THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRYAN SHANKEL,	)	
Employee	)	OEA Matter No. 1601-0214-12
	)	
v.	)	Date of Issuance: March 20, 2014
	)	
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Angela Pringle, Employee Representative
Molly Young, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 21, 2012, Bryan Shankel ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Department of Public Works' ("DPW" or "Agency") decision to terminate him from his position as a Engineering Equipment Operator effective August 10, 2012. Following an Administrative review, Employee was charged with violating "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction, specifically: 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 as provided in D.C. Official Code §51-119(a) (2001). D.C. Personnel Regulations Chapter 16, § 1603.3(h)."[1] On September 24, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge ("AJ") on November 22, 2013. Thereafter, on December 2, 2013, I issued an Order scheduling a Status Conference in this matter for January 22, 2014. Both parties were present for the Status Conference. On January 23, 2014, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties timely submitted their briefs. After considering the parties' arguments as presented in their

[1]Specifically, Agency noted that Employee "knowingly and willfully failed to report your earnings from the D.C. Personnel Office for the week(s) ending: 05/31/2008; 06/07/2008; 06/14/2008; 06/21/2008; 06/28/2008; 07/05/2008; 07/12/2008; 07/19/2008; 08/02/2008; 08/09/2008; 08/16/2008; 08/23/2008; 08/30/2008; 09/06/2008; 09/13/2008; 09/20/2008; 09/27/2008; 10/04/2008; 10/11/2008; 10/18/2008 and 10/25/2008. As a result of this failure to report your earnings, you continued to collect unemployment insurance benefits to which you were not entitled."

submissions to this Office, I have decided that there are no material issues of facts in dispute, and therefore, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee applied for and received unemployment benefits in the District of Columbia while working full time with Agency in 2008. Employee received unemployment benefits from the week ending on May 31, 2008, until the week ending on October 25, 2008. In order to receive unemployment benefits through the District of Columbia Department of Employment Services ("DOES"), Employee was required to complete a "Continued Claim Form" weekly. On the forms Employee filled out starting May of 2008 until October of 2008, Employee certified that: 1) he was able, available and actively seeking work during the week claimed; 2) he did not perform work during the week claimed; and 3) he did not return to full time work during the week claimed.[2] Following an audit by DOES in March of 2012, Employee was served with a Notice of Overpayment, wherein, he was informed that an overpayment determination had been made.[3] Employee was notified that he was indebted to DOES in the amount of $7,899.[4] Subsequently, Employee entered into a payment arrangement with DOES, and on June 8, 2012, Employee began making payments to DOES to cover the overpayment. Thereafter, on June 20, 2012, Agency issued an Advance Written Notice of Proposed Removal to Employee for the following charge and specification:

> **Charge:** Any act which constitutes a criminal offense whether or not the act results in a conviction, specifically, 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 as provided in D.C. Official code § 51-119 (a) (2001) [See Section 1603.3 (h) of Chapter 16 of the District Personnel Manual.]
>
> **Specification (s):** You knowingly and willfully failed to report your earnings from DC Government Personnel Office for the week(s) ending 05/31/2008; 06/07/2008; 06/14/2008; 06/21/2008; 06/28/2008; 07/05/2008; 07/12/2008; 07/19/2008; 08/02/2008; 08/09/2008; 08/16/2008; 08/23/2008; 08/30/2008; 09/06/2008; 09/13/2008;

[2] Agency's Answer, at Tab 5 (September 24, 2012).
[3] *Id*. at Tab 8.
[4] *Id*. at Tab 11.

