THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TENNILLE RICH	)	OEA Matter No. 1601-0107-12
Employee	)	
	)	Date of Issuance: September 22, 2014
v.	)	
	)	
	)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF PUBLIC WORKS	)	Administrative Judge
Agency	)	
	)	

Tennille Rich, Employee, *Pro Se*
Lindsay Neinast, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Tennille Rich, Employee, filed a petition with the Office of Employee Appeals (OEA) on June 7, 2012, appealing the final decision of the D.C. Department of Public Works, Agency, to terminate her employment with Agency, effective May 11, 2012. At the time of the removal, Employee was a Parking Enforcement Officer.

The matter was assigned to me on September 16, 2013. On September 25, 2013, I issued an Order scheduling the prehearing conference for October 16, 2013. Lindsay Neinast, Esq., Agency representative, and Employee attended the prehearing conference. Agency declined mediation. The parties agreed to work cooperatively to obtain documents and witnesses, and to develop stipulations. An Order was issued October 29, 2013, memorializing the decisions reached at the prehearing conference including the deadline of November 22, 2013 to submit stipulations and lists of documents and witnesses. On November 22, 2013, Agency filed a request to extend the deadline to December 13, 2013. A conference call took place during which Employee stated that she did not oppose the request. Agency's request to extend the deadline to December 13, 2013 was granted, and was memorialized by Order dated December 2, 2013.

Agency submitted its witness and exhibit lists in a timely manner. It also proposed several days for the evidentiary hearing which, it said, the parties had agreed they were both available. By Order dated January 27, 2014, the hearing was scheduled for March 12, 2014. The parties were given until February 19, 2014, to request the issuance of subpoenas and to submit their lists of the witnesses and documents. In the Order, the Administrative Judge noted that although Employee had not complied with the December 13 deadline, it was possible that her failure to comply simply meant that she had resolved the issues she raised at the prehearing conference during her subsequent discussions with the Agency representative, since the parties had agreed on proposed hearing dates.

On March 12, 2014, Agency representative and witnesses were present for the evidentiary hearing, in a timely manner. Employee was not present and had not contacted the undersigned or OEA to ask for a delay or continuance. After waiting about 30 minutes, I telephoned Employee who stated that she had not received the January 27, 2014 Order, explaining that she had recently moved but had provided OEA with her new address. I offered to delay the proceedings, but Employee stated that she could not attend that day. She also stated that she did not think an evidentiary proceeding was needed. I informed Employee that the Agency representative and I would telephone her after I excused the witnesses.

During this subsequent telephone conference with Employee and Agency representative, Ms. Neinast argued that Employee had failed to prosecute the matter, noting that Employee failed to respond to several telephone and e-mail messages she left. Employee replied that she had received and responded to some messages. She did not explain why she did not respond to all messages. Employee again stated that she no longer wanted an evidentiary hearing and would be satisfied with submitting a closing brief. (Transcript, pp. 15, 25-26) The parties agreed to file closing briefs by April 11, 2014. (Transcript, p 26).

After the telephone conference, I had the opportunity to review the January 27, 2014 Order more thoroughly. I found, contrary to Employee's representation, that certificate of service listed Employee's current address. I also noted that the copy of the Order mailed to Employee had not been returned to this Office. Based on this new information and Agency's argument that Employee had failed to prosecute the appeal, I determined that Employee's explanation regarding her failure to appear was no longer sufficient. I issued an Order on March 14, 2014 directing Employee to show good cause for her failure to attend the hearing. I directed Employee to submit a notarized statement by April 11, 2014, establishing good cause why her appeal should not be dismissed for her failure to prosecute this matter by failing to attend the proceeding and for the other violations of directives stated in the Order. The parties were advised that if I determined that Employee established good cause; I would issue an Order regarding the filing of briefs, but otherwise the record would close on April 11, 2014.

On March 28, 2014, Employee filed a statement with OEA in which she stated that she did not "recall" receiving an Order scheduling the hearing. She noted that her family had been evicted several times since January 31, 2014, but that she kept the mailbox key. She asked that I

take these reasons into consideration when reaching a decision. The document was not notarized and did not contain a certificate of service certifying that it was served on Agency.

On April 11, 2014, Employee filed a statement with OEA which she identified as a "closing statement." She expressed her appreciation for being given the opportunity to be heard. She affirmed that she had received unemployment compensation while working at Agency, but maintained that she had done so only because she had been advised by a DOES customer service representative that she was permitted to do so. She stated that she "never knowingly or falsely" filed claims, and that once she became aware that she should not have received payments, she began repaying the overpayments. She asked that I consider her request for reinstatement.

In an effort to bring this matter to closure, I accepted Employee's March 28 statement, although it was not notarized. On June 17, 2014, I issued an Order setting a deadline of July 2, 2014 for Agency to submit either a closing statement or an argument that sanctions should be imposed on Employee. The parties were notified that unless they were advised to the contrary, the record would close on July 2, 2014. Agency filed a closing statement in a timely manner. Both closing statements were entered into the record which closed on July 2, 2014.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Did Agency meet its burden of proof in this matter? If so, is there a basis for disturbing the penalty imposed by Agency?

POSITIONS OF THE PARTIES, FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The following facts are not in dispute:[1]

- Employee began full-time employment with Agency beginning December 22, 2008. At the time of her removal on May 11, 2012, she had an annual salary of $32,574.
- In 2008, Employee was also employed part-time by Inter-Con Security Systems. She was terminated from her employment with Inter-Con on July 9, 2010.
- Employee applied for benefits with the Department of Employment Services (DOES) after her termination from Inter-Com. Inter-Com contested her claim.

1 These findings of fact are taken primarily from attachments 1-17submitted by Agency with its Answer on July 13, 2012. Employee did not dispute the authenticity or accuracy of those attachments.

- Following an evidentiary hearing, DOES determined Employee was "qualified" to receive benefits. She was awarded benefits in the amount of $359.00 each week as a result of her employment with Inter-Con.

- In order to receive benefits, DOES requires applicants to complete a weekly Claim Form in which they must answer a number of questions. One of the questions, relevant to this matter, asks the applicant: "Did you perform work during the week claimed?" If the applicant responds yes, the applicant must list his or her gross earnings. In her weekly response to this question, Employee checked "no," indicating that she did not perform work during the week claimed. She therefore left the space for information of gross earnings blank. At the end of the Claim Form there is a "Certification" which states: "I hereby certify that these statements are true and correct. I understand that the law provides penalties for false statements to obtain or increase benefits." The applicant is told to review his or her answers to be sure they are "true and correct" and then to "read and agree" to the Certification before submitting the Form.

- On August 12, 2011, DOES issued an Audit Notice to Employee, asserting:

  > An audit of your claim for Unemployment Insurance benefits disclosed that you may have received benefits to which you were not entitled.

- The Audit Notice listed the weeks that Employee received benefits based on her certification that she was unemployed. It directed that Employee submit a written response to the allegations, and to explain the discrepancies by October 22, 2010. Employee did not respond.

- On October 28, 2011, DOES issued a Notice of Overpayment in which it notified Employee that it had determined she received an overpayment representing funds to which she was not entitled. DOES also issued a Notice of Determination by Claims Examiner charging Employee with "knowingly and willfully [failing] to report [her] earning from DC Government Personnel Office."

- On April 4, 2012, Agency issued its "Advance Written Notice of Proposed Removal" which charged Employee with:

  > Cause(s): 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…..
  >
  > Specification(s):
  >
  > You knowingly and willfully failed to report your earnings from D.C. Government Personnel Office for the week(s) ending: 07/24/2010,

07/31/2010, 08/07/2010, 08/14/2010, 08/21/2010, 08/28/2010, 09/04/2010, 09/11/10, 09/25/2010, 10/02/2010, 10/9/2010, 10/16/2010, 10/23/2010, 10/30/2010, 11/06/2010, 11/13/2010, 11/20/2010, 11/27/2010, 12/04/2010, 12/11/2010, 12/18/2010, 12/15/2010, 1/08/2011, 1/15/2011, 1/22/2011, 1/29/2011, 2/05/2011, 2/12/2011, 2/19/2011, 2/26/2011, 3/05/2011, 3/12/2011, 2/19/2011, 3/26/2011, 4/02/2011, 4/09/2011, 4/16/2011, 4/23/2011, 4/30/2011, 5/07/2011, 5/14/2011, 5/21/2011, 5/28/2011, 6/04/2011, 6/11/2011, 6/18/2011, 6/25/2011, 7/02/2011 and 7/09/2011. As a result of this failure to report your earnings, you continued to collect unemployment insurance benefits to which you were not entitled.

- In the Notice of Final Decision on Proposed Removal, dated May 8, 2012, William Howland, Jr., Agency Director and Deciding Official, stated that upon "careful review" of the proposed notice, the hearing officer's report, and Employee's response, he found that Employee "intentionally made false statements to obtain unemployment benefits" that she was not entitled to receive. He further found that from July 24, 2010 through July 9, 2011, Employee stated on DOES claim forms that she was not working while she was in fact a full time employee with Agency. He stated that as a result of her responses, she received unemployment benefits to which she was not entitled. He concluded that the removal was supported by the evidence and therefore his decision was to remove Employee.

Employee does not dispute that she completed the weekly DOES form in the manner charged, *i.e.*, that she never provided information that she was a full-time employee with Agency during this time and earning a salary. She maintains that she completed the form in this manner based on instructions from a DOES employee who, apparently aware of her full-time employment with Agency, told her that she only needed to report the wages she received related to her employment with Inter-Con. She asserts she "never knowingly" filed false claims.

