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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
KIMBERLI MOTLEY,)	
Employee)	OEA Matter No. 1601-0120-13
)	
v.)	
)	Date of Issuance: April 18, 2017
DISTRICT OF COLUMBIA)	
METROPOLITAN POLICE)	
DEPARTMENT,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Kimberli Motley (“Employee”) worked as a Police Officer with the Metropolitan Police Department (“Agency”). On May 23, 2013, Agency issued a final notice of adverse action to Employee. The notice provided that Employee failed to report to duty. Consequently, Agency charged Employee with “AWOL (Absent Without Leave), i.e., reporting late for duty more than six (6) times within a one-year period, an absence from duty without official leave in excess of the first four (4) hours of a scheduled duty assignment that is not in the category of lateness” and “any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules,

regulations, and orders relating to the discipline and performance of the force.”¹ Employee appealed this decision to Chief Lanier. On June 26, 2013, Chief Lanier issued a final Agency decision which upheld a twelve-day suspension without pay as the result of Employee’s actions.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on July 24, 2013. She submitted her written response provided to Chief Lanier and Agency’s final decision. Employee requested that OEA rescind the adverse action and her twelve-day suspension without pay.³

Agency filed its response to Employee’s Petition for Appeal on August 28, 2013. It denied Employee’s claims. Consequently, Agency requested a hearing on the matter.⁴

Before issuing her Initial Decision, the OEA Administrative Judge (“AJ”) held an evidentiary hearing on March 2, 2015. After considering the testimonies provided during the hearing and documentary evidence, the AJ ruled that Agency had cause for both charges. She found that Employee failed to report for her regularly scheduled tour of duty on January 1, 2013, and she was not granted leave from a lieutenant for that date. Therefore, Employee was AWOL. The AJ found Employee’s arguments that she could not use her government email and did not have possession of her weapon or other equipment unpersuasive. She reasoned that there was no evidence in the record to prove that Employee’s work email was inaccessible or inoperable while she was on non-contact status. The AJ also noted that Employee conceded to not checking to see if her email was operational.

Additionally, the AJ found that Agency adequately proved the charge of prejudicial

¹ For the charge of prejudicial conduct, Agency alleged that Employee submitted a leave request to an official which was denied. Subsequently, she submitted the same leave request to another official without disclosing that the request was previously denied. *Metropolitan Police Department’s Answer to the Petition*, Tab #2 (August 28, 2013).

² *Id.*, Tabs #4 and 6 (August 28, 2013).

³ *Petition for Appeal*, p. 2 (June 24, 2013).

⁴ *Metropolitan Police Department’s Answer to the Petition*, p. 1-2 (August 28, 2013).

conduct. She held that the record supported Agency's claim that Employee submitted a leave request to a second Lieutenant after having her leave previously denied. Hence, the AJ opined that Agency's action was taken for cause and that the penalty of a twelve-day suspension was appropriate. Accordingly, Agency's suspension action was upheld.⁵

On December 9, 2015, Employee filed a Petition for Review with the OEA Board. She asserts that the AJ failed to address all of the issues of law and fact, and the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy. Employee contests the testimonies of several Agency witnesses. Additionally, she argues that Agency failed to consider all of the *Douglas* Factors. Employee contends that she was not returned to full-duty status until December 20, 2012, after her equipment was returned and she received her gun. She claims that she remained in non-duty status for several weeks after and would not have been able to work on January 1, 2013.⁶

Witness Testimony

As it relates to Employee's arguments regarding witness testimonies, OEA has held that it will not question an AJ's credibility determinations of a witness' testimony.⁷ The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A2d. 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. She found both Lieutenants Lamond and Whiteside to be credible witnesses. Moreover, she reasoned

⁵ *Initial Decision*, p. 9-14 (November 4, 2015).

⁶ *Petition for Review* (December 9, 2015).

⁷ *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); and *Ronald Wilkins v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013).

that their testimonies were supported by documented evidence. Alternatively, she found Employee's testimony to be unpersuasive. Thus, in accordance with *Metropolitan Police Department v. Ronald Baker*, this Board will not second guess the AJ's credibility determinations.

Douglas Factors

The Court in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), provided what an agency should consider when determining the penalty of adverse action matters.⁸ Despite Employee's contention that Agency failed to consider each of the *Douglas* factors in this matter, this Board believes that Agency adequately based Employee's removal on a consideration of relevant factors. Agency provided testimony and documented evidence that the relevant *Douglas* factors were considered. Agency considered each of the twelve factors and classified each factor as neutral, aggravating, or mitigating.⁹

More importantly, the Court in *Douglas* specifically ruled that not all of the factors would be relevant to each case. As a result, *Douglas* provided that "selection of an appropriate penalty

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- ⁸ (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.

⁹ *Metropolitan Police Department's Answer to the Petition*, Tab #2 (August 28, 2013).

must thus involve a responsible balancing of the relevant factors in the individual case.” The Court went on to note the following:

The Board’s role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board 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 Board’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 Board 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 Board then to specify how the agency’s decision should be corrected to bring the penalty within the parameters of reasonableness.

Therefore, this Board holds that Employee’s argument lacks merit because Agency adequately proved that its decision was based on a balance of relevant factors.

Full-Duty Status

Employee’s final argument is that she was not returned to full-duty status until December 20, 2012; therefore, she would not have been able to work on January 1, 2013. This Board does not understand the rationale behind this argument. The AJ properly held that the evidence in the record provides that Employee was restored to full-duty status on December 12, 2012.¹⁰ The record also provides that Employee’s weapon and equipment were returned on December 20, 2012.¹¹ Therefore, as the AJ concluded, Employee’s restriction on working holidays was lifted on December 12, 2012. Assuming *arguendo* that we used December 20, 2012, as the effective date that Employee returned to full-duty status, as she contends, she still resumed full-duty status prior to January 1, 2013. Therefore, it was unreasonable for her to believe that the holiday ban was still applicable. Moreover, if Employee really believed that the ban was in place, there would have been no need for her to include January 1, 2013, in her initial leave request.

¹⁰ *OEA Hearing Transcript*, Employee Exhibit #1 (March 2, 2015).

¹¹ *Id.*

Conclusion

Based on the aforementioned, the AJ made reasonable witness credibility determinations as the administrative fact finder in this matter. Despite Employee's contention, Agency considered all of the relevant *Douglas* factors prior to reaching its penalty decision. Finally, Employee was in full-duty status. Thus, she was required to go to work on January 1, 2013, because she did not properly secure leave. As a result, we must deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **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.