> 09/20/2008; 09/27/2008; 10/04/2008; 10/11/2008; 10/18/2008 and 10/25/2008. As a result of this failure to report your earnings, you continued to collect unemployment insurance benefits to which you were not entitled.[5]

This matter was referred to a Hearing Officer for a pre-termination review. The Hearing Officer issued a report on July 16, 2012, sustaining the charge and specification. However, the Hearing Officer recommended that because of mitigating factors, the proposed penalty of removal should be reduced to a thirty (30) day suspension without pay.[6] Upon review of the Hearing Officer's report, Agency's Director, on August 2, 2012, issued a Notice of Final Decision on Proposed Removal ("Final Agency Decision"), informing Employee that he would be terminated from his position effective August 10, 2012.[7]

Employee's Position

Employee acknowledges that he received $7,899 in overpayment from DOES while working with Agency. However, he explains that, he was offered a repayment plan with penalties which he began making payments in June 8, 2012. Employee argues that, by terminating him, Agency engaged in disparate treatment because there were other employees who were charged with the same cause of action but were able to keep their jobs. Specifically, Employee provided information on another employee ("comparison employee") who was also charged with the same cause of action as Employee, and was only suspended for nine (9) days. Employee maintains that, the comparison Employee only started making payments to DOES after he received Agency's Advance Written Notice of Proposed Removal. Employee further states that the penalty of termination was not appropriate under District law, especially since it did not apply to all.[8]

Agency's Position

Agency asserts that its action of terminating Employee was done for cause. Agency explains that pursuant to D.C. Official Code § 50-108 (a), a person who is working full time is not eligible for unemployment benefits. Agency further explains that by collecting unemployment benefits while he was employed full time with Agency, Employee violated the law. Agency also highlights that Employee further violated the law when he knowingly provided false information on claim forms in order to receive unemployment insurance.

With regards to the penalty, Agency asserts that it weighed the *Douglas* factors[9] and concluded that given the seriousness of Employee's misconduct, termination was the appropriate penalty to impose. Furthermore, as to Employee's claim of disparate treatment, Agency notes that the conduct of the comparison employee can be distinguishable from Employee's conduct in that, the comparison employee submitted fraudulent claims for approximately one (1) month and received $1,181 in unemployment insurances, whereas, Employee submitted fraudulent claims on twenty-two (22) separate occasions, spanning six (6) months, and received almost $8,000 in unemployment insurance. Agency maintains that, the existence of any potential mitigating circumstances did not

[5] *Id.* at Tab 10.
[6] *Id.* at Tab 12.
[7] *Id.* at Tab 13.
[8] Employee's Brief (March 4, 2014).
[9] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

outweigh the seriousness of the offense, the length of time Employee unlawfully obtained unemployment benefits, and the amount of unemployment benefits Employee fraudulently obtained. Accordingly, Agency contends that, when compared to the conduct of the comparison employee, Employee's conduct illustrates a much more serious and costly pattern of misconduct which had a deeper impact on both DOES and Agency.[10]

1) Whether Employee's actions constituted cause for discipline

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 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 Appeals 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.[11] And to prove that an employee violated D.C. Official Code § 51-119 (a), the agency has to prove 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. Here, Employee admits that although he was a full time employee, he knowingly omitted to inform the DOES of this fact when he filled out his unemployment claims form in an effort to obtain unemployment insurance. Accordingly, based on Employee's own admission, I find that Agency had sufficient cause to discipline Employee.

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

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).[12] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any

[10] Agency's Reply Brief (March 12, 2014).
[11] *Lewis v. United States*, 389 A.2d 306, D.C., July 10, 1978.
[12] *See also 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 No. 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).

applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, Agency maintains that it considered the *Douglas* factors in imposing the penalty of termination. Employee on the other hand notes that Agency engaged in disparate treatment in imposing the penalty of termination.

Disparate Treatment

Employee noted in his brief that Agency engaged in disparate treatment by retaining some employees who were charged with the same cause of action as Employee. OEA has held that, to establish disparate treatment, an employee must show that he worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period.[13] Additionally, "in order to prove disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[14]

Here, Employee has submitted evidence to show that there was another employee who was charged with the same cause of action within the same general time period, but who received a different penalty than Employee. Employee avers that the comparison employee was suspended for nine (9) days, while Employee was terminated. Employee explains that he was more proactive than the comparison employee in attempting to repay the overpayment. Employee maintains that when he received the Audit Notice from DOES, he entered into a repayment agreement, and he began making payments to DOES prior to Agency commencing disciplinary action. In contrast, the comparison employee did not respond to the Audit Notice, and he only began making payments after Agency commenced disciplinary action against him.

However, Agency argues that the comparison employee is distinguishable from Employee. Agency states that the conduct of the comparison employee differs from Employee's conduct in that, the comparison employee submitted fraudulent claims for one (1) month and received $1,181 in unemployment insurances, whereas, Employee submitted twenty-two (22) separate fraudulent claims and received almost $8,000 in unemployment insurance. I find these assertions unpersuasive. The fact remains that the comparison employee, just like Employee in this case, both violated the same rules and regulations, and they were both charged with the same cause of action.

Although Employee has provided evidence to show that the comparison employee was charged with the same cause of action as Employee, and disciplined within the same time frame, I find that Employee has not met his burden of proof in this matter. The evidence provided by Employee does not show that the comparison employee held the same position as Employee, or that both employees were disciplined by the same Supervisor. Agency highlights in its reply brief that the comparison employee was a Sanitation Worker (WS-3501 Grade 4, Step 2) in the Solid Waste Management Administration, while, Employee was an Engineering Equipment Operator (WS-5703,

[13] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[14] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).

Grade 7, Step 4) in the Waste Management Administration Public Space Cleaning.[15] Accordingly, I find that Employee has not established a prima facie showing of disparate treatment.

DPM § 1612 and § 1613

Citing DPM § 1612 and § 1613, Agency explains that the Deciding Official is not bound to adhere to the Hearing Officer's recommendation, and may issue a final decision independent of that recommendation.[16] I disagree with this assertion. DPM § 1613 provides that:

> **1613.1**: The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
>
> **1613.2:** The deciding official shall either ***sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty*** (emphasis added).

Moreover, in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that, "the OEA is responsible for enforcing the provisions of 6 DCMR § 1613.2, which includes a neutral review process…." The Court explained that, "[s]ections 1607 through 1612, covers the procedure an official must take in order to implement corrective or adverse action against an employee. Under Section 1612, a proposed removal action must be reviewed by a hearing officer. After a review of the case, the hearing officer shall make a written report and recommendation to the deciding official. Upon this recommendation, under section 1613, [t]he deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty." (Internal quotation marks omitted). In the instant case, the Hearing Officer recommended in her report that the "proposed termination be reduced to a 30 day suspension."[17] Consequently, I find that the Deciding Official in the instant matter could only 1) reduce the penalty to thirty (30) days as proposed by the Hearing Officer; 2) remand the action with instruction for further consideration, or 3) dismiss the action with or without prejudice, but in no event, increase the penalty. Pursuant to DPM § 1613, the Deciding Official was not permitted to increase the recommendation of the Hearing Officer. Accordingly, I find that, based on the Court of Appeals' reasoning in *Watts*, Agency's decision to increase the penalty recommended by the Hearing Officer is a violation of DPM § 1613.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[18] Employee argues that, by removing him, Agency abused its discretion. In this case, Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the

[15] Agency's Answer at Tab 9 (September 24, 2012).
[16] Agency's Brief (February 12, 2014).
[17] Agency's Answer at Tab 12, *supra*.
[18] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

decision to remove Employee.[19] Although Agency had cause to charge Employee with violating DPM §1603.3(h), given the totality of the circumstance, I find that the penalty of termination constitutes an abuse of discretion. The Hearing Officer recommended a thirty (30) day suspension in her report, however, Agency's Deciding Official imposed a penalty of termination, in violation of DPM § 1613. Consequently, I further find that Agency's action of removing Employee from service should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse him all back-pay, benefits lost as a result of his removal; and
3. Employee is suspended for thirty (30) days as recommended by the Hearing Officer; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Administrative Judge

[19] 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 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.