**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| SHERRY JACKSON, | ) | |
| Employee | ) | OEA Matter No. 1601-0001-15 |
| | ) | |
| v. | ) | Date of Issuance: May 29, 2015 |
| | ) | |
| DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, | ) | |
| Agency | ) | MONICA DOHNJI, Esq. |
| | ) | Administrative Judge |

Alletta Samuels, Employee Representative
Rushab Sanghui, Employee Representative
Rhesha Lewis-Plummer, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On October 3, 2014, Sherry Jackson ("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 fifteen (15) days from her position as a Customer Service Representative. Following an Agency investigation, Employee was charged with violating sections 1603.3(g) and 1603.3(f)(9) of the District of Columbia Personnel Manual ("DPM").[1] On March 11, 2014, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on December 19, 2014. Thereafter, a Status/Prehearing Conference was held in this matter on February 24, 2015. Both parties were in attendance. On February 24, 2015, I issued a Post Status/Prehearing Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status/Prehearing Conference. Both parties complied. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was not required. The record is now closed.

[1]DPM § 1603.3(g): Any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious: use of offensive or abusive language; and DPM § 1603.3(f)(9): Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: unreasonable failure to give assistance to the public.

## 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 was done for cause; and

2) If so, whether the penalty of fifteen (15) days suspension is within the range allowed by law, rules, or regulations.

## FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee was a Customer Service Representative with Agency. Employee's duties include, but are not limited to responding to customer inquiry relating to general Agency information, unemployment compensation, workforce development inquiries, job services and complaints. In her position, Employee has to build a relationship with Agency's customers by empathizing with them, while maintaining a courteous and respectful demeanor.[2]

On March 7, 2014, Employee received a call from a Limited English Proficient ("LEP") customer. A Spanish interpreter was required for this call. The LEP customer was inquiring about a letter he received from Agency. According to the audio recording[3] submitted by Agency as part of its record, because the customer was unable to read English, he conveyed that the letter seemed to be scheduling an appointment, to which Employee stated that "I do not know who called him or any of that stuff interpreter because I am in the call center." The interpreter relayed the customer's comment to Employee that Employee "should know what letter was sent out; you should see it in the system". To which, Employee responded "Excuse me! Excuse me! sir! That is like me telling you that you should be able to read English. I think that is very rude of you to say what I should, what I should know. You can tell him that interpreter." While the interpreter was translating the message to the customer, Employee said "one moment..." and placed the call on hold. When the call resumed, Employee inquired if the interpreter translated her message to the customer, to which the interpreter responded in the affirmative. The interpreter then began relaying this message from the customer "I didn't question her like that. My reason for calling was just to find out…" Before the interpreter could complete the message from the customer, Employee stated that "I understand that. I understand that. Well if he can't understand it that way, maybe he needs to come into the office…but to tell me I should know what they sent out is very rude of him. So maybe he needs to come into the office with the letter so somebody can translate for him."[4]

Upon receiving a complaint regarding the March 7, 2014, telephone call, Agency conducted an investigation into the matter. Employee attended a meeting with her union (AFGE) Representative present wherein, she was questioned about the March 7, 2014 telephone call. On

[2] Agency's Answer at Exhibit 1 (November 24, 2014); See also Agency's Brief (March 18, 2015).
[3] *Id*. at Exhibit 2.
[4] *Id*.

April 11, 2014, Employee was served with an Advance Written Notice of Proposed Suspension. Employee was informed that she would be suspended for fifteen (15) days for violating DPM §1603.3(f)(9) and DPM §1603.3(g).[5] On September 5, 2014, a Notice of Final Decision on Proposed Official Suspension was issued by the Deciding Official, sustaining the fifteen (15) days suspension.[6]

***Employee's Position***

Employee believes that the action taken against her was wrong. She explains that she has always provided stellar customer service to claimants that contact the call center to inquire about their unemployment. Employee disagrees with the time frame the discipline was issued. She notes that Agency failed to render a decision in accordance with DPM § 1614.2, and Agency's delay in issuing the Final Agency Decision brought harm to her.[7]

In her brief, Employee contends that Agency failed to establish the charges alleged against her. She explains that with regards to the charge of unreasonable failure to give assistance to the public, she did in fact provide assistance to the customer in question. Employee fielded the customer's call, suggested an action to take and asked if the customer had additional questions prior to the close of the call. Employee further notes that while she was unable to translate the letter that the customer was referring to over the phone, she suggested the reasonable action of bringing the letter into the office for translation. Employee maintains that the suggestion was sufficient to satisfy her duties of assisting the customer. She also states that it would be unreasonable for Agency to expect an employee to complete every task a member of the public requests. In this case, the task requested was to translate a letter that Employee could not see, and the customer could not provide additional information about the letter. Additionally, Employee asserts that Agency failed to determine how she engaged in an unreasonable failure to give assistance and instead, Agency discussed the separate alleged offenses of a violation of Customer Service policy and violation of the language access policy.[8]

Furthermore, Employee argues that the penalty of fifteen (15) days suspension is not appropriate because Agency failed to prove all of the alleged charges. Employee maintains that even if Agency is found to establish either of the alleged charges, the penalty cannot be sustained because it was based on both charges, thus, the penalty should be reversed or mitigated. In additional, Employee contests that Agency failed to consider the *Douglas* Factors or any mitigating factors in its decision and proposal to suspend Employee.[9]

***Agency's Position***

Agency submits that it was within its authority to suspend Employee for failure to give assistance to the public; discourteous treatment of the public, and violations of department customer service standards. Agency states that, as a Customer Service Representative, Employee

[5] *Id*. at Exhibit 3.
[6] *Id*. at Exhibit 4.
[7] Petition for Appeal (October 3, 2014).
[8] Employee's Brief (April 8, 2015).
[9] *Id*.

is responsible for responding to customer inquiries related to general information, unemployment compensation, workforce development inquiries, job services and complaints. Agency contends that there is evidence in the record to prove that Employee was rude and boisterous to an LEP customer and neglected to escalate the customer's concerns, thereby failing to meet Agency's standards as prescribed in DOES Policy 100.20-1 which highlights that all incoming calls must be handled with the highest level of professionalism and courtesy by Agency's employees. Furthermore, Agency states that it strives to provide equal access to services and programs regardless of one's culture or English speaking abilities which is why every employee is trained on the importance and usage of the language access line.

Agency explains that courtesy includes conveying sympathy, maintaining a pleasant attitude, avoid rude and confrontational behavior, and "never ask a customer if they speak and understand English." Agency further explains that Employee received and reviewed this policy as evidenced by her signature. Agency maintains that despite Employee's familiarity with the above-referenced DOES Policy, she showed blatant disregard for the policy when she rudely questioned a customer's English speaking/reading abilities. Even if the customer was rude, Employee had a duty to maintain proper customer service etiquette and professionalism at all times and she failed to do so. Her comments to the LEP customer were extremely offensive. The fact that the customer reported the incident to Agency shows that the customer found Employee's action to be rude and offensive.

In addition, Agency asserts that Employee violated DOES Policy 300.20-3 which states that an employee must not discourage or refuse services to LEP customers. Agency explains that Employee showed a blatant disregard for this policy as she expressed her refusal to provide services to the LEP customer when she stated that "well, if he can't understand it that way, maybe he needs to come into the office" and "So maybe he needs to come into the office with the letter so someone can translate for him." Agency maintains that Employee should have escalated the customer's concerns about the letter he received from DOES. It was unacceptable for Employee to refuse services to the customer based on his limited English proficiency and the Employee's perceived notion of rudeness by the customer.

With regards to penalty, Agency maintains that the penalty of fifteen (15) days suspension was reasonable. Agency explains that the penalty for unreasonable failure to give assistance to the public ranges from reprimand to ten (10) days suspension, and the penalty for the use of offensive or abusive language range from reprimand to fifteen (15) days suspension. Agency notes that Employee's conduct was a negative reflection on Agency. Employee's actions were not de minimis; they had a damaging and potentially discriminatory impact on Agency and Agency's reputation in the community. Agency also states that not sanctioning Employee for her actions sets a poor example for other employees and diminishes the integrity of the District workforce and operations. Thus, Agency was within its discretion to propose adverse action, and it also had the authority to suspend Employee for fifteen (15) days. And the imposed penalty was less punitive than the guideline proscribed by DPM Chapter 16 Table of Penalties. Accordingly, Employee's Petition for Appeal should be dismissed.[10]

[10] Agency's Answer (November 4, 2014) See also Agency's Brief (March 18, 2015).

***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. Agency's decision to suspend Employee for fifteen (15) days was based upon these enumerated causes: 1) any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: unreasonable failure to give assistance to the public; and 2) any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious: use of offensive or abusive language.

***Unreasonable failure to give assistance to the public***

DPM § 1603.3(f)(9), defines cause to include unreasonable failure to give assistance to the public. Employee argued that Agency failed to prove this cause of action, and instead submitted evidence of Employee's violation of Agency's customer service standards which is not part of the charges levied against Employee in the Notice of Final Decision. I disagree with Employee's assertion. According to DPM 1619.1(6)(i), violation of department customer service standard is considered an on-duty or employment related act or omission that interferes with the efficiency and integrity of government: unreasonable failure to give assistance to the public. Here, a review of record proves that Employee violated DOES Policies 100.20-1. Employee failed to handle the customer's call with the highest level of professionalism. From Employee's statements and the tone of her voice during the call, it is obvious that Employee became agitated, unpleasant, and confrontational when the customer stated that Employee should know what is in the letter he received from Agency. Further, at one point during the conversation, in response to the customer's question, Employee stated that "…that is like me telling you that you should be able to read English…." This comment is in violation of Agency's policies and therefore constitutes a failure to provide assistance to the public.

Employee also violated DOES Policy 300.20-3 which provides that an employee must not discourage or refuse services to LEP customers. At some point during the conversation between Employee and the customer, the interpreter was attempting to relay the customer's reason for calling to Employee, when she interrupted him and stated that "….well if he can't understand it that way, maybe he needs to come into the office…but to tell me I should know what they sent out is very rude of him. So maybe he needs to come into the office with the letter so somebody can translate for him." Employee argues that while she was unable to translate the letter over the phone, she suggested a reasonable action when she asked the customer to bring the letter to the office to be translated. Employee explains that her suggestion was reasonable and sufficient to satisfy her duties of assisting the customer. I find that interrupting the customer and suggesting that he comes into the office to have the letter translated proves that Employee was not willing to continue assisting the customer at that time. Based on the totality of the circumstance surrounding the telephone call, I find that Employee's suggestion was just an attempt to get the customer off her phone without addressing his concerns or give him the opportunity to explain himself because she believed he was rude. Employee's voice tone and her statement also portray Employee's lack of desire to continue assisting the customer. This is a

violation of DOES customer service standards, and consequently, I conclude that Employee's action constitutes a failure to assist the public.

