THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BELYNDA ROEBUCK,	)	
Employee	)	OEA Matter No. 1601-0098-12
	)	
v.	)	Date of Issuance: February 5, 2014
	)	
D.C. OFFICE OF AGING,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Francis Coleman, Esq., Employee Representative
Lindsay Neinast, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 11, 2012, Belynda Roebuck ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Office of Aging's ("DCOA" or "Agency") decision to terminate her from her position as a Special Project Coordinator effective April 11, 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") in October of 2013. Thereafter, on October 9, 2013, I issued an Order scheduling a Status Conference in this matter for November 6, 2013. Both parties were present for the Status Conference. Subsequently, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties have submitted their briefs. After considering the parties' arguments as presented in their submissions

[1]Specifically, Agency noted that Employee "knowingly and willfully failed to report your earnings from the D.C. Government Personnel Office for the week(s) ending: 09/04/2010; 09/11/2010; 09/18/2010; and 09/25/2010. As a result of this failure to report your earnings, you continued to collect unemployment insurance benefits to which you were not entitled."

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 Special Project Coordinator for Agency effective August 30, 2010, Employee was unemployed and receiving unemployment benefits from the District of Columbia. While working full time with Agency effective August 30, 2010, Employee continued to apply for and receive unemployment benefits from the District of Columbia. Employee received unemployment benefits from the week ending in September 4, 2010, through the week ending on September 25, 2010. 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 for the weeks ending on September 4, 2010 through September 25, 2010, Employee certified that: 1) she was able, available and actively seeking work during the weeks claimed; 2) she did not perform work during the weeks claimed; and 3) she did not return to full time work during the weeks claimed.[2] Following an audit by DOES, Employee was asked to confirm whether she worked, received severance or other income during the aforementioned period, and if so, Employee was asked to submit a response explaining why she incorrectly reported her income. In reply to this audit notice, Employee noted that she worked but did not get paid for the periods in question. Thereafter, on April 12, 2012, DOES issued a Notice of Overpayment to Employee, seeking repayment in the amount of one thousand five hundred and thirty-six dollars ($1,536.00) in unemployment benefits - the amount Employee collected as unemployment benefit from DOES while she was employed full time by Agency.[3] In addition, DOES issued a Notice of Determination to Employee, notifying her that she would not be eligible for future unemployment benefits. Employee appealed the Notices from the DOES to the Office of Administrative Hearing ("OAH") which issued an Order affirming the Notice of Overpayment and overruling the Notice of Determination. Subsequently, Agency on February 8, 2012, issued an Advance Written Notice of Proposed Removal to Employee for the following charge and specification:

> **Charge:** Any act which constitutes a criminal offense whether or not the act results in a conviction, specifically, making a false

[2] Agency's Answer at Tab 1, pgs. 123-137 (January 26, 2012).
[3] *Id.* at Tab 1, pgs. 59-65.

> 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 regulations.]
>
> **Specification:** You knowingly and willfully failed to report your earnings from DC Government Personnel Office for the week(s) ending 09/04/2010; 09/11/2010; 09/18/2010; and 09/25/2010. As a result of this failure to report your earnings, you continued to collect unemployment insurance benefits to which you were not entitled.[4]

This matter was referred to a Hearing Officer for a pre-termination review. The Hearing Officer in his March 30, 2012 report, sustained the charge and specification, as well as the recommendation for removal. Upon review of the record and the Hearing Officer's report, on April 11, 2012, Agency's Director issued a Notice of Final Decision on Summary Removal Action informing Employee that she was terminated from her position effective April 11, 2012.[5]

Employee's Position

Employee argues that Agency's non-payment of her earnings for the week of August 30, 2010 through September 11, 2010, and subsequent managerial neglect actively produced the result of her unemployment overpayment issues. Employee explained that Agency deliberately failed to disburse payment for payroll transactions for the week of August 30, 2010 through September 11, 2010. Employee reiterates that this non-payment of her earnings was an intervening cause for her unemployment overpayment issues. She contends that she had no intent to defraud. She explains that she was not in a position to submit the unemployment claim form with no showing of wages, so in order to submit the form, she had to state that she was unemployed, and she submitted the form in the only way she could, by claiming she was unemployed. Employee also states that Agency was made aware of the minor inaccuracies in her PeopleSoft profile that hindered the population of her timesheet for the week of August 30, 2010 through September 11, 2010, in an email dated September 9, 2010. She explains that Agency assigned an inactive time reporter to enter her time for this pay period. She also explains that Agency changed her date of hire from August 30, 2010 to September 12, 2010 to preemptively void reported time entered on September 14, 2010 for the date range of August 30, 2010 through September 11, 2010. Employee notes that she was paid her August 30, 2010 through September 11, 2010 earning forty-four (44) days after she was hired.

Furthermore, Employee avers that the unemployment overpayment issue was resolved on September 14, 2012 by an Administrative Law Judge ("ALJ") who ruled that Employee did not

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[4] *Id.* at Tab 2.

[5] In its Brief in Support of Employee's Removal, Agency highlighted that the Notice of Final Decision which stated that Employee was summarily removed was a clerical error. Agency further explained that Employee was afforded advanced written notice pursuant to Chapter 16, § 1608 of the DPM, and thus, Employee was not summarily removed. *See* Agency's Brief in Support of Employee's Removal (November 27, 2013).

knowingly and willfully fail to report her earnings; Employee did not simultaneously receive earnings while receiving unemployment benefits; Employee consistently made timely payments towards satisfying the DOES overpayment since November 11, 2011; and Employee suffered hardship. And by failing to consider the mitigating factors in its decision to terminate Employee, Agency's decision should be rescinded, and Employee reinstated, with back pay and full benefits. Employee also states that Agency failed to provide sufficient evidence to satisfy or to establish a fraud standard with respect to the element of knowledge in violation of D.C. Official Code § 51-119(a).[6]

In addition, Employee alleges that Agency engaged in disparate treatment when it terminated her. She explains that she was not granted the privilege of an alternative resolution instead of termination in the unemployment matter like other employees who were similarly situated, despite the mitigating circumstance in her case. Employee highlights that she was issued a 15-day Advance Written Notice of Proposed Removal on February 8, 2012. She maintains that her due process rights were violated when Agency failed to comply with section 1608.2 (c), (e), (f), (g), (h) of Chapter 16 of the D.C. Personnel Regulation's 15-day adverse action rule. Employee also explains that Agency placed her on Leave Without Pay ("LWOP") status while a new Hearing Officer was assigned to review her responses. Furthermore, Employee alleges that Agency retaliated against her for refusing to testify on behalf of the government in a Whistleblower Protection Act Case. Employee also maintains that in April of 2012, she notified Agency that she was being retaliated against for participating in a Whistleblower case, and that she also intended to become a Whistleblower with regards to Agency's Fiscal Year ("FY") 2010 Anti-deficiency Act violation.[7]

Agency's Position

Agency asserts that its administrative error did not excuse Employee's action of continuing to apply for and receive unemployment benefits from DOES while employed with Agency. Agency maintains that although it is unfortunate that Agency's administrative error resulted in a delay in Employee receiving her paycheck, this administrative error did not justify Employee's actions of continuing to apply for and receive unemployment benefits, and failing to disclose her accrued wages. Agency also contends that Employee acknowledged and accepted full responsibility for her action when she stated that "I decided not to appeal the September 14, 2011 Final Order or challenge the validity of the Wage Audit Notice" in her February 13, 2012, response to the Advance Written Notice. Agency explains that Employee voluntarily began making monthly payments to DOES to correct the overpayment.

Agency maintains that its action of terminating Employee was done for cause. Agency explains that § 51-119(a) of the D.C. Official Code authorizes criminal penalties for submission of false or misleading statements in connection with an application for unemployment benefits, and under this section, Employee's actions constitute cause or disciplinary action. Agency explains that it is undisputed that on August 30, 2010, Employee began working full time with Agency, and yet she continued to submit Continued Claim Forms for the weeks ending September 4, 2010, through September 25, 2010. Agency further maintains that, by certifying

[6] Petition for Appeal (May 11, 2012); *See also* Employee's brief (December 18, 2013).
[7] *Id.*

that her responses to the questions on the Continued Claim Forms were true and correct and also that by agreeing that she understood that the law provides penalties for false statements to obtain or increase benefits, Employee still made statements or representations on the Continued Claim Forms knowing it to be false. Agency also highlights that in view of the serious nature of Employee's conduct, Agency's decision to remove Employee from her position was within the acceptable range of penalties within Chapter 16 of the District Personnel Manual ("DPM") and was reasonable and appropriate under the circumstances.[8]

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.[9] And to prove that an employee violated D.C. Official Code § 51-119 (a), the agency has to show 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.

In the instant matter, when completing the Continued Claim Forms for the weeks ending September 4, 2010 through September 25, 2010, Employee answered '**NO**' to the following questions on the form:

1) **Did you perform work during the week claimed? If yes, indicate gross earnings amount in the box at the right.**
2) **Did you return to full time work?**[10]

The responses to these questions are important to DOES' when deciding who is eligible for unemployment benefits, as well as how much they are entitled to. And based on these two

[8] Agency's Answer, *supra*; *See also* Agency's brief in Support of Employee's Removal, *supra*.
[9] *Lewis v. United States*, 389 A.2d 306, D.C., July 10, 1978.
[10] Agency's Answer at Tab 1, pgs. 123-137 (January 26, 2012).

responses, it is undisputed that Employee made false statements of material facts on the Continued Claim Form in order to continue receiving unemployment benefits. The record shows that Employee began working with Agency effective August 30, 2010, thus, her answers to the questions in the September 4, 2010 and subsequent forms were false, and this satisfies the first element of false pretense listed above.

As to the second element – knowledge of the falsity or failure to disclose, Employee argues that Agency failed to provide sufficient evidence to satisfy or to establish a fraud standard with respect to the element of knowledge in violation of D.C. Official Code § 51-119(a). Employee explained that Agency failed to satisfy the subjective standard in its knowledge of falsity finding.[11] Employee further explained that according to the Court in *Jacobs*, the knowledge requirement is a subjective one as it relates to the particular individual charged with the fraud, not to a hypothetical reasonable person. Employee maintains that to prove knowledge, the Court of Appeals has ruled that the agency must establish either that the employee had actual knowledge of the falsity, or the employee made the statement recklessly, careless of whether it is true or false.[12] Employee goes on to note that the "scienter element is met if the representation is 'recklessly and positively made without knowledge of its truth."[13] Employee in this matter notes that her case is factually similar to *Jacobs*. Employee contends that from a subjective standpoint, she submitted the form the only way she could, by claiming she was unemployed. She also explains that once she started receiving pay in early October 2010, she stopped filing her claims for benefits; she was not in the position to submit the unemployment claim form with no showing of wages, so in order to submit the form; she had to state that she was unemployed.

I find these arguments unpersuasive. Once Employee became employed on August 30, 2010, she was no longer entitled to submit a Continued Claim Form for unemployment benefits. Additionally, while Employee may not have had actual knowledge of her gross earnings when she filled out the forms because she had not yet received a paycheck, she had an idea of how much her weekly, bi-weekly or monthly income would be based on her annual income, which she had knowledge of, at the time she completed the forms. Additionally, Employee had knowledge of whether or not she had returned to work when she filed the Continued Claim Forms for the weeks ending in September 4, 2010 through September 25, 2010, because she had actually began working effective August 30, 2010. Consequently, I find that by answering 'NO' to the question regarding whether she had returned to full time work, Employee had actual knowledge of the falsity of this statement, or Employee made the statement recklessly, careless of whether it was true or false. Based on the above, I find that there is sufficient evidence in the record to satisfy the second element.

As to the third element, it is undisputed that Employee made these false statements on the Continued Claim Forms in an attempt to obtain unemployment benefits. Based on the record, Employee received unemployment benefit in the amount of one thousand five hundred and thirty-six dollars ($1,536.00). Therefore, I conclude that the third element – intent to obtain or increase benefits, has also been satisfied. Accordingly, I find that there is sufficient evidence in

[11] *Citing Jacobs v. District Unemployment Comp. Bd.*, 382 A.2d 282 (1978).
[12] *Id*.
[13] *Citing Premier Poultry C. v. Wm. Bornstein & Sons*, D.C. Mun. App., 61 A.2d 632, 634 (1948).

the record to satisfy the third element. And consequently, I find that Agency had cause to institute this cause of action against Employee.

Furthermore, I find that Employee's argument that Agency's non-payment of her earnings for the week of August 30, 2010 through September 11, 2010, and subsequent managerial neglect actively produced the result of her unemployment overpayment issues is without merit. Employee began filing for unemployment benefits the week ending September 4, 2010, more than a week before her first paycheck from Agency was actually due. So Employee had no way of knowing at the time she filed the September 4, 2010 Continued Claim form that her paycheck would be delayed. Moreover, Employee only noticed an error with reporting her time after she had filed the Continued Claim Form.[14]

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).[15] 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, I find that Agency has met its burden of proof for the charge of [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), and as such, Agency can rely on this charge in disciplining Employee. Agency maintains that it considered the *Douglas*[16] factors in imposing the penalty of termination. Employee on the other hand notes that Agency engaged in disparate treatment in imposing the penalty of termination.

Disparate Treatment

Employee noted in her Petition for Appeal and in her brief that Agency engaged in disparate treatment by not affording Employee the same treatment as similarly situated district employees, thus making the penalty of termination inappropriate. OEA has held that, in order to establish disparate treatment, an employee must show that she worked in the same organizational

[14] Employee first notified Agency of her inability to report her time in an e-mail dated September 9, 2010. *See* Petition for Appeal.

[15] *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).

[16] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

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.[17] Additionally, "in order to prove disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[18] Here, Employee simply makes a blanket assertion that Agency engaged in disparate treatment. She did not offer any evidence in support of this allegation. Therefore, I 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.[19] Employee argues that, by removing her, Agency abused its discretion as it failed to consider much less "weigh" the mitigating factors in making its determination to terminate her. 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.[20] In this case, the penalty for a first time offense for this cause

[17] *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).

[18] *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).

[19] *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).

[20] 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.

of action ranges from a ten (10) days suspension to removal. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is clearly not an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

Whistleblower, Retaliation, LWOP and Anti-Deficiency Act Violation

In her submissions to this Office, Employee alleged that Agency retaliated against her for refusing to testify on behalf of the government in a Whistleblower Protection Act Case. Employee also maintained that in April of 2012, she notified Agency that she was being retaliated against for participating in a Whistleblower case, and that she also intended to become a Whistleblower with regards to Agency's Fiscal Year ("FY") 2010 Anti-deficiency Act violation. However, Employee has not provided any credible evidence in support of these allegations. Moreover, with regards to the Anti-Deficiency Action violation, Agency explained that the matter has been referred to the Office of the Inspector General for appropriate action.

Employee also stated that Agency placed her on Leave Without Pay status while a new Hearing Officer was assigned to review her responses. However, Employee has not provided this Office with any evidence to substantiate this assertion.

Section 1608.2 (c), (e), (f), (g), (h) of D.C. Personnel Regulation's 15-day adverse action rule

Employee highlights that she was issued a 15-day Advance Written Notice of Proposed Removal on February 8, 2012. She maintains that her due process rights were violated when Agency failed to comply with section 1608.2 (c), (e), (f), (g), (h) of Chapter 16 of the D.C. Personnel Regulation's 15-day adverse action rule. Agency on the other hand noted that it complied with § 1608 of the DPM by affording Employee advanced Written Notice.

DPM §1608.2 provide that, [t]he advance written notice shall inform the employee of the following:

(a) The action that is proposed and the cause for the action;
(b) The specific reasons for the proposed action;
(c) The right to prepare a written response, including affidavits and other documentation, within six (6) days of receipt of the advance written notice;
(d) The person to whom the written response or any request is to be presented;
(e) The right to review any material upon which the proposed action is based;
(f) In the case of a proposed adverse action only, the right to be represented by an attorney or other representative;
(g)The right to an administrative review by a hearing officer appointed by the agency head, as provided in § 1612.1, when the proposed action is a removal; and
(h) The right to a written decision.

A review of the February 8, 2012 Advanced Written Notice of Proposed Removal shows that Agency complied with this section. Moreover, Employee's statement that her due process rights were violated when Agency failed to comply with section 1608.2 (c), (e), (f), (g), (h) of Chapter 16 of the D.C. Personnel Regulation's 15-day adverse action rule is without merits because this does not apply to §1608.2 of the DPM.

However, pursuant to § 1608.1 of the DPM, [e]xcept in the case of a summary suspension action pursuant to § 1615 or a summary removal action pursuant to § 1616[21], an employee against whom corrective or adverse action is proposed shall have the right to an advance written notice, as follows:

(a) In the case of a proposed adverse action, an advance written notice of fifteen (15) days; or
(b) In the case of a proposed corrective action, an advance written notice of ten (10) days.

Agency explained in its brief that while the Notice of Final Decision states that Employee was summarily removed, this was a clerical error. I disagree with Agency's assertion that this was a clerical error. I find that Agency summarily removed Employee on April 11, 2012, without providing her with the fifteen (15) days advance written notice as prescribed in § 1608.1(a) of the DPM. However, I further find that Agency's failure to provide Employee with at least fifteen (15) days advanced written notice is considered harmless error, and thus, calls for a "do-over" or reconstruction of this process as opposed to a retroactive reinstatement of Employee. DCMR § 631.3 provides that "… [OEA] shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless.

Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." Apart from asserting that Employee suffered hardship as a result of not receiving her first paycheck on time, Employee has failed to provide this Office with any evidence to establish that Agency's failure to provide Employee with fifteen (15) days advance written notice caused Employee substantial harm or was prejudicial to Employee's rights. Additionally, the fact that Agency issued its Advanced Written Notice of Proposed Removal, had the matter reviewed by a Hearing Officer prior to issuing its Notice of Final Decision on Summary Removal shows that it had time to review the entire record and had already made its decision to terminate Employee and a fifteen (15) days advanced written notice would not have made a difference in its decision to terminate Employee. However, I find that because Employee was nonetheless entitled to a fifteen (15) days advanced written notice, Agency is required to pay Employee for not providing her with such notice.

I therefore find that, although Agency had sufficient cause to terminated Employee pursuant to D.C. Official Code §51-119(a) (2001) and D.C. Personnel Regulations Chapter 16, §

[21] 1616.1 An agency head may remove an employee summarily when the employee's conduct:
(a) Threatens the integrity of government operations;
(b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or
(c) Is detrimental to public health, safety, or welfare of others.

1603.3(h), Agency's action of terminating Employee was not done in strict accordance with § 1608.1(a) of the DPM. However, I further find that Agency's actions constituted harmless error.

ORDER

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

1. Agency's action of terminating Employee is **UPHELD**; and

2. Agency shall reimburse Employee fifteen (15) days pay and benefits commensurate with her last position of record for failure to provide Employee with a fifteen (15) days advance written notice in compliance with § 1608.1(a) of the DPM; and

3. 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:

_____
MONICA DOHNJI, Esq.
Administrative Judge