

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. 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:)	
)	
HENRY McCOY,)	OEA Matter No. 1601-0008-09
Employee)	
)	Date of Issuance: December 12, 2011
)	
)	
D.C. DEPARTMENT OF YOUTH)	
REHABILITATION SERVICES,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Henry McCoy (“Employee”) worked as a Corrections Officer at the D.C. Department of Youth Rehabilitation Services (“Agency”). On September 22, 2008, Employee received a written notice removing him from his position. He was charged with an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations, neglect of duty, and incompetence.¹

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on October 21, 2008. He appealed his removal on the grounds that Agency lacked cause to remove him. Employee requested reinstatement and back pay.²

¹ Agency removed Employee because he violated YSA 1.14 for failing to report an altercation between a youth resident and a staff manager.

² *Petition for Appeal*, p. 3 (October 21, 2008).

On December 16, 2008, Agency filed its Answer to Employee's Petition for Appeal. It provided the charge against Employee and corresponding regulation or policy that addressed the act in which Employee was engaged. Agency considered the penalty for the charge as outlined in the District Personnel Regulations, Table of Penalties. Additionally, it considered all mitigating or aggravating circumstances. As a result, Agency requested that the case be dismissed.³

The Administrative Judge ("AJ") issued his Initial Decision in this matter on June 10, 2010. He found that Agency had adequate cause to remove Employee. He also found the penalty to be appropriate given the previous disciplinary action taken against Employee. He reasoned that Employee's earlier suspensions and counseling constituted appropriate progressive discipline and were designed to correct Employee's behavior. Given the facts of the case, the AJ held that Agency exercised managerial discretion and chose a reasonable penalty. Consequently, Agency's removal of Employee was upheld.⁴

Employee filed a Petition for Review on June 25, 2010. He simply requested to be heard regarding his reinstatement.⁵ Agency filed a response providing that Employee failed to state a ground upon which the Board could grant his Petition for Review. It argued that the Initial Decision was based on substantial evidence and should be upheld.⁶

This Board agrees with the AJ's assessment that there were adequate grounds for an adverse action claim against Employee. Agency charged Employee with violating Agency's Reporting Unusual Incidents Policy, YSA 1.14. YSA 1.14 was created so that all unusual

³ *Agency's Answer to Employee's Petition for Appeal*, p. 2-6 (December 16, 2008).

⁴ *Initial Decision* (June 10, 2010).

⁵ *Petition for Review* (June 25, 2010).

⁶ *Agency's Response to Employee's Petition for Review* (August 12, 2010).

incidents were reported in a timely manner. The policy provides that the effective and efficient operation of the agency depended on accurate communication of information regarding serious incidents involving youth and staff. Employee's failure to file an incident report of an altercation between a resident and staff member violated YSA 1.14. Therefore, Agency was justified in bringing the adverse action against Employee.

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).⁷ 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; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency.

Penalty Within Range Allowed by Law, Regulation, or Applicable Table of Penalties

Chapter 16 of the District Personnel Manual ("DPM") outlines the Table of Penalties for various causes of adverse actions taken against District government employees. Section 1619 of the DPM clearly lists that the penalties for an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations (neglect of duty) charge ranges from a reprimand to removal for the first offense. Hence, removal was an appropriate penalty for Employee.

⁷ 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).

Employee had been previously charged with incompetence on at least two other occasions.⁸ The penalty for a third offense of incompetence is suspension for 45 days to removal. Accordingly, removal was also an appropriate penalty for the incompetence charge against Employee.

Penalty Based on Consideration of Relevant Factors

In assessing whether the penalty is based on a consideration of relevant factors, OEA relies on *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).⁹ The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- (1) the nature and seriousness of the offense, and its 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 *Agency's Answer to Employee's Petition for Appeal*, p. 4-7 and Exhibits #16 and 19 (December 16, 2008).

⁹ *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).

- (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.

As provided in its December 16, 2008, Answer to Employee's Petition for Appeal, Agency considered all relevant factors when imposing its penalty against Employee. Agency determined that removal was appropriate because there were no mitigating factors and several aggravating circumstances to support Employee's removal. It considered Employee's past work record and dependability. However, that was balanced against Employee's past disciplinary record.¹⁰ In the end, Agency felt that there were no alternative sanctions that could be imposed to deter similar conduct from Employee in the future. Therefore, he was removed.¹¹ We agree with Agency's assessment.

No Clear Error of Judgment by Agency

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was within the range of penalties for the neglect of duty charge, as evidenced in Chapter 16 of the DPM. It was also a valid penalty given Employee's previous charges of incompetency. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Accordingly, Employee's Petition for Review is DENIED.

¹⁰ Agency provided five previous incidents where Employee was suspended or counseled for failing to comply with security and control protocols; failing to obtain permission to leave his post (absence without official leave); bringing contraband into the facility and accepting contraband from a resident youth; engaging in excessive tardiness; and failing to follow verbal and written rules.

¹¹ *Agency's Answer to Employee's Petition for Appeal* (December 16, 2008).

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

Richard F. Johns

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.