THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0030-22
v.	)	
	)	Date of Issuance: March 2, 2023
DISTRICT OF COLUMBIA OFFICE OF THE ATTORNEY GENRAL,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Support Services Specialist with the Office of the Attorney General ("Agency"). On November 16, 2021, Agency issued a final notice of separation removing Employee from her position effective on November 18, 2021. It charged Employee with non-resident fraud pursuant to District Personnel Manual ("DPM") §§ 1605.4(a)[2] – conduct prejudicial to the District: unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive, or confidential information; 1605.4(b) – false statements: misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; knowingly and willfully making an incorrect entry on an

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Agency did not denote the number for which the cause of action aligned. The Table of Illustrative Action specifies this cause of action in DPM § 1607.2(a)(10).

official record or approving an incorrect official record; and knowingly and willfully reporting false or misleading information or purposefully omitting material facts, to any supervisor; and 1605.4(1) – prohibited personnel practices. Agency alleged that Employee made false statements about her address and residency and altered her paystubs to enroll her daughter at KIPP public charter school in the District of Columbia ("D.C.") to avoid paying non-resident tuition.[3]

On December 16, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She explained that while she was a Maryland resident, her daughter resided with Employee's grandmother and eldest daughter in D.C. Additionally, Employee contended that she did not intentionally commit fraud. She attested that she did not alter her paystubs to reflect that she was a D.C. resident, but the paystubs did reflect where her daughter resided. Employee opined that Agency "terminating [her] for changing the address on her paystubs was extreme." As a result, she requested that the tuition fraud action be removed from her record.[4]

Agency filed an Answer to the Petition for Appeal on February 4, 2022. As it related to the conduct prejudicial to the District charge, Agency argued that in accordance with 5-A District of Columbia Municipal Regulations ("DCMR") §§ 5001.1, 5001.3, and 5001.5, residency is not determined by the student, but by the student's custodian; thus, for a student to attend a D.C. public charter school free of charge, the student's parents, guardian, or other primary caregiver must reside in D.C. As for the false statements and prohibited personnel practices charges, it alleged that Employee, with the help of Marjorie Hogan, fraudulently altered her paystub from her Maryland address to a D.C. address, so that her daughter would be able to attend KIPP, D.C.

[3] *Petition for Appeal*, p. 2-13 (December 16, 2021). In a subsequent reply brief, Employee asserted that she emailed her paystub to a co-worker, Marjorie Hogan, who altered her paystubs by changing her address. Moreover, Employee made a disparate treatment claim by arguing that although Ms. Hogan falsified the paystubs, she was only suspended while Employee was terminated. *Unita Crudup's Reply Brief,* p. 2 and 9 (September 1, 2022).
[4] *Petition for Appeal,* p. 4 and 10 (December 16, 2021).

Agency offered the altered paystubs and residency verification forms submitted by Employee with her KIPP applications from 2014-2021. Agency explained that Employee knew or should have known that altering her paystubs was improper. It contended that removal was within the penalties for conduct prejudicial to the District, false statements, and prohibited personnel practices. Moreover, Agency argued that it thoroughly considered the *Douglas* factors when deciding Employee's penalty.[5] Therefore, it requested that OEA uphold its termination action.[6]

The Administrative Judge ("AJ") issued an Initial Decision on September 20, 2022. She held that Agency had cause to take the adverse action against Employee. She determined that, for several years, Employee utilized altered paystubs as part of her application for her daughter to attend KIPP. She found that the record adequately reflected that Employee altered her address on the paystubs to reflect a D.C. residence and tax withholdings. As for Employee's argument that another employee altered her paystub, the AJ found that this did not lessen Employee's

[5] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and 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 supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses.
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct.

[6] *Agency's Answer to Employee's Petition for Appeal*, p. 8-17 (February 4, 2022).

involvement in utilizing the paystubs for her application. She opined that Employee admitted to being aware that her paystub, which was a government document, included an altered address. The AJ noted Employee's admission that she resided in Maryland until August 2021, which helped to establish that the documents were falsified.[7]

Additionally, the AJ ruled that Employee's conduct was prejudicial to the government and was a prohibited personnel practice. She reasoned that given Employee's access to financial records, honesty and integrity were important to her job. Consequently, she held that Agency proved both causes of action.[8] Finally, the AJ held that because removal was an appropriate penalty for each cause of action, termination was reasonable under the circumstances. Therefore, she upheld Employee's termination.[9]

Employee made many of the same arguments in her Petition for Review that she presented to the AJ. She alleges that her co-worker, Ms. Hogan, offered to help her get her daughter into KIPP. Employee provides that she emailed Ms. Hogan a copy of her paystub, which Ms. Hogan altered by changing her address. She asserts that although she was a Maryland resident, she used the address where her daughter resided on her enrollment form. Additionally, she contends that Agency did not consider any mitigating factors in her case. Finally, Employee renews her disparate treatment claims that she was terminated while Ms. Hogan was only suspended. Accordingly, she requests that this Board rescinds her termination and instead allows her to resign.[10]

---

[7] *Initial Decision*, p. 10-11 (September 20, 2022).
[8] *Id.* As for Employee's disparate treatment argument, the AJ found that Employee failed to provide sufficient proof to establish disparate treatment. *Id.* at 11.
[9] *Id.*, 12-13.
[10] *Petition for Review* (October 18, 2022).

Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] After a review of the record, this Board believes that the AJ's rulings were based on substantial evidence.

Cause

Agency accused Employee of violating DCMR §§ 1605.4(a)(10); 1605.4(b)(2), (3), and (4); and 1605.4(l). Those regulations provide the following:

> 1605.4 Though not exhaustive, the following classes of conduct and performance deficits constitute cause and warrant corrective or adverse action:
>
> (a)(10) Conduct prejudicial to the District Government, including – Unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive, or confidential information.
>
> (b) False Statements, including:
>
> (2) Misrepresentation, falsification, or concealment of material facts or records in connection with an official matter.
>
> (3) Knowingly and willfully making an incorrect entry on an official record or approving an incorrect official record; and
>
> (4) Knowingly and willfully reporting false or

[11] *Black's Law Dictionary*, Eighth Edition; *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).

> misleading information or purposely omitting material facts, to any supervisor.

(l) Prohibited personnel practices.

As it relates to the charge of conduct prejudicial to the government – unauthorized use of information protected by regulation, Agency provided that in accordance with 5-A § 5001.1, all school aged children who establish bona fide residency in the District of Columbia, may attend a District of Columbia public charter school free of charge. Agency also provided that 5-A § 5001.3 noted that residence shall be presumed to be the bona fide residence of the student's parents, guardian, custodian, or other primary caregiver.[12] Finally, Agency explained that pursuant to 5-A § 5001.5, the bona fide residence is established if person seeking to enroll the student has established a physical presence in the District of Columbia and submitted valid and proper documentation.[13]

Agency submitted Employee's paystubs from 2014-2018 and 2020-2021, which all provided Maryland residency addresses for Employee and not a District of Columbia address.[14] Employee concedes that she resided in Greenbelt and Silver Spring, Maryland during the period in question.[15] However, as part of her Office of the State Superintendent of Education ("OSSE") D.C. residency verification forms, which were a part of her KIPP application, Employee submitted that she was the student's legal parent; she was a District of Columbia resident; and she listed District of Columbia addresses as her residence from 2014-2018 and 2020-2021.[16] Consequently,

---

[12] Other primary caregiver is defined as the person, other than a parent or court-appointed custodian or guardian, who is the primary provider of care and support to a child who resides with him or her, and whose parent, custodian, or guardian is unable to supply such care and support and submits evidence that he or she is the primary caregiver of the student. 5-A DCMR § 5099.
[13] Physical presence is defined as the actual occupation and inhabitance of a place of abode with the intent to dwell for a continuous period of time. 5-A DCMR § 5099.
[14] *Agency's Answer to Employee's Petition for Appeal,* p. 39-44 and 154 (February 4, 2022).
[15] *Unita Crudup's Reply Brief,* p. 2-6 (September 1, 2022).
[16] *Agency's Answer to Employee's Petition for Appeal,* p. 46-47, 50-51, 54-55, 58-59, 62, and 65-66 (February 4, 2022) and *Agency's Brief*, p. 156-158 (August 5, 2022).

Agency did prove that Employee engaged in conduct prejudicial to the government through her unauthorized use of information protected by regulations 5-A §§ 5001.1, 5001.3, and 5001.5. Accordingly, cause for conduct prejudicial to the District was established.

Likewise, the AJ found that Agency met its burden of proof related to false statements and prohibited personnel practices. Again, Employee's OSSE residency verification forms indicated that she was the student's legal parent; she was a District of Columbia resident; and she listed District of Columbia addresses as her residence.[17] The altered paystubs that Employee provided as a part of her KIPP application clearly show that she changed her actual Maryland address and Maryland state tax withholdings to a D.C. address with D.C. withholdings.[18] Agency reasoned that Employee made the false affirmation of a District residency to avoid paying the tuition subsidy required for students who live outside of the District. It is Agency's position that the District was harmed because its resources were used to educate Employee's child in a District classroom as the result of her deception.[19] This Board also agrees with the AJ's reasoning that Employee's involvement in utilizing altered paystubs was not lessened because she had another Employee alter them. Employee was aware that her government-issued paystubs included an altered address and state withholdings before she submitted them with her KIPP applications. Thus, there is substantial evidence that Employee engaged in making false statements and prohibited personnel practices.

Penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on

[17] *Agency's Answer to Employee's Petition for Appeal,* p. 46-47, 50-51, 54-55, 58-59, 62, and 65-66 (February 4, 2022).
[18] *Agency's Brief*, p. 32-34, 48-49, 52-53, 56-57, 60-61, 63-64, 67-68, 156-158 (August 5, 2022).
[19] *Id.* at 6.

Stokes v. District of Columbia, 502 A.2d 1006 (D.C. 1985).[20] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.[21]

In DCMR § 1607.2, the Table of Illustrative Actions are provided as a guide to assist managers in determining the appropriate agency action. The range of penalties for a first offense of DCMR § 1605.4(a)(10), conduct prejudicial to the District – unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or confidential information, is counseling to removal. Similarly, the range of penalties for a first offense of DCMR § 1605.4(b)(2), (3), and (4), false statements, is reprimand or counseling to removal. Finally, the range of penalties for a first offense of DCMR § 1605.4(l), prohibited personnel practices, is suspension to removal. Because removal is within the range of penalties for all three causes of action, Agency's penalty was appropriate.[22]

---

[20] *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No.1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review (*April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[21] The D.C. Court of Appeals 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." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. *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). Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

[22] This Board must also note that despite Employee's contention, Agency did consider the *Douglas* factors, which included mitigating factors before rendering its decision to terminate her. *Agency's Answer to Employee's Petition*

Disparate Treatment

OEA has historically held that if an employee is singled out for punishment or is punished in a disproportionate manner as compared with other similarly-situated employees, the punishment may be reviewed for consistency and may be reduced or reversed altogether.[23] Over the years, OEA has reasoned that an employee who raises an issue of disparate treatment has the burden of making a *prima facie* showing that they were treated differently from other similarly-situated employees.[24]

According to the AJ, Employee provided that Ms. Hogan's work was just as important as

for Appeal, p. 20-26 (February 4, 2022) and *Petition for Appeal*, p. 6 (December 16, 2021).

[23] *Employee v. Agency*, OEA Matter No. 1601-0180-81, 31 D.C. Reg. 2186 (1984); *Harris v. Department of Human Services,* OEA Matter No. 1601-0188-91 (May 19, 1993); and *Alvin Frost v. Office of the D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Sheena Washington v. Office of State Superintendent of Education*, OEA Matter No. 1601-0129-11R16, *Opinion and Order on Petition for Review* (July 11, 2017).

[24] In *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994), the OEA Board provided the following as it relates to disparate treatment:

> A number of factors are important in determining whether a penalty is reasonable. Among these factors is whether or not the agency has meted out similar penalties for similar offenses. However, the principle of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity, or perfect consistency regardless of variations, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where genuinely similar cases are presented. . . . Employee bears the burden of showing that the circumstances surrounding the misconduct are substantially similar to the circumstances in the cases being compared. . . . Normally, in order to establish disparate treatment, the employee must show that they worked in the same organizational unit as the comparison employees, and they were subject to discipline by the same supervisor within the same general period.

Citing *Douglas v. Veterans Administration,* 5 M.S.P.R 280 (306-307)(1981); *Bess v. Department of the Navy*, 46 M.S.P.R. 583 (1991); *Carroll v. Department of Health and Human Services,* 703 F.2d 1388 (Fed. Cir. 1983); *Kuhlmann v. Department of Health and Human Services,* 10 M.S.P.R 356 (1982); *Mille v. Department of Air Force,* 28 M.S.P.R 248 (1985). *Also see Huntley v. Metropolitan Police Department,* OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Adewetan v. D.C. General Hospital,* OEA Matter No. 1601-0021-93 (July 11, 1995); *Link v. Department of Corrections,* OEA Matter No. 1601-0079-92, *Opinion and Order on Petition for Review* (September 29, 1995); *Jordan v. Metropolitan Police Department,* OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995); *Shade v. Department of Administrative Services,* OEA Matter No. 1601-0360-94 (August 3, 1999); *Reynold Morris v. Office of State Superintendent of Education,* OEA Matter No. 1601-0261-10 (September 4, 2013); *Shalonda Smith v. D.C. Fire and Emergency Medical Services,* OEA Matter No. 1601-0195-11 (November 27, 2013); and *Shelby Ford v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0066-13 (January 12, 2016)

the work she performed. She provided that beyond that, Employee did not offer any substantive proof to establish disparate treatment. This Board agrees with the AJ's assessment that Employee did not make a *prima facie* showing that she was similarly situated to Ms. Hogan. She failed to assert any arguments that she and Ms. Hogan worked within the same organizational unit; shared the same supervisor; or that the circumstances surrounding the misconduct of her and Ms. Hogan were similar. Therefore, Employee did not prove disparate treatment.

Conclusion

There is substantial evidence to support the AJ's ruling that Agency adequately established the causes of action in this case and that its penalty of removal was appropriate. Moreover, this Board agrees with the AJ's holding that Employee failed to make a *prima facie* case to establish disparate treatment. Accordingly, Employee's Petition for Review is denied.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

_____
Clarence Labor, Jr., Chair

_____
Jelani Freeman

_____
Peter Rosenstein

_____
Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.