THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	
	)	OEA Matter No. 1601-0034-22
	)	
v.	)	Date of Issuance: May 17, 2023
	)	
D.C. DEPARTMENT OF CORRECTIONS,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

Employee, *Pro Se*
Connor Finch, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 6, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Corrections' ("DOC" or "Agency") decision to terminate her from her position as an Operations Research Analyst, effective December 3, 2021. Employee was terminated for (1) "Failure to meet established performance standards"[2] and (2) "Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions and Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions."[3] Employee was also charged with violating Agency's Policy and Procedures 3300.1E – Employee Code of Ethics and Conduct, Section 10 Personal Accountability – Employees shall obey all lawful orders from their superior. On January 6, 2022, 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 February 22, 2022.

Following a failed attempt at mediation, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on May 17, 2022. Thereafter, on May 20, 2022, the

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

[2] 6B District of Columbia Municipal Regulations ("DCMR") §1607.2(m).

[3] 6B DCMR §§1607.2(d)(1) and (2).

undersigned issued an Order scheduling a Status/Prehearing Conference for June 16, 2022. While Employee was present for the scheduled Conference, Agency did not appear. Consequently, the undersigned issued an Order for Statement of Good Cause to Agency, requiring that Agency provide good cause for its failure to attend the scheduled Conference. Agency responded to the Order for Statement of Good Cause on July 1, 2022. Subsequently, on July 11, 2022, the undersigned issued an Order rescheduling the Status/Prehearing Conference for July 28, 2022. On July 22, 2022, Agency filed a Motion to Continue the Status/Prehearing Conference. This Motion was granted in an Order dated July 28, 2022, and the Status/Prehearing Conference was rescheduled for August 30, 2022.

On August 3, 2022, Agency filed a Motion to Dismiss, noting that OEA lacked jurisdiction over this matter because Employee's appeal with OEA was untimely. On August 11, 2022, the undersigned issued an Order requiring Employee to address the jurisdiction issue raised by Agency in its Motion to Dismiss. Employee complied with the August 11, 2022, Order. The previously scheduled Status/Prehearing Conference was held on August 30, 2022, with both parties present. The undersigned verbally denied Agency's Motion to Dismiss during the conference and found that OEA retained jurisdiction over the current appeal. Subsequently, on August 31, 2022, the undersigned issued a Post-Status/Prehearing Conference Order requiring the parties to submit briefs. Following a prolonged discovery period, and several requests for extensions of time, both parties submitted their respective briefs. Upon review of the record and considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

1) Whether Agency followed the appropriate Performance Improvement Plan ("PIP") procedures in terminating Employee.

2) Whether Agency had cause to institute adverse action against Employee pursuant to 6 DCMR §§1607.2 (d) (1) and (2); and Agency's Policy and Procedure 3300.1E.

3) If so, whether the penalty of termination is appropriate under District law, regulations or the Table of Penalties.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (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:

> the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[4]

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, ANALYSIS AND CONCLUSIONS OF LAW[5]

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA.

On November 5, 2020, Employee met with her supervisor, Reena Chakraborty ("Dr. Chakraborty") via Microsoft TEAMS to discuss her Fiscal Year ("FY") 2020 performance and her FY21 SMART Goals. Thereafter, Employee went out on approved Family Medical Leave Act ("FMLA") from December 7, 2020, to March 29, 2021.[6] Dr. Chakraborty emailed Employee a Fiscal Year 2021 ("FY21") performance plan on December 15, 2020, while Employee was out on FMLA.[7] Subsequently, on May 24, 2021, Agency informed Employee via Microsoft TEAMS that she was placed on a Performance Improvement Plan ("PIP") which would run to the end of FY21. Agency mirrored the PIP to Employee's FY21 performance goals that were issued on December 15, 2021.[8] On July 9, 2021, Employee filed a grievance against Agency for the May 24, 2021 PIP.[9] On September 2, 2021, Dr. Chakraborty issued and mailed out a written decision on the outcome of the PIP to Employee's address on record. On the same day, Agency mailed an Advanced Notice of Proposed Removal to Employee's address of record and Employee was also placed on Administrative Leave effective the same date. Employee was not 'in-duty' status on September 2, 2021. She was out on approved leave from September 2, 2021, to September 8, 2021. She received the notices from Agency on September 10, 2021.[10] This matter was referred to a Hearing Officer. Employee submitted a response to the Advanced Notice of Proposed Removal in September of 2021. The Hearing Officer issued her Report and Recommendation on

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[4] OEA Rule § 699.1.
[5] 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").
[6] Agency's Answer (February 22, 2022).
[7] *See* Petition for Appeal (January 6, 2022); *See also* Agency's Brief (February 16, 2023).
[8] Agency's Answer (February 22, 2022). It should be noted that the deadline for Employee to complete SMART GOAL #1 was May 31, 2021, however, Agency included this SMART GOAL on Employee's PIP, even though the deadline had not expired. *See also* Agency's Brief, *supra*.
[9] *Id*.
[10] Petition for Appeal, *supra*.

November 3, 2021. On November 29, 2021, Agency issued its Final Agency Decision removing Employee effective December 3, 2021.[11]

Employee's Position

In her Petition for Appeal, Employee asserts that Agency lied and retaliated against her after she filed a complaint with the Equal Employment Opportunity Commission ("EEOC") asserting sexual and verbal abused by a former co-worker. Employee also argues that her supervisor falsified performance points to expedite disciplinary action against her.[12]

Employee also avers that Agency failed to inform her of the Performance Standards in violation of 6-B DCMR § 1410. Employee questions the validity of Agency's PIP completion notification process while she was on leave. Employee asserts that although Dr. Chakraborty's PIP decision letter was dated September 2, 2021, she received the letter on September 10, 2021. She also explains that Agency wrongfully placed her on a PIP based on her FY20 performance evaluation, in violation of 6-B DCMR §1410.2. Employee provides that Agency further failed to comply with the PIP duration as provided in 6-B DCMR §1410.3. Employee also avers that Agency failed to follow the Grievance procedures in violation of DCMR Grievance Procedures sections 1630, 1631, and 1632. Employee provides that the penalty of termination was too harsh, and in violation of the *Douglas* factors.[13] She explains that Agency treated similar employees differently. Employee highlights that she received her scheduled two-years step increase from Grade 14 Step 5, to Grade 14, Step 6 on October 1, 2021, despite the alleged performance deficiencies, in violation of the District of Columbia Department of Human Resources' ("DCHR") performance standards. Employee asserts that she met all the actionable and reasonable goals as specified by Agency. Employee requests that her termination be rescinded and that she be provided backpay and benefits.[14]

Agency's Position

In its February 16, 2023, Brief to this Office, Agency asserts that it followed the appropriate PIP Procedure as prescribed in 6-B DCMR §1410. Agency explains that because Employee's performance was deficient, it placed her on a PIP to address the areas of deficiency. Agency states that when Employee failed the PIP, it timely terminated her. Agency avers that the PIP was for 90-days as prescribed by law. Agency notes that the PIP was properly documented, and it provided Employee with clear goals to accomplish, the means to accomplish the goals and benchmarks to measure her performance. Agency asserts that the PIP ended on August 22, 2021, and Dr. Chakraborty issued a PIP decision on September 2, 2021, eight (8) business days after the end of the PIP.[15]

Agency further noted that it had cause to impose adverse action on Employee pursuant to 6B DCMR §§1607.2(d)(1) and (2); and Agency's Policy and Procedures 3300.1E. Agency

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[11] Agency's Answer, supra. See also Agency's Sur-Reply Brief (March 16, 2023).
[12] Petition for Appeal (January 19, 2021).
[13] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).
[14] Petition for Appeal, *supra*. See also Employee's Brief (March 1, 2023).
[15] Agency's Brief, *supra*.

