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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
MARIA AMAYA,	)	
Employee	)	OEA Matter No. 1601-0178-12
	)	
v.	)	Date of Issuance: April 9, 2014
	)	
DISTRICT OF COLUMBIA DEPARTMENT	)	
OF EMPLOYMENT SERVICES,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge
<hr/>		
Dawn Crawford, Employee Representative		
Tanya Sapp, Esq., Agency Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 3, 2012, Maria Amaya (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Employment Services’ (“DOES” or “Agency”) decision to suspend her for ten (10) days effective July 23, 2013. Following an Agency investigation, Employee was charged in accordance with § 1603.3(f)(3) and § 1603.3 (f) (6) of the District Personnel Manual (“DPM”).<sup>1</sup> At the time of her suspension, Employee was a Manpower Development Specialist at Agency. On September 12, 2012, Agency submitted its Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on October 25, 2013. Thereafter, I issued an Order scheduling a Status Conference in this matter for December 3, 2013.<sup>2</sup> On December 9, 2013, Employee filed a request for a continuance of the Status Conference due to a sudden illness. This request was granted in an Order dated December 13, 2013. The Status Conference was rescheduled for January 13, 2014. Both parties were in attendance. On January 14, 2014, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Agency submitted a

<sup>1</sup> § 1603.3 (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: (3): Neglect of duty; and (6): Misfeasance (dishonesty).

<sup>2</sup> On or around December 3, 2013, Employee’s representative requested that the Status Conference in this matter be continued. The undersigned AJ advised Employee’s representative that in order to continue this matter, Employee’s representative has to submit a written request to this Office.

timely brief, but Employee did not. Consequently, on March 5, 2014, the undersigned issued an Order for Statement of Good Cause wherein, Employee was required to submit her brief, along with a statement of cause for her failure to submit her Post Status Conference brief. Employee had until March 14, 2014, to respond to the March 5, 2014, Order. On March 19, 2014, Employee submitted her brief. After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

### JURISDICTION

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

### ISSUES

- 1) Whether Agency's action of suspending Employee for ten (10) days was done for cause; and
- 2) Whether the penalty of suspension is within the range allowed by law, rules, or regulations.

### FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a Manpower Development Specialist with Agency in 2012. As part of her job requirements, Employee was tasked with providing coverage at the DC Works! Career Center Northwest (Reeves Center One-Stop) location until 4:00 pm from Monday through Friday. On April 6, 2012, Employee closed and locked up the resource area at the Reeves Center prior to the official closing time of 4:00 pm.<sup>3</sup> Thereafter, an investigation was conducted and subsequently, on June 1, 2012, Agency issues an Advanced Written Notice of Proposed Suspension of 15 days to Employee.<sup>4</sup> Employee submitted a response to the Proposed Suspension on June 11, 2012.<sup>5</sup> Subsequently, on July 6, 2012, Agency issued its Final Decision on Proposed Suspension, reducing Employee's suspension from fifteen (15) days to ten (10) days.<sup>6</sup>

#### ***Employee's Position***

In her submissions to this Office, Employee acknowledges that she closed the resource center 5-10 minutes prior to the official close of business time on April 6, 2012. Employee explains that she closed the center early due to lack of customers visiting the resource center for services. Employee further notes that, there were no customer complaints filed due to her early

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<sup>3</sup> Agency provided evidence from two Agency employees stating that Employee closed the center on or around 3:38 pm and 3:40 pm respectively. However, Employee stated that she closed the center 5-10 minutes early due to a lack of customers visiting the resource center for service. *See* Employee's brief (March 19, 2014).

<sup>4</sup> Agency's Answer at Tab 3 (September 12, 2012).

<sup>5</sup> *Id.* at Tab 4.

<sup>6</sup> *Id.* at Tab 5.

closure of the center on April 6, 2012. Employee questions the authenticity of the statements provided by Agency in support of its charge against Employee. Employee explains that, because the names of the authors of the statements are redacted, the statements are questionable. Additionally, Employee submits that, DOES management failed to answer the Union's questions on April 27, 2012, pursuant to its Collective Bargaining Agreement ("CBA"), in violation of Article 17 of the CBA. Specifically, Employee highlights that, Agency should have concluded its investigation on or before May 9, 2012, therefore, the proposed action was filed untimely. Employee also notes that the penalty of ten (10) days suspension is too severe for the charge.<sup>7</sup>

### ***Agency's Position***

Agency submits that Employee was tasked to staff the resource area until 4:00 pm on April 6, 2012; however, she admitted that she closed the resource center before 4:00 pm, thereby, failing to carry out her assigned tasks. Agency notes that Employee's conduct constitutes Neglect of Duty and as such, she is subject to corrective or adverse action. Agency also highlights that, after Employee's premature closing of the resource area, it had to pull another employee from their assigned duties to reopen the resource area to ensure that the public had access to DOES services.<sup>8</sup>

In addition, Agency avers that, Employee provided misleading or inaccurate information about the time that she closed the resource area and about her attempts to find coverage for the resource area by calling her co-worker. Agency states that Employee's conduct constitutes Misfeasance and is subject to corrective or adverse action. Agency explains that in a meeting with Employee on April 9, 2012, Employee stated that she closed the resource center five (5) minutes prior to the official close time. However, during the investigative meeting held on April 26, 2012, Employee advised that she closed the resource area at 3:50 p.m., contrary to the statement she provided on April 9, 2012. Agency further submits that, contrary to Employee's statement that she called her co-workers in order to find coverage for the resource center, a thorough and extensive search of Employee's phone record from April 6, 2012, clearly indicates that Employee did not call any DOES employees between 3:30 pm and 4:00 pm. Agency further maintains that the penalty of ten (10) days suspension is within the parameters outlined by the Table of Penalties.<sup>9</sup>

### ***Analysis***

#### **1) Whether Employee's actions constituted cause for discipline**

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(f)(3) and (6), the definition of "cause" includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include, (3) neglect of duty and (6) misfeasance.

