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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0006-21
	)	
v.	)	Date of Issuance: September 18, 2023
	)	
UNIVERSITY OF THE	)	JOSEPH E. LIM, Esq.
DISTRICT OF COLUMBIA,	)	Senior Administrative Judge
<u>Agency</u>	)	
Marc Wilhite, Employee Representative <sup>1</sup>	)	
Anessa Abrams, Esq., Agency Representative	)	

**INITIAL DECISION**

INTRODUCTION

On December 17, 2020, Employee, a Police Officer in the University of the District of Columbia's ("Agency" or "UDC") Department of Public Safety and Emergency Management, filed a Petition for Appeal contesting Agency's final decision to remove him from his position effective December 17, 2020. Agency alleged that Employee filed a fraudulent Worker's Compensation Claim with the D.C. Public Sector Worker's Compensation Program ("PSWCP").

OEA requested Agency's response on December 21, 2020, and Agency submitted its response on February 15, 2021. After a failed attempt to mediate this matter, it was assigned to the undersigned on May 7, 2021. After two continuances requested by the parties, I conducted a Prehearing Conference on July 28, 2021. After the parties completed an extensive discovery, I held another Conference on January 13, 2022.

Following an extension of time requested by Employee, the parties submitted a Joint Stipulation of Facts on March 8, 2022. A Status Conference was held on June 23, 2022, wherein a hearing was discussed for December of 2022. However, based on the parties' Consent Motion to File Motions for Summary Disposition, I issued an Order granting the request to submit briefs in lieu of a hearing on December 6, 2022. The parties submitted their briefs after another requested extension. Based on the pleadings, I determined that an Evidentiary Hearing in this

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<sup>1</sup> Ann-Kathryn So represented Employee until October 5, 2022. Mr. Wilhite took over the matter afterwards.

matter was not necessary as no material facts were in dispute. This decision is based on the stipulations of fact agreed to by the parties and the documentary evidence on file. The record is closed.

### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.

### ISSUES

1. Whether Agency's action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

### FINDINGS OF FACT<sup>2</sup>

Employee is a former Police Officer with the UDC Office of Public Safety and Emergency Management ("OPSEM"), UDC Police Department. His regular appointment with Agency as a Police Officer began on April 16, 1994. In 2020, Employee served as a Police Officer Job Series AD083. Employee was a member of the American Federation of State, County, and Municipal Employees District Council 20, Local 2087 ("AFSCME" or "Union"). As a union member, Employee's terms and conditions of employment were governed by a Collective Bargaining Agreement ("CBA") between Agency and the AFSCME. The CBA was in full force and effect during all relevant times in this matter.<sup>3</sup>

The Management Rights clause set forth in the CBA provides, among other things, that "[c]onsistent with applicable laws, rules, regulations, and the terms of the Agreement," Agency retains the "sole right" to "discharge . . . employees for cause."<sup>4</sup> In the case of a termination, the CBA provides, among other things: "In the event of a termination, the Vice President of Human Resources or his/her designee *may, at the Union's option*, meet with the Union President or his/her designee within five (5) working days of the employee's termination to discuss the matter, unless there is a mutually agreed upon extension. *The employee may be present at the Union's discretion*, unless the underlying conduct relates to workplace violence, in which the employee shall not attend. . . ."<sup>5</sup> (emphasis added). The CBA further provides: "[a]n employee who has been issued a disciplinary action may file an appeal either through the Office of Employee Appeals ("OEA"), subject to its jurisdictional requirements, or through the grievance procedure in this Agreement, but not both."<sup>6</sup> The extensive grievance and arbitration process is

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<sup>2</sup> These facts are obtained from the parties' stipulations of fact and undisputed facts derived from documents and exhibits submitted by the parties.

<sup>3</sup> Agency Brief in Opposition to Employee's Motion for Summary Disposition ("Agency Opposition"), Exh. 8 at 29 (Article 36) (the CBA "shall automatically be renewed from year to year thereafter unless either party gives to the other party written notice of a desire to modify or amend this Agreement.").

<sup>4</sup> *Id.* at 2 (Article 3); *see also id.* at 20 (Article 27, Section 1).

<sup>5</sup> *Id.* at 22-23 (Article 27, Section 9).

<sup>6</sup> *Id.* at 23 (Article 27, Section 10).

set forth in Article 28 of the CBA.<sup>7</sup>

As a University Police Officer, Employee was responsible for, among other things, “[s]afeguard[ing] University owned and controlled buildings, facilities and premises,” including being “[r]esponsible for access control through manual locking and unlocking of facilities and continual monitoring and inspecting.”<sup>8</sup> A University Police Officer must possess the following required competencies, among others:<sup>9</sup> Decision making skills that demonstrate sound and prudent judgment particularly under stressful conditions; Knowledge of university practices, policies, procedures, rules and regulations; Precision in identifying problems, relating findings and reporting facts.

Agency’s General Orders for OPSEM were distributed during a September 12, 2018, meeting between the University administration, the Union, and members of OPSEM, including Employee.<sup>10</sup> Pursuant to General Order 201.1, University Police Officers are “charged with preserving life, protecting property, maintaining human rights, and promoting individual responsibility,” and “[p]atrol coverage of the campus is continuous. All public safety members are expected to patrol the campus . . . Police officers are expected to be “highly visible.”<sup>11</sup> Officers are expected to be “highly visible” so they can be seen by those within the campus community.<sup>12</sup> An officer is not “highly visible” if they are sitting inside a closed/locked building.<sup>13</sup> When Agency is less occupied, more roaming and patrolling is necessary.<sup>14</sup>

Pursuant to General Order 201.1, University Police Officers are responsible for, among other things, “recognizing real and potentially dangerous or hazardous conditions,” and updating the Emergency Communications Center (“ECC”) with the current status of an incident.<sup>15</sup> Officers are required to “prepare/write reports of all incidents occurring on campus and to report their whereabouts regularly to the ECC.”<sup>16</sup> Police officers are expected to report injuries to the ECC and their supervisor when the injury occurs.<sup>17</sup> As it relates to patrol/building checks on Agency’s Van Ness campus, General Order 201.1 provides that police officers “are to conduct random security checks of their assigned patrol service area.”<sup>18</sup> The General Order makes clear that it is not sufficient for an officer to report that he/she is conducting an interior check of a building or location; rather, the officer must be specific with respect to his/her location. Among other things, police officers patrolling the Van Ness campus are required “to (at a minimum)

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<sup>7</sup> *Id.* at 23-26.

