THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHAEL DUNN,	)	OEA Matter No. 1601-0047-10
Employee	)	
	)	Date of Issuance: April 15, 2014
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Dunn ("Employee") worked as a Lead Youth Development Specialist with the District of Columbia Department of Youth Rehabilitation Services ("Agency"). On September 18, 2009, Agency issued a notice of final decision to remove Employee from his position for (1) on-duty acts or omissions that interfere with the efficiency and integrity of government operations: neglect of duty and incompetence and (2) any knowing or negligent material misrepresentation on other document given to a government agency. Employee appealed Agency's decision to the Office of Employee Appeals ("OEA") on October 20, 2009.

In his Petition for Appeal, Employee argued that he was forced to act in a supervisory role for which he was not trained. Additionally, he asserted that he was terminated for failure to complete forms for which he was not trained to complete. Accordingly, he requested that he be

reinstated to his position with back pay.[1]

Agency filed its response to Employee's Petition for Appeal on November 23, 2009. It provided that Employee was removed pursuant to District of Columbia Municipal Regulation ("DCMR") §1603.3.[2] Agency explained that in accordance with the "Reporting Unusual Incidents" policy, Youth Services Administration ("YSA") 1.14, Employee was required to file a report after the incident with the resident, and he failed to do so. Additionally, Agency claimed that Employee violated its "Use of Physical Restraints" policy, YSA 9.16 when he failed to file a report that handcuffs were used to restrain the resident. Finally, it asserted that Employee falsified and back-dated a restraint form and incident report which he submitted several weeks after the incident.[3]

Before issuing her Initial Decision in this matter, the OEA Administrative Judge ("AJ") held a two-day evidentiary hearing. After receiving the hearing transcripts, both parties submitted closing arguments. In his closing brief, Employee argued that the evidence presented during the hearing established that he completed and submitted his unusual incident report in a timely manner. With respect to the use of restraints report, Employee conceded that he did not complete the form on the day of the incident. However, he reasoned that his failure to complete the form did not constitute neglect of duty because he immediately reported the use of restraints to his direct supervisor.[4] Moreover, Employee asserted that no other staff members completed a

[1] *Petition for Appeal,* p. 3 (October 20, 2009).
[2] According to Agency, on May 16, 2008, Employee was the Acting Supervisory Youth Development Specialist, which is also known as the Acting Officer of the Day. A resident at the Oak Hill Youth Center was being escorted by another Youth Development Specialist for drug testing when the resident refused to report to the testing center or to return to his room. As a result of the resident's non-compliance, a call was placed to Agency staff requesting assistance. Employee and other staff members responded. Agency claimed that the resident was grabbed by four male staff members who wrestled him to the floor, causing the resident to hit his head twice on the floor. Agency alleged that Employee then placed handcuffs on the resident. *Agency's Answer to Employee's Petition for Appeal,* p. 2-6 (November 23, 2009).
[3] *Id.*, 2 and 8-13.
[4] Additionally, he instructed another staff member to take the resident to Agency's medical unit since restraints were

use of restraint form despite witnessing, participating in, or having knowledge of the use of restraints on the resident. Thus, he could not have neglected his duty because others who were similarly situated did not prepare the forms either.[5]

In response to Agency's allegations that Employee falsified and back dated the restraint form and incident report, Employee provided that this was done at the instruction of his supervisor. He claimed that after being told that his unusual incident report could not be located, his supervisor instructed him to complete an incident report and use of restraint form and to slide the documents under his door if he was not present in his office. As a result of that request, Employee argued that he prepared and submitted both forms.[6]

After three requests for extensions, Agency finally submitted its closing brief and argued that although it failed to inform Employee of his right to representation, it was harmless error. It reasoned that Employee did not demonstrate that the violation had a determinative effect on his case. Agency also argued that it met its burden of proving that Employee violated the unusual incident and restraint policies. It claimed that Employee was not a credible witness on these

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used. Employee also alleged that he contacted the medical unit by radio to alert them that the resident was reporting to the unit.

[5] As for Agency's claims of incompetence, Employee explained that Agency could not prove this charge because it never provided him training to act as Officer of the Day. Employee's supervisor testified that he was not a supervisor, nor was he trained to act as a supervisor. Employee argued that because no counseling or training was provided, Agency could not show that he was incompetent. *Michael Dunn's Proposed Findings of Fact, Conclusions of Law, and Closing Argument,* p. 6-7 (July 20, 2012).

[6] One of Employee's final closing arguments was that Agency violated its own regulations, and as a result, his termination should be vacated. He contended that the "Use of Force" policy requires Agency to complete ". . . a final report on its investigation of an allegation of staff abuse of a youth within ten (10) business days after receiving oral or written notice of an allegation of staff physical abuse." Likewise, the "Use of Physical Restraints" policy requires Agency to complete ". . . a final report on its investigation of an allegation of improper use of restraints with youth within ten (10) business days after receiving oral or written notice of an allegation of staff physical abuse." Employee explained that the incident occurred on May 23, 2008. However, Agency's investigative report was not completed until September 5, 2008, well beyond the ten-day period. Furthermore, Employee argued that during the hearing, Agency's investigator admitted that he failed to advise Employee of his right to union representation prior to questioning him on a matter which could result in disciplinary action. Employee claims that this is a violation of Article 7, Section 4 of the Collective Bargaining Agreement ("CBA"). As a result of these violations and Agency's lack of proof that he failed to submit the reports, Employee requested that the AJ reverse Agency's termination action. Additionally, Employee argued that his termination should be vacated because it was not supported by the *Douglas* factors. He alleged that the factors were not addressed in Agency's advanced written notice of proposed removal or its final agency decision. *Id.,* 7-17.

issues and that he knew or should have known that he was required to provide the forms. Finally, Agency contended that Employee admitted that he back dated both forms and did not note the actual date that he prepared the document on the forms. It opined that because removal was an appropriate penalty in this matter, its termination action should be sustained.[7]

The AJ issued an Initial Decision on October 5, 2012. She held that in accordance with Agency's policy YSA 1.14, all employees are required to file unusual incident reports when necessary. Thus, Employee and each other staff member who witnessed the incident were required to complete and submit the report within two hours of the incident. However, the AJ ruled that Agency failed to establish a cause for termination because it did not offer any evidence to rebuff Employee's testimony that he timely submitted the form.[8]

As for the physical restraint charge, the AJ determined that YSA 9.16(III) applied to all Agency employees who perform official duties. However, YSA 9.16(V)(A) explained that the control and use of restraints are directed by a supervisor. The AJ held that although Employee was acting in the capacity of a supervisor on the date of the incident, his position of record was not a supervisor. As a result, she reasoned that he was not subject to the section of the policy pertaining to supervisors. Furthermore, the AJ provided that because Employee was not a supervisor, he was not trained on filling out a restraint form. Thus, she ruled that Employee's failure to submit a timely restraint form was not cause for his termination.[9]

However, the AJ did find that Employee back-dated the unusual incident and restraint

[7] *Agency's Closing Argument,* p. 9-16 (August 15, 2012).
[8] *Initial Decision,* p. 12 (October 5, 2012).
[9] In response to Employee's argument that Agency failed to follow its own regulations, the AJ opined that pursuant to Agency's own rules, it should have completed its investigation within ten business days. She held that the matter was referred to Agency on May 23, 2008, and ten business days from that date was June 6, 2008. She ruled that because Agency's report was not completed until September 5, 2008, it clearly violated YSA 9.16(V)(G)(4). Thus, Employee's action was not cause for his termination. Additionally, the AJ found that Agency violated Article 7, Section 4 of the CBA, and the violation constituted harmful error to Employee because the decision to terminate him was largely based on the interview between him and the Agency interviewer. *Id.*, 13-16.

forms. She held that in completing the forms, Employee listed May 16, 2008, instead of the date that the forms were actually filled out. Therefore, there was cause to discipline Employee for that action. Consequently, the AJ determined that in accordance with the Table of Penalties, the penalty for a first offense of making any knowing or negligent material misrepresentation on other document given to a government agency was a suspension of five to fifteen days. Accordingly, the AJ ruled that Employee's termination be reversed and replaced with a suspension for fifteen days. She ordered that Agency reinstate Employee and reimburse him with back-pay and benefits lost as a result of his removal.[10]

On November 9, 2012, Agency filed a Petition for Review. The petition provides the following:

> Agency seeks review of the Initial Decision because it is based on an erroneous interpretation of statute, regulation[,] or policy. Agency has filed, contemporaneously with Agency's Petition for Review, Agency's Motion for an Extension of Time to Submit a Memorandum of Points and Authorities in Support of the Petition for Review.[11]

Agency requested an extension until November 27, 2012, to submit its Memorandum of Points and Authorities. It provided that due to the press of other business, its counsel needed additional time to prepare its submission.[12]

Employee filed an Opposition to Agency's Motion for an Extension of Time on November 16, 2012. He argued that in accordance with D.C. Municipal Regulations ("DCMR") 633.3, Agency's Petition for Review was required to set forth objections to the Initial Decision supported by reference to the record. Employee asserted that if Agency was allowed to circumvent the filing requirements of Petitions for Review set forth in the DCMR, then the

[10] *Id.*, 17 and 20.
[11] *Agency's Petition for Review*, p. 2 (November 9, 2012).
[12] *Agency's Motion for an Extension of Time to Submit a Memorandum of Points and Authorities in Support of Petition for Review* (November 9, 2012).

requirements would be nullified. Therefore, he requested that Agency's motion be denied and the Petition for Review be dismissed.[13]

On November 27, 2012, Agency filed a Second Motion for an Extension to Submit a Memorandum of Points and Authorities. Again, Agency's counsel provided that due to the press of other business, he needed additional time to prepare its submission. Agency requested a new deadline of November 29, 2012.[14]

Agency finally submitted its Brief in Support of the Petition for Review on November 29, 2012. It contends that the Table of Penalties, relied on by the AJ, is advisory in nature and not mandatory. Agency cites to *Taylor v. Department of Veterans Affairs,*112 M.S.P.R. 423 (MSPB 2009) and alleges that "an agency's table of penalties is merely a guide and is not mandatory unless the agency has a specific statement making the table mandatory and binding rather than advisory." Agency opines that because the applicable version of the DCMR is silent on whether the Table of Penalties is mandatory, then the prior version of the regulation should be used. It cites to a 1987 version of the Table of Penalties which it alleges that "management shall not be restricted absolutely by the range of penalties as provided, but shall provide written justification for any variance therefrom, which shall be placed in the corrective or adverse action file." Thus, Agency asserts that the Table of Penalties is not mandatory in nature.[15]

Additionally, Agency explains that the responsibility to determine the penalty imposed rests with it. Agency asserted that "the AJ was not authorized to impose a penalty simply because it is the maximum suggested penalty in the [Table of Penalties]." Thus, Agency requested that the OEA Board remand the matter to it for further consideration of an appropriate

[13] *Opposition to Agency's Motion for Extension of Time to Submit a Memorandum of Points and Authorities in Support of the Petition for Review* (November 16, 2012).
[14] *Agency's Second Motion for an Extension of Time to Submit a Memorandum of Points and Authorities in Support of the Petition for Review* (November 27, 2012).
[15] *Agency's Brief in Support of the Petition for Review,* p. 3-5 (November 29, 2012).

penalty for the charge the AJ sustained.[16]

Despite Employee's Opposition Motion to Agency's Motion for an Extension, he filed an Answer to Agency's Petition for Review on December 4, 2012. He highlighted that Agency only presented one argument on Petition for Review -- that was that the Table of Penalties is advisory and not mandatory in nature --; thus, the AJ's ruling to adjust the penalty to a fifteen-day suspension was an erroneous interpretation of the Table of Penalties outlined in the DCMR.[17] However, Employee contends that DCMR §1619.1 clearly provides that "the Table of Appropriate Penalties . . . shall be used as specified in this chapter." Employee also claims that the D.C. Court of Appeals in *District of Columbia Department of Corrections v. Teamsters Union Local No. 246*, 554 A.2d 319, 325-326 (D.C. 1989), held that the Table of Penalties is mandatory in disciplinary actions. Additionally, Employee argues that OEA has held that an agency penalty will only be set aside if it exceeds the range of sanctions permitted by regulation. Therefore, it is his position that the Table of Penalties is not just a discretionary tool to be ignored by Agency. Employee reasons that because the maximum penalty for a first offense of knowing or negligent material misrepresentation is fifteen days, then the AJ's decision was not erroneous. Moreover, Employee claims that Agency is barred from presenting its argument regarding the penalty because it was not raised before the Initial Decision was issued. Hence, he requests that Agency's Petition for Review be denied.[18]

Requirements of Petitions for Review

This Board will first address Employee's Opposition to Agency's Petition for Review. We would recommend for Agency, and others like it, to review the OEA Rules and D.C. Official Code and note that this Board does not have the statutory or regulatory authority to rule on

[16] *Id.,* 5-6.
[17] Employee provided that Agency did not challenge any of the other findings made in the Initial Decision.
[18] *Employee's Answer to Agency's Petition for Review,* p. 6-9 (December 4, 2012).

motions for extension. The deadline to file Petitions for Review is mandatory, as evidenced in D.C. Official Code § 1-606.03(c) and OEA Rule 633.1.[19] Therefore, we cannot extend the time for such filings. As Employee provided, if this Board allows Agency to circumvent the filing requirements of Petitions for Review, then the requirements would be nullified.

As to Employee's claims regarding the lack of information presented in Agency's Petition for Review, we are governed by OEA Rules 633.3 (a) – (d). The Rule provides the following:

> 633.3 The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a petition for review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or
>
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

The plain language of OEA Rule 633.3 is that a Petition for Review is required to do two things. First, the Petition for Review must state objections to the ruling made in the Initial Decision. Secondly, it must refer to portions of the record to support its objections.

As previously provided, Agency's Petition for Review simply stated that it sought ". . . review of the Initial Decision because it is based on an erroneous interpretation of statute,

[19] D.C. Official Code § 1-606.03(c) provides that ". . . The initial decision of the Hearing Examiner shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." Moreover, OEA Rule 633.1 provides that "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision."

regulation[,] or policy." This curt statement cannot reasonably be viewed as adequate grounds to serve as a true Petition for Review or as an objection to the AJ's Initial Decision. Agency did not provide which statue, regulation, or policy, relied on by the AJ, was erroneously interpreted. More importantly, it did not reference the record to support its contention that AJ committed an error. On this basis alone, this Board could deny Agency's Petition for Review.[20]

Back-dated Document

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decision is based on an erroneous interpretation of statute, regulation, or policy. The only charge in question on Petition for Review stems from Agency's cause of action of Employee's knowing or negligent material misrepresentation on other document given to a government agency. DCMR § 1603.3(d) provides that ". . . cause for disciplinary action for all employees covered under this chapter is defined as . . . any knowing or negligent material misrepresentation on other document given to a government agency."

