THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	
Employee	)	OEA Matter No. 1601-0044-24
	)	
v.	)	Date of Issuance: May 29, 2026
D.C. DEPARTMENT OF	)	
CORRECTIONS,	)	Michelle R. Harris, Esq.
Agency	)	Senior Administrative Judge
	)	

Employee, *Pro Se*
Madeline Terlap, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 22, 2024, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Corrections' ("Agency" or "DOC") decision to terminate him from his position as Correctional Officer. The effective date of Employee's separation from service was March 22, 2024. Following a letter from OEA dated April 23, 2024, requesting an Agency Answer, the Agency filed its Answer on May 21, 2024. This matter was initially assigned to Administrative Judge Lois Hochauser ("AJ Hochhauser") in or around June 2024. The following is representative of the procedural history in this matter conducted by AJ Hochhauser. On June 20, 2024, AJ Hochhauser issued an Order scheduling a Prehearing Conference for August 16, 2024. Following the Prehearing Conference on August 16, 2024, this matter was referred for mediation via an Order issued by AJ Hochhauser on August 19, 2024. The matter was assigned for mediation, and a mediation/settlement conference was scheduled. However, on October 31, 2024, Agency filed a declination of mediation in this matter. On March 3, 2025, AJ Hochhauser issued an Order scheduling an Evidentiary Hearing in this matter for April 10, 2025. On March 12, 2025, Agency filed a Motion for Summary Disposition. AJ Hochhauser presided over an Evidentiary Hearing held on April 10, 2025. On May 19, 2025, AJ Hochhauser issued an Order requiring the parties to submit written closing arguments by or before June 27, 2025. On June 23, 2025, Agency filed a Consent Motion to Stay Written Closing Arguments.

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

On June 24, 2025, the undersigned Senior Administrative Judge (SAJ") issued an Order notifying the parties that this matter had been reassigned to her. That Order also convened a Status Conference for July 8, 2025. Both parties appeared for the Status Conference as required. During the Conference, I explained that the matter had been reassigned and would be considered *de novo*. As a result, the undersigned would not be relying on the Evidentiary Hearing (or associated testimony/admitted exhibits) held by AJ Hochhauser. During the July 8, 2025, Status Conference, the undersigned heard the parties' oral summary of their positions in this matter. Both parties agreed that Employee had been subject to administrative leave since 2021 in this matter and was subsequently terminated following a failure to "check-in" as designated by the October 28, 2021 letter with instructions to do so. Agency also asserted during this Status Conference that the administrative leave was not at issue before this Office. Employee asserted that he had been wrongly placed on administrative leave and that Agency failed to give due consideration for his reasons for failing to check-in during the period cited in the final notice.

Accordingly, the undersigned determined that briefs were warranted in this matter. On July 8, 2025, I issued an Order requiring the parties to submit written briefs addressing whether Agency had cause for this action, whether it followed all applicable laws rules and regulations and whether the penalty of termination was appropriate. Agency's brief was due by or before August 15, 2025; Employee's brief was due by or before September 15, 2025; and Agency had the option to submit a sur-reply brief by or before September 30, 2025. That Order also scheduled a Status Conference for October 15, 2025. The parties complied with the deadlines for the submissions of their respective briefs. Further, both parties appeared at the October 15, 2025, Status Conference. The undersigned advised the parties that in review of the submissions, an Evidentiary Hearing was not warranted. Upon review of the record and submissions of the parties, I have determined that an Evidentiary Hearing is not warranted. 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 Agency followed all applicable rules, and regulations in its administration of the adverse action; and
3. If so, whether termination was the appropriate penalty 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.

FINDINGS OF FACT, ANAYSIS AND CONCLUSIONS OF LAW

Agency's Position

Agency avers that its action of removing Employee from service was proper due to his failure to follow instructions and unauthorized absence. Agency cites that Employee was hired as a Correctional Officer on April 23, 2018. Agency notes that on October 28, 2021, it sent Employee a letter placing him on administrative leave pending a Department of Justice ("DOJ") investigation. Agency avers that in 2021, it became aware of a DOJ investigation wherein Employee was being investigated for suspected smuggling of contraband into a D.C. Jail.[2] Agency avers that the letter placing Employee on administrative leave indicated the following: "The Administrative Leave letter instructed Employee to contact the Major's Office via telephone "between the hours of 8:30a.m. and 9:00a.m. each day Monday through Friday, during this period of Administrative Leave" to check in for attendance."[3] Agency notes "Employee's adherence to this instruction would-and did for a time-enable DOC to account for Employee's attendance while he was on paid administrative leave."[4] Agency cites that "Employee called into the Major's Office without issues for nearly two years, between October 2021 and September 2023…"[5]

Agency asserts that beginning September 25, 2023, Employee failed to call in as directed. Agency cites that "on October 19, 2023, Deputy Warden Manuel Williams sent Employee a letter (October 19, 2023 Letter) stating that Employee had failed to call the Major's Office from September 25, 2023, through October 19, 2023."[6] This letter also noted that Employee's failure to check in had resulted in an "unauthorized absence status" and that Employee had more than five days of absences. Agency further maintains that the October 19, 2023 Letter required Employee to "submit justification and documentation for his failure to check in within five days, or else adverse action would be initiated against him." Agency asserts that Employee did not respond until November 1, 2023. Agency cites that Employee responded via email on November 1, 2023, and explained that he failed to call because of the death of his aunt and his involvement in an automobile accident. Employee attached a disability form, dated October 25, 2023, from a doctor's office that stated Employee was disabled and unable to perform work duties from October 8, 2023, to October 18, 2023, due to the accident.[7]

Agency further cites that on December 1, 2023, it issued an Advance Written Notice of Proposed Removal to Employee. That Notice charged Employee with Failure/Refusal to Follow Instructions[8] and Attendance Related Offenses for being AWOL for more than five days between September 25, 2023, through October 19, 2023.[9] Agency also avers that it included copy of the administrative leave letter with the advance notice, as well as the 1199-A Notice and timesheets

[2] Agency's Brief at Page 1 (August 15, 2025).
[3] *Id*. at 2.
[4] *Id.*
[5] *Id.* Agency cites that the DOJ investigation was ongoing.
[6] *Id*. at Page 2.
[7] *Id.* at Page 3.
[8] 6-B DCMR §1607.2(d)(2).
[9] 6-B DCMR §1607.2(f).

which reflected Employee's absences. Agency contends that its initial Notice erroneously cited that Employee was absent through November 3, 2023, but that it corrected its error in the Final Notice. Additionally, Agency notes that "although October 9, 2023, was a holiday, employees do not receive holiday pay while in administrative leave status."[10] Agency maintains that it followed all appropriate and applicable regulations in its administration of the termination action against Employee. Agency asserts that it was "permitted to place Employee on indefinite paid administrative leave pending the DOJ investigation."[11] Agency further avers that it was "appropriate for Agency to place [Employee] on paid administrative leave…the DOJ investigation could have led to a corrective or adverse action against Employee if the DOJ found that Employee was involved with smuggling contraband." Agency cites that there are "no laws or regulations [that] impose a time limit on the place[ment] of paid administrative leave [while] awaiting the conclusion of a pending investigation."[12] Further, Agency argues that its requirement that Employee call and check in daily to record his attendance was also at their discretion while Employee was on paid administrative leave. Agency maintains that there are no provisions in the CMPA to preclude them from this requirement. Agency further avers that "even if Employee were challenging his placement on paid administrative leave beginning in October 2021, or the call requirement, such challenges would undoubtedly be untimely and outside of OEA's jurisdiction."[13]

Agency contends that it had cause to discipline Employee for his failure to call the Major's Office from September 25, 2023, to October 19, 2023. Agency cites that Employee admits to his failure, but claimed his failures were excusable due to the death of his aunt and his being involved in a car accident. Agency asserts that Employee did not provide any evidence to the Hearing Officer that would excuse him from not calling as required during that time frame. Further, Agency asserts that despite Employee's claims that his car accident rendered him disabled, his medical records do not reflect that. Agency also avers that Employee's "evidence of his car accident" does not meet the "standard under *Wade v. Department of Behavioral Health*."[14] Agency contends that Employee's accident occurred on October 8, 2023, and the "disability form dated October 24, 2023, noted that Employee was disabled and unable to perform work duties from October 8, 2023, to October 18, 2023." Agency argues that this form "does not constitute clear and complete medical evidence establishing that Employee was so "medically incapacitated" that he was unable to perform his singular work duty of calling the Major's Office."[15] Agency avers that the form does not indicate any incapacity that would prevent making a phone call. Agency also asserts that "even if Employee's failure to call from October 9-18, 2023, could be excused because of his purported disability, Employee still failed to call and was AWOL on October 19, 2023, because the disability form did not excuse Employee from his work duties on that day."[16]

Agency maintains that Employee was AWOL for nineteen (19) days, and that "even if eight of Employee's charged AWOL days were medically excusable, that would still leave eleven days when Employee failed to call, justifying discipline for more than five days of AWOL…"[17] Agency avers that the penalty of termination was in the allowable range and was appropriate in this

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[10] *Id.* at Page 4. See footnotes 7 and 8.
[11] *Id*. at Page 5. Citing to Cf. Grant v District of Columbia, 908 A.2d. 1173, 1178 (D.C. 2006).
[12] *Id*. at Page 6.
[13] *Id*.
[14] *Id*. at Page 7. See also Agency' Sur Reply Brief at Page 4. Agency cites to *Wade v. Department of Behavioral Health*, OEA Matter No. 1601-0067-15, Opinion and Order on Review (December 18, 2018.)
[15] *Id*. at Page 8.
[16] *Id.*
[17] *Id.* at Pages 8 -9.

circumstance. Further, Agency asserts that Employee has not provided any evidence to the contrary that the penalty was unreasonable.[18] Agency notes that Employee does not provide any evidence that "Agency's *Douglas* factor analysis was flawed beyond his own conclusory or incorrect allegations."[19] Agency asserts that its *Douglas* factors were considered appropriately. For past disciplinary considerations, it noted in its final decision dated March 14, 2024, that Employee did not have discipline in the past three years, so it made that factor neutral. Agency notes that the discipline from September 2020 was considered in the December 1, 2023 Notice, but it had no impact on the final decision.[20] Agency also asserts that for the past work record factor, "Employee states that Agency was incorrect that he had spent the majority of his five-year tenure (i.e. more than two and half years) with DOC on administrative leave." Agency avers that "although Employee is correct that by December 1, 2023, the date of the Notice, Employee had only spent about two years out of his five on administrative leave, the difference of less than half a year is immaterial."[21] Agency contends that it found this factor neural and "it is not unreasonable to assume Agency still would have found factor four neutral if it had considered that Employee had only spent two years – rather than two and a half years – on administrative leave."[22]

Agency also disputes Employee's contention that mitigating factors were ignored. Agency argues that "it is true that the Notice did not mention any mitigating circumstances…however because the October 19, 2023 letter was not a notice of proposed action pursuant to 6B DCMR § 1618, Agency was not required to provide Employee with an opportunity to respond nor was Agency required to consider any response by Employee prior to issuing the Notice."[23] As such, Agency avers that it is "ultimately immaterial that the [November 1, 2023] email was not considered in the Notice because it was considered in the Final decision and found to be insufficient to mitigate Employee's misconduct." For these reasons, Agency avers that its action of terminating Employee from service should be upheld.

Employee's Position

Employee asserts that Agency has failed to show cause for discipline. Employee contends that Agency failed to consider mitigating circumstances and has a long history of discriminatory and retaliatory treatment. Employee cites that on October 28, 2021, he was placed on paid administrative leave pending a DOJ investigation. Employee avers that that investigation "yielded no charges." Employee further asserts that for two years, he complied and made the daily calls while he was on paid administrative leave. He also claims that he faced discrimination. He cites that during the time he was on administrative leave, Agency withheld his pay for over a month, even though he was in compliance with the requirement to call in. He further notes that there was a prior time when Agency erroneously charged him with AWOL and that it was only resolved when his union became involved.

Employee also asserts that his initial placement on administrative leave on October 28, 2021, was mishandled. He cites that he was "accosted by four investigators and three K9 officers, stripped of gear (vest, keys, phone, badge, pepper spray, ID), denied explanation/union rep, and subjected to K9 sniffs/searches (nothing found)." Employee further asserts that he was "escorted out, followed to a car and vehicle searched without warrant." Employee contends this violated D.C. Code §1.616.54,

[18] Agency Sur-Reply at Page 5.
[19] *Id*. at Page 6.
[20] Agency Sur-Reply at 6.
[21] *Id.*
[22] *Id.*
[23] *Id.* at Page 7.

which requires "5-day initial AL and rights…"[24] Employee avers that the calls lapsed from September 25, 2023, to October 6, 2023, due to the death of his aunt. He further asserts that the failure to call from October 8, 2023, through October 18, 2023, were due to his being involved in a car accident. Employee also argues that the Agency's decision "ignore[d] mitigation and misstated [administrative leave] as "majority" of tenure (-2.5/6years)." Employee maintains that he was hired on April 23, 2018, and was placed on administrative leave on October 28, 2021, which meant he had 3.5 years of active duty prior to the leave status. He also asserts that he was terminated on March 22, 2024, which was after the two and a half (2.5) years of Administrative Leave. Employee contends that "this factual error undermines the analysis (neutral length of service) and suggests bad faith."[25]

Employee also argues that "while [administrative leave] is permissible (6-B DCMR §1266.4) …administration must be equitable."[26] Employee avers that withholding his pay, biased discipline and the incident on October 28, 2021, are all evidence of violations of the CMPA, labor rights and are forms of retaliation. Employee also avers that Agency had no cause because his accident meets the standards under the *Wade* decision.[27] He also avers that termination is excessive and exceeds the parameters set forth in *Stokes v. District of Columbia*. Employee contends that a lesser penalty was warranted and for these reasons the termination should be reversed.

ANALYSIS[28]

This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1,[29] this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

(a) A performance rating resulting in removal;
(b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
(c) A reduction-in-force; or
(d) A placement on enforced leave for ten (10) days or more.

OEA Rule § 631.2, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states that "[t]he employee shall have the burden of proof as to issues of jurisdiction..." Further, pursuant to this OEA Rule 631.1, the burden of proof is by a preponderance of the evidence which is defined as "[t]hat 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

[24] Employee's Brief (September 15, 2025).
[25] *Id*.
[26] *Id*. citing to *Grant v District of Columbia*, 908 A.2d 1173 (D.C. 2006). And D.C. Code §1-616.51.
[27] *Id*. citing to *Wade v. Dept. of Behavioral Health*, OEA No. 1601-0067-15 (2018).
[28] 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").
[29] *See also*, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

true than untrue." This Office has no authority to review issues beyond its jurisdiction.[30] Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[31]

Whether Agency Had Cause/Followed All Applicable Laws/Rules/Regulations

In the instant matter, Employee's termination was predicted by two (2) charges. First, Employee was charged with Failure to Follow Instructions/Deliberate Malicious Refusal under DPM §1607.2(d)(2). Employee was also charged with unauthorized absence under DPM §1607.2(f)(4). Both charges were assessed while Employee was on paid administrative leave, which began in 2021 pursuant to what Agency asserts was a Department of Justice ("DOJ") investigation. Agency avers that its placement of Employee on administrative leave for over two (2) years is not at issue before OEA and not in this tribunal's jurisdiction. The undersigned would agree to the extent that Employee's Petition for Appeal addresses the termination predicated by the two aforementioned charges. However, it should be noted that this is a novel matter before this Office wherein an Employee has been on paid administrative leave for an extended period and was also subsequently terminated for AWOL while on a paid leave status. This stated, the undersigned would agree that the administrative leave itself is not in this Office's jurisdiction, but that charges for which Employee's termination were levied do have a causal connection to the administrative leave action itself. To that extent, the undersigned finds that Agency's use of paid administrative leave does not align with any of the District personnel policies and complicates its administration of the instant termination action it levied against Employee.

Failure/Refusal to Follow Instructions (Deliberate/Malicious)

OEA has held that a failure/refusal to follow instructions includes a deliberate or malicious refusal to comply with the rules, regulations, written procedures, or proper supervisor instructions.[32] DPM Section 1607(d)(2) includes an element of intent: the evidence must support a finding of *deliberate or malicious refusal to comply….* (Emphasis Added). In accordance with DPM §1607.2(d)(2), OEA has consistently held that the evidence presented must exhibit a deliberate or malicious act to support a charge under this DPM section.[33] Here, Agency avers that Employee failed to call in to the Major's Office Monday through Friday between 8:30am and 9:00am beginning on September 25, 2023, through October 19, 2023, as instructed. Agency asserts that from October 2021 until the September 25, 2023, date, Employee had complied with making the calls to the Major's Office each day. Agency also asserts that the Deputy Williams sent a letter to Employee dated October 19, 2023, citing to Employee's absences and noted that Employee needed to submit justification within five (5) days regarding his failure to comply, or he would face disciplinary action. Agency avers that Employee did not respond until November 1, 2023, and at that time stated that he had failed to call due to the death of his aunt and because he had been involved in an automobile accident. Agency also cited that Employee included a disability form which cited to a doctor's note that Employee was unable to perform his work duties from October 8, 2023, through October 18, 2023, due to the accident. Agency ultimately found that neither of these circumstances justified

[30] *See. Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, Opinion and Order on Petition for Review (September 30, 1992).
[31] *See. Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, Opinion and Order on Petition for Review (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, Opinion and Order on Petition for Review (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[32] *Employee v. D.C. Fire and Emergency Medical Services* Department, OEA Matter No. 1601-0056-22 (June 22, 22023).
[33] *Employee v DC Department of Transportation*, OEA Matter No. 1601-0069-23 (September 18, 2024).

Employee's failure to call. Employee avers that he was grief stricken given that he was very close to the aunt who had passed and that he suffered injuries as a result of being in an automobile accident. Employee also asserts that he had been compliant with the requirements since October 2021, even at times where he did not receive his pay.

As was previously noted, Agency charged Employee with a deliberate/malicious failure to follow instructions. While Employee admits that he failed to call as required, he cited that the loss of his family member and personal injuries from an automobile accident that he faced during the time period were the cause of his inability to contact. The undersigned finds that the evidence presented by Agency fails to exhibit malicious or deliberate refusal of Employee to call in as required. There was nothing in any of Employee's responses to suggest that he acted in a deliberate or malicious manner, rather, he was dealing with issues that caused a lapse in his ability to do what was required. Further, the fact that Employee complied with the directive to call in for two (2) years while he was on administrative leave suggests that his failure to call in during this time period was not out of malice or deliberate in nature. As a result, I find that Agency has not met the burden of proof regarding this charge and that it cannot be sustained.

Unauthorized Absence (AWOL)

As was previously noted, Employee was placed on paid administrative leave in October 2021 for an investigation that Agency asserts was conducted by the Department of Justice. During the period of administrative leave and pursuant to a letter issued on October 28, 2021, Employee was to call Agency Monday through Friday between 8:30am and 9:00am. The record is clear that from October 2021 through September 25, 2023, Employee complied with this directive. Agency avers that beginning September 25, 2023, and through October 19, 2023, Employee failed to call and report in as required. Agency cites that "on October 19, 2023, Deputy Warden Manuel Williams sent Employee a letter (October 19th Letter) stating that Employee had failed to call the Major's Office from September 25, 2023, through October 19, 2023."[34] This letter also noted that Employee's failure to check in had resulted in an "unauthorized absence status" and that Employee had more than five days of absences. Agency further maintains that the October 19, 2023, letter required Employee to respond, and "submit justification and documentation for his failure to check in within five days, or else adverse action would be initiated against him." Agency asserts that Employee failed to response to the October 19, 2023 letter until November 1, 2023.

Agency further noted that Employee responded via email and "explained that he failed to call because of the loss of his aunt and an automobile accident…Employee attached a disability form, dated October 25, 2023, form a doctor's office that stated Employee was disabled and unable to perform work duties from October 8, 2023 to October 18, 2023, due to the accident."[35] Agency asserts that Employee's reasons for his failure to call were inexcusable. Further, Agency avers that Employee's injury claims from his car accident do not meet a standard that would preclude him from calling in as required. Employee maintains that due to the death in his family and his involvement in a car accident that he failed to call in as required. He asserts that Agency's actions failed to follow all applicable laws, rules and regulations and that there was no cause for the action. Agency maintains that it followed the appropriate actions for its use of Administrative Leave, AWOL and its decision to terminate Employee.

[34] *Id*. at Page 2.
[35] *Id*. at Page 3.

As was previously noted, the issue of AWOL while in a paid leave status is a novel issue before this tribunal. The District Personnel Manual (DPM) defines administrative leave in the following ways: DPM §1299.1 "Administrative leave – an *excused absence from duty* without loss of pay and without charge to annual, sick leave, or compensatory time." (Emphasis added). Similarly, DPM §1699.1 defines administrative leave as "an *excused absence with full pay* and benefits that is not charged to annual leave or sick leave."(Emphasis added). Further, pursuant to DPM § 1268 Absence without Leave ("AWOL"). AWOL is defined as "an *absence from duty* that was not authorized or approved, or for which a leave request has been denied, shall be charged on the leave record as "absence without leave (AWOL)". (Emphasis added). The AWOL action may be taken whether or not the employee has leave to his or credit."[36] Section 1268.4 also notes that "if it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay as appropriate."[37] Agency asserts that it was "permitted to place Employee on indefinite paid administrative leave pending the DOJ investigation."[38] Agency further avers that it was "appropriate for Agency to place [Employee] on paid administrative leave [because the] DOJ investigation could have led to a corrective or adverse action against Employee if the DOJ found that Employee was involved with smuggling contraband." Agency asserts that there are "no laws or regulations [that] impose a time limit on the place of paid administrative leave awaiting the conclusion of a pending investigation."[39] DPM§ 1266.1 provides that "administrative leave may be granted by an agency head, at his or her discretion *for up to ten (10) consecutive workdays*." (Emphasis added). Section 1266.2 provides that administrative leave *in excess ten consecutive days "may only be granted with the approval of the personnel authority*." (Emphasis added). The undersigned would note that the record is void of any such approval. As was previously cited, the undersigned agrees that the use of administrative leave is not before this tribunal. This noted, the underlying cause of action for AWOL has been charged while Employee was in this leave status. This stated, the undersigned would again note that while Agency's use of administrative leave in this matter does not align with DPM rules and regulations, this decision is relegated to causes of action itself and whether Agency followed the applicable laws rules and regulations related to the charges of Failure to Follow Instructions (Deliberate/Malicious) and AWOL.

In the instant matter, Agency cites that the relevant period of Employee's AWOL dated from September 25, 2023, through October 19, 2023. On October 19, 2023 (October 19th Letter), a letter from Deputy Williams notified Employee that he had failed to report in as required in the October 28, 2021 administrative leave letter.[40] The October 19th Letter also included a form DCSF 1199-A which noted Employee's absences from September 25, 2023, to October 6, 2023. This form does not include any information about attempts by Agency to contact Employee. Further, the record is also void of whether Agency personnel contacted Employee at any time prior to its issuance of the October 19th Letter. Here, Agency avers that Employee's response email on November 1, 2023, came after the five-day deadline prescribed in the October 19th letter. Further, Agency avers that the reasons provided by Employee for absence were not excusable. In review of the disability/injury

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[36] DPM §1268.1. (2019)
[37] The undersigned finds Agency's use of AWOL while Employee was effectively in a non-duty status does not appear to follow any District personnel regulations or laws. Even though there was a requirement for Employee to call in while on administrative leave, the classification of the administrative leave itself is a non-duty status. Thus, it begs the questions as to how an employee can be AWOL when they are not technically on duty. The undersigned finds that Agency could have operationally employed other options pursuant to the DPM.
[38] *Id.* at Page 5. Citing to Cf. Grant v District of Columbia, 908 A.2d. 1173, 1178 (D.C. 2006).
[39] *Id.* at Page 6.
[40] Agency Brief at Attachment 4.

claim following a car accident, Agency avers the medical documentation provided by Employee does not meet the *Wade* standard.[41] Agency further asserts that even if this tribunal found that the absence due to the car accident were found to be excusable, that there would still be 11 days of unauthorized absence.

In the instant matter, I find that Agency's review of Employee's medical claims is dismissive without any further exploration. Agency did not provide any evidence of alternative *medical* review or examination but simply determined that the letter provided by Employee's physician was insufficient to support claims that Employee was unable to call in as required. In review of the record, the undersigned finds that Employee provided medical documentation, including doctor's visits and physical therapy consultations regarding his injuries. Further, Employee also provided pictures of the accident, which exhibited significant damage to his vehicle to which injuries would be likely. Consequently, I find that Agency failed to give due consideration to the medical documentation provided by Employee and as such did not do an appropriate review to determine whether that time should have been applied retroactively as sick leave. As a result, I find that the time from October 8, 2023, through October 18, 2023, should have been applied as sick leave and not AWOL.

Appropriateness of Penalty/Douglas Factors

Agency avers that even if this tribunal finds that the dates from October 8, 2023, through October 18, 2023, are determined to be justifiable, that the period from September 25, 2023, though October 6, 2023, and October 19, 2023, still reflect AWOL and as a result, its penalty of termination should be sustained. Agency further avers that it considered all the relevant *Douglas*[42] factors in its administration of the instant action. Employee avers that Agency's *Douglas* factor considerations were flawed, namely with Factors 3, 4, 5, and 11.

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[41] *Wade v. Dept. of Behavioral Health*, OEA No. 1601-0067-15 (2018).

[42] *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.

OEA has consistently held that "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[43] 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 exercised." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[44] Further, the OEA Board has held that an Agency's penalty will not be reversed *unless it fails to consider relevant factors, or the imposed penalty constitutes an abuse of discretion*. (Emphasis added).

In the instant matter, I find that Agency failed to review any mitigating circumstances in accordance with *Douglas* Factor 11- "mitigating circumstances." While Agency concedes that it did not make those considerations, it argues that its October 19th Letter was "not a notice of proposed action." Agency further asserts that Employee's email, while not considered in the Notice, was "ultimately immaterial because it was considered in the Final Decision and found to be insufficient to mitigate Employee's conduct." In this matter, Employee had been on administrative leave for two (2) years. From October 28, 2021, through September 25, 2023, Employee complied with the directions in the October 28th Letter which required him to call into the major's office between 8:30am and 9:00am Monday through Friday. As was previously noted, the use of administrative leave for this length of time, coupled with the requirement to call in pending an investigation is an occurrence that has not been previously reviewed by this tribunal. It should be noted that even when disciplinary action is pending under DPM §1619, any period of administrative leave over 90 days must receive written approval by the personnel authority and is only approved in 30-day increments. Further, in disciplinary actions, the DPM requires that the Agency must be "diligently pursuing a final decision and the delay is due to circumstances beyond the agency's control."[45] If that time frame is exhausted, the employee is to return to full duty pending a final agency action. Here, Employee was on administrative leave for two (2) years *without* any final pending disciplinary action, but pursuant to an ongoing investigation.[46] (Emphasis added) For those two years, Employee complied with the directives to call every day. Consequently, the undersigned finds that Employee's longstanding compliance with these directives should have been considered as a mitigating factor in this matter.

Thus, in further consideration of *Douglas* Factor 11 "mitigating circumstances" the undersigned finds that Agency failed to consider Employee's two (2) years of administrative leave

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[43] *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).

[44] *Love* also provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (Citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

[45] DPM §1619. (2019)

[46] The record is void of when (or if) this investigation was ever resolved or what the result of the investigation was. This noted, the administrative leave itself is not before this tribunal.

and the unusual tensions that would cause for any employee in consideration of the uncertainty of whether they would retain their job or otherwise. This stated, the undersigned would note that the issue of assessing AWOL while Employee was in an Administrative Leave Status, is also unusual.[47] Further, the undersigned would also note that the record does not reflect that Agency documented any attempts of outreach to Employee prior to the October 19, 2023 Letter. Thus, I find that Agency failed to give due weight to Employee's explanation that he was dealing with a death in the family and as such, was unable to call in as required. Employee admits his shortcoming in this regard, and in review of DPM §1268, the undersigned finds that Agency could have exercised discretion in this manner and assigned the time frame from September 25, 2023, to October 6, 2023, as leave without pay (LWOP). Thus, this leaves one (1) workday for which Employee was AWOL. The Table of Illustrative Actions cites that the penalty range for a first occurrence of an unauthorized absence of one (1) workday or more, but less than five (5) workdays, is counseling to 3-day suspension and the range for subsequent occurrences is 14-day suspension to removal. In review of the penalty range, I find that Agency's penalty of termination in this instance was excessive.

The OEA Board in *Edward Morgan v. Fire and Emergency Medical Services Department*,[48] noted that:

> "Additionally, the D.C. Court of Appeals has consistently relied on the Table of Penalties when determining the appropriateness of an agency's penalty.[49] Furthermore, the OEA Board held in *Richard Hairston v. Department of Corrections,* OEA Matter No. 1601-0307-10, *Opinion and Order on Petition for Review* (September 16, 2014)(citing *Power v. United States*, 531 F.2d 505, 507-508, 209 Ct.Cl. 126 (1976) (citing *Daub v. United States*, 292 F.2d 895, 154 Ct.Cl. 434 (1961) and *Cuiffo v. United States*, 137 F.Supp. 944, 950, 131 Ct.Cl. 60, 68 (1955)), that there are two scenarios in which courts will not uphold the punishment imposed by the agency because of an invalid penalty. The first is where the sanction exceeds the range of permissible punishment specified by statute or regulation. The second scenario is *where a court has determined that the discipline is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency*."[50] (Emphasis added).

The OEA Board found that the agency in *Edward Morgan v. Fire and Emergency Medical Services Department* abused its discretion when it terminated Morgan, although the maximum penalty for the first offense was a fifteen (15) day suspension. The OEA Board stated that "As the AJ held, Agency's penalty of removal exceeds the range of penalty outlined for the first offense of incompetence." Here, Employee complied with the instructions from October 28, 2021, through September 25, 2023, which comprises roughly 471 workdays. As was previously noted, I find that Employee's absence from October 8, 2023, through October 18, 2023, was proven to be justifiable due to medical issues/illness as reflected in the documentation submitted. Thus, Employee's AWOL

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[47] As was previously cited, administrative leave as defined by the DPM is an "excused absence from duty." AWOL is defined as "an absence from duty." Wherefore, the undersigned finds that Agency should have exercised more consideration in examining the assessment of AWOL in this circumstance given the unique status of Employee's employment given the administrative leave.
[48] OEA Matter No. 1601-0039-13, *Opinion and Order on Petition for Review* (September 13, 2016).
[49] Citing *Department of Public Works v. Colbert,* 874 A.2d 353 (D.C. 2005); *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985); *Brown v. Watts,* 993 A.2d 529 (D.C. 2010); *Hutchinson v. D.C. Office of Employee Appeals,* 710 A.2d 227 (D.C. 1998); and *District of Columbia v. Davis,* 685 A.2d 389 (D.C. 1996).
[50] The OEA Board in *Edward Morgan v. Fire and Emergency Medical Services Department, supra*, noted that although the decisions issued in federal circuit courts are not binding on the OEA Board, it found that they offered sound guidance regarding Table of Penalties.

rests on the time from September 25, 2023, through October 6, 2023, and October 19, 2023. As previously noted, I find that Agency failed to appropriately follow the AWOL procedures as noted in DPM §1268 in that it did not consider the ability to retroactively applying the September 25, 2023 – October 6, 2023, dates to LWOP given Employee's documentation regarding the death in the family.

OEA has held that although an agency may present sufficient evidence to establish that its selection of the imposed penalty was not arbitrary or capricious, a penalty of termination can be considered excessive if the record does not support an "evidentiary basis" for removal.[51] In this matter, I find that Agency failed to meet its burden to sustain the charge that Employee deliberately and maliciously failed to follow instructions. Likewise, I find that Agency exceeded its managerial discretion in its failure to consider the mitigating circumstances pursuant to *Douglas* Factor 11 and failed to consider alternative leave categories as denoted in DPM §1268 regarding the AWOL charge. The undersigned would further note that the record is also void of any information to suggest that Agency did any outreach to Employee prior to October 19, 2023, which further exhibits the unusual circumstances of the two-year administrative leave status Employee was subject to at the time of Agency's assessment of AWOL against him. For these reasons, I find that Agency exceeded the exercise of its managerial discretion and failed to properly consider the relevant *Douglas* factors. I further find that the penalty of removal was harsh and extraordinarily disproportionate given the totality of the circumstances. Thus, I conclude that Agency failed to appropriately follow all applicable laws, rules and regulations and its chosen penalty of termination exceeded managerial discretion. Consequently, I find that Agency's penalty of terminating Employee from service cannot be sustained.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**.
2. Agency shall reimburse Employee all back pay and benefits lost as a result of the termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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

[51] *Jones v. D.C. Department of Schools Transportation*, OEA Matter No. 1601-0077-09 (January 7, 2010).