THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LISA RANDOLPH,	)	OEA Matter No. 1601-0008-11
Employee	)	
	)	Date of Issuance: October 28, 2014
DEPARTMENT OF MOTOR VEHICLES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Lisa Randolph ("Employee") worked as an Inspector with the Department of Motor Vehicles ("Agency"). On September 28, 2010, Agency removed Employee from her position for "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law – offensive comments, assault, or fighting on duty" and "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious – arguing, use of abusive or offensive language." Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 12, 2010. She argued that she worked in a hostile environment which she reported Agency. Employee explained that her actions were the result of a precarious situation that occurred at work after Agency failed to protect her safety due to its own negligence and disregard. Therefore, she

requested to be reinstated with back pay and benefits.[1]

Agency submitted its Response to Employee's Petition for Appeal on November 15, 2010. In it, Agency provided that Employee failed to substantiate her claims of a hostile work environment. Additionally, it contended that there was no nexus between Employee's claims of a hostile work environment and her assault on a co-worker. Agency claimed that Employee was aware of the consequences of her action and chose to ignore them. Because Agency has a zero tolerance policy on workplace violence, it believed that it acted appropriately by terminating Employee.[2]

The OEA Administrative Judge ("AJ") requested that both parties submit briefs on whether Agency's action was taken for cause and if the penalty was appropriate under the circumstances. Employee submitted her brief on January 11, 2013. She argued that she was approached and threatened by a co-worker ("N.S.") at work. Following the altercation, they went to court, and she won her case. However, she took issue with the fact that N.S. returned to work and was promoted while she was sent home on leave without pay. It was Employee's position that both she and N.S. should have been terminated.[3]

In its brief, Agency submitted that Employee's argument amounted to a claim that the penalty imposed was improper because it was discriminatory. In response, Agency simply provided that OEA does not have jurisdiction to decide allegations of discrimination. Therefore, it requested that the case be dismissed.[4]

The AJ issued her Initial Decision on July 29, 2013. She held that Employee's claims

[1] *Petition for Appeal*, p. 3-4 (October 12, 2010).
[2] *Agency Response to Employee's Petition for Appeal,* Exhibit #1 (November 15, 2010).
[3] *Employee's Brief* (January 11, 2013). Employee also filed a subsequent brief which claimed that a court ruled that she was acting in self-defense. Therefore, she requested reinstatement. *Employee Amended Brief* (March 15, 2013).
[4] *Agency's Motion to Dismiss the Appeal,* p. 2-3 (February 25, 2013).

regarding discrimination were not properly before OEA.[5] The AJ went on to provide that Employee did not contest her involvement in a fight with a co-worker while on duty. She ruled that Agency had cause to establish that Employee was involved in a physical altercation at work which violated District Personnel Manual ("DPM") § 1603.3. As for the penalty imposed, the AJ found that in accordance with the Table of Penalties, removal was within the range of penalties for a first offense of fighting. Therefore, Agency's action was upheld.[6]

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on September 3, 2013. She argues that, contrary to the AJ's holding, she did not concede that she engaged in a fight. Employee also asserts that the AJ did not consider her claim of self-defense or her acquittal by the Superior Court of the District of Columbia. Finally, she contends that she could not have known that she violated the law when a court found that she had not.[7]

Based on some arguments raised on review, it appears that Employee is of the belief that the outcome in a criminal trial should influence an administrative proceeding regarding employment. The Office of Employee Appeals is guided by the D.C. Official Code and DPM, not criminal laws or decisions, as it relates to adverse actions. OEA's jurisdiction is established in D.C. Official Code § 1-606.03(a). It provides that

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective

[5] The AJ provided that the Office of Human Rights was the proper venue to raise such claims.
[6] *Initial Decision*, p. 4-6 (July 29, 2013).
[7] *Petition for Review* (September 3, 2013).

date of the appealed agency action.

Additionally, in accordance with OEA Rule 633.3, this "Board may grant a petition for review when the petition establishes that the findings of the Administrative Judge are not based on substantial evidence."

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[8] 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. Moreover, the Court in *Raphael v. Okyiri*, 740 A.2d 935 (D.C. 1999), held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. After a review of the record, this Board believes that a reasonable mind would accept the finding of facts made by the AJ as adequate to support her conclusions.

Causes of Action

Agency charged Employee with any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law – offensive comments, assault, or fighting on duty and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious – arguing, use of abusive or offensive language. 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 an

[8] *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).

employee knew or should reasonably have known is a violation of law – offensive comments, assault, or fighting on duty." Similarly, DPM § 1603.3(g) provides that ". . . cause for disciplinary action for all employees covered under this chapter is defined as . . . any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious – arguing, use of abusive or offensive language." Based on documents present in the record, it is clear that Employee's actions met the definition of fighting on duty and arguing.

In the record, Agency provided a Metropolitan Police Department Incident Report, a Metropolitan Police Department Supplemental Report, and a Metropolitan Police Department Report Complaint. The police reports stated that after a verbal altercation, Employee stabbed the left side of N.S.'s face with a pen. It went on to note that N.S. had to be transported to G.W. Hospital for treatment. Agency's address is listed as the address of the event.[9] Employee also noted in her Amended Brief that "on the date of the incident . . . [N.S.] attacked [her] and because of the nature of [their] work [she] had a pen in her hand." She went on to say that as a result of [N.S.'s] attack, "[she] began to defend [herself]" because she believed she was going to be hurt by him.[10] Although Employee only alludes to the fact that she was in a fight, the police report was enough evidence to support Agency and the AJ's conclusion that a fight did occur. Similarly, the police report does note that N.S. was stabbed "after a verbal altercation." Therefore, Agency also proved the Employee engaged in arguing.[11]

Appropriateness of Penalty

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

[9] *Agency Response to Employee's Petition for Appeal*, Exhibits #6 and 10 (November 15, 2010).
[10] *Employee Amended Brief* (March 15, 2013).
[11] This Board notes that DPM § 1603.3(f)(6) does not allow for the defense of self-defense to the cause of fighting on duty. Employee offered no evidence of self-defense as it relates to her employment. The record only contains a partial transcript from her criminal case before Superior Court of the District of Columbia. On Petition for Review there is merely the recitation that Employee acted in self-defense.

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."[12] 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.

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

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District Government employees. DPM §1619.1(5)(c) lists the penalties for the charge of any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law – fighting on duty. As the AJ correctly held, the penalty for a first offense of this charge is removal.

As for the penalty for arguing, DPM §1619.1(7) provides that the range of penalties for the first offense for this cause of action is reprimand to a fifteen-day suspension. Because removal was the penalty for fighting while on duty, Agency was still within its authority to remove Employee from her position. In accordance with *Love v. Department of Corrections,* OEA Matter No. 1601-0034-08R11 (August 10, 2011) selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[13]

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[12] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[13] *Love* held that:

> [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

This Board believes that Agency's decision was reasonable under the circumstances. It is Agency's job to manage its own workforce. Agency's judgment did not exceed the limits of reasonableness. It properly exercised its authority to remove Employee for cause, and the penalty of removal was within the range allowed by the regulation.[14]

Penalty Based on Relevant Factors

The Court in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), provided what an agency should consider when determining the penalty of adverse action matters.[15] In the current matter, it is clear that Agency based Employee's removal on a consideration of relevant factors. This is evidenced in Agency's Response to Employee's Petition for Appeal and its

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> 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, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

[14] It should also be noted that Employee provided in her brief that she and N.S. ". . . both should have been terminated." *Employee's Brief* (January 11, 2013). Thus, it appears that at some point, Employee considered termination a reasonable penalty.

[15] (1) the nature and seriousness of the offense, and it's 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 in the future by the employee or others.

Notice of Final Decision. In its response, Agency provided that its hearing officer considered the nature and seriousness of the offense; Employee's job level and type of employment; Employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 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; the consistency of the penalty imposed upon other employees for the same or similar offenses; and the notoriety of the offense or its impact upon the reputation of the agency.[16]

In Agency's Notice of Proposed Removal, it also considered any mitigating factors. Agency provided that "violence, regardless of how provoked, cannot be tolerated by the Department of Motor Vehicles, especially in the presence of customers."[17] This statement suggests that Agency did consider *Douglas* factor eleven regarding the provocation of others. However, it found Employee's behavior to still warrant removal. This was within Agency's authority to determine, and in accordance with *Stokes* and *Love*, this Board cannot substitute its decision for Agency's.

Clear Error of Judgment

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was a valid penalty under the circumstances. There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of removal. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Consequently, we deny Employee's Petition for Review.

[16] *Agency Response to Employee's Petition for Appeal,* Exhibits #6 (November 15, 2010).
[17] *Agency Response to Employee's Petition for Appeal,* Exhibit #8 (November 15, 2010).

ORDER

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

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.