THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Matthew Coates	)	OEA Matter No. 1601-0017-13
Employee	)	
	)	Date of Issuance: November 21, 2014
v.	)	
	)	Senior Administrative Judge
Department of Corrections	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Laura Kakuk, Esq., Employee Representative
Lindsey Neinast, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On November 1, 2012, Matthew Coates ("Employee"), a former Masonry Worker, filed a Petition for Appeal with the Office of Employee Appeals ("OEA") from Department of Corrections' ("Agency" or "DOC") final decision removing him from his position. This matter was assigned to me on January 21, 2014. I conducted a Prehearing Conference on April 10, 2014, and ordered the parties to submit briefs on the penalty issue. The record is closed.

JURISDICTION

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

ISSUE

Whether Agency's penalty should be upheld.

Position of the parties

Employee asserts that termination is an unreasonable penalty and secondly, that his termination is based on an improper charge. Agency insists that it properly weighed the relevant factors in coming up with its penalty and that the charge was proper.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Based on the submissions of both parties, I make the following findings of facts:

1. Prior to joining DOC, Employee was unemployed and collecting unemployment compensation from the District of Columbia.

2. On March 29, 2010, Employee began working full-time as a Masonry Worker with Agency, but did not receive a paycheck from the Agency for at least 30 more days.

3. Because of the lag in time, Employee continued to collect unemployment compensation for several more weeks. He submitted Continued Claim Forms[1] for the weeks ending April 3, 10, 17, and 24, 2010, as well as May 1, 2010, in order to collect unemployment benefits. *Agency's Answer*, Tab 3.

4. For each of the five (5) weeks, Employee certified that he: 1) was "able, available and actively seeking work during the week claimed"; 2) "did not perform work during the week claimed"; and 3) "did not return to full time work [during the week claimed]." *Id*. Before submitting his Continued Claim Forms for each of the five (5) weeks, Employee had to certify that his "statements were true and correct," and that he "understood that the law provides for penalties for false statements to obtain or increase benefits."[2] *Id*.

5. In March of 2012, the Department of Employment Services ("DOES"), the agency that administers unemployment compensation benefits in the District of Columbia, conducted an audit that revealed that Employee obtained unemployment benefits while working as a full-time District of Columbia Government employee. *Agency's Answer*, Tab 3.

6. After conducting an investigation, DOES issued a Notice of Overpayment, seeking repayment from Employee. Employee unlawfully collected $1,920.00 in unemployment benefits while he was a full-time Agency employee by submitting false statements in his Continued Claim Forms. *Id*. DOES then notified Agency of its investigation.

7. On June 20, 2012, Agency issued an Advance Written Notice of Proposed Removal, notifying Employee that it was proposing removal because Employee certified false

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1 A Continued Claim Form is an official online form that a claimant completes on a weekly basis in order to receive unemployment compensation benefits for the week claimed. The form is submitted to the Department of Employment Services. *See e.g., Agency's Answer*, Tab 3.

2 At the bottom of each Continued Claim Form, the following appears in bold font:

> When you are satisfied that your answers are true and correct, read and agree to the Certification below. Clicking the I Agree button will cause your form to be submitted to the system. Your form will not be submitted to the system until you click the I Agree button.
>
> CERTIFICATION: I hereby certify that these statements are true and correct. I understand that the law provides for penalties for false statements to obtain or increase benefits.

See Agency's Answer, Tab 3.

statements to collect unemployment benefits, which constitutes a criminal offense. *Agency's Answer*, Tab 4.

8. Agency's ground for cause was "any act which constitutes a criminal offense whether or not the act results in a conviction." 6-B DCMR § 1603.3(h). *See Agency's Answer*, Tab 4. With the issuance of the Advance Notice of Proposed Removal, Employee was placed on administrative leave. Specifically, Agency alleged that Employee violated D.C. Code § 51-119(a)(2001), which prohibits an employee from 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.

9. Employee met with a representative from the D.C. Department of Unemployment Compensation to discuss a payment plan.

10. A Hearing Officer conducted a review of the record and supported Employee's proposed removal. *Agency's Answer*, Tab 6.

11. After reviewing the record and the Hearing Officer's recommendation, Agency's Deciding Official sustained the proposed removal in a Notice of Final Decision on Proposed Removal on October 1, 2012. *Agency's Answer*, Tab 7. In his Final Decision, the Deciding Official Director Faust sustained the cause "any act which constitutes a criminal offense, whether or not the act results in a conviction", outlined in the Hearing Officer's recommendation.

12. In his analysis of the *Douglas* factors,[3] the Deciding Official states that he "considered the twelve Douglas factors." However, in his report, Faust elucidated his opinions only on factors 1, 5, 6, and 9. He noted that "Employee willfully and intentionally made false statements of material fact for personal gain…" *Agency's Answer*, Tab 7. Due to Employee's misconduct in fraudulently obtaining benefits and the nature of his job, the Deciding Official found that Employee's actions in this matter have "eroded the supervisor's confidence in employee's credibility and capability to perform assigned duties and function effectively." *Id*. Accordingly, the Deciding Official found that termination was necessary and Employee's termination became effective on October 2, 2012. *Agency's Answer*, Tab 7.

