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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
TAMEKA GARNER BARRY,)	
Employee)	OEA Matter No. 1601-0083-14
)	
v.)	
)	Date of Issuance: July 11, 2017
DEPARTMENT OF PUBLIC WORKS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Tameka Garner Barry (“Employee”) worked as a Parking Enforcement Officer with the Department of Public Works (“Agency”). On May 23, 2014, Agency issued a final notice to suspend Employee for fifteen work days. The causes of action alleged were “any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious – sleeping on the job” and “any other on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations – neglect of duty.”¹ The effective date of Employee’s suspension was June 1, 2014.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on June 6, 2014. She asserted that the disciplinary action that Agency took was retaliatory in

¹ *Agency’s Answer*, Tab #20 (July 9, 2014).
² *Petition for Appeal*, 5-9 (June 6, 2014).

nature. Therefore, she requested that the suspension be rescinded and that she receive back pay.³

Agency filed its response to Employee's Petition for Appeal on July 9, 2014. It argued that Employee failed to submit evidence supporting her claim for retaliation. It posited that the penalty imposed in the instant matter was proper. It was Agency's position that Employee was appropriately charged per the District Personnel Manual ("DPM"), Chapter 16 § 1619.1. Specifically, Employee was charged with "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations" and "any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious." According to Agency, per the Table of Penalties, the recommended penalty for an initial violation of the two offenses for which Employee was charged is reprimand to suspension for up to ten days and reprimand to suspension for up to fifteen days, respectively.⁴ Agency argued that Employee violated Chapter 18, Section 18.56 of the Standard Operating Procedures for Parking Officers and Supervisory Parking Officers, 2011 which provides that "no parking officer shall...sleep, idle, or lay around while in uniform or when assigned for official activities or fail to perform work assignments that directly impact the public perception of District government employees." Additionally, it provided that the decision rested on the accounts of three eyewitnesses and photographic evidence of Employee sleeping while on duty. Therefore, Agency requested that Employee's suspension action be upheld.⁵

Before issuing her Initial Decision, the OEA Administrative Judge ("AJ") held an evidentiary hearing on November 18, 2015. Both parties submitted closing statements. Agency asserted that a fifteen-day suspension without pay was the appropriate penalty for both charges.

³ *Id* at 2.

⁴ Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees.

⁵ *Agency's Answer*, p. 1-10 (July 9, 2014).

Furthermore, the *Douglas* Factors determined that its decision to suspend Employee from her position was reasonable.⁶ Agency explained that per the testimony provided by Employee's supervisor, sleeping while on duty was a serious offense that had significant ramifications. It reasoned that Employee could have easily been observed by a member of the public while sleeping in Agency's official vehicle. As such, sleeping while on duty could reasonably be expected to have an adverse impact on Agency's reputation. Therefore, Agency requested that its action of suspending Employee be upheld.⁷

In Employee's closing statement, she opined that she was on a break with her partner, Ms. King. While Ms. King used the restroom, Employee stated that she waited in prayer and meditation for her to return. She was approached by her supervisor who accused her of sleeping despite her explanation of being in prayer while she waited for Ms. King to return. Employee argued that per the Standard Operating Procedures for Parking Officers and Supervisors, the facts did not support her charge of alleged sleeping while on duty or interfering with the integrity

⁶ The *Douglas* factors are provided in the matter *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The court held 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.

⁷ *Agency's Closing Statement*, p. 1-28 (April 4, 2012).

and efficiency of government operations. Employee contested the suspension and believed that an oral or written reprimand would be the maximum appropriate punishment for the offense. Furthermore, Employee stated that it was virtually impossible that an employee who fell asleep in a parking lot closed to the public at 1:00 a.m. would cause embarrassment to the District Government. Accordingly, she requested that Agency's decision be reversed.⁸

The AJ issued her Initial Decision on May 25, 2016. She found that Employee was sleeping when the picture was taken and opined that any reasonable person reviewing the picture would conclude that Employee was asleep while on duty. The AJ found Employee's assertion that she was meditating to be unpersuasive. Moreover, the AJ stated that Agency did not abuse its discretion when determining Employee's penalty. Hence, she posited that Agency was within its authority to suspend Employee for fifteen days given the Table of Penalties. However, she found that Agency failed to prove the neglect of duty charge. Because removal was within the range of penalties for sleeping while on duty, the AJ upheld Agency's decision to suspend Employee for fifteen days.⁹

On August 16, 2016, Employee filed her Petition for Review. Employee provides that she was in compliance with her Collective Bargaining Agreement ("CBA"), which states that she is to receive two fifteen minute breaks on each shift, one for each two-hour period worked. Additionally, she argues that her contract did not state that she could not sleep, meditate, or pray during any break while on duty. Accordingly, Employee requests that the Board reverse her suspension with back pay.¹⁰

⁸ *Closing Statement*, p. 1-2 (April 28, 2016).

⁹ *Initial Decision*, p. 1-18 (May 25, 2016).

¹⁰ *Petition for Review*, p.1-2 (August 16, 2016).

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence or when the Initial Decision did not address all material issues of law and fact. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹¹ After reviewing the record, this Board believes that the AJ's assessment of this matter was based on substantial evidence.

Cause

In accordance with DPM § 1603.2, disciplinary actions may only be taken for cause. The AJ ruled that Agency did not prove its neglect of duty charge. However, it did uphold Employee's suspension for the cause of "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious – sleeping on the job," in accordance with DPM § 1603.3(g).

Employee provides that her contract does not state that she cannot sleep while on a break. However, Agency relied on its Code of Conduct outlined in its Standard Operating Procedures for Parking Officers ("PO"). As the AJ provided, section 18.56 of the procedures provide that "no PO shall sleep, idle, or lay around while in uniform or when assigned to official activities, or fail to perform work assignments that directly impact the public perception of District

¹¹*Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

government employees.”¹² Thus, despite Employee’s assertion, the procedures are clear that she should not sleep, idle, or lay around while in uniform. There are no exceptions provided, so the no sleeping requirement included when she was on break. The AJ relied on written statements and testimonies and found that Employee was sleeping while in uniform.¹³ Therefore, Agency adequately proved its charge of sleeping on duty. Based on the aforementioned, it is clear that the AJ’s ruling was based on substantial evidence.

Appropriateness of Penalty

In determining the appropriateness of an agency’s penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).¹⁴ According to the *Stokes* Court, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there

¹² *Agency’s Answer*, Tab #3 (July 9, 2014).

¹³ It is clear from the Initial Decision that the AJ found Agency’s witnesses to be more credible than Employee. This Board has consistently held that it will not question an AJ’s credibility determinations. *Ernest H. Taylor v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September, 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Anita Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012); and *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013). In accordance with *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Kennedy v. District of Columbia*, 654 A.2d 847, 854 (D.C.1994); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 683 A.2d 470, 477 (D.C.1996); *Kennedy*, *supra*, 654 A.2d at 856; and *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C.1989)), due deference must be accorded to the Administrative Judge’s credibility determinations, both by the OEA, and by a reviewing court. The Court in *Raphael v. Okyiri* held that the Administrative Judge’s findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. Thus, although it is hard to determine how much weight the AJ gave to each witness’ testimony, after a review of the hearing transcript, a reasonable mind would accept the credibility determinations the AJ made as adequate to support his conclusion.

¹⁴ *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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 *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

is clear error of judgment by the agency.

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District Government employees. As the AJ stated, Section 1619(7) of the DPM provides the penalties for the charge of “any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.” DPM § 1619(7) specifically lists “sleeping on the job” as conduct included in the cause of action. The penalty for the first offense of this charge is reprimand to suspension for up to fifteen days.

The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that “managerial discretion has been legitimately invoked and properly exercised.”¹⁵ OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.¹⁶ Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

Love went on to provide the following:

[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the

¹⁵ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

¹⁶ *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 and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

This Board believes that the AJ's ruling was proper. The penalty of a fifteen-day suspension was within the range allowed by the regulation. Thus, Employee's fifteen-day suspension was an appropriate penalty for the first offense sleeping on duty.

Consideration of Relevant Factors

The OEA Board held in *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), that an Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.¹⁷ In the current matter, the evidence did not establish an abuse of discretion by Agency. As presented above, the penalty for the first offense of sleeping on duty is reprimand to a fifteen-day suspension. Additionally, Agency presented evidence that it considered relevant factors as outlined in *Douglas* when arriving at its decision to suspend Employee.¹⁸

No Clear Error of Judgment

Based on the aforementioned, there is no clear error in judgment by Agency. The fifteen-day suspension was a valid penalty under the circumstances. This Board does not find a conflict in the CBA, DPM, or Agency's Standard Operating Procedures. Employee presented no evidence that Agency was prohibited by law, regulation, or guidelines from imposing the penalty

¹⁷ This reasoning was also presented in *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

¹⁸ *Agency's Answer*, Tab #22 (July 9, 2014).

of suspension. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Consequently, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.