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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
RASHID JONES,	)	OEA Matter No. 1601-0176-08SJR11
Employee	)	
	)	Date of Issuance: March 4, 2014
	)	
OFFICE OF THE CHIEF MEDICAL	)	
EXAMINER,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON REMAND

Rashid Jones (“Employee”) worked as an Autopsy Assistant in the Office of the Chief Medical Examiner (“Agency”). Agency alleged that from April 11, 2008 to May 6, 2008 Employee was on approved sick leave. However, from April 13, 2008 to April 19, 2008 and again from April 27, 2008 to May 3, 2008, Employee received compensation from the District of Columbia Department of Parks and Recreation (“DPR”).<sup>1</sup>

Agency terminated Employee for having committed 1) an on duty or employment-related act that he should have known was a violation of law and for having committed 2) an on duty or employment-related act that interfered with the efficiency of government operations. Specifically, it alleged that by working at DPR while on sick leave from Agency, Employee

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<sup>1</sup> According to Agency, Employee worked a total of ninety-six hours at DPR during the period in question. *Agency’s Supplemental Answer*, p. 1-3 (October 31, 2008).

violated the regulation that prohibits outside employment while in a leave status. Moreover, Agency claimed that Employee left it short-staffed when he took the sick leave.<sup>2</sup>

Thereafter, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He admitted that he worked for DPR while he was on sick leave from Agency. He argued, however, that because he was not a full-time employee of DPR, Agency should not have terminated him.<sup>3</sup>

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 (“AJ”) 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.” However, the AJ went on to find 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.”<sup>4</sup>

The original AJ in this matter retired, and the case was reassigned to a new AJ in June of 2012. After receiving briefs by both parties addressing the appropriateness of the penalty, the AJ

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<sup>2</sup> *Id.*, 5-9.

<sup>3</sup> *Petition for Appeal*, p. 4-5 (September 17, 2008).

<sup>4</sup> Because the AJ upheld one charge brought against Employee and denied the second charge, she ordered both parties to submit briefs addressing the penalty of the remaining charge. Specifically, she asked them to discuss whether the penalty of removal was commensurate with the offense; whether Employee’s violation was *de minimus*; whether the penalty was lawful; and whether Agency abused its discretion in selecting the penalty. *Initial Decision Ruling Granting Agency’s Motion for Summary Judgment in Part and Order Setting a Deadline for Briefs on the Penalty*, p. 4-6 (May 8, 2009). Notwithstanding that order, Agency filed a Petition for Review on June 15, 2009. In its petition, it argued that the AJ’s decision was based on erroneous interpretations of law and statute; her findings were not based on substantial evidence; and she improperly issued the decision before the record was closed. *Petition for Review* (June 15, 2009). Employee did not file a response.

A previous OEA Board held that Agency was correct in arguing that the Initial Decision should have contained an order as to the final disposition of the case including the appropriate relief, if such relief was granted. Because the decision did not contain such an order, the Board remanded the case to the Administrative Judge to assess the appropriateness of the penalty. The Board cautioned the AJ to rely on *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985) when assessing the appropriateness of the penalty, and it reminded her that OEA is not to substitute its judgment for that of the agency. Therefore, Agency’s Petition for Review was granted, and the matter was remanded to the Administrative Judge for further consideration of the penalty imposed on Employee. *Opinion and Order on Petition for Review*, p. 3-4 (October 25, 2010).

issued an Initial Decision on Remand on August 29, 2012.<sup>5</sup> She held that because the original AJ dismissed the second charge against Employee, she would not address the penalty for that charge. Thus, the AJ focused on the charge of any on duty or employment-related act or omission that the employee knew or should reasonably have known was a violation of the law.<sup>6</sup>

She ruled that the range of penalties for the charge of any on duty or employment-related act or omission that the employee knew or should reasonably have known was a violation of the law was a thirty-day suspension to removal. The AJ found that Employee was aware that working another job while on sick leave was a violation of District law because he was previously counseled on this subject during an ethics training session in 2007. Therefore, by working at DPR from April 11 through May 6, 2008, while on sick leave at Agency, Employee violated DPM §1619.1(5)(b) because he misused sick leave resources. Moreover, the AJ held that Agency considered all relevant factors when deciding to remove Employee. As a result, she upheld its decision to remove Employee.<sup>7</sup>

Employee disagreed and filed a Petition for Review on October 3, 2012. Subsequently, he filed a Supplemental Petition for Review on December 17, 2012. He contends that he was on sick leave because he witnessed his deceased brother on a gurney at Agency. Employee provides

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<sup>5</sup> In his brief on the appropriateness of the penalty, Employee admitted that he violated the charge of any on duty or employment-related act or omission that the employee knew or should reasonably have known was a violation of the law. He conceded that during the time period in question, he was on sick leave from Agency while working for DPR as a swimming instructor. However, he claimed that this was his first offense. It was Employee's position that in accordance with the District Personnel Manual ("DPM") Table of Penalties, the range of penalties for a first offense of this charge was reprimand to a ten-day suspension. Additionally, Employee argued that he had no prior disciplinary action taken against him; that he had an excellent performance evaluation; that he received certificates for outstanding customer service; that he received a monetary award for his job performance; and that there is no contention that he did not work while receiving funds from the District government. *Employee's Brief on Penalty*, p. 2-4 (August 9, 2012).

Agency argued in its brief that the original AJ should not have dismissed the second charge against Employee. However, it provided that it considered the factors provided in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), and its decision to remove Employee was within its discretion. *Agency's Brief on the Issue of Penalty* (August 20, 2012).

<sup>6</sup> *Initial Decision on Remand*, p. 3-4 (August 29, 2012).

<sup>7</sup> *Id.*, 5-7.

that this caused him extreme distress and led to his inability to work at Agency. However, he claims that he was physically and mentally able to continue to work at DPR. Employee explains that he was not intentionally violating District regulation because he was not claiming that he was “sick with the flu only to then work . . . and get paid [from] another District job.” Additionally, he reasons that he did not believe that he was violating any laws, which is critical under the *Douglas* factors. Furthermore, Employee argues that he did not violate the regulation because he worked at DPR during hours that did not overlap with his scheduled hours at Agency.<sup>8</sup> Finally, Employee asserts that the AJ failed to address all material issues of law and fact by accepting Agency’s conclusive discussion of the *Douglas* factors.<sup>9</sup>

Agency also filed a Petition for Review in this matter. It argues that the Initial Decision on Remand was based on an erroneous interpretation of law and statute and that the AJ’s findings were not based on substantial evidence. Additionally, it contends that the Initial Decision on Remand was improperly issued because the previous Opinion and Order on Petition for Review did not rule on whether the original AJ’s decision to dismiss the second charge was based on substantial evidence.<sup>10</sup>

On February 20, 2013, Employee filed an Answer to Agency’s Petition for Review. He argues that the AJ correctly held that Employee was entitled to sick leave, and Agency cannot contend that use of such leave interfered with the integrity and efficiency of its operations. As a result of the dismissal of charge two, Employee agrees with the Board and AJ’s determinations not to address that charge in subsequent decisions.<sup>11</sup>

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<sup>8</sup> Employee explains that his tour of duty at Agency was midnight until 8:00 a.m. He claims that his shift at DPR typically began at 9:00 a.m. Thus, his schedules did not overlap.

<sup>9</sup> *Employee Jones’ Supplement to Petition for Review* (December 17, 2012).

<sup>10</sup> *Petition for Review and Consent motion for Enlargement of Time to File Supporting Memorandum of Points and Authorities* (October 3, 2012) and *Agency’s Supplement to its Petition for Review* (December 17, 2012).

<sup>11</sup> *Employee Jones’ Answer to Agency’s Petition for Review*, p. 13-15 (February 20, 2013).

### Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>12</sup>

### Dismissal of Second Charge

The original AJ ruled that Agency did not adequately prove that Employee's actions rose to the level of DPM §1603.3(f). That section provides the following:

For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows:

- (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include:
  - (1) Unauthorized absence;
  - (2) Absence without official leave;
  - (3) Neglect of duty;
  - (4) Insubordination;
  - (5) Incompetence;
  - (6) Mifeasance;
  - (7) Malfeasance;
  - (8) Unreasonable failure to assist a fellow government employee in carrying out assigned duties; and
  - (9) Unreasonable failure to give assistance to the public.

Agency presented the same argument in its Petition for Review that was raised before the original AJ in this matter. It claims that Employee's absence significantly impacted its operation of the mortuary unit because several employees were required to modify their shifts or work double shifts to accommodate Employee's sick leave. Consequently, there were overtime costs

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<sup>12</sup>*Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

associated with double shifts being worked by these employees. Thus, Agency claims that Employee's absence impacted the efficiency and integrity of the operations.<sup>13</sup>

However, the AJ ruled that because Agency approved Employee's sick leave request and granted him leave, it was prohibited from arguing that because he used the leave, he interfered with the efficiency and integrity of government operations.<sup>14</sup> This Board believes that a reasonable mind would accept this rationale as adequate to support the AJ's conclusion. We, further, find that Agency failed to offer any evidence to support the charge levied against Employee.

In accordance with DPM §1603.3(f), there are nine causes that an agency could allege to support that an employee engaged in activities that interfered with the integrity or efficiency of government operations. Agency did not advance any of these causes of action, and there is no evidence that any of them were present in the record. Because Agency approved Employee's leave, he did not have an unauthorized absence or absence without official leave. Similarly, there was no proof that his absence was the result of neglect of duty, insubordination, incompetence, misfeasance, or malfeasance. Finally, because he was on approved leave, he did not fail to assist a fellow employee or to provide assistance to the public.

As a result of the aforementioned, we believe that there was substantial evidence to support the AJ's dismissal of the second charge against Employee. Moreover, in accordance with *Baumgartner* even if there is substantial evidence in the record to support a contrary finding, we must accept the administrative findings because it is supported by substantial evidence. Accordingly, we must DENY Agency's Petition for Review.

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<sup>13</sup> *Agency's Supplement to its Petition for Review*, p. 2 (December 17, 2012).

<sup>14</sup> *Initial Decision Ruling Granting Agency's Motion for Summary Judgment in Part and Order Setting a Deadline for Briefs on the Penalty*, p. 4 (May 8, 2009).

### Substantial Evidence to Support First Charge

Next, we must determine if there was substantial evidence to support Agency's first charge to remove Employee. Employee was charged with DPM 1603.3(e), which is "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law." Agency claimed that Employee engaged in outside employment while on scheduled sick leave. Employee admits that he was working at DPR while on sick leave at Agency. Hence, Agency adequately proved its charge against Employee. However, Employee claims in his Supplement to Petition for Review that he held an "honest belief that working part-time with [the Department of Parks and Recreation] was permitted by the District Personnel Manual." Unfortunately, he offered no evidence from the DPM to support this inaccurate assessment.

DPM Chapter 18, Subpart 2, § 2.5(A)(2) addresses outside employment while on leave.

It provides the following:

- A. Conditions to be met by employee. A District employee may not engage in any kind of outside employment, private business venture, or other financial undertaking, whether or not for compensation:
  2. While on sick leave for all or part of a regularly scheduled workday, nor during the entire 24-hour period of any regularly scheduled workday thereafter until the employee has returned from sick leave and performed at least one full tour of duty.

DPM Chapter 18, Subpart 2, § 2.5(B) also offers an explanation of the regulation. It provides that

. . . the purpose of paragraph A(2) above is to restrict a District employee from engaging in any of the aforementioned non-governmental activities while on sick leave. Proper application of the regulation does not mean, however, that a District employee is prohibited from engaging in any outside activity not otherwise in conflict with law or regulation on any non-workday. This is true because an employee is not considered to be in a sick leave status on a non-workday. Thus an employee whose tour of duty is scheduled to run

from 8:15 a.m. to 4:45 p.m., Monday through Friday, may properly engage in a non-governmental activity between midnight Friday and midnight Sunday even though he or she requested and was subsequently placed in a sick leave status on Friday. Said employee may not, however, engage in any non-governmental activity prior to midnight Friday and after midnight Sunday, and such restriction shall continue during the entire 24-hour period of any workday until the employee has returned from sick leave and performed at least one full tour of duty.

Employee's tour of duty at Agency was midnight until 8:00 a.m., and according to Employee, his shift at DPR typically began at 9:00 a.m. Based on DPM Chapter 18, Subpart 2, § 2.5(B), Employee would still be on sick leave when his shift began at 9:00 a.m. at DPR. From April 13, 2008 to April 19, 2008 and again from April 27, 2008 to May 3, 2008, Employee's tour of duty at Agency was for eight hours per day from Sunday through Tuesday, Friday, and Saturday.<sup>15</sup> During this same period, he worked at DPR for eight hours per day from Sunday through Friday (April 13-19, 2008) and Sunday through Thursday (April 27 – May 3, 2008).<sup>16</sup> Thus, Employee worked at both Agency and DPR on Sunday, Monday, Tuesday, and Friday during the periods in question. According to the regulation, he could not have engaged in employment at DPR during a 24-hour period of a workday until after he had returned from sick leave and performed at least one full work day at Agency. It is clear from the record that this did not occur. Employee did not work one tour of duty at Agency from April 13-18, 2008 and April 27 – May 3, 2008. The record is clear that Employee, instead, received sick leave pay from Agency within the same 24-hour period of working and receiving compensation from DPR. This is a clear violation of the regulation. Thus, Agency proved that Employee engaged in outside employment while on leave.

Moreover, the second AJ correctly held that Employee was aware that engaging in outside employment was a violation of the law. Agency offered evidence that it counseled

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<sup>15</sup> *Agency's Supplemental Answer*, Exhibit D (October 31, 2008).

<sup>16</sup> *Id.*

Employee that it was a violation of the regulation to work outside his position as an autopsy assistant. Additionally, it offered ethics training on the issue.<sup>17</sup> Because Employee was aware of the regulation, Agency was able to prove that he was properly charged with any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law.

Assuming that we believe Employee's assertion that he was under the impression that he could work at DPR and Agency, his argument still lacks merit. Employee's claims seem to suggest that because he did not have the intent to violate the DPM, then Agency cannot prove that he did violate the regulation. However, DPM Chapter 18, Subpart 2, § 2.5 does not provide a required intent on the part of an employee to engage in outside employment.<sup>18</sup> Nonetheless, Agency did prove that Employee was on notice by Agency that working for DPR was a violation of the DPM. Thus, by continuing to work at DPR, he did intentionally violate the regulation.<sup>19</sup>

#### Appropriateness of Penalty

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). According to the *Stokes* Court, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.

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<sup>17</sup> *Agency's Supplemental Answer*, Exhibit E (October 31, 2008); *Agency's Brief on the Issue of Penalty*, Declaration of Dr. Marie Lydie Y. Pierre-Louis (August 20, 2012); and *Employee's Petition for Appeal*, Exhibit on Government Ethic Training (September 17, 2008).

<sup>18</sup> Employee cites *Cross v. Department of the Army*, 89 M.S.P.R. 62 (2001) in his Supplemental Petition for Review. He relies on the holding in *Cross* that "even when a specific intent is irrelevant to whether a charge has been proved, 'whether the offense was intentional or technical or inadvertent' is always a factor to be considered in assessing the reasonableness of an agency's penalty." This language is derived from one of the *Douglas* factors. As will be discussed later, Agency did indeed consider Employee's intent and state of mind before imposing its penalty.

<sup>19</sup> This will be discussed in further detail below.

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

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District Government employees. DPM §1619.1(5) lists the penalties for the charge of any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law. As the second AJ correctly held, the range of penalties for a first offense of this charge is suspension of thirty days to removal.<sup>20</sup>

The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."<sup>21</sup> OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.<sup>22</sup> Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

*Love* went on to provide the following:

[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,

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<sup>20</sup> This Board agrees with the AJ's assessment that Employee's conduct most clearly falls under the category of misuse of resources or property under DPM § 1619.1(5).

<sup>21</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

<sup>22</sup> *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *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); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

or that the agency's judgment clearly exceeded the limits of reasonableness, it is 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)).

This Board believes that Agency and the AJ's decisions were reasonable. Agency properly exercised its authority to remove Employee for cause, and the penalty of removal was within the range allowed by the regulation.

#### Penalty Based on Relevant Factors

The Court in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), provided what an agency should consider when determining the penalty of adverse action matters.<sup>23</sup> Despite Employee's contention that the AJ accepted Agency's conclusive discussion of the *Douglas* factors in this matter, this Board believes that Agency adequately based Employee's removal on a consideration of relevant factors.<sup>24</sup> This is evidenced in Agency's Brief on the Issue of

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- (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) 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.

<sup>24</sup> *Douglas* provided that "selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case." It went on to note that "the Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board 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 Board's review of an agency-imposed penalty is essentially to assure that the

Penalty. Agency considered the nature and seriousness of the offense;<sup>25</sup> Employee's past work and disciplinary records;<sup>26</sup> the consistency of the penalty imposed upon other employees for the same or similar offenses;<sup>27</sup> the clarity with which Employee was on notice of the rules that were

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agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board 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 Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." It should be noted that one of the holdings in *Douglas* was that not all of the factors would be relevant to each case. *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 332-333 (1981).

<sup>25</sup> Agency explained that honesty and trustworthiness are essential to the duties of an autopsy assistant. However, it found that Employee used his brother's death to further his own financial gain. It claimed that Employee achieved this by taking leave from Agency, so he could work uninterrupted at DPR.

Agency also proved that Employee was aware that working an outside job was prohibited by providing training to Employee on October 17, 2007 and counseling on July 25 and October 2, 2007. Additionally, Agency provided that in February of 2008, Employee was reprimanded once it was discovered that he was working at DPR. However, he intentionally continued to work at both agencies, despite prior warning to cease. *Agency's Brief on the Issue of Penalty*, p. 4-5 (August 20, 2012). Employee admits that there was a meeting in February 2008, where Agency confronted him about working at DPR, and he asserted that "he did not consider working at DPR to conflict with his Agency position . . . ." *Employee Jones' Supplement to Petition for Review*, p. 21 (December 17, 2012).

<sup>26</sup> Agency recognized that Employee held the same position for over fifteen years. Thus, it properly considered his length of service. However, Agency offered a number of instances of past disciplinary and corrective action taken against Employee.

In 1998, Agency claimed that Employee was suspended for fifteen days for falsifying official records. It also provided that during the 1990s, Employee was featured in a newspaper having run a marathon when he was scheduled for work. *Agency's Brief on the Issue of Penalty*, p. 6-7 (August 20, 2012). However, in light of DPM § 1606.2, Agency can only consider incidents within a certain period of time as prior disciplinary action. Section 1606.2 provides that when "determining the penalty for a disciplinary action under this chapter, documentation appropriately placed in the OPF [Official Personnel Folder] regarding prior corrective or adverse actions, other than a record of the personnel action, may be considered for not longer than three (3) years from the effective date of the action, unless sooner ordered withdrawn in accordance with section 1601.7 of this chapter." The effective date of Employee's removal was August 28, 2008. The prior disciplinary action provided by Agency occurred in the 1990s, and thus, it is outside the scope of what could be considered.

Agency also alleged that Employee failed to follow rules for completing timesheets on January 18, 2006; March 17, 2006; and March 22, 2006. *Agency's Brief on the Issue of Penalty*, p. 6-7 (August 20, 2012). Yet, there is no evidence in the record to support Agency's claims that Employee failed to follow instructions regarding his timesheets. Accordingly, Agency is unable to rely on its prior action.

However, Agency does offer proof that Employee was reprimanded and counseled on outside employment. *Agency's Brief on the Issue of Penalty*, p. 6-7 (August 20, 2012). Employee even concedes this point in his Petition for Appeal where he provides that Agency "management met with [him] regarding 'outside employment' . . . ." Additionally, Employee asserted that Agency provided him "ethics training . . . [on] October 1, 2007. . . ." *Petition for Appeal*, Exhibit #1 (September 17, 2008). Hence, although Agency could not prove its prior disciplinary action against Employee on some charges, the record does adequately reflect that Employee was previously reprimanded and counseled on outside employment prior to this current charge.

<sup>27</sup> Agency provides that its policy is to terminate employees who "show a pattern of willful acts of insubordination." *Agency's Brief on the Issue of Penalty*, p. 7 (August 20, 2012). However, insubordination corresponds with the second charge of "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." This charge was properly dismissed by the original AJ, so Agency's reliance on cases of insubordinate lacks merit. Moreover, Agency offers no evidence in the record that other employees were terminated who committed any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law. There is only a mention in an Inspector General's report that an

violated;<sup>28</sup> any mitigating circumstances;<sup>29</sup> and the adequacy and effectiveness of sanctions to deter future conduct by Employee or others.<sup>30</sup>

### Clear Error of Judgment

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was a valid penalty under the circumstances. There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of removal. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Consequently, we must also DENY Employee's Petition for Review.

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employee who engaged in outside activity resigned from her position from Agency after she was confronted with the charges. *Agency's Supplemental Answer*, Exhibit B (October 31, 2008). This is not adequate proof of the consistency of penalty imposed upon other employees.

However, this Board does note that Agency did sufficiently prove *Douglas* factor number seven -- the consistency of penalty with applicable agency Table of Penalties. As previously provided, the Table of Penalties in DPM §1619.1(5) provides that the range of penalty for any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law as suspension of thirty days to removal. Thus, removal is consistent with the Table of Penalties.

<sup>28</sup> Agency made considerable efforts to help Employee understand that he was in violation of the DPM by working for two agencies. As previously provided, Agency offered ethics training and counseling. *Agency's Brief on the Issue of Penalty*, p. 7-8 (August 20, 2012). These efforts were conceded by Employee. However, despite being warned, Employee intentionally continued to work for Agency and DPR. *Petition for Appeal*, Exhibit #1 (September 17, 2008) and *Employee Jones' Supplement to Petition for Review*, p. 21 (December 17, 2012).

<sup>29</sup> Agency considered Employee's state of mind dealing with his brother's death and its impact on him. However, it found that there was no justification for Employee's repeated failure to follow Agency's directive not to work for DPR. Additionally, it explained that Employee's misconduct occurred long before his brother's death. *Agency's Brief on the Issue of Penalty*, p. 8 (August 20, 2012).

<sup>30</sup> Finally, Agency convincingly described how if Employee's conduct continued to go unchecked, it would undermine its ability to effectively carry out its mission and give the impression to other employees that supervisory controls are meaningless. *Id.*

**ORDER**

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

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

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.