**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| BRYAN SHANKLE, | ) | OEA Matter No. 1601-0214-12 |
| Employee | ) | |
| | ) | Date of Issuance: January 5, 2016 |
| | ) | |
| DEPARTMENT OF PUBLIC WORKS, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Bryan Shankle ("Employee") worked as an Engineering Equipment Operator for the Department of Public Works ("Agency"). On August 2, 2012, Agency issued a Notice of Final Decision to Employee, notifying him that he would be terminated from his position. Employee was charged with making a false statement or representation knowing it to be false or to increase unemployment insurance benefits.[1] The effective date of the termination was August 10, 2012.[2]

On August 21, 2012, Employee challenged Agency's action by filing a Petition for Appeal with the Office of Employee Appeals ("OEA"). He explained that he was offered a plan to repay the unemployment insurance benefits, but Agency terminated him prior to the issue

[1] The notice explained that in 2008, Employee failed to report his earnings and collected unemployment benefits that he was not entitled to receive.
[2] *Petition for Appeal,* p. 8-10 (August 21, 2012).

being resolved. Therefore, Employee requested that the termination be rescinded and that he be reinstated while continuing to make the scheduled payments toward the balance of the unemployment insurance benefits.[3]

Agency filed its Answer to the Petition for Appeal on September 24, 2012. It asserted that in 2012, the Department of Employment Services ("DOES") issued Employee a Notice of Overpayment after an investigation revealed that he received unemployment insurance benefits to which he was not entitled.[4] Agency learned that from May 31, 2008 to October 25, 2008, Employee repeatedly submitted fraudulent unemployment claim forms and owed $7,898.00 to the District.[5] Ultimately, Agency's Director terminated Employee, concluding that ". . . Employee's actions were so serious that they outweighed any mitigating factors . . . ." [6] Thus,

[3] *Id.* at 2.

[4] Agency explained that from 2008 to 2012, Employee held a number of temporary positions with Agency. After one of the temporary appointments expired on April 25, 2008, Employee applied for and received unemployment insurance benefits. On May 27, 2008, Employee returned to Agency working in a temporary position; however, he continued to apply for and receive unemployment compensation.

[5] As a result, Agency issued Employee an Advanced Written Notice of Proposed Removal. The matter was referred to a Hearing Officer, who sustained the charges but reduced the penalty of removal to a thirty-day suspension.

[6] *Agency Answer,* p.4 (September 24, 2012). Agency also provided that the termination was supported by the factors in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), which 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 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.

Agency requested that Employee's removal be sustained.[7]

The matter was assigned to an OEA Administrative Judge ("AJ"), who scheduled a Status Conference and subsequently issued a Post Status Conference Order.[8] In the Post Status Conference Order, the AJ directed the parties to submit briefs addressing whether Agency's action was taken for cause in accordance with the District's laws; whether Agency engaged in disparate treatment; and whether the penalty of termination was appropriate. Agency's brief provided that Employee violated D.C. Official Code § 51-119(a) when he failed to disclose information in order to receive unemployment insurance benefits. It also provided that Employee's conduct was consistent with District Personnel Manual ("DPM") § 1603.3(h) and the Table of Penalties. Moreover, Agency argued that Employee did not satisfy his burden of proof to establish that there was disparate treatment.[9]

In his brief, Employee claimed that he was subjected to disparate treatment. He provided that there were other employees who committed the same offense but were not terminated. Employee explained that after DOES notified him that he was in violation of the law, he immediately made arrangements to repay the money owed.[10] He believed that the penalty was unreasonable because Agency did not adhere to its policies and because he had an excellent record with no past disciplinary actions.[11]

On March 20, 2014, the AJ issued her Initial Decision. She found that in order to prove

[7] *Id.* at 7.
[8] *Order Convening a Status Conference* (December 2, 2013) and *Post Status Conference Order* (January 23, 2014).
[9] *Agency's Brief,* p. 5-10 (February 12, 2014).
[10] Employee explained that prior to DOES' notification, he did not know that he was violating any laws. He was also informed that he would not face any charges as long as he continued to repay the money owed.
[11] *Employee Brief* (March 4, 2014). In reply to Employee's brief, Agency provided that Employee's conduct was distinguishable from that of the comparison employee mentioned to support his claim of disparate treatment. It explained that Employee's conduct lasted for six months and that he unlawfully received unemployment compensation twenty-two times, while the conduct of the comparison employee consisted of one month and five instances of collecting unemployment compensation. Further, Agency provided that the comparison employee owed much less to the District than Employee. Finally, Agency reiterated that the mitigating factors did not outweigh the seriousness of the offense, the length of time that Employee continued to receive unemployment, and the amount of money that Employee collected. *Agency Reply Brief* (March 12, 2014).

that Employee violated D.C. Official Code § 51-119(a), Agency needed to show that Employee made a false statement of a 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. After reviewing the party's submissions, the AJ held that Employee knowingly submitted unemployment claim forms that did not include his employment status in order to collect unemployment insurance benefits. Thus, the AJ ruled that Agency had cause to discipline Employee.[12]

With regard to the appropriateness of the penalty, the AJ found that Agency violated DPM § 1613.2 when its Deciding Official increased the Hearing Officer's recommended penalty.[13] She explained that the Hearing Officer recommended that Employee's proposed termination be reduced to a thirty-day suspension, but the Deciding Official proceeded with the termination. Thus, the AJ found that Agency abused its discretion. Accordingly, Agency's action was reversed, and it was ordered to reinstate Employee with back pay and benefits. The AJ ordered that Employee be suspended for thirty days, as recommended by the Hearing Officer.[14]

Agency filed a Petition for Review with the OEA Board on April 24, 2014. It argues that the Initial Decision was based on an erroneous interpretation of the DPM. It explains that pursuant to DPM § 1613.2, it could not impose a greater penalty than the proposed penalty. Agency argues that its Director followed this regulation – the proposed penalty was sustained, and the Hearing Officer's recommended penalty was rejected. Therefore, it requests that the

[12] As for Employee's claim of disparate treatment, the AJ found that he did not meet his burden of proof for this allegation. She reasoned that Employee did not present evidence to prove that the comparison employee held the same position and was disciplined by the same supervisor. *Initial Decision,* p. 5 (March 20, 2014).

[13] DPM § 1613.2 provides that:

> [t]he 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.

[14] *Initial Decision,* p. 6-7 (March 20, 2014).

Initial Decision be vacated and that its termination action be affirmed.[15]

As previously held in *John Judd v. Department of Public Works,* OEA Matter No. 1601-0184-12, *Opinion and Order on Petition for Review* (April 14, 2015), 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 a removal; and
> (h) The right to a written decision.

[15] *Agency's Petition for Review,* p. 4-5 (April 24, 2014).

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.[16] Additionally, the proposed penalty of removal is discussed in the Hearing Officer's report and recommendations.[17] Moreover, it is noted in the Notice of Final Decision on Proposed Removal.[18] Thus, the AJ did misinterpret the regulations. 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 was well within his authority to do. Therefore, the AJ's ruling on Initial Decision must be reversed.[19] Accordingly, Agency's Petition for Review is granted.

[16] 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 Engineering Equipment Operator . . . ." *Agency Answer*, Exhibit #10 (September 24, 2012).

[17] 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 #12.

[18] 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 #13.

[19] This Board agrees with the AJ's determination that Agency had cause to remove Employee from his position. There is adequate evidence in the record to support this conclusion. In accordance with DPM § 1619(8), the penalty for the cause of action is suspension for ten days to removal. Because removal was within the range of penalties for a first offense of this action, Agency's penalty was appropriate. Thus, there is no need to remand the matter to the AJ for any further review.

## ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**. The Initial Decision is **REVERSED**, and Employee's removal is **UPHELD**.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
A. Gilbert Douglass

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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.