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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| EMPLOYEE, |) | OEA Matter No.: 1601-0079-22 |
| Employee |) | |
| |) | |
| v. |) | Date of Issuance: April 14, 2025 |
| |) | |
| DEPARTMENT OF GENERAL |) | |
| SERVICES, |) | |
| Agency |) | ERIC T. ROBINSON, ESQ. |
| |) | SENIOR ADMINISTRATIVE JUDGE |
| _____ |) | |

Michael R. Goldstein, Esq., Employee Representative
C. Vaughn Adams, Esq., and Erin Meadors, Esq., Agency Representatives

INITIAL DECISION

PROCEDURAL HISTORY

Employee filed his Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) on August 25, 2022, contesting the Department of General Services’ (“DGS” or the “Agency”) action of removing him from service. As will be explained in greater detail *supra*, Employee was removed from service due to two separate events that occurred on the same day wherein Employee was charged with violating 6B DCMR § 1607. 2 (e) Neglect of Duty. In a nutshell, Agency asserts that Employee walked off his assigned post (twice) at the District of Columbia National Guard (“DCNG”) Armory leaving his post unmanned. His absence in one instance resulted in a breach of the premises by an unidentified person.

The effective date of Employee’s removal was July 29, 2022. On August 25, 2022, the Office of Employee Appeals sent a letter to DGS requiring that it provide an Answer to Employee’s Petition for Appeal. The deadline for filing its Answer was September 24, 2022. This matter was then assigned to the Undersigned on October 14, 2022. On October 18, 2022, an Order for Statement of Good Cause was sent to the Director of DGS, Keith Anderson. This Order noted that DGS had not filed its Answer in this matter, and it further admonished that it was required to file an Answer. DGS was then required to respond no later than November 2, 2022, with a statement as to why its Answer was late and it was required to submit its Answer. The Agency timely filed

a response where it asserted that neither the DGS' Office of the Director nor its Office of the General Counsel had received OEA's request for an Answer in this matter. It also asked for additional time to file its Answer. Upon review, the Agency's response was deemed adequate.

At the parties' continuing request, citing circumstances relating to either the press of business, substitution of counsel, or the availability of witnesses, the Evidentiary Hearing in this matter was rescheduled on three separate occasions. Ultimately, the Evidentiary Hearing was held on March 13 and 15, 2024. After an administrative delay in receiving the transcript in this matter, the parties were then tasked with providing their written closing arguments in this matter. Both parties have submitted their closing arguments. Upon review of the record, the Undersigned has determined that no further proceedings are necessary. 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 the Agency's adverse action was taken for cause. And,
2. If so, whether the penalty was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for 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 631.2 id. States:

For appeals filed under §604.1, 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 MATERIAL TESTIMONY

Volume I: Wednesday, March 13, 2024

Agency's Case-in-Chief

Michael Wilhelm ("Wilhelm") Transcript (Tr.) pp. 36-99.

Wilhelm worked as an adjuster for USAA. Prior to this position, he served as a Lieutenant and Watch Commander with the D.C. Department of General Services (“Agency”). Wilhelm testified that a watch commander is responsible for the Protective Service Division’s (“PSD”) citywide operations, including mobile operations, the D.C. Army National Guard (“National Guard”), the John Wilson Building, or the Consolidated Forensic Laboratory. Wilhelm further explained that the PSD was an element of Agency that was responsible for coordinating and providing security and law enforcement services to the District government. He stated that the PSD employees are commissioned under the D.C. Municipal Regulations as special police officers who carry weapons and have full arrest authority. Tr. 36-38.

Wilhelm testified that there were two types of PSD officers assigned to the D.C. Armory (“Armory”): career service and term employees. He provided that Career Service officers were utilized and deployed citywide; whereas term officers could only be used to support the National Guard because the funding for the term officers came out of the National Guard’s Department of Defense budget. According to Wilhelm, if there were not enough term officers to cover all of the positions, the Career Service officers would fill the spots at the Armory. Tr. 39-40. Wilhelm attested that the chain of command between himself and the officers at the Armory was that the sergeant would report to him. As watch commander, he was responsible for supervising subordinate personnel on duty through his sergeants. If there was no sergeant on duty, Wilhelm testified that he would be responsible for directly supervising and monitoring subordinates, which could be upwards of twenty officers at any given time. Tr. 41.

Wilhelm testified that he was the watch commander on duty on February 21, 2022. He confirmed that he was covering as the acting watch commander for the day work operations from 5:30 a.m. until 12:00 p.m. Tr.42. Wilhelm identified Joint Exhibit 3, and provided that it was a Memorandum for Record that he wrote to his supervisor, Captain Gregory Godwin (“Godwin”). He explained that he informed Godwin of a critical failure that occurred at the Armory and the preliminary investigation conducted was a request to open a formal investigation into the event. Wilhelm further provided that there was a security breach that occurred at the Armory. He testified that there was a trespasser, later identified as Tanya Gardner (“Gardner”), who was found walking through the secure military area, outside of the Commanding General’s office area of the Armory. Tr. 44-46.

According to Wilhelm, three officers would typically be assigned on duty during the weekend. However, he qualified that on drill weekends and during any activations, additional staffing would be on site to support the National Guard. Wilhelm stated that because the incident in question took place around President’s Day, there was an officer posted at the open gate at Post 9. Tr. 48. He explained that Post 9 was accessible to a secure parking lot which some military vehicles were stored. Wilhelm further declared that Post 2 was located on the Independence Avenue side of the Armory noting that it was primarily used by officers who parked in the garage, including the Commanding General. Further, Wilhelm noted that Post 2 was different from Post 9 due to the automatic gate and card-controlled access, whereas the gate at Post 9 was not automatic and required a guard to manually close it. Tr. 49-50.

Wilhelm identified three specific failures of the PSD on February 21, 2022. He testified that the first failure was that Gate 9 was unattended when Gardner entered the lot of the Armory and walked around the secure military areas of the Armory. Wilhelm stated that the second failure was that the electronic security system that controlled the doors to the Armory from the lot were left unlocked, which allowed Gardner to enter the building. Lastly, he surmised that the third failure was that Gardner was not properly stopped and identified. Tr. 60.

Wilhelm testified that Employee was assigned to Post 9 on February 21, 2022. According to his investigation report, Officer Herbert Lara (“Lara”) observed at 1:10 p.m. that Employee was in civilian clothes. After Wilhelm interviewed other officers who observed Employee, they provided that prior to the end of Employee’s shift, Employee went into the locker room and changed into civilian clothes. According to Wilhelm, Lara instructed Employee to change back into his uniform and Employee complied. Wilhelm opined that Employee displayed gross misconduct by having his post unattended. Tr. 63-69.

On cross examination, Wilhelm confirmed that Officer Michael Boyd (“Boyd”) was the rover on February 21, 2022. According to him, the role of the rover was to acknowledge the request of the officer who needed to be relieved from their post. Wilhelm explained that in order for the officer to leave their post, he or she was required to wait for the rover to physically arrive on scene for the officer to leave. Wilhelm testified that he ultimately covered the post on February 21st because he did not hear anyone announce on the radio that they would cover Post 9. Subsequently, he called on the radio for Boyd to respond to Post 9. Wilhelm admitted to counseling Boyd on the importance of ensuring that he provided breaks to officers. However, he did not speak with Employee about leaving his post because Wilhelm left for the day before Employee came back from his break. Tr. 71-79.

Captain Gregory Godwin (“Godwin”) Transcript (Tr.) pp. 100-192.

Godwin worked as a Captain with the PSD at Agency. He was responsible for all operations for protective services, including managing facilities and mobile operations. Employee was a term employee always stationed at the DC National Guard Armory, and his position was funded pursuant to a Memorandum of Understanding (MOU) between the DC National Guard and the Department of General Services. Tr. 100-103. Godwin stated that he was informed by way of a memorandum from Wilhelm that Employee abandoned his post twice on February 21, 2022. Godwin testified that in turn he directed Lieutenant Craig Leo (“Leo”) to investigate the matters. He attested that the proposed disciplinary charges against Employee after receiving the Investigative Report. Additionally, Godwin provided that on May 2, 2022, a notice of proposed separation was issued to Employee. The notice provided that Employee, charging him with neglect of duty because Employee failed to maintain his post until he was properly relieved. Further, Godwin stated that Employee allowed the building to be compromised when he abandoned his post. Tr. 105-115.

On cross examination, Godwin confirmed that Employee did not notify his supervisor that he would be leaving his post. He also acknowledged that according to page 78-79 of the Joint Exhibit List, Officer Belton (“Belton”) provided in the report that Employee did not abandon his post, noting that Belton’s testimony lamented that Employee requested a 10-7R, which is code for

a restroom break. Godwin lastly testified that Belton did not consider any other forms of discipline within the spectrum of counseling to removal. Tr. 163, 174.

Lieutenant Craig Leo (“Leo”) Transcript (Tr.) pp. 197-270.

Leo worked as a Lieutenant with the PSD at Agency and was assigned to training under the firearms and tactics unit. He stated that prior to serving in the unit, he was a watch commander and was assigned to patrol operations. Leo testified that he was carbon copied via email of a memorandum of a breach in security that occurred at Lot 9 involving Employee. He provided that he was then instructed to investigate and prepare a report detailing the incident. Tr. 202-204. Leo stated that he was unsure as to why Employee was dressed in civilian clothes around 1:10 p.m.; however, Employee was instructed to change back into his uniform and remain at his post. Tr. 206-207. After viewing the video in Joint Exhibit 4, Leo depicted Employee carrying a bookbag walking towards the entrance of the Armory at 1:14 p.m. Additionally, he viewed a civilian driving up to Post 9. Leo testified that the vehicle stopped, but continued to drive and was not identified by a guard. He affirmed that at 1:16 p.m., Gardner walked out towards Post 9 and roamed the facility, and that by 1:30 p.m., Gardner was surrounded by a PSD officer and two National Guard members before being escorted off Lot 9. Leo testified that the video depicted Employee returning to his post at 1:36 p.m. Tr. 216-221.

Leo identified Joint Exhibit 3, as the PD 119 report that Employee provided. According to the report, Employee took his belongings to his vehicle that was parked on the street from Lot 9. Leo attested that when Employee arrived back at his post, he learned that Gardner had gained access to Lot 9 and entered the building. He further provided that Employee recognized Gardner who was walking the area prior to Employee leaving Lot 9 and noted that Employee was not aware that Gardner entered the lot when he turned away. Tr. 207-208. Leo testified that once he concluded the investigation, he determined that Employee abandoned his post twice: once in the morning, and again in the afternoon. Further, he stated that the afternoon abandonment was a breach in security. Leo provided that Employee failed to follow protocol for calling out from a post or waiting for a relief to cover his post by not calling in and asking for Code 10-7. He also explained that Employee violated PSD’s General Orders for time and attendance, mishandling radio assignments, false statements, failure/refusal to follow instructions, neglect of duty, and attendance related offenses. Tr. 229-236.

On cross examination, Leo confirmed that Employee violated the PSD General Order 605.01, Time and Attendance and General Order 406.02. Tr. 254. He reiterated that Employee did not request a Code 10-7. Tr. 267. Lastly, Leo stated that there was no surveillance footage from inside the building during the nine minutes that Gardner was inside. Tr. 264.

Colonel Moses Robinson, II. (“Robinson”) Transcript (Tr.) pp. 274-332.

Robinson worked as the Deputy Chief of Staff for Operations for the Army National Guard. His primary role was developing operations orders and plans, in addition to coordinating training for the for the National Guard. Tr. 274-276. Robinson stated that the National Guard and Agency have a relationship, based on facility security requirements. He explained that he was responsible for physical security and force protection, which included the police or the National Guard force

that was assigned to the facility. Robinson stated that Agency's PSD officers assisted with physical security. He further provided that the officers were stationed at one of four primary posts noting that Agency would typically have security personnel at the two posts on the east and west side of the Armory. Tr. 277-280.

Robinson testified that a security breach occurred on February 21, 2022. He explained that he and Command Sergeant Major Octavia Williamson ("Williamson") questioned Gardner as they were coming down the stairwell of the Joint Operations Center ("JOC") located on the east side of the Armory. According to Robinson, they asked Gardner various questions, including how she entered the facility and Gardner told them that she entered the building through a rear entrance. He testified that he and Williamson determined that Gardner should be brought to the PSD for further investigation. Tr. 286-294. Robinson provided that he subsequently learned that the Maglocks were disabled at the time Gardner entered the building. He explained that the locks were disabled because a unit needed to bring materials into the building, so it was requested through the PSD to have the locks disabled. Robinson noted that if the locks were not disabled and the door was left open for an extended period of time, an alarm would sound on the doors. Tr. 297-298.

On cross examination, Robinson testified that he did not see Gardner as a threat, but he knew after questioning her, Gardner should not have been on their side of the building. He also provided that alarms do not sound off when the building is in a lockdown posture. Robinson stated that the building was locked down so a sweep could be conducted by members of the National Guard to ensure that no other intruder was in the facility. Tr. 309-314.

Volume II: Friday, March 15, 2024

Agency's Case-in-Chief

Command Sergeant Major Octavia Williamson ("Williamson") Transcript (Tr.) pp. 8-70.

Williamson, worked as a Land Component Command 20 Sergeant Major for the National Guard. She oversaw all the Army units assigned to the Armory. However, Williamson explained that she served in a different role on February 21, 2022. She stated that she was the G3 Sergeant Major and the Brigade Command Sergeant Major. Williamson explained that it was a scheduled day off, but a lot of staff were on site because they were preparing for a mission. She provided that on February 21st, the staff was released from the mission in the JOC and when Williamson and other soldiers walked down the steps of the east side of the building, they noticed Gardner coming up the steps. Williamson testified that she and Robinson questioned Gardner. According to Williamson, initially Gardner stated that she was in the military and Williamson asked Gardner how she entered the facility. She attested that Gardner subsequently took her and other soldiers back through the parking lot where she entered. Tr. 8-13. After conducting their due diligence, and notifying the staff of the intrusion, Williamson stated that she found out that soldiers used the door through which Gardner entered to bring supplies in and out; however, none of the soldiers went back to ensure that the door was properly secured. She testified that the Army conducted a subsequent sweep to ensure that the building was secure. Tr. 14-21.

On cross examination, Williamson reiterated that she and Robinson intercepted Gardner while walking down the stairwell on the east side of the Armory. She stated that they were on the first level of the building. Williamson testified that Gardner did not seem intoxicated, but it appeared that she may have had some mental health challenges. She was also unsure if Gardner was part of the shelter that was near the south side of the building. Tr. 29-34. Williamson explained that the incident took place over the span of two hours. She stated that a lockdown occurred after Gardner was escorted off the Armory and the Army conducted a sweep of the facility to ensure there were no other trespassers on site. Tr. 35-41.

Inspector Herbert Lara (“Lara”) Transcript (Tr.) pp. 71-149.

Lara worked with the Homeland Security division of the Federal Protective Service. Prior to this post, he worked as a Special Police Officer for the PSD with Agency and was responsible for access control and services, including screening portals. Tr. 71-75. Lara testified that he worked with Employee, noting that Employee worked the day shift, while he worked the night shift. Lara recalled the incident involving Employee. He clarified that he worked the day shift on February 21, 2022. Lara stated that he was not aware at the time that Gardner had entered the facility because he was stationed at Post 2. Lara also stated that he learned that Gardner was sent back with Officer Lassiter to show how she entered the facility. Tr. 94-98.

Lara testified that he, Wilhelm, and the 1A Command Center, tried to contact Employee multiple times over the radio during the morning shift, but Employee did not respond. According to Lara, she saw Employee talking on the telephone, but did not see a radio on him. He stated that he informed Employee that the 1A Command Center was trying to reach him on the radio. Tr. 101-102.

On cross-examination, Lara attested that Agency provided training at the beginning of his tenure on its leave procedures. Specifically, Lara stated that Agency explained the procedures of taking breaks during their field trainings. He explained that the officers learned that they would have to request taking a break over the radio and wait for the break guard or the rover to relieve the officer. He recalled this training only occurring the first two weeks of his employment. Lara testified that Employee was not in the same training class as he was since Employee was hired with Agency before he began. Tr. 105-109. He confirmed that he always requested breaks using his radio and claimed that he never used text message to request relief because he always had a radio. To his knowledge, he was not aware if other officers text messaged or emailed their break requests. Tr. 111.

Employee’s Case-in-Chief

Employee Transcript (Tr.) pp. 151-228

Employee testified that he worked for Agency since August of 2017, specifically at the Armory starting in October of 2017. Employee was hired as a term employee and stayed in this position throughout his tenure. Employee testified that it was his understanding that his position would be converted to career permanent status after working for four years, which would have occurred in 2022. He stated that a term employee was specifically for the National Guard, and a

Career Service employee was able to move out through different areas of the PSD units. Employee attested that when his status was not changed, he filed a grievance through his union. Tr. 151-154.

Employee stated that his tour of duty was from 6:00 a.m. to 2:00 p.m. and confirmed that he worked this schedule on February 21, 2022. According to Employee, on February 21st, there were only officers stationed at the Armory, noting that there were no lead officers, sergeants, or lieutenants physically stationed. Employee stated that he was stationed alone at Post 9, which was situated outside the D.C. Armory at the east side of the building. Employee stated that when he was stationed at Post 9, he was responsible for verifying correct identifications of drivers and pedestrians. Tr. 156-166.

Employee testified that prior to the incident on February 21, 2022, he had not been suspended, disciplined, or reprimanded. He explained that if he needed a break, he would request it via radio. Employee said that if there was a failure with the radio, officers would use their personal cellphones by either calling or texting. He attested that in practice, it was appropriate for officers to leave their post to call out a code 10-7R, for a restroom break or a short break, or 10-7E, to take a lunch break. Employee explained that if the rover Post 1A failed to respond, officers would notify over the radio that no one was responding, and the officer would take their break and watch their post from the bubble. Tr. 169-174.

Employee testified that at 8:15 a.m. on February 21st, he requested over the radio a 10-7E. When he did not receive a response, Employee claimed that he still proceeded with his break. Employee explained that no one questioned him when he returned from break, and to his knowledge, no one gained access to the east lot through Post 9 while he was gone. He stated that during the afternoon at approximately 1:00 p.m., he took a 10-7R. According to Employee, towards the end of his shift, he wrapped up some of his belongings and took them to his car. Employee confirmed that he was not informed that doors to the Armory were unlocked and testified that had he been notified that the doors were unlocked, he would have notified Post 1A to secure the doors before he left his post. Tr. 182-184.

After reviewing Joint Witness Exhibit 7, Employee recalled receiving a notice of proposed removal around May 2, 2022. He stated that his union representative assisted him with the response to the removal and requested the materials that Godwin used to determine a proposed removal. It was Employee's understanding that he received one charge for neglect of duty, not two charges. Employee stated that he believed that he would receive a suspension without pay, as a consequence of his actions, not termination. He explained that the removal action prevented him from being gainfully employed with other law enforcement bodies. Tr. 185-189.

Employee testified that in the past, the Armory was open to the public for major events such as motorcycle gatherings, car clubs, marathons, and job fairs held for civilians. He stated that there were numerous times that he was on his tour of duty when he would witness civilians wandering around the building. Tr. 191.

On cross examination, Employee affirmed that prior to leaving Post 9, he contacted Post 1A via telephone instead of using the radio because there was a radio failure from earlier in the morning when he tried to call a 10-7E. He testified that he did not receive any formal training;

however, he was verbally spoken to on the procedure to call out on the radio to take a break. Tr. 198. Employee claimed that he has emails providing that the post could be guarded from the bubble. Tr. 211. Employee further maintained that he had his radio on him, but since the radio was down, he called Post 1A to send a rover to relieve him. Tr. 209, 219. He testified that he did not have his civilian clothes on until after 2:00 p.m. when he finished his shift, not at 1:00 p.m. as Agency's witnesses testified. Tr. 210.

Robert Miller ("Miller") Transcript (Tr.) pp. 230-273.

Miller worked as a Special Police Officer with Agency. He was assigned to the National Guard. Miller testified that there was one entrance to get into the Armory on the east side of the building. He explained that first the visitor would have to enter through Lot 9 and use a badge to enter the facility. Miller stated that the east side entrance was controlled by Post 1A and provided that the locks of the building from Post 9 could not be controlled. Tr. 230-238.

Miller testified that if a break was needed, it would have to be requested over the radio. He explained that when he contacted Post 1A for a break, he would call a Code for a 10-7R. Then, the break order rover would respond by notifying the requesting officer that the rover was en route to relieve the officer for their break. However, if the rover did not respond, the officer would contact the Post 1A watch the chamber to take the Code 10-7R. Tr. 240.

Miller stated that Employee was his coworker, and they worked together for approximately four and a half years. He described Employee as a good person, worker, and dependable. Miller testified that his tour of duty began at 2:00 p.m. on February 21, 2022 and that when he arrived at the bubble at 1:20 p.m., he noticed that three officers were in the bubble. Miller provided that he found it unusual because there were not many officers stationed in the bubble at once. He explained that he subsequently changed into his uniform and when he came out from changing, he learned that Employee abandoned his post. Miller provided that he was subsequently notified that Gardner entered the building but was ultimately escorted from the Armory. He testified that the building was not placed in an immediate lockdown procedure as a result of the breach, confirming that if there was a lockdown, he would have been notified by the JOC. Tr. 243-251.

On cross examination, Miller stated that he did not know whether Employee had on civilian clothes before he went back into the restroom because Miller was not at work during the day shift, but was told by Employee of the events that occurred. He then admitted to not having firsthand knowledge of what occurred at the Armory; however, he maintained that he knew something serious occurred for three officers to be stationed in the bubble. He provided that the radio was used to take restroom breaks, lunch breaks, or to leave the post. Tr. 257-259.

On redirect, Miller stated that calling on a break via telephone was not prohibited and that in the past, he would use the phone to call out if his radio died. To his knowledge, there are no Agency policies, procedures, orders or directives that govern taking breaks. Finally, he recalled receiving trainings on the proper break usage using a radio. Tr. 260-263.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

On August 21, 2017, Employee began his career as a Career Services Term Special Police Officer (Grade 6) with Protective Service Division (“PSD”) within the Department of General Services. Employee’s duty station was at the DC Armory. According to letter dated May 2, 2022, Advance Written Notice of a Proposal to Remove Employee for cause from service, the following reasons were cited in support of this action:

1. On Monday, February 21, 2022, while on duty, you were assigned to the District of Columbia National Guard (DCNG) building on post #9. This assignment is a fixed post, and you must remain on the post until you have been relieved of your duties by another officer. At approximately 0815 hours, you left your post open without being relieved for over 20 minutes putting the DCNG at risk of a security breach.

2. On Monday, February 21, 2022, while on duty, you abandoned your post at approximately 1300 hours without being relieved. By doing so, this caused a security breach to the DCNG by an unauthorized person. This breach of security put the entire building and its occupants at risk of danger and caused the DCNG to go into lockdown mode.

Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties..., 6B DCMR § 1607.2 (e.)

According to DGS, the date in question in this matter bore witness to two security errors by Employee that led to at least one well documented security breach. Agency’s witnesses testified in unison that Employee’s lapses left his station vulnerable to a breach and could have resulted in unnecessary dire consequence(s). Employee’s primary assigned duties required him to be exceptionally diligent in providing security as directed all while doing so at his duty station. DGS alleges that Employee failed in this regard on two separate instances on the same date. DGS further asserts that after thoughtful consideration, anything less than removal from service would not be an appropriate penalty given the instant circumstances.

Employee asserts that DGS did not meet its burden of proof in this matter. He further contends that he is the victim of Disparate Treatment considering the severity of the penalty meted out in this matter. Employee further asserts that Agency violated his constitutional due process, was retaliated against for engaging in a protected activity and that DGS committed harmful procedural error.

Agency fervently asserts the following in its Closing Argument:

On February 21, 2022, Petitioner twice abandoned his post without relief during his tour of duty. Because of Petitioner’s actions on this date, the DCNG found itself in a potentially avoidable lockdown situation – a

situation that Petitioner's post for the day was assigned to mitigate by providing security services. This is untenable behavior for a security officer, especially in light of the heightened security posture of the DC National Guard Armory after January 6, 2021. Further, the District is not required to allow multiple instances of post abandonment that amounts to neglect of duty in order to substantiate a termination decision. DPM §1601.6. Still, even were the Agency so required, here Petitioner offered not one but two such instances in one day. And there was a breach of security because of one instance of Petitioner's neglect of duty. The Agency contends that Petitioner cannot serve as a Protective Services Division Special Police Officer when he has shown himself incapable of remaining on his post, which is integral to the job. Remaining on his post until relieved is a requirement of his job as a Special Police Officer, as the job is to secure the physical campus and building to which a SPO is assigned. Were it not necessary, there would be no need to have employed Petitioner or any other officers to the location or any other location that the PSD or its contracted officers secure throughout the District. Petitioner's multiple, same-day abandonments of his post and resultingly permitting an unknown person to wander into the facility through his abandoned post, which culminated in a lockdown of the DC National Guard Armory, constituted neglect of duty in every sense of the phrase.¹

I find that Employee's assertion that DGS did not meet its burden of proof in this matter is without merit. Employee's assertion that Post 9 was not a fixed post is incredulous and was credibly contradicted by Wilhelm, Leo, and Godwin. I find that Employee's testimony in this matter was self-serving and not credible. Accordingly, I have afforded little credence to his "explanations" in this matter. The breadth of testimonial and documentary evidence includes clear video footage of Employee abandoning his post and separate footage of an intruder breaching said post; as well as the clear, credible and consistent testimony of DGS' witnesses delineating what happened, when it happened, and how Employee was thoroughly on notice that he was neglecting his duty by abandoning his post and leaving it unguarded. I note that his last infraction was the most egregious in that it was his express (almost sole) duty to screen incoming persons and provide armed security to the DCNG Armory facility.

Employee's excuse that he followed established protocol when he called out to be relieved of his guard post for a bathroom break is only half-true. He did in fact do as he said, but what he failed to do was wait for his relief to physically arrive at the guard post prior to leaving it. Employee then repeated this behavior again by leaving his assigned post so that he could change out of his uniform in preparation for the end of his tour of duty. This deleterious action allowed an unauthorized person to gain entry to the DCNG Armory grounds and resulted in a lockdown while the person was located and apprehended. I find this error to be egregious and dispositive of the finding that he neglected his duty when he left.

Employee further asserts that he is the victim of disparate treatment in that he was removed

¹ Agency Closing Argument p. 13 (July 2, 2024).

from service for acts that others had a less severe sanction meted out. The Board of the OEA has provided a framework that I will now utilize to ascertain whether a claim of disparate treatment may survive. The OEA Board noted as follows:

An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees. In proving a claim for disparate treatment, an agency must apply practical realism to each disciplinary situation to ensure that employees receive equitable treatment when genuinely similar cases are presented. To establish disparate penalties, an employee must show that there is “enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently. If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.”²

In its closing argument, Agency provides a compelling response to Employee’s disparate treatment allegation by noting that:

...no comparable PSD officer who abandoned their post twice in one shift *and* whose post abandonment resulted in a security breach. Notably, he has presented no case of a PSD officer abandoning their post twice in one shift or any of a PSD officer abandoning their shift twice in one day for any such officer who may have been working a double shift in one day. As such, the alleged misconduct of Officers Moore, Belton, and Lara is not comparable to the misconduct of Petitioner.

I adopt DGS’ comparator assessment as noted above. I find that Employee abandoned his post twice on the same day with one of those abandonments resulting in a breach and a temporary lockdown. I find that none of the comparators come close to this egregious action. Considering that, I find that the comparators provided by Employee are not similarly situated to Employee herein. Therefore, it is unquestionable that the Employee’s disparate treatment allegation must fail.

Agency further notes that the District Personnel Manual (“DPM”) Table of Illustrative Actions³ provides that removal is an acceptable recourse when confronted with one sustained instance. Here, Employee committed two separate acts of this charge. I find that Agency provided credible and compelling testimony from Wilhelm, Godwin, Robinson, Leo, Williamson, and Lara. These witnesses collectively testified that Employee committed the acts as alleged by DGS and that these acts were something that Employee should have known was a violation of Agency policy; and a violation of his training and that he created an unnecessary security risk that thankfully did not result in further calamity. Given the gravity of the conduct and the proper procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to terminate Employee. Although the OEA has a

² Employee v. Department of General Services, OEA Matter No. 1601-0077-15 pp. 11 – 12 (January 30, 2018).

³ DPM § 1607 (e). See also, District Personnel Instruction 16-18 (June 22, 2016).

“marginally greater latitude of review” than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate.⁴ The “primary discretion” in selecting a penalty “has been entrusted to agency management, not to the OEA.”⁵ Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in the individual case. 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 ensure that the Agency conscientiously considered 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.⁶ I find that the evidence did not establish that the penalty removal constituted an abuse of discretion.⁷ I conclude that the Agency has met its burden of proof in this matter and that Employee’s termination should be sustained.

ORDER

Based on the foregoing, it is ORDERED that the Agency’s action of REMOVING EMPLOYEE FROM SERVICE is hereby UPHeld.

FOR THE OFFICE:

/s/ Eric T. Robinson

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

⁴ See, *Douglas v. Veterans Administration*, 5 MSPB 313, 328, 5 M.S.P.R. 280, 301(1981) (Federal Merit Protection Board case); *Raphael* 740 A. 2d 945).

⁵ *Id.*

⁶ *Raphel* 740 A. 2d at 945.

⁷ 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”).