***Use of offensive or abusive language***

DPM § 1603.3(g), defines cause to include the use of offensive or abusive language. Additionally, pursuant to DPM § 1619.1(7), a violation of DPM 1603.3(g) includes any activity for which the investigation can sustain that it is not "de minimis" (i.e., very small or trifling matters) such as the use of offensive or abusive language. There is sufficient evidence in the record to prove that Employee used offensive or abusive language during her telephone conversation with the customer. Because the customer was unable to speak/read English, he could not understand the content of the letter he received from Agency. Employee made the following statements to the customer: "Excuse me! Excuse me! sir! That is like me telling you that you should be able to read English. I think that was very rude of you to say what I should, what I should know. You can tell him that interpreter"; and "I understand that. Well if he can't understand it that way, maybe he needs to come into the office…but to tell me what I should know what they sent out is very rude of him. So maybe he needs to come into the office with the letter so somebody can translate for him." The customer was offended by Employee's statement and he reported it to Agency. Upon reviewing the audio submitted into evidence, I find that Employee was not only rude, and unprofessional, she also used abusive language when she questioned the customer's ability to speak/read English. Accordingly, I conclude that Agency had sufficient evidence to institute this cause of action against Employee.

***DPM § 1614.2 violation***

Employee also noted in her Petition for Appeal that Agency failed to render a decision in accordance with DPM § 1614.2, and Agency's delay in issuing the Final Agency Decision brought harm to her. DPM § 1614.2 highlights that "[e]xcept as provided in § 1614.3, the final decision shall be rendered at the earliest practicable date." DPM § 1614.3 does not apply to the current matter because it deals with summary suspensions and summary removals, and the current matter is not a summary suspension or removal. The incident occurred on March 7, 2014, Agency issued an Advanced Written Notice of Proposed Suspension of 15 Days on April 11, 2014; and the Notice of Final Decision was issued on September 5, 2014. Employee was given the right to respond to the April 11, 2014 Notice. Agency asserted that Employee requested an extension of time to file a response to the Advance Written Notice of Proposed Suspension for 15 Days; however, she never submitted a response. Employee does not dispute this assertion. Moreover, Employee has failed to provide this Office with any evidence in support of this allegation.

***2) Whether the penalty of fifteen (15) days suspension 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).[11] According to the Court in

[11] *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

*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 matter, I find that Agency has met its burden of proof for the charges of [a]ny other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious: use of offensive or abusive language; and [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: unreasonable failure to give assistance to the public.

In reviewing Agency's decision to suspend Employee for fifteen (15) days, OEA may look to the Table of Appropriate Penalties ("TAP"). Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalties for "[a]ny other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious: use of offensive or abusive language" is found in DPM § 1619.1(7). The penalty for the first offense for DPM § 1619.1(7) is reprimand to fifteen (15) days suspension. The penalties for "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: unreasonable failure to give assistance to the public" is found in DPM § 1619.1(6)(i). The penalty for a first offense for DPM § 1619.1(6)(i) ranges from reprimand to ten (10) days suspension. Employee's conduct is consistent with the language of DPM §§ 1619.1(7) and 1619.1(6)(i). Therefore I find that, by suspending Employee for fifteen (15) 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.[12] 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. I find that the penalty of fifteen (15) days suspension was within the range allowed by law. Accordingly, Agency was within its authority to suspend Employee for fifteen (15) days given the TAP.

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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).

[12] *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).

Penalty was 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.[13] Employee argues that Agency did not discuss the *Douglas* factors and it failed to consider any mitigating factors that would have justified a lower penalty. The evidence does not establish that the penalty of fifteen (15) days suspension constituted an abuse of discretion. While there is no evidence that Agency specifically considered the relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the decision to suspend Employee, Agency noted that Employee's actions were not de minimis; they had a damaging and potentially discriminatory impact on Agency and Agency's reputation in the community.[14] Agency also stated that not sanctioning Employee for her actions sets a poor example for other employees and diminishes the integrity of the District workforce and operations. Moreover, this Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors does not amount to reversible error, where there is substantial evidence in the record to uphold the Initial Decision.[15]

In this case, the penalties for a first time offense for these causes of action range from reprimand to a fifteen (15) days suspension. In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to suspend Employee for fifteen (15) days. Agency has properly exercised its managerial discretion and its chosen penalty of fifteen (15) days

[13] *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).

[14] 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;
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.

[15] *See Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).

suspension is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

## ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for fifteen (15) days is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge