THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
Matthew Coates, Employee	) OEA Matter No. 1601-0017-13R16)
	) Date of Issuance: June 27, 2016
v.	)
	) Senior Administrative Judge
Department of Corrections, Agency	) Joseph E. Lim, Esq.)
	)

Brendan Flynn, Esq., and Daniel Crowley, Esq., Employee Representatives
Lindsey Neinast, Esq., Agency Representative

INITIAL DECISION ON REMAND

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. I conducted a Prehearing Conference on April 10, 2014, and ordered the parties to submit briefs on the penalty issue. On November 21, 2014, I issued an Initial Decision ("ID") that reversed Agency's adverse action.

The parties appealed, and on November 25, 2015, the D.C. Superior Court remanded this matter along with three others to this Office for further proceedings.[1]

At a status conference held on February 3, 2016, I ordered the parties to submit briefs on the issue(s) identified by the Superior Court. The parties have complied. 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 removal of Employee for cause of "any act which constitutes a

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1 *D.C. Dept. of Corrections vs. D.C. Office of Employee Appeals*, 2015 CA 000455 P(MPA), 2015 CA 000457 P(MPA), 2015 CA 001113 P(MPA), 2015 CA 001114 P(MPA), (D.C. Super. Ct. November 19, 2015). The Court consolidated this matter with those of Tonia Adams, Kenya Fulbert-Cubertson, and Jolanda Phillips-Armstead.

criminal offense whether or not the act results in a conviction" should be upheld where there was no arrest record.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following facts are uncontroverted:

1. Prior to being hired by 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 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[2] for the weeks ending April 3, 10, 17, and 24, 2010, as well as May 1, 2010, in order to collect unemployment benefits.[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]." 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."[4]

5. In March of 2012, the Department of Employment Services ("DOES"), the agency that administers unemployment compensation benefits in the District of Columbia,

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2 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.

3 *Agency's Answer*, Tab 3.

4 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.

conducted an audit that revealed that Employee obtained unemployment benefits while working as a full-time District of Columbia Government employee.[5]

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. DOES then notified Agency of its investigation.[6]

7. Despite the result of this investigation, Employee was never arrested or criminally charged for her unlawful collection of unemployment benefits.

8. On June 20, 2012, Agency issued an Advance Written Notice of Proposed Removal, notifying Employee that it was proposing removal because Employee certified false statements to collect unemployment benefits, which constitutes a criminal offense.[7]

9. 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 also* D.C. Personnel Regulations Chapter 16 § 1603.3(h).

10. 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. D.C. Code § 51-119(a) creates a criminal offense for 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.

11. The corresponding section of the Table of Appropriate Penalties, 6-B DCMR §1619.1(8), states that a conviction is not needed to sustain this cause. It further states that Agency may act on an arrest if the arrest is related to the job. The table specifies that the proof needed is an arrest record.

12. A Hearing Officer conducted a review of the record and supported Employee's proposed removal.[8]

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5 *Agency's Answer*, Tab 3.

6 *Id*.

7 *Agency's Answer*, Tab 4.

8 *Agency's Answer*, Tab 6.

13. 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. In his Final Decision, 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.[9]

14. In his analysis of the *Douglas* factors,[10] 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…" 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." Accordingly, the Deciding Official found that termination was necessary and Employee's termination became effective on October 2, 2012.[11]

15. 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.

<u>Position of the parties</u>

Employee's arguments:

Employee does not dispute the facts presented by Agency, but rather contests removal as the appropriate penalty. She argues that her 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 D.C. Municipal Regulations, Table of Appropriate Penalties does prescribe such a standard. 6-B DCMR § 1619.1(8) states that in order to charge an employee with the above mentioned conduct, and to impose discipline based on that conduct, the amount of "proof needed" is an "arrest record."[12]

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9 *Agency*'*s Answer*, Tab 7.

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

11 *Agency*'*s Answer*, Tab 7.

12 *See Table of Appropriate Penalties* (Employee Exhibit 3).

Employee argues that 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).[13] Employee stresses that requiring an arrest record in using § 1603.3(h) best harmonizes this provision with the Table of Appropriate Penalties.

Employee insists that the burden and threshold of proof needed to sustain a charge under 6-B DCMR § 1603.3(h) is the requirement of an arrest record, regardless of the absence of a criminal conviction. She states that the proof of an arrest is a reasonable proxy determination that probable cause exists to remove Employee from her job.

Lastly, Employee declares that her interpretation allows for a rational and logical way to read both 6-B DCMR § 1603.3(h) and 6-B DCMR §1619.1(8) in light of the statute taken as a whole.

Agency's arguments:

Agency agrees with Employee that there was no arrest record in this matter; but argues that an arrest record is not necessary for the charge under 6-B DCMR § 1603.3(h) to be sustained. Agency concludes that 6-B DCMR § 1603.3(h), 1603.4, and 1603.9 all indicate that the definition of cause is limited to District Personnel Manual ("DPM") § 1603, and that the language contained in the Table of Appropriate Penalties under "General Considerations" is subordinate to the definitions of cause contained in Section 1603.

Whether Agency's removal of Employee for cause of "any act which constitutes a criminal offense whether or not the act results in a conviction" should be upheld where there was no arrest record.

To put it another way, the issue presented by the D.C. Superior Court is whether the statute requires an "arrest record" for there to be cause for adverse action under 6-B D.C.M.R. § 1603.3(h).

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

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

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.[14] 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, Employee does not dispute that her actions satisfies the above elements of her criminal act. She does, however, argue that the enabling regulations mandate that the cause for adverse action against her should fail because she has no arrest record.

The relevant regulations are as follows: (*emphasis supplied*)

6-B DCMR § 1603.2 In accordance with section 1651 (1) of the CMPA (D.C. Official Code § 1-616.51 (1)) (2006 Repl.), *disciplinary actions may only be taken for cause*.

6-B DCMR § 1603.3 For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows:

(h) *Any act which constitutes a criminal offense whether or not the act results in a conviction*;

6-B DCMR § 1603.4 The causes specified in section 1603.3 of this section *shall include but not necessarily be limited to the infractions or offenses under each cause contained in the Table of Appropriate Penalties* in section 1619 of this chapter.

6-B DCMR § 1603.9 In any disciplinary action, the District government will bear the burden of proving by a preponderance of the evidence that the action may be taken or, in the case of summary action, that the disciplinary action was taken for cause, as that term is defined in this section. A criminal conviction will estop the convicted party from denying the facts underlying the conviction.

6-B DCMR § 1619.1(8) Table of Appropriate Penalties states that a conviction is

14 *Lewis v. United States,* 389 A.2d 306 (D.C., July 10, 1978).

> not needed to sustain this cause. It further states that Agency *may* act on an arrest if the arrest is related to the job. The table specifies that the proof needed is an arrest record.

The provisions above clearly states that the Table of Appropriate Penalties is not a complete or exhaustive listing of all possible offenses under each enumerative causes in 6-B DCMR § 1603.3. The requirement that disciplinary action for cause under 6-B D.C.M.R. § 1603.3(h) must take into consideration 6-B D.C.M.R. § 1603.4, which provides that the definition of cause "shall include but *not necessarily be limited to* the infractions or offenses under each cause contained in the Table of Appropriate Penalties in section 1619." 6-B D.C.M.R. § 1603.4 (emphasis added). The requirement of an "arrest record" is a limitation on what would constitute cause under 6-B D.C.M.R. § 1603.3(h). Thus, 6-B D.C.M.R. § 1603.4 clearly makes the Table of Appropriate Penalties in 6-B D.C.M.R. § 1619 subordinate to the definition of cause set forth 6-B D.C.M.R. § 1603.

Second, 6-B D.C.M.R. § 1603.9 provides that the government bears the burden to show, "in the case of summary action, that the disciplinary action was taken for cause, *as that term is defined in this section*." (emphasis added). The alleged additional requirement of an "arrest record" appears in 6B D.C.M.R. § 1619, a separate section. I also note that § 1619 states that Agency *may* act on an arrest if the arrest is related to the job. This further buttresses the argument that an arrest record is not mandatory.

It is clear that the purpose of the legislature in crafting the law was to ensure that an employee who commits a criminal act, in this instance, fraud in the unlawful collection of unemployment insurance benefits, will be subject to personnel adverse action regardless of whether said employee was ever convicted. Accepting Employee's argument that an arrest record is mandatory for a charge of "Any act which constitutes a criminal offense whether or not the act results in a conviction" to stick, would lead to a situation where an employee commits a criminal act but would escape adverse action simply because he or she was not arrested as a result of it. This would lead to an absurd result that is inconsistent with the intent of the law.

Third, OEA has upheld adverse actions against employees who had unlawfully collected unemployment insurance benefits but were never arrested.[15] Implicitly, therefore, the OEA has decided that no "arrest record" is required for disciplinary action for cause under 6-B D.C.M.R. § 1603.3(h).

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

ORDER

15 *See Roebuck v. D.C. Office of Aging*, OEA Matter No. 1601-0098-12 (July 12, 2015), and *Charles v. D.C. Dept. of Public Works*, OEA Matter No. 1601-0164-12 (May 15, 2014).

It is hereby ORDERED that:

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

FOR THE OFFICE: JOSEPH E. LIM, ESQ.
Senior Administrative Judge