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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
BELYNDA ROEBUCK,)	OEA Matter No. 1601-0098-12
Employee)	
)	
v.)	Date of Issuance: July 21, 2015
)	
DISTRICT OF COLUMBIA OFFICE ON)	
AGING,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Belynda Roebuck (“Employee”) worked as a Special Projects Coordinator with the D.C. Office on Aging (“Agency”). On April 11, 2012, Employee received a Final Notice of Summary Removal from Agency informing her that she would be terminated from her position. She was charged with 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.¹ The effective date of the termination was April 11, 2012.²

Employee challenged Agency’s action by filing a Petition for Appeal with the Office of

¹ The notice explained that Employee failed to report her earnings from the D.C. Government Personnel Office for the weeks ending on September 4, 2010, September 11, 2010 and September 18, 2010. As a result, she continued to collect unemployment insurance benefits to which she was not entitled.

² *Petition for Appeal*, p. 64-67 (May 11, 2012).

Employee Appeals (“OEA”) on May 11, 2012. She provided, *inter alia*, that the overpayment for unemployment benefits was the result of Agency’s non-payment of earnings for the weeks of August 30, 2010 through September 11, 2010. Employee explained that during this time, Agency did not have the funds to pay her, and it “. . . knowingly deferred the recordation of said payroll transaction incurred in fiscal year 2010 to a subsequent fiscal year . . . to deliberately cover up the misappropriation of . . . funds.”³ Moreover, Employee provided that Agency violated her due process rights when it did not comply with the District Personnel Manual (“DPM”) governing the notice requirements for adverse actions. Therefore, she requested reinstatement, back pay, benefits, and damages for pain and suffering.⁴

In its Answer to the Petition for Appeal, Agency provided that Employee began working full time on August 30, 2010 but continued to file for and receive unemployment compensation after that date. It explained that Employee failed to disclose her earnings to the Department of Employment Services (“DOES”). With regard to Employee’s claim that it did not pay her for the weeks of August 30, 2010 through September 11, 2010, Agency provided that this non-payment was the result of an administrative error. However, Agency contended that this error did not justify Employee’s actions regarding unemployment compensation.⁵ Lastly, Agency argued that removal was an acceptable penalty under Chapter 16 the DPM. Thus, it requested that the removal be upheld.⁶

The matter was assigned to an OEA Administrative Judge (“AJ”), who scheduled a Status

³ Employee also provided that she was retaliated against for participating in a case involving the Whistleblower Act and because she alleged that Agency violated the Anti-Deficiency Act. *Id.* at 2-4.

⁴ *Id.*

⁵ Furthermore, Agency provided that Employee accepted full responsibility for her actions and began making payments to DOES in order to remedy the overpayments that she received.

⁶ With regard to Employee’s retaliation allegation, Agency provided that Employee’s claim was meritless. In addition, with regard to Employee’s concern with the Anti-Deficiency Act, Agency submitted that this allegation was not germane to Employee’s termination. *Agency Answer*, p. 5-9 (June 26, 2012).

Conference and subsequently issued a Post Status Conference Order.⁷ 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 she failed to disclose information in order to receive unemployment compensation. It also provided that in making its decision to terminate Employee, it considered the *Douglas* factors and the DPM's Table of Penalties.⁸ Agency asserted that its decision was not arbitrary or capricious.⁹

Employee's brief provided that Agency failed to prove that she violated D.C. Official Code § 51-119(a). She reasoned that in accordance with *Richard Jacobs v. District Unemployment Compensation Board*, 382 A.2d 282 (D.C. 1978), Agency needed to prove that she knowingly falsified and submitted unemployment compensation forms. Employee explained that she did not intend to defraud Agency and that during the time that she submitted the

⁷ *Order Convening a Status Conference* (October 9, 2013) and *Post Status Conference Order* (November 6, 2013).