maintains that because Employee did not meet the performance standards, she was placed on a PIP. Furthermore, Employee failed to meet the expectations set by management for the PIP, consequently, she was removed from her position.[16] Regarding the appropriateness of penalty, Agency cited to *Stokes v. District of Columbia*[17], asserting that in assessing the appropriateness of the penalty, OEA is limited to ensuring that "[m]anagerial discretion has been legitimately invoked and properly exercised." Accordingly, Agency outlined its reasons for terminating Employee. Agency explains that it analyzed each of the twelve (12) *Douglas* factors and concluded that removal was the most appropriate penalty based on her failure to meet the performance goals as stated in the PIP.[18]

1) **Whether Agency followed the appropriate PIP procedures in terminating Employee**

Pursuant to DPM §1410.2, "a PIP is designed to facilitate constructive discussion between an employee and his or her immediate supervisor to clarify areas of work performance that must be improved. Once the areas for improvement have been identified, the PIP provides the employee the opportunity to demonstrate improvement in those areas and his or her ability to meet the specified performance expectations." Additionally, DPM §1410.3 provides that "a PIP issued to an employee shall last for a period of thirty (30) to ninety (90) days and must: (a) Identify the specific performance areas in which the employee is deficient; and (b) Provide concrete, measurable action steps the employee can take to improve in those areas." Furthermore, DPM § 1410.4 provides that "[a]n employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, as the term is defined in Section 1499, shall complete a PIP when the employee's performance has been observed by the immediate supervisor as requiring improvement."

In addition, DPM §§ 1410.5-6 & 11 highlight that, **1410.5** *"[w]ithin ten (10) business days after the end of the PIP period, the employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, shall issue a written decision to the employee as to whether the employee has met or failed to meet the requirements of the PIP*." **1410.6** "If the employee fails to meet the requirements of the PIP, the written decision shall state the reason(s) the employee was unsuccessful in meeting those requirements and: a. Extend the PIP for an additional period, in accordance with Subsection 1410.8; or b. Reassign, reduce in grade, or remove the employee." **1410.11** "[w]henever an immediate supervisor or, in the absence of the immediate supervisor, a reviewer, *fails to issue a written decision within the specified time period as provided in Subsections 1410.5 or 1410.9, the employee shall be deemed to have met the requirements of the PIP*." (Emphasis added).

Here, Employee contends that Agency did not comply with the PIP procedures in terminating her. Agency on the other hand asserted that it complied with all the PIP procedures. The relevant date here is May 24, 2021, the day on which the PIP started. The maximum length of a PIP is 90-days. Calculating 90-days from May 24, 2021, is August 22, 2021. Pursuant to DPM § 1410.5, if the PIP was for the maximum 90 days period as Agency claims, Agency was required to *issue a written decision to Employee within ten (10) business days as to whether*

[16] *Id*.
[17] 502 A.2d 1006, 1010 (D.C. 1985).
[18] Agency's Brief, *supra*.

Employee met or failed to meet the requirements of the PIP. Ten (10) business days from August 22, 2021, is September 3, 2021. Because Employee was not in duty status on September 2, 2021, Employee's supervisor, Dr. Chakraborty mailed a written decision to Employee notifying her of the outcome of the PIP. The written decision informed Employee that she was unsuccessful in the PIP. This decision was mailed via USPS Priority Mail Express. Agency mailed two (2) additional letters to Employee via USPS Priority Mail Express, one placing her on administrative leave immediately and the second one proposing Employee's termination for her failure to meet the PIP requirements. Agency did not provide this Office with a return receipt for any of the three notices mailed to Employee.[19]

In *Aygen v. District of Columbia Office of Employee Appeals*,[20] the D.C. Superior Court found that where an employee is in duty status, "the notice of final decision must [be] delivered to the employee on or before the time the action is effective, *with a request for employee to acknowledge it*" (emphasis added). The Court noted that if the employee refused to acknowledge receipt, a signed written statement by a witness may be used as evidence of service.[21] Additionally, the Court found that where an employee is not in duty status, the notice "*must* be sent to employee's last known address by courier, or by certified or registered mail, *return receipt requested*, *before the time of the action becomes effective*" (emphasis added).[22] The court further explained that "a dated cover letter, by itself, was insufficient evidence" of a mailing date or proof of receipt by an employee.[23] In the current matter, Employee was not in duty status on September 2, 2021. Agency was aware that Employee was out on approved leave until at least September 8, 2021. Employee asserted that she received the notices from Agency on September 10, 2021, after she was denied access into the workplace. Employee noted that the notices were left outside of her home with no signature or receipt.[24] Agency did not provide this Office with any information evidencing service on Employee prior to September 10, 2021, or prior to the ten (10) business days deadline. Wherefore, I find that the September 2, 2021, date on the notice is insufficient evidence of proof of receipt by Employee.

Furthermore, I find that the time period between August 22, 2021, to September 10, 2021, is thirteen (13) business days. I conclude that this is more than the required ten (10) business days as provided in DPM §1410.5. DPM § 1410.11 provides that whenever an immediate supervisor or a reviewer *fails to issue a written decision within the specified time period as provided in Subsections 1410.5 or 1410.9, the employee shall be deemed to have met the requirements of the PIP*. (Emphasis added). Since Agency's PIP notices to Employee did not include a return receipt, and there is no evidence of such in the record proving that Employee actually received the notice on or before September 3, 2021, I conclude that Employee is deemed to have met the requirements of the PIP, and any adverse action stemming from the PIP is null and void. Moreover, it can be reasonably assumed that if Employee had received the PIP notices prior to September 10, 2021, she would not have returned to work or attempted to access the workplace on September 10, 2021.

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[19] *See* Petition for Appeal, *supra*.
[20] No. 2009 CA 006528; No. 2009 CA 008063 at p. 9 (D.C. Superior Ct. April 5, 2012).
[21] *Id*.
[22] *Id.*
[23] *Id*. at pp. 10-11.
[24] Petition for Appeal, *supra*.

Assuming *arguendo* that Agency complied with DPM §1410.5, I find that Agency did not comply with DPM §1410.3. Employee argues that Agency placed her on a PIP for one (1) year.[25] DPM §1410.3 provides that "a PIP issued to an employee *shall* last for a period of thirty (30) to ninety (90) days and must: (a) Identify the specific performance areas in which the employee is deficient; and (b) Provide concrete, measurable action steps the employee can take to improve in those areas." Here, Agency argued that it was its practice to place employees on a 90 day PIP to provide them the maximum amount of time allowable under District regulations to improve their performance.[26] Agency submitted an Affidavit from Gitana Stewart-Ponder, the Deputy Director of Administration at Agency stating that she instructed all the supervisors under her, which included Dr. Chakraborty to issue 90-day PIPs.[27] Agency asserted that because the projects Employee worked on were long term projects, Employee was automatically issued a 90-day PIP. Although it might be customary for Agency's managers to issue 90-days PIPs, it should be noted that Employee is not a manager or someone who administers PIPs on other employees. Accordingly, absent any information in the record to prove that Employee was aware of the duration of the PIP, I conclude that Employee was not aware of the length/duration of the PIP. Also, the PIP notice provided to Employee did not inform her of the length of the PIP – as it did not include a PIP end date. On the contrary, Employee's supervisor, Dr. Chakraborty stated during the May 24, 2021, Microsoft TEAMS PIP meeting with Employee that the PIP would run to the end of FY21, which is September 30, 2021 – 40 calendar days more than the prescribed maximum length for a PIP – 90 days, and in violation of DPM §1410.3. It appears Agency realized its error and unilaterally ended the PIP on August 22, 2021, exactly 90 days from the start of the PIP, without providing Employee with any notice that the PIP would end on August 22, 2021.[28] Based on the foregoing, I find that Agency did not comply with DPM §1410.3 in implementing this PIP.

Moreover, Employee cited that Agency violated DPM §1410.2 by placing her on the PIP based on her FY20 performance and not based on the current year – FY21 performance. Dr. Chakraborty stated during the Microsoft TEAMS PIP meeting held on May 24, 2021, that Employee was placed on the PIP to address her performance deficiencies from FY20. Although Dr. Chakraborty also stated that the PIP mirrored Employee's performance plan for FY21, she noted that the goal of the PIP was to address the areas of Employee's FY20 plan where she did not receive a 3 or above rating.[29] DPM §1410.2 provides in part that "a PIP is designed to facilitate constructive discussion between an employee and his or her immediate supervisor to clarify areas of work performance that must be improved…" The "EPerformance Frequently Asked Questions (FAQs) Performance Improvement Plan (PIP)" found on the DCHR website[30] highlights in pertinent parts as follows:

Can a PIP be extended into the next performance management period?

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[25] Employee's Brief, *supra*.
[26] Agency's Answer, *supra*.
[27] *Id*. at Exhibit 13.
[28] Employee's Brief, *supra*, see thumb drive.
[29] *Id*.
[30] https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/DCHR_performance_improvement_plan_faq_8_26_09.pdf retrieved May 5, 2023.

> A PIP is issued for the *current performance management period based on the employee's current performance plan*. It cannot be extended into the next performance management period (emphasis added).
>
> **Can an employee's performance in the past performance management period be considered when issuing a PIP in the new performance management period?**
>
> *Only performance occurring during the current year (i.e. performance management period) and based on the employee's current Plan is to be considered*. (Emphasis added).

Additionally, DCHR's Performance Improvement Plan FAQ found on the DCHR website notes as follows:[31]

> **Can an employee's performance in the past performance management period be considered when issuing a PIP in the new performance management period?**
>
> *No.* P.I.P.s are based on the employee's current Performance Plan. *(*Emphasis added)

As noted above, while Dr. Chakraborty stated during the May 24, 2021, Microsoft TEAMS meeting that the PIP mirrored Employee's FY21 performance plan, she further noted that Employee was placed on the PIP to address performance issues from FY20 in areas that Employee did not receive a rating of 3 or higher. I find that this constitutes another violation of the PIP procedure. Furthermore, Employee was not provided with the opportunity to fully perform her assigned tasks pursuant to her FY21 performance plan before being placed on the PIP. Employee received her FY21 performance plan via email on December 15, 2020, while she was on FMLA. She returned to work after her FMLA ended on March 29, 2021. Thus, Employee had less than two (2) months to meet the requirements of her FY21 performance plan, prior to being placed on the PIP on May 24, 2021. I find that as Agency previously noted, because the projects Employee worked on were long term projects, Employee should have been provided more time after her return to work on March 29, 2021, to complete the tasks as outlined in her FY21 performance plan before being placed on a PIP.

2) Whether Agency had cause to discipline[32]

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. Further, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. Since I have concluded that Agency did not comply with all the PIP requirements, and that Employee was successful in the PIP since Agency failed

[31] https://dchr.dc.gov/publication/performance-improvement-plan-faq retrieved May 5, 2023.
[32] Because I find that Agency did not have cause to discipline Employee, I will not address Employee's retaliation claims.

to timely notify her of the PIP outcome, Agency does not have cause to discipline Employee pursuant to 6B DCMR 1607.2(d)(1) and (2); and Agency's Policy and Procedures 3300.1E.

3) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions

Here, because I find that Agency has not met its burden to establish cause for the adverse action in this matter, I conclude that Agency cannot rely on these causes of action to discipline Employee. Accordingly, I further find that Agency's penalty of termination must be reversed.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of terminating Employee is **REVERSED**; and
2. Agency shall reimburse Employee all back-pay, and benefits lost as a result of her termination; and
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