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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
RASHID JONES,)	
Employee)	OEA Matter No. 1601-0176-08SJR11
)	
v.)	Date of Issuance: August 29, 2012
)	
OFFICE OF THE CHIEF)	
MEDICAL EXAMINER,)	
Agency)	MONICA DOHNJI, Esq.
_____)	Administrative Judge
Othello Jones, Esq., Employee Representative		
Ross Buchholz, Esq., Agency Representative		

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 17, 2008, Rashid Jones (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Office of the Chief Medical Examiner’s (“OCME” or “Agency”) decision to terminate him from his position as a full time Autopsy Assistant. On July 25, 2007, and October 2, 2007, Agency officials met with Employee to discuss allegations that he was also working at Diener’s Autopsy Services, Inc., (“DASI”) while working at Agency. Agency alleged that, on May 22 and June 5, 2007, Employee called in sick to OCME and worked for DASI at Children’s Hospital National Medical Center.

In October of 2007, the Office of the Inspector General (“OIG”) began an investigation of Employee’s alleged outside employment with DASI. According to the Investigator, Teddy Clark, DASI, a Maryland corporation, refused to honor a subpoena from OIG. As a result, OIG was unable to gather evidence to support the allegations of dual employment. Agency also determined that Employee did not use any leave at Agency on May 22 or June 5, 2007. Agency generated no charges and the investigation was closed in February of 2008.

On October 17, 2007, Employee attended an ethics training conducted by Thorn Posen, Ethics Counselor of the Office of the Attorney General. He was advised against working a second job that would conflict with the interests of the D.C. government or his scheduled tour of duty. Employee was also advised that D.C. government employees are prohibited from engaging in any outside employment during working hours unless that employee is on approved annual leave. In addition, Employee was informed that D.C. government employees may not work at another job while on sick

leave or during any regularly scheduled period of work thereafter until returning to work for at least one full tour of duty.

On April 9, 2008, Employee's brother was killed. On April 10, 2008, Employee suffered a trauma when he entered his work site to find his deceased brother positioned for an autopsy. Employee was granted sick leave for a period thereafter (April 11 – May 6, 2008) and went into counseling for post-traumatic stress disorder. While employed by the Agency, Mr. Jones also undertook a position with the DC Department of Parks and Recreation as a Swimming Instructor. According to the records of Richelle West Marshall, Chief Administrative Officer, Employee started working for that agency before the incident described and continued to do so while he was on sick leave. According to Ms. Marshall's records, Employee worked the following hours for Parks and Recreation while he was on sick leave:

April 13 to April 19, 2008 (48 hours)

April 27, 2008 to May 3, 2008 (48 hours)

Agency removed Employee effective on August 23, 2008, pursuant to Chapter 16, Section 1608 of the District Personnel Manual (DPM) setting forth cause as follows:

Charge Number 1

An[y] on duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law (DPM § 1603(3)(e). (Outside employment while on scheduled sick leave at OCME and employment by a second District government agency, Parks and Recreation).

Charge Number 2

An[y] on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (DPM § 1603(3)(f) (Absence significantly impacting the operations of the mortuary unit).

In a May 8, 2008 decision entitled "Initial Decision, Ruling Granting Agency's Motion for Summary Judgment in Part and Order Setting a Deadline for Briefs on the Penalty," the Administrative Judge held that "[b]y working for Parks and Recreation forty (40) hours or more per week while employed by Agency and working shifts there while on sick leave, Employee did commit acts that he had reason to know were unlawful."¹ Administrative Judge ("AJ") Sheryl Sears went on to find, however, that because Agency "granted the sick leave, Agency cannot now argue that, by using it, Employee interfered with the efficiency or integrity of its operations."²

Because AJ Sears upheld one charge brought against Employee and denied the second charge, she ordered both parties to submit briefs that addressed the penalty. Specifically, she asked them to discuss whether the penalty of removal was commensurate with the offense, whether

¹ Initial Decision at 4 (May 8, 2008).

² *Id.*

Employee's violation was *de minimus*, whether the penalty was lawful, and whether Agency abused its discretion in selecting the penalty. The briefs were due by June 17, 2009. Notwithstanding that order, Agency filed a Petition for Review on June 15, 2009. In its petition, Agency argues that AJ Sears' decision "is based on erroneous interpretations of law and statute, that the findings of the AJ are not based on substantial evidence and that the AJ improperly issued the [decision] before the record was closed in this matter. Employee did not file a response."³

On October 25, 2010, the Board issued an Opinion and Order on Petition for Review ("O&O"), remanding this matter. In effectuating the remand, the Board stated as follows:

"We believe this decision must be remanded to the Administrative Judge for further consideration of the penalty...Therefore, we will remand the case for the purpose of allowing the Administrative Judge to assess the appropriateness of the penalty."⁴

This matter was reassigned to the Undersigned AJ around June of 2012, pursuant to AJ Sears' retirement from service. I then issued an Order on June 19, 2012, requiring the parties to submit briefs addressing the issue of the appropriateness of the penalty in this matter. The briefs were due on July 13, 2012. On June 28, 2012, Agency submitted a Consent Motion for Extension of Time to File Briefs. Agency's request was granted in an Order dated July 13, 2012. The parties now had until August 13, 2012, to submit their briefs. Thereafter, on August 7, 2012, Agency again, submitted another Consent Motion for Extension of time to File Briefs. This request was granted in an Order dated August 8, 2012. Per Agency's request, the briefs were now due on August 20, 2012. Both parties have complied. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

Whether the penalty of removal is within the range allowed by Law, Regulation, or Applicable Table of Penalties.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Because AJ Sears dismissed the second charge in her May 8, 2008, Initial Decision, and per the October 25, 2010, O&O, the Undersigned will address the issue of the appropriateness of the penalty, only in relation to charge one: ***An[y] on duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law (DPM § 1603(3)(e). (Outside employment while on scheduled sick leave at OCME and employment by a second District government agency, Parks and Recreation).***⁵ (Emphasis added).

³ Agency's Petition for Review (June 16, 2009).

⁴ *Rashid Jones v. Office of the Chief Medical Examiner*, Opinion and Order on Petition for Review, October 25, 2010.

⁵ Agency's Supplemental Answer at TAB G (September 23, 2008).

Employee's position

Along with admitting to violating DPM Section 1603(3)(e), Employee also submits the following in his brief:

- 1) That his violation was a first offense;
- 2) That he has no prior disciplinary record;
- 3) That based on his last performance evaluation, he was doing an excellent job;
- 4) That prior to this action, he received a special recognition certificate for outstanding customer service;
- 5) That he received a monetary award for his job performance;
- 6) That pursuant to DPM 1619.1(1)⁶, Table of Appropriate Penalties ("TAP"), Charge I, for a first offense has a recommended penalty of reprimand up to ten (10) days suspension; and
- 7) That there is no contention that Employee did not work at all and was receiving funds from the District.⁷

Employee also submits that his violation of Charge I was *de minimus* because it did not impact the operation of the District of Columbia. He notes that Agency had other remedies to rectify the problem such as administratively taking away an appropriate amount of annual leave out of Employee's accumulated two hundred and eighty (280) hours of annual leave. Employee also alleges that the Department of Parks and Recreation was not harmed since it received full value for the work performed by Employee during his sick leave from Agency.⁸

Employee further contends that while DPM Chapter 18, Subpart 2, Paragraph 2.5(A)(1) and (2) prohibits the type of dual complaint herein, there is no specific sanction suggested for the violation thereof, other than DPM 1619.1(2), and this puts the burden on Agency to show that Employee's conduct was not *de minimus*. Employee again asserts that the recommended penalty for this offense is not termination, but rather reprimand to fifteen (15) days suspension. Employee also notes that since he was suffering from the aftermath of a trauma, his conduct should be excused. Employee concludes by noting that Agency abused its discretion in selecting the penalty of removal because according to TAP, the recommended penalty for a violation of Charge I is reprimand to ten (10) days suspension.⁹

Agency's position

In its brief to this Office, Agency submits that it maintains its objection to AJ Sears' dismissal of Charge II because it was based on erroneous interpretation of law and statute. Agency also notes that Employee had been counseled, trained and warned not to engage in outside employment that poses a conflict with the interests of the District government or interferes with his scheduled tour of duty at OCME. Agency also notes that Employee was advised to disclose any other employment to ensure compliance with District policy, but he failed to comply. Agency further asserts that the penalty of removal is an appropriate penalty to impose under the facts and circumstances in this case. Agency explains that in making its decision to terminate Employee, it

⁶ DPM 1619.1(1) only applies to causes that involve conviction of a felony, therefore, does not apply to this case.

⁷ Employee's Brief on Penalty (August 9, 2012).

⁸ *Id.*

⁹ *Id.*

took into consideration a number of factors deemed relevant in this matter. Agency also notes that even if the Undersigned disagrees with Agency's conclusion in its *Douglas* factor analysis, this is not sufficient to overturn Employees termination because, doing so is in contravention of Agency's managerial discretion.¹⁰

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

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).¹¹ 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.

Employee contends that the penalty of removal was not within the range allowed by law, regulation or TAP. Employee maintains that the penalty for first offense is reprimand to ten (10) days suspension. I disagree.¹² In reviewing the Agency's decision to terminate Employee, OEA may look to the Table of Appropriate 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. The penalty for violating DPM § 1603(3)(e): "any on duty or employment-related act or omission that the employee knew or should reasonable have known is a violation of law (engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws and statutes)" is found in § 1619.1(5) of the DPM. According to DPM § 1619.1(5), the penalty for a violation of this cause of action ranges from a five (5) days suspension to removal. Here, Employee was aware that working at another job while on sick leave was a violation of District laws and statutes because he had been counseled on this issue during the ethics training in October of 2007. Thus, by working at Parks and Recreation while he was on sick leave from OCME for the period of April 11 through May 6, 2008, Employee misused Agency's resources (sick leave) in violation of District laws and statutes. Although it is less clear on which subsection of DPM § 1619.1(5) Agency relied on to determine the penalty for Employee, its reliance however, on DPM § 1619.1(5) in general is reasonable given the charge. And while Agency does not specify which subsection of DPM §1619.1(5) it utilized as its basis to remove Employee, I find that Employee's specific conduct falls under the umbrella of §1619.1(5)(b): **Misuse of resources or property**. And the recommended penalty for a first time offense under this section is thirty (30) days suspension to removal. By working at Parks and Recreation and taking tours of duty there while on sick leave from OCME, Employee engaged in an act that he knew or should have reasonably known was a violation of law.

¹⁰ Agency's Brief on the Issue of Penalty (August 20, 2012).

¹¹ 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).

¹² Employee incorrectly references penalty relevant to charge II, which was dismissed by AJ Sears. See TAP 1619.1(6)(d). The penalty range for Charge I includes a suspension of five (5) days to removal for a first offense. See TAP 1619.1(5).

Considering the nature of Employee's offense, I find that, Agency acted within the confines of the law, regulations, and employed sound judgment in its determination to remove Employee.

When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within managerial discretion and otherwise within the range allowed by law. As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.¹³ Accordingly, Agency was well within its authority to remove Employee given the Table of Penalties.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.¹⁴ Employee argues that, by removing him, Agency abused its discretion. However, the evidence did not establish that the penalty of removal constituted an abuse of discretion.¹⁵ Employee's penalty for Charge I was within the parameters of the established TAP, even with the dismissal of Charge II. Moreover, Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee. 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 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;

¹³ *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

¹⁴ *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).

¹⁵ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

- 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.

In this case, the penalty for a first time offense ranges from thirty (30) days suspension up to removal. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." Agency presented evidence that is considered relevant as outlined in *Douglas* in reaching the decision to remove Employee. Agency gave credence to the nature and seriousness of the offense; employee's past disciplinary and his past work record; the consistency of penalty with those imposed on other employees for a similar offense; the clarity with which Employee was on notice of the rules that were violated; mitigating circumstances; and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.¹⁶

CONCLUSION

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was within the range of penalties for any on duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law (DPM § 1603(3)(e)), as evidenced in Chapter 16 of the DPM. Consequently, the Undersigned AJ finds that Agency acted within the confines of the law, regulations, and employed sound judgment in its determination to remove Employee.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee for cause from his position of Autopsy Assistant is UPHELD.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

¹⁶ Agency's Brief, *supra*, Declaration of Dr. Marie Lydie Y. Pierre Louis.