The relevant facts in this matter are not in dispute. Employee applied for unemployment benefits following the termination of her employment from Inter-Con in 2008. Although working full-time for Agency, Employee responded on the DOES form she completed each week, that she was not working during the week for which she was seeking benefits, although she was employed full-time with Agency. If she had responded that she was working, she would have been required to state her gross earnings. Since she responded she was not working, she did not report any income. Employee's position is that she was following advice from a DOES employee that she only needed to report wages received from the employer that had terminated her.

Employee and Agency were given an extensive period of time to work cooperatively to obtain evidence that each thought the other could better obtain. As part of this effort, Agency agreed to use its best efforts to identify the DOES employee who allegedly gave Employee the instructions. However, neither party could identify this individual. Thereafter, Employee determined that she did

not want an evidentiary hearing, and would rely on the documents submitted as well as the written arguments presented.

Employee did not present any evidence to support her position. She asserts that she acted in good faith based on her reliance on advice from a DOES employee. The Administrative Judge accepts Employee's statement that she spoke with a DOES employee. However, upon reviewing the statements she said were made by the DOES employee to her, it appears that the DOES employee may have told her that her benefits were limited to her employment with Inter-Con. Employee does not contend that the DOES employee told her not to answer the questions honestly and fully. In any event, Employee was responsible for answering the questions honestly and accurately; and each time she completed the form she was instructed to review her answers to ensure their accuracy. The question asked Employee if she had worked during the week she was seeking benefits. Employee knew she was working for each of the weeks she responded that she was not employed. If she was confused because the instructions appeared to require her to certify the veracity of something she knew not to be true, she could have contacted DOES and asked for clarification.

D.C. Code §1-616.51 (2001) requires that the Mayor "issue rules and regulations to establish a disciplinary system [for agencies over which he has personnel authority] that includes…1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken." The Mayor has personnel authority of Agency. The D.C. Office of Personnel, the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of §1-616.51 and apply to all employees in permanent status. *See* 47 D.C. Reg. 7094 *et seq*. (2000). The definition of "cause" includes "any on-duty or employment–related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious". 47 D.C. Reg. 7096.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) requires Agency to prove its case by a preponderance of evidence, which is defined as "the degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." In this matter, most of the relevant facts are undisputed. The Administrative Judge concludes that Agency met its burden of proof regarding the first issue, i.e., that Employee engaged in the charged conduct. There is substantial evidence in the record that Employee made false statements and "knowingly failing to disclose a material fact to obtain or increase unemployment insurance benefits" by responding that she was not working and was not receiving income during the weeks she was seeking benefits, since she was a full-time employee at Agency. [2]

Employee also challenges the penalty imposed by Agency. She asks to be reinstated, contending that she was relying on instructions from a DOES employee, and that once she was

[2] If Employee had produced the DOES employee who she claimed gave her the instructions on which she relied, and if the DOES employee had testified that she in fact told Employee not to list her full-time Employee with Agency, perhaps there would be an issue since the charge requires intent. However, despite being given an extended period of time and Agency's cooperation to identify this individual, Employee was unable to do so. She subsequently waived her right to an evidentiary hearing. .

notified that she was not entitled to the funds, she began to repay the sum owed. She also contends that she has suffered severe economic hardship as a result of her removal.

Agency has the primary responsibility for managing its employees, which includes determining the appropriate discipline to impose for misconduct. This Office has a limited role in reviewing the penalty. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994). This Office will not substitute its judgment for that of an agency when determining if a penalty should be sustained, but rather will limit its review to determining that "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). In *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), the Board stated that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

Agency has considerable discretion in determining the penalty to impose in this matter and its decision will not be disturbed unless the Administrative Judge concludes that Agency failed to consider relevant factors or that the imposed penalty constitutes an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985). Employee asks that the penalty be reduced so that she can be reinstated based on her position that she had followed the advice of a DOES employee when completing the Form, that she began repayments when directed, and that she has suffered significant financial hardship. Although Agency did not go through an analysis of how it reached its decision, it did determine that Employee's conduct of "having committed fraud in obtaining unemployment benefits…severely diminished [her] credibility and usefulness as a Parking Officer." Employee has not argued, that Agency committed a clear error in judgment or abuse of discretion by removing her. Employee did not offer any evidence or argument that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of removal. Whether or not this Administrative Judge would have imposed a less severe penalty is irrelevant, if the penalty imposed by Agency is permitted by law and was not imposed arbitrarily. There is no any evidence or argument in the record that that Agency's decision to remove Employee was prohibited by law or regulation, or that the decision was arbitrary or an abuse of discretion. The Administrative Judge concludes that she has no basis upon which to disturb the penalty in this matter.

ORDER

It is hereby

ORDERED: This petition for appeal is dismissed.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge