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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE, ¹)	OEA Matter No. 1601-0008-24
)	
v.)	Date of Issuance: September 18, 2024
)	
OFFICE OF CONTRACTING)	
AND PROCUREMENT,)	MONICA DOHNJI, Esq.
Agency)	Senior Administrative Judge
)	
Sandra A. Maddox Britt, Esq., Employee Representative		
Timothy McGarry, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 9, 2023, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Office of Contracting and Procurement’s (“OCP” or “Agency”) decision to summarily remove Employee from her position as a Contract Specialist, effective October 10, 2023. Employee was charged with False Statements/Record: Deliberate falsification of a material item on an application for employment or other personal history record by omission or by making a false entry.² On November 13, 2023, OEA issued a Request for Agency’s Answer to Employee’s Petition for Appeal. Agency submitted its Answer to Employee’s Petition for Appeal on December 13, 2023.

This matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on December 14, 2023. Thereafter, the undersigned issued an Order on December 14, 2023, convening a Prehearing Conference for January 18, 2024. On January 5, 2024, Employee’s representative filed a Consent Motion to Reschedule Status/Prehearing Conference. This Motion was granted in an Order dated January 17, 2024, and the Status/Prehearing Conference rescheduled for February 27, 2024. Both parties attended the scheduled conference. Subsequently, on February 27, 2024, the undersigned issued an Order scheduling a Prehearing Conference for March 26, 2024, with Prehearing Statements due by March 19, 2024. Both

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

² This cause of action is found in 6-B DCMR §1605.4(b)(1).

parties submitted their Prehearing Statements and were present for the March 26, 2024, Prehearing Conference. Upon review of the record and considering the parties' arguments as presented in their Prehearing Statements and the Prehearing Conference, I determined that there were material facts in dispute, and as such, on March 26, 2024, I issued an Order scheduling an Evidentiary Hearing for June 4, 2024. Both parties were present for the June 4, 2024, Evidentiary Hearing. However, because a material witness was not available to testify during the June 4, 2024, Evidentiary Hearing, the record was left open, and a second Evidentiary Hearing date was scheduled for July 9, 2024. This witness appeared and testified during the July 9, 2024, Evidentiary Hearing. Upon receipt of the Evidentiary Hearing transcripts, on July 29, 2024, the undersigned issued an Order requiring the parties to submit written closing arguments by August 29, 2024. Both parties have filed their respective closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Employee's actions constituted cause for adverse action; and
- 2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

SUMMARY OF MATERIAL TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Agency's Case in Chief

Andrea Johnson ("Ms. Johnson") Tr. Vol. I. pgs. 24- 68

Ms. Johnson confirmed that she worked for Agency in June and July 2023, as a Human Resources ("HR") Manager and Family Medical Leave Act ("FMLA") coordinator. Her responsibilities included administering FMLA benefits in accordance with federal law and district government law. Ms. Johnson affirmed she knew Employee as an OCP employee in June and July 2023. Tr. Vol. I. pg. 25. Ms. Johnson left Agency in August 2023. Tr. Vol. I. pg. 33.

Ms. Johnson averred that Employee submitted a FMLA certification form signed by Doctor Shelley Williams ("Dr. Williams") on July 3, 2023. She stated that the purpose of the form was to get leave for the time Employee was out of the office. Ms. Johnson testified that the form listed inconsistent dates, and she requested multiple times that Employee take the forms back to the doctor to get clarity from the doctor on the specific dates on the form. Tr. Vol. I. pgs. 26 – 27. Referencing Agency's Exhibit 4, Ms. Johnson noted that she was familiar with the form, and she confirmed that the form was submitted to Agency on July 12, 2023. She affirmed that

the July 12, 2023, FMLA certification form was also signed by Dr. Williams, and it sought restored leave. Tr. Vol. I. pgs. 28 – 29.

Ms. Johnson asserted that she contacted Dr. Williams after Employee submitted the July 12, 2023, FMLA certification form because similar to the July 3, 2023, form, the dates were incorrect based on the year that was listed therein. She stated that the year listed on the forms went back to 2020, versus being 2023, and she needed to get clarification on the specific dates. Tr. Vol. I. pgs. 29-30. Ms. Johnson testified that she called Dr. Williams and "... I got the receptionist, and I asked the receptionist -- I actually introduced myself, said who I was, and shared that I needed to speak with Dr. Williams regarding the information that was listed on the form because I wanted to get clarity on the dates. Because time was of the essence, and I wanted to complete the form for [Employee], to see if information or FMLA needed to be provided." When asked if Dr. Williams indicated that there were dates included on the FMLA certification that she did not see Employee, Ms. Johnson responded that "That's correct. [Dr. Williams] mentioned that [Employee] came into the office, and presented the forms, and they were already completed, and she did not take a look at those at all but authored her signature on the forms." Tr. Vol. I. pg. 30.

Ms. Johnson testified that during her call with Dr. Williams, Dr. Williams stated that she had not seen Employee and that she could not validate the information provided. Ms. Johnson asserted that Dr. Williams "felt as though it was erroneous because with the condition that was listed, the appearance of [Employee] coming into the office did not indicate or wasn't consistent with the sickness that had been listed on the forms. And because of that, she felt as though it was incorrect for her to move further with her signature on the forms, and she wanted to withdraw her signature from the forms." Ms. Johnson testified that from that conversation, she informed Dr. Williams that she would email her to document their conversation. She also noted that she requested that Dr. Williams provide Agency with a statement of why she was withdrawing her signature from the forms, and any other pertinent details, which she did. Ms. Johnson confirmed that Dr. Williams indicated that there were diagnoses included on the FMLA certification that she did not diagnose Employee with. She acknowledged that Dr. Williams indicated that she believed that Employee was using the FMLA certification as an excuse to avoid returning to in-person work. Ms. Johnson identified Agency's Exhibit 5 as the email that she received from Dr. Williams. Tr. Vol. I. pgs. 30-32. Ms. Johnson averred that she took notes to memorialize her conversation with Dr. Williams. She identified Agency's Exhibit 15, as the notes she took soon after her conversation, with Dr. Williams to memorialize what took place. Tr. Vol. I. pgs. 33.

