THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RICHARD HAIRSTON,	)	OEA Matter No. 1601-0307-10
Employee	)	
	)	Date of Issuance: September 16, 2014
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF CORRECTIONS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Richard Hairston ("Employee") was a Correctional Officer with the Department of Corrections ("Agency"). On December 8, 2009, Agency issued a notice to Employee informing him of its proposal to removal him from his position. The proposal was based on its finding that Employee engaged in any on duty or employment related act or omission that interfered with the efficiency and integrity of government operations: misfeasance.[1] Following an administrative review of the matter and a hearing officer's recommendation of termination, Agency issued its final notice which sustained the hearing officer's decision. As a result, Employee was removed from his position, effective April 3, 2010.[2]

Employee contested the termination and filed a Petition for Appeal with the Office of

[1] Specifically, Agency alleged that on July 16, 2009, Employee participated in an attempt to pass canteen items into the South One Housing Unit of the D.C. Central Detention Facility.
[2] *Petition for Appeal,* p. 64-72 (May 3, 2010).

Employee Appeals ("OEA") on May 3, 2010. He provided that he did not engage in any misconduct. Employee explained that even if OEA found that he did commit misconduct, Agency's penalty was too harsh given the circumstance. He argued that his termination was actually a retaliatory action by Agency because of his successful, previous appeals before OEA. Therefore, he requested reinstatement to his position, back-pay, reimbursement of attorney's fees and costs, and that his removal be expunged from his personnel file.[3]

Agency submitted its response to the Petition for Appeal on June 22, 2010. It contended that Employee violated its rules and regulations. Specifically, Agency provided that Employee violated the Employee Code of Ethics and Conduct, the District Personnel Manual ("DPM"), and the D.C. Department of Corrections' Program Statement. Agency reasoned that its review of the July 16, 2009 incident revealed that Employee attempted to pass canteen items into a unit that housed inmates who were not permitted to have such items. Therefore, Agency believed that its termination action was warranted.[4]

Thereafter, the matter was assigned to an OEA Administrative Judge ("AJ") who scheduled a Pre-hearing Conference which required the parties to submit Pre-hearing Statements.[5] In Agency's Pre-hearing Statement, it claimed that in addition to a surveillance video capturing Employee placing three bags of canteen items in the storage area of a unit within the detention facility, it also learned that Employee motioned for another employee to allow an inmate to leave his assigned unit. Agency submitted that it interviewed Employee regarding the incident, and it ultimately determined that he committed acts of misconduct.[6]

Employee's Pre-hearing Statement provided that this was his third appeal to OEA. He

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[3] *Id.*, 3-5.
[4] *Agency's Pre-hearing Statement and Supporting Documents* (June 22, 2010).
[5] *Order Convening a Pre-hearing Conference* (July 13, 2012).
[6] *Agency's Pre-hearing Statement*, p. 2-4 (August 8, 2012).

argued that pursuant to an AJ's ruling in an Initial Decision issued on December 15, 2008, he was reinstated in February of 2009. However, months later, he received a proposal to remove him. Employee submitted that the issues in this case were whether he committed any misconduct by moving the plastic bags containing canteen items into a storage unit; whether Agency initiated the adverse action against him in retaliation for his appeals filed at OEA; and whether Agency failed to weigh the relevant *Douglas* Factors, thereby exceeding the limits of reasonableness.[7]

Following an evidentiary hearing, the AJ issued his Initial Decision on April 30, 2013. He found that Agency's witnesses were more credible than Employee during the evidentiary hearing.[8] The AJ held that Employee collected canteen items and placed them in the South One Housing Unit. He reasoned that Employee violated basic correctional regulations when he motioned for another employee to open a cell door so that an inmate could drop canteen bags in a hallway; when he placed the canteen bags in an unlocked storage area without securing them; and when he failed to inform his superiors of the contraband. Thus, the AJ concluded that Employee was guilty of committing misfeasance.[9]

With regard to the penalty of removal, the AJ cited DPM § 1606.2, which discusses consideration of the employee's prior disciplinary record.[10] Based on his review of Employee's

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[7] *Employee's Pre-hearing Statement* (August 20, 2012). The *Douglas* Factors are provided in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

[8] The AJ explained that during the hearing, Employee did not offer any witnesses or evidence to corroborate his assertions, and he contradicted himself during his testimony. He found that Employee's credibility was also questioned when he submitted his own definition of contraband which differed from the other witnesses' definition. He also did not find Employee's assertion that he did not receive adequate training with regard to contraband credible.

[9] *Initial Decision,* p. 7-8 (April 30, 2013).

[10] This section provides that:

> In determining the penalty for a disciplinary action under this chapter, documentation appropriately placed in the OPF regarding prior corrective or adverse actions, other than a record of the personnel action, may be considered for not longer than three (3) years from the effective date of the action, unless sooner ordered withdrawn in accordance with section 1601.7 of this chapter.

past record, he found that he was put on enforced leave in August of 2005. However, because this disciplinary action occurred more than three years prior to the July 16, 2009 incident, the AJ concluded that this could not be considered in determining the appropriate penalty in this matter. As a result, he found that Employee's misfeasance was considered a first offense, and the penalty should have been a suspension of fifteen days. Thus, the AJ ruled that Agency did not properly exercise managerial discretion, and its penalty was an error of judgment. Accordingly, Agency's action was reversed and modified to a fifteen day suspension.[11]

Agency filed a Petition for Review with the OEA Board on June 4, 2013. It argues that the AJ's decision was based on an erroneous interpretation of statute, regulation, or policy. Specifically, Agency contends that the Table of Appropriate Penalties is advisory, not mandatory. It relies on *Taylor v. Department of Veterans Affairs,* 112 M.S.P.B. 423 (2009) to further assert that the Table of Penalties is advisory unless an agency has adopted a policy that indicates that it is mandatory. Thus, it believes that its penalty should not have been modified by the AJ.[12]

In his Opposition to the Petition for Review, Employee asserts that the AJ properly applied the *Douglas* Factors and was correct in finding that removal was inappropriate. Furthermore, Employee argues that Agency did not meet its burden of proving that its penalty was appropriate. Additionally, he claims that Agency's argument lacks merit because the Initial Decision considered a number of factors, not just the Table of Appropriate Penalties. Employee provides that the DPM has the weight of law, and removal was not within the range of penalties prescribed. Therefore, he believes that the AJ's decision was proper and requests that the Board

[11] With regard to Employee's claim that Agency was acting in retaliation to his previous appeals to OEA, the AJ ruled that Employee failed to present evidence to support this contention. Further, the AJ ruled that Employee failed to meet his burden of proof for a claim of disparate treatment. *Id.*, 9-11.
[12] *Agency's Petition for Review,* p. 4-6 (June 4, 2013).

uphold the decision.[13]

Misfeasance

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. Agency charged Employee with any on duty or employment related act or omission that interfered with the efficiency and integrity of government operations: misfeasance. DPM § 1603.3(f)(6) provides that ". . . cause for disciplinary action for all employees covered under this chapter is defined as . . . any on duty or employment related act or omission that interfered with the efficiency and integrity of government operations: misfeasance."

Based on documents present in the record and the testimonies of witnesses, it is clear that Employee's actions met the definition of misfeasance. Agency claimed that Employee violated DPM Chapter 18, Section 1801; the D.C. Department of Corrections Program Statement 3300.1, Section 8(n); and DPM § 1619.1(6)(f).[14] There is substantial evidence in the record to support

[13] *Employee's Opposition to Agency's Petition for Review,* p. 6-22 (June 25, 2013).
[14] *Agency's Pre-hearing Statement and Supporting Documents,* p. 3 (June 22, 2010). DPM Chapter 18, Section 1801 provides the following:

> Employees of the District government shall at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government.

Department of Corrections Program Statement 3300.1, Section 8(n) explains the following:

> Employees shall not engage in trading or trafficking with inmates. This includes selling, buying from, or delivery to any inmate any article or commodity of any description, except through authorized channels.

DPM § 1619.1(6)(f) provides the following:

> Misfeasance: Includes careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources for other than official business.

the AJ's conclusion that Employee violated Agency's policies on contraband.[15] Because the canteen bags were moved from their authorized area, they were considered contraband, despite Employee's contentions to the contrary. Employee collected the contraband. However, it was not secured, and he did not inform his supervisor of the unattended contraband, nor did he write a report describing the details of the incident. As the AJ held, these actions all violate the regulations and policies relied upon by Agency. Therefore, Agency did adequately prove that cause existed to take action 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."[16] As a result,

[15] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[16] *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

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.[17]

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 M.S.P.R. 313 (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 . . . ."[18] 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.[19] 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 Table of Penalties. Agency cites to a 1987 version of the DPM to argue that the regulation is advisory in nature. It relied on *Taylor v. Department of Veterans Affairs* to support this claim. Agency contends that the 1987 version of the regulation provides that "the Table of Appropriate Penalties

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should be corrected to bring the penalty within the parameters of reasonableness.

[17] *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).

[18] *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.

[19] *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).

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."[20]

Contrary to Agency's contentions, Employee asserts that the Table of Appropriate Penalties is mandatory because of the use of the word "shall" to indicate is applicability. As a result, Employee argues that ". . . there is nothing precatory about the requirement that agencies must consider the table in meting out discipline." Finally, he provides that Agency improperly relied on *Taylor v. Department of Veterans Affairs* because DPM §1619.1 provides a statement which makes the Table of Appropriate Penalties mandatory and not advisory.

At the time of Agency's action in the current case, the latest amendment to the DPM was made on February 22, 2008. The amendment completely eliminated the language used in the 1987 version of the DCMR. In 2008, DPM §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.

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

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

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 . . . ." This reasoning is also presented in the 2008 version of DPM §§1603.6 and 1603.7 (55 DCR 1775 (February 22, 2008)).[21]

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 DPM. An exception would exist if the Department of Corrections decided to implement its own separate and independent Table of Penalties which it clearly indicated was advisory and not mandatory. 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 DPM § 1619, which is mandatory in nature.

Penalty for Cause of Action

DPM §1619.1(6)(f) lists the range of penalties for the charge of any on duty or employment related act or omission that interfered with the efficiency and integrity of

[21] Those sections provide the following:

> 1603.6 The authority to adopt corrective or adverse action penalty guidelines or requirements is held exclusively by the Mayor and independent personnel authorities covered under this chapter . . . .
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> 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.

government operations: misfeasance. The range of penalty for the first offense is suspension for fifteen days. The range for a second offense is a twenty to thirty-day suspension, and the penalty for a third offense is removal. Agency properly proved that Employee engaged in misfeasance. However, this was Employee's first offense of misfeasance. Therefore, in accordance with the Table of Penalties, removal was not the appropriate penalty in this matter. A fifteen-day suspension is the maximum penalty that could be imposed for a first offense of misfeasance. Hence, the AJ's ruling was proper. Accordingly, Agency's Petition for Review is DENIED.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is denied. 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.