**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| DANIELLE PENNINGTON, | ) | OEA Matter No. 1601-0187-12 |
| Employee | ) | OEA Matter No. 1601-0059-13 |
| | ) | |
| v. | ) | Date of Issuance: February 12, 2014 |
| | ) | |
| DISTRICT OF COLUMBIA OFFICE OF THE INSPECTOR GENERAL, | ) | |
| Agency | ) | MONICA DOHNJI, Esq. |
| | ) | Administrative Judge |

Danielle Pennington, *Employee Pro Se*
Lindsay Neinast, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 8, 2012, Danielle Pennington ("Employee") filed a Petition for Appeal ("First")[1] with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Office of the Inspector General's ("OIG" or "Agency") decision to place her on Enforced Leave effective August 3, 2012. Employee was a Forensic Evidence Specialist with OIG. Employee was charged in accordance with District Personnel Manual ("DPM") §1620.1(a)[2] for falsifying official records in order to obtain unemployment benefits from the Department of Employment Services ("DOES"). On September 13, 2012, Agency submitted its Answer to Employee's Petition for Appeal. Thereafter, on February 25, 2013, Employee filed another Petition for Appeal ("Second")[3] with this Office contesting her termination from Agency, which was effective February 2, 2013. On May 25, 2013, Agency filed an Answer to this Petition for Appeal.

The First Petition for Appeal was assigned to the undersigned Administrative Judge ("AJ") on October 25, 2013. Subsequently, on October 28, 2013, I issued an Order Scheduling a Status Conference in this matter for November 18, 2013. Both parties were present for the Status Conference. On November 22, 2013, I issued a Post-Status Conference Order requiring the

[1] OEA Matter No. 1601-0187-12.
[2] DPM §1620.1(a) authorizes placing an employee on Enforced Leave if [a] determination has been made that the employee utilized fraud in securing his or her appointment or that he or she falsified records.
[3] OEA Matter No. 1601-0059-13.

parties to submit written briefs addressing the issues raised at the Status Conference. On December 13, 2013, Agency filed a Motion for Consolidation and for Clarification of November 22, 2013, Post-Status Conference Order, wherefore, Agency moved to consolidate the First and the Second Petition for Appeal. This Motion was granted in an Order dated December 16, 2013. Additionally, this Order also provided the parties with a revised briefing schedule. Both parties have submitted their written briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts at issue, and as such, 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).

## ISSUE

1) Whether Agency's action of placing Employee on Enforced Leave was done in accordance with District laws, rules and regulations; and
2) Whether Employee's actions constituted cause for removal; and
3) 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 was hired on January 5, 2009, as a full-time Administrative Support Specialist with the Medicaid Fraud Unit of Agency. Subsequently, Employee was promoted to a Forensic Evidence Specialist position. While working full time with Agency, Employee applied for and received unemployment benefits from the District of Columbia. Employee received unemployment benefits from the week ending on January 09, 2009, until the week ending on April 4, 2009.[4]

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 January of 2009 to April of 2009, Employee certified that: 1) she was able, available and actively seeking work during the week claimed; 2) she did not perform work during the week claimed; and 3) she did not return to full time work during the week claimed.[5] Following an audit by DOES, Agency was notified via email on July 11, 2012, that Employee had filed and receive unemployment compensation while working for Agency. Accordingly, Agency placed Employee on Enforced Leave pending an investigation into the charges, pursuant to DPM §1620.1(a). While on Enforced Leave, the United States Attorney for the District of Columbia issued an arrest warrant based on Employee's intent to defraud the District of Columbia Government. Employee was charged with first degree fraud at the District of Columbia Superior Court.

[4] Agency also noted in its March 25, 2013, Answer that Employee also received unemployment benefits from October 2007 to 2008, in the amount of $10,648, while she was employed.
[5] Agency's Answer at Tab B (September 13, 2012).

While still on Enforced Leave, on January 2, 2013, Agency issued an Advanced Written Notice of Proposed Removal to Employee, for violating DPM §1603.3(d), (e), (f)(7), and (h). This matter was assigned to a Hearing Officer for an administrative review. On January 9, 2013, Employee requested that the Hearing Officer postpone the removal action until her criminal case was resolved. This request was denied by the Hearing Officer, noting the lack of good cause for granting Employee's request pursuant to § 1611.2. In his January 28, 2013 letter, the Hearing Officer noted that an adversary hearing was not conducted and Employee did not submit any response to the Advanced Written Notice of Proposed Removal. Additionally, following his review of the record, the Hearing Officer recommended that Agency proceed with its proposed removal of Employee for cause.[6] Thereafter, on January 28, 2013, Agency issued a Final Decision Notice on Proposed Removal, terminating Employee's employment with Agency effective February 2, 2013.[7]

***Employee's Position***

Employee contends that there was a conflict of interest in her termination because she was questioned by her job about receiving unemployment benefit from DOES. She also stated that, her direct supervisor assisted in getting the warrant against her and she was also the one who gave her [Employee] advice on how and what to do to turn herself in with regards to the arrest warrant. Employee also noted that OIG gave her wrong information on the procedures to purposely sabotage her release.[8]

Employee asserts that Agency failed to ensure fair and equitable treatment on July 11, 2012, when General Counsel, Tonya Sapp sent an email to Agency notifying them of the overpayment audit, but Agency failed to notify her. Employee further asserts that DOES did not handle the Overpayment Notification properly – they did not mail a copy of the Notice to her, which is a violation of her due process. Employee explained that she did not receive documentation, paperwork or an explanation in time to resolve the fraud allegation levied against her. She stated that her Supervisor sent an email from Tonya Sapp to her, which explained what issues were presented and notifying her that she was being placed on Enforced Leave.[9] Employee highlights that she spoke with Pat Holmes who told her that because she was on the list for a repayment arrangement, she could not be prosecuted. She explains that she was never given any advance notice plan, and that if Agency told her about the overpayment in a timely manner, she could have rectified the issue immediately.[10]

Employee made several allegations against her direct supervisor, the functioning of DOES, Agency, and other Agency employees. These allegations range from performance issues, office gossips about her situation, to how Agency and DOES handled these issues, as well as how Agency handles evidence overall. Employee also noted that she was effective in her job, never had a bad report, and always carried out her assigned functions.[11] With regards to her

[6] Agency's Answer at Tab H (March 25, 2013).
[7] *Id*. at Tab I.
[8] Petition for Appeal (August 8, 2012). *See also* Employee's brief (January 23, 2014).
[9] *Id.*
[10] *Id.*
[11] *Id.*

termination, Employee simply notes that she has been advised by her attorney not to talk about the matter since it is still in the District of Columbia Superior court.[12]

***Agency's Position***

In its submissions to this Office, Agency submits that it had the authority to place Employee on Enforced Leave, in accordance with District of Columbia Personnel Regulation ("DCPR") § 1620.6. Agency explains that its action of placing Employee on Enforced Leave was appropriate because DOES had determined that Employee falsified official record. Additionally, Agency notes that it considered and reviewed the credible information forwarded by DOES regarding its investigation and appropriately placed Employee on Enforced Leave pursuant to § 1620.1(a). Agency maintains that it complied with the procedural requirements and regulations in placing Employee on Enforced Leave in accordance with DCPR § 1620.6, and therefore, Agency had cause to place Employee on Enforced Leave.[13]

With regards to Employee's termination, Agency contends that Employee's action constituted a criminal offense, misfeasance, misrepresentation on an official government form, and an employment related act that Employee knew or should reasonable have known is a violation of the law. Consequently, it had cause to terminate Employee pursuant to DPM § 1603.3 (d), (e), (f)(7), and (h). With regards to the penalty, Agency asserts that it weighted the *Douglas* factors[14] and concluded that given the seriousness of Employee's misconduct, termination was the appropriate penalty to impose. Furthermore, Agency states that Employee failed to state a rationale or argument to support any finding of wrong doing on behalf of Agency with respect to her removal.[15]

***1) Whether Agency's action of placing Employee on Enforced Leave was done in accordance with District laws, rules and regulations***

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, placement on enforced leave, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

Here, Employee was placed on Enforced Leave from for more than ten (10) days, August 3, 3012, through February 2, 2013. And pursuant to the aforementioned provision, I find that OEA has jurisdiction over this matter.

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[12] Petition for Appeal (February 25, 2013).
[13] Agency's Answer (September 13, 2012); See also Agency's Brief (January 6, 2014).
[14] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).
[15] Agency's Answer (March 25, 2013); See also Agency's Brief (January 6, 2014).

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, DPM § 1620.1 provide as follows: [n]otwithstanding any other provision of this chapter, a personnel authority may authorize placing an employee on enforced leave if:

> (a) A determination has been made that the employee utilized fraud in securing his or her appointment or that he or she falsified official records;
>
> (b) The employee has been indicted on, *arrested for*, or convicted of a felony charge (including conviction following a plea of nolo contendere) (emphasis added); or
>
> (c) The employee has been indicted on, *arrested for*, or convicted of any crime (including conviction following a plea of nolo contendere) that bears a relationship to his or her position; except that no such relationship need be established between the crime and the employee's position in the case of uniformed members of the Metropolitan Police Department or correctional officers in the D.C. Department of Corrections. (Emphasis added).

Here, Agency placed Employee on Enforced Leave after finding out that Employee falsified official records to fraudulently obtain unemployment benefits from DOES. In order to receive unemployment benefits through DOES, Employee was required to complete a "Continued Claim Form" weekly. On the forms Employee filled out for the weeks ending in January 10, 2009 through April 4, 2009, Employee certified that: 1) she was able, available and actively seeking work during the weeks claimed; 2) she did not perform work during the weeks claimed; and 3) she did not return to full time work during the weeks claimed. The Continued Claim Form is an official document, and by certifying that she did not perform work during the week claimed and that she did not return to work during the week claimed, when she was working and fully aware of the falsity of the statement, I conclude that Employee falsified official records. Consequently, Agency had cause to place Employee on Enforced Leave in accordance with DPM § 1620.1 (a) above.

Throughout her appeal process with this Office, Employee does not offer any evidence to rebut the allegation that she falsified official records by providing DOES with false information on the Continued Claim Form in an attempt to collect unemployment benefits; nor does she allege that Agency did not comply with the procedures for placing an employee on Enforced Leave. Agency notes that it followed all the procedures set forth pursuant to DPM § 1620.6 in placing an Employee on Enforced Leave. According to DPM § 1620.6, [t]he proposing official shall issue a written notice to propose placement of an employee on enforced leave. The notice shall inform the employee of the following:

> (a) The reasons for the proposed enforced leave;

(b) The specific basis, including affidavits or other documentation, upon which the decision to propose placement of the employee on enforced leave was based and which establishes that the conditions described in section 1620.1 of this section have been met. The employee shall be provided with a copy of the notice;

(c) The beginning and ending dates of the five (5) workdays of administrative leave;

(d) The beginning date of the proposed enforced leave;

(e) The right to make a written or oral response, or both, to the notice, and to furnish written statements of witnesses or other documentation in support of the response, all within one (1) workday of receipt of the notice of proposal;

(f) The person to whom the response is to be presented;

(g) The right to be represented by an attorney or other representative; and

(h) The right to a written final decision within the five (5) workdays of administrative leave.

Upon learning of the Overpayment from DOES, on July 26, 2012, Agency issued an Advanced Written Notice of Proposed Enforced Leave to Employee. This notice stated that Employee was being placed on Enforced Leave because a determination had been made that Employee falsified official records. Specifically, the Notice explained that DOES determined that while working for the District of Columbia Government, Employee received unemployment benefits to which she was not entitled to for the weeks ending January 10, 2009, through April 4, 2009. The Continued Claim Forms for the claimed weeks were provided to Employee, along with this Notice. Employee was also informed in this Notice that she would be placed on Administrative Leave with pay for a period of five (5) workdays, beginning July 27, 2012, and that if a determination was made to take the proposed action, Employee would be placed on Enforced Leave beginning August 3, 2012. Employee was also provided with her right to make an oral or written appeal or both, and to furnish written statements of witnesses or other documentation in support of the responses, within one (1) day of receipt of the Notice to the Deciding Official – Charles Willoughby. Employee was also informed of her right to be represented by an attorney or other representative. Based on the record, Employee made an oral request and she was afforded an opportunity to present her case. On July 31, 2012, Agency issued a Notice of Final Decision – Proposed Enforced Leave. This Notice was issued within the five (5) workdays of administrative leave. Consequently, I find that Agency complied with DPM § 1620.6 when it placed Employee on Enforced Leave.

***2) Whether Employee's actions constituted cause for removal***

With regards to her termination, Employee simply notes that "I replied to the request in a timely fashion and with the advice of my attorney to not speak on this matter because this matter

is with the Superior Court."[16] Agency contends that it had cause to terminate Employee. On January 2, 2013, Agency issued an Advanced Written Notice of Proposed Removal to Employee pursuant to DPM § 1603.3 (d), (e), (f)(7), and (h).[17] Agency explains that Employee's knowingly or negligent material misrepresentation on the Continued Claim Forms constituted cause pursuant to § 1603.3(d). Agency also explains that, because Employee was employed in the Medicaid Fraud Control Unit - the agency entrusted to detect and monitor fraud with the District of Columbia, she reasonably should have known that submitting false information on the Continued Claims Forms and certifying to the truthfulness of the information was a violation of the law, pursuant to DPM § 1603.3(e). Additionally, Agency maintains that the credibility of OIG as a law enforcement agency depends on the credibility of the integrity and work of its employees. And by being arrested and convicted of engaging in a scheme to defraud the District Government of over $14,000,00[18] in unemployment benefits, Employee's conduct interfered with the integrity of Agency's operations and constitutes malfeasance pursuant to DPM § 1603.3(f)(7).

Furthermore, Agency notes that, Employee's action constituted cause pursuant to DPM § 1603.3(h) since she was convicted criminally for fraudulently obtaining unemployment benefits. Agency highlights that, even if Employee had not been criminally convicted, it is still undisputed that she began working full-time with Agency on January 5, 2009, and yet she completed the Continued Claim forms certifying under penalty of perjury that she was 1) able, available and actively seeking work during the week claimed; 2) did not perform work during the week claimed; and 3) did not return to full time work during the week claimed. According to Agency, such conduct constitutes "making a false statement or representation knowing it to be false or knowingly failing to disclose a material fact to obtain or to increase unemployment benefits" a criminal violation, pursuant to D.C. Official Code §51-119(a).[19] As previously noted, Employee has not provided any evidence to rebut these assertions nor has she argued that Agency does not have sufficient evidence to bring these causes of action against her. Based on the evidence on record, I find that Agency's analysis of the applicable laws as described in its January 6, 2014, brief is thorough and accurate. Accordingly, I hereby adopt Agency's aforementioned arguments as my own and find that Agency had sufficient cause to terminate her.

Moreover, the D.C. Court of Appeal 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.[20] And to prove that an employee violated D.C. Official Code § 51-119 (a), the agency has to show that:

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[16] Petition for Appeal (February 25, 2013).
[17](1)DPM § 1603.3(d) – [a]ny knowing or negligent material misrepresentation on other document given to a government agency;
(2)DPM § 1603.3(e) – [a]ny on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law;
(3) DPM § 1603.3(f)(7) – [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Malfeasance; and
(4) DPM § 1603.3(h) – [a]ny act which constitutes a criminal offense whether or not the act results in a conviction.
[18] Agency asserts that, the $14,000.00 is the total amount of unemployment benefits that employee illegally received from 2007, through 2009.
[19] See Agency's Brief, pgs. 7-11 (January 6, 2014).
[20] *Lewis v. United States*, 389 A.2d 306, D.C., July 10, 1978.

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.

The responses to the questions on the Continued Claim form are important to DOES' when determining who is eligible for unemployment benefits, as well as how much they are entitled to. And based on the record, it is undisputed that Employee made false statements of material facts on the Continued Claim Form in order to continue receiving unemployment benefits. Once Employee became employed with Agency on January 5, 2009, she was no longer entitled to submit a Continued Claim Form for unemployment benefits. Additionally, Employee had actual knowledge of her gross earnings when she filled out the Continued Claim forms and she had actually started working effective June 5, 2009. Therefore, by answering 'NO' to the question regarding whether she had returned to full time work, Employee had actual knowledge of the falsity of this statement, or she made the statement recklessly, careless of whether it was true or false. Further, it is undisputed that Employee made these false statements on the Continued Claim Forms in an attempt to obtain unemployment benefits. Based on the record, Employee received unemployment benefits of over $14,000.00, from 2007, through 2009.

***3) If so, 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).[21] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any 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, I find that Agency has met its burden of proof for the above-referenced charges, and as such, Agency can rely on these charges in disciplining Employee. Agency maintains that it considered the *Douglas*[22] factors in imposing the penalty of termination. The penalty for a first offense for these causes of actions collectively, range from a five (5) days suspension to removal. In *Douglas,* the Court held that "certain misconduct may warrant removal in the first instance."

[21] *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).

[22] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

An agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[23] In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to place Employee on Enforced Leave, as well as to remove Employee. I further conclude that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is clearly not an error of judgment. Accordingly, I find that Agency's action should be upheld.

**Grievances**

During her appeal process with this Office, Employee also made the following contentions:

1) There was a conflict of interest in her termination because she was questioned by her job about receiving unemployment benefit from DOES;
2) Her direct supervisor assisted in getting the warrant against her and she was also the one who gave Employee advice on how and what to do to turn herself in with regards to the arrest warrant;
3) Agency failed to ensure fair and equitable treatment on July 11, 2012, when Tonya Sapp sent an email to Agency notifying them of the overpayment audit, but Agency failed to notify her;
4) Employee further asserts that DOES did not handle the Overpayment Notification properly – they did not mail a copy of the Notice to her, which is a violation of her due process;[24]
5) She did not receive documentation, paperwork or an explanation in time to resolve the fraud allegation levied against her;
6) She spoke with Pat Holmes who told her that because she was on the list for a repayment arrangement, she could not be prosecuted;
7) Employee contends that if Agency informed her about the overpayment in a timely manner, she could have rectified the issue immediately;
8) She relays that she was effective in her job, she never had a bad report, and she always carried out her assigned functions;
9) She also made several allegations against her direct supervisor, and the functioning of DOES and of Agency. These allegations range from performance issues, privacy violation, and office gossips, to how Agency and DOES handled these issues, as well as how Agency handles evidence overall;

It is an established matter of public law that as of October 21, 1998, pursuant to OPRAA, D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. And I find that Employee's above arguments are all grievances and outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

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[23] *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).

[24] It is worth noting that there is evidence in the record which shows that DOES mailed the Notice of Overpayment to the address they had on record for Employee (3525 Jay St NE #202, Washington, DC 20019), on March 30, 2012. *See* Agency's Answer, at Exhibit B (September 13, 2012).

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of placing Employee on Enforced Leave, as well as its action to subsequently terminate Employee is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge