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

In the Matter of:)	
)	OEA Matter No.: 1601-0032-22
EMPLOYEE, ¹)	
Employee)	
)	Date of Issuance: November 29, 2023
v.)	
)	
D.C. DEPARTMENT OF FORENSIC SCIENCES,)	MICHELLE R. HARRIS, Esq.
Agency)	Senior Administrative Judge
)	
)	
)	
J. Barrett Kelly, Esq., Employee Representative)	
Hillary Hoffman, Esq., Agency Representative ²)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 21, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Forensic Sciences’ (“Agency” or “DFS”) decision to terminate her from service effective November 19, 2021.³ OEA issued a letter dated December 21, 2021, requesting Agency file an Answer on or before January 20, 2022. Agency filed its Answer to Employee’s Petition for Appeal on January 20, 2022. Following an unsuccessful attempt at mediation, I was assigned this matter on June 24, 2022. On June 27, 2022⁴, I issued an Order Convening a Prehearing Conference for July 27, 2022. On June 30, 2022, Employee by and through her representative, filed a Consent Motion to Continue the Prehearing Conference and to extend the timeline for discovery in this matter and requested dates for September 2022. On June 30, 2022, I issued an Order granting Employee’s Motion and rescheduled the Prehearing Conference to September 8, 2022, and Prehearing Statements were due by September 1, 2022. On August 24, 2022, Agency filed a Motion for a Protective Order regarding depositions. On August 30, 2022, Agency filed a Motion to Withdraw the Motion for a Protective Order.

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² During the course of this matter, the Agency representative of record was Rachel Coll, Esq. However, on August 24, 2023, Ms. Coll notified the undersigned via email that her last day with Agency would be August 25, 2023, and that Hillary Hoffman, Esq. was the newly designated representative.

³Employee was terminated for the following causes of action: (1) DPM § 1607.2(b)(4) False Statements/Records; (2) §1607.2(d)(1) Failure/Refusal to Follow Instructions; (3) DPM § 1607.2(e) Neglect of Duty; and (4) DPM §1607.2(m) Performance Deficits.

⁴ A subsequent Order was issued on June 29, 2022, because Agency filed an updated Designation of Representation on June 28, 2022.

On September 6, 2022, Employee filed a Motion to Compel Discovery. Agency filed an Opposition to the Motion to Compel Discovery on September 7, 2022. Both parties filed their Prehearing Statements and appeared for the Prehearing Conference on September 8, 2022. That same day, I issued a Post Prehearing Conference Order wherein, I granted Agency's Motion to Withdraw the Protective Order and ordered that depositions in this matter be completed and Amended Prehearing Statements be submitted by September 30, 2022. That Order also scheduled a Status/Discovery Conference for September 21, 2022. On September 21, 2022, both parties appeared for the Status/Discovery Conference. During that conference, the parties requested more time as they had engaged in settlement discussions. Accordingly, I issued an Order that same day scheduling a Status Conference for October 19, 2022, to provide time for a potential settlement. On October 17, 2022, Agency filed a Consent Motion to Postpone the Status Conference. Agency cited therein that it had received notice from the Mayor's Office of Legal Counsel that there was a backlog of settlement requests, and more time was needed to approve Agency's request for settlement authority. Accordingly, on October 18, 2022, I issued an Order granting the extension and required the parties submit a status update by November 18, 2022, regarding settlement.

On November 18, 2022, the parties notified the undersigned that settlement had been unsuccessful. That same day, I issued an Order scheduling a Status Conference for November 30, 2022. Both parties appeared for the Status Conference as required. During that conference, the undersigned provided a verbal ruling regarding the outstanding Laboratory Information Management System (LIMS) data in Employee's previously filed Motion to Compel. On November 30, 2022, I issued an Order materializing the verbal orders made during that conference. Accordingly, Agency was required to produce the documents by or before January 30, 2023. Further, that Order amended the deadline for Prehearing Statements to February 17, 2023, and a Prehearing Conference was scheduled for February 23, 2023. The parties submitted their Prehearing Statements and attended the Prehearing Conference as required. During the Prehearing Conference, I determined that an Evidentiary Hearing was warranted. As a result, on February 23, 2023, I issued an Order Convening an Evidentiary Hearing for April 11, 2023, noting that April 12, 2023, would be reserved for a second day if needed. That Order also required the parties to submit supplemental information regarding witnesses. Employee provided her Supplemental Statement submission on March 3, 2023, and Agency filed its Response on March 8, 2023. On March 14, 2023, following submissions from the parties regarding witnesses for the Evidentiary Hearing, I issued an Order denying Employee's request for witness testimony from J.W. and E.S. Employee filed a Motion for Subpoenas on March 13, 2023.

On March 29, 2023, Agency filed a Consent Motion to Postpone the Evidentiary Hearing citing that one of its essential witnesses was no longer available on April 11, 2023. Agency noted that the dates of May 30, 2023, and May 31, 2023, had been agreed upon by both parties for which to reschedule the Evidentiary Hearing. I issued an Order on March 30, 2023, granting Agency's Motion and rescheduled the Evidentiary Hearing to May 30, 2023, and May 31, 2023. Employee filed an additional Motion for subpoenas on April 18, 2023. On May 17, 2023, I issued an Order scheduling a Status Conference for May 23, 2023, to discuss witness testimony for the Evidentiary Hearing. The Evidentiary Hearing convened on both May 30, 2023, and May 31, 2023.

Following the receipt of the transcript of the Evidentiary Hearing in this matter, I issued an Order on June 15, 2023, requiring the parties to submit written closing arguments on or before July 31, 2023. On July 28, 2023, Employee's counsel filed a Consent Motion to Extend the deadline to file closing arguments, citing that he needed more time due to unfortunate circumstances regarding the passing of his pet. Employee requested an additional week to submit closing arguments. On August 1, 2023, I issued an

Order granting Employee's Motion. Closing arguments were now due by or before August 7, 2023. Both parties complied with the prescribed deadline.⁵ The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. Whether all applicable laws, rules and regulations were followed in the administration of the adverse action; and
3. If so, whether termination was the appropriate penalty under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY⁶

On May 30, 2023, and May 31, 2023, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions.

⁵ Employee's Closing Argument was filed stamped at OEA on August 8, 2023. However, this submission is treated as timely because the Office closed early on August 7, 2023, due to inclement weather. As a result, this decision will reference the closing arguments for a date of August 7, 2023.

⁶ For the purposes of this Initial Decision and its subsequent publication to the OEA website and D.C. Register; the names of all other employees who testified (employees who are not supervisors or agency leadership) and/or were included as a part of the parties' submissions to this Office have been redacted to only reflect the initials of their first and last names.

*Agency's Case in Chief*Erin Price ("Price") Tr. Pg 21 -58

Price has worked at DFS since October 2013 and prior to that was employed at the Metropolitan Police Department (MPD). Currently, Price is the Deputy Director of Crime Scene Scientists at Agency. Her duties are administrative in nature, but she also looks over other teams in the Crime Scene unit. She assists with paperwork, working with case jackets and supports the needs of other supervisors. Tr. 23. In October 2020, she was one of the supervisors in the Crime Scene Scientists Unit ("CSSU"). She oversaw approximately eight (8) forensic scientists and would go to crime scenes with them, observe, assist with case jackets and other paperwork.

Price testified that the Laboratory Information Management System ("LIMS") is used to document all the evidence collected from a crime scene. Tr. 24. Price explained that the purpose of LIMS with respect to reports is that the scientists upload their reports into LIMS once they are completed so that they are available to DFS and for distribution to their stakeholders. Tr. 25. Reports are not distributed through LIMS but are distributed through the USAO portal as well as to a CSID which goes to MPD stakeholders. Tr. 25. Price further noted that the purpose of tracking reports in LIMS is to basically mark a distribution date that they have actually distributed the report into those other portals. It is a part of a process they are required to do within a 14-day turnaround period. Tr. 25-26. The 14-day turnaround was one of the Agency's key performance indicators ("KPI"). Price further explained that the "distribution date" was the date that you are "actually supposed to be distributing to the USAO Portal" for them to review, as well as MPD. Tr. 26. The date is automatically populated in LIMS. When submitting the report, it involves the use of a scanner which has a barcode that must be marked. Price testified that this was the process in October 2020, and had worked that way since around 2015. Price testified that a crime scene scientist should not alter the automatically populated date because it alters the information as to when it was actually distributed to the portal as well as MPD. Tr. 28. Price cited that the only situation where she would tell a crime scene scientist to alter a date would be if a person was trying to rectify a date that could be verified that it was actually distributed into the USAO portal and was not marked in LIMS. Tr. 28. Price noted that a supervisor would have to have provided permission for that action.

Price testified that in early 2021, she was advised by one of her team members that distribution dates were being altered. That person told her that there were individuals who had said that they could alter the distribution date. Tr. 29. Price did not know that this was possible. Price notified the Director that this was happening and that the distribution dates were not accurate or were not being entered in accurately. Tr. 29. Price also noted that other dates that are tracked in LIMS are the entry date when a case is started, and any of the dates that are being marked whenever evidence is entered. Tr. 30. An entry date is the date the case is opened and added to as a case, but it can be assigned to a scientist at a later date. Tr. 30. Once a scientist drafts a report, it will then go to a supervisor or manager for a technical and administrative review. The completion dates are documented. Once the technical and administrative review is completed, the report goes back to the scientist for it to be distributed. Tr. 31. Price iterated that those dates are different from the distribution date. Price also stated that there is no situation where the administrative review date would be changed to reflect the distribution date. Crime Scene Scientists are expected to know this process and it is in a user guide that explains the process of distributing a report. Tr. 32. Price also explained that scientists are provided with training when they first start at DFS and that the training last approximately four and a half (4.5) weeks for the classroom portion, followed by a six months field training program where they accompany training scientist. Tr. 32-33. Price cited that during the time the scientists are in training and are shadowing others; report drafting, and distribution is a part of that work. Tr. 33.

Price testified that at the time in 2021, the Director was Christopher LoJocano (“LoJocano”). Following her notice to LoJocano about altered distribution dates, all the supervisors were instructed to pull audits on the Crime Scene Scientists to get information from LIMS and the USAO Portal. Tr. 34. Price cited that information was needed from the USAO portal because it is an external portal, so whenever entries were actually entered into the USAO portal, it was on their end, so the dates were very important to determine when those reports were actually uploaded into the portal. Tr. 34-35. Price explained that they were comparing the dates captured for distribution in LIMS to the USAO Portal. Tr. 35. No one at DFS could alter dates in the USAO Portal, as it is controlled by the USAO. Price further testified that the audit consisted of pulling information from the beginning of the fiscal year 2020, to a point in the beginning of 2021. They were pulling information from all scientists related to the distribution date entered into LIMS and then comparing them to what was reflected in the USAO portal. They then submitted this information in an Excel spreadsheet to the Director. Tr. 36. Price noted that for most of the scientists, the dates matched, but there were a few individuals whose date entries did not, and Employee was one of those whose dates did not match. Tr. 36. Price also noted that R.A., M.R. and C.B. were other employees whose dates did not match. Tr. 36. Neither of those persons currently work at DFS and Price thought that some had been terminated and others may have resigned. Price believed that their terminations and resignations were related to the date changes. Tr. 38.

Price testified that at the time she was not aware of anyone that had instructed employees to make the date changes that she uncovered during the audits. Price further cited that R.A. was not a supervisor. Price further testified that there is guidance where crime scene scientist should take instructions from. Price explained that each scientist has a supervisor that they report to and if they cannot go to that supervisor, they also have a unit manager as well as the director in following the chain of command. Price believed that the chain of command was in the Department Operation Manual “DOM” or a Laboratory Operational Manual “LOM”. Tr. 39. Price iterated that crime scene scientists are not to take instructions from other scientists who are not supervisors, because the work they do required instruction from a supervisor, manager, or director. Price testified that Kristie Stone was a former supervisor at DFS but is no longer with the Agency.

Price cited that Stone now worked in New Mexico. Tr. 40-41. Price testified that she came to learn about a project that Stone worked on through the investigation. Price explained that the project entailed Stone noting dates in the USAO portal where things had been uploaded, but not reflected in LIMS. Because those dates were not in LIMS, it was holding up the turnaround time. Stone assigned R.A. to compare those dates between the USAO portal in order to update in LIMS so the KPI would be accurate. Tr. 41. Price also noted that the dates entered were supposed to reflect the same date as the USAO Portal. Prior to these assignments, these dates were blank. Tr. 32. Price testified that to her knowledge, no one other than R.A. was assigned to do this project. Price further iterated that there would never be a time where a supervisor or anyone else would instruct someone to back date LIMS’ distribution dates prior to the date reflected in the USAO portal. Tr. 42-43. Price also testified that at the time Employee was at DFS, her supervisor was John Allie.

On cross examination, Price testified that she is familiar with the LIMS system and has used it to distribute reports and she also knew the distribution process. Price cited that presently, a person cannot alter the date a file is uploaded into LIMS, but there was a time when the individual who uploaded the report could change that date. Price cited that during the time of the investigation, they were able to do that, but was not sure of the exact date when that option was no longer available. She cited that it did change based on the investigation. Price cited that she was referring to the distribution date in LIMS. Tr. 44-45. Price explained that she was not sure whether the LIMS system reflects the date on which the report was uploaded (referring to Employee’s representative’s question regarding the prepared LIMS report.) Tr. 45-46. Price further cited that the scanning of the bar code on the physical copy of the report is different and a separate bar code for the distribution. Price cited that the barcode was generated in the

LIMS system and also affirmed that the process includes using a scanner to scan the bar code on the case jacket. She cited that Employee could not have changed the date that the system reflects that barcode scan. Tr.47.

Price testified that she can only assume that Employee received training when she first came to DFS. She cited that there was a time in the past where the distribution process was handled by administrative staff and not forensic scientists but was unsure when that responsibility was transferred to the forensic scientist. Price affirmed that individuals found to have changed the distribution date included R.A., M.R., C.B. and Employee. Tr. 48. Price believed that all those persons were supervised by John Allie at the time, but she could not be 100% sure who all their supervisors were. Price explained that an administrative review date is the date that reflects the last step in the review process and then it goes back to the scientist for distribution. Tr. 49-50.

On redirect examination, Price explained that scan dates are a date that the physical copy of the PDF is uploaded into the system. She was not aware that a date could be changed because they have a dashboard system that pulls information for those dates when the reports are actually distributed, not when the physical PDF files are uploaded. Price further noted that that date should be the same as the date it is distributed because that is the process of distributing in the SOP. Price cited that the distribution process starts with the receipt of the case jacket. The employee would scan a copy of the jacket to themselves, they save it on their computer based on a specific naming convention. Price noted this was important because the USAO Portal will not accept unless it follows a certain naming convention. Tr.51. Next, it will be marked distributed into LIMS using the barcode associated with the scene attendant and will be uploaded in to the USAO Portal and then an email will be sent to the CSID which is Agency's MPD stakeholders which includes a copy of the report as well. Tr. 52. Price testified that currently in LIMS, when you go to actually distribute the case jacket, the date will mark that specific date and is not able to be changed. Tr. 52. Prior to 2021, this date could be changed. Price cited that there were no dates in LIMS where scientists were expected to manually enter. Price iterated that LIMS is an automatically generated system and that everything is supposed to be in real time. This ensures the stakeholders have the product within 14 days. Tr. 53.

On recross examination, Price explained the barcode affixed to the physical case jack will stop once it has been administratively reviewed. Once the administrative review is complete, the barcode would be transferred to a storage system where case jackets are stored once the distribution process is completed. Tr. 55. Price further cited that the distribution process sends all the information to the stakeholders. Scanning is the last step where it will then go into storage at Agency. Tr. 56. LIMS will reflect the date that it is put in the storage location, and that is reflected on a chain of custody report. Price cited that Employee as a forensic scientist would have been aware that scanning the barcode affixed to the physical case jacket would be reflected on a chain of custody report. Tr. 57.

Christopher LoJocano ("LoJocano") Tr. Pgs. 59 – 122

LoJocano retired from Agency in September 2021. Prior to his retirement, he was the Director of the Crime Scene Sciences Unit, and he served in that capacity for approximately three years. Tr. 60. LoJocano also worked at MPD from 1983 to 2023. As director of the CSSU, LoJocano oversaw the crime scene scientists who went to crime scenes and processed crime scenes for evidence, and he was also over the Central Evidence Unit. Tr. 61. LoJocano cited that LIMS is the Laboratory Information Management System. He explained that chain of custody is tracking from the time something is collected and the location and person who had that piece of evidence. Chain of custody is important because when in court, they must be able to show how evidence was kept while they were in possession of it. LoJocano rarely used the LIMS system. He testified that his staff used LIMS for the collection of evidence and upon return to the lab, they would enter that into the LIMS system, as the chain of custody started at the scene,

but entry into LIMS was the tracking. Tr. 62-63. LoJocano explained that scientists are required to do a report which is generally a narrative of what they did at the crime scene and the location and time of evidence collected etc. Tr. 64. That report is sent to Agency's customers which include MPD, prosecutors and other agencies if requested, like the U.S. Capitol Police. Tr. 64. LoJocano noted that the prosecutors were the USAO or the D.C. Office of the Attorney General ("OAG") These reports are documented in LIMS to keep a record. Tr. 65. LoJocano explained that for LIMS, scientists prepare reports, it would go to a supervisor for review and that supervisor would sign off or note corrections needed to be made. Eventually the supervisor would sign off on the report and it would go to the scientist to be uploaded in LIMS and then distributed to MPD, USAO and in some cases, the OAG. Tr 66. LIMS does not automatically distribute to customers, but there was an email address that the scientist would also send reports for MPD, and the USAO had its own USAO Portal where they would be sent. LoJocano did not believe that scientists could make changes to the USAO Portal and cited that it was date stamped. Tr. 67.

LoJocano testified that when he arrived at DFS in February 2018, he learned that they had to provide quarterly Key Performance Indicator ("KPIs") reports to the City Administrator and Deputy Mayors. Tr. 68. He noted that his boss at the time, Dr. Smith, had initiated the requirement that reports be distributed to customers within 14 calendar days of receiving the assignment. LoJocano initially believed that LIMS recorded those dates automatically and that it was automatically populated. Tr. 69. In March 2021, he was contacted by one of the supervisors, Erin Price, who told him that scientists had reported to her that people had been changing the distribution dates in the system. Tr. 70. LoJocano identified Agency's Exhibit 2 as a training memorandum that they relied upon during the investigation which described the process for distributing reports in LIMS. Tr. 70. LoJocano identified Agency's Exhibit 3 as the Standard Operating Procedure ("SOP") for the Crime Scene Sciences Division. He did not create the original of this document but did make modifications over time. Tr. 71. LoJocano affirmed that this document cited that the issuance date was September 8, 2020, and that he was the director and that he had the issuing authority. LoJocano noted that the purpose of the operating procedures was to give guidelines on how processes should be performed. He explained that if an employee is unsure or does not understand the procedures, they can ask a supervisor. He further noted that when an SOP is distributed, everyone is responsible for reading and acknowledging they understand it.

LoJocano testified that in March 2021, Erin Price ("Price") notified him about distribution dates being changed and that prior to this, he did not know those dates could be changed. Tr. 75. LoJocano cited that for the purposes of KPIs and then eventually for all performance evaluations, he made it a goal to distribute reports within 14 calendar days of receiving the case. He noted that the report distribution date is the date that the reports are submitted to the stakeholders. T. 75-76. When he learned about the changes being made, he started an investigation where he asked Price to start running an audit alphabetically of every scientist in the division. Tr. 75. LoJocano testified that he was trying to determine whether this was a "one-off" or if this involved more than one person. LoJocano recalled that he asked Price to conduct the audit going back to October and to audit about 25 reports. He noted that they were comparing the dates when they were sent over to the USAO versus what was in the system to note any discrepancies. Tr. 77. LoJocano did not personally participate in the audit but directed Price to do it. He stated that it was very time-consuming and that when she had gotten through approximately 20-25 people, they saw it was not just one person who was changing dates. At that time, he directed all six (6) supervisors of the squads to conduct audits for personnel in their squad. Tr. 78. Ultimately the audit resulted in a finding that ten (10) employees had distribution date discrepancies. Employee was one of those persons. LoJocano further explained that of the 10 employees, seven were found to have changed dates, and three others were found not to have changed dates, but rather to have not had any distribution dates. Tr. 79. JusticeTrax revealed that there was a way to manually go into the distribution date and change it.

LoJocano testified that of the changes in the distribution dates between LIMS and the USAO, the date in LIMS were showing an earlier distribution date than when it was actually sent to the USAO. Tr. 80. LoJocano identified Agency's Exhibit 7 as a memorandum he prepared to reach out to JusticeTrax to inquire about the field being open to manipulation. Tr. 81. LoJocano noted that JusticeTrax was going to engage in a project to prevent that field from being changed. In the meantime, LoJocano cited that the Director, Dr. Smith, asked him to put something in place to correct this issue. Tr. 82. LoJocano identified that there were new requirements made for distributing reports, to include adding the emails of the supervisors and maybe even managers to the distribution. Supervisors also were required to do monthly audits to make sure that the dates aligned in LIMS. Tr. 82. LoJocano testified that ultimately a person outside of the Agency, Hillary Hoffman Peak, served as an investigator into this matter. Tr. 83. LoJocano identified Employee's supervisor at the time as John Allie. LoJocano cited that there was no circumstance where an employee would have been instructed to alter a distribution date. Tr. 84. He noted that employees were to take instructions from supervisors, managers, and the director. He also explained that it was not a large unit and there was a hierarchy in the squad, with the supervisor who oversaw the squad, then there were two managers who were over the supervisors, and that he (LoJocano) was over both managers. Tr. 85. There was a time where there were acting supervisors if they were down a person where an employee could ask another supervisor if their supervisor could not answer a question. That employee could also go to a manager and/or LoJocano to ask.

LoJocano affirmed that R.A. was one of the seven (7) employees identified as having made date change. She was not a supervisor or a manager in the unit. When asked whether crime scene scientists were advised to take guidance or instruction from other colleagues, LoJocano explained that during training another colleague might provide some instruction, but that generally speaking, written policies and the supervisors dictated the rules of the Agency. LoJocano did not think that R.A. had trained any of the seven (7) employees, including Employee. He also noted that Employee came in at a Grade 13 and R.A. was a lower grade, either Grade 9 or 11, so that would have indicated that Employee had more experience and would not have been trained by someone of R.A.'s grade. There was an organizational chart that reflected who everyone reported to. Tr. 87-88. LoJocano testified that the date changes were concerning to him because it was in essence putting false information into LIMS. He noted that it spoke to truthfulness, veracity and that they rely on employees to follow the rules, and if they are not truthful, it calls into question other things they are not being truthful about. Tr. 88.

LoJocano explained that he recommended that Employee be terminated because she had put in false dates for the distribution of her reports. He also cited that even though LIMS was internal, it could be externally turned over to defense attorneys in a criminal case. Tr. 89. LoJocano also testified that LIMS was used for KPI report in that the distribution dates were a part of Agency's goals to distribute reports to stakeholders within 14 calendar days, 95 percent (95%) of the time. He explained that if they did not reach 95 percent, then it would go into a dashboard that would reflect what your time parameters were. Tr. 90. Sometimes they would have to write justifications for why they did not reach the 95 percent goal.

LoJocano identified Agency's Exhibit 4 as the proposing official rationale's sheet. He did not personally draft the forms but signed them. He also attested that he reviewed the forms but could not recall who drafted them. He noted that there were several people working on the forms and believed that Hillary Hoffman Peak had some people working on preparing the reports. Tr. 92. LoJocano reiterated that he proposed termination for Employee because she had falsified distribution dates in some of her reports. He noted that her duties included testifying for criminal cases and that the prosecutor over the case (USAO, OAG, etc.) would determine if the scientist would be called to testify. DFS did not play a role in determining whether a scientist would be a witness. Tr. 93-94. LoJocano further testified that triggers that might make a scientist a witness might be if you collected evidence that was a key component of prosecution, so that scientist may be called to testify about how evidence was collected, why it as

collected, how it was documented etc. He noted that a scientist could still be called to testify even if they had resigned from Agency. Tr. 94-95. The prosecutor would still determine if that person would be called as witness. LoJocano also stated that other duties of scientist might include speaking with the police, agency investigating a crime scene and also entering into LIMS. He noted that truthfulness is important with these tasks because it calls into question the integrity of the evidence.

LoJocano testified that his basic understanding of the “Lewis List” is that it is a list in the USAO that notes persons that they have concerns about their behavior or something they did where they will not sponsor their testimony in court. Tr. 97. He cited that agencies are responsible for reporting behaviors and issues of crime scene scientist to the USAO and/or the OAG. Tr. 97. LoJocano did not believe that being on the Lewis List absolutely precluded someone from testifying. Tr. 98. LoJocano stated that he would not have changed his recommendation for termination for Employee even if she were called by the USAO to testify because it still was about being truthful.

On cross examination, LoJocano affirmed that there were three (3) individuals identified in the audit who were ultimately not found to have changed distribution dates and that two (2) of those persons were E.S. and J.W. Tr. 99-100. In identifying Agency’s Exhibit 3, LoJocano noted that E.S. and J.W. were found to have failed to distribute reports within 14 days. They received official reprimands for this conduct. LoJocano also affirmed that E.S. and J.W. performed the basic job function that Employee did. When asked where in the SOP where it says how the distribution date should be populated, LoJocano noted that section 7.56 stated the distribution process must be completed within 14 calendar days. LoJocano iterated that the distribution process has several steps that are included in the SOP. Tr. 104. He affirmed that all those steps are applied within the 14-day completion period. Tr. 105.

LoJocano identified Employee’s Exhibit 1 as the proposed separation that he issued to Employee. He noted that the proposed separation includes four (4) separate disciplinary causes. Tr. 107. LoJocano testified that Employee was charge for failing to comply with CSS35, and other regulations for the second charge. The fourth charge was related to performance evaluations and KPIs. Tr. 109. LoJocano did not recall whether Employee had to take a test regarding the SOP in CSS35. Tr. 110. He noted that it was within the LIMS system and that you had to go in and read it and take a test. LoJocano further explained that there was a LIMS administrator who was also over the administration of the policies and other system needs that had to be reviewed etc. Tr. 111. He also believed that these reviews were a part of the accreditation processes and requirements as well. LoJocano reiterated that Employee’s termination came down to truthfulness. He noted that Employee changed the distribution dates, so those were not the date she actually distributed. He believed that she was lying when she changed those dates. Tr. 113. In review of a deposition, he did in 2022, LoJocano cited that he asked various questions of Employee and she never specified why she changed the dates. He noted that he just looked at the fact that she changed the dates. LoJocano did not know whether Employee was on the Lewis List or not. Tr. 116. LoJocano iterated that there were times employees would receive training from other employees. He also noted that scientists used scanners for the distribution process. Tr. 117. He cited the scanner had many uses and that scientist had scanners at their desk and that they probably used those scanners for the distribution process. Tr. 118. On redirect, LoJocano reiterated that he first became aware of the distribution field change in March 2021. He put out a memorandum to address that until another measure could be incorporated into an official SOP. Tr. 122.

Kristie Stone (“Stone”) Tr. Pages 126 – 154

Stone currently works as the Scientific Evidence Division Manager at the crime lab for the Albuquerque Police Department in Albuquerque, New Mexico. Prior to this she was employed at Agency as a Crime Scene Supervisor, where she left in August 2020. Tr. 172. Stone testified that she used the LIMS system while at DFS. She explained that LIMS was used not only to track calls and reports but

also for all evidence collected at scenes and submitted to the police department. Everything had a bar code and they also processed other evidence. Stone further testified that there was a field in LIMS for the distribution date. She noted that once a report was finalized and was finished all reviews, it was given back to the author of the report to scan and email it to an administrative box for MPD and also into the USAO portal. It would be uploaded into LIMS and the barcode scanned to mark it distributed within the system. Stone testified that the distribution date would default to the day it was uploaded, but that the distribution date field was editable. Tr. 130. She knew that it was editable because she was an administrator in the LIMS system, so she had a lot of use and understanding of the system. She did not recall if crime scene scientists were trained to edit that date. Tr. 130. Stone cited that perhaps if a supervisor had come to a scientist and said that they forgot to mark system, they might be advised to go back and put a proper date in, but she noted that that would be more of a situational occurrence. Tr. 130-131.

Stone testified that there was a time where she had a project where she advised an individual to manually enter distribution dates into LIMS after the reports had been distributed. She cited that it was necessary because there were issues with data in the system that needed to be addressed for statistical needs. Tr. 131-132. The dates needed to match what had happened in reality so that project was started in order to accomplish that. Tr. 132. The scope of this project was for the person to look at the USAO portal and see what was in there and to update LIMS to match that. This project focused on distribution dates that were not in LIMS. Tr. 133. She noted that the data would reflect that a report had not been distributed when it had, but it just was not showing in LIMS. Tr. 133. Stone further testified that R.A. was on light duty at the time and that she assigned her to work on this project. Stone identified Agency's Exhibit 10 as an email she sent to R.A. back in 2017 about this project. The project was called the "Dashboard" project and R.A. was assigned to review dates in the USAO portal and figure out the distribution. Tr. 136. Stone iterated that the USAO portal had the correct dates because of how it was entered in that portal and ultimately delivered to their customers. Tr. 137. DFS scientists did not have the capability to change the USAO portal date.

Stone noted that R.A. was the only person assigned to this project and Stone did not instruct anyone else about it, nor did she tell R.A. to have anyone assist her with the assignment. Tr. 139. Stone testified that R.A. was told that the distribution date and assignment date were very different, and she did not tell R.A. that the distribution date should reflect the assignment date. Tr. 139-140. Stone went on to explain that the assignment date and distribution date are very different. The assignment date would have been the day the incident occurred, and the distribution date is the date the report was distributed to the customer. Tr. 140. She cited that there could be rare instances where those dates would match but would be one-off reports where someone was able to complete the entire process all in one day. Tr. 140. Stone also testified that she did not believe she told R.A. that the distribution date should reflect the administrative review date. Stone iterated that all her instructions for the project were in the email in 2017 and that to her knowledge, it was only in 2017 that this type of project was completed at DFS. Tr. 141.

Stone reiterated that for this project, the dates were blank and that they worked to try to alleviate the problem. She also explained that at one point, an administrator would distribute reports in the system, so they worked to resolve those issues caused by just one person. She noted there was a transition to scientists doing the distribution themselves, and that she thought this occurred sometime around 2016 or 2017. Tr. 141-142. Stone testified that once the scientists were responsible for distribution, they were all trained in how to do it and the process. Tr. 143. She noted that scientists were told to ask their supervisors if they were confused or had questions. They were also able to have the DFS Legal team assist if needed. Tr. 144. Stone left DFS in August 2020. She affirmed that she was a supervisor at the time of her departure. She explained that up to her departure that she thought the unit was doing well with the distribution in LIMS. Tr. 144. Stone cited that she was not aware of an instance where a crime scientist

would have been advised to enter a distribution date in LIMS that pre-dated the distribution date in the USAO portal.

On cross examination, Stone reiterated that she was familiar with the report distribution process. She explained that the distribution process included several individual steps, which potentially included emailing to whichever agency the report was for. She noted that most of their reports were for MPD. Tr. 147. The process also included uploading into the USAO portal and actions in LIMS. She explained that you would upload the file into LIMS and then mark the assignment activity as distributed. Tr. 148. Stone was not sure if LIMS reflected the date it was uploaded. She also noted that there was a barcode that you could scan on the case file which would open the case up in LIMS. She further explained that to actually distribute the report, a specific barcode would have to be printed out of the system for that purpose and it was under the distribution action. Tr. 148-149. Stone stated that when that particular barcode was scanned, it would have populated that into the date box and default to that current date. Tr. 149. Stone reiterated that the distribution barcode was different than the barcode affixed to the case file. The barcode on the case file was a part of the chain of custody tracking which was maintained in LIMS. Tr. 150-151. Stone testified that that report was the case file to track the chain of custody for the evidence in a case. Tr. 151-152. Stone states that once completed, the distributed reports would be taken to storage in the evidence control unit. Scientists were expected to scan the physical case jacket to reflect that the folder was in that storage bin. Tr. 153. Stone iterated that whatever date the barcode was scanned for chain of custody was not editable. So, if a person had scanned it and placed it in a bin, but reported a distribution date of seven days earlier, the date of chain of custody was not editable. Tr. 154.

Hillary Hoffman (“Hoffman”) Tr. Pgs. 156 – 196

Hoffman currently serves as the supervisory attorney advisor at DFS and has been in that role for approximately two (2) years. Prior to this, Hoffman was an attorney advisor at the Office of the State Superintendent of Education (“OSSE”). Hoffman testified that in March of 2021, she was still working at OSSE. There came a time in 2021 where she investigated Employee. Tr. 158. Hoffman explained that while at OSSE, she would periodically do investigations for other agencies who may not have the capacity to do it themselves and that she was asked to investigate a group of people who had changed dates at DFS. Hoffman also explained that she had conducted many investigations outside agencies and for OSSE. She iterated that she was not employed by DFS at this time. Hoffman testified that when she first began her investigation, she was advised by the interim director that the Crime Scene Services director had learned that dates inside the LIMS could be changed from those that were pre-populated. They explained to her that they had a report on where dates had been changed from the distributions to the USAO or OAG. Agency had compared the USAO dates to the LIMS dates because the USAO date could not be changed. Hoffman testified that there were nine (9) people who had changed dates.

Hoffman testified that Employee was one of the individuals who had changed dates. Hoffman explained that at the start of the investigation, she was provided with two reports. She inquired about whether metadata was kept by the creator of LIMS which was known as JusticeTrax. Tr.162. Hoffman testified that she reached out to JusticeTrax to discuss the metadata with them and to be sure that the data they were reviewing was clean – in other words that it was not coming from inside the Agency. Tr. 162. Hoffman explained that she wanted to know if they had made the changes and if they could be certain who made them and what dates were changed. JusticeTrax kept all that information and could run a report for Hoffman. Hoffman identified Agency’s Exhibit 1 as the report provided by Justice Trax showing the person who had made changes, what changes they had made and when the change was made. She noted that this particular report was for Employee. Tr. 163. Hoffman further explained that JusticeTrax cited that every employee had an individual password they entered into the system, so they knew exactly who had entered the information into the system. Because everyone had their own username, ID, and a password, no one else could get in. As a result, this report showed when Employee logged into the system, what

dates she logged in and what dates she changed the dates (which is the modified date) and what dates she changed it to (the updated date). Hoffman noted that the report could not show the date since it had been changed from. The columns corresponded to the modified date in the report and included a column that had the USAO distribution date. Tr. 165. Hoffman testified that the USAO date and the JusticeTrax metadata were not changeable – so it was uncorruptible by any person within DFS.

Hoffman explained that the reports in Agency Exhibit 1 showed the instances where Employee had logged in and changed dates. There was one date where Employee logged in on November 10, 2020, and updated the distribution date in LIMS to October 18, 2020, and the USAO distribution date was October 20, 2020. There was another column that showed the mismatch which was the date between when Employee modified and updated the date as 23 days. Tr. 166-167. Hoffman testified that in actuality, the updated date of October 18, 2020, was two (2) days prior to when Employee actually distributed the report to the USAO on October 20, 2020. They know Employee had made these changes because her username and password were used and the metadata in LIMS captured her login, what she did – going in and changing the pre-populated date. Tr. 167. Hoffman iterated that the pre-populated date in LIMS could be manually changed. Tr. 168. Hoffman noted that the size of the mismatch did not have weight in terms of the severity of conduct in this matter, but that it was just the fact that a change was made.

Hoffman further testified that she spoke with Employee on more than one occasion about this matter. Employee was the very first person that Hoffman interviewed about the date changes. The initial meeting included the DFS HR person at the time, Michael Hodge, and Employee's union representative. Hoffman cited that she asked Employee if she had changed the dates, and Employee responded that she had changed the dates. Hoffman stated that Employee's explanation at the time was that they had been told to change the dates by Kristie Stone who wanted the dates to reflect what date they actually distributed them. She said Employee went on to tell her that sometimes they did submit the reports the same they day finished, citing that sometimes they might not upload to the USAO for a week – but that Stone had told them to put in the date that they actually finished, even though they hadn't uploaded it into the USAO portal. Tr. 170. Hoffman explained that the date changes mattered because every employee had performance evaluations and had a 14-day turnaround time for distributing reports and their evaluations are based on that. It is also a KPI for the entire crime scene unit. Tr. 171. These KPIs were also reported to the Mayor's Office and City Council.

Hoffman testified that she was provided with nine (9) employees who had been identified as having changed dates in LIMS. Two of those nine were found not to have changed dates. Tr. 172. Those two came up because they had no distribution to the USAO. One person identified that he did not know he was supposed to distribute it out, and the other said that he used to have an icon to upload that disappeared, and once it did, he did not know how to upload it to the USAO. Tr. 172. Hoffman noted that their conduct was different from the affirmative steps in making date changes and also their metadata reflected no date changes. Tr. 173. The others who were found to have changed dates were not all in the same unit. Approximately four (4) or five (5) were in the same unit, two were in another and one person was sort of an outlier. Tr. 173. Hoffman affirmed that R.A., C.B. and M.R. were all employees she investigated for date changes. Tr. 174. Hoffman testified that there wasn't a specific pattern with the date difference except that all the date changes that were made were made to reflect earlier dates. Tr. 174. Hoffman explained that it would have improved both their performance evaluation and KPI because every single date was earlier. Tr. 175. Hoffman testified that this was a problem because it was considered by the Agency to be untruthful and lying on an official record because LIMS is considered an official record. Tr. 175-176.

Hoffman also spoke with Kristie Stone during her investigation. Hoffman asked Stone if she had told anyone to change dates, and Stone said that she had not. Tr. 176. She said Stone explained that she

had given R.A. a project to add date to empty fields and that it was from that project that R.A. realized that the pre-populated dates could be changed. Stone cited that she did not have employees change dates. Hoffman testified that she spoke to Employee again after their initial conversation and told Employee she wanted to check to see whether Employee had been given a directive to change dates. Hoffman checked with LoJocano, and he was adamant that he had not given such a directive and wanted to meet with Employee. Tr. 178. As a result, on her next meeting with Employee, Hoffman was joined by LoJocano wherein she listened to their discussion. She noted that LoJocano asked many things, and that she noted that Employee completely changed her story and cited that she did not know how to enter the information. Hoffman stated that LoJocano went through the SOP in detail and also a spreadsheet that showed pictures of each screen of the steps they were supposed to do. Hoffman testified that Employee changed from stating that she had been told to make these changes, to again say she did not know how to make these changes, and then switched to saying that she had not made any changes. Tr. 179.

Hoffman further testified that Employee cited that the dates did not make any difference and she did not understand why anyone cared. Tr. 180. She noted that Employee said that no one cared when they had been distributed so no one care if the date was right or wrong, so it did not make a difference if you changed the date. Hoffman explained that this statement from Employee made her go back and see whether it mattered if they had been distributed and that is when it became clear that it was a performance evaluation indicator and a KPI. Hoffman explained that Key Performance Indicators are given to Agency from the Deputy Mayor for Public Safety, and they review whether the 14-day turnaround time is met. Hoffman identified Agency Exhibit 5 as the report she wrote after she completed the investigation. Tr. 181. Hoffman found that Employee had intentionally changed many dates in the LIMS systems, that she knew it could be changed and that it was done to improve the KPI and her personal performance evaluation. Hoffman also recommended termination for changes to District records. Hoffman reiterated that Employee told her that she had changed dates. She said the first time she met Employee; Employee told her that she knew the dates needed to be changed so she changed them. Tr. 183. Hoffman explained that she could not see any other reason Employee would change the dates except to misrepresent when distributed. Tr. 183. Employee did not explicitly state that to Hoffman, but that was what Hoffman determined. Tr. 183.

Hoffman testified that she was familiar with the "Lewis List" and noted that it is a list maintained by the USAO. Hoffman cited that it was a list that indicated those who could not testify in criminal matters but cited that just because someone is on that list does not mean that they may not be called to testify. Tr. 184-185. Hoffman testified that misrepresentation of a DFS employee does matter to a USAO if it is a part of Giglio or Brady information which is information Agency is required to report regarding any impeachable information. The prosecution must provide this to the defense in a criminal matter. Tr. 186. It is a problem for Agency because they want all of their employees to be credible as either fact witnesses or expert witnesses. Tr. 187. Hoffman cited that her recommendations for terminations would not have changed even if she learned that Employee was still receiving subpoenas to testify from the USAO because Employee's actions violated the District Personnel Manual (DPM). Tr. 189.

On cross examination, Hoffman affirmed that she met with Employee twice in the course of the investigation but noted that LoJocano did the questioning in the second interview. Hoffman testified that in the first interview, Employee stated that she relied upon information provided to her by R.A. about changing dates, but not in the second interview. Tr. 190-181. Hoffman cited that R.A. confirmed that she had told Employee how to change the date field. Hoffman affirmed that she spoke with Ms. C.B. during the investigation and that she also stated she relied upon information from R.A. about the date change. Tr. 191. M.R. also noted the same about relying on information from R.A.. Tr. 192. In identifying Agency's Exhibit 1, Hoffman reiterated that the modified date is the date Employee went into the LIMS systems and the updated date is the date she changed the distribution date to. Tr. 193. She also noted that the size of the mismatch indicator is the number of days between the two dates. Hoffman also explained that while

they did not go through each day to see how close the date changes made Employee closer to the 14-day turnaround, that because all the date entries were earlier – by definition it improved performance and KPI. Tr. 194. Hoffman cited that the spreadsheet does not tell whether any particular date brought Employee within the 14-day period. Tr. 195. Hoffman explained that KPIs are something that the entire unit is evaluated on. Hoffman testified that she thought the improved KPIs were a byproduct of Employee's actions. Tr. 195.

Hoffman testified that regarding the charge of false statements/records, that Employee's action of changing an official record were what that charge was based on. It was also based on her lying about it and willfully omitting that to her supervisor, as she did not tell anyone she was changing dates. Hoffman cited that she did not tell LoJocano that she was changing dates, but that she stated that she did not know that it was wrong or that she should not be doing it. Tr. 198. Hoffman testified that there have been multiple times where Giglio and Brady information were provided for Employee due to the date change issue. Tr. 199. Hoffman also testified that she is aware of who E.S. is and that she believes that Giglio and Brady information had been sent to him with regard to the investigation. Tr. 200. She also noted that J.W. was a part, but that he was found not to be in the same category because he had never been provided with the SOP and he did not know he was supposed to distribute his reports. So, he was completing his reports, but just was not distributing them. Thus, J.W. was not disciplined and there is no Giglio or Brady information for him.

Quiyana Hall ("Hall") Tr. Pgs. 203 –221

Hall is the Human Resources Director at DFS and has been with Agency for approximately two (2) years. She joined Agency in the fall of 2019. She is responsible for all functions of human resources including employee relations, which also involves discipline, corrective and adverse action. Tr. 204. Hall drafted the final separation for Employee but was not involved in the investigation. Her role involved getting the hearing officer's report and recommendation and taking the necessary steps to close the disciplinary action out. Hall also explained that in her HR role, they are trained to utilize the same process for discipline which involves steps for investigations and documentation. Tr. 205. Hall further noted that the deciding official is required to review the final reports and recommendations and make a determination on if the proposed discipline would be sustained. Once the deciding official makes the decision, the documents are returned to HR and the final documents are sent based off that decision. Tr. 207. Hall testified that adverse action cases go for administrative review. She identified Agency's Exhibit 12 as the administrative review report for Employee.

Hall explained that once she received this type of report, she moves forward with whatever steps were required based on what the report indicated. She cited that the Agency director signed off on this report and also identified that the hearing officer in this matter was Jared Siegel. Tr. 210. Hall also explained that the signature noted that the report was "adopted" as shown by the signature of Anthony Crispino who was the interim director at the time. She stated that once she received that document, she prepared the final notice pursuant to his adoption of the recommendation from the hearing officer. Hall identified Agency's Exhibit 13 as the final notice and affirmed that she drafted the final notice for Employee and that the deciding official was Anthony Crispino Tr. 212. Hall testified that she signed the form because she has delegated authority to sign and close out certain actions.

Hall testified that she did not personally investigate any of the charges in this matter. She noted that she is a deciding official in matters that fall under her HR role or for other matters such as sexual harassment cases, ethical or legal matters. Tr. 216. Hall further noted that HR will draft proposed worksheets prior to them being signed by a proposing official. She also indicated that her predecessor did not have her title, but that his name was Michael Hodge. Hall stated that she had a "handful" of conversations with Hodge about many things but could not say whether she specifically spoke to him about Employee's matter. Tr. 217. Hall iterated that there would not be a situation where she would issue

a final decision (that was not a case under her purview) without the director's approval as she does not have that authority. Tr. 217.

On cross examination, Hall identified Agency's Exhibit 4 as the *Douglas Factors*. Tr. 219. Hall testified that she did not refer to worksheets in her prior testimony. She testified that HR will typically prepare a *Douglas Factors* worksheet for proposed disciplinary action.

Employee's Case in Chief

Employee Tr. Pgs., 222-296

Employee testified that her educational background includes a master's degree in forensic sciences, as well as a bachelor's degree in forensic science with a minor in chemistry. She graduated from George Washington University in 2006 and first went to work at the Wyoming State Crime Lab and was there for nine (9) years. Following that, she accepted a full-time crime scene position at DFS in May 2016. Tr. 22 -226. Employee's job duties included mainly responding to crime scenes where she would document, collect and preserve evidence that might link a suspect with a victim. She also would debrief law enforcement and send evidence collection logs to MPD and the USAO. She also noted that she would write reports and sometimes testify about the reports. Employee enjoyed her work Tr. 226 - 227. Employee testified that in preparing reports, it was basically a reiteration of the evidence collected. She used LIMS to do reports at DFS. Employee explained that after she would do a report, she would print it out and put it in a manila folder along with an Admin Technical Review form. Then she would create a chain of custody. She would enter her report as an item of evidence into LIMS and then once it is entered into LIMS, she could print off a barcode that described the item of evidence. Tr. 229. Employee cited that after this, she would then electronically transfer her report to "technical review pending" in LIMS, which she described as the chain of custody location and also it will give the date and time that she did that. After this, she would put the report in the manila folder and usually would put it in her supervisor's mailbox. Tr. 230.

Employee identified Agency's Exhibit 3 as the CSS35 Procedures for Case Notes, Reports and Administrative Functions. Employee explained that this was an SOP that governed some of the rules and procedures that had to be followed when writing case notes. Employee recalled that the original SOP existed when she was hired in 2016. She noted that the SOP changed over time, as the SOPS undergo regular modifications. Tr. 231. Employee cited that there were dozens of SOPs in place while she was employed at Agency. Employee also identified section 7.50 of that document as the report distribution process. Employee explained that there was a USAO portal that attorneys had access to. Employee said they would put the evidence collection log in the portal on the day they went to the crime scene so attorneys would immediately know what evidence was collected. Employee also stated that once their report was finalized and supervisors had made corrections, they would upload the final report to the USAO portal. Tr. 232-233. Employee testified that the USAO portal was "just a folder that the USAO has access to." Tr. 233. Employee further testified that she did not use LIMS to complete the steps in 7.50. Tr. 234.

Employee went on to explain that in the steps found in 7.51, that she would send her completed reviewed report to two separate email groups that were listed in the CSID Evidence reports. Employee believed those emails belonged to MPD and another to the DFS/CSS report distribution, which she thought was an email supervisors could access. Employee did not use LIMS to complete the distribution process in step 7.51, iterating that it was just email. Employee testified that the steps found in 7.51 through 7.55 were steps taken in the LIMS system. Employee described that for step 7.512, she created a folder in LIMS and uploaded her report into it. She noted that there is a section in LIMS where attachments could be uploaded. So, if she went to a crime scene, she could find her assignment and then create a folder attached to her assignment in the module portion of LIMS. She would then upload that

completed reviewed report into that folder and then attach it to her assignment. Tr. 236. Employee cited that the action of uploading her report, the date on which it occurred was reflected in LIMS. She cited that if she right clicked on the file, she could see who uploaded it and the date and time. Tr. 236. Employee noted that this date could not be changed.

Employee testified that the steps in 7.53 and 7.54 were basically one step. She explained that under the assignment, if she right clicked, she would get a list of options in LIMS and that one of them was "Request Report." She stated that if you clicked "Request Report", this form would pop up on her computer and the form would state the date the crime scene or vehicle or autopsy assignment was assigned to them. It would also state the date that the supervisor reviewed it. Tr. 236-237. Employee also testified that a barcode would pop up along with a "little editable box." Tr. 237. Employee testified that there came a time when she changed the editable date field. Employee cited that she changed it to "match the release date you could see on the form you were scanning." Tr. 238. Employee explained that the form she was scanning meant the electronic pop up. She said that once you clicked on "request report" that the form would pop up and it had a barcode that included the date you were assigned and the date the report was released. Employee affirmed that she would scan that barcode. Tr. 238. Employee had a scanner connected to her computer. Employee assumed that the date and time she scanned that barcode was recorded in LIMS because she thought everything done in LIMS was recorded. Tr. 239. Employee cited that she was not aware of a way in which she could have caused LIMS to reflect having scanned that barcode on a different date or time than the one she actually did. Tr. 239.

Employee further explained that step 7.55 was the final step in the chain of custody for the report and it was called "Distribution Complete." Tr. 239. Employee testified that this is when she indicated that her report had been distributed. Tr. 240 Employee testified that she would scan the barcode that she had affixed to the manila envelope that contained her report. She would first scan it to her supervisor and then he would scan it back to her and it was scanned to "Review Complete". Once she had distributed the report following all other steps, she transferred it electronically to "Distribution Complete." Tr. 240. Employee said she used the same scanner as she did for step 7.54. Tr. 241. She said that the date and time she scanned that barcode was recorded in LIMS. She cited that she knew this because once you scan the chain of custody, you can then access what is called the "Chain of Custody Report" in LIMS. She said that chain of custody will list every single date and time and by whom evidence was moved from the time it was initiated as an item of evidence until the end of custody. Tr. 241. Employee cited that she could not have caused LIMS to show a time other than what was scanned with the barcode.

Employee testified that after she finished scanning the barcode affixed to the physical case file and updating LIMS, she would physically put the envelope containing her report in the bin. She noted that this task only took about five or ten minutes. Tr. 242. Employee cited that the steps in the distribution process could be completed in any order. Employee said that the steps did not need to all be completed on the same day, but that she tried to do so to the best of her abilities but was sometimes pulled away to a crime scene. Tr. 243. Employee testified that she sometimes distributed her report more than 14 days after receiving it back from her supervisor. Employee explained that there were a couple of reasons that might happen. For her cases, she liked to wait until she had a section of time to distribute multiple points at once. In other instances, she would wait until a 3D scan was available. On a couple of occasions, her reports were returned in LIMS but were not in her mailbox, so she did not have the physical copy. Tr. 245-246. Employee identified Exhibit 1 as the proposed separation document she received on July 16, 2021.

Employee testified that there came a time when R.A. told her that she was supposed to change the date in LIMS. Employee cited that R.A. told her that the box that popped up after clicking on "Request Report" needed to match the release date, which was the date the supervisor had reviewed the report. Tr. 247-248. Employee said R.A. told her she got this information from Kristie Stone. Tr. 238. Employee

believe that R.A. told her this in the year prior to March 2021. Employee began changing the editable distribution date field after communication with R.A.. Tr. 249. Employee asserted that it was common for them to confer with teammates about certain job functions and also advice and training. Tr. 249. Employee testified that R.A. was employed at Agency at the time she began there. Employee further noted that prior to talking to R.A. she did not do anything with the date field, and she did not even notice the box. She just scanned the barcode and did not change anything.

Employee explained that in March 2021, she stopped changing the date after she heard from another individual in the Crime Scene Unit – who was not on her team, but was on Erin Price’s team, that they had a meeting, and it was discussed that John Allie’s team had been changing dates and they were not supposed to do so. Tr. 250-251. After this, a memorandum from LoJocano came out, which did not discuss the editable box, but she had already heard that it was a problem. Tr. 251. Employee heard this from Sergio Bercarrerra. She said that once he told her, that there could be only one date that was being referred to for distribution date because only one was editable. Tr. 251. Employee also talked to another person on Price’s team who mentioned that there was an investigation in relation to the date changes and that Director LoJocano was mad. Tr. 242. Employee said that she never changed any dates after that time. She said she tried to distribute it on the same date her supervisor returned and reviewed her report so that the date still matched, but she never changed that box again. Tr. 252. Employee also said R.A. told her she had an email from Kristine Stone about changing dates in LIMS. She said R.A. mentioned this to her when they first heard about the investigation and that R.A. told the Employee not to worry because she had an email from Kristie Stone supporting their actions. Tr. 254. Employee noted that she did not actually see the email until she was interviewed by Hoffman. Tr. 253. She said after that interview, she asked R.A. for the email so that she could hand it over. Tr. 25-254.

Employee identified Agency’s Exhibit 10 as the email from Kristie Stone to R.A.. Employee testified that when she changed the date field that she did not do so with the intent to mislead Agency management, or to gain an advantage on her performance evaluation. Tr. 255. Employee did not believe she was violating Agency policy when she changed the dates. Tr. 255. Employee testified that her proposed notice included Excel spreadsheets that were provided to her on a CD. Tr. 255-256. She identified Employee’s Exhibit 13 as the proposed notice. Employee had never previously been the subject of discipline or proposed disciplined while at DFS. She had never been told her performance was substandard and had not received any warnings about conduct. Tr. 25. Employee identified Employee’s Exhibit 12 as a performance evaluation document and that Page 7 was from October 2016 through September 2017. That report noted a turnaround time and that it said to complete reports within a turnaround time of 10-15 days. Employee identified subsequent years and noted the performance and competencies summary. Employee testified that she was not told what the metrics of the 14-day calendar turnaround goal would be based on. Tr. 262. She said that no one said that it would be evaluated exclusively based on LIMS or that it would be based on the changeable distribution date field in LIMS. Tr. 263.

Employee cited that she never requested an administrative day which was a day where they could request to get caught up on administrative tasks. Tr. 264. There was no penalty for requesting an administrative day. Tr. 264. Employee identified Employee’s Exhibit 37 as a subpoena she received in the mail where she testified in a trial in March 2023. She testified to work she had done while at DFS. Tr. 267. She also noted that Employee’s Exhibit 45 was also a subpoena to testify that she received in the mail. The prosecutors in these matters were aware that she had been terminated by DFS. At the time of her termination, Employee cited that her supervisor was John Allie. Tr. 272.

On cross-examination, Employee affirmed that she changed dates in in LIMS based on the instructions she received from R.A.. Tr. 275. Employee did not remember the date that R.A. gave those instructions. Employee cited that John Allie was her supervisor during her time at DFS. She noted that

when she first started, she was not on a specific team, but was later put on John Allie's team when he came. Employee asserted that there was a couple of month period when she first started where she relied on her peers. Tr. 276. Employee said during that time, her time was approved by Grant Greenwalt, and that he was the manager of everyone at that time. Tr. 277. Employee cited that in 2017, R.A. got the email and that she was on Allie's team, and that after she got that email, she told Employee that she should be modifying the distribution date to reflect the release date. Tr. 279. Employee cited that the release date was the administrative review date and that they were the same thing. Tr. 279. Employee testified that the administrative review date was the date the supervisor finalized the report. The release date was the date they actually reviewed the report. Tr. 280. She iterated that the administrative due date is the date they reviewed it and what was in LIMS as the "release date." Tr. 280.

Employee explained that the difference between those three dates is that the administrative review date, in her belief and experience, was the day her supervisor distributed the report to the scientist and the scientist has made all the corrections. Then they would sign a Technical Admin Review form and give it back to you. After that, the supervisor was supposed to scan the chain of custody to say "review complete" on the same day he signed that form. Tr. 282. She said that the release date is the date the supervisor signed the form, and the admin review was completed where there should not be any more changes to the report. Tr. 282. Employee iterated again that she believed the administrative review date and the release date were the same. Tr. 282. Employee explained that there were five (5) major steps of distribution, and all were date timestamped. She said the same date she put her report into the USAO portal was the same date she uploaded her report to LIMS and the same date she emailed the two addresses. She said that R.A. said there was another step and that they need the release/admin review date, which Employee thought was reasonable. Tr. 283.

Employee testified that she backdated the date in LIMS so that it would match the date of review which would naturally be prior to distribution because you could not get the report back for distribution until it had been reviewed. Employee cited that she believed that the distribution date column in LIMS should have a date other than the date a report was distributed to the USAO portal in just that one box based on the instructions from R.A.. Tr. 284. When asked whether she believed that the distribution date in LIMS should reflect a date other than the USAO portal distribution date, Employee cited that there were five (5) dates that were recorded. When it was specified that it was about the distribution date field in LIMS, Employee cited that there are three (3) steps of distribution in LIMS. One is chain of custody scan which scans to the electronic location of Distribution Complete. Then there is another date when you upload your report and then there is a date with a separate barcode on the Request Report Sheet. Tr. 286. When asked specifically about the distribution date that automatically populates in LIMS when a report is distributed, Employee testified that she made that date change in the editable file because she was matching the date of release or the date of review and she believed that date should reflect the release date instead of the date it actually was distributed to the USAO based on what was communicated to her by her coworker. Tr. 287. Employee testified that she did not ask John Allie if this is what he wanted her to do. She did not ask any supervisors, managers or directors if this is what they wanted to be done. Tr. 287. Employee asserted that she regularly consulted her coworkers and teammates for all kinds of policies and procedures. Tr. 288.

Employee affirmed that R.A. received the email (from Stone) in 2017. Employee also attested that the CSS35 was issued on September 8, 2020. Employee noted that this did not mention anything referencing the release date in the distribution section. Employee affirmed that the distribution date is automatically populated. Tr. 289-290. Employee testified that in March 2021, she heard through the rumor mill that the date was not supposed to have been changed. She did not think that this was addressed in LoJocano's memorandum (Agency's Exhibit 7) that was issued in March 2021. Tr. 291. Employee affirmed that she had seen LoJocano's memorandum noted as Agency's Exhibit 7 when LoJocano issued it, as it would have been emailed to everyone. Tr. 292. Employee maintained that this memorandum did

not mention the date change. Employee testified that no one other than R.A. told her to make these changes and that R.A. was also terminated. Tr. 292. When asked what Employee thought the distribution date meant if she thought it was the same thing as the release date, Employee iterated that there were multiple timestamped dates and five (5) separate steps. Employee testified that she did not tell anyone that she thought there were multiple dates of distribution, and she did not ask for guidance about which one should be used. Tr. 293. Employee asserted that she did not know how they were used and that they just existed when you created these dates. Tr.294. When asked how she chose which one date to enter into LIMS if there were so many options, Employee testified that she did not choose the date and that she could not change the date she put it in the portal. She said the only date that was changed was the one editable box in step 7.3 and 7.54 and that it was communicated to her that it needed to match the release date. Tr. 294. Employee asserted that she thought it was reasonable to change that one date in LIMS. Tr. 295.

When asked by the AJ whether R.A. was in her supervisory chain, Employee testified that R.A. was not. R.A. did not conduct performance evaluations for Employee or otherwise advise her of performance metrics for her job. Tr. 295. Employee also attested that R.A.'s instructions from what she could recall were just a verbal conversation. Tr. 296

R.A. ("R.A.") 298 – 307

R.A. testified that she currently works at a biotech company and that she previously worked at DFS from 2014 to November 2021 as a crime scene scientist. Tr. 300. Her duties at DFS included responding to crime scenes, collecting evidence and processing evidence. She was also responsible for preparing reports. R.A. explained that she was required to take notes on the scene and that those notes were put into a template type report, along with the evidence and a printed report was provided to your supervisor for review. Once reviewed, it would be sent to the USAO. Tr. 304. R.A. explained that LIMS was the Laboratory Information Management System and that she used LIMS to generate barcode to track reports. R.A. testified that it had been two years since she had done the report distribution process, but cited that it included writing the report, providing it to the supervisor and then once reviewed, it goes into the USAO report folder. Tr. 306.

R.A. affirmed that she knew Employee because they worked at the same time. R.A. testified that she did not believe she told Employee to change the distribution date in the LIMS system. Tr. 306. R.A. said she had conversations with Employee about a date in the LIMS system because she had a project in 2017 where she was updating dates in LIMS to match the dates in the USAO portal. Tr. 307. R.A. asserted that her record reflects the fact that she resigned from DFS. Tr. 307.

C.B. ("C.B.") Tr. (Vol. 2) Pages 7 –21

C.B. testified that she worked at DFS as a crime scene forensic scientist from August 2013 to September 2021. Her duties included responding to crime scenes and collecting and processing evidence. Tr. 6-7. C.B. cited that her job duties also included preparing reports. She explained that notes and evidence collected would be entered into templates. It would be reviewed by supervisors and then once returned, she would upload it to different agencies. Tr. 8. C.B. affirmed that she used LIMS for part of this process. Tr. 8. C.B. testified that at some point, R.A. told her that when you get your report back and go into LIMS that you put the date the supervisor signed off marking your report as complete and to put that date in the field and then distribute it. Tr. 10. C.B. cited that it was a pre-populated box, so that when it came up, she would change that date to the date that her supervisor signed off on it. Tr. 11. C.B. testified that she began to change the date after this communication with R.A.. She could not recall exactly what timeframe R.A. had told her this information. Tr. 11.

C.B. testified that R.A. had mentioned that when she was on light duty, she was given an assignment by Kristie Stone for imputing dates in the field. C.B. explained that it was her practice from the time R.A. told her (around 2018) to change the dates until an email came out from Director LoJocano stating that they weren't supposed to be changing the date and from that time she followed that guidance. Tr. 13. C.B. did not recall having any conversations with Employee about the date field, and if so, the conversations came after the email from Director LoJocano. Tr. 14.

The AJ asked whether R.A. was a supervisor or manager to her, and Employee testified that R.A. was not. C.B. also cited that John Allie was her supervisor when she returned from maternity leave, but she did not recall if they had a unit manager or not, but if it were, it would have been Grant Greenwalt. Tr. 14-15. C.B. did not confer with her supervisor about date changes during this time. Tr. 15.

On cross-examination, C.B. testified that she had been changing dates since approximately 2018. C.B. explained that when she first started working at DFS, they were not responsible for distributing reports. When she did become responsible for the reports, C.B. stated that she thought the distribution date was the date you completed the report, not the date it was distributed. Tr. 17. She stated that she never asked the supervisors for clarification because they did not distribute reports. Tr. 17. C.B. testified that she spoke with Hoffman in June 2021, where she told Hoffman about the instruction from R.A.. She said she told Hoffman that the instruction was given to R.A. by Kristie Stone. Tr. 19. C.B. noted that R.A. showed her the email. Tr. 19. C.B. identified the email and noted where the email stated that there were multiple ways the task could be done. She interpreted that information to mean that the distribution date was the same as the release date. Tr. 20-21. C.B. affirmed that that language was not specifically cited in email. Tr. 21. C.B. testified that she received a proposed separation from Agency, but she ultimately resigned. Tr. 21.

Brief Summary of Agency's Position

Agency asserts that it had cause to terminate Employee from service and that it did so in accordance with all applicable laws, rules and regulations. Agency avers that in March 2021, it was alerted that employees in the Crime Scene Science Unit ("CSSU") were changing pre-populated dates in the internal data system – the Laboratory Information Management System ("LIMS"). The dates that were being changed were the distribution dates that reflected when the evidentiary reports were sent to the USAO. The employees had a 14-day timeline for which to distribute their reports to the USAO for the cases that they were assigned. As a result of this information about employees' potentially changing dates, the then director, Christopher LoJocano, tasked supervisor Price to conduct an audit of the employees in that division to see whether these claims could be substantiated. The audit pulled data from around October 2020 through March 2021. An initial result of the audit revealed employees that had changed the dates. An investigation was conducted by Hillary Hoffman (who at the time was not employed at Agency), and the results of her investigation, which included obtaining specific data from JusticeTrax, revealed that Employee was one of nine (9) employees initially identified as having changed the distribution dates in LIMS. The results of the audit and investigation revealed that Employee had made sixty-seven (67) date changes within the audit timeframe and the dates were backdated to an earlier date than the actual submissions took place when referenced against the entries in the USAO portal. Agency asserts that Employee admitted to altering the dates when she was interviewed as a part of the investigation in this matter. Further, Agency avers that even during the Evidentiary Hearing held before OEA, that Employee admitted to altering the dates, but offered a "self-serving explanation for doing so that lacks credibility."⁷

⁷ Agency's Closing Argument at Page 5 (August 7, 2023).

Agency asserts that Employee's termination was for cause as her actions were a breach of trust and integrity. Further, Agency avers that changing the distribution dates, which were all backdated, were done to improve the performance as it related to the 14-day timeline for the distribution of the reports to the USAO. Agency maintains that LIMS is an official government document and that Employee's actions of changing the pre-populated distribution dates amounted to making false statements on an official government record/document. In that same vein, Agency asserts that the record is clear from the LIMS data that Employee utilized her own unique identification and password and changed the prepopulated distribution dates herself. Agency also avers that Employee's reliance on the instructions of a coworker, are irrelevant and also notes that that coworker was not in Employee's supervisory chain of command.

Agency also argues that it appropriately considered the *Douglas* Factors in this matter, and that all other applicable laws, rules and regulations were followed. Agency further maintains that it determined that Employee could not be rehabilitated or continue in any duties associated with her position. Agency also notes that this was supported by an "external and objective Hearing Officer." Agency also asserts that Employee's claims of disparate treatment are without basis. Agency asserts that two (2) other employees who were identified in the audit did not have the same conduct as Employee. Agency asserts that the two other employees did not manually change any dates, but instead, they failed to distribute the documents as required, thus their actions did not warrant the same action as Employee and the other employees who had been identified as having manually changed the distribution dates. As a result, Agency asserts that its penalty of termination was appropriate under the circumstances.

Brief Summary of Employee's Position

Employee acknowledges that she changed the dates, and asserts that it was her "practice to modify the editable date field such that it would reflect the date that the corresponding report had been returned to her for distribution from supervisory review, rather than to leave the field untouched with the date that it defaulted to (i.e. the current date)."⁸ Employee asserts that she "adopted that practice based on the guidance provided to her by a colleague ...which she and at least two of her colleagues reasonably relied."⁹ Employee avers that she was eventually made aware that this guidance was incorrect and that the changing of the dates was inconsistent with applicable Agency policy regarding the report distribution process, and that she immediately stopped doing this once she was made aware of this.¹⁰ Employee also avers that there were several dates in LIMS, and the dates she changed were meant to match a "release date", in order to follow the guidance she received from her coworker.

Employee asserts that she was charged based on four (4) disciplinary charges, but that the final notice reflects that the underlying basis for all the charges are based on the alleged falsification. Employee asserts that because of this, the "only way termination could possibly be supportable" is if it were found that she did these actions with the specific intent of misleading Agency. Employee avers that Agency has not shown this to be the case. Employee asserts that her actions were an "innocent misunderstanding about a simple administrative process." Employee also argues that she was never made aware of the metrics around 14-day turnaround timeline and that Agency has failed to provide evidence that her date changes would have aligned her with that performance goal.

In addition to Employee's assertions that Agency's accusations are not supported by the record, Employee cites that *assuming arguendo* that there was cause, that Agency's removal was not an appropriate penalty. Employee asserts that the penalty of termination should be rescinded in its entirety or at the very least "mitigated to a substantially lesser penalty." As such, Employee asserts that "Agency's

⁸ Employee's Closing Argument at Page (1-2) August 7, 2023.

⁹ *Id.* at Page 2.

¹⁰ *Id.*

penalty determination is entitled to no deference and should be substantially reduced, to the extent that any penalty is even appropriate.”¹¹ Employee also argues that post termination, she has still been subpoenaed by USAO attorneys to testify in matters for which she collected evidence, thus disproving Agency’s allegations regarding her veracity and truthfulness. Employee also avers that Agency failed to appropriately consider and weigh the *Douglas* Factors in consideration of the action against her and also treated two (2) other employees differently, in that those employees were given reprimands. Employee also makes an argument that Agency’s disciplinary action is untimely, and that Agency violated the 90 Day rule and the 45 Day rule in the administration of the instant action. For these reasons, Employee avers that Agency’s action was not for cause and that it should be reversed.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

ANALYSIS¹²

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. (*Emphasis added*).

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012)¹³, Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee’s termination was levied pursuant to DPM (1) § 1607.2(b)(4) False Statements/Records; (2) §1607.2(d)(1) Failure/Refusal to Follow Instructions; (3) DPM § 1607.2(e) Neglect of Duty; and (4) DPM §1607.2(m) Performance Deficits. In a Final Notice of Separation dated November 16, 2021, Employee was terminated from service effective November 19, 2021. In the instant matter, Employee was a Forensic Scientist in the Crime Scene Sciences Unit (CSSU) at DFS and had been at Agency since 2016. Employee’s responsibilities included the submission of evidence and related materials to the United States Attorney’s Office (USAO) and documentation of evidence through the use of the Agency’s internal software program, LIMS which was managed by JusticeTrax. Agency avers that in March 2021, it was made aware that some employees were changing the pre-populated “distribution date” in LIMS. Agency

¹¹ *Id.* at Page 21.

¹² Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) (“The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence”).

¹³ It should be noted that the OEA Rules were updated and made effective December 27, 2021. However, Employee’s Petition for Appeal was filed prior to the effective date (filed on December 21, 2021), thus the previous OEA Rules are applicable for this matter.

asserts that the distribution date was the date in LIMS “which was intended to reflect the date the materials were distributed to the USAO portal.”¹⁴

Agency asserts that the distribution date was a pre-populated field in LIMS. However, in March 2021, a supervisor, Price notified the CSSU Unit Director, Christopher LoJocano (“LoJocano”) that she had been made aware by another employee that there were employees in some of the squads in the CSSU who were manually changing the distribution date, such that they were not matching the actual date that materials were distributed to the USAO. LoJocano explained during his testimony in the Evidentiary Hearing, that upon receiving the information about this, he asked Price to conduct an audit to ascertain how much this was happening in the CSSU. LoJocano and Price were unaware that the distribution date field could be changed prior to the audit. Agency also avers that all employees, including Employee, were provided the SOP for the distribution process.

The audit ultimately revealed that Employee was identified in a number of nine (9) employees who had manually changed the distribution date. An investigation conducted by Hoffman identified through use of data obtained from JusticeTrax, that there were 67 instances wherein Employee manually altered/changed the distribution date. Agency also asserts that based upon Employee’s unique user identification and password, that she was the person who entered the LIMS system and made those 67 alterations. Hoffman noted that in her investigation, that this data showed that Employee went into LIMS and asserted that this was known because Employee’s username and identification were implicated in the data provided by Justice Trax and that this information “was sic [incorruptible] by any person within the agency from this side.”¹⁵ These changes were noted as “mismatch indicators” in the data and spreadsheets utilized for the investigation in this matter. Hoffman also interviewed Employee during her investigation into this matter, and cited that Employee admitted making the changes, but that she had been given those instructions by R.A., who was supervised by Kristie Stone, and cited that this is what they had been told to do.¹⁶ Kristie Stone denied providing this instruction, but noted that R.A. was given a light duty assignment in 2017, wherein she was updating distribution dates, but that this was not an instruction made outside of this specific project in 2017. Agency asserts that by and through this project, R.A. realized that the distribution date was an editable field.¹⁷

Agency avers that Employee had the motive to make the date changes because she stood to benefit from those changes. Agency further asserts that Employee’s “reason for making the changes is irrelevant as it was a material misrepresentation that did mislead agency management.”¹⁸ To this end, Agency argues that “while the court can and should certainly find that this was done by [Employee] to improve her performance and her unit’s KPI, such a finding is not required in order to find she made false statements in agency records.”¹⁹ Agency maintains that all the charges for which Employee was charged carry a penalty of termination and that it appropriately considered the *Douglas* factors in the administration of this action.

Employee asserts that during the period for which the audit was conducted from October 1, 2020, through March 8, 2021, it was her “practice to modify that editable date field such that it would reflect the date that the corresponding report had been returned to her for distribution from supervisory review, rather than to leave the field untouched with the date it defaulted to (i.e., the current date).”²⁰ Employee

¹⁴ Agency’s Closing Argument at Page 2 (August 7, 2023).

¹⁵ Agency Closing Argument at Page 4.

¹⁶ *Id.* at Page 8.

¹⁷ *Id.*

¹⁸ *Id.* at Page 12.

¹⁹ *Id.* at Page 14.

²⁰ Employee’s Closing Argument at Page 1-2 (August 7, 2023).

further maintains that she adopted this practice based on the instruction of her colleague, R.A. and that she reasonably relied upon what R.A. conveyed to her in this regard. Employee asserts that once she learned that this was not the practice, that she immediately ceased modifying this editable date field.²¹ Employee avers that based on this alone, Agency charged her with four (4) causes of action, wherein, “only one of those four Disciplinary Causes explicitly charged [Employee] with having made false statements and/or falsified records, the broader structure and language of the Proposed Separation and subsequent the Decision Notice make it clear that the underlying basis for *all four* Disciplinary Causes was [Employee’s] alleged falsification of dates in the LIMS system, not mere neglect of duty or failure to follow policy.”²² As such, Employee contends that the “only way termination could be possibly supportable here is if [Employee were found to have been changing the date filed in LIMS with the specific intent of misleading Agency management into believing that she was distributing reports earlier than she in fact was.”²³

Employee avers that she made an ‘innocent administrative error’, and that even if cause is found, which she does not believe there is cause, that the penalty should be rescinded or mitigated to a lesser penalty. Employee maintains that her actions in preparing the distribution reports and in accordance with SOP CSS35 were consistent with Agency practice. Employee maintains that the SOP CSS35 “does not mention the editable date field in LIMS nor does it provide guidance as to how forensic scientists such as [Employee] were expected to populate that field.”²⁴ Employee asserts that she used the barcodes to scan documents and that her chain of custody reports were in the LIMS system and that she could not manipulate that particular date.²⁵

Employee also explained that “a number of years prior to October 2020, R.A., who was a colleague of [Employee’s] at the time, stated to [Employee] that the editable date that appeared in LIMS during the report distribution process should reflect the date that the report being distributed was returned from supervisory review for distribution (i.e. the “release date”), and that editable date should thus be changed to match the release date if it did not already.”²⁶ Further, Employee asserts that R.A. was told to do this by then supervisor, Kristie Stone. Employee contends that “based on that advice from Ms. R.A. [Employee] began changing the editable date field that appeared in LIMS during the report distribution process to reflect the date the corresponding report was released from supervisory review for distribution.”²⁷ Employee maintains that she did not take these actions to mislead Agency and also notes that R.A. started at Agency prior to when she started.²⁸ Employee also avers that there were several SOPs over time and that those went under modifications and that it was “common for [Employee] to confer with her teammates and coworkers about how to perform various job functions and duties.”²⁹ Employee asserts that two other employees also made these same changes – C.B. and M.R. Employee averred that those other two coworkers, like her, never “inquired with their supervisor about whether the editable date field should be changed to match the date the corresponding report was released from supervisory review, but instead relied on the advice of their colleagues.”³⁰ Wherefore, Employee avers that this was a common practice in changing these dates. Employee asserts that once she learned in March 2021, that this was not correct, she immediately stopped changing the editable field.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at Page 6.

²⁵ *Id.* at Page 6 -7.

²⁶ *Id.* at Page 7.

²⁷ *Id.* at Page 8.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at Page 9.

Employee asserts that “pursuant to SOP CSS35, [Employee] was expected to complete each of the steps in the distribution process for any particular case assigned to her within 14 days of the date of case processing – i.e. within 14 days the case was assigned to her.”³¹ Employee also avers that this was one of the S.M.A.R.T. Goals on her performance evaluation and her performance with respect to that comprised 10% of her overall performance evaluation.³² Employee asserts that she was never advised regarding the metrics her success or failure in meeting the 14-day turnaround would be evaluated. Nor was she advised that it would be based on the date contained in the editable date field.³³ Employee asserts that it is “impossible to determine from Agency Exhibit 1 whether any of the date changes reflected in that spreadsheet brought [Employee] within the 14-day turnaround period and that Agency failed to prove this.”³⁴ Employee also contends that Agency failed to appropriately consider *Douglas* factors, noting certain factors as ‘neutral’ when they should have been categorized as ‘mitigating.’³⁵

Employee also avers that Agency has failed to meet its burden of proof regarding the charges and further, that the disciplinary charge, should have been combined such that all the charges 1-4 should have been treated as “a single disciplinary charged for the alleged falsification of dates in the LIMS system, not mere neglect of duty or failure to follow policy.”³⁶ Employee avers that the “broader structure and language” reflect that the “underlying basis for all four Disciplinary Causes was [Employee’s] alleged falsification of dates in the LIMS system, not mere neglect for duty or failure to follow policy.”³⁷ Employee also argues that Agency’s disciplinary action was untimely and that it violated the 90 Day Rule and 45 Day Rule in the administration of this adverse action.³⁸ Employee also asserts that despite the charges and subsequent termination, she has still been called to provide testimony by the USAO.³⁹

False Statements/Records

As was previously noted, Employee was terminated from Agency effective November 19, 2021, pursuant to four (4) charges. The first charge was “False Statements/Records pursuant to DPM § 1607.2 (b)(4). Employee was charged with this cause of action following the Agency’s discovery that she had changed the distribution dates in the LIMS system. Agency asserts that “the LIMS distribution date field was/is intended to represent the date reports were distributed to the USAO or OAG, and the simple act of changing the dates – for any reason- constitutes a violation of 6B DCMR § 1607.2(b)(4) False Statements/Records. Manual alteration of LIMS dates by anyone apart from a manager with specific directions to do so, regardless of reasoning, constitutes a report of false information to a superior.”⁴⁰ Further, Agency cites that the “LIMS entries are used by the Crime Scene Sciences Unit and DFS as a whole to report compliance to the Executive Office of the Mayor and the D.C. Council.” Employee acknowledges making changes to the editable distribution date field but maintains that she reasonably relied upon a coworker’s guidance and that her actions constituted an “innocent administrative error.” Employee asserts that Agency has failed to meet the burden of proof with regard to this cause of action, and if cause were found, the penalty of termination should be substantially mitigated.

The undersigned finds that Agency has met its burden of proof with regard to this charge. Here, the record is clear that LIMS is a part of the system for which DFS, specifically the CSSU, utilizes as a

³¹ *Id.* at 10.

³² *Id.* at Page 10-11.

³³ *Id.*

³⁴ *Id.* at Page 13-14

³⁵ *Id.* at Page 14-16.

³⁶ *Id.* at Page 17-18.

³⁷ *Id.*

³⁸ *Id.* at Page 23.

³⁹ *Id.* at 16.

⁴⁰ Agency’s Closing Argument at Page 17 (August 7, 2023).

part of its distribution process. The record also is clear that the distribution in LIMS was a pre-populated field, but that was editable at the time. It is also well documented that the LIMS system is a secure system wherein each user must use their own unique identification and passwords to login. The spreadsheets relied upon in this investigation were provided by JusticeTrax and I find that those records were reliable. During the Evidentiary Hearing, the undersigned had the opportunity to observe the poise, demeanor, and credibility of the witnesses. I found Employee's testimony regarding the changing of dates to meet the release date and her practice and reliance on the guidance of her coworker to lack credibility. It is clear that Employee went into the LIMS system under her own unique login in credential on those dates and altered the dates. Employee admits that she altered the editable distribution date field. Further, I find that Employee's statements regarding the other barcodes, chain of custody dates and release dates were unreliable as none of those actions for which she cites as her reasoning for changing the date align with the SOPs utilized by the unit. The undersigned finds these assertions made by Employee regarding the alteration to match the release date only operate as an irrelevant distraction from the fact that the distribution dates were changed and did not match the dates reports were actually distributed to the USAO portal. The undersigned also found it disingenuous for Employee to assert that it was reasonable for her to rely on her coworker because she started at Agency two year prior to her tenure. As the record reflects, R.A. was not in Employee's supervisory chain of command (nor was she a supervisor or manager in any capacity) and she was in a lower Grade than Employee. Further, R.A. testified during Employee's case in chief in the Evidentiary Hearing that she did not tell Employee to change the dates but may have had a conversation about her 2017 project with Kristie Stone, wherein the editable date field was discussed. The undersigned also finds Employee's statements that two other employees relied on R.A.'s instructions and never inquired with their supervisors about the accuracy of those instructions, further evince that Employee (nor anyone in the unit) received supervisory guidance to change the pre-populated distribution date field in LIMS.

OEA has consistently held, that to sustain a falsification charge, that "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency."⁴¹ Here, because the LIMS system had a pre-populated date to reflect the distribution date, I find Employee's manual alteration of the date field (67 times), reflects an intention of misleading information. The prepopulated date is the actual date and was meant to reflect the date it was distributed to the USAO, thus any change, whether to a "release date" or otherwise reflects a false statement/record that misleads the Agency. As a result, I find Employee knowingly and willfully reported misleading information, given that the date change was not a directive from any supervisor or manager and that this action was a manual alteration of the LIMS' pre-populated date to reflect that change. Wherefore, I find that Agency has met its burden of proof with regard to this cause of action and charge.

Failure/Refusal to Follow Instructions

For the same reasons highlighted above, I find that Employee's actions constituted a failure to follow instructions. The SOP CSS35 specifically highlighted the distribution requirements. I find Employee's contentions about various other barcode scans and that her alterations were done to reflect the release date lack credibility regarding the SOP and the distribution processes required. The record is clear that Employee was aware that the distribution date, was not the same as the release date, inasmuch as she cites that the release date was the date she received it back from supervisory review. The record is clear that the distribution date was meant to reflect the actual date that the report materials were distributed to the USAO portal. As a result, I find that the alteration of that pre-populated date reflects a failure to

⁴¹ *John J. Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), citing *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); See also *Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

follow the SOP and managerial directives established for the CSSU. It is also of note that the 67 date changes made by Employee all reflect an earlier date than the actual distribution date. This stated, the undersigned finds that any alteration of this date field, whether earlier or later, would constitute a failure to follow instructions for this distribution process. Further, the undersigned would note that Employee's own admissions regarding her alteration of these dates also evince her failure to follow the instructions for distribution. Accordingly, I find that Agency has met its burden of proof regarding the charge of Failure/Refusal to Follow Instructions.

Neglect of Duty

For the reasons already outlined, namely that Employee's actions were outside the scope of Agency directives and instructions, I find that she failed to carry out duties as would be expected, thus constituting a neglect of duty. The record clearly reflects that accurate reporting was a part of the duties and expectations of forensic scientists in the CSSU. Thus, the alteration of dates, again whether earlier or later, constitutes a failure to abide within those directives as would be expected of an employee. Additionally, I find that Employee's assertions that she relied on the instructions from a coworker in changing the dates, and that she believed those dates were supposed to be changed to match release dates to be entirely unbelievable, and that this action further supports a charge of a neglect of duty. There is nothing in the instant record to suggest that if Employee had questions about her tasks that she could not access a supervisor or manager. Further, the employee (coworker R.A.) that Employee asserts she relied upon for instruction was a Grade 9, while Employee was a Grade 12. Additionally, the other employee was in no way in the supervisory chain for Employee (nor was R.A. in any supervisory or managerial capacity). Employee avers that she has still been called by the USAO to testify in criminal matters, thus showing that her veracity and truthfulness were not impacted by these actions and the termination. The undersigned finds that to be irrelevant to the actions itself inasmuch as there could have been (and could be) instances for which Employee was not called to testify or was otherwise impeached during her testimony based upon these actions. As a result, I find that Agency has met its burden of proof with regard to the charge for neglect of duty.

Performance Deficits

Employee was also charged with Performance Deficits. Here, Agency asserts that Employee altered the distribution dates, and those alterations were dates earlier than the original date entered and "was done after the entire unit had been advised of a required 14-Day turnaround time in 95% of cases."⁴² As such, Agency argues that "if deficits did not exist, there is no logical reason dates would have been altered to advance the distribution date." Employee avers that Agency has failed to produce any evidence to show that she changed dates to gain advantage in her performance evaluation. Further, Employee asserts that Agency never advised her about the metrics regarding how the 14-day turnaround would be considered, nor was she advised that the LIMS editable distribution date were inclusive of those metrics.

DPM 1607.2(m) notes that performance deficits are a "failure to meet established performance standards." In the instant matter, Agency proffers that actions taken to alter any dates would affect the performance standard regarding the 14-Day turnaround and 95%-time frame prescribed in its directives. Employee avers that she was not made aware that these metrics would be considered based on LIMS editable date field data and also avers that Agency has failed to show where her actions constituted a failure to meet the standards. The undersigned disagrees with Employee's assertions. I also find it disingenuous for Employee to suggest that she was not aware of those standards as it related to LIMS, again given her previous performance evaluation and also her use of LIMS for her reports and

⁴² Agency Closing Arguments at Page 18 (August 7, 2023).

distribution. Further, it is also incongruous to assert that she would not have made those changes since they only would have comprised 10% of her overall evaluation. Here, there were 67 altered dates discovered as a result of the audit. That noted, it stands to reason that making that number of alterations would have impacted the percentage for the performance standards. While I do find that Agency has not provided details regarding the exact percentage of the deficit for Employee, I find that in review of the record that because Employee altered dates on 67 occasions, it stands to reason that this would have impacted the performance standards. Further, because the altered dates are misrepresentations, it also evinces that Employee failed to meet performance standards. Further, I find that Employee's own attestations that it was her practice to alter these dates, also provide evidence of her failure to meet performance standards.

Employee also asserted that all the charges for which she was disciplined were borne out of the one charge for false statements/records and that the subsequent charges should have been merged to reflect that one (1) charge. The undersigned would note that in the assessment of discipline, the DPM does not necessarily preclude or set limitations for how many charges can be assessed against an employee in the administration of discipline. Employee cites to a Merit Systems Protection Board case (MSPB) wherein, the board in that case cited to how charges should be construed.⁴³ In the instant matter, the charges were borne out of the same action of the alteration of the distribution dates, but I do not find where Agency failed to appropriately construe the other charges for which Employee was disciplined and ultimately terminated. The undersigned would also note that *assuming arguendo* that Employee's claim regarding one charge was to be considered, because I found that Agency met its burden of proof with regard to the False Statement/Records, the discipline would be sustained in this matter. Accordingly, I find that Agency has met its burden with all four (4) of the charges levied against Employee in this instant action.

90 Day Rule & 45 Day Rule⁴⁴

It should be noted that Employee raised these issues for the first time in the submission of closing arguments, Employee asserts that Agency violated the 90-Day Rule and the 45-Day rule in the administration of the instant matter. Specifically, Employee cites that based on the investigate report completed by Hillary Hoffman, that the "Agency became aware of the alleged conduct on March 8, 2021." Employee asserts that the Proposed Action dated July 15, 2021 – which reflects 90 business days from March 8, 2021, did not arrive to her until July 16, 2016. Thus, July 15, 2016, was the date the Proposed Notice was mailed, not that she received it.⁴⁵ Additionally, Employee avers that pursuant to DCMR §6B-1623.6(c), Agency violated the "45-Day Rule." Employee avers that the 45-Day rule requires a final decision within 45 days of the completion of the Hearing Officer's Report. Employee cites that the Hearing Officer, Jared Sigel, issued the report on September 7, 2021, so that 45 days would have meant that the final notice should have been issued by October 22, 2021. However, the final notice was not issued until November 16, 2021, making it untimely.

The District Personnel Manual ("DPM") §1602.3 (a) provides that a "corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action."⁴⁶ Code §5-1031, are

⁴³ Employee's Closing Arguments at Page 23 (August 7, 2023).

⁴⁴It should be noted that upon review of the record, Employee did not previously raise these arguments during the course of this matter. Agency did not address this in its closing arguments.

⁴⁵ *Id.* at Page. 20.

⁴⁶ The OEA Board has held that the legislative intent of the 90-Day Rule provision found in DPM §1602.3 (a) is to "establish a disciplinary system that included *inter alia*, that agencies provide prior written notice of the grounds on which the action is proposed to be taken."⁴⁶ The Board noted that prior to this revision, the "courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Code § 5-1031...[t]his statutory language is only applicable to those employed by the Metropolitan

mandatory in nature.⁴⁷ Here, Employee asserts that the Agency knew or should have known of the conduct on March 8, 2021. However, the undersigned would note that the March 8, 2021, date reflects this as the time frame for which Agency first became aware of the *possibility* that employees had altered distribution dates, and that a subsequent audit and investigation was launched to substantiate the claims. Hillary Hoffman was the investigator and was assigned to investigate this matter on June 8, 2021, and her final report regarding this matter was dated July 13, 2021. As such, the undersigned finds that the date of final report was the “trigger date” of when Agency knew or should have known that there were employees, including Employee, who had been found to have altered distribution dates. It is of note that during his testimony, Christopher LoJocano specifically cited that when Erin Price told him in March that this might be occurring, that he wanted to do an audit to confirm whether this was actually happening or not. This was corroborated by the testimony of Erin Price as well.⁴⁸ These dates noted, I find that Agency’s notice dated of July 15, 2021, and the date of Employee’s receipt of that notice would fall well within 90 Days of July 15?, 2021. The undersigned finds that even if the “trigger date” of the 90-Day Rule was June 8, 2021, the day Hoffman was appointed to investigate the matter, that Proposed Notice receipt date of July 16, 2021, would have also fallen within the appropriate timeline. Assuming *arguendo* that the “trigger date” was March 8, 2021, I would find that Employee’s receipt of the notice, one (1) day late, would constitute harmless error in accordance with OEA 631.3.⁴⁹

Regarding Employee’s claims of Agency’s violation of the the 45-Day Rule pursuant to 6B DCMR § 1623.6; the OEA Board has consistently held that the 45-Day rule is directory, not mandatory in nature.⁵⁰ The OEA Board has held that “an agency’s violation of a statutory procedural requirement does not necessarily invalidate the agency’s adverse action.⁵¹ Thus, the facts in this matter warrant the invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, this Board will apply a two-prong analysis: whether Agency’s error caused substantial harm or prejudice to Employee’s rights *and* whether such error significantly affected Agency’s final decision to suspend Employee.”⁵² Further, the Board has noted that this is directory in nature because there is “no consequence for failure to strictly adhere to the regulation.”⁵³ Here, Agency’s action did not cause substantial harm nor did it affect the final decision to remove Employee from service. As a result, I find that Agency’s issuance of the final notice on November 16, 2021, constitutes harmless procedural error and does not warrant reversal of the disciplinary action.

Whether the Penalty was Appropriate

Based on the above-mentioned findings, I find that Agency’s action was taken for cause, and as such, Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency’s penalty, OEA has relied on *Stokes v. District of Columbia*,

Police Department or the D.C. Fire and Emergency Medical Service agencies.” That noted, the Board further held that while the intent for the 1602.3 (a) provision was not “spelled out in the DPM, it is reasonable to believe that the intent was similar to that provided by the D.C. Council when establishing the language of the ninety-day rule.” The Board referenced a D.C. Court of Appeals decision⁴⁶ wherein, the Court found that “the deadline was intended to bring certainty to employees of an adverse action that may otherwise linger indefinitely.” The Board has also held that this provision of the DPM 1602.3(a) like its counterpart in found in D.C. Code §5-1031, are mandatory in nature.

⁴⁷ *Id.* at Pages 9-10.

⁴⁸ *See.* Evidentiary Hearing Transcript at Page 29, 34-35 (Erin Price) and Pages 69-72 (LoJocano). (May 30, 2023).

⁴⁹ OEA Rule 631.3 (2012).

⁵⁰ *Kyle Quamina v. DYRS*, OEA Matter No. 1601-0054-17, *Opinion and Order on Review* (April 5, 2019).

⁵¹ *Kyle Quamina v. DYRS*, OEA Matter No. 1601-0054-17, *Opinion and Order on Review* (April 5, 2019). *Citing to Diaz v. Department of the Air Force*, 63 F.3d 1107 (Fed. Cir. 1995).

⁵² *Id.*

⁵³ *Id.*

502 A.2d. 1006 (D.C. 1985).⁵⁴ According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in the DPM; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, “the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not this Office.”⁵⁵ Therefore when assessing the appropriateness of a 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 exercise.”⁵⁶ Employee avers that Agency failed to appropriately consider the *Douglas* Factor in this matter. Specifically, Employee asserts that the Agency is “entitled to no deference” and that the penalty should be “substantially reduced to the extent any penalty is even appropriate.”⁵⁷ Employee argues that the Deciding Official, Anthony Crispino (Crispino), failed to “conscientiously consider the *Douglas* factors in deciding to terminate [Employee’s] employment.”⁵⁸

Employee contends that the Proposing Official and Deciding Official “reached conflicting conclusions as to *Douglas* Factors 3, 10, 11, and 12,” but that “despite those conflicting conclusions, the Deciding Official fully adopted the evidence, recommendations, rationale and conclusions of the proposing official and the hearing officer.”⁵⁹ Employee further asserts that the Hearing Officer, Jared Seigel issued a report finding preponderant evidence to sustain all four charges against her.⁶⁰ Employee asserts that the Proposing Official, Christopher LoJocano, found *Douglas* Factors 3 (Past Corrective or Adverse Action including Reprimand) and Factor 11 (Mitigating Circumstances) should to be ‘neutral’ whereas the Hearing Officer cited that this should be treated as ‘mitigating.’ LoJocano also treated factor 10 (Potential for Rehabilitation) and Factor 12 (Adequacy of Alternative Actions) as aggravating, whereas the Hearing Officer found that Factor 10 should be mitigating, and Factor 12 should be neutral.⁶¹ Wherefore, Employee asserts that the Deciding Official, Crispino did not appropriately consider the *Douglas* factors when citing that he adopted both the proposing official and hearing officer’s recommendations as presented.⁶² Lastly, Employee asserts that two similarly situated employees only received official reprimands whereas she was terminated.⁶³

OEA has consistently held that in assessing the penalty, OEA does not substitute its judgment, but ensures that managerial discretion has been invoked. Here, the penalty range for all the charges levied against Employee have a range that includes removal for a first occurrence. OEA has held that an Agency’s decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty

⁵⁴ *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). 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).

⁵⁵ See *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*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

⁵⁶ *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁵⁷ Employee’s Closing Arguments at Page 24 (August 7, 2023).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at Page 15.

⁶¹ *Id.*

⁶² *Id.* at Page 16.

⁶³ Employee’s Closing Arguments at Page 16 (August 7, 2023).

constitutes an abuse of discretion.⁶⁴ Here, while the record reflects that the Hearing Officer assigned different categories to certain *Douglas* Factors, I do not find based on the totality of the review of the *Douglas* Factors that Agency's Deciding Official's adoption of both the proposing official and hearing officers recommendation to constitute an abuse of discretion or a lack of due consideration of the *Douglas* factors that warrants reversal. Further, the undersigned notes that while the proposing official and hearing officer assigned different categories, the Hearing Officer's recommendation was a finding that Agency had met its burden of proof for all four (4) charges and that termination was reasonable. This was the recommendation even with the different categorizations assessed to the *Douglas* Factors. Employee asserts that two other employees, J.W. and E.S. received official reprimand. The record clearly reflects and testimony during the Evidentiary Hearing reiterated that J.W. and E.S. were ultimately found not to have been altering any dates, but instead, had just failed to follow the SOP CSSS35 in that they failed to distribute as required. This noted, the undersigned finds that these employees' conduct was substantially different from what Employee was charged with, thus I find no error in the assessment for this *Douglas* factor.⁶⁵

Accordingly, I find that Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.⁶⁶ Chapter 16 §1607 of the District Personnel Manual Table of Illustrative Actions ("TIA")

⁶⁴ *Employee v. Dept. of Human Services*, OEA Matter Nos. 1601-0048-18 and 1601-0015-18R19, Initial Decision, (June 17, 2021) citing: *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 (1981).

⁶⁵ Employee does not outright make a declarative claim of disparate treatment. However, for the sake of the record, the undersigned notes that based on the record, there was no disparate treatment. Specifically, Employee cites those two other employees, J.W. and E.S., were only given official reprimands. OEA has consistently held that a prima facie claim must be met to substantiate a claim of disparate treatment. See *Jordan v. Metropolitan Police Department* OEA. Matter No. 1601-0285-95, *Opinion and Order on Petition for Review (September 29, 1995)*. The record reflects that J.W. and E.S. actions did not include any alteration or manipulation of the distribution dates, but they failed to distribute entirely.

⁶⁶ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). 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) 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.

provides that the appropriate penalty for a first occurrence for False Statements/Records⁶⁷ ranges from Counseling to Removal.⁶⁸ Additionally, the TIA provides that the appropriate penalty for a first occurrence of Failure/Refusal to Follow Instructions is Counseling to Removal; the range for a first occurrence for Neglect of Duty is Counseling to Removal.; and a first occurrence for Performance Deficits is Reassignment/Reduced Grade to Removal.⁶⁹ As a result, I find that removal is an appropriate penalty under the circumstances. Accordingly, I further find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and not a clear error of judgment. I conclude that Agency had appropriate and sufficient cause to terminate Employee from service. As a result, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee from service is **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Senior Administrative Judge

⁶⁷ DPM § 1607.2(b)(4) (2019).

⁶⁸ DPM § 1607.2 (d)(1) (2019).

⁶⁹ DPM § 1607.2 (e); § 1607.2(m) (2019).