grave misconduct and dishonesty. Specifically, Agency asserts that Employee maintained dual employment at DCPS and Prince Georges' County Public Schools ("PGCPS"). Agency notes that Employee first began his tenure with Agency in 2004.<sup>8</sup> Following a separation and subsequent reinstatement, Employee was scheduled to return to Anacostia High School for the 2021-2022 school year.<sup>9</sup> Agency asserts that while employed by DCPS, Employee was also an employee of PGCPS. Agency avers that on September 7, 2021, during a routine classroom check, Anacostia HS Principal, William Haith ("Haith") noticed that Employee was absent. Haith investigated this matter, and it was revealed from PGCPS personnel that Employee was actively employed with PGCPS.<sup>10</sup> Prior to that, Employee had submitted several notices of leave to DCPS in August and early September citing leave for funerals and bereavement, and later for Covid related leave.<sup>11</sup> These notices were sent to the Business Manager, Patricia Wilson Ross, and were also submitted via PeopleSoft (personnel database). Additionally, it was shown that Employee had also submitted leave requests from PGCPS in August and September 2021.<sup>12</sup> Agency avers that these leave requests further suggested that Employee had requested leave from DCPS in order to work for PGCPS. Later, an investigation was conducted by Agency's Labor Management and Employee Relations division, and it was determined that Employee had been working simultaneously at DCPS and PGCPS.

Agency terminated Employee from service pursuant to the provision in 5E-DCMR §1401.2 "just cause for adverse action" for grave misconduct and dishonesty. Agency asserts that "for most allegations of 5E DCMR §1401.2(b) – grave misconduct and 1401.2(i) - dishonesty, many teachers will be terminated." Agency asserts that a similar matter wherein a full time DCPS teacher worked for Calvert County Primary School while taking FMLA leave from DCPS and having overlapping compensation was terminated, and the same would apply to Employee.<sup>13</sup> Accordingly, Agency asserts that Employee was appropriately terminated for working at DCPS and PGCPS and that its action should be upheld.

### Employee's Position

Employee avers that he was not an employee of DCPS at the time for which the charges were administered. Employee asserts that he never signed a contract, and that pursuant to an agreement regarding reinstatement, that he should not have been assigned to Anacostia High School. Employee also avers that he never received any payment from DCPS during the time for which Agency asserts he was employed. Further, Employee has argued that Agency's actions in the course of the appeal process have resulted in personal and professional harm against him, since he avers that the charges

---

<sup>8</sup>Agency's Brief at Page 2 (July 1, 2022).

<sup>9</sup> *Id.*

<sup>10</sup> Agency Brief at Page 3-4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at Page 6.

<sup>13</sup> *Id.* at page 7.

are false in nature.<sup>14</sup> As a result, Employee avers that Agency's action was inappropriate and unwarranted and should not be upheld. Employee maintains that he was wrongfully terminated, in that he was not an employee of Agency.<sup>15</sup>

### Analysis

#### Whether Agency had Cause for Adverse Action

In the instant matter, Employee continues to raise an issue regarding whether he was an employee of DCPS. The undersigned issued an Order on April 28, 2022, establishing that in review of the record, that Employee was employed at DCPS between August 2021 and September 2021. In an Order dated April 28, 2022, the undersigned found that Employee was an employee of DCPS at the time of adverse action.

In a Final Notice dated October 15, 2021, Employee was terminated from his position as a Teacher, effective November 1, 2021.<sup>16</sup> The cause cited for his removal was that he was employed by both Agency and Prince George's County Maryland schools at the same time. Employee initially asserted that he was not an employee of DCPS. D.C. Code §1603.01(7) defines an employee as the following: "[t]he term 'employee' means, except when specifically modified in this chapter, an individual who performs a function of the District government and who receives compensation for the performance of such services." Employee maintains that he was not employed by DCPS, and the termination was improper. Employee avers that he didn't sign a contract and did not receive payment from DCPS. However, in his responsive brief and supplemental filings, Employee asserts that for the "2021 school year, DCPS produced two pay stubs."<sup>17</sup> The first was dated September 10, 2021, and the second was for September 24, 2021. Employee asserts that Agency acknowledged that it had sent payments to a "defunct checking account." It should also be noted that Employee executed a document with DCPS which indicated that Employee was being assigned to Anacostia HS and that his first date to report was July 19, 2021. The date of this document was July 13, 2021, and

---

<sup>14</sup> On May 18, 2022, Employee filed a motion for a Temporary Restraining Order (TRO) against Agency's representative Nicole Dillard. Employee alleged that Dillard had threatened and harassed him by stating false information regarding his employment. On June 21, 2022, Superior Court Judge-In-Chambers, Gregory R. Mize issued an Order Denying Employee's Motion. Judge Mize stated therein that:

"[t]he limited issue before Judge-in Chambers" is whether plaintiff was employed with DCPS during the relevant period and whether defendant's communication with P.G. County Public Schools regarding this employment was libel and/or slander." Judge Mize noted that "the court finds that the plaintiff has not shown the likelihood of success on the merits of his claim. The court finds that the plaintiff was engaged as an employee by DCPS from at least August 2021 to November 1, 2021. The Court further finds that any communication defendant had with P.G. County Public schools was part of her investigation into whether plaintiff was dually employed."

Following this, on August 1, 2022, Superior Court Judge Heidi M. Pasichow issued an Order Granting Defendant's Motion to Dismiss the Complaint or in the Alternative for Summary Judgment which was filed on June 6, 2022. Judge Pasichow noted in the Order that Agency's representative's statements were made in the capacity of her role as agency counsel in the matter pending before OEA and that "the judicial proceedings privilege applies to those statements and provides absolute immunity to Defendant for her statements made during and pertaining to this employment dispute." This Order was granted with prejudice. See Agency's Motion to Supplement its Brief at Attachment (August 9, 2022)

<sup>15</sup> Employee's Brief (August 2, 2022). Employee also referred to a grievance process in his response, however the undersigned finds that it is unrelated to the matter pending before this Office.

<sup>16</sup> Employee's Petition for Appeal at Final Notice. (November 29, 2021).

<sup>17</sup> Employee's Brief. (March 31, 2022).

Employee signed and dated it on July 15, 2021. That document also said that “per the terms of your agreement that it would be a 12- month assignment that would expire on July 15, 2022.”<sup>18</sup>

Employee also provided a copy of a W2 form for 2021.<sup>19</sup> Further, in a supplemental submission dated April 4, 2022, Employee provided a copy of an email exchange between him and Temony McNeil, Director of the Office and Pay Retirement Services (“OPRS”). Mr. McNeil noted that he had received Employee’s “escalation regarding the wages reported on the W2 for calendar year 2021.” Further, McNeil advised that he had his team research to determine the “disconnect” regarding the payments. McNeil noted that “it appears there were 4 payments initiated to you between August and November for time worked, bereavement leave, sick leave, and summer pay credit due to you.”<sup>20</sup> McNeil also stated that the payments were sent to a USBank pay card that was returned by the bank to the post office and ultimately inactivated. Employee also noted in his brief on March 31, 2022, that he believed that “DCPS’s [sic] behavior toward [him] is overwhelmingly a relationship worthy of review.”<sup>21</sup>

To support its charges, Agency received affidavits from representatives at PGCPs that confirmed Employee’s employment at the same time for which he was actively employed by DCPS.<sup>22</sup> An affidavit from Eric Stephens, dated June 30, 2022, notes that Employee was employed as a mentor teacher with the Office of Professional Learning and Leadership. Further, Stephens noted that he was Employee’s supervisor at that time. Stephens cited that Employee was serving in a “full time, 11-month position with a Monday-Friday work schedule with core work hours of 8:30am - 4:00pm. Stephens also attested that Employee was employed with PGCPs on September 10, 2021, and that he confirmed this with William Haith, principal of DCPS Anacostia HS on that same date. Agency also provided a series of email correspondence between Stephens and DCPS personnel which included copies of Employee’s attendance records for the 2021-2022 school year, including virtual meetings, emails and leave request etc.<sup>23</sup> Additionally, this email correspondence noted that Employee had been employed with PGCPs with an assignment start date of July 26, 2018, and confirmed that as of the date of September 10, 2021, Employee had been and was still classified as employed with PGCPs. As previously noted, Employee also requested and submit leave requests at DCPS at time frames, though not all leave request at PGCPs or DCPS overlapped.

Based upon the parties’ submission in this matter, I find that Employee was employed by DCPS at the time related to the instant cause of action. Notably, the email communication provided by Employee from the Director of OPRS, Temony McNeil, clearly noted that with regard to Employee that “there were 4 payments initiated to [him] between August and November for **time worked**, bereavement leave, sick leave, and summer pay credit **due to [him]**.”<sup>24</sup> (**Emphasis added**). The undersigned also notes that in review of the record, Employee made leave requests via an official DCPS email address (which he acknowledged in his supplemental brief that he possessed). He requested leave/notified Agency on August 24, 2021, for bereavement leave on August 20, 2021, and

---

<sup>18</sup> Agency’s Brief at Exhibit 3 (July 1, 2022).

<sup>19</sup> *Id.* at Attachment –W2.

<sup>20</sup> Employee Supplemental Submission (April 4, 2022). The date of this email exchanged was March 28, 2022.

<sup>21</sup> Employee Brief (March 31, 2022).

<sup>22</sup> Agency’s Brief at Exhibit 9 – Affidavit of Eric Stephens (July 1, 2022).

<sup>23</sup> *Id.* at Exhibit 10.

<sup>24</sup> Employee Supplemental Submission (April 4, 2022). The date of this email exchanged was March 28, 2022.

August 23, 2021.<sup>25</sup> Further, in an additional exchange on August 27, 2021, Employee relayed that his daughter had contracted Covid and that he would ultimately “need to take personal leave in addition to the bereavement I previously submitted.”<sup>26</sup>

The undersigned finds that Employee’s argument that he was not employed by DCPS at this time to be wholly incongruous with the interactions and actions taken during this time. All the information in the record suggests otherwise. This includes the letter signed by Employee on July 15, 2021, regarding the assignment for the school year. The undersigned finds that Employee’s signature to this document, coupled with the other aforementioned actions (leave requests, etc.) lends to a reasonable conclusion that Employee was and acted in a manner of an employee of DCPS. A reasonable mind would presume that unless a person was an employee, that they would not have otherwise made leave requests, noted those leave requests were entered into Peoplesoft (the employee personnel database), or otherwise notified supervisors of their absences from work. Further, a reasonable mind would presume that a non-employee would have no need to request leave, nor would they have access to the Peoplesoft system. I also find that the attempts made to pay Employee also evince his employment with DCPS. While the payments were sent to a wrong account, Employee, by and through his own communication with OPRS is entitled to the pay owed for the time worked and other leave etc., ascertained during that time.

Agency provided email correspondence and affidavits from the PGCPs that indicated that Employee was employed by that school system at the same time for which he was employed by DCPS.<sup>27</sup> DCPS regulations provide that dual employment is not permitted and is subject to termination. Wherefore, I find that Agency has shown cause for adverse action in this matter. Assuming *arguendo* that Employee never signed an official contract with DCPS and was not employed by DCPS, then that would preclude Employee’s claims before OEA. It has been long established that OEA only retains jurisdiction over the appeals of employees of the District of Columbia. Wherefore, the undersigned would also conclude that this matter would be dismissed and Employee’s claims regarding wrongful termination or otherwise would not be considered by this Office because it would lack the jurisdictional authority to do so. Accordingly, I find that Agency had cause to discipline Employee.

### **Whether the Penalty Was Appropriate**

Based on the aforementioned findings, I find that Agency’s action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency’s penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).<sup>28</sup> According to the Court in *Stokes*, OEA must determine

---

<sup>25</sup> See Agency’s Answer at Exhibit 8. Email exchanges. Employee had sent correspondence to Sharon Bynum but was advised by a Mr. William Haith to submit emails to Ms. Wilson-Ross and supervising AP, Ms. Kush. Employee also noted that he submitted a leave slip in Peoplesoft. (January 12, 2022).

<sup>26</sup> *Id.*

<sup>27</sup> Agency’s Brief at Exhibits 7 – 13 (July 1, 2022).

<sup>28</sup> *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and

whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in the DPM; whether the penalty is based on a consideration of relevant factors; and whether there is a clear error of judgment by agency. Further, “the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not this Office.”<sup>29</sup> Therefore, when assessing the appropriateness of a 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 exercise.”<sup>30</sup>

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.<sup>31</sup> It should be noted that the penalty for which Employee was charged does not fall under the DPM. Employee’s disciplinary action was administered under 5E-DCMR § 1400 et.al, which provides the Superintendent of Schools (or its designee) may affect the dismissal, suspension or demotion of any employee under its authority.<sup>32</sup> Further, §1401.2 (a)-(z), lists all adverse actions for which an employee under this authority may be disciplined. Agency administered this action under that authority and for the aforementioned charges for Grave Misconduct and Dishonesty. In its administration of the instant action, Agency considered all the relevant *Douglas* factor considerations, and cited therein to three (3) similar disciplinary actions regarding these charges and cited that all resulted in termination.<sup>33</sup> Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of a termination is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to take adverse action against Employee. As a result, I conclude that Agency’s action should be upheld.

---

*Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

<sup>29</sup> See *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>30</sup> *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

<sup>31</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee’s past disciplinary record;
- 4) the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in employee’s ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee’s rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

<sup>32</sup> See 5E-DCMR§1402.1.

<sup>33</sup> Agency’s Brief at Exhibit 4 (July 1, 2022).



**ORDER**

Based on the foregoing, it is **ORDERED** that the Agency's action of terminating Employee from service is hereby **UPHELD**.

FOR THE OFFICE:

**/s/ Michelle R. Harris**  
Michelle R. Harris, Esq.  
Administrative Judge