THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ANTHONY DYSON, Employee	
v.	OEA Matter No.: 1601-0079-14
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, Agency	Date of Issuance: September 13, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Anthony Dyson ("Employee") worked as a Correctional Officer with the D.C. Department of Corrections ("Agency"). On April 14, 2014, Agency issued an Advance Notice of Proposed Removal charging Employee with "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty: failure to follow instructions or observe precautions regarding safety; and misfeasance: providing misleading or inaccurate information to superiors. The charges stemmed from a January 12, 2014 incident wherein Employee failed to take action after witnessing an inmate attack another inmate with a sharp instrument.[1] Agency claimed that he also provided false

[1] *Agency's Prehearing Statement*, Tab 3 (June 20, 2014).

information during an internal investigation conducted by the Office of Investigative Services ("OIS").

On May 7, 2014, a Hearing Officer conducted an independent review of the evidence in support of Agency's removal action.[2] The Hearing Officer opined that the charges against Employee should be sustained; however, he recommended that the penalty be reduced from removal to a suspension of at least thirty days and a reduction in grade/pay.[3] Agency issued its Notice of Final Decision on May 20, 2014.[4] Its Director, who was the deciding official, sustained the charges against Employee and adopted the Hearing Officer's recommended penalty of a thirty-day suspension and a demotion. Employee's suspension was effective from May 23, 2014 through June 21, 2014. His reduction in grade became effective on June 29, 2014.[5]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on May 30, 2014. He believed that the Hearing Officer actually proposed a suspension of fifteen days, and not thirty days.[6] In addition, Employee stated that the deciding official improperly increased the proposed penalty to a thirty-day suspension and demotion, in violation of the District Personnel Manual ("DPM"). He, therefore, requested that OEA order Agency to only impose a fifteen-day suspension and reverse his reduction in grade.[7]

In its Answer to the Petition for Appeal, Agency argued that it had cause to take adverse action against Employee for neglect of duty and misfeasance.[8] It also disagreed with his contention that the Hearing Officer recommended a penalty of a fifteen-day suspension. According to Agency, Employee failed to acknowledge that there were two separate charges:

---

[2] *Id*. at Tab 2.
[3] *Id*.
[4] *Id*. at Tab 1.
[5] *Id*.
[6] *Petition for Appeal*, Attachment A (May 30, 2014).
[7] *Id*.
[8] *Agency's Answer to Petition for Appeal* (June 20, 2014).

neglect of duty and misfeasance.[9] It asserted that under the Table of Penalties, found in Chapter 16 of the DPM, a first offense for misfeasance allowed for a penalty no greater than fifteen days; whereas, the penalty for a first offense for neglect of duty may range from reprimand to removal. Agency submitted that it followed all relevant District laws when it suspended and demoted Employee.[10]

The matter was assigned to an OEA Administrative Judge ("AJ") on August 25, 2014. On September 8, 2014, the AJ issued an order, requesting Employee to address whether OEA had jurisdiction over his appeal because he filed a grievance with his union prior to filing a Petition for Appeal with OEA.[11] After determining that that OEA could exercise jurisdiction over his appeal, the AJ held a prehearing conference to assess the parties' substantive arguments.[12] During the conference, Employee did not dispute that he engaged in misconduct on January 12, 2014. His sole argument was that Agency imposed an improper penalty. Therefore, the parties were ordered to submit written briefs to address the penalty issue.[13]

Employee's brief reiterated that his discipline improperly exceeded the Hearing Officer's recommended penalty.[14] He also argued that the Collective Bargaining Agreement ("CBA") between the Department of Corrections and his union was violated when the final decision maker imposed a penalty that was "not in concert with" the provisions of the CBA.[15]

In response, Agency argued that it considered the *Douglas* factors and the DPM's Table of Appropriate Penalties in making its decision to suspend and demote Employee.[16] It stated that

---

[9] *Id*. at 2.
[10] *Id*.
[11] *Order on Jurisdiction* (September 8, 2014).
[12] *Prehearing Conference Order* (December 22, 2014).
[13] *Order Requesting Briefs* (January 28, 2015).
[14] *Employee Brief* (February 18, 2015).
[15] *Id*. at 3.
[16] *Agency Brief* (February 18, 2015). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

accepting the Hearing Officer's recommended penalty was neither arbitrary nor capricious.[17] Agency further reasoned that the imposed penalty should not be disturbed because the Director acted within his authority when he adopted the Hearing Officer's recommendation. Agency, therefore, requested that the AJ uphold Employee's suspension and reduction in grade/pay.

The AJ issued her Initial Decision on June 10, 2015. She determined that Agency had cause to take adverse action against Employee for neglect of duty and misfeasance.[18] With respect to the penalty, the AJ provided that Agency did not abuse its discretion, act arbitrarily, or fail to consider the relevant *Douglas* factors when it selected the penalty to impose upon Employee.[19] She also noted that his penalty was less severe than the penalty imposed on other employees who engaged in similar conduct. Consequently, the AJ upheld Agency's decision to suspend and demote Employee.[20]

---

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in 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. *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

[17] *Id*. at 5.
[18] *Initial Decision* (June 10, 2015). Employee did not dispute that he engaged in misconduct and solely disagreed with the penalty that was imposed by Agency.
[19] *Id*. at 5.
[20] *Id*.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on July 4, 2015. He first submits that other Correctional Officers were punished less severely than him for similar misconduct.[21] Additionally, Employee asserts that the AJ erroneously concluded that OEA was guided by the DPM and not the Collective Bargaining Agreement in this matter. Lastly, he reiterates his belief that the Hearing Officer recommended a fifteen-day suspension, and not a thirty-day suspension.[22] Employee, therefore, requests that this Board grant his Petition for Review.

In response, Agency argues that the AJ properly evaluated the consistency of the penalty imposed on Employee.[23] It states that the new evidence regarding other Correctional Officers being disciplined disparately should not be considered by the Board because Employee failed to explain why he could not produce the documents to the AJ.[24] According to Agency, the AJ addressed the appropriateness of Employee's penalty in accordance with the DPM and the *Douglas* factors. Thus, it opines that the Petition for Review should be denied.[25]

Article 11 of the CBA

Employee contends that Agency improperly imposed a penalty higher than the penalty recommended by the Hearing Officer who reviewed his case. Contrary to Employee's argument, it is clear that the Hearing Officer recommended a penalty of a thirty-day suspension and a reduction in grade/pay.[26] Thus, the issue to be decided is whether the Deciding Official acted within his authority when he sustained the charges against Employee and adopted the Hearing

[21] *Petition for Review* (July 14, 2015).
[22] *Id*. at 3.
[23] *Agency's Answer to the Petition for Review* (August 17, 2015).
[24] *Id*. at 3.
[25] *Id*. at 6.
[26] *Agency's Prehearing Statement*, Tab 8 (June 20, 2014). In his recommendation, the Hearing Officer stated that "were [he] making an independent assessment of the appropriate penalty, he would suggest a suspension of at least 30 days and a reduction in grade/position for both offenses combined."

Officer's recommendation. Agency has submitted an excerpt from the CBA that addresses its the adverse action process. Article 11, Section 9D of the CBA provides the following:

> [the] Deciding Official shall issue a final decision after reviewing the recommendation of the Disinterested Designee/Hearing Officer. The deciding official may sustain or reduce the penalty recommended by the Disinterested Designee, remand the matter for further consideration by the Hearing Officer, or dismiss the charge but may not increase the penalty recommended by the Disinterested Designee/Hearing Officer.

Here, Agency issued a Twenty-Day Advance Notice of Proposed Removal on April 14, 2014, based on charges of neglect of duty and misfeasance. However, after reviewing the evidence, a disinterested Hearing Officer recommended that the proposed penalty of termination should be reduced to a thirty-day suspension and a reduction in grade. Agency's Director, who was the deciding official, sustained the Hearing Officer's recommendation and reduced the proposed penalty accordingly. Thus, we find that the Director acted within his authority because he did not increase the penalty that was recommended by the Hearing Officer. Consequently, Agency did not violate Article 11, Section 9D of the CBA.

Disparate Treatment

Employee also contends that his punishment constituted disparate treatment. He now submits the Advance Notice of Proposed Demotion for another Correctional Officer (L. Smith), who was also charged with "any on-duty or reemployment-related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty: failure to follow instructions or observe precautions regarding safety.[27] However, in *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on*

[27] *Petition for Review* (July 14, 2015). The document was not issued to Officer Smith until June 29, 2015, after the AJ issued her Initial Decision in this matter. Therefore, the Board will consider this document as new evidence that was not available at the time the record was closed.

Petition for Review (September 29, 1995), OEA's Board held the following with respect to a claim of disparate treatment:

> [An agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to his own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

In this case, Employee has failed to make a *prima facie* showing of disparate treatment. He has failed to produce Officer Smith's Final Notice on Proposed Demotion, which reflected Agency's final decision regarding a penalty. According to the partial document submitted by Employee, Agency proposed to demote Officer Smith based on a single charge of neglect of duty. Whereas, Employee was charged with both neglect of duty and misfeasance.[28] Moreover, Employee has not provided any affidavits or evidence showing that he was similarly situated to other Correctional Officers that were punished less severely than him. Accordingly, this Board finds that Employee did not meet his burden of proof with respect to the disparate treatment claim.

Collective Bargaining Agreement

Employee contends that the AJ erroneously held that OEA was guided by the DPM and not the CBA in this case. In *Brown v. Watts*, 933 A.2d 529 (D.C. 2010), the D.C. Court of Appeals held that OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The Court explained

[28] *Id.*

that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure." Under D.C. Official Code § 1-616.52(d), "[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by the labor organization."

The parties do not dispute that Employee was a member of the Fraternal Order of the Police, Department of Corrections Labor Union, at the time he was suspended and demoted. Thus, the CBA between Agency and the union must be utilized to determine whether the penalty imposed upon Employee violated any terms of the agreement.[29] However, this Board cannot fully make this determination based on the evidence in the record, as neither party has submitted a full copy of the CBA. The agreement, in its entirety, is germane to the appropriate disposition of this case. Consequently, the matter must be remanded to the AJ to determine whether the CBA contains its own table of penalties, and whether the penalty imposed was allowable under the circumstances.

Conclusion

Agency did not violate Article 11, Section 9D, of the CBA. Additionally, Employee has not met his burden of proof on his claim of disparate treatment. However, in the absence of a full copy of the Collective Bargaining Agreement, this Board is unable to conclude if Employee's demotion was an allowable penalty. Therefore, this matter must be remanded to the AJ for further proceedings.

[29] This Board notes that the AJ erroneously determined that OEA does not have the authority to hear allegations regarding violations of collective bargaining agreements.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **REMANDED** for further consideration.

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

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.