THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JOHN JUDD,	)	OEA Matter No. 1601-0184-12
Employee	)	
v.	)	Date of Issuance: April 14, 2015
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

John Judd ("Employee") worked as a Motor Vehicle Operator at the Department of Public Works ("Agency"). On July 26, 2012, Agency issued a notice of final decision removing Employee from his position. Agency provided that the cause of action was "any act which constitutes a criminal offense whether or not the act results in a conviction, specifically: making a false statement or representation knowing it to be false or knowingly failing to disclose a material fact to obtain or increase unemployment insurance benefits as provided in D.C. Official Code § 51-119(a)(2001)."[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 7, 2012. He asserted that Agency's Director was unaware that payments were being made to the Department of Employment Services regarding the unemployment benefits. Along with his petition, Employee submitted repayment documents from the office of Unemployment

[1] *Petition for Appeal,* p. 5 (August 7, 2012).

Compensation, which is within the Department of Employment Services.[2]

Agency filed its answer on September 10, 2012. It argued that Employee applied for and received unemployment benefits while employed with Agency. Agency contended that Employee was terminated because his action of stealing funds, directly from his employer and indirectly from the District taxpayers, was a serious offense. It reasoned that termination was supported by the *Douglas* factors.[3] Therefore, it contended that its decision to terminate Employee was proper, and it requested that OEA sustain Employee's removal.[4]

The OEA Administrative Judge ("AJ") convened a status conference to narrow the issues in this case. On November 22, 2013, she issued an order requesting briefs. The AJ asked each of the parties to address whether Employee was terminated for cause and in accordance with District statutes, regulations, and laws; whether Agency engaged in disparate treatment; and whether the penalty of termination was appropriate under District law, regulations, and the Table of Penalties. Additionally, Agency was required to submit a list of employees who were charged

[2] *Id.*, p. 1-3 and Exhibit #1.

[3] These factors are provided in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The factors require consideration of the following:

(1) the nature and seriousness of the offense, and it's 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.

[4] *Agency Answer* (September 10, 2012).

with the same cause of action as Employee, along with the penalty they received for each charge.[5]

Agency's brief provided that Employee was terminated from his position with a previous employer in March of 2007. It claimed that while Employee was unemployed, he applied for and received unemployment benefits. On December 24, 2007, Employee began employment with Agency, but he continued to receive unemployment benefits until March 22, 2008. Therefore, on June 5, 2012, he was issued an Advance Written Notice of Proposed Removal. Subsequently, a Hearing Officer was appointed to conduct a pre-termination review of his case. She issued her decision on June 27, 2012, and recommended that the proposed penalty of removal be reduced to a thirty-day suspension without pay. The Agency Director reviewed the recommendation but determined that removal was appropriate under the circumstances. Therefore, Agency again asserted that its action was taken for cause and removal was an appropriate penalty under *Douglas.* As for the disparate treatment issue, Agency provided that seven employees received unemployment benefits after submitting fraudulent claims. Of the seven employees, four were within Employee's organizational unit, and three of the four were removed from their positions.[6]

In Employee's brief, he argued that he was wrongfully terminated because he had entered into a restitution agreement. Employee reasoned, as provided by the Hearing Officer, that the mitigating factors in his case outweighed the aggravating factors. As for the disparate treatment argument, he contended that it was unfair that other employees were allowed to continue

[5] *Post Status Conference Order* (November 22, 2013).
[6] Agency explained that one employee was suspended because he engaged in the conduct for a short period of time; he responded to an audit notice from the Department of Employment Services and entered into a repayment agreement; and he had substantially repaid the money owed by the time Agency commenced disciplinary action. *Agency Brief in Opposition to the Appeal* (December 20, 2013).

employment when they committed the same offense.[7]

The AJ issued her Initial Decision on January 15, 2014. She held that Employee violated D.C. Official Code § 51-119(a) and that Agency was able to prove that Employee made a false statement of material fact or failed to disclose a material fact; that Employee knew the statement was false; and that Employee made the statement with the intent to obtain or increase benefit. The AJ reasoned that because Employee admitted that he was working with Agency and failed to inform the Department of Employment Services of this fact, Agency had sufficient cause to impose disciplinary action. Moreover, she found that Agency did not engage in disparate treatment.

However, the AJ ruled that although removal was within the range of penalty for Employee's action, Agency violated District Personnel Manual ("DPM") § 1613. She provided that in accordance with the regulation, the process was that the proposed action was to be reviewed by a Hearing Officer. Subsequently, the Hearing Officer would make a recommendation to the deciding official. Then the AJ claimed that "upon this recommendation, under section 1613, the deciding official shall either sustain the penalty proposed, reduce it, remand the action for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty." She ruled that because the Hearing Officer recommended that the proposed penalty of removal be reduced to a thirty-day suspension, then the deciding official violated the regulation by imposing a penalty of removal. Therefore, she reversed Agency's action and reinstated Employee with back pay and benefits.[8]

Agency filed a Petition for Review on February 19, 2014. It contends that the AJ misinterpreted the DPM when holding that the deciding official could not impose a penalty

[7] *Employee Brief and Supporting Documents* (December 24, 2013).
[8] *Initial Decision*, p. 5-7 (January 15, 2014).

greater than that which was recommended by the Hearing Officer. Agency reasons that in this case termination was proposed, and the deciding official sustained that penalty. Therefore, the Initial Decision was based on the erroneous interpretation of the regulation.[9]

This Board believes that a review of multiple sections of the DPM is required to fully understand DPM § 1613. The DPM §§ 1607, 1608, 1612, and 1613 lay out the process by which disciplinary action is taken against employees. DPM § 1607 addresses the role of the proposing official and provides the following:

> 1607.1 The proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2.
>
> 1607.2 At any time prior to the deciding official rendering the final decision, the proposing official may withdraw a proposed corrective or adverse action with or without prejudice and, if withdrawn, shall so notify the employee and the deciding official.
>
> 1607.3 The proposing official shall not be the deciding official, except the proposing official may be the deciding official when the proposing official is the head of an agency.

As DPM § 1607.1 states, the proposing official shall provide an advanced notice proposing adverse action. DPM § 1608.2 outlines the specifics of what is to be contained in the notice. It states that:

> 1608.2 The advance written notice shall inform the employee of the following:
> (a) The action that is proposed and the cause for the action;
> (b) The specific reasons for the proposed action;
> (c) The right to prepare a written response, including affidavits and other documentation, within six (6) days of receipt of the advance written notice;
> (d) The person to whom the written response or any request is to be presented;
> (e) The right to review any material upon which the proposed action is based;
> (f) In the case of a proposed adverse action only, the right to be represented by an attorney or other representative;
> (g) The right to an administrative review by a hearing officer appointed by the agency head, as provided in § 1612.1, when the proposed action is

[9] *Agency's Petition for Review,* p. 3-4 (February 19, 2014).

a removal; and
(h) The right to a written decision.

DPM § 1608.2(g) introduces the role of the hearing officer. DPM § 1612 provides the responsibilities of the hearing officer and states the following:

> 1612.1 The personnel authority shall provide for an administrative review of a proposed removal action against an employee.
>
> 1612.2 The administrative review shall be conducted by a hearing officer . . . .
>
> 1612.3 The hearing officer shall be responsible for keeping the proposed removal action moving to a conclusion at the earliest practicable date.
>
> 1612.10 After conducting the administrative review, the hearing officer shall make a written report and recommendation to the deciding official, and shall provide a copy to the employee.

Finally, DPM § 1613 offers the role and responsibilities of the deciding official. This is the section primarily relied upon by the AJ. It states that:

> 1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
>
> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

Reading all of the above-mentioned sections together, provides the complete adverse action process. We believe that a careful review of the language chosen within each regulation makes clear what steps can be taken by whom and when. The advanced written notice is the document which *proposes* the action against an employee (emphasis added). It is then the Hearing Officer's job to review the *proposed* action and make a *recommendation* to the deciding official (emphasis added). DPM § 1613.1 states that the deciding official is to *consider* the report and recommendation of the Hearing Officer (emphasis added). However, in DPM § 1613.2, the

regulation provides all of the possible rulings the deciding official can make as it relates back to the penalty *proposed* (emphasis added). Because the proposing official is the only person in the process who offered a proposed penalty within the advanced written notice, DPM § 1613.2 refers back to the decision made by the proposing official, not the Hearing Officer, as the AJ ruled.

It is clear from the record that removal was the proposed penalty in this case. The penalty of removal is provided in Agency's Advanced Written Notice of Proposed Removal.[10] Additionally, the proposed penalty of removal is discussed in the Hearing Officer's report and recommendations.[11] Moreover, it is noted in the Notice of Final Decision on Proposed Removal.[12] Thus, the AJ did misinterpret the regulations pertaining to the final Agency decision. Because removal was the proposed penalty, the deciding official could sustain, reduce, remand, or dismiss the action. The deciding official chose to sustain it, which he was well within his authority to do. Therefore, the AJ's ruling on Initial Decision must be reversed. Accordingly, Agency's Petition for Review is granted.

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[10] The notice provides "this constitutes the thirty-day (30-day) advance written notice on a proposal to remove you for cause from your position of Motor Vehicle Operator . . . ." *Agency Answer*, Exhibit #7 (September 10, 2012).

[11] The report begins by stating that the Hearing Officer has "been assigned . . . to conduct an administrative review of the proposed removal of . . . Employee . . . The purpose of the review is to determine whether the proposed action is taken for cause . . . ." In conclusion, the Hearing Officer's report provides that she "recommend[s] that the proposed termination be reduced to a 30 day suspension." *Id.*, Exhibit #8.

[12] The notice provides that "the removal action, which was proposed in accordance with section 1608 of Chapter 16 of the regulations, is based on the following cause(s). . . ." Additionally, the notice provides that "after careful review of the advance written notice and the Hearing Officer's *Written Report and Recommendation*; and due consideration of your response, I find that the cause for the proposed removal is supported by the evidence, and it is my final decision to sustain the proposed removal action." This is consistent with the terms outlined in DPM § 1613. *Id.*, Exhibit #10.

ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**, and the Initial Decision is **REVERSED**.

FOR THE BOARD:

_____
William Persina, Chair

_____
Sheree L. Price, Vice Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

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.