13. On November 1, 2012, Employee appealed the removal to the Office of Employee Appeals. Employee does not contest the facts alleged by Agency, but does contest the reasonableness of Agency's imposed penalty.

Whether Termination is an Unreasonable Penalty.

Agency has the burden of demonstrating that the penalty imposed was within the tolerable limits of reasonable penalties.[4] In *Douglas v. Veterans Administration*, the Merit

3 *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280 (1981).

4 *See Douglas v. Veteran's Administration*, 5 M.S.P.R. 280, 307 (1981).

Systems Protection Board ("MSPB" or "the Board") ruled that an employee's due process rights require the agency to consider specific mitigating and aggravating factors in determining an appropriate penalty. These factors are termed as the *Douglas* Factors.[5] These standards have been adopted in this jurisdiction. *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

In the instant case, Employee argues that the Deciding Official did not consider half of the *Douglas* factors, and that he failed to consider any mitigating factors that would have justified a lower penalty. As evidence, Employee points out that no disciplinary document even mentions mitigating factors. Employee claims that the only factors that the Agency considered relevant were those that called for an aggravated penalty, citing this as a one-sided analysis and not a balanced assessment.

Employee asserts that the Deciding Official did not consider Factor 3, which deals with Employee's past spotless disciplinary record, or Factor 4, which deals with Employee's past favorable work record. As for Factor 6, which looks at the consistency of the penalty with those

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5 The *Douglas* Factors, *Id.*, p. 305-06 are:

1. The nature and seriousness of the offense, and its 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 supervisor's confidence in the 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.

imposed upon other employees for the same or similar offenses, Employee disputes Agency's claim that it employed the penalty of removal in similar circumstances. Employee asserts that he believes there are several other employees throughout the government of the District of Columbia who committed similar if not the exact same offenses but were not terminated. However, Employee did not proffer any evidence to support this contention.

Employee also believes that the Deciding Official failed to consider Factor 10, which looks at the potential for the employee's rehabilitation, or Factor 12, which looks at the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. Employee points out his remorse at his deed, and that he welcomes the option of a payment plan. He states that a lesser penalty would still have held him accountable for his conduct, but would have also been effective in assuring that neither he nor any other employee would commit a similar violation in the future.

Employee concludes that because the Deciding Official failed to engaged in a "responsible balancing of the relevant factors, this Office should vacate or reduce the penalty." *D.C. Dept. of Public Works v. Colbert*, 874 A.2d at 356. *See Cantu v. Dep't of the Treasury*, 88 M.S.P.R. at 256.

Agency denies Employee's allegations by pointing out that Deciding Official, Agency Director Thomas Faust, reviewed the Hearing Officer's recommendation and sustained the removal after properly weighing the relevant *Douglas* factors. Agency insist that it was "within the range of reasonableness" for Agency's Director to weigh the pertinent factors and ultimately determine that Employee's action—fraudulently obtaining unemployment benefits—"raises significant questions about [his] judgment, integrity, dependability and credibility, which makes [him] a liability for the Agency," and that terminating him from his position was both appropriate and necessary.[6] Agency concludes that given the seriousness of the offense and that Agency considered relevant *Douglas* factors, its decision to remove Employee was "neither arbitrary nor capricious and, therefore, should not be disturbed." *See Stokes*, 502 A.2d at 1010.

The District of Columbia Court of Appeals has held that a D.C. government agency must demonstrate a reasoned assessment of the *Douglas* Factors when making a disciplinary determination. *D.C. Dept. of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005). In *Colbert*, the Court of Appeals explained that "not all of these factors will be pertinent in every case," but the "[s]election of an appropriate penalty must involve a responsible balancing of the relevant factors . . ." *Id.* at 356. (Internal citations omitted). The Court explained that an agency must employ a responsible balancing of the *Douglas* factors at the onset of termination and in consideration of pre-termination protections. *Colbert*, 874 A.2d at 359. Where the agency failed to do so, the reviewing entity is free to rectify the error by directing an appropriate punishment, if any. *Id.* at 361. *See also Cantu v. Dep't of the Treasury*, 88 M.S.P.R. 253, 256 (2001)(stating that "the Board [MSPB] will disturb an agency's chosen penalty only if it finds that the agency failed to weigh relevant factors . . ..").

Although Employee insists that Agency failed to consider all the Douglas Factors, the

6 *Agency's Reply Brief*, page 4. In its brief, Agency mistakenly identified Employee as a correctional officer.

letter from the Deciding Official indicated that he did. That he elaborated only on the aggravating factors does not prove Employee's contention that the Deciding Official failed to consider any mitigating factors. It simply shows that the Deciding Official felt that the aggravating factors outweighed the mitigating ones.

The D.C. Court of Appeals has consistently relied on the Table of Penalties outlined in the District Personnel Manual ("DPM") § 1619 when determining the appropriateness of an agency's penalty.[7] DPM §1619.1(6)(h) lists the range of penalties for the charge of "Any act which constitutes a criminal offense whether or not the act results in a conviction." The range of penalty for the first offense is suspension for ten days to removal. This was Employee's first offense of this charge, and the table allows the ultimate penalty of removal.

The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

> Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate . . . to specify how the Agency's penalty should be amended.[8]

The Court in *Stokes* went on to hold that the reviewing tribunal may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Stokes* at 1011. Indeed, the primary discretion in selecting an appropriate penalty for misconduct is firmly within the purview of the employer. *See id*.

Considering all these, and the fact that the Deciding Official indicated in his decision that he considered all the Douglas Factors, I find the penalty of removal is reasonable for the charge indicated.

Whether Agency used an Improper Charge

Employee argues that his termination is based on an improper charge of "any act which constitutes a criminal offense whether or not the act results in a conviction." Employee states that while 6-B DCMR § 1603.3(h) does not mention the standard that must be met when charging an employee with "any act which constitutes a criminal offense, whether or not the act results in a conviction," the corresponding section in the Municipal Regulations, Table of Appropriate Penalties *does* prescribe such a standard. 6-B DCMR § 1619.1(8) states that in order to charge

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7 *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).

8 *Id*. at 1010. *See also Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0012-82, *citing* 30 D.C. Reg. 352 (1985) ("An agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.").

an employee with the above mentioned conduct, and to impose discipline based on that conduct, the amount of "proof needed" is an "arrest record." *See Table of Appropriate Penalties* (Employee Exhibit 1).

A logical reading of this requirement would suppose that where there is no arrest record for the conduct in question, the employer may not rely on 6-B DCMR § 1603.3(h) for discipline. Moreover, there is no discretion in applying this standard, as the DCMR makes the application of the Table of Appropriate Penalties mandatory. *See* 6-B DCMR § 1619.1 (stating that "The Table of Appropriate Penalties . . . *shall* be used as specified in this chapter.") (emphasis added).[9]

In the instant case, Agency agrees with Employee that there was no arrest record in this matter. No office embodied with prosecutorial power in the District of Columbia issued an arrest warrant for Employee's conduct. Agency determined on its own that Employee engaged in criminal conduct, and that she should be terminated for it. Agency argues that a criminal conviction is not necessary for the charge to apply.

However, Agency misses the point. The issue is not the uncontroverted fact that there is no criminal conviction in this matter, but there is no arrest record either. The logic behind the requirement for an arrest record is clear. A District agency may not prescribe criminal conduct to an employee without the minimal assessment of the District of Columbia's actual prosecutorial bodies, whether it be a law enforcement agency, the Office of the Attorney General for the District of Columbia, or the United States Attorney's Office for the District of Columbia. While the charge specified in 6-B DCMR § 1603.3(h) makes clear that a conviction need not result, the Table of Appropriate Penalties in 6-B DCMR § 1619.1(8) effectively requires *at least* a determination of enough probable cause to lead to an arrest for the conduct in question. *See United States v. Henry Ogle Watson*, 423 U.S. 411, 417 (1976); *see also Perkins v. United States*, 936 A.2d 303, 305 (D.C. 2007) (both holding that for an arrest to be lawful, the Fourth Amendment requires that it be supported by probable cause.) The Table of Appropriate Penalties goes even further, though, and requires an actual arrest. *See* Agency Exhibit 1.

In order to establish the offense and the prescribed penalty of termination, an arrest record is a prerequisite. Such a record does not exist, and thus, the termination may not be properly based on this charge. I therefore find that Agency failed to prove its cause for Employee's termination and thus, her penalty must be reversed.

I am in full agreement that Employee had committed and indeed, admitted, to a serious offense. However, Agency failed to levy the proper charge against Employee. Although it is true that Agency could have brought a more appropriate charge against Employee which would cover the facts that occurred, the District of Columbia Court of Appeals has made clear that employees can be expected to defend only against the charges which were actually leveled against them. *See Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994). *Goldstein v. Chestnut Ridge Vol. Fire Co*., 218 F. 3d. 337, 357 (4th Cir. 2000)

9 *See Hairston v. D.C. Dept. of Corrections*, OEA Matter No. 1601-0307-10, *Opinion and Order on Petition for Review* (September 16, 2014).

("Inasmuch as explanations legitimizing otherwise prohibited conduct can easily be conjured post hoc, we have reviewed these explanations with a jaundiced eye.").

In addition, the Board in *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981) held that it will not sustain an agency action on the basis of a charge that could have been brought, but was not. Rather, it is required to adjudicate an appeal solely on the grounds invoked by the agency, and may not substitute what it considers to be a more appropriate charge. *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989).

In conclusion, I find that Agency failed to prove its charge against Employee, and thus its penalty must be reversed.

ORDER

It is hereby ORDERED that:

1. Agency's decision to remove Employee from his position is REVERSED.

2. Agency is directed to reinstate Employee, issue the back pay to which he is entitled and restore any benefits lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.

3. Agency is directed to file with this Office documents within 45 calendar days to reflect its compliance with the directives of this Decision.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge