THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RICHARD AFOLABI-BROWN	)	
Employee	)	
	)	OEA Matter No. 1601-0121-99P04
	)	
v.	)	Date of Issuance: July 6, 2004
	)	
DEPARTMENT OF CORRECTIONS	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee was removed from his position as a Supervisory Physician's Assistant based on an incident that occurred the night of March 23, 1999, and a second, but related, event that occurred the afternoon of March 24, 1999. As result of these events, Agency charged

Employee with dishonesty and inexcusable neglect of duty and removed him from his position effective May 11, 1999.

On the night of March 23, 1999, Employee was working in the pharmaceutical unit of Lorton's Central facility. At approximately 11:00 p.m. a nurse also working in that unit received a telephone call from a former Agency employee named Dr. Alfred Cannon.[1] Dr. Cannon said he was calling from the gatehouse checkpoint of Lorton's minimum facility. The nurse gave Dr. Cannon the names of those persons on duty at that time and Dr. Cannon, recognizing Employee's name, asked to speak to Employee. According to Employee, Dr. Cannon told Employee that he had a very sick patient who was in need of a pain medication. Employee told Dr. Cannon that Toradol, a pain medication, was in stock. Dr. Cannon asked Employee to give him a dose of Toradol and promised Employee that he would return the medication the next day. Because it was near the end of his shift, Employee signed out for the evening, left the pharmaceutical unit with the medication, and met Dr. Cannon at the gatehouse where he then gave the Toradol to Dr. Cannon.

According to Employee, when he returned to work the next day, March 24, 1999, he entered the Central facility at the gatehouse checkpoint. The security officer on duty handed to Employee an envelope which Employee opened and found inside of it a vial of medication that supposedly contained Toradol. Along with the medication was a note from Dr. Cannon

---

[1] Agency hired Alfred Cannon in 1986 as a Chief Physician's Assistant. Dr. Cannon stopped working for Agency in 1991.

thanking Employee and asking Employee to call him.

Employee entered the unit with the medication and took it to the nurse on duty in the pharmaceutical unit. Employee asked that nurse to return the medicine to the pharmaceutical stock, but she refused to do so. Instead, she told Employee that she would not accept the supposed Toradol because to do so would create a discrepancy in the amount of medication she knew to be within the pharmaceutical inventory. The nurse then informed Agency's medical officer about Employee's attempt to return to the stock a vial of what Employee claimed to be Toradol.

Thereafter, Agency began an investigation into the incident. As part of its investigation, Agency asked Employee to write a report of what had occurred. Employee wrote in an incident report dated March 24, 1999, that "[a]s a result of a request by an outside physician to borrow Toradol for his brother in pain from cancer–I removed a vial of Toradol 30 mg. and return (sic) the same the next day." As it continued its investigation, Agency discovered that on the night Employee removed the Toradol from the facility, an inmate's medical chart contained the notation that Toradol had been ordered for that inmate. Further, alongside that notation the phrase "returned, not given" was written and a line was drawn through the medication. The physician whose name appeared on the chart as the one who purportedly authorized the medication, informed Agency officials that the notation prescribing Toradol was not his writing and that the notations were written without his knowledge. Knowing that Employee had treated this inmate earlier in his shift that day, Agency concluded that Employee

had ordered the medication for the inmate and then supplied the additional notation. This act, according to Agency, amounted to a cover-up and was the means by which Employee was able to remove the Toradol from the pharmaceutical inventory and then attempt to return it to the inventory.

Based on this series of events, Agency charged Employee with dishonesty and inexcusable neglect of duty and removed him from his position. Employee appealed Agency's actions to this Office. The Administrative Judge, in an Initial Decision issued September 9, 2002, upheld Agency's action. The Administrative Judge sustained the dishonesty charge finding that Agency had proven, based on the documentary evidence of record and the testimony adduced at the hearing in this appeal, that Employee had knowingly taken, without authorization, the Toradol which was Agency property and given it to an outside physician for the physician's brother. Furthermore, with respect to the inexcusable neglect of duty charge, the Administrative Judge held that Agency had proven that Employee had willfully and without authorization taken out of the institution, and attempted to introduce into the institution, a drug that was intended to be administered to an inmate and that was for the use of the inmates within the institution. Thus the penalty of removal was upheld.

Employee has since timely filed a Petition for Review. In his Petition for Review Employee claims that several errors were committed in the trial of this appeal that warrant a reversal of the Initial Decision. Specifically, Employee claims that the nature of the trial proceedings was unfair because he thought the trial was to be a status conference instead of an

evidentiary hearing. Therefore, according to Employee, he was not able to adequately prepare his witness for the hearing. We find this argument to be without merit. The record below includes an "Order Convening Hearing." The hearing was originally scheduled for August 10, 2001 but, pursuant to an "Order Reconvening Hearing," the hearing was postponed to April 1, 2002. The certificates of service attached to both orders indicate that Employee was served a copy of them both. There is nothing in the record to show that Employee did not receive the orders.

Employee's second claim of error is that the Administrative Judge failed to consider the environment in which Employee worked and, thus, failed to address any issues related to his co-workers and that the Administrative Judge failed to address the manner in which Agency investigated this incident. In this appeal Agency bore the burden of proving by a preponderance of the evidence that Employee had in fact been dishonest and had inexcusably neglected his duty. If Employee's working environment or the manner in which Agency investigated this incident had any connection to this appeal, we believe it was incumbent upon Employee to demonstrate how those issues were relevant. Employee did not do this in the trial below nor does he demonstrate the relevancy of those issues in his Petition for Review. Therefore, we find these arguments also to be without merit.

Next, Employee disputes the testimony Agency's witnesses gave at the two-day evidentiary hearing held in this appeal. In the Initial Decision the Administrative Judge held that "[b]ased on their demeanor during testimony. . . I find Agency's witnesses' to be far more

credible that Employee and his sole witness, Dr. Cannon. Employee often contradicted himself and his own written reports to his superiors. . . . Dr. Cannon's assertion on the stand that Employee was unaware [that] the medication was for his brother and not an inmate is not supported by Dr. Cannon's own written report." *Initial Decision* at 9. To merely disagree with the testimony of a witness, as Employee does in this appeal, is not enough to cause us to discredit that testimony. Thus, the Initial Decision cannot be reversed on this basis.

Lastly, Employee claims that removal was an inappropriate penalty in this case and that the Administrative Judge should have evaluated the penalty in light of the so called *Douglas* factors. In a statement we recently submitted to the District of Columbia Court of Appeals in the case of *District of Columbia Department of Public Works v. Colbert*, No. 01-CV-1002 (MPA 12-00), we explained how we analyzed the appropriateness of a penalty in view of the *Douglas* factors.[2] We stated that we have "not required the *Douglas* factors to be applied in a mechanical fashion at a certain time in the proceeding or in a certain way. We view *Douglas* as a simple rule of reason. The factors are not required by statute." *Id.* at 3. Instead, we have consistently held that in accordance with *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985), this Office's primary responsibility is "simply to ensure that 'managerial discretion has been

---

[2] The Merit Systems Protection Board established a 12-prong test for evaluating the appropriateness of a penalty in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Hence the name "*Douglas* factors." The first time this Office applied the *Douglas* factors in assessing the appropriateness of a penalty was in the case of *Employee v. Agency*, 29 D.C. Reg. 4565 (July 15, 1982). In that case the administrative judge stated that the "[r]eview of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. . .[and that] [t]his Office is *guided* in this matter by the principles set forth in *Douglas*. . . ." *Id.* At 4570 (emphasis added).

legitimately invoked and properly exercised.'" Consequently, we continue to apply the test of whether the penalty imposed by an agency is supported by substantial evidence and thus, is reasonable. We do not substitute our judgment for that of the agency.

Agency believed that given the nature of the offense and the fact that extreme caution is warranted with respect to what is brought onto the grounds of a prison, removal was the appropriate penalty in this appeal. We find that the penalty Agency imposed is reasonable and is supported by substantial evidence. Therefore, we will not disturb it. Based on the foregoing reasons, Employee's Petition for Review is denied and the Initial Decision is affirmed.

ORDER

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

FOR THE BOARD:

Erias A. Hyman, Chair

Horace Kreitzman

Brian Lederer

Jeffrey J. Stewart

Keith E. Washington

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.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail this day to:

Richard O. Afolabi-Brown
8820 Rustburg Circle
Gaithersburg, Md. 20886

Fred Staten
Department of Corrections
1923 Vermont Ave., N.W.
Washington, D.C. 20001

Katrina Hill
Clerk

July 6, 2004
Date