THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JOHN JUDD,	)	
Employee	)	OEA Matter No. 1601-0184-12
	)	
v.	)	Date of Issuance: January 15, 2014
	)	
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

John Judd, Employee *Pro Se*
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 7, 2012, John Judd ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Department of Public Works' ("DPW" or "Agency") decision to terminate him from his position as a Motor Vehicle Operator effective August 3, 2012. Following an Administrative review, Employee was charged with violating "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction, specifically: 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 as provided in D.C. Official Code §51-119(a) (2001). D.C. Personnel Regulations Chapter 16, § 1603.3(h)."[1] On September 10, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on October 25, 2013. Thereafter, on October 28, 2013, I issued an Order scheduling a Status Conference in this matter for November 19, 2013. Both parties were present for the Status Conference. On November 22, 2013, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Agency's brief was due on or before December 13, 2013, while Employee's brief

[1]Specifically, Agency noted that Employee "knowingly and willfully failed to report your earnings from the D.C. Personnel Office for the week(s) ending: 01/05/2008; 01/12/2008; 01/26/2008; 02/02/2008; 02/09/2008; 03/01/2008; 03/08/2008; 03/15/2008; and 03/22/2008. As a result of this failure to report your earnings, you continued to collect unemployment insurance benefits to which you were not entitled."

was due on or before January 3, 2014. Following Agency's failure to submit its brief by the required deadline, on December 17, 2013, I issued an Order for Statement of Good Cause to Agency. Agency was ordered to submit a Statement of Good Cause based on its failure to submit its brief by the required deadline. Agency had until December 27, 2013 to respond. On December 20, 2013, Agency submitted its brief. Employee submitted his brief on December 24, 2013. Thereafter, on December 30, 2013, Agency filed a response to the Show Cause Order. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material issues in dispute, and therefore, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, prior to being hired as a Motor Vehicle Operator for Agency in December of 2007, Employee was unemployed. He applied for and received unemployment benefits in the District of Columbia. While working full time with Agency in December of 2007, Employee continued to apply for and receive unemployment benefits from the District of Columbia. Employee received unemployment benefits from the week ending in January 05, 2013, until the week ending on March 22, 2008. In order to receive unemployment benefits through the District of Columbia Department of Employment Services ("DOES"), Employee was required to complete a "Continued Claim Form" weekly. On the forms Employee filled out starting December of 2007 to March 22, 2008, Employee certified that: 1) he was able, available and actively seeking work during the week claimed; 2) he did not perform work during the week claimed; and 3) he did not return to full time work during the week claimed.[2] Following an audit by the DOES on March 15, 2012, Employee was asked to confirm whether he worked, received severance or other income during the aforementioned period, and if so, Employee was asked to submit a response explaining why he incorrectly reported his income. However, Employee failed to respond to the Audit Notice. Thereafter, on April 12, 2012, DOES issued Employee a Notice of Overpayment, seeking repayment from Employee in the amount of $4,058 in unemployment benefits (this was the amount Employee collected as unemployment benefit from DOES while he was employed full time by Agency).[3] Subsequently, Agency on June 5, 2012, issued an Advance Written Notice of Proposed Removal to Employee for the following charge and specification:

[2] Agency's Brief in Opposition to the Appeal, at Tab 3 (December 30, 2013).
[3] *Id.* at Tab 5 (December 30, 2013).

> **Charge:** Any act which constitutes a criminal offense whether or not the act results in a conviction, specifically, 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 as provided in D.C. Official code § 51-119 (a) (2001) [See Section 1603.3 (h) of Chapter 16 of the District Personnel Manual.
>
> **Specification:** You knowingly and willfully failed to report your earnings from DC Government Personnel Office for the week(s) ending 0/05/2008; 01/12/2008; 01/19/2008; 01/26/2008; 02/02/2008; 02/09/2008; 02/16/2008; 02/23/2008; 03/01/2008; 03/08/2008; 03/15/2008; and 03/22/2008. As a result of this failure to report your earnings, you continued to collect unemployment insurance benefits to which you were not entitled.[4]

On June 13, 2012, DOES sent out a letter with a Restitution Agreement attached. According to the June 13, 2012, letter, Employee was informed of the terms of repayments for the overpayment of unemployment benefits. Employee was advised in this letter of the amount due every month, and that his first payment was due on July 13, 2012. This matter was referred to a Hearing Officer for a pre-termination review. The Hearing Officer issued a report on June 27, 2012, sustaining the charge and specification. However, the Hearing Officer recommended that because of mitigating factors (specifically the fact that Employee had entered into a payment agreement with DOES and had agreed to pay the amount owed), the proposed penalty of removal should be reduced to a thirty (30) day suspension without pay.[5] Employee made his first payment on July 9, 2012, in compliance with the June 13, 2012 letter from DOES. Upon review of the Hearing Officer's report, Agency's Director on July 26, 2012, issued a Notice of Final Decision on Proposed Removal ("Final Agency Decision"), informing Employee that he would be terminated from his position effective August 3, 2012.

Employee's Position

Employee admits that he knew it was wrong to continue to receive unemployment compensation after he started working for Agency in December of 2007. Employee explained that, the reason he continued to claim unemployment while he was employed with Agency was because he was uncertain as to whether his employment would continue with Agency.[6] In his Petition for Appeal, Employee explains that the Director was not aware that payments had been made at the time of his Decision to remove Employee. Employee further explains that he made payments after his meeting with the Hearing Officer, and that during the meeting, the Hearing Officer was aware that Employee had made payment arrangements with DOES. Employee also

[4] *Id.* at Tab 7 (December 30, 2013).
[5] *Id*. at Tab 8 (December 30, 2013).
[6] *Id.*

maintains that he was out of work from February 14, 2012, due to a medical disability that resulted from an accident and he was not due to return to work until August 27, 2012.[7]

In his brief, Employee alleges that he was wrongfully terminated on a matter that had a Restitution Agreement with DOES. Additionally, Employee notes that by terminating him, Agency engaged in disparate treatment because there were other employees who were charged with the same cause of action but were able to keep their jobs, even without an Agreement with DOES. Employee further states that the penalty of termination was not appropriate under District law, especially since it did not apply to all. Employee maintains that, even the Hearing Officer noted in the report that the mitigating factors outweigh the aggravating factor, and that termination was not a reasonable penalty in this case.[8]

Agency's Position

Agency asserts that its action of terminating Employee was done for cause. Agency explains that pursuant to D.C. Official Code § 50-108 (a), a person who is working full time is not eligible for unemployment benefits. Agency further explains that by collecting unemployment benefits while he was employed full time with Agency, Employee violated the law. Agency also highlights that Employee further violated the law when he knowingly provided false information on claim forms in order to receive unemployment insurance. Agency maintains that failing to report material information to the District in order to collect benefits is a crime.

With regards to the penalty, Agency asserts that it weighted the *Douglas* factors[9] and concluded that given the seriousness of Employee's misconduct, termination was the appropriate penalty to impose. Furthermore, as to Employee's claim of disparate treatment, Agency notes that there were four (4) employees under Employee's organizational unit (Solid Waste Management Administration) that received unemployment insurance after submitting fraudulent claims and three (3) out of the four (4) were terminated. Agency contends that the conduct of the one (1) employee ("comparison employee") who was not terminated can be distinguishable from Employee's conduct in that, the comparison employee submitted fraudulent claims for three (3) weeks and received $1,181 in unemployment insurances, whereas, Employee submitted twelve (12) weeks of fraudulent claims and received $4,058 in unemployment insurance - four (4) times longer and almost three (3) times as much in fraudulent unemployment insurance. Agency also notes that, the response, once the misconduct was detected is different between Employee and the comparison employee. Agency explains that the comparison employee responded to the audit notice, entered into a repayment agreement, and had substantially repaid all of the money owed to DOES when Agency commenced the disciplinary action. In contrast, Employee did not respond to the Audit Notice, and began making payments after Agency commenced adverse action against Employee.[10]

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[7] Petition for Appeal (August 7, 2012).
[8] Employee's Brief and supporting documents (December 24, 2013).
[9] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).
[10] Agency's Brief, *supra*.

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, the DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(h), the definition of "cause" includes any act which constitutes a criminal offense whether or not the act results in a conviction. 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.

The D.C. Court of Appeal 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.[11] And to prove that an employee violated D.C. Official Code § 51-119 (a), the agency has to prove that 1) the employee made a false statement of a material fact or failed to disclose a material fact; 2) the employee knew the statement was false; and 3) the employee made the statement with the intent to obtain or increase benefit. Here, Employee admits that although he was a full time employee, he knowingly omitted to inform the DOES of this fact when he filled out his unemployment claims form in an effort to obtain unemployment insurance. Accordingly, based on Employee's own admission, I find that Agency had sufficient cause to discipline Employee.

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

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).[12] 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 ("TAP"); 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, Agency maintains that it considered the *Douglas* factors in imposing the

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[11] *Lewis v. United States*, 389 A.2d 306, D.C., July 10, 1978.

[12] *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).

penalty of termination. Employee on the other hand notes that Agency engaged in disparate treatment in imposing the penalty of termination. Employee also asserts that Agency should have followed the recommendation of the Hearing Officer. DPM § 1613 provides 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.
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> **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.

Moreover, in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that, "the OEA is responsible for enforcing the provisions of 6 DCMR § 1613.2, which includes a neutral review process…." The Court explained that, "[s]ections 1607 through 1612, covers the procedure an official must take in order to implement corrective or adverse action against an employee. Under Section 1612, a proposed removal action must be reviewed by a hearing officer. After a review of the case, the hearing officer shall make a written report and recommendation to the deciding official. Upon this recommendation, under section 1613, [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." (Internal quotation marks omitted). Here, the Hearing Officer recommended in her report that the "penalty of termination be reduced to a 30 day suspension."[13] Consequently, I find that the Deciding Officer in the instant matter could only 1) reduce the penalty to thirty (30) days as proposed by the Hearing Officer; 2) remand the action with instruction for further consideration, or 3) dismiss the action with or without prejudice, but in no event, increase the penalty. Pursuant to DPM § 1613, the Deciding Officer was not permitted to increase the recommendation of the Hearing Officer. Accordingly, I find that, based on *Watts*, Agency's decision to increase the penalty recommended by the Hearing Officer is a violation of DPM § 1613.

Disparate Treatment

Employee noted in his Post Status Conference brief that Agency engaged in disparate treatment by retaining some employees who were charged with the same cause of action as Employee. OEA has held that, to establish disparate treatment, an employee must show that he worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period.[14] Additionally, "in order to prove

[13] Agency's Brief at Tab 8, *supra*.
[14] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[15] Here, Agency concedes that there was one other employee who was similarly situated as Employee, but who received a different penalty than Employee. Agency attempts to distinguish the comparison employee from Employee by stating that the conduct of the comparison employee differs from Employee's conduct in that, the comparison employee submitted fraudulent claims for three (3) weeks and received $1,181 in unemployment insurances, whereas, Employee submitted twelve (12) weeks of fraudulent claims and received $4,058 in unemployment insurance, four (4) times longer and almost three (3) times as much in fraudulent unemployment insurance. I find this assertion unpersuasive and inconsequential. The fact remains that the comparison employee, just like Employee in this case, both violated the rules and regulations, and they were both charged with the same cause of action.

Furthermore, Agency also notes that, the response, once the misconduct was detected is different between Employee and the comparison employee. Agency explains that the comparison employee responded to the Audit Notice, entered into a repayment agreement, and had substantially repaid all of the money owed to DOES when Agency commenced the disciplinary action. In contrast, Employee did not respond to the Audit Notice, and he only began making payments after Agency commenced disciplinary action against him. I do agree with Agency's assertion that the comparison employee and Employee responded differently to the misconduct. The comparison employee immediately took steps to correct the misconduct, whereas, Employee did nothing until Agency commenced a disciplinary action process against him. Employee contacted DOES and agreed to pay the amount owed prior to meeting with the Hearing Officer, as well as making his first payment before the Final Agency Decision was issued. However, the fact remains that unlike the comparison employee who responded to DOES prior to Agency commencing a disciplinary action against them, Employee only responded to DOES after Agency commenced adverse action against him – after receiving the June 5, 2012 Advance Written Notice of Proposed Removal. Accordingly, I concur with Agency's assertion that the comparison employee is distinguishable from Employee. I further find that Employee has not established a prima facie showing of disparate treatment and as such, I conclude that Employee was not subjected to disparate treatment.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[16] Employee argues that, by removing him, Agency abused its discretion. In this case, Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.[17] Although Agency had cause to charge Employee

[15] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).
[16] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).
[17] 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 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;

with violating DPM §1603.3(h), given the totality of the circumstance, I find that the penalty of termination constituted an abuse of discretion. The Hearing Officer recommended a thirty (30) day suspension in her Report, however, Agency's Deciding Officer imposed a penalty of termination, in violation of DPM § 1613. Consequently, I further find that Agency's action of removing Employee from service should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse him all back-pay, benefits lost as a result of his removal; and
3. Employee is suspended for thirty (30) as recommended by the Hearing Officer; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

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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.