THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
BOBBY REVELL Employee	
	OEA Matter No. 1601-0359-96P99
v.	
	Date of Issuance: March 2, 2005
D.C. GENERAL HOSPITAL Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW No. 2

On July 12, 1996, Agency notified Employee of its proposal to remove him from his position as a Special Police Officer assigned to D.C. General Hospital. Agency charged Employee with four counts of insubordination, two counts of discourteous treatment of a supervisor or other employee, and one count of inexcusable absence without leave. The insubordination charge was based upon Employee's failure to obey the dress code, failure to obtain a doctor's certificate while on sick leave and failure to comply

with a leave restriction plan. The discourteous treatment charge was based upon Employee's failure to communicate with the proper personnel regarding his leave documentation and upon the manner in which Employee left a meeting that he was having with his supervisor. Lastly, the inexcusable absence without leave charge was based upon Employee's failure, on several occasions, to report to work on time. As a result, Agency removed Employee effective August 3, 1996.

Employee filed a timely Petition for Appeal with the Office of Employee Appeals ("Office") on August 23, 1996. Once this appeal was assigned to an administrative judge, Agency was required to file a response by July 7, 1997. Agency did not file a timely response. The Administrative Judge granted to Agency several extensions in which to file its response. When Agency finally filed its response, the Administrative Judge found that the response failed to adequately explain why Agency had terminated Employee. As such, she deemed it incomplete. Consequently, on February 27, 1998, the Administrative Judge issued an Initial Decision in which she held that Agency had failed to defend the appeal. Thus, the Administrative Judge reversed the adverse action, reinstated Employee to his former position, and restored to him all pay and benefits that he had lost.

Agency timely appealed that decision, and on July 15, 1998, we issued an Opinion and Order on Petition for Review in which we vacated the Initial Decision and remanded the appeal. We held that because Agency had filed a response and further because a decision on the merits is preferred, the Administrative Judge should not have concluded that Agency had failed to defend the appeal.

On remand, the Administrative Judge conducted a two day evidentiary hearing. Thereafter, she issued a second Initial Decision on December 4, 1998. This time the

Administrative Judge held that Agency had proven two of the insubordination charges, one of the discourteous treatment charges, and one of the inexcusable absence without leave charges. Even though the Table of Penalties permitted Agency to remove Employee based on the charges that were sustained, the Administrative Judge, nevertheless, remanded the appeal for Agency to reconsider its penalty.

On January 4, 1999, Agency notified Employee that its decision to terminate him would stand. Based on this ruling, Employee filed a motion requesting that the Administrative Judge mitigate the penalty to suspension. Employee argued that Agency should have applied the so-called "Douglas" factors when it reconsidered the penalty.[1] Agency argued in a counter motion that it had considered the relevant Douglas factors when it decided to uphold the removal.

Thus on May 24, 1999, the Administrative Judge issued a third Initial Decision. In this Initial Decision the Administrative Judge found that Agency had indeed considered the Douglas factors when it was ordered to reconsider the penalty. Even so, according to the Administrative Judge, the penalty of removal was further supported by the testimony and evidence put forward at the hearing. Therefore, the Administrative Judge upheld Agency's removal action.

Employee has again filed a Petition for Review. In his Petition for Review Employee argues that the Administrative Judge erred when she denied Employee's request for an additional hearing so that he could further question an agency official. Employee states that when the Administrative Judge issued the May 24, 1999 Initial Decision, she

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[1] The Douglas factors were first announced in the case of *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). They are 12 mitigating factors that are frequently used to assess the appropriateness of a penalty.

effectively denied him the "right" to such a hearing. This Office's rules make clear that while a party may request a hearing, it is within the administrative judge's discretion as to whether that request will be granted. *See* OEA Rule 625. As such Employee does not have a "right" to a hearing as he claims. Further, the agency official that Employee would like to question testified on the first day of the hearing held on October 15, 1998. At that time Employee had the opportunity to, and in fact did, question that particular person. Thus we find Employee's argument to be without merit.

Employee's second claim of error is that the Administrative Judge erred when she failed to independently review the appropriateness of the penalty in light of the Douglas factors. An administrative judge is not required to make an independent assessment regarding the appropriateness of a penalty using the Douglas factors. As we have stated to the District of Columbia Court of Appeals in another matter, there is no statute that requires that this Office apply the Douglas factors in an appeal. Instead, as the court has recognized, this Office's primary responsibility is "simply to ensure that 'managerial discretion has been legitimately invoked and properly exercised.'" *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). In this appeal it is clear that the Administrative Judge reviewed each party's submission and found that there was substantial evidence to conclude that Agency had in fact considered the relevant Douglas factors when it decided, on remand, to again impose the penalty of removal. We find this argument as well to be without merit.

Employee's last claim of error is that the Administrative Judge erred by allowing Agency to rely upon the Table of Penalties to determine that removal was appropriate. In the May 24, 1999 Initial Decision the Administrative Judge stated that "[i]t is well settled

that the Agency has the discretion to impose a penalty that cannot be reversed if it is within the applicable range of penalties and not so harsh as to amount to an abuse of discretion." *Initial Decision* at 4 (quoting *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983)). Removal was an allowable penalty for the charges that were sustained. This being so the Administrative Judge upheld Agency's decision. We find no reason to disturb that ruling, nor has Employee presented us with a reason. Because there is substantial evidence in the record to uphold the Initial Decision, we deny Employee's Petition for Review.

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.