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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
ALICE HOLLAND,	)	OEA Matter No. 1601-0062-08
Employee	)	
	)	Date of Issuance: September 17, 2012
	)	
	)	
D.C. DEPARTMENT OF	)	
CORRECTIONS,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Alice Holland (“Employee”) worked as a Management Liaison Specialist for the D.C. Department of Corrections (“Agency”).<sup>1</sup> On August 3, 2007, Employee was placed on administrative leave from her position pending an investigation of a charge of malfeasance.<sup>2</sup> Specifically, Employee was charged with failure to follow a directive from her supervisor;<sup>3</sup>

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<sup>1</sup> Employee was charged with developing an orientation protocol implemented to hire Agency correctional officers. There was a 4-step applicants’ orientation process. The first step was to have the applicants provide notarized releases to have a background check conducted by Agency. After applicants were cleared, they would interview with an Internal Affairs investigator; they had to pass a physical fitness test; and they were required to take a correctional officer test. The next phase of the orientation was to have a pre-psychological assessment. Finally, a successful candidate would have another psychological assessment performed and have to pass drug testing.

<sup>2</sup> *Petition for Appeal*, Exhibit #2 (March 24, 2008).

<sup>3</sup> Employee’s supervisor informed her that three applicants, who previously failed the physical fitness exam, should be invited back to retake that portion of the test. The three applicants were all men, and Employee believed that if her supervisor only invited the men back that this would constitute an Equal Employment Opportunity (“EEO”)

failure to comply with security protocol;<sup>4</sup> and attempting to administer a portion of the orientation procedure in an improper facility without prior authorization.<sup>5</sup> As a result, Employee was terminated.<sup>6</sup>

On March 24, 2008, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). She argued that her conduct did not constitute malfeasance and that the record is void of any evidence that she intended wrongdoing. Employee reasoned that her conduct was *de minimus*, at best. Thus, termination was an inappropriate penalty.<sup>7</sup>

Agency filed its response to Employee’s Petition for Appeal on May 5, 2008. It stated that Employee’s actions were not consistent with Agency’s protocol for processing applicants for Correctional Officer positions. Agency argued that her actions compromised the integrity of the hiring process and were not *de minimus*. Agency also asserted that Employee provided no evidence of retaliation. As a result of the egregious nature of Employee’s actions, her supervisors could not rely on her to follow orders or act without supervision. As for the penalty, Agency described the *Douglas*<sup>8</sup> factors that were considered before it reached its decision to terminate Employee.<sup>9</sup>

There were a number of depositions conducted before the OEA Administrative Judge (“AJ”) held a three-day hearing. Thereafter, the AJ issued his Initial Decision where he found

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violation. Therefore, Employee invited six applicants to retake the test instead of the three authorized by her supervisor. *Agency’s Pre-hearing Statement and Supporting Documents*, Exhibit #1, p. 5 (May 5, 2008).

<sup>4</sup> Employee allowed two applicants to participate in advanced stages of the orientation process prior to them receiving background clearances. *Id.* at 6.

<sup>5</sup> According to Agency, Employee attempted to have two applicants perform the correctional officer test at an unsuitable location conducive for testing. *Id.*

<sup>6</sup> *Petition for Appeal*, Exhibit #6 (March 24, 2008)

<sup>7</sup> Employee also provided that her termination should be vacated because Agency retaliated against her for reporting violations. She further contended that she should have been afforded Whistleblower protection. Finally, Employee alleged that her supervisor’s directive violated Agency protocol. *Petition for Appeal*, Memorandum of Points and Authorities in Support of Alice Holland’s Petition for Appeal (March 24, 2008).

<sup>8</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

<sup>9</sup> *Agency’s Pre-hearing Statement and Supporting Documents*, p. 2-7 (May 5, 2008).

Agency witnesses to be credible and consistent. He held that Agency proved that Employee failed to live up to its standards and jeopardized its mission by her failure to follow protocol and directives during the correctional officer hiring process. During the OEA hearing, Employee admitted that although she was aware of her supervisor's directive, she was justified in not following it. However, the AJ held that Employee offered no credible evidence to prove that her supervisor's order was illegal. Because OEA has held that an employee's admission is sufficient to meet Agency's burden of proof, the AJ did not disturb Agency's penalty and upheld Employee's removal.<sup>10</sup>

Employee filed a Petition for Review of the Initial Decision with the OEA Board on May 27, 2011. She claims that the AJ erroneously asserted that she was charged misfeasance, not malfeasance. It is her belief that this error is substantial and prejudicial because the offenses differ significantly. As it relates to the charge of malfeasance, Employee makes many of the same arguments that were presented in her Petition for Appeal. She provides that there is not substantial evidence in the record for Agency to prove any of the charges against her. Further, she explains that the Initial Decision failed to address that her termination was the result of retaliation and Whistleblower claims. Finally, Employee contends that Agency did not adequately rely on the *Douglas* factors in reaching its decision.<sup>11</sup>

Agency responded by arguing that the AJ clearly made a typographical error when he referenced the charge of misfeasance in his decision. Agency explained that this was evidenced by the AJ's use of the proper charge of malfeasance in previous sections of the Initial Decision

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<sup>10</sup> *Initial Decision*, p. 11-12 (April 25, 2011).

<sup>11</sup> Employee made a myriad of other arguments on appeal. She claimed that Agency did not have authority to promulgate hiring rules or procedures. Consequently, the correctional officer hiring process was invalid. As a result, she reasoned that her termination was invalid and should be vacated. Employee went on to describe her belief that the proposing official had a conflict of interest. Additionally, she claimed that the AJ did not issue an order on her Motion for Default Judgment. *Employee's Petition for Review*, p. 6-20 (May 27, 2011).

and his reference of the specifics of the malfeasance charge. Agency went on to note that Employee's argument pertaining to the invalidity of its hiring practices is without merit. As it did in its Pre-hearing Statement, Agency asserted the basis for the malfeasance charge against Employee. Finally, it provided that that *Douglas* factors were outlined in its Final Agency Decision, therefore, the factors were considered.<sup>12</sup>

Employee contends that the malfeasance charge was not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>13</sup> Therefore, this Board must determine if the evidence that Employee failed to follow a directive from her supervisor; failed to comply with security protocol; and attempted to administer a portion of the orientation procedure in an improper facility without prior authorization is adequate to support a malfeasance charge.

Employee concedes during her testimony at the OEA hearing that she failed to follow a directive from her supervisor. She provided that despite being told by her supervisor to invite three applicants to retake testing, she decided that the pool of applicants should be increased. Therefore, she added applicants. After being confronted by her supervisor, Employee admitted to going back and forth with her about why she invited six applicants instead of the requested three.<sup>14</sup> Thus, Agency proved that Employee did not follow a directive from her supervisor.

Employee was also charged with failure to comply with security protocol. Agency claimed that Employee allowed two applicants to move forward in the hiring process who were not previously cleared by the Office of Internal Affairs ("OIA"). OIA is a division within

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<sup>12</sup> In response to Employee's notion that her termination was the result of retaliation or Whistleblower claims, Agency provided that she offered no evidence to support these assertions, and they fall outside the scope of OEA's purview. Finally, Agency reasoned that Employee's claims of a conflict of interest with the proposing official was not based in law and should not be addressed.

<sup>13</sup> *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).

<sup>14</sup> *OEA Hearing Transcript*, p. 328-337 (October 8, 2008).

Agency that conducts background checks on applicants. Agency provided a schematic that outlined its policy regarding the hiring process protocol. The document indicates that the only way an applicant can move forward to the physical fitness exam is if they cleared background with OIA.<sup>15</sup>

Several Agency witnesses provided that if an applicant did not clear background checks, then they were not allowed to move forward in the hiring process.<sup>16</sup> The Chief of the OIA provided that background checks were not performed on the two applicants before Employee invited them to move forward in the hiring process.<sup>17</sup> When asked specifically about the applicants' background check form, Employee admitted that the forms did not indicate either way if the applicants were cleared or not. She claimed that it was the practice to allow applicants to proceed to orientation unless OIA specifically provided that the applicant was disqualified.<sup>18</sup>

Employee's argument is flawed. A reasonable person would accept that if the forms did not provide that the applicant passed or failed the background check, then the background check probably had not been performed. It would have been prudent for Employee to have made subsequent inquiries regarding the applicants' status before allowing them to proceed. Thus, Employee failed to comply with security protocol.

Finally, Employee was charged with attempting to administer a portion of the orientation procedure in an improper facility without prior authorization. Agency provided, and Employee concedes, that testing was typically done in the D.C. General Hospital complex. However, she

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<sup>15</sup> *Agency's Pre-hearing Statement and Supporting Documents*, Exhibit #12 (May 5, 2008).

<sup>16</sup> Patricia Britton testified that if an applicant failed a background check, they were not invited to orientation. She provided that only the Office of Internal Affairs had the mechanisms in place to make clearance determinations. *OEA Hearing Transcript*, 38-42. Moreover, Joan Murphy provided that the initial phase of the orientation process was to "ensure that the applicant had completely, successfully passed the Office of Internal Affairs background process." Ms. Murphy went on to testify that Employee "had the responsibility [of] ensuring that [the background] form was actually submitted to the Office of Internal Affairs and received as cleared or approved by Internal Affairs prior to [applicants] participating in any part of . . . orientation or other activities." *Id.*, 114-122.

<sup>17</sup> *Id.* at 218.

<sup>18</sup> *Id.* at 309.

scheduled testing for two applicants in a lunch room across from her office. These two applicants could have been subject to unfair conditions due to the noise and opportunity for distractions in the lunch room. Because Employee admits to scheduling the testing in the unauthorized space, Agency adequately proved that she engaged in the activity.<sup>19</sup>

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."<sup>20</sup> OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.<sup>21</sup> When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.<sup>22</sup> As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.<sup>23</sup>

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<sup>19</sup> As Agency provided, the AJ properly considered all issues presented before him. Employee offered no evidence of retaliation, Whistleblower claims, or conflict of interest with the proposing official. Additionally, the record is replete with references to malfeasance. The AJ simply made a typographical error, and this Board will not remand or reverse the matter on this basis.

<sup>20</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

<sup>21</sup> *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).

<sup>22</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *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); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

<sup>23</sup> Love also provided 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 the agency did conscientiously consider the relevant factors and did strike

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.<sup>24</sup> The evidence did not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas* when arriving at the decision to remove Employee.<sup>25</sup>

Agency gave great weight to the nature and seriousness of the offense; Employee's job level and type of employment; and the effects of the offense upon Employee's ability to perform as a satisfactory level and its effect on her supervisors' confidence in her ability to perform assigned tasks.<sup>26</sup> There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of removal.

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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, is it 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).

<sup>24</sup>*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).

<sup>25</sup> 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 in the future by the employee or others.

<sup>26</sup> *Agency's Pre-hearing Statement and Supporting Documents*, Exhibit #1 (May 5, 2008).

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was a valid penalty under the circumstances. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Consequently, we must DENY Employee's Petition for Review.

**ORDER**

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

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.