Ms. Johnson confirmed that she provided Employee with Paid Family Medical Leave ("PFMLA") paperwork to complete, and Employee returned the completed form, signed by her doctor to her. Ms. Johnson affirmed that Employee submitted two (2) versions of the form. When questioned if she initially emailed Employee informing her that no serious health condition was listed on the form, Ms. Johnson responded that "I probably did, because all the form, if I recall, the form only said that as a result of whatever the illness was, she could not sit, stand, drive, something like that. But there was no condition listed." Ms. Johnson averred that the FMLA legislation requires that the condition be listed to ensure the employee is in fact ill and to ensure it is a serious health condition that would keep the person out of work. Tr. Vol. I. pgs. 34-36.

Referencing Employee's Exhibit 1, Ms. Johnson provided an example of diagnoses that could be listed on the PFMLA form, to include pregnancy, and chronic conditions. She explained that the form listed 'incapacity' "[b]ut it doesn't tell you what the incapacity is. It only gives you dates which are listed for 2020, which the information is out of date with the form, because you can only go back under federal law for one year. But under D.C. law, 18 months. And at this point, it had been three years, so the information was incorrect." Tr. Vol. I. pgs. 44 – 45.

When asked if the instruction under number three (3) of Employee's Exhibit 1, requires the PFMLA applicant to check another box in order to show a serious condition if the 'incapacity plus treatment box is checked', Ms. Johnson's response was "I don't think so." Tr. Vol. I. pg. 47. Ms. Johnson confirmed that her job included assisting employees with PFMLA paperwork. Ms. Johnson confirmed that Employee emailed her on July 6, 2023, needing clarification with the alleged inconsistent dates in the form. Referencing Employee's Exhibit 7, Ms. Johnson testified that "I'm looking at what, I'm looking at the email and I don't see a response there from me, so I don't know what I'm responding to. I just see [Employee's] email." Tr. Vol. I. pgs. 62 -63. Ms. Johnson confirmed that she did not provide a direct response to Employee's question about the date. Tr. Vol. I. pg. 66. Ms. Johnson explained that the dates were insufficient because they were outside of the scope of the relevant timeframe. She testified that "I thought that was clear on the form with the 2020 on there in saying it's inconsistent and insufficient. It goes out, as I stated earlier, it goes outside of the timeframe for FMLA, period. So I can't make a decision on a form if the dates are incorrect, insufficient, or inconsistent." Ms. Johnson was asked if she explained this to Employee and she averred that "I did when I said it insufficient. Or inconsistent." She further stated that "I thought that was relatively clear when it's in -- when you say it's insufficient or inconsistent." Tr. Vol. I. pgs. 64-65.

Shelley Williams ("Dr. Williams") Tr. Vol. II. pgs. 13- 47

Dr. Williams is a Physician at Holy Cross Health Partners. She testified that her responsibilities include "Primary care patients, so diabetes, hypertension, cholesterol, colds, that kind of stuff." She stated that she has known Employee for about three (3) years. Tr. Vol. II. pg. 14. Dr. Williams cited that she has been treating Employee for about three (3) years, at the Georgia Avenue, Silver Spring, Maryland location. Tr. Vol. II. pg. 15.

Dr. Williams averred that she remembered signing an FMLA form For Employee, but she could not recall the date she did so. She identified her signature on Agency's Exhibit 4, and she recalled signing the document. Tr. Vol. II. pgs. 15 – 16. Referencing page 3, of this Exhibit, Dr. Williams could not recall if she treated Employee on June 15, 2023. When asked if she saw Employee on June 23, 2023, Dr. Williams responded that "Yeah, I see all of those dates that are there. I just don't think I would have done that many dates in succession." Tr. Vol. II. pg. 16. She further testified that "I don't want to say no. I just don't think I did -- it could have been one of those, but I don't think it would have been all...." Dr. Williams affirmed that there were three (3) dates on this Exhibit that she did not see Employee in-person. Tr. Vol. II. pg. 17.

Dr. Williams confirmed that after signing Employee's PFMLA form, she was contacted by Agency to inquire if she was aware of what she signed and if she agreed to all the dates on the form. Dr. Williams testified that "I'll be honest, this was kind of a rush job. I think [Employee]

had brought the form in. I had done one before that was not correct. She was sitting in the office and needed it signed, so I just signed it. And I think they asked did I see her on all of those dates, and I think the answer was no, and I think that's how the conversation went." Tr. Vol. II. pgs. 17 – 18. Referencing Agency's Exhibit 15, Dr. Williams affirmed that Ms. Johnson's notes reflected her recollection as to how the conversation went with Agency. Tr. Vol. II. pgs. 18 -21.

When asked if she recalled telling Agency that she believed Employee was abusing leave to avoid returning to in-person work, Dr. Williams testified that "So, I don't know if I said it like that, but I do remember that she had a document that was signed by a, I'm thinking a psychiatrist or a specialist who had been seeing her, and I questioned why did I need to do another one because I wasn't seeing her for those things, but she said it needed to come from me as well. So, I think I just maybe cosigned it or did another letter saying that I was basing my judgment on what another practitioner had already said because I did not see her for those. So, I just felt, I don't want to use the word overwhelmed, but they use the word agitated, that I was being asked to do documents that I didn't have any part in the diagnosis, or treatment, or the request." Tr. Vol. II. pg. 21. Dr. Williams explained that Employee had her sign documents in addition to what her psychiatrist provided, and she felt that she wasn't the one that should be doing it because it was for diagnoses that she wasn't seeing Employee for. Tr. Vol. II. pgs. 21-22.

Dr. Williams was asked if she told Agency she wanted nothing to do with Employee, she asserted that "So, at this point, I did get kind of agitated because I had gone back and forth with documents, and I just felt like I was signing things that I had done before or signing things that I wasn't privy to, and at that point, yeah, I was kind of agitated." Tr. Vol. II. pg. 22.

When asked if she requested to rescind her signature on the PFMLA form, Dr. Williams testified that "I did, because what I had signed was not -- there were some dates. I remember the 2019 thing, ..., it says 2019, and I don't think -- I don't know if it was 2019. I don't even think I saw her at that time, so part of the information on the document was not accurate. So, because I had to sign what was there, I didn't want my signature on that because there were some things that were true and there were some things that I was not a part of. So, I said if they have to go by that document, I don't want to sign that document." Tr. Vol. II. pg. 23.

Dr. Williams confirmed that apart from her signature, Employee filled out the form for her. Dr. Williams testified that to officially rescind her signature, she was told she had to email what they had talked about. Dr. Williams recalled sending the email in Agency's Exhibit 5, and she confirmed its accuracy. Tr. Vol. II. pg. 23-24. Dr. Williams further responded as follows:

Q: "Dr. Williams, do you believe that [Employee] has acted dishonestly in her application for paid family leave benefits?"

A: "No."

Tr. Vol. II. pg. 24.

Dr. Williams testified that she was Employee's primary care physician. She confirmed that prior to the submission of the PFMLA form at issues, Employee had submitted a work from

home accommodation documentation to her to complete for her job. Tr. Vol. II. pgs. 25-26. Dr. Williams confirmed that she had patients other than Employee submit partially filled out documents for her to review and sign. She affirmed that it was her practice to review the information for accuracy and she would correct any incorrect information or ask for a new form because erasures or whiteouts are typically not accepted on official documents. She would then sign the form. Tr. Vol. II. pgs. 26-27.

Dr. Williams testified that Employee brought the partially filled out PFMLA form to her office for her to sign. She noted that she did not make any corrections on the form. Dr. Williams averred that it was unusual for her to sign forms she had not read. She asserted that “So, we had gone back and forth with forms. It was my negligence. It was a busy day. She brought the forms in. She didn't want to leave until I addressed it, so I just asked my receptionist to give me the papers and I signed it, so that's my fault I did not read it prior to signing. I had seen the previous ones, so I didn't read this one in detail.” Tr. Vol. II. pgs. 27-28.

When asked about her involvement with the reasonable accommodation request form, Dr. Williams testified that “So, that was a form that I used what her psychiatrist had said and just transferred that information onto the form, and let it be known that I was using information that was obtained by other provider and signed my name to that.” Tr. Vol. II. pgs. 29 -30.

Referring to Employee's Exhibit 1, when asked if she told Ms. Johnson that Employee asked her to align her dates in the PFMLA form with her psychologist's dates, Dr. Williams responded that “I don't know if it was dates. It was the information. I don't remember it being dates. Let's see, again, we're going through two different forms, because I remember the other stuff ... were dates that she had been seen, but not by me. It was by another provider. So, this, I don't think she was trying to get me to align dates. She just wanted me to reaffirm the information that the other specialist had written.” Tr. Vol. II. pgs. 31-32.

Dr. Williams confirmed that she was familiar with Employee's Exhibit 3. Tr. Vol. II. pg. 34. Dr. Williams confirmed that was her handwriting and signature on the doctor's note. She stated that it was an excuse note for June 14, 2023, to June 27, 2023. She testified that she saw Employee on June 14, 2023, and that Employee returned to her office on June 27, 2023, stating that she had not been back to work. Tr. Vol. II. pg. 35. Dr. Williams stated that she did not recall sending Employee to any specialists when she returned to her office on June 27, 2023. Tr. Vol. II. pg. 36. She explained that “...I think she was talking about she still couldn't go back to work. She was having, I think she was having some ... pain, so I'm not sure if I sent her for a radiology test or to a gyn, but I think my response was that ... we needed to get more information.” Tr. Vol. II. pgs. 37.

Referencing Employee's Exhibit 10, Dr. Williams testified that she requested that Employee get radiology exams. She asserted that she wasn't sure if Employee came back to see her, but she did inform Employee that her test results were negative, and she could not identify what was going on. Tr. Vol. II. pgs. 37-38, 41.

Referring to Employee's Exhibit 1, page 3, Number 5, Dr. Williams confirmed that June 15, June 23, and June 27, are days within the date range of the doctor's note that she wrote. She

reiterated that she did not recall if she saw Employee on June 30. Tr. Vol. II. pgs. 44-45. Dr. Williams affirmed that she did not personally perform the radiology tests done on June 23, 2023, and she did not see Employee on that date because it was performed by another specialist - Chesapeake Urology. When asked if she could testify to Employee's whereabouts on June 30, 2023, Dr. Williams affirmed that based on the documents, Employee was seeing another doctor on June 30, 2023. Tr. Vol. II. pgs. 46 -47.

Employee's Case in Chief

Beatrice Muma ("Ms. Muma") Tr. Vol. I. pgs. 70-79

Ms. Muma is a Nurse Practitioner with Chesapeake Urology and has been for about 15 years as of the date of the Evidentiary Hearing. She testified that she saw Employee for the first time in July of 2023. She confirmed that she provided Employee with medical services and recommended treatment, which she completed and was feeling better. Tr. Vol. I. pgs. 70-71.

Ms. Muma testified that around March of 2024, Employee emailed her requesting that she call Employee regarding completing information on FMLA paperwork. Ms. Muma stated that both she and the office staff responded to Employee via email, informing her that they have another division that handled FMLA paperwork. Ms. Muma testified that "I didn't have any reason to complete FMLA paperwork for [Employee] at that time based on the reasons that I saw her in the office. So she mentioned in an email to me that was regarding a chest x-ray and an ultrasound that was requested by her primary care provider. So I told her that normally I'm not supposed to review those exams that I did not request, and really, the reason, the symptoms which I was treating her for did not require any FMLA paperwork, or off of work. And so if she needed -- if she had FMLA paperwork to be filled out, that has to go through her primary care, or better still, through the division that handles all paperwork for our company, which is MediCopy." Tr. Vol. I. pgs. 72-73. Ms. Muma asserted that "Her primary care requested a chest x-ray and an ultrasound, which are involved in this document. So yes, the primary care provider should have reviewed those results and completed any paperwork regarding them." Tr. Vol. I. pg. 75.

Employee Tr. Vol. I. pgs. 79 – 122; Tr. Vol. II. pgs. 49-52

Employee worked at Agency as a Contract Specialist for about three and a half (3.5) years, until she was terminated effective October 10, 2023. She testified that she was responsible for procuring and maintaining services and goods for the District of Columbia. Tr. Vol. I. pg. 80. Employee averred that her termination was based on Agency's "discrimination against my disability." Tr. Vol. I. pg. 81.

Employee confirmed that she submitted her FMLA request to Ms. Johnson. She testified that Employee's Exhibit 1, was the FMLA application she submitted to Ms. Johnson for her review and processing. She stated that Ms. Johnson provided that the form was insufficient. When asked if she knew why the form was considered insufficient, Employee testified that "No, I didn't know why. That's why I emailed her ... to explain what the inconsistencies were, and why the signatures were required on each page." Employee identified Employee's Exhibit 7, as

the email she sent to Ms. Johnson “for clarification on her email that she sent me on July 3rd, when she said it was insufficient and I wanted to know what was insufficient about the document, so I can better explain it to my doctor.” She noted that Ms. Johnson did not provide her with a response. Employee cited that “She just gave me a response to refer back to her July 3rd email that states the document was insufficient, but no reasons why it was insufficient.” Tr. Vol. I. pgs. 82-84. Employee reiterated that “No, she never came back to answer any of my questions.” Tr. Vol. I. pg. 86.

Regarding the dates, Employee testified that “... when I looked at my form, my PDF form, my dates were correct. They had 2023 on there.” Employee explained that “When I looked at the PDF form on my computer. The FMLA PDF form, it had the correct dates of 2023. It didn't have '20 on there.” Employee further stated that “It was showing the correct dates of 2023. I guess when I printed it out, it cut off the ending of the year to the 2023, because on my computer it showed 2023.” Employee asserted that she did not find out that the year on the FMLA form was the issue until she was terminated. Tr. Vol. I. pgs. 84-86.

Employee asserted that she tried to comply with Ms. Johnson’s requests to fill out the form sufficiently. Employee testified that “Yes. I emailed my doctor so she can look over their form again and have her sign it again. I went back to the doctor's office to have the doctor look over the forms again and have her sign it. *She seemed very annoyed by it because I have -- kept having her sign information.*” (Emphasis added). Tr. Vol. I. pg. 86. Employee confirmed that there were two (2) forms and stated that “I had the first form and I submitted it to Ms. Johnson. That's when she came back and said it was insufficient, that it has to be signed and it needs to have a diagnosis and prognosis on there. I then went back to my doctor again to have her sign each page and review the document for -- to Ms. Andrea's point.” Employee affirmed she completed part of the form, and her doctor reviewed the form prior to signing. Tr. Vol. I. pg. 87.

Employee testified that she completed sections one (1) and two (2) of the FMLA form. She explained that “I did it to make it easier for Dr. Williams because she gets agitated whenever I give her paperwork for my job, due to prior history.” Employee asserted that “I had presented the form to Dr. Muma, and she referred me to my primary care doctor, because my primary care doctor is the one who requested I get a CT scan and to see her.” Tr. Vol. I. pg. 88.

Employee identified Dr. Williams’ signature on Employee’s Exhibit 1, pages 4 and 8. Tr. Vol. I. pg. 89. She identified Employee’s Exhibit 3 as the doctor's excuse note she received after seeing Dr. Williams and the doctor’s note covers the period of June 14, 2023, to June 27, 2023. Employee identified Employee’s Exhibit 5, as the doctor’s note she received from Chesapeake Urology covering the period of June 29, 2023, to July 5, 2023. She averred that she got the note “Because I went to the doctor for a medical issue I was having.” She confirmed that this was a referral from Dr. Williams. Tr. Vol. I. pgs. 91-93, 102. Employee identified Employee’s Exhibit 6, as a doctor’s note she got from an urgent care facility on June 27, 2023. She explained that “I wasn't able to get an appointment with Dr. Williams that day, so I was referred to go to urgent care and that's where I got this document from. It's a doctor's note from the urgent care that I visited that day.” Tr. Vol. I. pgs. 93-94.

Referencing Employee's Exhibit 10, Employee testified that "I requested those documents at the beginning of May, and I just got a response back last week." Employee explained that she only requested the document when "... I was advised that I needed it to show proof that I did see a physician that day." Employee stated that on June 23, 2023, "I had to go to community radiology to get various exams...." Employee also testified that she saw Dr. Anup Vora ("Dr. Vora") at Chesapeake Urology on June 30, 2023. She asserted that Employee's Exhibit 10, was found in the patient's portal and she cannot alter the appointment dates. Tr. Vol. I. pgs. 97-101.

Referencing Employee's Exhibit 1, at page 2, Question Number 1, (state the appropriate date the condition started or will start,), Employee confirmed that the June 14 date on this page was within the timeframe of Dr. Williams doctor's note. For Question Number 2, which cites a date of July 15, Employee testified that "That's the date Dr. Anup put on my doctor's note" found in Employee's Exhibit 5. Employee asserted that she was referred to Dr. Anup by Dr. Williams and after being seen by Dr. Anup, he stated that Employee could return to work on July 5, 2023. Tr. Vol. I. pgs. 103 – 104. Employee confirmed that the month and date of June 15, to July 5, as stated in Question Number 3, of Agency's Exhibit 3 is accurate and the month and date is reflected on all the doctor's notes she presented to Agency. Tr Vol. I. pg. 104-105.

Employee affirmed that the month and day - July 5, is reflected in the FMLA form she submitted to Agency and it corresponds with Employee's Exhibit 5, the doctor's note from Dr. Vora. She affirmed that the year was incorrect. Tr. Vol. I. pg. 105. Employee confirmed that the months and day - June 15, was accurate and she saw Dr. Williams on that date. She affirmed that she saw Dr. Vora on June 30, and the month, day and year are accurate. Tr. Vol. I. pgs. 105-106.

Referencing Employee's Exhibit 1, Question Number 4, Employee confirmed that the treatments, and tests listed are reflected in the doctor's notes and the referrals, as found in Employee's Exhibit 10. Tr. Vol. I. pgs. 106 – 110. Referencing the FMLA form, Employee's Exhibit 1, at Question Number 5, Employee affirmed that the dates – year, month and day, were accurate. She cited that these dates reflect the dates she had treatment and was seen by a doctor. Tr. Vol. I. pgs. 110 - 111. Referencing Question Number 8, Employee noted that the beginning date as provided in Dr. Williams' notes is June 14 and the month and date was accurate. She noted that the end date as provided by Dr. Vora was July 5. Tr. Vol. I. pgs. 111 – 112.

Employee asserted that she never asked Dr. Williams to align the dates in the FMLA form with the dates from her psychiatrist because those were two (2) different requests. Employee testified that "I also did not ask her about any dates on the FMLA form because there was nothing to ask. The dates provided were the dates that I saw her and especially that she referred me to. So I have no idea where she got that it was untrue because it's completely false that I asked her about anything, aligning of the dates, because that's completely untrue." When asked if she had any reason to believe that Dr. Williams did not read the FMLA form, Employee stated that "No, because I saw her read them myself. I knew she had read them over multiple times and signed them multiple times before." She asserted that she emailed the FMLA forms to Dr. Williams and brought the forms to her office twice. Employee noted that after she got the FMLA forms reviewed and signed by Dr. Williams, she turned them in to Ms. Johnson. Employee testified that she was invited to a Zoom meeting to discuss her accommodation, to

support her return to in-person work.” She when she joined the meeting, she was told she was being terminated for falsifying her FMLA paperwork. Tr. Vol. I. pgs. 115-117.

When asked if she intentionally put false information on the document to defraud the Agency or her doctor, Employee stated that “No, I did not intend to defraud the agency. I drafted the document for Dr. Williams to review. She reviewed it and never said she had a problem with it. And she signed each page after she reviewed it.” Employee confirmed that she had provided Dr. Williams with a form that she started and Dr. Williams would review, sign and send the form back to her. Employee averred that Dr. Williams had once pointed out errors in a form Employee submitted, and Dr. Williams resubmitted the form directly to Agency. Employee noted that Dr. Williams never told her not to fill out the forms. Tr. Vol. I. pgs. 117-119.

Employee was asked if Dr. Williams complained about the FMLA form in questions, and she responded that “She was tired of me coming to her to give it to her to sign. She was frustrated.” She cited that Dr. Williams never told her the dates were incorrect and she never told her that anything on the FMLA form was incorrect. Employee confirmed that Dr. Williams signed both the first and the second FMLA forms. Tr. Vol. I. pgs. 119.

Employee was recalled to testify by Agency during the June 19, 2024, Evidentiary Hearing, and she admitted to pleading guilty to conspiracy to commit wire services and fraud against the District of Columbia government on June 6, 2024. Employee stated that she began committing fraud against the District of Columbia government in 2022. Tr. Vol. II. pg. 49.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW³

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Furthermore, the District Personnel Manual (“DPM”) regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Employee was terminated for “False Statements/Record: Deliberate falsification of a material item on an application for employment or other personal history record by omission or by making a false entry.”

1) Whether Employee's actions constituted cause for discipline

False Statements/Record: Deliberate falsification of a material item on an application for employment or other personal history record by omission or by making a false entry:

Here, Agency charged Employee with False Statements/Record: Deliberate falsification of a material item on an application for employment or other personal history record by omission or by making a false entry. Agency asserted that on July 12, 2023, it was discovered that Employee deliberately falsified the dates of medical treatment with one (1) of four (4) health

³ 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”).

care providers and provided falsification of a current health diagnosis to receive pay through the D.C. Family Medical Leave/Paid Family Leave Program (“PFMLA”).

Agency asserted that Employee does not dispute that she inputted the information in the July 3, 2023, and July 12, 2023, FMLA certification forms and presented them to Dr. Williams to sign or that the dates presented in the FMLA certification forms were dates she was not seen or treated by Dr. Williams.⁴ Additionally, Agency averred that Employee does not deny that she was informed by the FMLA Coordinator, Ms. Johnson that there were inconsistent dates and information in the July 3, 2023, FMLA certification form, yet she maintained the same dates and information in the July 12, 2023, FMLA certificate form.⁵ Agency argued that Employee made deliberate false entries in the FMLA certificate form she submitted to Ms. Johnson on July 3, 2023, and July 12, 2023.⁶ Agency cited that Dr. Williams, in an email dated July 19, 2023, provided a clear statement of her request to withdraw her signature from the FMLA certification form and her disagreement with the inclusion of dates and diagnosis from 2020, in the July 3, and July 10, 2023, FMLA certification form.⁷ Agency maintained that it took appropriate action in removing Employee for the charge of False Statement/records, and its decision is reasonable and within the guidance provided in the Table of Illustrative Actions (“TIA”)⁸.

Citing to the *Douglas* factors⁹, Employee argued that Agency did not consider all of the relevant factors, and it did not act reasonably by terminating Employee when there was a lesser sanction.¹⁰ Under *Douglas* factor Number 2, Employee averred that she did not provide fraudulent dates of care and an outdated diagnosis for approval to gain payment for PFMLA.¹¹ Employee argued under *Douglas* factor Number 7 that she “never had an intent to mislead the District.”¹² Under *Douglas* factor Number 9, Employee stated that she was not aware that her actions were not appropriate. She explained that she “worked with her doctor in a fashion with which they had worked together for years in preparing [Employee’s] documents.” Employee cited that the doctor noted that she did not mind if patients enter their information on the documentation. She stated that Dr. Williams reviewed and signed the PFMLA documentation three (3) times. She asserted that she did not forge a signature or force the doctor to sign them. She noted that Dr. Williams was frustrated by Agency’s multiple requests to sign and send back documentation for petty reasons.¹³

Employee was terminated pursuant to 6-B DCMR § 1605.4(b)(1) and 6-B DCMR § 1607.2(b)(1), False Statements/Record: Deliberate falsification of a material item on an application for employment or other personal history record by omission or by making a false entry. OEA has held that, to sustain a falsification charge, “agency *must* prove by preponderant evidence that employee *knowingly* supplied *incorrect information* with the *intention of*

⁴ Agency Answer (December 13, 2023).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

¹⁰ Petition for Appeal (November 9, 2023).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

defrauding, deceiving or misleading the agency.”¹⁴ (Emphasis added). Additionally, in *Leatherbury v. Department of Army*,¹⁵ the Court of Appeals for the Federal Circuit opined that:

“In order to sustain a charge of intentionally submitting false information, the agency “must prove by a preponderance of the evidence that the employee *knowingly supplied wrong information*, and that he did so with the intention of defrauding the agency.” *Naekel v. Dep't of Transp.*, 782 F.2d 975, 977 (Fed.Cir.1986). In *Naekel*, we explained that the charge of falsification requires proof “not only [of a false statement], but also that [the false statement] was given with intent to deceive or mislead the agency.” *Id.* at 978. A false statement alone “cannot control the question of intent.” *Id.* Otherwise, “the ‘intent’ element of the charge would be subsumed within the distinct inquiry of whether the employee’s [statement] adheres to the true state of facts.” *Id.* The agency may establish an employee’s intention to deceive or mislead the agency by *circumstantial evidence*. *Kumferman v. Dep't of Navy*, 785 F.2d 286, 290 (Fed.Cir. 1986).

A charge that an employee knowingly supplied wrong information with an intent to defraud the agency requires first that the agency prove that the information submitted included a false statement. The test here is objective and is made without regard to the employee’s subjective understanding or knowledge. Second, the agency must prove that the false statement was material. Third, the agency must show that the employee acted with the requisite intent. Our cases confirm that the intent element itself requires two distinct showings: (a) that the employee intended to deceive or mislead the agency, and (b) that he intended to defraud the agency for his own private material gain. *See Bradley*, 900 F.2d at 237 (finding the false statement motivated by a desire for privacy rather than a desire to defraud). Under the first intent prong (a), it is sufficient that the employee either knew that the submission included a false statement of material fact, or was reckless with respect to ascertaining the truth of the statement. *See Kumferman*, 785 F.2d at 290.

However, *an employee’s good faith explanation can negate an inference of intent to deceive or mislead the agency. See Naekel*, 782 F.2d at 979-80; *Kumferman*, 785 F.2d at 290; *Dennis v. Dep't of Health & Human Servs.*, 804 F.2d 670, 673 (Fed. Cir.1986) (finding credible an employee’s explanation that she relied on supervisor instructions). Thus, *a reasonable good faith belief in the truth of a statement precludes a finding that an employee acted with deceptive intent.*” (Emphasis added).

In the current matter, I find that there is sufficient evidence in the record that Employee completed the FMLA certification form that was signed by Dr. Williams and submitted to Agency’s FMLA Coordinator, Ms. Johnson on July 3, 2023, and July 12, 2023. There’s also evidence in the record to support Agency’s assertion that the dates in the FMLA certification forms were inconsistent. However, upon review of both documents, the undersigned finds that

¹⁴ *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).

¹⁵ 524 F. 3d 1293 - Court of Appeals, Federal Circuit 2008.

the inconsistency was due to typographical error and therefore does not satisfy the ‘intent’ and ‘knowledge’ element required by this cause of action. In support of this assertion, the undersigned notes the following as found in Agency’s Exhibits 3 and 4:

On Page 1, Question Number 2: Date (List date certification requested: Employee entered- 06/27/2020).

On page 2, of the same Exhibit, under Part A ‘Medical Information’

Question Number 1: State the approximate date the condition started or will start: 06/14/20.

Question Number 2: Provide your best estimate of how long the condition lasted or will last: 07/05/20023.

Question Number 3 Checkbox 2: Incapacity plus Treatment: (e.g. outpatient surgery, strep throat).

Due to the condition, the patient (X has been / is expected to be) incapacitated for more than three consecutive, full calendar days from: 06/15/20 (mm/dd/yyyy) to 07/05/20 (mm/dd/yyyy).

The patient (X was / will be) seen on the following date(s): 06/15/2020, 06/30/2023.

On Page 3, Part B: Amount of Leave Needed,

Question Number 5: Due to the condition, the patient (X had / will have) planned medical treatment(s) (scheduled medical visits) (e.g. psychotherapy, prenatal appointments) on the following date(s): 06/15/2023, 06/23/2023, 06/27/2023, 06/30/2023.

Question 8: Due to the condition, the patient (X was / will be) incapacitated for a continuous period of time, including any time for treatment(s) and/or recovery.

Provide your best estimate of the beginning date 06/14/20 (mm/dd/yyyy) and end date 07/05/20 (mm/dd/yyyy) for the period of incapacity.

Ms. Johnson asserted that she contacted Dr. Williams after Employee submitted the July 12, 2023, FMLA certification form because similar to the July 3, 2023, form, the dates were incorrect based on the *year* that was listed therein (emphasis added). She stated that the year listed on the forms went back to 2020, versus being 2023. I find that but for the reference of the year ‘2020’ in Agency’s Exhibits 3 and 4, the months and days referenced in these exhibits correspond with the months and days found in the doctors’ notes Employee submitted to Agency prior to her termination.¹⁶ These notes reference the year 2023, whereas Employee listed both

¹⁶ See. Employee’s Exhibit 3- This note was signed by Dr. Williams and it excused Employee from work for June 14, 2023, to June 27, 2023. Employee’s Exhibit 5 is a release note issued by Chesapeake Urology on June 30, 2023, excusing

2020 and 2023, in Agency's Exhibits 3 and 4. Based on the above, I further find that Employee's reference to the year 2020, in the exhibits was unintentional, and resulted from a simple oversight or mistake by both Employee and Dr. Williams. Further, Dr. Williams testified that "I'll be honest, this was kind of a rush job. I think [Employee] had brought the form in. I had done one before that was not correct. She was sitting in the office and needed it signed, so I just signed it." Tr. Vol. II. pgs. 17 – 18. Further, Dr. Williams was asked:

Q: "*Dr. Williams, do you believe that [Employee] has acted dishonestly in her application for paid family leave benefits?*"

A: "*No.*" Tr. Vol. II. pg. 24. (Emphasis added).

Additionally, Dr. Williams noted that it was unusual for her to sign forms she had not read. She asserted that "So, we had gone back and forth with forms. It was my negligence. It was a busy day. She brought the forms in. She didn't want to leave until I addressed it, so I just asked my receptionist to give me the papers and I signed it, so that's my fault I did not read it prior to signing. I had seen the previous ones, so I didn't read this one in detail." Tr. Vol. II. pgs. 27-28.

Agency asserted that Employee does not deny that she was informed by the FMLA Coordinator, Ms. Johnson that there were inconsistent dates and information in the July 3, 2023, FMLA certification form, yet she maintained the same dates and information in the July 12, 2023, FMLA certificate form. According to the record, in an email dated July 3, 2023, from Ms. Johnson to Employee, Ms. Johnson provides in pertinent part as follows: "... Furthermore, based on your attachment, the application is dated or inconsistent with the responses which prevents me from processing and your physician should be completing as well as signing pages 2 & 3 of the WH-380E."¹⁷ Employee responded to this email on the same day stating "... the date is dated on the day OCP requested it and additional the day my doctor was able to start her review."¹⁸ On July 6, 2023, Employee sent a follow-up email to Ms. Johnson requesting clarification as follows:

"I am following up on receipt of your email response denying my PFMLA. I would like to take the opportunity to provide any missing information in the form. I will get a more detailed response from my doctor but I need clarification on a couple of items you mentioned in your email below.

1. Please let me know what you meant when you say "Furthermore, based on your attachment, the application is dated or inconsistent with the responses". The doctor signed the document when she completed it and she provided the dates for

Employee from work from June 29, 2023, to July 5, 2023. Employee testified that she was referred to Chesapeake Urology by Dr. Williams for treatment. Tr. Vol. I. pgs. 91-93, 102. *See also*. Employee's Exhibit 6, an 'Absence Note' issued by Dr. Rostam Nassiri, of Briggs Chaney's Walk-in Clinic on June 27, 2023, and excusing Employee from work until June 29, 2023. Employee asserted that she was referred to the Urgent care because she was unable to get an appointment with Dr. Williams on that day. *See* Employee's Exhibit 10, include several radiology exams conducted on June 23, 2023, and ordered by Dr. Williams. This exhibit also includes an appointment with a Dr. Anup Vora at Chesapeake Urology on June 30, 2023.

¹⁷ Employee's Exhibit 17.

¹⁸ *Id.*

my treatments. *Please let me know what inconsistencies in dates you are referring to.* (Emphasis added).

Ms. Johnson responded that "... Based on your response, you are seeking to "get a more detailed response from your doctor" should be sufficient with addressing the email I provided to you on July 3, 2023." Ms. Johnson confirmed during the Evidentiary Hearing that her job included assisting employees with PFMLA paperwork. However, she confirmed that she did not provide a direct response to Employee's question about the dates. Tr. Vol. I. pg. 66. Employee cited during the Evidentiary Hearing that she did not find out that the year on the FMLA form was the issue until she was terminated. Tr. Vol. I. pgs. 84-86. Based on the foregoing, I conclude that Employee sought clarification from Ms. Johnson regarding the alleged 'inconsistencies in the dates', but Ms. Johnson failed to assist her or provide clarification on the dates. Consequently, I find that the incorrect year Employee listed on the July 3, and July 12, 2023, forms were not made knowingly or with the intent to deceive or mislead Agency.

Agency also argued that the dates presented in the FMLA certification forms were dates Employee was not seen or treated by Dr. Williams. Contrary to Agency's argument, and pursuant to Employee's Exhibit 3, Employee was seen on June 14, 2023, and June 27, 2023, by Dr. Williams, and she was under Dr. Williams' care from June 14, 2023, to June 27, 2023. Ms. Muma also testified that "[Employee's] *primary care requested a chest x-ray and an ultrasound, which are involved in this document. So yes, the primary care provider should have reviewed those results and completed any paperwork regarding them.*" (Emphasis added). Tr. Vol. I. pg. 75. Additionally, Employee testified that because she was not able to get an appointment with Dr. Williams on June 27, 2023, she was referred to the Urgent care. Tr. Vol. I. pgs. 93-94. Therefore, I find that Employee was still under Dr. Williams' care even when she was seen by other specialists, since Dr. Williams was Employee's primary care physician, and she referred Employee to these specialists. As evident in Employee's Exhibit 10, all her radiology tests were requested by Dr. Williams and the results were sent to her. Further, Dr. Williams testified that she reviewed the results and noted that they were 'negative'.

Agency further contended that Dr. Williams, in an email dated July 19, 2023, provided a clear statement of her request to withdraw her signature from the FMLA certification form and her disagreement with the inclusion of dates and diagnosis from 2020, in the July 3, and July 12, 2023, FMLA certification form. Dr. Williams provided in Agency's Exhibit 5, that "I would like to withdraw my signature from the FMLA forms. I was agreeing to the dates that occurred this year. When I was sent the forms to review, it included dates and diagnosis in 2020. I did not agree to those dates."¹⁹ During the Evidentiary Hearing, Dr. Williams was asked if she requested to rescind her signature on the PFMLA form, and she testified that "I did, *because what I had signed was not -- there were some dates. I remember the 2019 thing, ..., it says 2019, and I don't think -- I don't know if it was 2019. I don't even think I saw her at that time, so part of the information on the document was not accurate.* So, because I had to sign what was there, I didn't want my signature on that because there were some things that were true and there were some things that I was not a part of. So, I said if they have to go by that document, I don't want to sign that document." (Emphasis added). Tr. Vol. II. pg. 23.

¹⁹ See Agency's Exhibit 5.

Dr. Williams was also asked if she told Agency during her phone conversation with Ms. Johnson that she wanted nothing to do with Employee, to which she asserted that “So, at this point, I did get kind of agitated because I had gone back and forth with documents, and I just felt like I was signing things that I had done before or signing things that I wasn't privy to, and at that point, yeah, I was kind of agitated.” Tr. Vol. II. pg. 22. Based on the record, I find that the basis of Dr. Williams’ withdrawal of her signature was her understanding that Employee was referencing treatments and diagnosis from 2020, she did not assert that she did not see or treat Employee in 2023. Furthermore, Dr. Williams noted that she did not believe that Employee acted dishonestly in her application for paid family leave benefits. Tr. Vol. II. pg. 24.

Additionally, Dr. Williams testified that Employee brought the partially filled out PFMLA form to her office for her to sign. Dr. Williams confirmed that she had patients other than Employee submit partially filled out documents for her to review and sign. She affirmed that before signing forms, it was her practice to review the information for accuracy, correct any incorrect information or ask for a new form. Tr. Vol. II. pgs. 26-27. Also, when asked if she told Ms. Johnson that Employee asked her to align her dates in the PFMLA form with her psychologist's dates, Dr. Williams responded that “*I don't know if it was dates. It was the information. I don't remember it being dates. Let's see, again, we're going through two different forms, because I remember the other stuff ... were dates that she had been seen, but not by me. It was by another provider. So, this, I don't think she was trying to get me to align dates. She just wanted me to reaffirm the information that the other specialist had written.*” (Emphasis added). Tr. Vol. II. pgs. 31-32. Agency has the burden of proof in this matter, and based on the foregoing, and consistent with 6-B DCMR §§ 1605.4 (b)(1) and 1607.2 (b)(1), as well as case law, I find that Agency has not met its burden of proof because it has failed to establish that Employee *deliberately* supplied incorrect information on her PFMLA certification forms with the *intention of defrauding, deceiving or misleading* Agency. (Emphasis added).

Credibility Determination

During the July 19, 2024, Evidentiary Hearing, Employee confirmed that she pled guilty to conspiracy to commit wire and service fraud against the District of Columbia government. Employee stated that she began committing fraud against the District of Columbia government in 2022. Tr. Vol. II. pg. 49. Based on the above testimony, Agency asserted that Employee’s credibility was at issue because Employee pled guilty to fraud against the District of Columbia government and committed other acts of dishonesty.²⁰ During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses. As a result, I was able to determine the credibility of the witnesses. I find that Employee credibly testified regarding the dates and her lack of knowledge of the inconsistencies in the FMLA forms in the current adverse action. This is supported by the July 6, 2023, email she sent to Ms. Johnson asking for clarification.²¹

²⁰ Agency averred that in the event that Employee’s termination is eventually reversed, her guilty plea would go to the application of her damages. Agency further noted that by pleading guilty to fraud against the District government, Employee has now made herself ineligible to work for the District of Columbia government in any capacity. I find that this issue is related to compliance and would be addressed if and when a Petition for Enforcement is filed with this Office.

²¹ See Employee’s Exhibit 7.

The undersigned also finds that Employee credibly testified that she partially completed the FMLA certification forms and submitting them to Dr. Williams for her signature based on her experience with Dr. Williams with completing documentation. This too, is supported by Dr. Williams' testimony that Employee was not the only patient that submitted partially completed documents for her to review and sign. She affirmed that before signing forms, it was her practice to review the information for accuracy, correct any incorrect information or ask for a new form. Tr. Vol. II. pgs. 26-27.

Additionally, I find that Employee credibly testified that when she presented the form to Ms. Muma, she referred her to her primary care doctor, Dr. Williams because Dr. Williams ordered the radiology tests performed on June 23, 2023. Tr. Vol. I. pg. 88. This testimony is also supported by Ms. Muma's testimony that "[h]er primary care requested a chest x-ray and an ultrasound, which are involved in this document. So yes, the primary care provider should have reviewed those results and completed any paperwork regarding them." Tr. Vol. I. pg. 75. Therefore, despite Employee's guilty plea, I find Employee's testimony during the Evidentiary Hearing for the current cause of action to be trustworthy.

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

Based on the foregoing, I find that Agency does not have cause for adverse action against Employee. As a result, I also find that the penalty of termination was inappropriate under the circumstances. The undersigned further finds that because Agency has failed to meet its burden of proof for the cause of action in this matter, the action against Employee 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 and benefits lost pay 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/ Monica N. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge