

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Laveria Smith)	OEA Matter No. 1601-0064-11
Employee)	
)	
v.)	Date of Issuance: November 4, 2013
)	
DC Department of Employment Services)	Joseph E. Lim, Esq.
Agency)	Senior Administrative Judge
_____)	

Laveria Smith, Employee *pro se*¹
Renee McPhatter, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On February 8, 2011, Employee filed a petition for appeal with this Office regarding her January 14, 2011, removal as a Claims Clerk by the agency for malfeasance.

I held a Prehearing Conference and subsequently concluded that a hearing was not warranted. I ordered the parties to submit their legal briefs on the issue of whether D.C. Department of Employment Services (“Agency”)’s choice of Employee’s penalty should be upheld. The record was closed after the parties filed their submissions.

JURISDICTION

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

ISSUE

Whether Agency had proper cause to remove Employee from service.
If so, whether Agency’s penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following facts are undisputed.

1. Employee was a Claims Clerk for the Agency’s Workers’ Compensation Department from January 2009 to January 2011. She was a career service, union employee.
2. As a Claims Clerk, Employee was responsible for a variety of administrative and

¹ Employee was initially represented by her union. However, the union withdrew its representation on September 13, 2012, after complaining that Employee to respond to them.

analytical duties under the supervision of the Office of Workers Compensation supervisor. Employee's duties included assisting Claims Examiners in developing claims for Workers Compensation; seeking out missing information through telephone or face-to-face contact with the injured worker, employer, representative of insurance companies, attorney and other concerned parties and recording information in the claimant's case file; reviewing claims to determine type of injury, nature of injury and part of body affected as a result of the injury and affixing proper coding on forms for computer entry purposes; receiving telephone calls and answering inquiries of a general nature regarding Workers Compensation; referring callers seeking technical information to Claims Examiners or appropriate persons or offices; and reproducing, assembling and distributing office correspondence, as required. *See Agency Attachment 1, Position Description of Claims Clerk*

3. From July 6, 2010 to September 23, 2010, Employee used her District of Columbia issued computer on numerous occasions to enter the Unemployment Insurance database maintained by Agency and altered the unemployment insurance records of Dante Tyler, her son's father and a claimant receiving unemployment insurance benefits. *See Agency Attachment 2, List of Address Changes to DOES Unemployment Insurance database.*
4. Employee was not authorized or directed by DOES to perform any tasks pertaining to unemployment insurance benefits. Further, Employee was not authorized or directed by DOES to alter claimant unemployment insurance benefit records. Lastly, DOES employees are forbidden from working on the unemployment insurance claim of any personal friend.
5. On October 15, 2010, Employee used her District of Columbia issued computer and email account to send email correspondence to Mr. Dante Tyler, an unemployment insurance (UI) claimant. The email contained a file over 10 megabytes in size. The file contained a picture that was sexual in nature. *See Agency Attachment 3, October 15, 2010 Email and attachment.*
6. On October 19, 2010, Employee used her District of Columbia issued computer and email account to send email correspondence containing personal information to Mr. Tyler. The email correspondence contained Employee's signature block that identified her as an employee of DOES and provided DOES' address. *See Agency Attachment 4, October 19, 2010 email.*
7. On October 25, 2010 Employee used her District of Columbia computer and email account to send harassing and threatening email correspondence to Mr. Tyler regarding Demitrea Foote, an apparent romantic partner of Mr. Tyler. Employee wrote the following: "Dee FUCK YOU BITCH AND I'M READING [sic] ANYTIME YOU FEEL YOU GOT THE HEART TO BE READY TO GET YOUR ASS FUCKED UP BITCH." The email correspondence contained Employee's signature block that identified her as an employee of DOES and provided DOES' address. *See Agency Attachment 5, October 25, 2010 email.*
8. On November 23, 2010, DOES mailed and hand delivered a fifteen (15) day advance written notice of proposal to remove the Employee from her position as a Claims Clerk in the Office of Workers Compensation. The cause for the termination was based on the charge of "an employment-related act or omission that interferes with the efficiency and

integrity of government operations.” See *Agency Attachment 6, Advance Written Notice*.

9. On December 23, 2010, Employee submitted a written response to the advance written notice. Employee admitted the misconduct in her response but asserts that she was unaware that her conduct was illegal. See *Agency Attachment 7, Employee's written response*.
10. On January 4, 2011, the Hearing Officer, assigned to conduct the administrative review of the proposed removal action, submitted the required Written Report and Recommendation to the Deciding Official. The Hearing Officer recommended removal.
11. On January 10, 2011, the Deciding Official issued a decision to sustain removal.
12. On January 14, 2011, Employee was removed from her position as a Claims Clerk in the Office of Workers Compensation.

Employee does not deny any of the charges, but at the prehearing conference, she argued that the ultimate penalty of removal was too severe. In her legal brief, Employee emphasized that this incident came to light only because the target of her ire, Demitrea Foote, complained to Agency about her emails. Employee points out that Dante Tyler’s written retraction proves that Ms. Foote was a liar. She emphasizes that she did not know that her actions were grounds for adverse action.

What Employee fails to realize is that she was terminated not because of the credibility of the complainant, but because she used her position to access Agency’s computer to alter the unemployment insurance record of a claimant without authorization and to send personal emails of a sexual and harassing nature to a romantic rival. Agency’s policies clearly prohibits these actions. See *Agency Attachment 8, Dept. of Human Resources Ch. 18 Employee Conduct, Electronic-District Personnel Manual and Agency Attachment 11, D.C. Email Use Policy*. Employee’s misconduct violated Ethics Rule 1803.1 and constituted malfeasance as contemplated by the District Personnel Manual, Chapter 16, Section 1603.3(0(7)). See *Agency Attachment 9, District Personnel Manual, chapter 16*.

Because of Employee’s admission, there was never any question that the agency had met its burden of establishing cause for taking adverse action. However, Employee asserts that her penalty should be overturned and that she should be returned to work.

As noted above, the only remaining issue is whether the discipline imposed by the agency was an abuse of discretion. Any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency’s work force is a matter entrusted to the agency, not this Office. See *Huntley v. Metropolitan Police Dep’t*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ___ D.C. Reg. ___ (); *Hutchinson v. District of Columbia Fire Dep’t*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), ___ D.C. Reg. ___ (). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.”² When the charge is upheld, this Office

² *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."³

The record shows that the Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present. Agency noted that the Table of Appropriate Penalties for this misconduct for a first offense ranges from Suspension for 30 days to Removal. *See Agency Attachment 10, District Personnel Manual, Table of Appropriate Penalties.*

For the foregoing reasons, I conclude that the Agency's decision to select removal as the appropriate penalty for the employee's infractions was not an abuse of discretion and should be upheld.

ORDER

It is hereby ORDERED that the agency action removing the employee is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

³ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).