THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WIDMON BUTLER	)	OEA Matter No. 1601-0397-10
Employee	)	
	)	
v.	)	Date of Issuance: March 21, 2013
	)	
D.C. METROPOLITAN POLICE DEPARTMENT	)	Lois Hochhauser, Esq.
Agency	)	Administrative Judge
	)	

David Branch, Esq., Employee Representative
Ronald Harris, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Widmon Butler, Employee, filed a petition with the Office of Employee Appeals (OEA) on September 2, 2010, appealing the final decision of the District of Columbia Metropolitan Police Department (MPD), Agency, to suspend him for ten days without pay, effective August 30, 2010.[1] At the time of the adverse action, Employee had a permanent appointment and was in career status.

The matter was assigned to me on July 20, 2012. The prehearing conference was held on September 20, 2012. The hearing took place on November 16, 2012. At the hearing, the parties had full opportunity to, and did in fact, present testimonial and documentary evidence.[2] Closing written arguments were filed on February 7, 2013, and the record was closed at that time.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

[1] Five days of the suspension was held in abeyance. However, Employee served the full ten day suspension following the initiation of a subsequent adverse action.
[2] Witnesses testified under oath. The transcript is cited as "Tr" followed by the page number. Exhibits introduced by Agency are identified as "A" and exhibits introduced by Employee are identified as "E".

ISSUES

Did Agency meet its burden of proof regarding its decision to suspend Employee? If so, is there sufficient evidence to support the penalty imposed?

FINDINGS OF FACT, POSITIONS OF THE PARTIES, ANALYSIS AND CONCLUSIONS

Background and Undisputed Findings of Fact

Employee, an attorney licensed in the District of Columbia and Pennsylvania, began his employment with MPD in February 2000. At the time of the adverse action, he held the position of human resources specialist and was medical claims examiner at the Police and Fire Clinic (PFC). Employee began this assignment in March 2009, but had served as a medical claims examiner early in his tenure with Agency.

As a medical claims examiner, Employee was tasked with reviewing claims (PD-42s) filed by police officers contending that their injuries or illnesses were incurred in the performance-of-duty (POD). The determination that an injury or illness was incurred in the performance-of-duty generally entitles an officer to benefits not available to an officer with an injury or illness that was not incurred in the performance-of-duty (non-POD). MPD investigates each PD-42. Employee was responsible for reviewing the PD-42, the medical file and MPD's investigation of the claim, and consulting with staff and then determining if documentation supported a determination that the claim should or should not be considered POD. Paul Quander became Director of the Medical Services Branch in February 2009. During Employee's first tenure as a claims examiner, the claims examiner issued the POD determination letter. However, Mr. Quander changed the procedure so that the claims examiner did not issue the determinations, but rather submitted the reports to him. He then issued the determination letter.

The charge relates to Employee's review and recommendation of a PD-42 submitted by Officer T on March 10, 2009. Officer T had previously sustained POD injuries to his left knee which had required surgery and ultimately the insertion of "hardware" in his left knee. In the PD-42, Officer T stated he was experiencing significant pain in his left knee, which he thought was due to the hardware in his knee becoming dislodged. He contended the injury was POD because it was related to the earlier POD injury. Employee was assigned the claim.

According to Employee's report, Officer T attributed a purple mark and the pain in his left knee "to a flare up" of his previous injury. The report summarized Officer T's medical history, noting that he initially injured his left knee in 1993 while chasing a suspect. The report referenced surgery performed by Dr. Mark Danziger, an orthopedist, in 2007. It stated that on March 10, 2009, PFC Dr. Smith-Jeffries saw Officer T and diagnosed the problem as "left knee pain, multiple knee surgeries". Officer T was placed on sick leave and then on limited duty. According to the report, on April 21, 2009, Dr. Smith Jeffries referred Officer T to Dr. Danziger. Employee's report notes that Dr. Danziger stated that Officer T's "pain should be decreasing within the next two weeks and that he should be able to begin limited duty within four weeks". Employee's report concluded:

> Based upon the foregoing circumstances, the member's version of events, and the medical record, based upon injury to his left knee did not occur in the course of his employment. This is a non-POD claim.

Employee provided the following reasons to support his conclusion:

> The claimant did not establish the occurrence of a traumatic injury
>
> The claimant's Notice to an Official of his injury was untimely[3]
>
> A significant factual issue in the narrative…what mechanism was responsible for Officer T's current left knee problem is in need of explanation
>
> There is no explanation from medical personnel for the member's reoccurrence or flare-up
>
> There was no evidence that police work aggravated or accelerated the specified injury
>
> Due to the nature of the recent flare-up, further evaluation is needed. (Ex A-1).

On May 7, 2009, Employee submitted his report in which he determined that the injury was non-POD. Mr. Quander did not challenge or change the non-POD conclusion, and issued the determination, as drafted by Employee, denying the POD claim, on May 8, 2009. (Ex A-1).

Approximately a year after the determination was issued, Officer T told Mr. Quander that the injury should have been deemed POD. Mr. Quander reviewed the file and determined that the initial non-POD decision was wrong. He directed Employee to justify his recommendation and then initiated this adverse action process.

On May 25, 2010, MPD issued an advance notice of proposed adverse action charging Employee with violating D.C. Personnel Regulations, Chapter 16, Part 1:

> Charge No. 1: 1603.3: "Any on duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary and capricious." This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking information from the government.
>
> Specification No. 1: In that, on March 19, 2010, Mr. Paul Quander, Director, MSS, was notified by a sworn member of this Department that he had not been notified of his March 10, 2009, injury claim ruling. Moreover, following an internal investigation into the matter, it was determined that you rendered an improper ruling of a Non-POD, and that you failed to review all of the medical information at the time of the ruling, which

[3] This issue was not raised at the proceeding and is not discussed herein.

could have prevented the unwarranted ruling.[4]

Employee protested the proposed suspension. The Notice of Final Agency Decision was issued on August 4, 2010. The Deciding Official reduced the suspension to ten days, with five days held in abeyance. Employee served the full ten days after being the subject of a subsequent adverse action.

Positions of the Parties and Summary of Evidence[5]

Agency's position is that Employee did not conduct a thorough review of Officer T's claim as required; and that as a result, he reached the wrong conclusion. Agency contends Mr. Quander had counseled Employee, verbally and in writing, because he was not satisfied with Employee's performance. Agency maintains that the ten day suspension was appropriate under the circumstances. and that it considered mitigating factors when deciding upon the penalty.

Mr. Quander testified that he was unsure if his predecessor reviewed the recommendations of the examiners before issuing the POD determination letters, but that he initiated the procedure of having the claims examiner make recommendations which he would then review and that he would issue the determination letter. He did so, he explained, in part because he was responsible for the decision, but also because of his concern that Employee's work was "poor" and "completely unprofessional." (Tr, 26). He asserted that Employee was not always thorough in his review, and he questioned the "fairness" of some of Employee's recommendations as to whether Employee was "applying the law and the facts appropriately," particularly in reaching decisions ruling a claim non-POD. (Tr, 27-29).

> [S]ome of the things that I was seeing were extremely troubling that led me to question his fundamental competence to make these determinations. (Tr, 30).

Mr. Quander testified that he counseled Employee about his performance and his work product "repeatedly" both verbally and in written comments he wrote on reports submitted by Employee that he returned to him to redraft. (Ex A-2). He stated that at times Employee did not offer any support for his position. (Tr, 34). The witness asserted that Employee resisted his authority and challenged his assessments of Employee's deficiencies. (Tr, 32-33).

With regard to the Officer T matter, Mr. Quander pointed out that the May 8, 2009 determination letter referred to Dr. Danziger's statement that the officer's pain should decrease in a few weeks and he could then return to limited duty, but omitted the facts that Officer T had surgery, that the screw had become dislodged and that he was prescribed medication for pain which were included in that document. (Tr, 60). He noted that while Dr. Danziger's surgical report was not added

[4] Agency initially presented evidence that Employee was responsible for failing to send the determination letter to Officer T. At the close of Agency's case, however, Agency agreed that this allegation was not part of the charge. (Tr, 111). Therefore, evidence presented on this issue is not included in this Initial Decision.

[5] Evidence presented was limited to the period between March 2009 and May 8, 2009 when the decision regarding Officer T's claim was issued.

to the Officer T's file after Employee submitted his report, there was documentation available to Employee regarding the problem with the hardware becoming dislodged, with the pain experienced by Officer T, and with the pooling of blood, "that it was related to the initial POD determination, that they were planning surgery [and] that they had done the preoperative work." (Ex E-1; Tr, 54, 57-58).

Mr. Quander stated that he issued Officer T's determination letter denying the POD claim, based on Employee's "findings, his research, his work," assuming that Employee had done a thorough job. (Tr, 47, 61). The witness stated that when he reviewed Officer T's records in 2010 following his conversation with Officer T, he found the facts were "plain as day" that the ruling should have been POD. (Tr, 35). He concluded that if Employee had done a thorough job, he would not have concluded the injury was non-POD. To support his view, Mr. Quander pointed out that Employee referenced specific clinic visits which indicated to him that Employee had reviewed PFC notes, yet Employee omitted facts in the notes "that dealt with the nature of the injury, that there was hardware that had become dislodged…that the doctors had recommended surgery to repair the problem [and that] the officer was given a prescription to deal with the pain that was caused by the hardware that had become dislodged". (Tr, 65-66). He stated there were several medical evaluations in Officer T's records noting problems with the hardware. (Tr, 38). Mr. Quander stated that he thought Employee chose not to place" certain information before him because he had a "prejudice against police officers who filed POD claims, asserting there was "a pattern where [Employee] would consistently rule them non-POD, without giving appropriate review to the medical files." (Tr, 61, 68).

The witness stated that when he spoke with Employee about the matter in 2010, Employee was "unapologetic, didn't see where he made any mistakes at all, disputed what was clearly in the record and wasn't upset at all." (Tr, 69). He said he decided to initiate "formal action" because Employee's work was "totally unacceptable." (Tr, 39).

Mr. Quander stated that Employee did not receive "formal" training when he began in March 2009, noting that Employee told him that he "needed no training, [that] he was an expert, [and that] he was a claims examiner." The witness testified Employee informed him "that he had done this many times before, [and that] he knew exactly what was going on." (Tr, 48-49).

Felicia Lucas was assigned to PFC on April 23, 2009 and was Deputy Director during the relevant period. She stated that she was Employee's supervisor and that although Employee's work was reviewed by Mr. Quander, she would review his work if Mr. Quander returned it with comments. (Tr, 92). She said she sat in on several counseling sessions with Mr. Quander and Employee between April 23, 2009 and May 9, 2009 regarding Employee's "rulings and his inability to put all of the information that was provided in the medical charts in some of those claims write-ups that he provided and how he came to the determination." She said Employee was not responsive to the counseling and was "pretty argumentative." (Tr, 82).

> He wasn't receptive, he was pretty argumentative and sometimes he did it in a lighthearted way, kind of laughing, joking. And then he became a bit serious and what I thought was borderline insubordinate, because this was his supervisor and he was merely pointing out some of the information that [Employee] left out, pertinent information which would change the ruling of the claim. (Tr, 85).

Ms. Lucas stated that when she reviewed Employee's revised submission following a counseling session she attended between Mr. Quander and Employee, she found Employee "left out exactly what Mr. Quander asked him to put in." (Tr, 84-85). The witness stated that even when she was not present at a counseling session, she reviewed notes Mr. Quander wrote to Employee, and found that Employee did not made corrections as directed. (Tr, 88). She said she thought Employee's conduct was deliberate because "it was in black and white and it was in the medical review." (Tr, 89).

Lieutenant Anthony Harris, who investigated the matter for Agency, concluded that the negligence charge should be sustained based on his findings that Employee omitted essential information that would have changed the outcome of the claim. He found Employee's actions to be negligent and his work to be "incomplete." (Tr, 95).

Michael Eldridge, Inspector with Agency's Disciplinary Review Branch, was the proposing official in this matter. He stated that the penalty for a first instance of neglect of duty ranged from reprimand to removal. He discussed the considerations, including *Douglas* factors [6] that were utilized in reaching the decision to propose a 15 day suspension. (Tr, 106). The Inspector stated that he was aware that Mr. Quander and not Employee made the actual decision.

Employee's position is that he properly performed his duties in reviewing Officer T's claim. He asserts that he did not have all of the records in 2009 that were available when the matter was reviewed a year later. He notes that Mr. Quander is responsible for the final decision, and that Mr. Quander accepted his recommendation. Employee argues that if he is determined to have been negligent, the imposed penalty was too severe since he had only been at PFC for a month when he made the recommendation regarding Officer T and had not received any training before beginning his assignment as a claims examiner in 2009.

Employee testified that he volunteered for the claims examiner assignment in 2009, and had previously held that position and had other relevant experience outside the Agency. (Tr, 116). He said he began the assignment in March 2009 without training or specific directions because "it was assumed [he] knew the ropes." (Tr, 116, 118). He said he felt he had sufficient training since he had held the job before. (Tr, 138). Employee stated he might have asked for additional training to ensure he was aware of all current rules and regulations, but thought he could perform the duties of the job. (Tr, 143).

Employee testified he was assigned between 20 and 30 claims per week between March 2009 and May 2009. He said his practice was to check that the claim was complete and then to review the investigation report, medical records and other documents that were part of the claim to determine if they supported Member's assertion of the injury was POD. (Tr, 124). Employee asserted that Mr. Quander's dissatisfaction with him was primarily related to typographical errors in the first reports he submitted to Mr. Quander. Employee agreed that between March 2009 and May 2009, Mr. Quander raised concerns to him a number of his non-POD recommendations and had returned reports to him.

[6] Those factors identified in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981),

(Tr, 148). He said he changed his recommendations from non-POD to POD at Mr. Quander's direction even if he disagreed because Mr. Quander "was the one making the determinations." (Tr, 151-152).

Employee stated he was assigned Officer T's claim in March 2009, and that he reviewed the pertinent documents that were available to him. He explained that Officer T was claiming a reinjury of his knee which was first injured in 1993 and then reinjured in 2000 and 2007. (Tr, 127). He noted Officer T had multiple surgeries. He concluded that Officer T did not establish "the occurrence of a traumatic injury" and that "[d]ue to the nature of the recent flare-up, further evaluation is needed". (Ex A-1, Tr, 129-130). Employee said he bore no "ill will" toward Officer T or any officer making a POD claims. He said he did not intentionally omit any relevant information in his recommendation, but felt that the record was "incomplete" and he did not feel "comfortable" making a POD recommendation. (Tr, 133). Employee agreed he had not included Officer T's assertion that the pain was caused by the loosened screws although it was in the file that he reviewed. (Tr, 154).

Analysis, Findings and Conclusions

This Office can address only the charge(s) contained in the advance or final agency notice. *D.C. Controller v. Frost*, 638 A.2d 547 (D.C. 1994). See also *Green v. Department of Public Works*, OEA Matter No. 1601-0036-94, Opinion and Order on Petition for Review (October 10, 1997). It is a fundamental principle of due process that an employee charged with misconduct must be informed of the basis for the charge so that he or she can be prepared for the proceeding. In this matter, the charge was limited to Employee's review and recommendation in Officer T's case. Agency did not, for example, include a more general charge of poor performance, although evidence was presented to support such an allegation. The charge against Employee was limited to the performance of his duties Officer T's claim. Further, although Agency presented evidence that Employee's actions were intentional, he was charged with failing to completely review Officer T's claim which does not connote deliberate conduct. The Final Investigative Report that formed the basis of the adverse action concluded that Employee was negligent in that he "did not use due care or prudence in carrying out his responsibilities and [fell] below the standards established by his element." (Ex A-1). Actions cannot be both intentional and neglectful. Employee was charged with neglectful conduct and that is the charge that was considered by the Administrative Judge. In addition, the parties agreed at the proceeding that the relevant time period for consideration would be between March 2009, when Employee assumed the claims examiner position, and May 7, 2009, when the determination letter was issued regarding Officer T's POD claim. Therefore, testimony about events outside of that timeframe was not considered in reaching a decision.

The Administrative Judge considered the issues raised by Employee. First, he argued that the charge cannot be sustained because Mr. Quander, and not Employee, was responsible for making the final decision. Employee is correct that Mr. Quander was responsible for making the final decision. However, Employee is charged with failing to conduct a complete review as required of a medical claims examiner. The fact that Mr. Quander made the final decision does not excuse Employee from failing to perform his duties in an acceptable manner. Given Employee's experience and expertise, it would have been reasonable for Mr. Quander to rely on Employee's recommendation. Second, Employee points out that unlike other non-POD recommendations that Mr. Quander returned to him to change to POD, Mr. Quander issued the Officer T report without comment or criticism. Employee

is correct in this assertion as well. However, it is Employee's performance that is at issue in this proceeding, and not the thoroughness of Mr. Quander's review. The fact that Mr. Quander issued the report without comment, does not, without factual support, lead to the conclusion that Employee completed his assignment in a satisfactory matter. Employee was an attorney with considerable experience and expertise in this area, according to his own testimony. He was expected to perform his duties commensurate with this experience and expertise. Mr. Quander's failure to return this report for revisions would not excuse Employee's substandard performance.

The Administrative Judge also considered Employee's argument about the lack of written standards and Agency's failure to provide him with training when he assumed the position in 2009. The two are related since it is assumed that the training would include the required standards for review. However, by his own testimony, Employee possessed the expertise and qualifications to serve as a medical claims examiner when he returned to that position in March 2009. There was no evidence presented that the standards to which medical claims examiners were held had changed since Employee first held this position 2000 or that additional training was required for Employee to perform those duties. Employee testified that he was qualified to perform the duties of a medical claims examiner without additional training, explaining that the training he sought was to ensure that he was current on the laws and statutes. (Tr, 141-143). He did not argue that such training would have impacted on his duties as it pertained to Officer T's claim and the evidence would not support such an argument.

Agency did not offer evidence of specific written standards provided to claims examiners to guide them in the review process and the Administrative Judge assumes that written standards did not exist at the time. While written standards certainly would have made resolution of this matter easier, the lack of written standards does not necessarily defeat Agency's case for several reasons. First, Employee possessed the requisite expertise and experience as a medical claims examiner and in related positions, and, in fact, had previously served in this position. He did not assert or present evidence that he needed to be trained in how to review a file and determine if a claim should be deemed POD. In addition, the documentary and testimonial evidence support the conclusion that Mr. Quander was dissatisfied with Employee's performance as a medical claims examiner from the time Employee returned to PFC in March 2009 and that he counseled Employee both in orally and verbally regarding deficits he observed, particularly in how Employee reached his non-POD determinations. In addition to the counseling sessions, Mr. Quander returned Employee's reports to him giving reasons why he thought Employee's non-POD determinations were incorrect. For example, on or about March 26, 2009, Mr. Quander returned Employee's report on the Officer A noting: "I do not understand your reasoning. The officer sustained a knee injury while standing post. A sergeant observed the swollen knee. The Clinic provided treatment for the knee. Explain why this is not a POD injury." The April 29, 2009 report was returned to Employee with the following statement by Mr. Quander: "This is POD-continuation of earlier injury. Please change." Returning another the report, Mr. Quander stated: "This is a continuation of an injury that was ruled POD. Why are you recommending non-POD?" Two reports dated April 8, 2009 were returned to Employee with the following comments from Mr. Quander: "This is unacceptable work. You indicate the ruling is POD and in the conclusion you rule non-POD." (emphasis in original); "You initially indicate a POD determination. Then you conclude it's non-POD." (Ex A-2). This provides substantial evidence that Employee knew or should have known that his work product was not satisfactory, that his analysis

was insufficient, and that his conclusions were incorrect. Although these are not written standards, the comments put Employee on notice that his analyses were incomplete and that his conclusions did not match the facts. Employee was thus on notice on the quality of performance required of him as a medical claims examiner. But Employee also testified about the review process and what was required to have a legally supportable position. (Tr, 124). Employee testified that Mr. Quander took issue with Employee's non-POD decisions on more than five occasions between March and May 2009. (Tr, 148). The evidence established that in addition to these written comments, Mr. Quander counseled Employee a number of times between March and May 7, 2009 regarding deficiencies in the quality of his analysis. This further supports the conclusion that even without written standards, Employee was aware of the requirements of his duties and the need to provide a thorough analysis and to reach a conclusion supported by the facts.

The determination of whether an injury or illness is POD requires specialized knowledge. The Administrative Judge is not in a position to make an independent assessment. As with many medical and legal issues, there may be more than one supportable position. It is not the decision that Employee reached, but rather whether he was negligent in performing his duties in order to reach that decision which is critical in this matter. Employee had the expertise and experience to serve as a medical claims examiner when he assumed the position in March 2009, having previously served in that position and having other related experience. Employee argues that Agency present evidence of the analysis of the documents available to Employee that it contends would have required him to reach the opposite conclusion. However, both Lt. Harris and Mr. Quander offered credible testimony that based on their review, Employee's performance in assessing Officer T's claim was incomplete and inconsistent. Mr. Quander provided credible reasons for his conclusion that Employee's analysis was insufficient. Employee did not offer an adequate explanation of his analysis to support his conclusion. When asked to explain why he concluded Officer T's POD claim should be denied, Employee merely read the language in his report, which he described as "boilerplate,." It contained no reasoning, no explanation and no analysis. (Tr, 128-129). His testimony did not include the explanations requested by his attorney, it merely repeated boilerplate language. Two of the conclusions in the report were that further investigation was necessary. However, Employee did not explain why he completed this report and reached a conclusion when he determined that additional information was necessary. When given the opportunity to provide "any other reasons" why he recommended denial of Officer T's claim, Employee did not provide any substantive reasoning:

> Mainly incomplete record and I was comfortable saying that this was---that there was causation there, there needed to be - - now at the time, I'm not sure –well, we're getting off on something else. (Tr, 133).

Employee argues that Agency did not identify the documents in the file when reviewed by Employee, and it is undisputed that additional documents were added after Employee submitted his report. However, Agency submitted the documents it claimed were in the file. The Administrative Judge relied largely on Employee's report and his testimony to identify the documents he reviewed. (Ex A-1). Employee admitted that he omitted Officer T's assertion that the pain was likely due to the pain was caused by the loosened screws although it was in the file. (Tr, 154). He did not explain why he omitted this assertion since it offered a nexus between the injury and the POD claim. Employee's report included Dr. Danziger's statement in Clinic's Form dated April 21, 2009, that

Officer T's "pain should be decreasing within the next two weeks and that he should be able to begin limited duty within four weeks" so he did consider this statement.. However, Employee omitted the part of the April 21 Form which stated that Dr. Danziger operated on Officer T on April 13 to remove hardware from his left knee. This omitted language, again could provide a nexus between the current injury and the prior POD injury. (Ex A-1).

Agency is required to prove its case by a preponderance of evidence. "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". Agency is required to prove its case by a preponderance of evidence. OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). See also 5 C.F.R. § 1201.56(c)(2). This is fairly low quantum of proof, often preceded by the word "mere" or "only." *See, e.g.*, Elkouri & Elkouri, How Arbitration Works (6th Ed), p. 949, ft. 124. The Administrative Judge has pointed out flaws in Agency's case. However, despite these flaws, a careful review of the evidence in this matter leads to a conclusion that Agency met its burden of proof in this matter.

The standard used to determine if conduct is negligent is: a determination of an actual duty, a determination that the duty was neglected, and a determination that the neglect was not excusable. As discussed in detail above, Agency established that Employee had an actual duty to review Officer T's PD-42, to review the file and to make a recommendation based on the contents of the file and the legal standards as to whether the injury or illness was POD. Agency also presented sufficient evidence to establish that Employee neglected that duty by omitting or failing to consider documents in the file and by failing to analyze the information to determine the result. The only explanation provided by Employee was a recitation of boilerplate language, without any reference to the facts in the individual case. Finally, Agency presented sufficient evidence that the duty was not excusable in that, as discussed above, Employee had ample experience and expertise as a claims examiner and also Employee had been counseled verbally and in writing numerous times within the first few weeks of his return to PFC, that his non-POD determinations were not supported by the documents in the file, and that his work was "unacceptable." Based on the evidence presented and the analysis above, the Administrative Judge concludes that Agency met its burden of proof and that the charge should be sustained

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The OEA Board has long recognized that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment." *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). This Office's function is not to usurp managerial responsibility in determining a penalty, but only to ensure that the penalty reflects a responsible balancing of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). A penalty will not be reversed unless the Administrative Judge concludes that an agency has not considered relevant factors or that the imposed penalty constitutes an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985). A penalty that comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment" will not be disturbed. *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985).

Disciplinary action against an employee may only be taken for cause. The charged conduct falls within the definition of "cause."[7] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985) provides that OEA must determine whether the penalty is 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 this matter, I have concluded that Agency met its burden of proof with regard to the charge. According to DPM §1619.1 the range of discipline for a first offense of negligence is reprimand to removal. Employee argues that even if the adverse action is sustained, the penalty should be reduced because Employee had not received training and had only recently returned to PFC as a claims examiner. An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion. *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011).The evidence does not establish that the suspension imposed constituted an abuse of discretion. Agency presented evidence that it considered relevant factors outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the decision to suspend Employee. This Office is guided by *Douglas* in which the U.S. Merit Systems Protection Board enumerated factors that were relevant for a governmental agency to consider when determining the appropriateness of a penalty. An agency is not required to analyze each factor. In this matter, the Final Decision references the *Douglas* factors and states that the penalty was reduced from 15 days to 10 days based on the mitigating factors that Employee had volunteered for the position and that regardless of Employee's experience and expertise, he should have received training. The penalty for Neglect of Duty ranges from reprimand to removal. The penalty imposed in this matter falls within this range.

The Administrative Judge concludes that Agency met its burden of proof with regard to the adverse action, that it properly exercised its managerial discretion; and that the penalty was reasonable and not an error of judgment. In sum, the Administrative Judge concludes that Agency's action should be upheld.[8]

ORDER

It is hereby

ORDERED: This petition for appeal is DISMISSED.

FOR THE OFFICE: LOIS HOCHHAUSER, ESQ.
Administrative Judge

[7] Agency cites DPM § 1603.3 *Infra*, p. 3. However, this does not appear to be the version of DPM § 1603. in effect when the adverse action was initiated. Employee did not raise this issue, and, in any event, the applicable language offers no substantive change. It did not impact on the outcome of this matter. The error is *de minimis*.

[8] Employee moved for a directed judgment arguing that he could not be charged with making an improper ruling since he did not make rulings; and further that Agency failed to introduce the documents that were in the file as reviewed by Employee into evidence. Employee contends that reliance should be placed on Mr. Quander's statement in his March 30, 2010 report. However, the Administrative Judge placed more weight on Mr. Quander's sworn testimony. And, as discussed herein, she relied on documents that Employee did not dispute were in the file he reviewed. Employee's arguments have been addressed at length in this Initial Decision and will not be repeated here. For these reasons, Employee's motion is denied