

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CHERYL SPANN,)	
Employee)	
)	OEA Matter No.: 1601-0041-16
v.)	
)	Date of Issuance: December 18, 2018
DISTRICT OF COLUMBIA)	
CHILD AND FAMILY SERVICES,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Cheryl Spann (“Employee”) worked as a Program Monitor with D.C. Child and Family Services (“Agency”). On January 20, 2016, Employee received a Notice of Proposed Removal, charging her with “any on-duty employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty.”¹ An Agency hearing officer conducted a review of the charges against Employee and submitted a report on February 29, 2016, recommending that the neglect of duty charge be sustained. Agency also conducted an informal hearing on February 1, 2016. On March 4, 2016, Employee received a Notice of Final

¹ Agency identified two specifications in support of its neglect of duty charge: failure to complete a 100 % desk audit of a private provider, Umbrella Therapeutic Services; and failure to submit an accurate and complete quarterly report for Umbrella Therapeutic Services.

Decision on Proposed Removal, sustaining the neglect of duty charge. The effective date of her termination was March 4, 2016.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on April 4, 2016. Attached to Employee’s appeal were several documents pertaining to her performance as a Program Monitor. Employee disagreed with each of Agency’s assessments concerning her duties and responsibilities. Consequently, Employee requested that she be reinstated to her previous position, or in the alternative, be paid six months’ salary as a result of her wrongful termination.³

Agency filed its answer on May 6, 2016, stating that its termination action was supported by substantial evidence; that it did not commit a harmful procedural error; and that Employee was terminated in accordance with all applicable laws, rules, and regulations. Additionally, Agency provided that it notified Employee of her work deficiencies and that she was afforded ample guidance on how to improve upon her performance. Agency also stated that prior to being terminated, Employee received several other corrective and disciplinary actions, including a letter of reprimand, a Performance Improvement Plan (“PIP”), and three suspensions. Therefore, Agency opined that its adverse action was supported by cause, and termination was the appropriate penalty under the circumstances.⁴

An OEA Administrative Judge (“AJ”) was assigned to this matter in September of 2016. After several failed attempts at mediation, the AJ issued an order scheduling a prehearing conference to assess the parties’ arguments.⁵ After the conference, the AJ ordered the parties to submit written briefs addressing whether Agency had cause to take the adverse action against

² *Agency Answer to Petition for Appeal* (May 6, 2016).

³ *Petition for Appeal* (April 4, 2016).

⁴ *Agency Answer to Petition for Appeal*.

⁵ *Order Rescheduling Prehearing Conference* (January 24, 2017).

Employee, and whether termination was the appropriate penalty.⁶ However, after reviewing the briefs, the AJ determined that there were genuine issues of fact in contest which required an evidentiary hearing. Therefore, a hearing was held on February 7, 2018, wherein Agency and Employee presented documentary and testimonial evidence in support of their positions.⁷

An Initial Decision was issued on June 29, 2018. With respect to the neglect of duty charge, the AJ held that Employee failed to complete a 100% desk audit for the entire staff at Umbrella Therapeutic Services (“Umbrella”) before October 30, 2015. The AJ also provided that Employee neglected her duties by utilizing the incorrect form to prepare a written transfer summary to another Program Monitor; failing to obtain the required clearance documentation from Umbrella during a site visit on October 28, 2015; and failing to adequately follow up with Umbrella regarding one of its employee’s expired security clearances. Additionally, he concluded that Agency gave Employee several opportunities to correct her performance deficiencies, but she failed to do so. Consequently, he held that Employee did not complete a comprehensive desk audit by the prescribed deadline.⁸

Next, the AJ held that Employee neglected her duties by failing to submit an accurate Fourth Quarter Report for Fiscal Year 2015. He noted that Employee’s report was edited by her supervisor on at least four separate occasions as a result of errors, omissions, and lack of detail. Additionally, the AJ relied on the testimony of Ransom Washington (“Washington”), Employee’s former supervisor, in support of his conclusion. The AJ found Mr. Washington’s testimony regarding Employee’s negligence in producing the Fourth Quarter Report to be reliable and credible. Thus, the AJ determined that Agency provided substantial evidence regarding this specification.

⁶ *Post-Prehearing Conference Order* (March 13, 2017).

⁷ *Order Rescheduling Evidentiary Hearing* (February 2, 2018).

⁸ *Initial Decision* (June 29, 2018).

Concerning the penalty, the AJ first highlighted the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), in which the District of Columbia Court of Appeals held that OEA is tasked with determining whether the imposed penalty is within the range allowed by law, regulation, and any table of penalties; whether the penalty is based on a consideration of relevant factors; and whether the agency committed a clear error of judgment. The AJ stated that the Table of Appropriate Penalties (“TAP”), found in Chapter 16 of the District Personnel Manual (“DPM”), was applicable to the instant matter. He noted that under the TAP, a first offense for a neglect of duty charge carried a penalty ranging from reprimand to removal. After reviewing the record, the AJ determined that the current matter constituted the fifth instance in which Employee was charged and disciplined for neglect of duty. Additionally, he held that Agency adequately considered the *Douglas* factors in selecting the appropriate penalty.⁹ Based on the foregoing, the AJ concluded that Agency’s adverse action was taken for cause, and that removal was an appropriate penalty under the circumstances. Therefore, Employee’s termination was upheld.¹⁰

Employee disagreed with the AJ’s findings and filed a Petition for Review with OEA’s Board on August 3, 2018. She argues that the Initial Decision should be reversed because Agency failed to produce substantial evidence to support its factual assertions regarding the neglect of duty charge. Employee states that on appeal, Agency attempted to raise new allegations regarding her work performance that lacked credibility, were irrelevant, and were inadmissible based on Constitutional grounds. Additionally, she asserts that Agency utilized her Family Medical Leave Act (“FMLA”) status as a pretense to discipline her for neglect of duty. Employee also claims that Agency penalized her for refusing to accept an offer of settlement

⁹ See 5 M.S.P.R. 280 (1981).

¹⁰ *Initial Decision* at 18.

after filing an appeal with OEA. Lastly, Employee contends that Agency improperly benefited from the District of Columbia Attorney General's refusal to appoint an independent counsel to prosecute alleged violations of the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964. Therefore, she requests that this Board grant her Petition for Review and reverse the Initial Decision.¹¹

In response, Agency argues that Employee fails to substantiate any of the claims raised on Petition for Review. Agency claims that a review of the record reflects that it met its burden of proof with respect to the neglect of duty charge. Moreover, Agency states that it presented a number of witnesses who provided relevant testimony to support its position that Employee's termination was warranted. According to Agency, Employee's FMLA status did not prevent her from fully completing her duties as a Program Manager because she only utilized leave one day per week during the relevant time period. As a result, it posits that the AJ's decisions were based on substantial evidence. Consequently, Agency asks that the Board uphold the Initial Decision and deny Employee's Petition for Review.¹²

Standard of Review

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

¹¹ *Petition for Review* (August 3, 2018).

¹² *Response to Petition for Review* (September 7, 2018).

- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Substantial Evidence

Employee argues that Agency failed to proffer substantial evidence to support its assertion that Employee neglected her duties as a Program Monitor. This Board disagrees. On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), 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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹³ Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that 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.

Neglect of Duty

In this case, the record is replete with documentary and testimonial evidence to support the conclusion that Employee neglected her duties as a Program Monitor. Chapter 16, Section 1603.3, of the D.C. Personnel Regulations ("DPR") provides that an agency may institute an adverse against an employee for neglect of duty. Under the Table of Appropriate Penalties, a neglect of duty charge includes failure to follow instructions or observe precautions regarding

¹³*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).

safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; careless or negligent work habits.¹⁴

As a Program Monitor, Employee's duties, though not exhaustive, included reviewing and evaluating contractors' systems for compliance with their respective licensing standards; maintaining an on-going contract file for each assigned vendor; reviewing monthly and quarterly program-related performance reports; evaluating and assessing detailed data and reports; and ensuring that contract providers were in compliance with all applicable regulations to ensure that the services rendered promoted the safety and well-being of children in foster care.¹⁵

This Board finds that Employee neglected her duties in performing a 100% desk audit for Umbrella prior to the contract being transferred to Program Monitor, Seegars. The audit included completing an updated staff roster for Umbrella using a Staff Tracker Form, no later than October 30, 2015. Employee was directed to perform this task to ensure that the staff roster at Umbrella was current and that the staff clearance information was accurate.¹⁶ In addition, Employee was required to prepare a written memorandum for Seegars which addressed the transfer prior to a scheduled meeting on November 6, 2015.

During the evidentiary hearing, Employee's former supervisor, Ransom Washington, testified that Employee was having performance difficulties after he requested that she provide a

¹⁴ See DPR § 1619.1

¹⁵ The Foster Care Resources Administration was responsible monitoring contracts with group home providers, overseeing licensing, foster parent recruitment, and retention. The administration was abolished in 2016 and currently falls under the purview of the Business Services Administration. Umbrella is a group home provider with whom Agency contracted with beginning in the 2000.

¹⁶ *Agency Answer to Petition for Appeal*, Tab 20; and *Agency Response to Petition for Review* at 4. According to Agency, Chapters 62 and 63 of the DCMR require that staff clearances be maintained by all employees working for a contract provider. The types of clearances include a Child Protective Registry clearance; a local clearance for arrests occurring within the District of Columbia or Maryland; and FBI clearances. Clearances for providers expire every one or two years, depending on the type of the clearance. Staff clearances are also required to ensure that employees working with contract providers do not have any drug charges, child abuse, neglect charges, or felonies.

synopsis of the programs that she was monitoring.¹⁷ While Employee testified that she completed the 100% desk audit, after transferring the contract to Seegars, it was revealed that the documents Employee submitted were either incomplete or inaccurate.¹⁸ According to Washington, Employee used the incorrect form to update the staff roster at Umbrella.¹⁹ Employee's failure to correctly update and monitor the staff clearance tracker form later resulted in the discovery that a staff member at Umbrella had an expired Federal Bureau of Investigation ("FBI") clearance, yet remained on the roster after being arrested in December of 2014.²⁰ Moreover, Seegars testified that Employee never informed her that there was an issue with the staff member's clearance.

Accordingly, this Board finds that there is substantial evidence in the record to support a finding that Employee neglected her duties by failing to complete an accurate 100% desk audit. While she testified that she should not have been punished for neglecting her duties while on FMLA status, Employee conceded that she was only absent from work one day a week during the relevant time period. Thus, it was incumbent upon her to complete the duties as assigned by her manager when she was present for work. As a Program Monitor, Employee was responsible keeping accurate, complete, and updated records for Umbrella. Employee's carelessness and negligent work habits with respect to monitoring the contract with Umbrella fell short of the normal standard of care expected for her position. Both Employee and Agency were afforded the opportunity to present documentary and testimonial evidence in support of their positions. After reviewing the record, the AJ found Agency's case-in-chief to be more compelling than Employee's. Moreover, many of Employee's assertions pertinent to the veracity of Agency's

¹⁷ Tr. pg. 35.

¹⁸ Tr. pg. 50.

¹⁹ Tr. pg. 44.

²⁰ Tr. pg. 327.

witness testimony are merely disagreements with the AJ's findings. This is not a valid basis for appeal. Consequently, we find no compelling reason to disturb the AJ's findings regarding such.

Likewise, this Board finds that there is substantial evidence in the record to support the conclusion that Employee neglected her duties with respect to her preparation of the Evaluation for Congregate Human Care Agreement Q4 FY15 ("Quarterly Report"). In its Advance Written Notice of Proposed Removal, Agency stated that Employee was required to revise her Quarterly Report on at least four occasions, further noting a lack of quality check of the report for errors. Washington also testified regarding the errors, omissions, and lack of timeliness in the report. Washington stated that Employee neglected her duties in this respect because the quarterly reports were required to be given to providers in a timely manner so they would be accurately apprised of their performance.²¹ Additionally, he stated that the number of edits required on quarterly reports were a part of a Program Monitor's performance plan.²² Christine Phillips, who also supervised Employee, testified that Employee often submitted quarterly reports that were untimely and/or inaccurate.²³

The AJ was the trier of fact in this case and was in the best position to observe the demeanor and credibility of each witness. Ultimately, he deemed the testimony of Washington and Phillips to be credible and trustworthy. This Board finds that the AJ's conclusions of law flowed rationally from the facts presented. Thus, we disagree with Employee's argument that Agency failed to provide substantial evidence in support of its allegations pertinent to the Quarterly Report. Moreover, we find Employee's argument that Agency attempted to raise new allegations related to her underperformance to be without merit. Employee was adequately apprised of the charges and allegations against her. She was provided with several opportunities

²¹ Tr. pg. 104.

²² Tr. pg. 105.

²³ Tr. pgs. 217-270.

throughout the course of this appeal to provide evidence in support of her position. As previously stated, Employee's disagreements with the AJ's findings do not serve as a basis for appeal. Based on the foregoing, the AJ did not err in finding that Employee neglected her duties by failing to perform a 100% desk audit and by failing to ensure the accuracy of her Quarterly Report.

Additional Legal Arguments

Employee raises several other arguments in her Petition for Review that this Board finds to be without merit or outside the scope of OEA's jurisdiction. Namely, she proffers that Agency improperly benefited from the D.C. Attorney General's refusal to appoint an independent counsel to prosecute alleged violations of the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964. This is an issue that is outside the purview of OEA's jurisdiction. Similarly, Employee's assertion that she was penalized for not accepting an offer of settlement from Agency has no bearing on the AJ's ultimate conclusion in this matter, as Agency's decision to initiate an adverse action against Employee based on a neglect of duty charge occurred prior to any attempt at mediation/conciliation. Lastly, there is no credible evidence in the record to establish that Agency used Employee's FMLA status as a pretense to initiate the current neglect of duty charge. As the AJ noted, prior to being terminated, Employee was charged with neglect of duty a total of five times within the preceding three-year period. Thus, removal was an appropriate penalty under the circumstances.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision is supported by substantial evidence. Agency has met its burden of proof in establishing that Employee neglected her duties as a Program Monitor. Additionally, the AJ addressed each argument raised on

Petition for Appeal. Agency did not abuse its discretion in selecting termination as the appropriate penalty. Finally, we find Employee's ancillary arguments to be either unpersuasive or outside the scope of OEA's jurisdiction. Consequently, her Petition for Review must be denied.

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Vera M. Abbott

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

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.