THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No
Alphonso Bryant,	)	1601-0034-08R14,
Darryl Love,	)	1601-0038-08R14
Employees,	)	
	)	Joseph E. Lim, Esq.
v.	)	Senior Administrative Judge
	)	
Department of Corrections	)	Date of Issuance**:** November 4, 2014
Agency	)	

Kevin J. Turner, Esq., Agency Representative
J. Michael Hannon, Esq., Employee Representative

INITIAL DECISION ON REMAND

INTRODUCTION

On January 14, 2008, Employees appealed from Department of Corrections' ("Agency" or "DOC") final decision, effective December 17, 2007, removing them from their positions as Correctional Officers at the D.C. Jail for "negligence," or "malfeasance." Employees were accused of negligently allowing two prison inmates to escape. I held a hearing on December 8, 10, and 12, 2008, and issued an Initial Decision on June 22, 2009. I found cause for adverse action against Employees and upheld the penalty of removal.

Appeals followed, and on May 8, 2014, the D.C. Court of Appeals upheld my findings of negligence but reversed my decision to uphold Agency's terminations of Employees. *See Love and Bryant v. D.C. Office of Employee Appeals and D.C. Department of Corrections*, D.C. Court of Appeals, Nos. 12-CV-1514 & 12-CV-1544 (May 8, 2014).

On June 13, 2014, based on the D.C. Court of Appeals Decision cited above regarding Employees Alphonso Bryant and Darryl Love, I thereby ordered Agency to reconsider its choice of penalty for the two employees, consistent with the court's opinion. Agency revised its *Douglas* Factor analysis of its penalty and submitted a report on July 15, 2014. Employees appealed Agency's action by submitting a motion for summary disposition on the revised penalty issue. As this matter can be decided based on the documents submitted, the record is closed.

JURISDICTION

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

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

FINDINGS OF FACT

Undisputed Facts:

On June 3, 2006, two inmates escaped from the DOC jail. The two escapees, Joseph Leaks and Ricardo Jones, were among the most dangerous offenders housed at the D.C. Jail. Inmates Leaks and Jones were co-defendants in a murder case. The escape was widely reported in the press, and brought media attention to both Agency and city administrators.

After an investigation, Agency Director Devon Brown summarily removed Employees from their positions on June 26, 2006. These summary removals were rescinded and replaced by new notices issued by Director Brown informing Employees they would be removed from their positions effective December 17, 2007. The effective date of the termination was subsequently amended to January 16, 2008. Thereafter, Employees appealed their terminations to the Office of Employee Appeals.

I held a hearing on December 8, 10, and 12, 2008, and issued an Initial Decision on June 22, 2009. I found cause for adverse action against Employees and upheld the penalty of removal.[1]

Appeals followed, and on May 8, 2014, the D.C. Court of Appeals upheld my findings of negligence but reversed my decision to uphold Agency's terminations of Employees. *See Love and Bryant v. D.C. Office of Employee Appeals and D.C. Department of Corrections*, D.C. Court of Appeals, Nos. 12-CV-1514 & 12-CV-1544 (May 8, 2014).

On June 13, 2014, based on the DC Court of Appeals Decision cited above regarding Employees Alphonso Bryant and Darryl Love, I thereby ordered Agency to reconsider its choice of penalty for the two employees, consistent with the court's opinion. Agency revised its *Douglas* Factor analysis of its penalty and submitted a report on July 15, 2014.

In its report, Agency left its original analysis of *Douglas* Factors 1 through 9, 11 and 12 untouched. It changed only its analysis of *Douglas* Factor 10, Potential for Rehabilitation, from an aggravating factor to neutral.[2] Previously, Agency has cited Employees' denial of misconduct as an aggravating factor that justified the ultimate penalty of termination. Agency Director Thomas Faust also reiterated his belief that termination is an appropriate penalty, repeating his contention that the Employees' misconduct was serious as it inexcusably compromised the safety and wellbeing of both the public and fellow coworkers. Nonetheless, Agency reduced its penalty from termination to a suspension from January 16, 2008, through January 29, 2012. Director

1 Seven other DOC employees accused along with Bryant and Love were acquitted and reinstated.
2 For a discussion on the *Douglas* factors, see *Stokes v. District of Columbia*, 502 A.2d 1006, 1010.

Faust justified his decision to rehire Employees "to foster positive labor/management relations."[3] There was no other communicated explanation for the reduction in penalty. Faust, did pointedly informed Employees that Agency "will not reinstate any back pay or benefits."[4] Agency reinstated Employees to their prior positions effective January 30, 2012.

On August 13, 2014, Employees submitted a Motion for Summary Disposition ("MSD"), arguing that the revised penalty of what amounted to a four year suspension was arbitrary, capricious, and not in accordance with the law.

ANALYSIS AND CONCLUSION

Whether the revised penalty of a four year suspension for Employees Alphonso Bryant and Darryl Love was appropriate.

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that "managerial authority has been legitimately invoked and properly exercised." See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must be based upon a consideration of relevant factors. See *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

The District government's Director of Personnel has issued amendments to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (the "CMPA"), as amended, including to Chapter 16, General Discipline and Grievances, now incorporated into the District Personnel Manual ("DPM"), which reestablished a table of penalties for designated offenses.[5] Termination and removal from a job position is a permissible penalty for Agency's proving the charge of neglect of duty, *even if it is the first offense.* (Emphasis added by the AJ). Accordingly,

---

3 July 14, 2014 Revised *Douglas* Factor Analysis.

4 *Id*, last page.

5 Effective April 25, 2008, the Director, D.C. Department of Human Resources (DCHR), with the concurrence of the City Administrator, issued new regulations on employee discipline and grievances, codified at Title 1, Chapter 6, Subchapter XVI, General Discipline and Grievances. This subchapter amends the prior Subchapter XVI by establishing a Table of Appropriate Penalties for certain enumerated offenses. In both the prior and current sections of 1603, *Definition of Cause: General Discipline,* of the Subchapter, Neglect of Duty (Sec. 1603.3(f)(3)), is included in the definition of the causes for which disciplinary action may be taken. The new section 1619, *Table of Appropriate Penalties*, provides that the disciplinary penalty available to the Agency upon a determination that cause has been established, includes the imposition of reprimand to removal, for the first offense of neglect of duty.

the penalty is permitted by existing regulations.

Nevertheless, the D.C. Court of Appeals has deemed the penalty of termination in this case to be "arbitrary, capricious, and not in accordance with the law."[6] Previously, Agency has cited Employees' denial of misconduct as an aggravating factor that justified the ultimate penalty of termination. The Court held that it is "inappropriate to consider an appellant's denial of misconduct as an aggravating factor in determining the maximum reasonable penalty."[7]

Here, Agency has relabeled *Douglas* Factor 10, potential for rehabilitation, from an aggravating factor to a neutral one. However, Agency still insisted that its prior penalty of termination was appropriate, but in order to foster labor-management relations, it magnanimously reduced its penalty from termination to a four year suspension. Apart from this stated rationale, Agency offered no other explanation or rationalization for its new, reduced penalty of what amount to a four year suspension.

In their motion for summary disposition, Employees have argued this reduced penalty of a four year suspension (equal to the amount of time between the original terminations and their subsequent reinstatements in 2012) is still "arbitrary, capricious, utterly unprecedented, and a thinly disguised effort to avoid paying hundreds of thousands of dollars in back pay and attorneys' fees."[8]

Employees argue that this is evident because (1) the chosen penalty was determined by accident and for an improper purpose; and (2) the Table of Appropriate Penalties does not contemplate such a penalty.

First, Employees argue that their four year suspensions are clearly arbitrary because they were determined by accident. They were determined after-the-fact, and solely by the amount of time between the terminations and the reinstatements. Employees contend that had their rehiring occurred six months earlier or six months later, the suspension undoubtedly would have been adjusted accordingly. There is nothing in the new July 14, 2014 *Douglas* factor analyses that suggests the penalties were determined by anything other than an accident, as they explicitly reference the two dates (termination and reinstatement) that ultimately formed the basis for the imposed penalties.

Moreover, Employees contend that the July 2014 *Douglas* factor analyses unequivocally state that these dates were selected so that the Agency did not have to "reinstate any back pay or benefits." It is abundantly clear then that the imposed four year suspensions had nothing to do with "fitting the crime" and disciplining the actual offense and everything to do with avoiding the payment to two employees of four years of back pay, benefits, and attorney's fees. This

---

6 *Supra, Love and Bryant*, quoting D.C. Code §2-510 (a)(3)(A) (2012 Repl.).
7 *Id*, quoting *Smith v. Dep't of Navy*, 62 M.S.P.R. 616, 621 (M.S.P.B. June 2, 1994).
8 August 13, 2014 MSD, p. 2.

motivation constitutes an improper purpose and further justifies Employees' position that the penalties are arbitrary.

Employees state that because the instant suspensions run from the date of termination to the date of reinstatement, they can be said to be "time served suspensions." In 1955, the United States Court of Claims first discussed the notion of "time served suspensions" and determined that a 320 day suspension, the amount of time it took in that particular case for the appeal to be resolved, "was determined by accident, and not the process of logical deliberation and decision." *Cuiffo v. United States*, 137 F.Supp. 944, 131 Ct. Cl. 60, 69 (1955). The court found that such a penalty was "so arbitrary and unfair that it should be set aside." *Id*. at 70.

Relying on *Cuiffo's* logic, the Merit Systems Protection Board ("MSPB") has consistently held for decades that imposing "time served suspensions -- without articulating a basis for the length of the suspension – is inherently arbitrary." *Greenstreet v. Social Security Admin*. 543 F.3d 705, 708 (Fed. Cir. 2008)(*citing Fulks v. Dep't of Def.*, 100 M.S.P.R. 228, 239(2005)(holding that arbitrator "erred as a matter of law in interpreting civil service law pertaining to mitigation authority, and that his mitigation of the appellant's removal to a 'time served' suspension of 20 months and 13 days is not entitled to deference"); *Jackson v. Veterans Admin.,* 14 M.S.P.R. 61, 65 (1982)(rejecting mitigation of removal to 164-day "time served" suspension when "the presiding official offered no reasonable basis for such penalty"); *Morris v. Naval Weapons Support Ctr.,* 9 M.S.P.R. 31, 34 (1981)(rejecting 162 day "time served" suspension because "the presiding official in this instance did not articulate a reasonable basis" for the length of the suspension); *Belldina v. Dep't of Justice,* 50 M.S.P.R. 497, 501 (1991)(rejecting arbitrator's imposition of a 435-day "time served" suspension, because length of suspension was not based on analysis of *Douglas* factors and arbitrator had "articulated no reasonable basis for the selection of such a suspension period")).

Employees assert that not only were the suspensions determined by complete accident and with an improper purpose, but they are also not supported by the Agency's actual *Douglas* factor analyses. In the analyses for Factors 6, 7, and 12, the Agency discusses termination, yet nowhere does it discuss a four year suspension. Further, in the Agency's conclusions for both Employees Bryant and Love, it states that "[t]he Department maintains that termination is the appropriate penalty." After providing analyses that contemplate termination and conclusions affirming the penalties of termination, the Agency goes on, however, to impose four year suspensions. It does so without any evidence of logical deliberation and decision regarding a four year suspension as opposed to a termination. It actually appears as if the Agency pulled the four-year suspensions out of nowhere, as they are not discussed in the *Douglas* factors analyses. Of course, the four year suspensions are not "out of nowhere", but rather they were determined by the dates of termination and reinstatement, and with the improper purpose of avoiding the inevitable financial consequence. Thus, even though the Agency completed a *Douglas* factor analysis, the actual penalties imposed were not born from those analyses, but rather by accident and with improper purpose of avoiding backpay.

Agency denies that the four year suspension is a "time served" suspension. It points out that Employees were reinstated even before a final decision on their appeals had been rendered and that the decision to rehire was not the product of an appellate tribunal decision. Agency also distinguished its action from the cases cited above by asserting that it did not mitigate its penalty.

Agency admitted that it reinstated Employees without regard to the *Douglas* factors or the merits of their appeals.[9] Agency also denies that the dates of suspension were chosen to avoid paying Employees back pay and benefits. Agency admits informing Employees that they would be rehired, but without receiving back pay. Agency did not cite any authority for their assertions.

Secondly, Employees charge that another factor that substantiates its allegation that Agency's chosen penalty of a four year suspension as capricious and arbitrary is the fact that the District's Table of Appropriate Penalties does not contemplate a four year suspension. The District of Columbia Municipal Regulations ("DCMR") provides a Table of Appropriate Penalties for public employee discipline. 6-B DCMR §1619. The discipline provided for by the Table is mandatory. *See* 6-B DCMR § 1619.1 (stating that "The Table of Appropriate Penalties . . . *shall* be used as specified in this chapter.")(emphasis added). The Table of Appropriate Penalties provides for several types of suspensions, depending on the offense, including suspensions for anywhere from five to 45 days. The Table contemplates no such penalty that could be comparable to a four year suspension, no matter what an employee was charged with. Therefore, Employees reiterate that their penalty is not supported by the DPM and is arbitrary and capricious.

Agency disputes this assertion by pointing out that the Table of Appropriate Penalties for Employees' offense(s) range from reprimand to removal, and that a four year suspension certainly falls within this range. Agency again stresses that the decision to reinstate Employees was unrelated to weighing the *Douglas* factors.

The relevant fact pattern in *Greenstreet v. Social Security Admin*., *supra* is similar to those in this appeal. Despite Agency's protestations to the contrary, its chosen penalty amounts to a "time served suspension." The length of the suspension was based primarily, if not solely, on the suspended employees' "time served" awaiting decision. In the instant matter it was the Agency director who decided when the suspension would end. In *Greenstreet,* the "time served" suspension was 342 days. In the instant matter, the length of the "time served" suspension was more than four times as long.

The decision of the Director does not provide a reasoned analysis and explanation as to why or how the four year suspensions would serve a punitive, rehabilitative, or any other non-arbitrary purpose. There is no justification anywhere in any document produced by the Agency

---

9 September 30, 2014 Agency Opposition to Employees' Motion for Summary Disposition, p. 6, second paragraph.

for the imposition of the four year penalties. Rather, it continues to defend *termination* in its July 14, 2014 *Douglas* factors, articulating why *termination* is the most appropriate, only to go on to impose a completely different penalty that had never been discussed, articulated or defended.

Moreover, it is clear that the "time served" penalties were a result of arbitrary circumstances. The Agency itself admits that the suspensions run from the date of termination to the date of reinstatement. Yet, if Director Faust, the same Director who reinstated Employees, would have reinstated Bryant and Love months earlier, or even months later, then the imposed suspension would be based on *those* arbitrary dates, and not the current dates. Thus, it is clear that the imposed suspension is merely based on what day Director Faust decided to sign the notice reinstating Employees herein. I find that the imposed four year suspensions had nothing to do with any reasoned analysis and were entirely arbitrary.

Like *Greenstreet*, there was no articulated basis made by management for the length of the suspension. Similar to the cases cited, the punishment, in the instant matter a four year suspension, was a "punishment determined by accident, and not by a process of logical deliberation and decision." *Id*. at 707. As *Greenstreet* court concluded, that is inherently arbitrary and capricious.

Indeed, judging from the Agency Director's own letter memorializing his decision regarding the penalty, the only articulated possible rationale for the choice of a four year suspension was to avoid paying any backpay and benefits to Employees. That rationale is inherently improper.

Greenstreet stands for the notion that where a suspension is determined by accident, where it is imposed without an articulate basis for the length of suspension, and where it was not arrived at after a process of logical deliberation and decision, the suspension is inherently arbitrary. *See Greenstreet* at 706-08. Nowhere does the court in *Greenstreet* make it a requirement that the decision must be a result of an appellate tribunal. In fact, the source of the altered penalty is ultimately irrelevant. Rather, what *Greenstreet* looks at in determining whether the "time served" penalty is arbitrary and capricious is whether it was determined by a process of logical deliberation and decision. The Agency's explanation fails this test miserably.

Agency's other argument that since its chosen penalty of a four year suspension falls within the Table of Penalties' range of reprimand to removal likewise falls flat. Although the Table of Penalties allows removal for a first offense, the maximum articulated penalties short of removal is a reduction in grade or a thirty day suspension. Nowhere does the Table provide for a four year suspension. By Agency's own logic, it can permissibly suspend an employee for ten to twenty years or more as that is still short of removal! This is unreasonable and is akin to a termination. Moreover, Agency does not cite any authority or comparable case in which an employee was subject to a four year suspension for negligence. It is clear that the four year suspensions are arbitrary and capricious. The next issue is the appropriate penalty for these

offenses.

The Office has on occasion determined that an Agency-imposed penalty should be reversed, and reduced to something less severe.[10] Also see *Palmer v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0048-05, March 6, 2007, (reducing a 35-day suspension to 13 days). That situation is applicable if the Administrative Judge finds Agency's initial disciplinary action to be arbitrary, excessive, or otherwise outside of the realm of managerial discretion, in terms of the character of the offense and the nature of the discipline imposed. Generally what happens is that an Agency-implemented termination or extended suspension may be reduced, with Employee reinstatement or the number of days of the extended suspension lessened, provided the AJ first determined that "cause" for disciplinary action still does exist, which would serve an any underlying basis for the imposition of some disciplinary action. The parties no longer dispute that cause does exist. They dispute on what the proper penalty is.

To allow Employees' behavior to go unpunished would undermine the efforts of Agency to convey to them and others the seriousness of such an infraction. But to allow a penalty of removal to stand would endorse the exercise of managerial discretion without a fair consideration of the total circumstances. In consideration of all of the *Douglas* factors as discussed by management, coupled with the fact that this is Employees' first offense, the penalty will be reduced from a four year suspension to a more reasonable thirty (30) day suspension.

ORDER

It is hereby ORDERED that:

1. Agency's decision to suspend these Employees from their position is REDUCED from four years to thirty (30) days.

2. Agency is directed to reinstate these Employees, issue them the back pay to which they are entitled and restore any benefits they lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.

---

10 In an earlier appeal, the Board of this Office issued an *Opinion and Order on Petition for Review* on January 26, 2007, upholding the determination of the Office to reduce the removal of an employee to a suspension. In the matter of *Robert Aronson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter 1601-0128-99, the Board found that the employee's ten (10) year history with no previous adverse actions and his strong potential for rehabilitation supported that decision. Agency sought review of the *Opinion and Order on Petition for Review* before the Superior Court of the District of Columbia (*District of Columbia Fire and Emergency Medical Services Department v. Office of Employee Appeals*, Civil Action No. 2007 CA 001923 P(MPA). On April 22, 2008, the Honorable Judith E. Retchin, Associate Judge of the Superior Court of the District of Columbia, issued an Order affirming the *Opinion and Order* of the Board of the Office of Employee Appeals.

3. Agency is directed to file with this Office documents within 45 calendar days to reflect its compliance with the directives of this Decision.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge