THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
RASHID JONES Employee	
v.	OEA Matter No.: 1601-0176-08SJ
OFFICE OF THE CHIEF MEDICAL EXAMINER Agency	Date of Issuance: October 25, 2010

OPINION AND ORDER
ON
PETITION FOR REVIEW

Rashid Jones ("Employee") worked as an Autopsy Assistant in the Office of the Chief Medical Examiner ("Agency"). From April 11, 2008 to May 6, 2008 Employee was on approved sick leave from Agency. From April 13, 2008 to April 19, 2008 and again from April 27, 2008 to May 3, 2008, Employee was working, however, for the District of Columbia Department of Parks and Recreation and got paid for having worked a total of 96 hours.

On August 23, 2008 Agency removed Employee for having committed an on duty or employment-related act that he should have known was a violation of law and for having committed an on duty or employment-related act that interfered with the efficiency of government operations. Specifically, Agency alleged that by working at the Department of Parks and Recreation while on sick leave from Agency, Employee violated the regulation that prohibits outside employment while in a leave status. Moreover, according to Agency, Employee left Agency short-staffed when he took the sick leave.

Thereafter, Employee filed a Petition for Appeal with the Office of Employee Appeals. Employee admitted that he worked for the Department of Parks and Recreation while he was on sick leave from Agency. He argued, however, that because he was not a full-time employee of the parks and recreation department, Agency should not have removed him.

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] The Administrative Judge 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]

[1] *Initial Decision* at 4.
[2] *Id*.

Because the Administrative Judge 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 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 the Administrative Judge's 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.

We believe this decision must be remanded to the Administrative Judge for further consideration of the penalty. Agency is correct in arguing that the Initial Decision was to have contained an order as to the final disposition of the case, including appropriate relief if granted. Regrettably, the decision in this case did not contain such an order. Therefore, we will remand the case for the purpose of allowing the Administrative Judge to assess the appropriateness of the penalty. We caution that in assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but 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). As we have held in the past, this Office is to leave the agency's penalty undisturbed when the "penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter

No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985). Accordingly, we must grant Agency's Petition for Review and remand this case for further consideration.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED** and this appeal is **REMANDED** for further consideration in accordance with this decision.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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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.