

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
ANITA POSEY,)	
Employee)	OEA Matter No. 1601-0016-18
)	
v.)	Date of Issuance: August 30, 2019
)	
DISTRICT OF COLUMBIA)	
FIRE AND EMERGENCY MEDICAL)	
SERVICES DEPARTMENT,)	MONICA DOHNJI, ESQ.
Agency)	Senior Administrative Judge
)	

Marlene Kemi Morton, Esq., Employee Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 29, 2017, Anita Posey (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Fire and Emergency Medical Services Department’s (“DC FEMS” or “Agency”) decision to terminate her from her position as an Emergency Medical Technician (“EMT”), effective November 3, 2017. Employee was terminated for “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically: Neglect of Duty: careless or negligent work habits.”¹

On December 27, 2017, Agency submitted its Answer to Employee’s Petition for Appeal. Following an unsuccessful mediation attempt, this matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) in March of 2018. A Status/Prehearing Conference was held on March 18, 2018, with both parties present. Thereafter, I issued a Post-Status/Prehearing Conference Order requiring the parties to submit written briefs addressing the issues raised at the Conference. Agency’s brief was due on or before May 18, 2018, and Employee’s brief was due on or before June 18, 2018. Agency also had the option to submit a reply brief on or before June

¹ Agency cited to the old regulation – 16 District Personnel Manual (“DPM”) section 1603.3(f)(3).

29, 2018. After several requests for extensions from both parties to submit their respective briefs, Agency submitted its brief on July 2, 2018; while Employee submitted her brief on August 17, 2018. Thereafter, I issued an Order scheduling a Prehearing Conference for November 13, 2018. After several requests from the parties to continue the Prehearing Conference, the Prehearing Conference was ultimately held on May 15, 2019, with both parties present.² On June 6, 2019, the undersigned issued an Order denying the parties' request for Summary Disposition, as well as setting a schedule for the submission of additional briefs and supporting documentation. The requested briefs/documentation were due on or before June 24, 2019. Agency requested that the submission deadline be extended. Agency's request was granted in an Order dated July 12, 2019, wherein, the parties were required to submit the required briefs and supporting documents on or before July 26, 2019. Both parties have made their respective submission as required. Upon further 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 utilized the appropriate District of Columbia Municipal Regulation in disciplining Employee; and
- 2) Whether Agency had cause to discipline Employee for “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty”; and
- 3) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions.

BURDEN OF PROOF

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

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

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

² Employee incorporated a request for summary disposition in her May 13, 2019, Prehearing Statement. On May 30, 2019, Agency filed its response to Employee's Motion for Summary Disposition, along with a Cross-Motion for Summary Disposition. In an Order dated June 6, 2019, the undersigned Denied the parties' requests for Summary Disposition. Additionally, the undersigned ordered the parties to submit additional information to further clarify the record.

OEA Rule 628.2 *id.* states:

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

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, 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.

According to the record, Employee was an Emergency Medical Technician with Agency. She sustained a work-related injury to her right hand and wrist on June 15, 2015, while rendering care to a patient. Employee filed a workers' compensation claim with the District of Columbia Public Sector Workers' Compensation Program ("PSWC") and was placed on Continuation of Pay status for twenty-one days, effective June 23, 2015 through July 12, 2015. Employee's workers' compensation claim was accepted on June 29, 2015, and her workers' compensation benefits commenced on July 14, 2015. Employee returned to work on a limited duty assignment effective July 15, 2015. From July 14, 2015 to September 16, 2015, Employee received compensation for both her limited hours worked and her workers' compensation payments. Employee was placed on Leave without pay for the hours that were covered by her workers' compensation payments. On September 17, 2015, Employee stopped working her modified limited duty schedule and continued receiving total temporary disability benefits until the effective date of her removal.

Prior to her termination, Employee had a follow-up examination at the Police and Fire Clinic ("PFC") on January 17, 2017, wherein, the Medical Director, Doctor Taisha Williams upon examining Employee noted that Employee had limited range of motion on all her fingers on her right hand and a limited range of motion on her right wrist. Doctor Taisha Williams concluded that Employee had reached her maximum medical improvement with respect to her June 15, 2015, work-related injury. Doctor Taisha Williams concluded that based on her determination, Employee could not return to her EMT position with Agency.

On July 19, 2017, Agency issued an Advance Written Notice: Removal to Employee. Employee received the Notice on July 21, 2017.³ On July 20, 2017, Employee was examined at the Howard University Orthopedics Rehabilitative Services and a Disability Certificate was issued and signed by Doctor Danielle Sutton. According to the Disability Certificate, Employee was diagnosed with Reflex Sympathetic Dystrophy. It further stated that Employee was partially incapacitated but now has sufficiently recovered to be able to return to light work duties on August 14, 2017.⁴ On July 28, 2017, Employee was approved to return to the Fire Prevention unit on August 14, 2017. Doctor Taisha Williams completed a Limited Duty Certificate form for

³ Agency Answer to Petition for Appeal, at Tab 10 (December 27, 2017).

⁴ Employee's Response to the questions whether the two-year timeframe should be adjusted to account for the days Employee worked regular hours at Exhibit 8 (July 29, 2019).

Employee's return to work on August 14, 2017.⁵ On August 14, 2017, Employee reported to work at 8:15 am for her limited duty assignment. Around 01:30 p.m., Employee was asked to go home.⁶ On the same day, Employee filed a response to the Advance Written Notice.⁷ The Hearing Officer issued his Report and Recommendation on September 9, 2017.⁸ Subsequently, on October 25, 2017, Agency issued a Final Agency Decision with a termination effective date of November 3, 2017.⁹

Employee's Position

Employee argues that the two-year period as provided in D.C. Official Code Ann. § 1-632.45(b)(1) began in September of 2015, and not in July of 2015 when Employee began receiving workers' compensation payments. Employee explained she was approved for limited duty by Doctor Taisha Williams on July 14, 2015, restricting her to five (5) hours of work per day, three (3) days per week, and not to lift anything heavier than five (5) pounds. Employee also states that on August 5, 2015, Doctor Kosmos Papiliadis issued a Limited Duty Certificate increasing her work hours to eight (8) hours per day, for three (3) days per week. She noted that while she was placed on limited duty schedule, she worked her regular hours from July 2015 to September 2015. As such, the two-year period prescribed by the Code should have been adjusted to account for the days she worked her regular hours.¹⁰

Employee asserts that she was granted a Digital Certificate from Doctor Robert Wilson when she visited Howard University Orthopedics and Rehabilitative Services on July 20, 2017. She took the letter to the D.C. Police and Fire Clinic appointment on July 28, 2017, and she was given a Limited Duty Slip and ordered to report to the Fire Prevention unit to work regular hours. Employee states that the physician felt she had recovered well enough to perform limited duty roles. Employee asserts that she reported to work on August 14, 2017, but was sent home midway, without being paid for the hours worked. Employee states that for the period of August 6, 2017 to August 19, 2017, she received workers compensation payments.¹¹

Agency's Position

Agency states that there is no dispute that Employee worked in a light duty capacity from July of 2015 to September 17, 2015. However, Agency notes that the light duty does not reset the clock to allow Employee another two years to get back to performing the essential functions of her position of record. Agency explains that limited, modified duty assignments were designed by the Mayor to provide District employees with temporary or partial disabilities consistent and appropriate assistance to return to work quickly and safely. Agency explained that modified duties are discretionary in nature and not designed as a vehicle to restart the clock for an employee who, due to injury, is unable to perform the essential functions of their position.

⁵ *Id.* at Exhibit 8a.

⁶ *Id.* at Exhibit 9.

⁷ Agency Answer to Petition for Appeal, *supra*, at Tab 11.

⁸ *Id.* at Tab 12.

⁹ *Id.* at Tab 14.

¹⁰ Employee's Response to the questions whether the two-year timeframe should be adjusted to account for the days Employee worked regular hours (July 29, 2019).

¹¹ *Id.*

Agency notes that there is no statutory or precedential support for Employee's argument that the period of her two-year count did not begin on June 29, 2015 because of her July 2015 participation in a discretionary, department provided limited duty assignment. Agency maintains that the fact that Employee worked a modified schedule during the period at issue in the current matter is of no moment because Agency could have chosen to forgo placing Employee in a modified duty position. Agency argues that Employee had not performed the essential functions of her position for over two years prior to Agency initiating adverse action against Employee.¹²

Agency asserts that Employee acknowledged that she had reached maximum medical improvement, has neither worked in a full duty capacity, nor has been medically able to perform the essential functions of her position since June 15, 2015. Agency avers that currently, Employee remains unable to perform the job she was hired to do as both of her temporary returns to work in July of 2015 and August of 2017 were for limited light duty assignments. Therefore, Agency concludes that it was justified in initiating removal proceedings when it did.¹³

Agency further argues that nothing in the D.C. Official Code Ann. § 1-632.45, *et seq.* supports Employee's contention that her temporary forays into light duty resets the two-year period, which started in June of 2015. On the contrary, D.C. Official Code Ann. § 1-632.45(b)(2) supports Agency's election to take adverse action against Employee based on her failure to return to her position of record, for two years from the date of her injury. Citing to case law, Agency asserts that an agency may remove an employee who is unable to perform the essential functions of her position because of a medical condition.¹⁴

Agency also contends that, assuming Employee legitimately reported to work on August 14, 2017 for limited duty, the fact remains that Employee still could not perform the essential functions of her job, and more importantly, she remained under the District of Columbia's workers' compensation program as a claimant and she continued receiving workers compensation benefits during her period of light duty. Agency states that Employee began receiving workers compensation benefits on June 29, 2015.¹⁵ She was never released to perform her actual job as her disability never ceased or lessened to such an extent that she received clearance to return to full duty capacity within two (2) years from the date of commencement of workers compensation. Agency maintains that it complied with all the statutory and regulatory requirements in removing Employee from her position of record.¹⁶

1) Agency's Use of District of Columbia Municipal Regulations

The District of Columbia Municipal Regulations ("DCMR") and the corresponding District Personnel Manual ("DPM") regulate the manner in which agencies in the District of Columbia administer adverse and corrective actions. The new DCMR and DPM (DCMR 6-B Chapter 16 and DPM Chapter 16) regulating the manner in which agencies administer adverse action went into effect in the District on May 12, 2017. Consequently, all adverse actions

¹² Agency's Brief (July 26, 2019).

¹³ *Id.*

¹⁴ *Id.* Citing *Johnson v. United States Postal Services*, 120 M.S.P.R. 87 (2013).

¹⁵ Agency's Brief, *supra*.

¹⁶ *Id.*

commenced after this date were subject to the new regulation. In the instant matter, Employee was terminated effective November 3, 2017 and the new version of the DPM was already in effect. However, Agency levied an adverse action against Employee utilizing an older version of the DPM. Specifically, Agency charged Employee with violating 16 DPM §1603.3(f)(3) (March 4, 2008). Under the Old DPM, this section correlated with “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty”. However, the new version of the DPM, moved all the adverse action charges to DPM § 1605. Thus, the charge of neglect of duty can now be found in DPM § 1605.4(e), with its corresponding penalty found in DPM § 1607.2(e).

Under the older version of the DPM, the specification for Neglect of Duty includes, but is not limited to: Failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; careless or negligent work habits. The penalty for the first offense for neglect of duty ranges from reprimand to removal. Under the new version of the DPM, the specification for Neglect of Duty includes, but not limited to: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; sleeping or dozing on-duty, or loafing while on duty. The penalty for the first offense is counseling to removal. Employee was charged with Neglect of Duty, for failing to carry out the essential functions of her position since June of 2015. This specification is capture in both the older and the new version of the DPM. Consequently, I find that in the current matter, the applicable DPM is not substantively different from the older version utilized by Agency as both the charge and penalty range are similar. Both provide that the maximum range for penalty may be removal. Thus, I conclude that Agency’s action constitutes harmless error.¹⁷

2) Whether Agency had cause to discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), 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. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause.

Whether Agency had cause to discipline Employee for [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty

Agency charged Employee with [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty.

¹⁷ OEA Rule 631.3 provides that: “[n]otwithstanding any other provisions of these rules, the Office shall not reverse an agency’s action for error in the application of its rules, regulations or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency’s procedures, which did not cause substantial harm or prejudice to the employee’s rights and did not significantly affect the agency’s final decision to take action.”

Agency noted that Employee was unable to perform the essential duties of her position for a two-year period due to her job-related injury that occurred on June 15, 2015.

The District's personnel regulations provide that neglect of duty include the following: (1) *failure to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position*; (2) failure to perform assigned tasks or duties; (3) failure to assist the public; (4) undue delay in completing assigned tasks or duties; (5) careless work habits; (6) conducting personal business while on duty; (7) abandoning an assigned post; and (8) sleeping or dozing on-duty, or loafing while on duty (*emphasis added*).¹⁸

Additionally, D.C. Code § 1-623.45(b)(1) (2007), provides in pertinent parts that an agency which was the last employer shall: (1) Immediately and unconditionally accord the employee the right to resume his or her former, or an equivalent, position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured or had a disability..., provided that *the injury or disability has been overcome within two years after the date of commencement of compensation and provision of all necessary medical treatment needed to lessen disability ...* (*emphasis added*).

In the current matter, Employee was injured at work while rendering care to a patient on June 15, 2015. She applied to the PSWC to receive disability benefits. Her claim was accepted on June 29, 2015 and at the conclusion of her twenty-one-day continuation of benefit pay, the PSWC commenced temporary total disability ("TTD") payments to Employee for the injury. Because Employee was also placed on a modified work schedule, she also received her regular pay as of July 15, 2015. According to her PeopleSoft entry, Employee's first TTD payment commenced on July 14, 2015.¹⁹ Furthermore, the record shows that Employee received her first workers' compensation partial payment on August 4, 2015, and this check covered the pay period from July 12, 2015 to July 25, 2015.²⁰ Employee in this matter argues that the two-year period stated in D.C. Code § 1-623.45(b)(1) commenced in September 2015, because she worked a modified schedule from July 2015 to September 2015. She contends that the clock reset to September 2015, when she stopped working and/or the clock should be adjusted to account for the hours she worked during her modified schedule placement.²¹ However, I do not find Employee's argument convincing. Employee did not provide any laws, rules and regulations in

¹⁸ See also DPM 827.15: This section provides in pertinent parts that, an employee covered by § 827.1(b) who has *fully recovered within two (2) years from the date of commencement of compensation ...*, shall be entitled to resume his or her former position (or an equivalent one) immediately upon cessation of compensation (*emphasis added*).

¹⁹ Agency Answer to Petition for Appeal, *supra*, at Tab 2.

²⁰ Employee's Response, *supra*, at Exhibit 1B.

²¹ Assuming *arguendo* that the clock was adjusted and or reset based on Employee working a limited duty position from the pay period of July 12, 2015, to the pay period of September 18, 2015, I find that, Employee did not overcome her disability within the required two-year window. As of August 14, 2017, Employee's Disability Certificates highlight that Employee had not overcome her disability and as such, she could not return to her former position, nor could she perform the essential functions of her former position. Moreover, even if the undersigned finds that the two-year period commenced in September of 2015, as asserted by Employee, based on the record, as of September 2017, Employee had not fully overcome her disability. And as of the effective date of Employee's termination on November 3, 2017, Employee had still not overcome her disability and could therefore not return to her former position.

support of her assertion.²² As such, I conclude that the clock started ticking once Employee was placed on leave without pay and her workers' compensation payment became effective.

I further find that the two-year period prescribed in D.C. Code § 1-623.45(b)(1), commenced on July 14, 2015, which is the date after Employee's workers' compensation payments commenced.²³ Employee had from July 14, 2015, to July 14, 2017, to overcome her disability. As of August 14, 2017, when Employee returned to work, she had not overcome her disability. This is more than the two-years prescribed. Doctor Taisha Williams concluded on January 17, 2017, that based on her determination, Employee could not return to her EMT position with Agency. Also, the Disability Certificates from July 20, 2017, and July 28, 2017, both cleared Employee for limited duty not full duty. The disability certificates further noted that Employee was able to return to light work duties on August 14, 2017. Agency issued its Final Agency Decision on October 24, 2015. The effective date of Employee's termination was November 3, 2017. As of the effective date of termination, Employee had not overcome her disability. Thus, I find that Agency provided Employee the proper two-year grace period to return to work after the commencement of her workers' compensation payments, as set forth in D.C. Code § 1-623.45.

In addition, DPM 827.5 provides that, at the end of the two-year (2-year) period specified in § 827.3, an agency shall initiate appropriate action under chapter 16 of these regulations. Thus, the DPM requires an agency to commence disciplinary action against an employee who remains in a Leave Without Pay status more than two years after an employee begins to receive workers' compensation. Employee was carried on leave without pay from July 14, 2015 to at least August 19, 2017.²⁴ Because Employee had not overcome her disability at the end of the two years grace period and was unable to perform the essential duties of her job as an EMT, I conclude that Agency had cause to discipline Employee for neglect of duty.

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

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).²⁵ According to the Court in

²² In addition, DPM 827.3 provides in pertinent parts that, an agency shall carry an employee covered by § 827.1(b) on *leave without pay* for two (2) years from the date of commencement of compensation, or from the time compensable disability recurs if the recurrence begins after the employee resumes full-time employment with the District government, ... (emphasis added). Employee was placed on leave without pay effective July 14, 2015. This section does not address whether the two-year period is tolled, adjusted or resets if Employee is also placed on a modified schedule during the same time period.

²³ Again, assuming *arguendo* that the workers' compensation payment is said to commence on the date Employee actually received payment, which is August 4, 2015, Employee would have had to overcome her disability by August 3, 2017. Per the July 20, and July 28, 2017 Disability Certificates, Employee had not overcome her disability. Also, Employee had still not overcome her disability when she returned to the limited duty position on August 14, 2017.

²⁴ See Employee's July 29, 2019, submission at Exhibit 10.

²⁵ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry*

Stokes, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty” and as such, Agency can rely on these causes of action in disciplining Employee.

This Office has held that, the selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.²⁶ When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. Accordingly, Agency was within its authority to terminate Employee. Based on a review of the entire record, I conclude that Agency's removal action must be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

Corbett v. D.C. Department of Corrections, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

²⁶ *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011). *Love* also provided that “[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.” Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).