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<sup>7</sup> Employee's Brief, (March 19).

<sup>8</sup> Agency's Brief (February 7, 2014).

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

Here, Employee's ten (10) days suspension was based upon a determination by Agency that Employee neglected her duties when she failed to carry out her assigned tasks. As a Manpower Development Specialist at the Reeves center, Employee had a responsibility to staff the resource area on Monday – Friday until 4:00 pm. Agency obtained statements from two (2) other employees stating that Employee closed the resource area between 3:38 pm and 3:40 pm. However, Employee argues that because the names of the employees who provided the statements were redacted, the statement could not be authenticated. Assuming *arguendo* that Employee's argument is valid, Employee, through her own admission stated in her brief that she closed the resource area 5-10 minutes prior to the official closing time. By closing the resource area on April 6, 2012, prior to the official closing time, I find that Employee neglected her assigned duties. Based solely on Employee's admission, I conclude that Agency had cause to institute this cause of action against Employee.

With regards to the charge of Misfeasance, Agency submits that Employee submitted contradictory statements with regards to when she closed the resource center. Agency also argues that, contrary to Employee's assertion that she contacted another staff member on April 6, 2012, a review of Employee's phone record from April 6, 2012, clearly indicates that Employee did not call any DOES employees between 3:30 pm and 4:00 pm. Moreover, throughout her appeal process with this Office, Employee has not offered any evidence to challenge the charge of misfeasance. Accordingly, I find that Agency had cause in instituting this cause of action against Employee.

***Collective Bargaining Agreement:***

Employee submits that, Agency failed to answer the Union's questions on April 27, 2012, CBA, in violation of Article 17 of the CBA. Specifically, Employee highlights that, Article 17, § 6 of the AFGE local CBA provides that, an employee shall be notified in writing of any proposed disciplinary action for cause with thirty (30) calendar days of the occurrence or knowledge of occurrence *excepting additional time needed for investigation* (emphasis added). Employee contends that, Agency should have concluded its investigation on or before May 9, 2012, therefore, the proposed action was filed untimely.

In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that OEA is not jurisdictionally barred from considering claims that a [suspension] violated the express terms of an applicable collective bargaining agreement. The court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in [suspension], including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure."<sup>10</sup> Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between AFGE and DOES, as it relates to the adverse action in question in this matter.

Based on Employee's assertion, Agency was made aware of the April 6, 2012, incident involving Employee on April 9, 2012. Employee also highlights that according to the CBA, Agency

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<sup>10</sup> Pursuant to D.C. Code § 1-616.52(d), "[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization *shall take precedence* over the procedures of this subchapter for employees in a bargaining unit represented by the labor organization" (emphasis added).

was required to provide Employee with written notice of any proposed disciplinary action for cause within thirty (30) days from April 9, 2012. Agency issued it Advanced Written Notice of Proposed Suspension of 15 days to Employee on June 1, 2012, outside of the required thirty (30) days stated in the CBA. However, because neither party provided this Office with a copy of the alleged CBA, the undersigned is unable to address this issue. Moreover, there is evidence in the record to show that the email dated April 26, 2012, from Rahsaan Coefield (Equal Opportunity Manager/Labor Relations Advisor) to Employee, notified Employee that the results of the scheduled meeting to discuss the April 6, 2012, closing of the resource area could lead to corrective or adverse action.<sup>11</sup> Additionally, the CBA provision as stated by Employee allows for an exception to the thirty (30) days requirement, wherein, additional time is needed for investigation. Here, while Employee states that the last document submitted during the investigation process was May 8, 2012; this does not by itself prove that the investigation into this matter ended on May 8, 2012. Further, the parties were required to submit briefs and *supporting documents* with regards to the issue of Employee's suspension (emphasis added). Consequently, by failing to provide this Office with all supporting documents in this matter, I find that there is insufficient information in the record for the undersigned to properly address this issue.

**2) Whether the penalty of ten (10) days suspension is within the range allowed by law, rules, or regulations.**

Employee also notes that the penalty of ten (10) days suspension is too severe for the charge. 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).<sup>12</sup> According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of “[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Misfeasance”, and as such, Agency can rely on these charges in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for “[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Misfeasance” are found in § 1619.1(6)(c) and 1619.1(6)(f) of the DPM. Employee's conduct constitutes an on-duty or employment-related act

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<sup>11</sup> Petition for Appeal.

<sup>12</sup> 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 *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

or omission that interferes with the efficiency and integrity of government operations and it is consistent with the language of § 1619.1(6)(c) and § 1619.1(6)(f) of the DPM. The penalty for a first offense for Neglect of duty is reprimand to removal. The record shows that this was the first time Employee violated §1619.1(6)(c). The penalty for a first offense for Misfeasance is suspension for 15 days. The record also shows that this was the first time Employee violated §1619.1(6)(f). Therefore I find that, by suspending Employee for ten (10) days, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.<sup>13</sup> When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. Agency has properly exercised its managerial discretion and I find that the penalty of ten (10) days suspension was within the range allowed by law. Accordingly, Agency was within its authority to suspend Employee for ten (10) days given the Table of Penalties. I further find that Agency's action should be upheld.

#### ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for ten (10) days is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Administrative Judge

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<sup>13</sup> *Love* also provided that “[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 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, is it 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).