⁸ The *Douglas* factors 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 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. *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

⁹ *Agency's Brief in Support of Employee's Removal*, p. 5-8 (November 27, 2013).

unemployment compensation forms, she was not receiving wages from Agency. Employee went on to provide that Agency engaged in disparate treatment. She alleged that there were three other Employees who were receiving unemployment compensation while working, but Agency did not terminate them.¹⁰ Lastly, Employee provided that Agency did not weigh the *Douglas* factors or any mitigating circumstances when making its decision to terminate her.¹¹

On February 5, 2014, the AJ issued her Initial Decision. She found that in order to prove 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 falsified and submitted Continued Claim Forms in order to collect unemployment compensation in the amount of one thousand five hundred and thirty-six dollars (\$1,536.00).¹² She reasoned that Employee began working at Agency on August 30, 2010, but on the Continued Claim Forms, she reported that she was not working. Thus, the AJ ruled that Agency had cause for the adverse action.¹³

With regard to the appropriateness of the penalty, the AJ found that Agency considered the *Douglas* factors when making its decision to terminate Employee. Thus, she held that Agency's decision to remove Employee was not an error of judgment. Lastly, as it relates to the proper notice, the AJ found that Agency did not provide Employee with an advanced fifteen-day notice in accordance with DPM §1608.1(a). However, she ruled that this error was harmless and

¹⁰ In reply to this assertion, Agency argued that Employee failed to make a *prima facie* showing of disparate treatment because she did not show that the charges and circumstances were similar to the other alleged three employees. *Agency's Reply Brief* (January 6, 2014).

¹¹ *Employee's Brief in Opposition of Employee's Removal*, p. 5-12 (December 18, 2013).

¹² The AJ was not persuaded by Employee's argument that her case was analogous with *Richard Jacobs v. District Unemployment Compensation Board. Initial Decision*, p. 5-7 (February 5, 2014).

¹³ As for Employee's claim of disparate treatment, the AJ found that Employee did not present evidence in support of this allegation.

could be corrected by ordering Agency to compensate Employee with fifteen days' pay and benefits. Accordingly, Agency's action was upheld, but it was ordered to reimburse Employee for fifteen days' pay and benefits for its failure to provide her the proper notice.¹⁴

Agency filed a Petition for Review with the OEA Board on March 12, 2014. It argues that the Initial Decision was not based on evidence in the record. It claims that on February 8, 2012, it provided Employee an advanced written notice of its proposal to terminate her. It explains that sixty-two days after that date, it notified Employee of its decision to sustain the action.¹⁵ Therefore, Agency requests that the AJ's determination regarding the fifteen days' back pay be overruled.¹⁶

Employee also filed a Petition for Review. She argues that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy; that the AJ's findings were not based on substantial evidence; and that the Initial Decision did not address all issues of fact raised in the Petition for Appeal. Employee asserts that the AJ was wrong in supporting Agency's contention that it considered the *Douglas* factors when it terminated her. She reiterates that there were mitigating circumstances, but the AJ did not consider them. Moreover, Employee believes that AJ should have conducted an evidentiary hearing. Lastly, Employee provides that the AJ did not address the issue of collateral estoppel. Employee claims that when the AJ made her ruling regarding whether she knowingly and willfully failed to report her earnings, she failed to consider two contrary holdings in decisions issued by the Office of Administrative Hearings. Thus, Employee believes that the Initial Decision should be reversed and requests reinstatement

¹⁴ *Id.*, 8-11.

¹⁵ Moreover, Agency provides that Employee was provided an opportunity to respond to the proposed removal and have her matter reviewed by a hearing officer.

¹⁶ *Agency's Petition for Review*, p. 3-4 (March 12, 2014).

with back pay and benefits.¹⁷

In opposition to Employee's Petition for Review, Agency argues that the AJ's findings regarding the appropriate penalty are supported by substantial evidence. Furthermore, Agency contends that Employee did not explain the error the AJ made with regard to the appropriateness of the penalty.¹⁸ With regard to Employees argument that the AJ should have held an evidentiary hearing, Agency provides that the AJ was not required to conduct an evidentiary hearing.¹⁹ As for Employee's collateral estoppel argument, Agency argues that this doctrine does not apply to unemployment compensation matters.²⁰ Therefore, Agency requests that the termination be upheld.²¹

Fifteen-day Advanced Notice

DPM § 1608.1(a) provides the following:

Except in the case of a summary suspension action pursuant to § 1615 or a summary removal action pursuant to § 1616, an employee against whom corrective or adverse action is proposed shall have the right to an advance written notice, as follows:

- (a) In the case of a proposed adverse action, an advance written notice of fifteen (15) days

Therefore, Agency was required to provide an advance written notice fifteen days before rendering a final decision. The AJ ruled that Agency failed to provide the requisite fifteen-day notice to Employee. However, the record does not support this ruling.

¹⁷ *Employee's Petition for Review* (March 13, 2014).

¹⁸ Agency explained that it had primary discretion over choosing the appropriate penalty, and the AJ could not substitute her judgment and decide which penalty was proper. Agency contends that its decision was supported by substantial evidence.

¹⁹ Furthermore, Agency explains that the AJ ordered the parties to submit briefs, and a hearing was not needed because there were no material facts in dispute.

²⁰ Agency cites *Markus Jahr v. D.C. Office of Employee Appeals*, 19 A.3d 334 (D.C. 2011), *as amended* (May 26, 2011) and states that pursuant to the Unemployment Compensation Act, Employee is barred from applying her unemployment compensation finding to an OEA decision. Agency contends that unemployment compensation decisions have no preclusive effect on OEA decisions. *Agency's Opposition to Employee's Petition for Review*, p. 10 (April 15, 2014).

²¹ *Id.* at 12.

Employee's Petition for Appeal provides that an Advanced Written Notice of Proposed Removal was issued to her on February 8, 2012.²² The record also provides Employee's response to the advanced notice.²³ Moreover, the record shows that a notice of Final Decision was provided to Employee sixty-three days later, on April 11, 2012.²⁴ This procedural history of the notices is consistent with what Agency provided in its Answer to Employee's Petition for Appeal. Agency provided that Employee was provided an Advanced Notice on February 8, 2012; she submitted a written response on February 13, 2012; and finally, it served its Final Decision on April 11, 2012.²⁵ Therefore, contrary to the AJ's determination, the fifteen-day advanced written notice was provided.

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. 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.²⁶ There is no substantial evidence to support the AJ's decision regarding the advanced notice. Because the record offers sufficient evidence that Agency complied with DPM § 1608.1(a), we must reverse the AJ's ruling on this issue. Therefore, Agency's Petition for Review is granted, and the AJ's ruling for fifteen days' back pay is reversed.

²² *Petition for Appeal*, p. 20-21 (May 11, 2012) and *Exhibits in Support of Agency's Answer*, p. 61 (June 26, 2012).

²³ *Id.*, 22-23.

²⁴ *Id.*, 64-67.

²⁵ *Agency Answer*, p. 4-5 (June 26, 2012).

²⁶ *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).

Cause

Employee argues on Petition for Review that the AJ's decision was based on an erroneous interpretation of the DPM and that she failed to adequately consider the *Douglas* factors. Agency charged Employee with DPM § 1603.3(h) "any act which constitutes a criminal offense whether or not the act results in a conviction." Employee was specifically charged with violating D.C. Official Code § 51-119(a) for knowingly and willfully failing to report her earnings while continuing to collect unemployment benefits.

D.C. Official Code § 51-119(a) provides the following:

Whoever makes a false statement or representation knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment provided for in this subchapter or under an employment security law of any other state, of the federal government, or a foreign government for himself or any other individual, shall, for each such offense, be fined not more than \$100 or imprisoned not more than 60 days, or both.

As the AJ provided, violation of D.C. Official Code § 51-119(a) could have resulted in a criminal offense. The notice to Employee from the DOES, Office of Unemployment Compensation clearly provided that Employee's ". . . failure . . . to voluntarily satisfy this liability may result in collection by civil or criminal action against you . . ." ²⁷ Moreover, a notice from the DOES, Benefit Payment Control Branch provided that ". . . if it is established that you willfully misrepresented material facts in order to obtain benefits to which you were not entitled, an administrative penalty which may result in criminal prosecution and possible imprisonment will be imposed." ²⁸ The record provides, and Employee does not dispute, that she was charged with failing to report her earnings while collecting unemployment benefits. Thus, despite the ruling of any other administrative agency, Agency proved that it had cause to remove

²⁷ *Exhibits in Support of Agency's Answer*, p. 134 (June 26, 2012).

²⁸ *Id.* at 170.

Employee from her position.

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). According to *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. 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."²⁹ As a result, OEA has consistently held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.³⁰

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

DPM § 1619(8) provides the range of penalty for a first offense of any act which constitutes a criminal offense whether or not the act results in a conviction. The penalty for a

²⁹ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided 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 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.

³⁰ *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).

first offense ranges from a fifteen-day suspension to removal. Because removal is within the range, the penalty was appropriate for the cause of action.

Douglas factors

The Court in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981) provided factors that an agency should consider when determining the penalty of adverse action matters. As the AJ held, the *Douglas* factors were considered by Agency. Before reaching its final decision, Agency reviewed the Hearing Officer's report on this matter. The Hearing Officer's report outlined each of the *Douglas* factors and held that "Employee's conscious failure to report her earnings to [the Department of Employment Services] in order to continue to unlawfully receive unemployment benefits places her squarely within violation of Chapter 16 of the DPM. As such, the penalty of REMOVAL is within the acceptable range of penalties."³¹ Hence, the *Douglas* factors were indeed considered by Agency.

Evidentiary Hearing

As for Employee's argument that the AJ failed to conduct an evidentiary hearing, this was not a requirement for the AJ. OEA Rule 624.2 clearly provides that an evidentiary hearing is within an Administrative Judge's discretion. The rule provides that

If the Administrative Judge grants a request for an evidentiary hearing, or makes his or her own determination that one is necessary, the Administrative Judge will so advise the parties and, with appropriate notice, designate the time and place for such hearing and the issues to be addressed (emphasis added)

Thus, the AJ was within her authority to determine that a hearing was not required.

Collateral Estoppel

This Board finds that Employee's collateral estoppel arguments are meritless. The OEA Board held in *Markus Jahr v. D.C. Department of Fire and Emergency Services*, OEA Matter

³¹ *Exhibits in Support of Agency's Answer*, p. 52-53 (June 26, 2012).

No. 1601-0180-99, *Opinion and Order on Petition for Review* (February 27, 2007) that “another agency’s decisions, such as the Office of Unemployment Compensation, cannot prevent this Office from carrying out its statutory duty.” As D.C. Official Code § 51-111(j) expressly states, a determination made by another body is not binding in a subsequent proceeding between an employee and his employer. The OEA Board in *Jahr* reasoned that the goal of the legislation in creating the D.C. Unemployment Office was not so that an employee could take a favorable opinion from that office to be used to prohibit another adjudicatory agency, such as OEA, from carrying out its statutory duty.³² Accordingly, the collateral estoppel issues raised by Employee are baseless before this adjudicatory agency.

Conclusion

Agency did prove that it had cause to remove Employee. Additionally, the penalty of removal was within the range under the Table of Penalties. Therefore, Employee’s Petition for Review is denied.

³² This ruling was upheld by the D.C. Court of Appeals in *Markus Jahr v. D.C. Office of Employee Appeals*, 19 A.3d 334 (D.C. 2011).

ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**, and the Administrative Judge's order for reimbursement of fifteen days' back pay is reversed.

It is further **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

William Persina, Chair

Sheree L. Price, Vice Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.