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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ANGELA WASHINGTON,)	
Employee)	
)	OEA Matter No.: 1601-0076-14
v.)	
)	Date of Issuance: January 24, 2017
DISTRICT OF COLUMBIA)	
OFFICE OF)	
UNIFIED COMMUNICATIONS,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Angela Washington (“Employee”) worked as a Telecommunications Equipment Operator with the Office of Unified Communications (“Agency”). On March 31, 2014, Agency issued Employee a Notice of Final Decision on Proposed Removal, charging her with “any on-duty or employment-related act or omission that Employee knew or should reasonably have known is a violation of law.”¹ Specifically, Employee was charged with engaging in activities that carried criminal penalties, in violation of federal or District of Columbia laws and statutes. The charges stemmed from an incident wherein Employee allegedly misused government resources by accessing the Washington Area Law Enforcement System (“WALES”) in order to retrieve an

¹ *Petition for Appeal and Motion for Dismissal with Prejudice* (May 5, 2014).

individual's personal information without a legitimate purpose or Agency's authorization.² The effective date of her termination was April 4, 2014.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on May 5, 2014. In her appeal, Employee argued that the penalty of removal was too harsh for the offense. She, therefore, requested that Agency's final decision be overturned at that she be awarded any relief deemed appropriate.³

Agency filed an Answer to Employee's Petition for Appeal on June 6, 2014. It argued that Employee was aware that her actions were improper because she was previously trained on the appropriate use of WALES, and she acknowledged that the database housed information of a confidential nature.⁴ Agency further noted that when users log into WALES, they receive a warning message stating that "it is illegal to run queries for personal use." In addition, it stated that the penalty of removal was in accordance with the Table of Penalties outlined in the Collective Bargaining Agreement ("CBA") between the OUC and the National Association of Government Employees, NAGE Local R4-07.⁵ Accordingly, Agency opined that it had cause to remove Employee from her position and requested that OEA dismiss the Petition for Appeal with prejudice.⁶

² According to Agency, on June 13, 2013, Employee filed a claim with the District of Columbia Public Sector Workers' Compensation Program after injuring herself while patronizing a food truck near her place of employment. She was advised by Agency that personnel from the Office of Unified Communication's ("OUC") Human Resource Department would be responsible for processing her claim. Employee subsequently asked that OUC provide her with the personal contact information for the person whom she believed to be the owner of the food truck, but she did not receive a response. On July 15, 2013 and July 21, 2013, she accessed WALES in order to retrieve the alleged food truck owner's personal information. On July 30, 2013, the owner contacted OUC to inform them that he had reason to believe that Employee obtained his personal information without his consent. In response, OUC requested that the Metropolitan Police Department ("MPD") run a report to determine whether any OUC employee had accessed WALES to obtain the food truck owner's personal information. MPD confirmed that Employee conducted two WALES inquiries using the truck owner's information twice during July of 2013.

³ *Petition for Appeal* (May 5, 2014).

⁴ *Agency's Answer to Petition for Appeal* (June 6, 2014).

⁵ *Id.* at 4.

⁶ *Id.* at 6.

The matter was assigned to an OEA Administrative Judge (“AJ”) on July 30, 2014. On September 2, 2014, the AJ issued an order convening a prehearing conference to assess the parties’ arguments.⁷ After determining that an evidentiary hearing was not warranted, the parties were ordered to submit written briefs that addressed whether Agency’s termination action was taken for cause and whether the penalty was appropriate under the circumstances.

In its brief, Agency reiterated that Employee was removed for cause because she used WALES, a government resource, to gain access to an individual’s private information without a law enforcement purpose and without authorization. It further argued that Employee’s actions constituted a misuse of government resources. With respect to the penalty, Agency stated that removal was appropriate in light of the OUC Table of Penalties. According to Agency, a first offense of “any on-duty or employment-related act or omission that employee knew, or should have reasonably have known, is a violation of the law (misuse of resources or property)” may result in a punishment ranging from a thirty-day suspension to removal. Lastly, Agency believed that Employee’s termination was reasonable in light of the seriousness of her actions. Accordingly, Agency requested that Employee’s removal be upheld.⁸

Employee filed a response brief on June 17, 2015. She contended that Agency failed to prove, by a preponderance of the evidence, that she committed the purported misconduct. In addition, Employee alleged that the reviewing Hearing Officer provided no rationale as to why her actions were improper or illegal in light of the issues she was facing in her Workers’ Compensation claim. Regarding the penalty, Employee argued that termination was improper

⁷ Due to scheduling conflicts, the conference was rescheduled by orders dated November 10, 2014; January 23, 2015; and February 19, 2015.

⁸ *Agency Brief* (May 20, 2015).

because it exceeded the bounds of reasonableness and should not be sustained.⁹ Consequently, she requested that the AJ reverse Agency's termination action.¹⁰

The AJ issued her Initial Decision on June 25, 2015. She first determined that Agency established that it had cause to initiate a termination action. The AJ noted that Employee admitted to accessing WALES for the purpose of obtaining someone's personal information that was unrelated to any work assignment, which was prohibited by Agency policy. The AJ disagreed with Employee's argument that Agency failed to provide a supporting rationale as to why her actions were improper. In addition, she concluded that Employee's due process rights were not violated.¹¹

Regarding the penalty, the AJ held that Agency did not abuse its discretion in terminating Employee. Moreover, she provided that Agency considered all of the relevant *Douglas* factors in reaching its decision to terminate Employee. Ultimately, the AJ held that Agency met its burden of proof in establishing that Employee was disciplined for cause and that termination was an appropriate punishment under the circumstances. Accordingly, Agency's termination action was upheld.¹²

⁹ *Id.* at 10. She further stated that Agency failed to weigh the relevant factors enumerated in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 328 (1981) to determine the appropriate punishment.

¹⁰ *Employee's Brief* p. 8-14 (June 17, 2015).

¹¹ *Initial Decision* (June 25, 2015).

¹² *Id.* at 7. In *Douglas v. Veterans Administration*, the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or 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;

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on July 30, 2015. She argues that the AJ's decision that Agency provided her with due process was based on an erroneous interpretation of statute. Employee also contends that the Initial Decision was not based on substantial evidence because there is insufficient evidence in the record to support a finding that Agency informed her of the proposed charges against her and the specific reasons for the proposed action, as required by DPM § 1608.2. According to Employee, this violation divested her of the opportunity to be apprised of, and respond to, the new charges that were allegedly levied against her in the final termination notice. She, therefore, requests that this Board grant her Petition for Review and overturn the Initial Decision.¹³

Agency filed its Reply to Employee's Petition for Review on September 3, 2015. It believes that the Initial Decision is supported by substantial evidence. Specifically, Agency states that Employee's claims that her due process rights were violated are without merit. It notes that according to the OUC Table of Penalties, any additional language that was used in the final termination notice "simply describes the act of misusing government resources or property." Moreover, it provides that misusing government resources is a type of activity that may carry

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5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the 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.

¹³ *Petition for Review* p. 5-6 (July 30, 2015).

criminal penalties and/or is a violation of federal or District of Columbia law. In sum, Agency asserts that Employee was provided with due process because both the Advance Notice of Termination and the Final Notice of Termination included the same sustained charge and that she was given ample time to provide a response. Consequently, it asks that the Initial Decision be upheld and that Employee's Petition for Review be denied.¹⁴

Due Process

Employee's sole argument is that Agency denied her due process because the Advance Notice of Proposed Removal failed to provide her with notice of all aspects of the sustained charges that were ultimately listed in the Final Decision on Proposed Removal. She believes that there is substantially different language contained in Agency's Advance Notice and its Final Notice which rendered her unable to adequately respond to the charges against her. This Board believes that an evaluation of the administrative review process is necessary to properly address Employee's argument.

DPM § 1608.2 outlines the specifics of what is to be contained in an agency's advance notice of proposed adverse action. Under DPM § 1608.2(a), the advance written notice must inform the employee of the action that is proposed and the cause for the action. Section 1608.2(b) requires that the notice state the specific reasons for the proposed action. DPM § 1608(c) provides employees with the right to prepare a written response, including affidavits and other documentation, within six (6) days of receipt of the advance written notice.

Here, Agency issued Employee an Advance Notice of Proposed Removal by letter dated January 7, 2014. The notice provided that Employee was being charged with "any on-duty or employment-related act or omission that the Employee knew or should reasonably have known is

¹⁴ *Agency Answer to Petition for Review (September 3, 2015).*

a violation of law: specifically, misusing government resources;” “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government resources: specifically misfeasance;” and “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: specifically, neglect of duty.” Agency’s notice went on to enumerate incidents wherein Employee allegedly accessed the WALES/NCIC system to retrieve information without a valid business purpose, thereby violating Agency policy. Employee was also given the right to provide a written response to the notice.¹⁵

DPM § 1612 introduces the role of the Hearing Officer. Under DPM § 1612.4, in conducting the administrative review, the hearing officer shall: “review the notice of proposed removal action; review the employee’s response, if there is one; and conduct an adversary

¹⁵ Agency’s Prehearing Statement, Attachment 1. The Advance Notice levied the following charges and specifications against Employee:

Charge No. 1: *any on-duty or employment-related act or omission that the Employee knew or should reasonably have known is a violation of law, specifically misusing government resources*

Specification No. 1: On July 15, 2013 and July 21, 2013, you accessed the WALES/NCIC system to retrieve information regarding a Mr. Rodney Taylor. There was no valid business purpose on the dates which would have necessitated a retrieval of the citizen data.

Specification No. 2: On October 14, 2012, you accessed WALES/NCIC to retrieve information on a Thomas Andrews and India Monique Andrews. There was no valid business purpose on the date in question which would have necessitated a retrieval of the citizen data.

Cause No. 2: *Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government resources: specifically, misfeasance, misuse of government resources.*

Specification No. 1: Over the past three years, you accessed WALES/NCIC on at least eleven occasions to retrieve information regarding yourself. In doing so, you erroneously retrieved personal information on persons with similar names. There was no valid business purpose on the dates in question which would have necessitated a retrieval of your personal data or theirs....

Cause No. 3: *Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government resources: specifically, neglect of duty*

Specification No. 1: You accessed the WALES/NCIC system on multiple occasions to obtain personal demographic information. Your use of the WALES/NCIC system to access data without a legitimate reason is an example of your failure to follow instructions and of your negligent work habits.

hearing when required in accordance with DPM § 1612.5.” After conducting the administrative review, the hearing officer is required to make a written report and recommendation to the deciding official.¹⁶

In this case, a Hearing Officer conducted a review of the charges and specifications against Employee. On March 24, 2014, the Hearing Officer determined that Agency met its burden of proof that it has cause to take the adverse action against Employee for Cause No. 1, Specification No. 1 for misuse of government resources. With respect to Cause No. 1, Specification No. 2; Cause No. 2, Specification No. 1; and Cause 3, Specification No.1, the Hearing Officer stated that further fact-finding was necessary to decide whether the proposed action was appropriate. She, therefore, requested clarification from Agency as to whether it wished to continue with the remaining charges.¹⁷

DPM § 1613 addresses the duties and responsibilities of the deciding official. The regulations state the following in pertinent part:

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.

Lastly, DPM § 1614 addresses the requirements of an agency's final decision notice, and provides the following:

1614.1 The employee shall be given a notice of final decision in writing, dated and signed by the deciding official, informing him or her of all of the following:

¹⁶ DPM § 1612.10

¹⁷ *Agency's Prehearing Statement*, Attachment 3.

(a) Which of the reasons in the notice of proposed corrective or adverse action have been sustained and which have not been sustained, or which of the reasons have been dismissed with or without prejudice;

(b) Whether the penalty proposed in the notice is sustained, reduced, or dismissed with or without prejudice;

(c) When the final decision results in a corrective action, the employee's right to grieve the decision as provided in § 1617;

(d) When the final decision results in an adverse action, the right to appeal to the Office of Employee Appeals as provided in § 1618.

Agency's Deciding Official issued a Notice of Final Decision on Proposed Removal on March 31, 2014, sustaining only Charge No. 1, Specification No. 1 against Employee for "any on-duty or employment-related act or omission that the Employee knew or should reasonably have known is a violation of law...specifically misusing government resources." Employee was given the right to file an appeal with OEA within thirty days of the final decision.¹⁸

This Board finds that Employee was adequately apprised of the charges and specifications against her as required by DPM § 1608.2. The Advance Notice of Proposed Removal indicated that the adverse action was based on Employee's alleged misuse of government resources and provided details pertinent to each charge and specification. Employee was given the opportunity to respond to the charges levied against her. Likewise, Agency's Final Notice on Proposed Termination complied with DPM § 1614. The notice included the same charge—misusing government resources—that was provided in the Advance Notice. Agency's decision to refrain from further fact-finding on the remaining charges of misfeasance and neglect

¹⁸ *Id.* at Attachment 4.

of duty was within its prerogative, and Employee does not argue that the Deciding Official lacked the authority to sustain the Hearing Officer's recommendations.

Based on the foregoing, this Board finds that Employee was given proper notice of the charges against her and was afforded a sufficient opportunity to respond. Moreover, Agency's final notice did not contain language which represented a new charge to which Employee could not proffer a response. Accordingly, the AJ's conclusion that Employee was afforded due process was not based on an erroneous interpretation of statute. Therefore, the Initial Decision should be upheld, and Employee's Petition for Appeal is denied.¹⁹

¹⁹ According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹⁹ In *Baumgartner v. Police and Firemen's Retirement and Relief Board*, the D.C. Court of Appeals held 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. In this case, there is substantial evidence in the record to support a finding that Employee misused government resources by accessing WALES without a legitimate reason, and she does not dispute this contention in her Petition for Review. Consequently, this Board finds that the Initial Decision was based on substantial evidence.

ORDER

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

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.