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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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In the Matter of:)	
)	OEA Matter Nos. 1601-0010-13R16
KENYA FULFORD-CUTHBERTSON)	1601-0016-13R16
TONIA ADAMS)	1601-0017-13R16
MATTHEW COATES, and)	1601-0018-13R16
JALONDA PHILLIPS-ARMSTEAD,)	
Employees)	
)	
v.)	
)	Date of Issuance: June 6, 2017
DEPARTMENT OF)	
CORRECTIONS,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Kenya Fulford-Cuthbertson, Tonia Adams, Matthew Coates, and Jalonda Phillips-Armstead (“Employees”) worked as Correctional Officers with the Department of Corrections (“Agency”). In October of 2012, Agency issued Final Notices on Proposed Removal, charging Employees with “any act which constitutes a criminal offense whether or not the act results in a conviction.” Specifically, Employees were accused of knowingly failing to disclose a material fact to obtain or increase unemployment insurance benefits as provided in D.C. Official Code § 51-119(a)(2001).

Employees subsequently filed Petitions for Appeal with the Office of Employee Appeals (“OEA”). In their appeals, Employees argued that Agency’s termination actions were wrongful and requested that an evidentiary hearing be held in the matter. Employees further requested that they be reinstated with back pay and benefits.¹

The cases were assigned to an OEA Administrative Judge (“AJ”) in January of 2014. On January 28, 2014, the AJ issued an Order Convening a Prehearing Conference to assess the parties’ arguments. During the conference, Employees admitted to Agency’s allegations of unlawfully collecting unemployment benefits. However, they argued that the penalty imposed was too severe. Therefore, the AJ ordered the parties to submit written briefs addressing whether termination was appropriate under the circumstances.²

In its brief, Agency argued that Employees’ terminations should be upheld under District of Columbia law. It reasoned that the standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board (“MSPB”) in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). Agency contended that it weighed the appropriate factors enumerated in *Douglas* in selecting the penalty of termination.³ Agency further provided that it

¹ Kenya Fulford-Cuthbertson filed a Petition for Appeal on November 2, 2012. She was charged with unlawfully collecting \$5,744.00 in unemployment benefits. Tonia Adams filed a Petition for Appeal on November 1, 2012. She was charged with unlawfully collecting \$3,622.00 in unemployment benefits. Matthew Coates filed a Petition for Appeal on November 1, 2012. He was charged with unlawfully collecting \$1,920.00 in unemployment benefits. Jalonda Phillips-Armstead filed a Petition for Appeal on November 2, 2012. She was charged with unlawfully collecting \$1500.00 in unemployment benefits. As discussed herein, the aforementioned appeals were consolidated upon Petition for Review in D.C. Superior Court.

² *Post-Conference Order* (April 18, 2014).

³ 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;

considered both mitigating and aggravating circumstances in this matter, and articulated the reasons for proposing each Employee's removal in its advance notice. Lastly, Agency stated that removal was appropriate under the District Personnel Manual ("DPM") Table of Appropriate Penalties for a first offense of "any act which constitutes a criminal offense whether or not the act results in a conviction." Therefore, it requested that the AJ not disturb its decision to terminate Employees.⁴

In their briefs, Employees contended that their terminations violated D.C. Municipal Regulation ("DCMR") §1603.3(h). According to Employees, in order to impose discipline based on a charge of "any act which constitutes a criminal offense whether or not the act results in a conviction," §1603.3(h) requires an agency to show proof of the employee's arrest record, or at least a determination of probable cause to lead to an arrest for the conduct in question. Since there were no arrest records for the conduct in question, Employees posited that Agency was not permitted to rely on DCMR §1603.3(h) as a basis for imposing discipline. They further opined

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- 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.

⁴ *Agency Brief* (July 2, 2014).

that a District agency may not prescribe criminal conduct to an employee without the minimal assessment of the District of Columbia's actual prosecutorial bodies, such as a law enforcement agency, the Office of the Attorney General, or the United States Attorney's Office for the District of Columbia. In addition, Employees argued that even if they were properly charged, termination was an unreasonable penalty under the circumstances. As a result, they requested that OEA vacate or reduce the penalty.⁵

The AJ issued his Initial Decisions in November and December of 2014. He first determined that it was undisputed that Employees unlawfully collected unemployment benefits while working full-time for the District government. The AJ stated that the Deciding Official assigned to review the charges against Employees considered both the mitigating and aggravating factors in reaching his decision to recommend removal. The AJ highlighted the holding in *Stokes v. District Columbia*, 502 A.2d 1006 (D.C. 1985), wherein the D.C. Court of Appeals held that the purpose of reviewing an imposed penalty is to assure that the agency has considered the relevant facts and acted reasonably. In applying the reasoning provided in *Stokes*, the AJ held that Agency did not abuse its discretion and considered each of the *Douglas* factors in making its final determination to terminate Employees.

Next, the AJ examined whether an arrest record was required to charge an employee with "any act which constitutes a criminal offense whether or not the act results in a conviction," as provided under DCMR §1603.3(h). He noted that DCMR §1603.3(h) does not mention the standard that must be met when charging an employee with such an act. However, the AJ opined that the Table Appropriate Penalties, as enumerated in DCMR §1619.1, mandated that Agency

⁵ *Employee Brief* (August 6, 2014).

produce an arrest record in order to impose discipline based on a violation of DCMR §1603.3(h). In addition, the AJ concluded that a District agency may not prescribe criminal conduct to an employee under DCMR §1603.3(h) without the minimal assessment of criminal conduct by an appropriate prosecutorial body. According to the AJ, Agency was required to at least prove that there was probable cause to lead to an arrest for each Employee's conduct of unlawfully collecting unemployment benefits. Since Employees were never arrested for their misconduct, the AJ concluded that Agency levied an improper charge against them. Therefore, he determined that Agency failed to meet its burden of proof in establishing that it had cause to terminate Employees. Consequently, Agency's termination actions were reversed and Employees were ordered to be reinstated to their previous positions with back pay and benefits.⁶

Agency disagreed with the Initial Decision and filed a consolidated Petition for Review with the District of Columbia Superior Court on January 23, 2015. On November 25, 2015, the Honorable Judge Thomas Motley issued an Order of Remand for the purpose of addressing three issues. First, Judge Motley stated that the record failed to indicate any consideration of DCMR § 1603.4, which states that the definition of cause "shall include but not necessarily be limited to the infractions or offenses under each cause contained in the Table of Appropriate Penalties in Section 1619." According to the Court, the "arrest record" requirement is a limitation on what would constitute cause under DCMR. § 1603.3(h). Thus, Judge Motley opined that the AJ's determination appeared to be "inconsistent with 6-B D.C.M.R. § 1603.4, which makes the Table

⁶ *Kenya Fulford-Cuthbertson v. Department of Corrections*, OEA Matter No. 1601-0010 (December 19, 2014); *Tonia Adams v. Department of Corrections*, OEA Matter No. 1601-0016-13 (December 19, 2014); *Matthew Coates v. D.C. Department of Corrections* (OEA Matter No. 1601-0017-13 (November 21, 2014); and *Jalonda Phillips-Armstead v. Department of Corrections*, OEA Matter No. 1601-0018-13 (November 19, 2014).

of Appropriate Penalties as provided in 6-B D.C.M.R. § 1619 subordinate to the definition of cause set forth in 6-B D.C.M.R. § 1603.”

Second, Judge Motley provided that the Court could not determine whether the AJ considered DCMR § 1603.9, which places the burden of proof on the government to show that a disciplinary action was taken for cause, “as that term is defined in this section.” Finally, the Court noted that there was a split within OEA’s decisions on the “arrest record” requirement, noting the holding in *Roebuck v. D.C. Office of Aging*, OEA Matter No. 1601-0098-12, *Opinion and Order on Petition for Review* (July 21, 2015), wherein the employee raised the same argument at issue in the instant matter.⁷ Therefore, the consolidated appeals were remanded to the AJ for further consideration.⁸

The AJ issued four Initial Decisions on Remand in June of 2016. With respect to the definition of cause, the AJ reiterated that DCMR § 1603.3(h) includes any act which constitutes a criminal offense whether or not the act results in a conviction. He further noted that the D.C. Court of Appeals has ruled that a violation of D.C. Official Code § 51-119(a) constitutes a criminal offense similar to the misdemeanor offense of false pretense.⁹ According to the AJ, Employees’ actions constituted a criminal act because they made a false statement of a material

⁷ See *Roebuck v. D.C. Office of Aging*, OEA Matter No. 1601-0098-12 (July 12, 2015).

⁸ *District of Columbia Department of Corrections v. District of Columbia Office of Employee Appeals*, 2015 CA 000455 P(MPA); 2015 CA 000457 P(MPA); 2015 CA 00113 P(MPA) and 2015 CA 001114 P(MPA) (D.C. Super. Ct. November 25, 2015).

⁹ See *Lewis v. United States*, 389 A.2d 306 (D.C. 1978). D.C. Official Code § 51-119 (a) provides that:

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.

fact or failed to disclose a material fact; knew the statement was false; and made the statement with the intent to obtain or increase a benefit.

Regarding the “arrest record” requirement, the AJ highlighted several provisions of the DCMR, including the following:

6-B DCMR § 1603.2: In accordance with section 1651 (1) of the CMPA (D.C. Official Code § 1-616.51 (1)) (2006 Repl.), disciplinary actions may only be taken for cause.

6-B DCMR § 1603.3: For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows:

(h) Any act which constitutes a criminal offense whether or not the act results in a conviction;

6-B DCMR § 1603.4: The causes specified in section 1603.3 of this section *shall include but not necessarily be limited to* the infractions or offenses under each cause contained in the Table of Appropriate Penalties in section 1619 of this chapter. (emphasis added).

6-B DCMR § 1603.9: In any disciplinary action, the District government will bear the burden of proving by a preponderance of the evidence that the action may be taken or, in the case of summary action, that the disciplinary action was taken for cause, as that term is defined in this section. A criminal conviction will estop the convicted party from denying the facts underlying the conviction.

6-B DCMR § 1619.1(8): [The] Table of Appropriate Penalties states that a conviction is not needed to sustain this cause. It further states that Agency may act on an arrest if the arrest is related to the job. The table specifies that the proof needed is an arrest record.

In considering each of the aforementioned regulations, the AJ concluded that the Table of Appropriate Penalties did not encompass a complete or exhaustive listing of each possible offense provided under the causes enumerated in DCMR § 1603.3. According to the AJ, the requirement of an arrest record is considered a limitation on what would constitute cause under § 1603.3(h). Thus, he held that the language of DCMR § 1603.4 plainly makes the Table of Appropriate Penalties subordinate to the definition of cause provided in DCMR § 1603.

Next, the AJ addressed DCMR § 1603.9, which provides that the government bears the burden of proof to show, “in the case of summary action, that the disciplinary action was taken for cause, as that term is defined in that section.” He stated that the purpose of the crafting the law was to ensure that an employee who commits a criminal act, such as fraud in the unlawful collection of unemployment insurance benefits, can be subject to an adverse personnel action, notwithstanding the disposition of any criminal charges brought against them. The AJ further held that if an arrest record were required to support a charge of “any act which constitutes a criminal offense whether or not the act results in a conviction,” employees could possibly avoid adverse personnel actions simply because he or she was not arrested as a result of said act.

Lastly, the AJ noted that OEA has upheld adverse actions against employees who unlawfully collected unemployment insurance benefits but were never arrested.¹⁰ Thus, in his Initial Decision on Remand, the AJ ultimately concluded that an arrest record was not required to support a charge pursuant to DCMR §1603.3(h). Consequently, he upheld Agency’s decision to terminate Employees.¹¹

Employees disagreed with the AJ’s findings and filed Consolidated Petitions for Review with OEA’s Board on August 1, 2016. They argue that a review of the Initial Decision on Remand is necessary because the AJ’s decisions were based on an erroneous interpretation of the regulations in favor of a flawed “policy” analysis. Employees further argue that the AJ failed to

¹⁰ See *Roebuck v. D.C. Office of Aging*, OEA Matter No. 1601-0098-12 (July 12, 2015) and *Charles v. D.C. Dept. of Public Works*, OEA Matter No. 1601-0164-12 (May 15, 2014).

¹¹ *Initial Decision on Remand*, OEA Matter No. 1601-0018-13R16.

address all the issues of law and fact raised by Judge Motley's Order of Remand. Therefore, they request that the Initial Decision on Remand be reversed.¹²

In response, Agency contends that the AJ properly interpreted the pertinent regulations in finding that an arrest record is not required to establish cause under DCMR §1603.3(h). In addition, it asserts that the Initial Decision on Remand addressed each issue of law and fact raised in Judge Motley's Order. As a result, Agency requests that the Petitions for Review be denied and that the Initial Decision on Remand be affirmed.¹³

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Employees first argue that the AJ's rationale for finding that DCMR § 1603.4 "clearly makes the Table of Appropriate Penalties in [DCMR] § 1619...subordinate to the definition of cause set forth in...§ 1603" to be flawed. They opine that the more harmonious way to read §

¹² *Consolidated Petitions for Review of Initial Decisions* (August 1, 2016). Employees subsequently filed a Sur-Reply brief on October 7, 2016 in support of their consolidated Petitions for Review, wherein they reiterated their arguments regarding the "arrest record" requirement.

¹³ *Agency's Reply to Employee's Consolidated Petitions for Review* (September 26, 2016).

1603.4 is as a disclaimer that although the Table of Appropriate Penalties lists specific “infractions or offenses” under some of the causes, the table is not an exhaustive list of all the infractions under each cause. In addition, they state that there is no reason to believe that the definition of cause cannot be limited by the Table of Appropriate Penalties.

However, Employees’ argument regarding the AJ’s analysis of DCMR § 1603.4 is merely a disagreement with the AJ’s ultimate ruling. In its Order of Remand, the D.C. Superior Court provided that the AJ failed to consider DCMR § 1603.4 in his Initial Decision. Judge Motley specifically stated that the requirement of an arrest record is a limitation on what would constitute cause under DCMR § 1603.3(h). He further held that the AJ’s determination was inconsistent with DCMR § 1603.4, which makes the Table of Appropriate Penalties subordinate to the definition of cause set forth in DCMR § 1603. In his Initial Decision on Remand, the AJ properly considered DCMR § 1603.4 and agreed with Judge Motley’s assessment. Accordingly, we find Employees’ arguments that the AJ’s ruling was based on an erroneous interpretation of DCMR § 1603.4 to be unpersuasive.

Next, Employees contend that the AJ misinterprets DCMR § 1603.9 in concluding that an arrest record is not mandatory under the Table of Appropriate Penalties.¹⁴ They appear to take exception with the AJ’s decision to reverse his previous holding that an arrest record is mandatory to support a charge of “any act which constitutes a criminal offense whether or not the act results in a conviction.” As previously stated, Judge Motley instructed the AJ to include a

¹⁴§ 1603.9 provides that:

In any disciplinary action, the District government will bear the burden of proving by a preponderance of the evidence that the action may be taken or, in the case of summary action, that the disciplinary action was taken for cause, as that term is defined in this section. A criminal conviction will estop the convicted party from denying the facts underlying the conviction.

consideration of DCMR § 1603.9 on remand, as the “alleged additional requirement of an ‘arrest record’ appears in [the Table of Appropriate Penalties], a separate section.”¹⁵ Judge Motley further suggested that including the consideration of DCMR § 1603.9 may cause the AJ to re-evaluate his holding that proof of an arrest record is required before any disciplinary action can be taken for cause under DCMR § 1603.3(h).

In this case, the AJ included a complete and thorough analysis of DCMR § 1603.9 in his Initial Decisions on Remand. The AJ was explicit in providing the reasoning for finding that an arrest record was not required under DCMR § 1603.3(h). Specifically, he stated that the purpose of the legislature was to ensure that an employee who commits a criminal act can be subject to an adverse personnel action, notwithstanding the disposition of any criminal charges brought against him or her. It is clear from the record, and Employees did not dispute, that they committed criminal acts by unlawfully collecting unemployment insurance benefits; thereby, violating of D.C. Official Code § 51-119(a). While they were not arrested, Employees’ actions could have resulted in the imposition of criminal penalties. Thus, this Board agrees with the AJ’s reasoning in reaching the conclusion that Agency met its burden of proof in establishing that Employees’ disciplinary actions were taken for cause. We further agree that Agency was not required to produce an arrest record to support a cause of action under DCMR § 1603.3(h).

Lastly, Employees argue that the AJ failed to address each issue articulated in the Order of Remand. Of note, they cite to Judge Motley’s concerns on whether there was an apparent split within OEA’s decisions regarding the need for an arrest record as a prerequisite for imputing disciplinary action under DCMR §1603.3(h). Employees suggest that the cases cited to in the

¹⁵ *Order for Remand* at 4.

Initial Decision on Remand lack precedential value because they do not specifically address the “arrest record” requirement.

However, it is clear from the record that the AJ adhered to the D.C. Superior Court’s Order and addressed OEA’s previous holding in *Roebuck v. D.C. Office of Aging*. In *Roebuck*, the employee was charged with violating DCMR §1603.3(h) for “any act which constitutes a criminal offense whether or not the act results in a conviction.” The employee in *Roebuck* was also alleged to have violated D.C. Official Code § 51-119(a) by knowingly failing to disclose a material fact to obtain or increase unemployment insurance benefits. On Petition for Review, this Board upheld the AJ’s Initial Decision, finding that the agency proved it had cause to take adverse action against the employee because a violation of D.C. Official Code § 51-119(a) could have resulted in a criminal offense.

The employee in *Roebuck* subsequently filed an Amended Petition for Review of Agency’s Decision in D.C. Superior Court on May 2, 2016. On appeal, the Court upheld this Board’s ruling. It determined that Agency provided the facts necessary to establish the elements of a criminal offense, namely, that the employee knowingly submitted false information to collect unemployment benefits while employed full-time. Agency was not required to produce an arrest record to support a charge under DCMR §1603.3(h). The Court; therefore, concluded that removal was an appropriate penalty.¹⁶

Likewise, in *Charles v. D.C. Dept. of Public Works*, OEA Matter No. 1601-0164-12 (May 15, 2014), the employee was charged with failing to disclose a material fact to obtain or

¹⁶ 2015 CA 06472 P(MPA) (D.C. Super. Ct. February 14, 2017).

increase unemployment insurance benefits. The AJ in *Charles* upheld the agency's removal action and held that the alleged underlying conduct must constitute a criminal offense to support any disciplinary action taken pursuant to DCMR §1603.3. In both *Roebuck* and *Charles*, OEA did not require the agency to show proof of the employee's arrest record in order to sustain a charge of "any act which constitutes a criminal offense whether or not the act results in a conviction."

After reviewing OEA's previous rulings, the AJ in this case correctly noted that OEA has upheld adverse actions against employees who unlawfully collected unemployment insurance benefits but were never arrested. While Employees disagree with the precedential value of the cases relied upon by the AJ, this Board finds that he adequately considered each issue addressed in the D.C. Superior Court's Order for Remand. In addition, the AJ's findings are supported by substantial evidence.¹⁷ Based on the foregoing, we must deny Employees' Petitions for Review.

¹⁷ The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held 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. *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).

ORDER

Accordingly, it is hereby ordered that Employees' Petitions for Review are **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.