<sup>8</sup> *Id.* Exh. 9; Exh. 2 Employee Dep. at 16-17.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Exh. 10. (Meeting Sign in Sheet); Employee Dep. at 17-21, 67-68, 186-88. *See also* Exh. 11. OPSEM General Order No. 201.1 is entitled “Patrol Responsibilities.”

<sup>11</sup> *Id.* Exh. 11 at 1.

<sup>12</sup> *Id.* Exh. 4. Knight Dep. at 107-08; Exh. 6. Treadwell Dep. at 22-23.

<sup>13</sup> *Id.* Exh. 4. Knight Dep. at 109-10.

<sup>14</sup> *Id.* Exh. 4. Knight Dep. at 106-07.

<sup>15</sup> *Id.* Exh. 11 at 2.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* Exh. 5. Deposition of Cetrina Smith, Dec. 16, 2021 (“Smith Dep.”) at 68-69.

<sup>18</sup> *Id.* Exh. 11 at 4.

contact the dispatcher via police radio every 30 minutes to advise one of the following: 1. Current location and activity (or at any time the location/activity changes);” 2. Request additional time to complete an activity (i.e. still on scene of an incident, completing report, etc.)<sup>19</sup>

As a result of the COVID-19 pandemic, University buildings were closed to the public in June 2020, and Agency was operating remotely, but essential employees, including University police officers, were required to work on-site. On Sunday, June 7, 2020, Employee was assigned to work the 2:00 p.m. to 10:30 p.m. shift at Agency's Van Ness Campus. At 1:36 p.m. on June 7, 2020, Employee swiped into the OPSEM Police Headquarters Roll call room. At approximately 10:00 p.m. on Sunday, June 7, 2020, Employee verbally reported to his supervisor, Sergeant Matthew Knight (“Knight”) that he had been injured at approximately 5:00 p.m. that day during his shift while inside the Architectural Research Institute (“ARI”) suite.<sup>20</sup> The former ARI Suite was located on level B in Building 38 on Agency’s Van Ness campus. Employee explained he had entered the interior of the ARI Suite utilizing a key and that while inside an interior door fell on his foot.<sup>21</sup> As of June 7, 2020, the ARI Suite was not being utilized, as ARI ceased to exist around October 2019.<sup>22</sup> Employee did not indicate why he was inside the ARI Suite.<sup>23</sup>

Employee did not report to the ECC that he was at Building 38 or that he had entered the ARI Suite, or that the interior door broke and fell on his foot.<sup>24</sup> At approximately 2:00 a.m. on June 8, 2020, Employee reported to Sgt. Knight that he fractured his toe.<sup>25</sup> Sergeant Knight documented Employee’s report of an injury in an internal Incident/Offense Report.<sup>26</sup> Since Employee claimed he was injured on the job, Employee was required to report his injury to the District of Columbia’s Office of Risk Management (“DC ORM”) via e-risk.<sup>27</sup>

As a result of Employee’s report of an alleged injury, Knight proceeded to the former ARI Suite in Building 38 and found the door locked. Knight utilized all the master keys maintained by the police department but was unable to gain access.<sup>28</sup> Unable to gain access to the interior of the ARI Suite, Sergeant Knight took a photograph of the exterior ARI Suite door.<sup>29</sup>

On June 11, 2020, Employee sent Sgt. Knight the physician's form with his work restrictions. The medical note dated June 11, 2020, indicated that Employee’s work restrictions were no more than two hours walking or standing in an 8-hour workday and that

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Exh. 26; Exh. 4. Knight Dep. at 118.

<sup>21</sup> *Id.* Exh. 26 at 3; Exh. 4. Knight Dep. at 118; Exh. 2. Employee Dep. at 47, 48, 61-62.

<sup>22</sup> *Id.* Exh. 2. Employee Dep. at 48; Exh. 4. Knight Dep. at 123; Smith Dep. at 111-12; Exh. 3. Deposition of James Killete, conducted Dec. 20, 2021 (“Killete Dep.”) at 14, 16.

<sup>23</sup> *Id.* Exh. 4. Knight Dep. at 121 (at time of deposition, Knight was not aware why Employee was inside ARI Suite).

<sup>24</sup> *Id.* Exh. 2. Employee Dep. at 47, 49, 65-66.

<sup>25</sup> See UDC Exhibit 13, Incident Report.

<sup>26</sup> Agency Opposition, Exh. 26.

<sup>27</sup> *Id.* Exh. 4. Knight Dep. at 68, 83; Exh. 1. Deposition of Katharine Bruce, conducted Dec. 14, 2021 (“Bruce Dep.”) at 49-50, 150; Smith Dep. at 177-78.

<sup>28</sup> *Id.* Exh. 4. Knight Dep. at 123-24.

<sup>29</sup> *Id.* Exh. 27; see also Exh. 4. Knight Dep. at 124.

he must wear a surgical boot. Employee had to stay home when Agency could not accommodate his work restrictions due to the nature of his job. As a result of his injury on June 7, 2020, Employee was out of work until August 16, 2020.

Employee reported his injury to DC ORM on June 11, 2020.<sup>30</sup> On June 12, 2020, DC ORM advised Employee by email, of certain forms he was required to complete in order to proceed with his workers' compensation claim.<sup>31</sup> Employee was further advised: "If you do not want to file a workers' compensation claim, please respond to this email to confirm that you do not want to file a claim."<sup>32</sup> Employee did not advise DC ORM in writing that he did not wish to file a workers' compensation claim. Rather, Employee completed and returned the forms requested by DC ORM.<sup>33</sup> Specifically, on or about June 18, 2020, Employee submitted Form 1 – Employee's Notice of Injury & Claim for Continuation of Pay (COP) to the District of Columbia's Office of Risk Management ("D.C. ORM"), Public Sector Workers' Compensation Program ("PSWCP").<sup>34</sup>

Therein, Employee noted he had been injured on June 7, 2020, at approximately 4:30 p.m., when a door fell on his toe. Employee certified under penalty of perjury, among other things, that the information provided in Form 1 was "true and correct to the best of [his] knowledge" and that the injury "was sustained in performance of duty as an employee of the District of Columbia government . . ."<sup>35</sup> Also, on or about June 18, 2020, Employee submitted Form CA-7, wherein he noted he was filing a claim seeking medical compensation for his alleged injury, certifying the claim for compensation was because of an injury sustained while in the performance of his duties.<sup>36</sup> By submitting Form CA-7, Employee requested medical compensation to pay for the medical treatment related to his alleged injury. Employee also completed Forms 3A, 4, and 11, and his physician completed Form 3.<sup>37</sup> On or about June 25, 2020, Employee completed Form 4506-T.<sup>38</sup>

The incident report completed by Knight was transmitted to Cetrina Smith ("Smith"), Manager, Administrative Operations Bureau, Executive Office of the Chief of Police, OPSEM, who is responsible for, among other things, investigating the workers' compensation claims filed by employees within Agency's Police Department. Knight further informed Smith that he was unable to access the ARI Suite.<sup>39</sup>

As part of her investigation, Smith reviewed the ECC Computer Aided Dispatch ("CAD") Report. The CAD Report is a log of all officer calls into the ECC during his/her shift,

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<sup>30</sup> *Id.* Exh. 36 (June 12, 2020, 9:55 a.m. entry).

<sup>31</sup> Agency Opposition, Exh. 37; Employee Dep. at 102-04.

<sup>32</sup> *Id.* Exh. 37.

<sup>33</sup> *See* Employee Dep. at 104-06.

<sup>34</sup> Exh. 38.

<sup>35</sup> *Id.*, Section IV.

<sup>36</sup> Agency Opposition, Exh. 39, Sections II, VI; Employee Dep. at 108-09.

<sup>37</sup> *Id.* Exhs. 40-43; Employee Dep. at 110-12.

<sup>38</sup> *Id.* Exh. 44.

<sup>39</sup> *Id.* Knight Dep. at 123-25.

which notes the time of the call-in, the location of the check, the time the check is completed, and any incidents noted during the check.<sup>40</sup> The June 7, 2020 CAD Report for Employee did not contain any entries indicating Employee performed a patrol check of any specific buildings within the Van Ness campus on that date. Moreover, the CAD Report did not contain any entries indicating Employee reported his alleged injury to the ECC at the time it allegedly occurred or that he reported the hazardous condition of the door that allegedly fell on his foot. Rather, the CAD Report revealed Employee made only one check during his June 7, 2020, shift: at approximately 6:46 p.m., Employee called in a High Visibility Check for the Van Ness campus without indicating a specific location for his visibility check.<sup>41</sup> The CAD Report demonstrated that at approximately the same time on June 7, 2020, Officer Brian Hedrick was assigned and performed a building check patrol of Buildings 38 and 39 between 4:32 p.m. and 5:45 p.m.<sup>42</sup>

Smith emailed Employee on June 11, 2020, to ascertain additional information needed to complete the report related to his reported June 7 injury.<sup>43</sup> In that email, Smith explained what the CAD Report showed as it related to Employee's June 7 tour of duty and inquired as to why there were no CAD entries except for the High Visibility Check. She further inquired as to how Employee obtained access to the location where his injury allegedly occurred. Smith asked Employee to provide information to corroborate that his injury occurred while he was on duty on June 7, 2020. Employee did not respond.<sup>44</sup>

By email dated June 25, 2020, D.C. ORM PSWCP Claims Examiner Katherine Harris ("Harris") informed Agency of Employee's statement of injury and sought additional information from Agency. Specifically, Harris sought information concerning the following: whether Agency could confirm that a portion of the door became loose and fell; how heavy the door is; what hours Employee worked and when he took a lunch break; whether Employee left work at any time on June 7, 2020; and whether Employee returned to work and if so, when.<sup>45</sup> Smith called Harris<sup>46</sup> and followed up via email.<sup>47</sup> Smith explained what she discovered concerning Employee's call-in checks, Agency's inability to access the ARI Suite absent having a key made by a locksmith, and what Agency discovered inside the ARI Suite. Smith further explained she had sought additional information from Employee, but Employee did not respond.<sup>48</sup> Smith provided Harris with documents and photographs.<sup>49</sup>

On July 1, 2020, Employee was interviewed by Harris.<sup>50</sup> Employee explained he was attempting to enter a room to retrieve some items, without specifying the items. Employee reported the door consisted of two parts – a top piece and a bottom piece, with the bottom piece

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<sup>40</sup> *Id.* Exh. 28.

<sup>41</sup> *Id.* at bates 23.

<sup>42</sup> *Id.* at bates 22.

<sup>43</sup> *Id.* Exh. 29.

<sup>44</sup> *Id.* Smith Dep. at 84-85; *see also* Employee Dep. at 96.

<sup>45</sup> *Id.* Exh. 45 at bates 440.

<sup>46</sup> *Id.* Exh. 36 at bates 4618 (June 26, 2020 4:12 p.m. entry).

<sup>47</sup> *Id.* Exh. 45.

<sup>48</sup> *Id.* at bates 439.

<sup>49</sup> *Id.* Exh. 45; *see also* Smith Dep. at 127-28.

<sup>50</sup> *Id.* Exh. 36 at bates 4619-22 (July 1, 2020, 10:12 a.m. entry).

being held by a stick – and the stick snapped, causing the bottom part to fall on his toe. Employee indicated this occurred at approximately 4:15-4:30 p.m. Employee further reported the key in his possession did not work on the door. Employee stated his job responsibilities included patrolling designated areas and this location was his section to patrol.<sup>51</sup>

During its investigation of Employee's alleged injury, Agency conducted an audit of Employee's key badge access on June 7, 2020. A review of the OPSEM badging system (Pro Watch) revealed Employee used his University key badge five times during his shift on June 7, 2020, as follows:<sup>52</sup>

- At 13:23 [1:23 p.m.], Employee entered campus by coming into the garage freight elevator on the B level of Building 44. This allowed him to gain access to level C of Building 39, where the University's Police Department Headquarters is located.
- At 13:36 [1:36 p.m.], Employee entered the Police Headquarters roll call room.
- At 13:36 [1:36 p.m.], Employee accessed the gun cage at Police Headquarters.
- At 21:52 [9:52 p.m.], Employee accessed the Police Headquarters Main Door.
- At 21:59 [9:59 p.m.], Employee accessed the gun cage at Police Headquarters.

The report did not show that Employee accessed Building 38 (where the former ARI Suite is located) on June 7, 2020.

The University also reviewed OPSEM's key watch system, from which University police officers retrieve keys for their posts. Employee did not sign out any keys during his June 7, 2020, shift. The report showed Employee had not signed out any keys from June 1-June 12, 2020.<sup>53</sup>

As the University Police Department did not have a key to the exterior door of the ARI Suite, Smith requested that the University locksmith make a key to the suite so that she could gain access. The ARI Suite was empty and merely contained partitions and old desks.<sup>54</sup> The area where Employee was allegedly injured was in the rear of the suite. In that area, there was a chair and two parts of a split door lying on either side of a door frame.<sup>55</sup> The area on the other side of the door frame led into a smaller area where there is an electrical closet and other old items.<sup>56</sup>

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<sup>51</sup> *Id.* at bates 4620.

<sup>52</sup> *Id.* See Exh. 30.

<sup>53</sup> *Id.* Exh. 31; *see also* Smith Dep. at 181-82.

<sup>54</sup> *Id.* See Exh. 32.

<sup>55</sup> *Id.* at bates 376-78.

<sup>56</sup> *Id.* Exh. 33.

On June 18, 2020, in response to an email sent to him by Employee, Alex Bako, the University's Director of Compliance and Risk Management, advised Employee that Smith had requested additional information from him regarding his alleged injury.<sup>57</sup> Despite this notification, Employee did not respond to Smith. The record reflects that while Employee read Smith's email on July 1, 2020, he still chose not to respond.<sup>58</sup>

Through an email dated July 1, 2020, Harris informed UDC that Employee stated he went to the room where he was allegedly injured in order to "retrieve some items" and inquired whether Employee was instructed by anyone at Agency to obtain items from that location.<sup>59</sup> Smith informed Harris that Agency was closed due to COVID-19 with the exception of essential personnel (Police Department and Power Plant), and that the Police Department did not instruct Employee to enter the ARI Suite, as there is nothing in the ARI Suite that was needed by the Police Department.<sup>60</sup> Smith further informed Harris that a review of the key watch system revealed Employee did not check out any keys for the period June 1-June 12, 2020, and a review of Employee's badge swipes for June 7, 2020 revealed Employee only had five transactions – all of which related to Agency's Police Headquarters.<sup>61</sup>

Harris had a subsequent conversation with Smith and Mr. Bako on July 9, 2020, wherein Smith and Mr. Bako expressed concern over whether Employee's alleged injury happened at work.<sup>62</sup> Claims Examiner Harris indicated she would have the file reviewed by DC ORM's legal department. On July 17, 2020, DC ORM transferred Employee's claim to Claims Examiner Carl Young.<sup>63</sup>

On July 24, 2020, D.C. ORM Public Sector Workers Compensation Program ("PSWCP") issued a Notice of Determination denying Employee's claim workers' compensation claim.<sup>64</sup> The PSWCP determined Employee did not suffer a compensable work injury on June 7, 2020. In reaching this conclusion, the PSWCP found as follows:

According to your recorded statement and incident report filed with UDC, you were injured sometime between 4:15 p.m. and 5:00 p.m. while in the ARI Suite of Building 38 on UDC's campus. However, a review of your check-ins with ECC indicated that you did not check in as performing your patrol duties until 6:46 p.m., and that another officer had been assigned to and was patrolling Building 38 on June 7, 2020, at the time of your alleged injury. Additionally, an investigation of Building 38 reflected that the area where reported to have been injured was inaccessible without a key and could only be accessed after a locksmith prepared a key to gain entry to that section of Building 38. Further, UDC could find no

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<sup>57</sup> *Id.* Exh. 34.

<sup>58</sup> *Id.* Exh. 35; Employee Dep. at 96-97.

<sup>59</sup> *Id.* Exh. 46 at bates 419.

<sup>60</sup> *Id.* at bates 418.

<sup>61</sup> *Id.*; *see also* Smith Dep. at 102-04.

<sup>62</sup> *Id.* Exh. 36 at bates 4624 (July 9, 2020, 3:42 p.m. entry).

<sup>63</sup> *Id.* (July 17, 2020, 5:50 pm entry and July 20, 2020, 9:43 am entry).

<sup>64</sup> *Id.* Exh. 47.



evidence to indicate that you had used your key card to enter any buildings on campus aside from Police Headquarters at the beginning and end of your shift on June 7, 2020. Additionally, you indicated that you were in the process of retrieving items at the time of your injury, without specifying the objects being retrieved or how this action was related to your patrol duties. UDC further stated that there would have been no reason for you to have entered the ARI Suite as part of your patrol duties on June 7, 2020, and that you had failed to report your entry or the purposes of your entry into Building 38 and/or the ARI Suite to the ECC. Therefore, UDC's investigation supports that *you were not injured at the location and at the time identified in your statements, and that you were not acting within the course and scope of your employment at the time of your injury.*

Therefore, *the PSWCP finds that you did not sustain any injury arising out of and in the course and scope of your employment for UDC as was reported.* Your claim for workers' compensation benefits for an injury reported to have occurred on June 7, 2020, is hereby being *denied*.<sup>65</sup>

The Notice of Determination included Form 9, the form required if Employee wanted to appeal DC ORM's determination.<sup>66</sup> DC ORM did not send this Notice of Determination to Agency.<sup>67</sup> Via emails dated August 4, 2020, and August 6, 2020, Agency inquired of DC ORM as to the status of Employee's workers' compensation claim.<sup>68</sup> Via email on August 6, 2020, DC ORM advised Agency that Employee's claim was denied on July 24, 2020, and forwarded a copy of the agency's denial letter to Agency.<sup>69</sup>

After the Notice of Determination was issued, representatives from DC ORM advised Employee he could appeal the determination by filing Form 9.<sup>70</sup> Agency was informed that as of August 20, 2020, Employee had not filed an appeal.<sup>71</sup> In fact, Employee never appealed the Notice of Determination.<sup>72</sup> DC ORM closed its file on November 4, 2020.<sup>73</sup>

### ***Termination of Employee's Employment***

After receiving DC ORM's denial letter and Notice of Determination, and in conjunction with Smith's factual findings, Smith discussed her findings and determinations with Deputy Chief Treadwell and Chief Foster, who agreed with her findings and determination.<sup>74</sup>

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<sup>65</sup> *Id.* (emphasis added); *see also* Employee Dep. at 113.

<sup>66</sup> Agency Opposition, Exh. 47; *see also* Young Dep. at 76.

<sup>67</sup> *Id.* Exh. 47; Young Dep. at 39-40.

<sup>68</sup> *Id.* Exh. 48 at bates 355-56.

<sup>69</sup> *Id.* Exh. 48. And Exh. 49.

<sup>70</sup> *Id.* Employee Dep. at 128-29; Exh. 50; *see also* Exh. 36 at bates 4627 (Aug. 7, 2020, 2:28 p.m. entry), 4628 (August 21, 2020, 10:01 a.m. entry); Employee Dep. at 134; Young Dep. at 40-41.

<sup>71</sup> *Id.* Exh. 51.

<sup>72</sup> *Id.* Employee Dep. at 115-17, 134-35; *see also* Exh. 36 at bates 4630.

<sup>73</sup> *Id.* Exh. 36 at bates 4630 (Nov. 4, 2020, entry).

<sup>74</sup> *Id.* *See* Smith Dep. at 159-60.

Agency proposed Employee's employment be terminated.<sup>75</sup> In doing so, Agency considered the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), and noted the following, among other things:<sup>76</sup>

- As a police officer, Employee held a position of trust; he is expected to provide all facts in a report and when being interviewed or asked about events which occurred during his tour of duty.
- The intentional filing of a false workers' compensation claim allowed Employee to gain time off from work and caused a shortage in patrol operations.
- Employee failed to follow the OPSEM General Order. Employee failed to call in his patrol checks and failed to report his alleged injury to the dispatcher on duty. In addition, Employee entered an unauthorized area with keys that he should not have had in his possession.
- Employee was on notice of the University's expectations and had received verbal counseling and directives. Moreover, Employee was previously disciplined within the two-year period prior to his proposed termination. He received a Letter of Written Reprimand for Poor Customer Service, Rude and Unprofessional Behavior, and Failure to Notify Supervisor of Incident. In addition, he received two Memoranda of Counseling – one for rude and unprofessional behavior towards a supervisor, and one for, among other things, failure to follow policy by not calling in status checks to the ECC.
- The University lost trust and confidence in Employee because of his conduct, as Employee was not patrolling and calling in his patrol checks, he refused to provide the University with information necessary to complete his injury report, and he failed to respond to the University's inquiries concerning why he was in an unauthorized area and how he gained access to the area.
- The proposed termination is consistent with the Table of Penalties for corrective and adverse actions.
- No lesser disciplinary action is appropriate, as Employee was previously disciplined and his conduct had not improved.

On November 2, 2020, Agency issued Employee a Notice of Proposed Adverse Action ("Proposal") proposing his termination effective November 17, 2020, for filing a false workers' compensation claim with the PSWCP.<sup>77</sup> Agency concluded that Employee engaged in the following misconduct:

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<sup>75</sup> *Id.* Exh. 55.

<sup>76</sup> *Id.* Exh. 25.

<sup>77</sup> *Id.* Exh. 56.

- a) Willfully providing of false, fraudulent, misleading, or harmful statements, action, or omissions of information involving self, another employee, student or visitor for personal gain.
- b) Refusal or failure to give oral or written statements of testimony in connection with an inquiry, investigation, etc. to include failure to cooperate with any management inquiry.
- c) Insubordination: willful and/or deliberate refusal to carry out orders, directions, assignments, instructions, etc., given by a superior official, either permanently assigned or in an acting capacity.
- d) Failure to comply with instructions, policies, procedures, or work standards.
- e) Unauthorized possession, inappropriate removal of University property or another person's personal property.

*Id.* A post-termination conference was scheduled per the CBA, but the Union cancelled the meeting.<sup>78</sup>

#### Position of the Parties

Agency asserts that because Employee filed a false workers compensation claim, it had cause to remove Employee for providing false information in pursuit of personal gain, failing to cooperate with an official investigation, insubordination, failure to comply with instructions and policies, and unauthorized removal of the property of others. Among other things, Agency cited Employee's failure to comply with Agency's instructions regarding its investigation of his conduct.

Employee does not dispute that he filed a workers' compensation claim that was later denied by the D.C. ORM and that he did not appeal its decision. However, Employee takes issue with his penalty. Specifically, Employee's defenses are that Agency violated the 90-day rule embodied in 8B DCMR § 1502.3; that Agency violated his due process rights; that his termination was retaliation by Agency for his complaint against Smith with the OIG, and that Agency ignored the *Douglas* Factors when it produced its *Douglas* Factor analysis only after the adverse action.

#### ANALYSIS AND CONCLUSIONS OF LAW

##### **Whether Agency's action was taken for cause.**

DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Employee's removal was based on his filing a fraudulent claim for workers'

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<sup>78</sup> *Id.* Exh. 57; *see also* Employee Dep. at 143.

compensation based on the extensive investigation undertaken by both Agency and DC ORM. Agency utilized 6B DCMR § 1605.4(b)(2) Misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; and (4) Knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any supervisor in its removal of Employee. To support its choice of termination as its penalty, Agency utilized the Table of Illustrative Actions, 6B DCMR § 1607.2(b)(2) Misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; and 6B DCMR § 1607.2(b)(4) Knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any superior. This Table listed included Removal as a penalty for a first offense. Employee never presented any evidence that would refute their findings; nor does he object to how their investigation was conducted. It is also notable that despite given the opportunity to do so, Employee did not appeal the denial of his workers' compensation claim.

The investigation revealed that Employee was insubordinate when he failed to conduct the proper checks and submit the reports required of a university police officer. These actions evidenced his failure to comply with Agency's instructions and policies with regards to how he should perform his job and how he filed his workers' compensation claim. The evidence also showed that Employee failed to cooperate with an official investigation. On June 18, 2020, in response to an email sent to him by Employee, Alex Bako, Agency's Director of Compliance and Risk Management, advised Employee that Smith had requested additional information from him regarding his alleged injury.<sup>79</sup> While Employee read Smith's email on July 1, 2020, Employee chose not to respond.<sup>80</sup>

Agency also charged Employee with the unauthorized removal of the property of others, it failed to specify what property belonging to others that he allegedly removed. It is undisputed that the movies that Employee allegedly removed belonged to him. Thus, I find that Agency failed to meet its burden of proof with regards to this charge.

In light of the evidence presented, I find that Agency met its burden of proving that Employee was guilty of filing a fraudulent claim for workers' compensation and that in doing so, he filed a claim for a non-compensable injury as it was not incurred in the course of and scope of his employment. I therefore find that Employee's action provided cause for Agency to remove Employee for providing false information in pursuit of personal gain, insubordination, and failure to comply with instructions and policies. I conclude that these can serve as a basis for adverse action.

### **Whether Agency's penalty was appropriate under the circumstances.**

While I find that Employee did file a fraudulent claim for workers' compensation, nonetheless, Employee insists that his termination should be reversed because Agency violated the mandatory '90-Day Rule' embodied in D.C. Official Code § 5-1031.<sup>81</sup>

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<sup>79</sup> *Id.* Exh. 34.

<sup>80</sup> *Id.* See Smith Dep. at 84-85; see also Employee Dep. at 96.

<sup>81</sup> While this rule has had three revisions, the relevant version for this matter was effective during the period of March 7, 2015, to April 20, 2023.

## 90 Day Rule

District of Columbia Code Division I. Government of District. § 5-1031. Commencement of corrective or adverse action states:

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.

(a-1) (1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

(2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

Employee points out that five (5) days after his injury on June 12, 2020, the Agency deployed a locksmith to enter the ARI office in Building #38 to investigate the location and to determine what, if anything, occurred. Employee states that as early as June 12, 2020, Smith, who conducted the Agency's investigation into the Employee's injury, expressed concerns of possible fraud, well before the DC ORM concluded its investigation.<sup>82</sup>

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<sup>82</sup> UDC Exhibit 62 Smith Dep. at 25 (discussing efforts taken to investigate injury in June 2020); *see also* Attachment 1, Smith's email to Katherine Harris on July 1, 2020, questioning whether the Employee was actually injured on the job as represented in his D.C. ORM Form 1 (Worker's Compensation Injury Form); *see also* Attachment 2 (Investigative Notes of Katie Harris (Claims Examiner-DC Office of Risk Management) (stating that on July 9, 2020 she called and spoke with both Alex Bako (Director of Compliance and Risk Management - UDC) and Ms. Centrina Smith (Executive Office of the Chief of Police - UDC Police

Employee formally filed his Workers' Compensation claim on June 18, 2020, by submitting his Form 1 PSWCP.<sup>83</sup> Therein, Employee certified under penalty of perjury, that his June 7, 2020, injury was sustained in performance of duty as an employee of the District of Columbia government.<sup>84</sup>

After Smith communicated to Harris on June 26, 2020, what she discovered concerning Employee's call-in checks, Agency's inability to access the ARI Suite absent having a key made by a locksmith, what Agency discovered inside the ARI Suite and Employee's failure to respond to her inquiries, Harris interviewed Employee on July 1, 2020.<sup>85</sup> Harris had a subsequent conversation with Smith and Mr. Bako on July 9, 2020, wherein Smith and Mr. Bako expressed concern over whether Employee's alleged injury happened at work.<sup>86</sup>

Employee argues that under a "knew or should have known standard", the Agency was required to complete its investigation and serve the Employee with its proposed discipline from when it first knew or should have known about the allegation. Employee states this proves that UDC should have known about the fraud allegation as early as June 12, 2020, and that it actually knew of the fraud allegation by July 9, 2020.

Employee argues that the anchor date for 90-day rule purposes does not start from the time the Agency's investigation has concluded, but rather from the time that the Agency first learns, or should have learned, of the allegation to be investigated. Employee states that the anchor date for the 90-day rule is June 12, 2020, the date that he filed his workers' compensation application and the date that UDC hired a locksmith to enter the disputed area and investigate. Therefore, the 90<sup>th</sup> day from June 12, 2020, is September 5, 2020. Given that Employee was served with the NPAA on November 2, 2020, which is 148 days after Employee's reported date of injury- June 7, 2020 and 143 days after Employee officially claimed a workers' compensation disability injury on June 12, 2020 and 117 days after the Claims Examiner for DC Risk Management told Mr. Bako and Smith that there was no evidence of the Employee being on campus the day that he reported he was injured. Employee reiterates that Agency's commencement of the adverse action against Employee was untimely and must be dismissed as required by law.<sup>87</sup>

On the other hand, Agency asserts that as of July 24, 2020, Smith's investigation into

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Department) and made notes of their discussion that 1) no keys were signed out from the key watch on June 7, 2020 and 2) there was no key card showing him swiping anything on campus and that 3) she had concluded that there was no evidence of him being on campus at all on June 7, 2020.

In response, "they both expressed concern that the injury didn't happen at work ...")

<sup>83</sup> Agency Opposition, Exh. 38.

<sup>84</sup> *Id.* Exh. 39, Sections II, VI; Employee Dep. at 108-09.

<sup>85</sup> *Id.* Exh. 36 at bates 4619-22 (July 1, 2020, 10:12 a.m. entry).

<sup>86</sup> *Id.* Exh. 36 at bates 4624 (July 9, 2020, 3:42 p.m. entry).

<sup>87</sup> *See, Alice Lee v. MPD, OEA Matter No. 1601-0087- 15 (Mar. 15, 2017)* at p. 20-21 (holding that the 90-day rule is mandatory and that this was a harmful procedural error, and as such, the adverse action was dismissed and the termination was rescinded for violating the 90-day rule by one business day), *aff'd by Metropolitan Police Department v. District of Columbia Office of Employee Appeals (In re: Alice Lee)*, Case No. 2017 CA 003525 P(MPA) (D.C. Sup. Ct., February 13, 2018) atp. 7.

Employee's alleged injury was not yet complete.<sup>88</sup> Agency investigated Employee's alleged injury and worked with DC ORM to provide information and respond to its inquiries. Only after receiving DC ORM's denial letter and Notice of Determination on August 6, 2020, and in conjunction with Smith's factual findings, did Agency determine that Employee's workers' compensation claim was invalid as Employee was not injured at the location and at the time he identified, nor was he acting within the course and scope of his employment at the time of his alleged injury. Agency points out that Smith testified without contradiction that its conclusion that Employee's workers' compensation claim was fraudulent was based upon her factual findings and DC ORM's determination.<sup>89</sup>

Agency calculates ninety days from August 6, 2020 – the date Agency received DC ORM's agency denial letter and Notice of Determination – was November 4, 2020. Employee was issued his Notice of Proposed Adverse Action for his termination on November 2, 2020.<sup>90</sup> Accordingly, Agency argues that it notified Employee of his proposed termination within the 90-day period set forth in 8B DCMR § 1502.3. Agency also states that Employee fails to cite to any legal authority supporting his interpretation of 8B DCMR § 1502.3.

Employee argues June 12, 2020, as the anchor date for the 90-day rule to commence because it was the date that Agency's investigation began when its locksmith tried to enter the ARC office in Building 38. However, Agency's charge rests on its premise that Employee filed a fraudulent Workers' Compensation Claim. At issue in this matter is when Agency knew or should have known of the conduct forming the basis of the charges against Employee. June 12, 2020, was too early for Agency to have known that Employee had filed a fraudulent workers' compensation claim. While the locksmith's report triggered suspicions and thus provided an impetus for further investigation, it is not the same as providing a solid foundation for charging an employee with the serious offense of filing a fraudulent claim. Since Agency's charge against Employee is specifically his filing of a fraudulent workers' compensation claim, I find that June 12, 2020, is not a proper anchor date for Agency's charge against Employee.

Employee's second anchor date of July 9, 2020, rests on his argument that when Investigator Centrina Smith expressed her concerns to DC ORM PSWCP Claims Examiner Katherine Harris and Director of Compliance and Risk Management Alex Bako regarding her suspicions about Employee's compensation claim, then Agency knew or should have known that Employee had filed a fraudulent workers' compensation claim by that date. However, while Agency had its suspicions, it could not reasonably be expected to be sure that Employee's worker's compensation claim was fraudulent until DC ORM itself finished its own investigation. DC ORM is the sole agency whose mission is to investigate and pay out proper workers' compensation claims. As such, DC ORM has the expertise and is the proper authority to definitively declare whether a workers' compensation claim is legitimate or not. To require Agency to charge Employee with fraudulently filing a workers' compensation claim before DC

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<sup>88</sup> UDC Exh. 62 Smith Dep. at 182-83.

<sup>89</sup> *Id.* Smith Dep. at 138-39.

<sup>90</sup> Agency Opposition, Exh. 56.

ORM itself had definitively concluded that Employee's claim was fraudulent would have exposed Agency to the embarrassing and untenable possibility that DC ORM itself could eventually conclude that Employee's workers' compensation claim was legitimate and compensable.

On July 24, 2020, the PSWCP issued its Notice of Determination denying Employee's workers' compensation claim because it determined Employee "did not suffer a compensable work injury on June 7, 2020."<sup>91</sup> DC ORM did not send this Notice of Determination to Agency.<sup>92</sup> It was only when Agency inquired of DC ORM on August 4, 2020, and again on August 6, 2020, as to the status of Employee's workers' compensation claim did DC ORM advised Agency that Employee's claim was denied and forwarded a copy of the agency's denial letter to Agency.<sup>93</sup>

In conclusion, I find that the proper anchor date is August 6, 2020, the date that Agency found out conclusively that DC ORM determined Employee's workers compensation claim was fraudulent. There are 60 business days from August 6, 2020, to November 2, 2020, the date that Agency issued its Notice of Proposed Adverse Action to Employee. Based on this, I conclude that Agency did not run afoul of D.C. Official Code § 5-1031.

### Due Process

Employee next argues that his due process rights were violated when Agency management failed to meet with him after he was issued his Notice of Proposed Adverse Action. The CBA does not require that Agency meet or communicate with Employee in a post-termination meeting. The post-termination meeting set forth in the CBA that it is within the discretion of the Union and, if held, is a meeting between Agency's Vice President of Human Resources (or designee) and the Union President (or designee).<sup>94</sup> The employee is only permitted at the meeting at the discretion of the Union.<sup>95</sup> Thus, Employee had no absolute right to be present at a post-termination meeting, even if he was represented by the Union. The CBA also does not require that a post-termination meeting be held between Agency and an employee's private counsel.

In this matter, a post-termination conference was scheduled as per the CBA, but the Union cancelled the meeting.<sup>96</sup> Since it was his Union who cancelled the meeting, Employee cannot now accuse Agency of not giving him a meeting. Accordingly, I find Employee was not denied any process under the CBA to which he was entitled.<sup>97</sup>

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<sup>91</sup> *Id.* Exh. 47.

<sup>92</sup> *Id.* Exh. 47; Young Dep. at 39-40.

<sup>93</sup> *Id.* Exh. 48.

<sup>94</sup> *Id.* Exh. 8 at 22-23 (Article 27, Section 9).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* Exh. 57; *see also* Employee Dep. at 143.

<sup>97</sup> *See, e.g., Green Leaves Restaurant, Inc. v. 617 H St. Assoc.*, 974 A.2d 222, 238 (D.C. 2009) ("[W]here the parties have a contract governing an aspect of the relation between themselves, a court will not displace the terms of that contract and impose some other [equitable] duties not chosen by the parties.").



Employee also alleges a violation of his due process rights when Agency failed to specify the charges against him. He states this failure deprived him a fair opportunity to contest his removal. Here, Agency issued Employee a Notice of Proposed Adverse Action - Termination by letter dated November 2, 2020.<sup>98</sup> The notice provided that Employee was being charged with “falsely filing a workers’ compensation claim.” University concluded that Employee engaged in the following misconduct:

- a) Willfully providing of false, fraudulent, misleading, or harmful statements, action, or omissions of information involving self, another employee, student or visitor for personal gain.
- b) Refusal or failure to give oral or written statements of testimony in connection with an inquiry, investigation, etc. to include failure to cooperate with any management inquiry.
- c) Insubordination: willful and/or deliberate refusal to carry out orders, directions, assignments, instructions, etc., given by a superior official, either permanently assigned or in an acting capacity.
- d) Failure to comply with instructions, policies, procedures, or work standards.
- e) Unauthorized possession, inappropriate removal of University property or another person’s personal property.

DPM § 1618.2 outlines the specifics of what is to be contained in an agency’s advance notice of proposed adverse action. Under DPM § 1618.2, the advance written notice must inform the employee of the following: (a) The type of proposed action (corrective, adverse, or enforced leave); (b) The nature of the proposed action (days of suspension or enforced leave, reduction in grade, reassignment, or removal); (c) The specific performance or conduct at issue; (d) How the employee’s performance or conduct fails to meet appropriate standards; and (e) The name and contact information of the anticipated deciding official, or if a removal action, the anticipated hearing officer for the administrative review.

DPM § 1618.3 states: “In addition to the information outlined in § 1618.2 the notice shall advise the employee of his or her right to: (a) Review any material upon which the proposed action is based; (b) Prepare a written response to the notice, as provided for § 1621; (c) Representation by an attorney or other representative; and (d) An administrative review in the case of a removal.”

In this matter, a reading of his Notice of Proposed Adverse Action – Termination belies his claim. The Notice clearly states the charges and specification against him. Thus, this

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<sup>98</sup> UDC Exhibit 46.

argument must fail. “[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>99</sup> In this matter, Employee was afforded the chance to be heard, including at OEA.

### Retaliation

Employee also argues that his removal is Agency’s payback retaliation for filing an Office of the Inspector General (OIG) complaint filed against Smith. To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act (“DCHRA”); (2) his employer took an adverse personal action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.<sup>100</sup> In this matter, Employee did not proffer any evidence to support his retaliation claim other than the fact that he was removed for filing a fraudulent workers’ compensation claim. This Office has held that a claim for retaliation must be supported by evidence, not mere speculation.<sup>101</sup>

### Non-Application of the *Douglas* Factors

Lastly, Employee alleges that Agency ignored the *Douglas* Factors at the time of its decision to remove Employee. In this matter, Agency performed its *Douglas* Factor analysis on October 7, 2020.<sup>102</sup> Since Agency issued Employee a Notice of Proposed Adverse Action - Termination by letter dated November 2, 2020, I find that Agency performed its analysis before deciding on Employee’s penalty.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."<sup>103</sup> When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is not clearly an error of judgment."<sup>104</sup>

In this matter, apart from the charge of unauthorized possession, inappropriate removal of University property or another person’s personal property, I find that Agency otherwise has met its burden of proof on all its other charges. The penalty for a first offense of False Statements/Records: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations is reprimand to removal.<sup>105</sup> The

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<sup>99</sup> *Saunders v. Donahoe*, 54 F. Supp. 3d 75, 78 (D.D.C. 2014), *aff’d*, 2015 WL 3372289 (D.C. Cir. Apr. 7, 2015).

<sup>100</sup> *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).

<sup>101</sup> *Employee v. Metropolitan Police Department*, OEA Matter No. 1601-0236-12 and 1601-0069-14 *Opinion and Order on Petition for Review* (April 18, 2017).

<sup>102</sup> UDC Exhibit 44.

<sup>103</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

<sup>104</sup> *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

<sup>105</sup> 6-B DCMR 1607.2 (b)(2) (2017).

penalty for a first offense of Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions is 3-day suspension to removal.<sup>106</sup> I find no error in Agency's choice of removal as the penalty. Accordingly, I conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

/s/ Joseph Lim, Esq.

JOSEPH E. LIM, ESQ.

Senior Administrative Judge

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<sup>106</sup> 6-B DCMR 1607.2 (d)(2) (2017).