Based on documents present in the record and Employee's own testimony, it is clear that he misrepresented the submission date indicated on the unusual incident and restraint reports provided to Agency.[21] Employee does not contest the charge in his response to Agency's Petition for Review.[22] Therefore, Agency did adequately prove that cause existed to take action

[20] Nonetheless, in an effort to err on the side of caution and to present our position on the record, we will address the merits of the arguments raised on petition and in response to the petition. It should be noted that in *Employee's Answer to Agency's Petition for Review*, he claims that Agency waived its argument regarding the advisory nature of the Table of Penalties since if failed to raise it prior to the AJ issuing her Initial Decision. OEA Rule 633.4 provides that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Although Agency did not specifically raise the fifteen-day suspension penalty before the AJ, the record is replete with claims by Agency pertaining to the Table of Penalties prior to the closing of the record. *See Agency's Answer to Employee's Petition for Appeal*, p. 8, 13, and 98-100 (November 23, 2009) and *Agency's Closing Argument,* p. 13 and 16 (August 15, 2012). Therefore, the Board will address Agency's argument regarding the penalty.

[21] *OEA Hearing Transcript*, p. 153-154, 160-162, and 175-182 (May 21, 2012).

[22] Employee provides the following in his answer to Agency's Petition for Review:

> . . . this Office did find that Mr. Dunn made a . . . knowing or negligent material misrepresentation on other document given to a government agency. Because this was Mr. Dunn's first offense and

against Employee. Hence, the only issue before the Board is whether the penalty imposed by the AJ was proper.

Appropriateness of Penalty

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). According to *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[23] As a result, OEA has consistently held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[24]

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

When discussing the imposition of penalties, the *Douglas v. Veterans Administration,* 5

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pursuant to the applicable Table of Penalties codified in 6-B DCMR § 1619.1, this Office suspended Mr. Dunn for fifteen (15) days, the maximum penalty allowable by law.

[23] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following:

> [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.

[24] *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 and Emergency Medical Services*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011).

M.S.P.R. 313, 5 M.S.P.R. 280 (1981), case provided that "any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service . . . ."[25] The D.C. Court of Appeals has consistently relied on the Table of Penalties outlined in the DCMR when determining the appropriateness of an agency's penalty.[26] However, the crux of this appeal hinges on whether the Table of Penalties outlined in DCMR § 1619.1 is mandatory or advisory in nature.

Mandatory versus Advisory Table of Penalties

Employee and Agency present two very different arguments on the nature of the DCMR regarding penalties. Employee relies on *District of Columbia Department of Corrections, et al. v. Teamsters Union Local* 246, 554 A.2d 319 (D.C. 1989), in arguing that the table is mandatory. In this case, the Court held that "the District of Columbia Office of Personnel has promulgated a *mandatory* Table of Penalties to be used in disciplinary actions (emphasis added)." However, at the time the decision was issued, the Court was relying on a 1983 version of DCMR § 1608.1, which provided, *inter alia*, that "use of the Table Penalties Guide for the penalties listed shall be mandatory; except that a lesser penalty may be imposed when the basis for the determination is included in the record."[27]

Contrary to Employee's assertions, Agency cites to a 1987 version of the DCMR to argue

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[25] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 330 (1981). Furthermore, *Power v. United States*, 531 F.2d 505, 507-508, 209 Ct.Cl. 126 (1976) (citing *Daub v. United States*, 292 F.2d 895, 154 Ct.Cl. 434 (1961) and *Cuiffo v. United States*, 137 F.Supp. 944, 950, 131 Ct.Cl. 60, 68 (1955)), held that there are two scenarios in which courts will not uphold the punishment imposed by the agency because of an invalid penalty. The first is where the sanction exceeds the range of permissible punishment specified by statute or regulation. The second scenario is where a court has determined that the discipline is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency. Although the decisions issued from these courts are not binding on the OEA Board, we believe that they offer sound guidance regarding Table of Penalties.

[26] *Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005); *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985); *Brown v. Watts*, 993 A.2d 529 (D.C. 2010); *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998); and *District of Columbia v. Davis*, 685 A.2d 389 (D.C. 1996).

[27] 30 D.C. Reg. 5891 (November 11, 1983).

that the regulation is advisory in nature. Agency contends that the 1987 version of the regulation provides that "the Table of Appropriate Penalties in § 1618 provides a range of penalties appropriate for an offense. Management shall not be restricted absolutely by the range of penalties as provided, but shall provide written justification for any variance therefrom, which shall be placed in the corrective or adverse action file."[28]

The chronological nature of the arguments presented seems to suggest that the Table of Penalties was mandatory in 1983 and became more advisory in 1987. However, at the time of Agency's action in the current case, the latest amendment to the DCMR was made on February 22, 2008.[29] The amendment completely eliminated the language used in both the 1983 and 1987 versions of the DCMR. In 2008, DCMR §1619.1 provided that "the Table of Appropriate Penalties . . . *shall* be used as specified in this chapter. . . . (emphasis added)." The plain language of the regulation and the use of the word "shall" clearly denote that the table is mandatory and not advisory in nature. Thus, contrary to Agency's assertions, the Table of Penalties was mandatory at the time of Employee's removal.[30]

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[28] 34 D.C. Reg. 1853 (March 20, 1987).

[29] This Board is perplexed by Agency's reliance on the 1987 language of the DCMR, especially because it indicates in its Petition for Review its knowledge that the 1987 language upon which it relied has been subsequently superseded.

[30] Agency cited to the *Taylor* case when arguing the advisory nature of the regulation. Therefore, this Board will address the holding in that matter. In *Taylor v. Department of Veterans Affairs*, 112 M.S.P.R. 423, 2009 MSPB 197 (2009)(citing *Farrell v. Department of the Interior*, 314 F.3d 584, 590–92 (Fed.Cir.2002); *Werts v. Department of Transportation*, 428 F.A.A., 17 M.S.P.R. 413, 415 (1983), *recons. denied sub nom. Burns v. Department of Transportation*, 22 M.S.P.R. 388 (1984), aff'd, 783 F.2d 196 (Fed.Cir.1986), the MSPB held that ". . . the Board and its reviewing court have found that an agency's table of penalties is merely a guide and is not mandatory unless the agency has a specific statement making the table mandatory and binding rather than advisory (emphasis added)." Furthermore, in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 330 n.63 (1981), the MSPB reasoned that "regardless of whether these provisions of the Federal Personnel Manual are 'mandatory' or 'precatory,' many such provisions have been made mandatory by implementing regulations of the individual agencies . . . ."

Thus, taking the holdings in *Taylor* and *Douglas* into consideration, it would follow that the nature of the Table of Penalties would be binding given the language provided in the District Government's personnel manual – the DCMR. An exception would exist if the Department of Youth Rehabilitation Services decided to implement its own separate and independent Table of Penalties which it clearly indicated was advisory and not mandatory. This reasoning is also presented in the 2008 version of DCMR §§1603.6 and 1603.7 (55 DCR 1775 (February 22, 2008)).

Those sections provide the following:

1603.6 The authority to adopt corrective or adverse action penalty guidelines or

Penalty for Cause of Action

DCMR §1619.1(4) lists the range of penalties for the charge of any knowing or negligent material misrepresentation on other document given to a government agency. There are two sub-categories for the penalty for this cause of action. The first is if the misrepresentation was "a non-intentional false statement as the result of negligence." The range of penalty for the first offense is suspension for five to fifteen days. The other category is if the misrepresentation was "an intentional false statement or omission with respect to other government documents or making a false entry on government records which call into question the credibility of the document." The penalty for the first offense of that cause of action is a fifteen-day suspension. This Board believes that Employee's action of back-dating the reports were more clearly aligned with the second category, and thus, the AJ was proper in her determination that a fifteen-day suspension was the maximum penalty for this charge. Therefore, we support the AJ's decision to impose a fifteen-day suspension.

Remand for Determination of Penalty

As for Agency's request that this Board remand the matter to it for consideration of the penalty, this Board is further guided by the *Douglas* court. The Court provided that OEA has the authority to modify an agency's penalty when a decision is made to dismiss some causes of action while sustaining others. Specifically, it held that:

> requirements is held exclusively by the Mayor and independent personnel authorities covered under this chapter . . . .
>
> 1603.7 Notwithstanding the provisions in sections 1603.3, 1603.5, and 1603.6 of this section, the Director, D.C. Department of Human Resources (DCHR), or independent personnel authority may, on a case-by-case basis, approve the use of penalty guidelines or requirements developed by an agency head for employees of the agency covered under this chapter. The Director, DCHR, shall publish in the District Personnel Manual any such guidelines or requirements approved for a subordinate agency.

Agency did not present any evidence that it created its own Table of Penalties, nor were any separate Agency penalty guidelines found to be published in the District Personnel Manual. It is clear from the record that Agency relied on the Table of Penalties outlined in DCMR §1619, which are mandatory in nature.

> whenever the agency's action is based on multiple charges some of which are not sustained, the presiding official should consider carefully whether the sustained charges merited the penalty imposed by the agency. In all cases in which the appropriateness of the penalty has been placed in issue, the initial decision should contain a reasoned explanation of the presiding official's decision to sustain or modify the penalty, adequate to demonstrate that the Board itself has properly considered all relevant factors and has exercised its judgment responsibly.[31]

The AJ offered a thorough analysis of her decision to modify Agency's penalty from removal to a fifteen-day suspension. All but one of the charges lodged against Employee were dismissed because Agency failed to prove that his actions constituted cause for removal. Moreover, the AJ held that Agency violated its own regulations regarding its investigation; engaged in disparate treatment; and failed to inform him of his right to representation.[32] More importantly, on Petition for Review, Agency does not dispute the AJ's ruling to dismiss its charges stemming from its on-duty acts or omissions that interfere with the efficiency and integrity of government operations: neglect of duty and incompetence cause of action. Additionally, the one charge that was sustained is not disputed by Agency or Employee. The only issue that is contested is the penalty for the sustained cause of action. As was discussed above, the record clearly establishes that the AJ exercised reasonableness when considering Employee's modified penalty.

Because the maximum penalty for any knowing or negligent material misrepresentation on other document given to a government agency is a fifteen-day suspension, any penalty beyond a fifteen-day suspension would not only exceed the limits of reasonableness, but it would violate the DCMR. In addressing this very issue, the *Douglas* court reasoned that "a penalty grossly exceeding that provided by an agency's standard table of penalties may for that reason alone be arbitrary and capricious . . . . (citing *Power v. United States*, 531 F.2d 505, 507-508, 209 Ct.Cl. 126 (1976), cert. denied, 444 U.S. 1044, 100 S.Ct. 731, 62 L.Ed.2d 730 (1980);

[31] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 334-335 (1981).
[32] *Initial Decision,* p. 11-16 (October 5, 2012).

Grover v. United States, 200 Ct.Cl. 337, 353 (1973); *Daub v. United States*, 292 F.2d 895, 897, 194 Ct.Cl. 434 (1961); and *Cuiffo v. United States*, 137 F.Supp. 944, 950 (Ct. Cl. 1955)."[33] Therefore, we need not remand this case for a penalty determination because the record is fully developed on this issue. As was provided in *Douglas*, *". . .* the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed."[34] A penalty beyond a fifteen-day suspension would violate the standard provided in Agency's Table of Penalties. Accordingly, Agency's request for this Board to remand this matter to it for further consideration of the penalty lacks merit and is futile. Consequently, we must DENY Agency's Petition for Review.

[33] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 333 n.71 (1981).
[34]The MSPB in *Douglas* also held that selection of the penalty is necessarily an element of the agency's decision which can be sustained only if the agency establishes the facts on which that decision rests by the requisite standard of proof. *Id.*, 333-334.

ORDER

Accordingly, Agency's Petition for Review is **DENIED**. Accordingly, Agency shall reinstate Employee to his last position of record or a comparable position and substitute for the removal a fifteen–day suspension. Agency shall reimburse Employee all back-pay and benefits lost as a result of the adverse action, less fifteen days which constitutes a fifteen-day suspension. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.