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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0009-21
EMPLOYEE,)	
Employee)	
)	Date of Issuance: March 1, 2022
v.)	
)	
D.C. DEPARTMENT OF CORRECTIONS,)	MICHELLE R. HARRIS, ESQ.
Agency)	Administrative Judge
)	
_____)	
Lauckland A. Nicholas, Esq., Employee Representative)	
Daniel Thaler, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 30, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Corrections’ (“Agency” or “DOC”) decision to suspend her from service for ten (10) days, effective January 4, 2021, through January 15, 2021. Following a letter from OEA dated March 9, 2021, requiring an Answer, Agency filed its Answer to Employee’s Petition for Appeal on April 29, 2021.¹ This matter was assigned to the undersigned Administrative Judge (“AJ”) on September 3, 2021. On September 10, 2021, I issued an Order scheduling a Prehearing Conference in this matter for October 27, 2021.² On October 19, 2021, Agency filed a Motion for Summary Disposition along with its Prehearing Statement. On October 27, 2021, Agency’s representative appeared for the Prehearing Conference as required. Employee called and indicated that she had not received the notice for the conference until the morning of the hearing. Upon consideration of Employee’s claim, I issued an Order Rescheduling the Prehearing Conference to November 16, 2021.

On November 9, 2021, Agency filed a Consent Motion to Continue the Prehearing Conference citing schedule conflicts. On November 10, 2021, I issued an Order granting Agency’s Motion and Rescheduling the Prehearing Conference to December 7, 2021. Employee was also

¹ In an email correspondence dated March 30, 2021, Agency’s General Counsel noted that it had not previously received OEA’s letter requesting an Answer. As a result, Agency requested an enlargement of time for which to file its Answer.

² Virtual Prehearing Conference via WebEx.

ordered to submit her Prehearing Statement by November 19, 2021, because it had not been submitted as required by the previous orders. On December 2, 2021, Employee, by and through counsel, filed a Motion to Continue citing that counsel had just been retained and more time was needed to comply with the Order. Accordingly, that same day, I issued an Order granting Employee's Motion and rescheduled the Prehearing Conference for December 16, 2021. Both parties appeared for the conference as prescribed. Following the Prehearing Conference, I issued an Order on December 16, 2021, requiring the parties to address Agency's Motion for Summary Disposition. Employee's responsive brief was due on or before January 7, 2022. Agency had the option to submit sur-reply brief on or before January 25, 2022. Both parties submitted their briefs in accordance with the prescribed deadline. I have determined that an Evidentiary Hearing is not warranted in this matter. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the ten (10) day suspension was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee is employed by Agency as a Database Management Specialist. In a Final Written Notice of Proposed Suspension dated December 15, 2020, Employee was informed that she would be suspended from service for ten (10) days for the following causes:

"Charge 1: Violation of DCMR 1607.2 (a)(5) **Conduct Prejudicial to the District Government** which states, "Off duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position.

“Charge 2: Violation of DCMR 1607.2 (j)(2) Discriminatory Practices which states, “Any reprisal or retaliation against an individual because of his or her involvement in the EEO complaint process.”

The Final Notice also noted that, “your conduct violated the following DOC and District of Columbia Human Resources (DCHR) policies and procedures: **Policy and Procedure 3300.1F, Employee Code of Ethics and Conduct, Section 11 Professional Conduct and DCHR I-2019-8, Maintaining a Healthy Workplace: Anti-Bullying Policy.**”³

Agency’s Position

Agency avers that it had cause to suspend Employee from service for ten (10) days and administered the action in accordance with all applicable laws, rules and regulations. Agency asserts that in June 2016 and October 2016, Employee filed an EEO discrimination complaint against her supervisor.⁴ On August 5, 2016, and December 23, 2016, Employee was issued Exit Letters and on August 18, 2016, the D.C. Office of Human Rights (“OHR”) contacted Employee in writing.⁵ Subsequently on September 10, 2020, OHR completed its investigation and issued a “Letter of Determination” citing that they found no probable cause to Employee’s discrimination claims. Employee’s co-worker, Xusheng Wang (“Mr. Wang”), was a witness in the OHR case that resulted in the final determination.⁶ Agency avers that on “October 29, 2020, at 3:27a.m. the Employee sent an email to Mr. Wang with the subject line “Great Job” and pasted an excerpt of Mr. Wang’s testimony from the OHR decision.”⁷ Mr. Wang forwarded this email to “DOC’s EEO Specialist, Tecora Martin (“Ms. Martin”) and carbon copied the DOC’s Deputy Director of Administration, Gitana Stewart-Ponder (“Ms. Stewart-Ponder).” The information forwarded from Mr. Wang included the following:

“I got the following email in my Gmail from [Employee] this morning. I do not know what she wants to do. So I just report the email to you and copy it to Deputy Director. Her behavior has affected my work and life. I promised to send you some evidence[sic] to support my comments during the interview about [Employee’s] EEO matter on June 26. Because the work was very busy since then, I did not get enough time to find and organize her emails, computer logs, and some documents. I will try my best to finish it and send them to you soon. For [Employee’s] case, it has not been solved for years. I hope DOC administration can organize Oracle database and computer security experts from external parts to have a deep investigation about her technical behaviors since OIT technical persons’ comments were hard to be used as evidence [sic]. I do not think this mess situation should continue. It hurts not only me, but the whole OIT.”

Accordingly, Agency cites that upon receipt of Mr. Wang’s email, Ms. Martin contacted Ms. Stewart-Ponder indicating that Employee’s behavior was “alarming and must cease immediately”

³ The Proposed Notice dated November 17, 2020, included the specified language that was relied upon for notification of the violation of these regulatory provisions. See Agency’s Answer at Tab 4. (April 29, 2021)

⁴ Agency’s Answer at Tab 4 - Proposed Notice of Suspension. (April 29, 2021)

⁵ *Id.* at Page 1 – Statement of Facts. (April 29, 2021).

⁶ *Id.*

⁷ *Id.*

and noted that “Mr. Wang’s participation in an EEO investigation is protected from retaliation and hostile work environment.”

As a result, on November 17, 2020, Agency issued Employee an Advance Notice for a ten (10) day work suspension.⁸ Employee filed a written response via her union representative. On December 15, 2020, Agency issued its Final Notice sustaining the ten (10) day work suspension. Agency asserts that its Final Decision showed that there was cause for discipline under DPM§ 1607.2(j)(2) and DPM § 1607.2 (a)(5). Agency avers that OEA may grant a motion for summary disposition if there are no material and genuine issues of fact. Agency asserts that a dispute of material fact is “where the evidence is such a that a reasonable [factfinder] could return a verdict.”⁹ Agency asserts that there are no genuine material facts at issue in the instant matter. Agency avers that Employee “does not deny the underlying conduct other than to assert nonsensical excuses and conclusory legal objections.”¹⁰ Agency argues that it had cause as Employee’s actions constituted bullying and discriminatory practices. Agency proffers that “prohibited discriminatory practices include any reprisal or retaliation against an individual because of his or involvement in an EEO complain process.” Agency asserts that an individual’s involvement includes being a witness in EEO proceeding.¹¹ Agency avers that Employee “directly and unambiguously communicated her anger with Mr. Wang for his testimony against her in the OHR investigation.”¹²

Agency cites that Employee “cropped out the exact two paragraphs of the LOD that included a summary of Mr. Wang’s testimony and sent him that excerpt via mail at 3:27am with the subject line “great job.” Agency argues that this was a “message of disapproval to Mr. Wang for his lawful participation as a witness in the OHR investigation.” Agency also notes that Mr. Wang was “unsettled” by this communication as evidenced by his statement in his email where he cites that Employee’s behavior has affected his work and life. Agency also avers that Employee’s conduct was prejudicial in nature pursuant to DPM § 1607.2 (a)(5) because her actions affected not only her on job performance but that of Mr. Wang’s as well. Further, Agency notes that Employee’s claims regarding a violation of the collective bargaining agreement to be without merit. Accordingly, Agency argues that it has shown cause and Employee has failed to show there is a genuine issue in dispute. As a result, Agency avers that its disciplinary action should be upheld, and its Motion for Summary Disposition should be granted.

Employee’s Position

Employee argues that her email was not damaging in anyway and that Agency’s assertions that her email was retaliatory or constituted bullying are incorrect. Employee avers that she and Mr. Wang are of the same “ethnic background and they had previously worked closely with one another without any prior incident.”¹³ Employee argues that it is a genuine issue of material fact regarding Agency’s classification of her email as “bullying and or a prohibited discriminatory practice.” Employee avers that Agency’s claims require “proof.” Employee denies that the email sent “created a damaging work environment which can interfere with the productivity of the targeted person.” Further, Employee asserts that “she did send the email to Mr. Wang; however, the parties had a very good working relationship and they were of the same ethnic background.” In a response to the

⁸ Agency’s Motion for Summary Disposition at Page 2. (October 19, 2021). *See also*. Agency’s Answer at Tab 4.

⁹ *Id.* at Page 3, citing to *George v Leavitt*, 407 F. 3d 405, 410 (D.C. Cir 2005). (October 19, 2021).

¹⁰ *Id.* at Page 4.

¹¹ *Id.*

¹² *Id.* at Page 5.

¹³ Employee’s Opposition to Agency’s Motion for Summary Disposition at Page 4 (January 6, 2022).

Proposed Separation, Employee, by and through her union representative, indicated that there are different cultural communications. Specifically, it was noted that “to the non-cultivated non-Chinese eye these communications may be interpreted as negative, they are not.”¹⁴ Further, Employee asserted in this same response that [her] “email to Mr. Wang was nothing more than her noting the growth he has shown in becoming a part of the IT team at DC DOC.”¹⁵ Moreover, Employee argues that “there is nothing in the email to suggest to a reasonable person, that Employee was retaliating to Mr. Wang.”¹⁶ Employee avers that she has been discriminated against several times by Agency and that there is evidence to support her past claims of discrimination. Employee also asserts that the Collective Bargaining Agreement (CBA) does give Agency the right to suspend an employee for cause but avers cause has not been proven in this matter. Consequently, Employee asserts that Agency’s Motion should be denied because it has failed to meet its burden and that a hearing on the merits is warranted in this matter.

ANALYSIS

Whether Agency Had Cause for Adverse Action

Agency maintains that it had cause to suspend Employee from service and that its action was in accordance with all applicable laws, rules and regulations. Further, Agency asserts in its Motion for Summary Disposition that there are no genuine issues of disputed fact and that” Employee does not otherwise deny the underlying conduct other than to assert nonsensical excuses and conclusory legal objections. Agency maintains in its Sur-Reply brief that Employee’s Opposition did not introduce any material issues of fact. Agency asserts that Employee only raised an issue regarding the ethnic background of she and Mr. Wang and that they had a good working relationship. Agency asserts that even if this were true, these issues are immaterial.¹⁷ Agency avers that Employee “omits any legal support or explanation whatsoever as to how these purported facts could be in any way mitigating.”¹⁸ Agency avers that “the material facts are undisputed.”¹⁹ Agency argues that “any notion that Agency could permit this behavior to occur is absurd.” For the following reasons, the undersigned agrees with Agency’s assertions.

It is undisputed that on October 29, 2020, at 3:27am, Employee sent her co-worker, Mr. Wang an email. The subject matter of which was “Good Job” and the contents of the email included a copy of Mr. Wang’s testimony from the LOD from the OHR investigation into Employee’s claim of discrimination. It is also undisputed that Mr. Wang subsequently forwarded this communication to supervisors and noted therein that Employee’s behavior has affected his work and life. Following a review into this matter, Employee was issued a Proposed Notice for a ten (10) day suspension for

¹⁴ Employee’s Petition for Appeal at Attachment- “Response/Rebuttal to Proposal to Suspend for Cause for Ten Calendar Days.” December 30, 2020.

¹⁵ *Id.*

¹⁶ Employee’s Opposition to Agency’s Motion for Summary Disposition

¹⁷ Agency’s Sur Reply Brief at Page 2. (January 21, 2022).

¹⁸ *Id.*

¹⁹ *Id.* at Pages 2-3. The undisputed facts listed by Agency were: “(1) Xusheng Wang (“Mr. Wang”) testified in Employee’s D.C. Office of Human Rights (“OHR”) proceeding that he “did not believe that [Employee] was being treated in a discriminatory manner,” (2) OHR cited to Mr. Wang’s testimony in its Letter of Determination (“LOD”) that rejected Employee’s discrimination claims, (3) Employee copied the excerpt of the LOD that cited to Mr. Wang’s testimony and pasted it into an email to Mr. Wang along with the subject line “great job,” and (4) Mr. Wang reported the email to Agency management and stated to them that “[h]er behavior has affected my work and life.”

violation of DPM§ 1697.2 (j)(2) Discriminatory Practices and DPM § 1607.2 (a)(5) Conduct Prejudicial to the Government. Specifically, DPM § 1607.2 (j)(2) prohibits “any reprisal or retaliation against an individual because of his or her involvement in the EEO complaint process.” Here, it is also undisputed that Mr. Wang participated in the OHR investigation into Employee’s EEO matter. Employee asserts that her email was not retaliatory in nature because she and Mr. Wang had a good working relationship and had the same ethnic background. Further, Employee indicated that her email was “nothing more than her noting the growth [Wang] has shown in becoming a part of the IT team.”²⁰

The undersigned finds Employee’s assertions to be wholly unfounded and dubious in nature. Further, I find that any reasonable person would be able to infer that Employee’s email was not in any way misconstrued due to cultural differences, nor would a reasonable mind conclude that her email was sent to be supportive of Mr. Wang’s growth at Agency. Here, the OHR LOD in Employee’s matter indicated that there was no probable cause to her discrimination claims. The excerpts that Employee included in her email from Mr. Wang’s testimony were from those proceedings. The District Personnel Manual § 1607.2 (j)(2) indicates that a person participating in an EEO investigation is protected from reprisal or retaliation. Employee’s email included excerpt from Mr. Wang’s testimony, which did not support Employee’s claims of discrimination. The OHR investigation determined that there was no probable cause for Employee’s claims. As a result, I find that Employee’s action of sending this email after the determination and the inclusion of the contents of the materials from those proceedings, constituted the behavior prohibited by DPM § 1607.2 (j)(2). This is of particular note given Employee’s subject line “Great Job”, which the undersigned finds that any reasonable mind could infer was sarcastic and mocking in nature since, Mr. Wang’s testimony did not support Employee’s assertions in the claim before OHR. Moreover, Agency’s “Policy and Procedures 3300.1F- Employee Code of Ethics and Conduct, Section 11 Professional Conduct (d)(7) notes that “written or electronic communication sent with the intent to harass, annoy or alarm another person...” is prohibited behavior. Similarly, DCHR I -2019 -8 also prohibits workplace bullying. Mr. Wang specifically noted in his report to the supervisors that Employee’s actions had affected his work and life.

Further, DPM § 1607.2(a)(5) notes that Conduct Prejudicial to the District Government includes “any off duty conduct that adversely affects the employee’s job performance or trustworthiness, or adversely affects his or her agency’s mission or had an otherwise identifiable nexus to the employee’s position.” Here, Employee sent an email at 3:27am on the morning of October 29, 2020 to her coworker. She sent this from her private email account to Mr. Wang’s private email account. Mr. Wang maintained that Employee’s actions were affecting his work and life. Employee offers no reasonable argument to dispute this notion and only provides unreasonable and illogical arguments regarding a misunderstanding of cultural differences or that Agency otherwise misinterpreted her intentions to explain her behavior. Accordingly, I find that Agency had cause for adverse action for both causes of action.

Summary Disposition

OEA Rule 615.1²¹ provides that “if upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law, or that the appeal fails to state a claim upon which relief can be

²⁰ See. Employee’s Petition for Appeal at Response to Proposed Notice.

²¹ 59 DCR 2129 (March 16, 2012).

granted, the Administrative Judge may, after notifying the parties and given them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings.”

Here, Agency filed a Motion for Summary Disposition contemporaneously with its Prehearing Statement. Following the Prehearing Conference in this matter, the undersigned provided Employee the opportunity to submit a response to Agency’s motion. Further, Agency was also provided the option to submit a sur-reply brief addressing this matter. For the reasons previously outlined, the undersigned finds that Employee’s Opposition failed to offer any reasonable argument regarding any material facts in this matter. Upon examination of entire record, I find that there are no material or genuine facts in dispute in this matter. As previously noted, it is undisputed that Employee sent the email and what the contents of that email included. Employee does not present any relevant factual disputes in this matter, but rather, provides dubious and illogical assertions regarding cultural differences and other speculative arguments regarding her intent that are unrelated to the material facts in this matter. Accordingly, I find that pursuant to OEA Rule 615.1, that the rendering of summary disposition is appropriate in this matter.

Whether the Penalty was Appropriate Under the Circumstances

Based on the above-mentioned findings, I find that Agency’s action was taken for cause, and as such, Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency’s penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).²² According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM; whether the penalty is based on a consideration of relevant factors; and whether there is a clear error of judgment by agency. Further, “the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not this Office.”²³ Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.”²⁴

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to suspend Employee from service.²⁵

²² *Shairmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). 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).

²³ See *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*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

²⁴ *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

²⁵ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

Chapter 16 § 1607.2 of the District Personnel Manual Table of Illustrative Actions (“TIA”) provides that the appropriate penalty for a first offense of Conduct Prejudicial to District Government ranges from Counseling to a 30-Day Suspension. Further, the penalty range for a first offense of Discriminatory Practices ranges from a ten (10) Day Suspension to Removal.²⁶ Consequently, I find that Agency has met its burden and had cause to take action against Employee for all the causes of action set forth in its Final Notice. Based on the penalty ranges for each cause of action as listed in the DPM, I find that a suspension of ten (10) days to be a fair and an appropriate penalty in the instant matter. I further find that Agency properly exercised its discretion, and its chosen penalty of suspension for ten (10) days is reasonable under the circumstances, and not a clear error of judgment. As a result, I conclude that Agency’s Motion for Summary Disposition should be granted and that its action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency’s Motion for Summary Disposition is **GRANTED** and Agency’s action of suspending Employee from service for ten (10) days is **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Administrative Judge

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- 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.

²⁶ DPM §1607.2 (a)(5) and DPM § 1607.2 (j)(2). (2019)