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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹)	OEA Matter No. 1601-0032-20
)	
)	Date of Issuance: November 17, 2021
v.)	
)	JOSEPH E. LIM, ESQ.
DEPARTMENT OF PUBLIC WORKS)	Senior Administrative Judge
<u>Agency</u>)	
Stephen Milak, Esq., Agency Representative		
Vanessa Dixon-Briggs, Employee Representative		

INITIAL DECISION²

PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on February 5, 2020, challenging the D.C. Department of Public Works (“Agency” or “DPW”) decision to suspend her from her position as a Sanitation Crew Chief for thirty (30) days. Employee’s suspension was based on the following causes: (1) Safety and health violations, (2) Neglect of duty, and (3) Failure/refusal to follow instructions. Agency filed its Answer on March 25, 2020. This matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on December 17, 2020.

A Prehearing Conference was held on January 29, 2021. After two postponement requests by the parties, an Evidentiary Hearing was held virtually on June 15, 2021. The parties submitted their closing arguments on October 4, 2021. Both parties complied with the deadline. The record is now closed.

JURISDICTION

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

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

² Reissued to reflect the correct date of November 17, 2021, instead of October 12, 2021.

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the penalty of a thirty-day suspension was appropriate under the circumstances.

UNDISPUTED FACTS

One of Agency's main functions is to collect trash from the neighborhoods in Washington, D.C. utilizing trash packers, also known as a dump trucks, to collect trash and recycling materials from the bins that the city provided District residents. Employee began her temporary appointment with Agency on October 16, 2006, as a Motor Vehicle Operator within the Solid Waste Management Administration ("SWMA"). On December 23, 2007, Employee obtained a permanent Motor Vehicle Operator position.³ On October 18, 2015, Employee was promoted to Sanitation Crew Chief ("Chief") within SWMA. According to her position description, the Chief "directs a crew of sanitation workers in the collection of solid waste and is responsible for the total performance of the crew."⁴ Additionally, the Chief must maintain "knowledge of acceptable safety precaution methodologies and applicable regulations relative to waste collections" and the Chief must possess "knowledge of the fundamentals of safe vehicle conditions and conducting visual inspections."⁵ On November 10, 2016, Employee signed an acknowledgement receipt of the Vehicle Safety Policy, which mandates that all Agency staff "[c]omply with all District, Federal or other local laws when operating motor vehicles and equipment."⁶

On September 17, 2019, Agency served Employee, a Sanitation Crew Chief, an Advance Written Notice of Proposed Thirty (30) Day Suspension based on three (3) causes.

Cause No. 1 "Safety and Health Violations: Failure or refusal to observe and or enforce safety and health regulations or to perform duties in a safe manner. [See Section 1607.2(i)(4) of Chapter 16 of the Regulations. integrity of government operations, to include Neglect of Duty." See also DPW's Vehicle Operator's Policy, Section V(A): "An employee driving a vehicle while on District government business shall comply with all applicable traffic, parking, and other vehicle use related laws and regulations; and See DPW Safety Policy, Section V1(1): "All DPW employees who operate agency motor vehicles or equipment shall: Comply with all District, Federal or other local laws when operating motor vehicles and equipment; and V1(2): Adhere to all DPW policies regarding the operation of vehicles and equipment].

³ Agency Exhibit 5. Notice of Personnel Action

⁴ Agency Exhibit 6. Sanitation Chief Position Description

⁵ *Id.*

⁶ Agency Exhibit 9. Policies & Procedures Manual for Vehicle Safety; Agency Exhibit 10. Policies and Procedures

Cause No. 2. Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; careless work habits. [See Section 1607.2(e) of Chapter 16 of the Regulations].

Cause No. 3. Failure/Refusal to Follow Instructions: Deliberate or Malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions. [See Section 1607.2(d)(2) of Chapter 16 of the Regulations].

Specifically, Agency alleges that on July 12, 2019, Employee abandoned one of her crew, Kenneth Battle, on their work route in 90-degree heat after their trash pickup rounds. Agency also charges that on July 19, 2019, Employee crossed a non-operational scale and bypassed a line of waiting dump trucks at Agency's Benning Road Transfer Station to dump her trash load. Agency further specifies that this action contravenes safety procedures and that Employee failed to notify the Disposal staff of her excuse beforehand that she needed to use the restroom. Lastly, Agency charges that on August 15, 2019, Employee was observed by Sanitation Supervisor Wanda Richardson of failing to stop at a stop sign before crossing a four-way intersection located at the corner of 13th and Taylor Street, N.W. Agency determined that each one of these charges and specifications warranted a thirty-day suspension.

SUMMARY OF TESTIMONIAL AND DOCUMENTARY EVIDENCE

On June 15, 2021, a virtual Evidentiary Hearing was held via WebEx.⁷ The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their positions.

July 12, 2019, Incident

Karston Booker ("Booker") Tr. pages 61-86.⁸

Booker worked as a Sanitation Supervisor in the solid waste collection division. He explained that typically, three employees are assigned to the crew of the trash packer. If the crew was short on personnel, then their team would wait until they could complete their crew. This could involve asking other supervisors in the building if they had available drivers, techs, or trucks to help accommodate a route that may not have sufficient staff. Even crew chiefs could drive or work as technicians where they may be needed.

Booker testified that on July 12, 2019, Agency experienced an employee shortage on one of the sanitation crews that he supervised.⁹ Typically, sanitation crews consist of a Chief and two

⁷ WebEx is a software program that enables participants to engage in a hearing or meeting remotely via an electronic device.

⁸ See also Agency Exhibit 24, Booker Affidavit

⁹ Agency Exhibit 24, Affidavit of Karston Booker.

(2) Sanitation Technicians, and, on this particular date, the sanitation crew only had one (1) Sanitation Technician. As a result, Booker contacted Employee's immediate supervisor to request assistance with filling the employee shortage. Employee was assigned to a route to cover for another employee who was not present on that date. Employee was sent to assist Booker's sanitation crew along with Sanitation Crew Chief Kenneth Battle ("Battle"), who would be acting as a Sanitation Technician that day. Employee was also instructed that Battle would meet her along the route. Employee, Lawrence Wolfe ("Wolfe"), and Battle made up the crew on that day. Battle was working as a technician on the back of the truck and Employee was assigned as crew chief for the day.

Later that day, Booker received a call from Battle who informed him that Employee left him on the route to return to the dumping site. Booker recalled that Battle said there was an argument with Employee, so Employee pulled off and proceeded to drive without him. Booker asserted that trash packers were not permitted to leave members of their crew on the route because the employee would not have transportation back to the yard. He stated that once he learned this, he contacted Employee and asked her if she left Battle. Employee told him that she did, so Booker ordered her to pick Battle up. On that day, the weather reported a high temperature of 90 degrees Fahrenheit. Booker stated that he contacted Employee twice when he learned that Battle was left on the route. The first time Employee answered the phone, Booker informed her that Battle was stranded and that she needed to pick him up. Booker could not recall what specific curse words Employee yelled at him. However, he attested that Employee asserted that she was not going back to pick up Battle and hung up the phone. Booker did not know why Employee was combative towards him.

The second time Booker contacted Employee; she did not answer. When Employee failed to comply, he had to contact another employee to retrieve Battle. Booker reported the incident to Associate Administrator Earl Simpson and an incident report was completed. The incident report provided that Booker instructed Employee to return to pick up Battle from the route in which she did not. Because Employee failed to obey, Battle was picked up by another employee in a government pick-up truck. Booker said that he found working with Employee as difficult due to her demeanor and stated he had to exercise patience when working with Employee.

Earl Simpson ("Simpson") Tr. pages 107-114, 132-134, 139-146, 150-153.¹⁰

Simpson, an Associate Administrator at the Collections Division, was in charge of ensuring that the recycling and bulk trash were serviced. Simpson testified that on July 12, 2019, he received a call from Battle notifying him that Employee left him on the route with no way to get back to facilities to complete the sign-out procedure. Simpson informed Battle to contact Booker, Battle's immediate supervisor, to inform him that he needed to be picked-up. Ultimately, Simpson contacted Roland Huff ("Huff"), a former employee, to pick Battle up from the route.¹¹ Subsequently, a meeting was held to discuss the incident. Employee, Wolfe, Battle, Booker, and a union representative attended the meeting. At the meeting, Employee said that Battle did not go with her on the route; that only Wolfe rode with her to the route, and that Battle met them on the

¹⁰ See also Agency Exhibit 25, Earl Simpson Affidavit

¹¹ See Agency Exhibit 26, Roland Huff Statement.

route. During the meeting, Battle stated that he did not know that Employee completed the route. Battle went to the opposite end of the alley, expecting Employee to come through, which was typical of staff to do when working the routes.

Simpson asserted that it was not safe to leave a crew member on the route, especially in the summer heat. He makes sure there are enough water bottles for the crew. He also contended that although Battle did not ride the route with Employee, Employee was still required to drive Battle back to the yard. Simpson explained that while it was not agency policy to do this, it was agency practice, and attributed the incident to their lack of communication. Simpson asserted that it was Employee's responsibility as sanitation crew chief to communicate with their crew to ensure that everyone was accounted for. He stated that it was not uncommon for an employee to meet up with a crew member in route as long as it was approved by a supervisor. Simpson reiterated that Employee was not permitted to leave Battle on the route. He explained that when the route ended, Employee should have communicated with Battle and confirmed his transportation back to the facility or she should have contacted a supervisor for instruction.¹²

Employee Tr. pages 185-213.¹³

Employee worked for Agency for fifteen (15) years. She worked as a motor vehicle operator, a special operation (street and alley), a sweeper operator, and finally as a sanitation crew chief in trash collection. Employee stated that she generally received good performance evaluations and that she often works in different situations – different crew, different truck.

Employee testified that she and Wolfe¹⁴ drove to their assigned route and planned to meet Battle. Once they arrived at the first stop on their route, they could not locate Battle. Subsequently, Employee saw Battle when they went for their second truck load. She claimed that Battle did not communicate with her during the entire route. Further, she testified that a few times during their route, Battle walked away from the truck causing her to await his return. Employee claimed that she repeatedly attempted to communicate with Battle, but he would not respond. For instance, she asked Battle why he did not let them know where he started his route. According to Employee, Battle walked away and started grabbing cans. She reiterated that she did not return to the yard with Battle, knowing that crew mates should not be left on route. Employee assumed that Battle went back to his car. She admitted that she could have called a supervisor to receive instructions regarding Battle's disappearance. Employee stated that she did not believe she needed to contact a supervisor regarding the July 12, 2019 incident. She maintained that it was her understanding that Battle drove to the route and so she assumed that his car was in the vicinity because he would have had to wait somewhere when she dropped the first load off. Since the supervisor gave Battle permission to drive to the route, Employee believed that there was no need to confirm Battle's return to the yard.

¹² See also Agency Exhibit 10, Agency Policies & Procedures Acknowledgement Form

¹³ See also Agency Exhibit 11 & Employee Exhibit 1, Employee Affidavit

¹⁴ See also Employee Exhibit 2, Wolfe Written Statement

Employee stated that she understood her role as a crew chief and her responsibility to her crew; however, she stated that she could not speak to someone who would not speak to her. Additionally, she claimed that she complained to management several times regarding Battle's demeanor and behavior to no avail. According to Employee, management would brush her off.

Subsequently, Booker contacted Employee about Battle. Employee told him what occurred, explaining that Battle walked away from the crew and did not return. According to Employee, Booker told Employee not to worry and that he would have someone else pick Battle up. She stated that she was never instructed to return to pick Battle up. If she was, she would have returned to get him. Employee also stated that they all met at the funeral of a colleague after her run and that Booker never talked to her about their phone conversation. Employee admitted that she may have cursed at Booker due to her frustration and acknowledged that her behavior was inappropriate. She asserted that she did not hang the phone up on Booker and insisted that Booker lied about her hanging up the phone on him

July 19, 2019, Incident

Sharon Leach ("Leach") Tr. pages 11-43.¹⁵

Leach, a Weighing Machine Operator with the Solid Waste Disposal Division, explained that a trash transfer station is where Agency's sanitation trucks dumped their load on the tipping floor and where the tractor trailers would remove incoming and outgoing waste. Leach stated that upon entering the trash transfer station, the trash truck, also known as a trash packer, is first required to come onto the scale to be weighed, after which she would issue the trash truck driver a weigh slip ticket so that they could proceed to the tipping floor to dump their load. The distance from the weighing scale to the tipping floor is about two blocks. Leach explained that there are four scales present at the trash transfer station at the Benning Road location. She explained that it was important that trash trucks be weighed, and drivers issued a ticket because in the past, trash trucks have been overloaded, and they have tipped over.

Leach testified that Employee did not receive authorization to have her truck weighed and that Employee dumped her truck without permission. Because Employee did not drive into her scale, Leach said that she did not see Employee come into the transfer station. She explained that, depending on the relative sizes of the trucks, she may not see a truck on the next lane if the truck on her scale blocks her view. Nor would she hear the driver yelling to her from the next lane as the trucks are very loud. Leach also testified that if a driver needed to relieve themselves, they were able to use the restroom in the scale where she is located, and that two other restrooms were located in the main building.

Leach indicated that the protocol for a trash packer driver entering the Trash Transfer Station is to wait in line at a scale to be weighed, drive up onto the weighing scale so that the weighing machine operator can note the truck number and determine the weight of the refuse, receive a weigh slip ticket from the weighing machine operator (indicating the weight of the refuse), wait for acknowledgment by an operator to proceed to the tipping area (where the refuse is discarded),

¹⁵ See also Agency Exhibit 27, Leach Affidavit

proceed to the tipping area, discard the refuse, and exit the Station after collecting another weigh ticket accounting for the now empty truck. However, on this day, Leach saw someone who she learned later was Employee, enter the Station through an inoperable lane, skip the weighing and acknowledgement procedures, and proceed towards the tipping area to discard her refuse.

Earl Simpson (“Simpson”) Tr. pages 114-132, 134-139, 151-154.¹⁶

Simpson also recalled receiving a call on July 19, 2019, regarding an incident with a truck at the tipping scale. He verified the truck number and determined that it was Employee’s vehicle. Simpson contacted Employee to inquire about what occurred, and Employee told him that she urinated behind the wall. According to Simpson, there were at least two restrooms designated for women at the Benning Road facility. He also stated that trash packers had access to the restrooms at the Trash Transfer Station. However, if a driver needed to use the restroom while in route, they could stop their route and visit a restroom at the nearest facility. Simpson also stated that in the past drivers have also utilized the restrooms at fast-food restaurants or other quick stops. Simpson opined that Employee should have pulled her truck over when she entered the Benning Road facility to use the restroom versus skipping the line to the scale and going to the tipping floor without getting clearance.

Simpson explained that Employee was charged with unsafe practices for running through the scales and dumping a load on the floor.¹⁷ Simpson stated that the incident that occurred on July 19, 2019, was unsafe because Employee went around the scale house, and went upstairs without being flagged in. He explained that personnel did not yet have the area cleared for her to dump her load. Simpson further explained that the protocol was for an employee to wait to be directed by personnel to ensure the safety of the personnel working on the floor and the loader-operator. He testified that he did not believe Employee was charged with urinating in public for not using the restroom appropriately.

Annie Johnson “Johnson” Tr. pages 44-60.¹⁸

Johnson worked as a Family and Medical Leave Coordinator (“FMLA”) and Americans with Disabilities Act (“ADA”) Intake Coordinator with Agency. She explained that during an intake meeting, an employee is provided with all documentation needed to utilize their FMLA or ADA accommodations. For a FMLA decision, the employee is notified within five days if they are approved or denied. There was no specific time frame to render a decision under ADA law. Johnson explained that Agency has a reasonable amount of time to accommodate the employee, so the ADA coordinator will contact the employee and notify them if they are approved for an accommodation.

Johnson testified that she has never processed an ADA or FMLA application for Employee. Furthermore, she was not aware that Employee’s medical condition would warrant FMLA or ADA

¹⁶ See also Agency Exhibit 25, Simpson Affidavit

¹⁷ See Agency Exhibit 7. Solid Waste Management Administration Standard Operating Procedures.

¹⁸ See also Agency Exhibit 30, Johnson Affidavit

accommodations. Johnson said that it was possible for an employee to have a medical condition and not utilize FMLA if the employee did not need to use leave.

Employee Tr. pages 213-232.¹⁹

As to the incident that occurred on July 19, 2019, Employee stated that she drove to the Benning Road Transfer Station to drop off her load.²⁰ After she arrived at the station, there was a line of twelve or thirteen trucks in front of her. The procedure was for her to drive her truck to the scale to get weighed. Then Leach gives Employee a ticket that authorizes her to proceed to the tipping floor where she dumps her truck load. But after ten minutes of waiting on the line with no truck movement on the line, she could no longer hold her bladder and jumped off the line to go to another lane that was not being used. Employee went to the scale to catch the attention of Leach since she had to use the restroom. She thought that Leach would be able to see her through the window. When Employee went across the scale and went up the ramp to the top of the tipping floor, she pulled the truck over, got out of the truck, and relieved her bladder behind a wall without being on the tipping floor.

After Employee relieved herself, she went back to retrieve her dumping ticket. She explained that she physically had to take the truck back to obtain a ticket because she left without a ticket. Employee claimed that she did not necessarily have to obtain a ticket before she tipped her truck. She further explained that once the truck was dumped, the truck is taken back to the yard. Later, Employee admitted that she never obtained a ticket before or after dumping her load. Moreover, Employee testified that she has medical documentation providing that she cannot hold her bladder. Employee testified that she proceeded up the ramp and dumped her trash without receiving authorization from Leach. She admitted that Leach could have stopped the line from moving for safety reasons, such as a fire truck coming to the tipping floor for the occasional trash fire. She stated that she accepted responsibility for her wrongdoing regarding this specific incident.²¹ However, Employee stated that she had been waiting in the line for a long period of time and had to use the restroom.

August 15, 2019, Incident

Wanda Richardson (“Richardson”) Tr. pages 87-106.²²

As a Superintendent with Agency, Richardson oversaw the daily collection of trash and recycling in the District. Richardson testified that on August 15, 2019, while sitting in her vehicle on the corner of 13th and Taylor Street, Northwest, she saw Employee traveling on the 1300 block of Taylor Street, Northwest, driving a trash packer. She explained that the area was a main thoroughfare with a four-way stop sign. She said that she had an unobstructed vantage point of

¹⁹ See also Agency Exhibit 11 & Employee Exhibit 1, Employee Affidavit

²⁰ See Agency Exhibit 12 tabs & Employee Exhibit 11 tabs, photos of Benning Road Transfer Station.

²¹ See also Agency Exhibit 19. Employee Response.

²² See also Agency Exhibit 28, Richardson Affidavit

the intersection and that she physically saw Employee behind the wheel. Richardson saw Employee drive past the stop sign without a pause. Instead, Employee tapped her brakes in the middle of the intersection, looked around, and kept going without waiting for any other cars to pass in the other lanes. Richardson testified that she was positive she saw not just Employee's vehicle but also Employee herself on the wheel.

Initially, Richardson attempted to confront Employee about the incident that Friday but she did not see her at the yard. She spoke to Employee about the incident the following Monday. Richardson testified that she reminded Employee that her failure to yield at the stop sign could have resulted in someone getting injured and/or physical damage to government or personal property. She also testified that she educated Employee about safety and the consequences of reckless driving. In response, Employee denied running a stop sign, said, "whatever," and walked away. Richardson informed Supervisor Rollin Keals ("Keals") of the incident.

Charlene Barber-Lewis ("Barber-Lewis")²³

Based on her statement, Lead Inspector Barber-Lewis was waiting at the stop sign when she also witnessed the near-accident occur. From her vantage point, Ms. Barber-Lewis was able to clearly identify Employee as the driver of the trash packer. Once Ms. Barber-Lewis parked her vehicle, she met up with Richardson, and asked her whether she witnessed the incident, to which Richardson replied that she had and that she would speak to Employee about the incident.

Earl Simpson ("Simpson") Tr. pages 146-150.²⁴

Regarding the third specification, Simpson testified that on August 15, 2019, he received a telephone call from Richardson informing him that she witnessed Employee's truck run through a stop sign. Richardson was with Charlene Barber ("Barber") and they both expressed how Employee's actions were dangerous. Simpson could not recall if he spoke with Employee regarding the incident.²⁵

For these incidents, Simpson charged Employee with misconduct.²⁶ Additionally, he explained that Employee repeatedly failed to safely operate heavy equipment and failed to operate responsibly as a sanitation crew chief, causing a safety hazard to herself, the crew assigned to work with her, and the public. As a result, Simpson proposed that Employee receive a thirty-day suspension.

Employee Tr. pages 232-287.²⁷

²³ See also Agency Exhibit 29, Affidavit of C. Barber-Lewis

²⁴ See also Agency Exhibit 25, Simpson Affidavit

²⁵ Agency Exhibit 29. Charlene Barber-Lewis affidavit.

²⁶ Agency Exhibit 18. Advanced Written Notice of Proposed Thirty (30) Day Suspension.

²⁷ See also Agency Exhibit 11 & Employee Exhibit 1, Employee Affidavit

With regard to the August 15, 2019, incident, Employee asserted that she was not driving on the side of town where it was alleged that she ran a stop sign at the intersection. She explained that she drove a different route every day and per her own investigation, her route that day was between Venice and Nebraska Avenue, located in the Tenleytown section. Additionally, Employee argued that the information regarding her route was not mentioned in her proposal for her suspension. Employee stated that the proposal also did not disclose the truck number. The proposal only provided that she ran the stop sign on that date. She believed that Richardson fabricated the story of Employee failing to stop at the stop sign. Employee stated that Richardson was probably confused and mistook Employee for Stacy Flowers (“Flowers”), another employee, as she and Flowers have similar physical features.

Employee testified that her union suggested that she drive up to the location that Agency alleged the incident occurred. Employee argued that 13th and Taylor street is not an intersection that one would want to run a stop sign.²⁸ She explained that it was a four-way, two-lane, intersection. Employee further explained that when she arrived at the area, she noticed that the stop sign is behind the cross walk, so if she stopped at the stop sign, Richardson would not have seen her, as she previously testified. Employee testified that she denied running the stop sign to Richardson.²⁹

Valentina Ukwuoma (“Ukwuoma”) Tr. pages 155-181.

Solid Waste Administrator Ukwuoma works in Agency’s Solid Waste Management Administration and is responsible for trash and recycling collection, street and alley, and disposal of trash and SWEEP Enforcement. Additionally, she was responsible for reviewing disciplinary decisions. Ukwuoma explained the process of reviewing an agency disciplinary decision and stated that she typically reviewed twenty to thirty agency decisions per year. In accordance with District rules, progressive discipline was the first step. A recommendation from a supervisor is provided and given to the associate administrator to render a decision.

In July of 2019, Ukwuoma was tasked with reviewing Agency’s decision to suspend Employee. Ukwuoma testified that she mailed a Final Decision (referred to as final notice in the record) to Employee upholding Agency’s suspension action. She upheld the adverse action because the sanitation crew chief is responsible for their crew members. Thus, it was Employee’s responsibility to ensure that Battle returned to the yard. Additionally, Employee leaving Battle in 90-degree Fahrenheit weather, and not showing any remorse for what happened to him, proved that she did not get along with her coworkers.

Ukwuoma testified that the statements Employee made did not negate her neglect of duty. She explained that the three incidents occurred almost subsequent of each other. Regarding the inappropriate use of the restroom, Ukwuoma opined that Employee could have asked where to park her truck, use the restroom, and rejoin the line. According to Ukwuoma, Employee admitted a flagrant disregard for safety and that Employee’s explanations did not justify why safety

²⁸ Employee Exhibit 12. photo of 13th and Taylor St., N.E. intersection.

²⁹ Agency Exhibit 19. Employee Response.9

regulations were disregarded. Ukwuoma testified that the reports she received from Employee's supervisor indicated that she did not work well with others.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency's adverse action was taken for cause

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1605.4 of the District Personnel Manual ("DPM") sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Employee's thirty (30) day suspension was based on:

§ 1605.4(i) Safety and Health Violations: Failure or refusal to observe and or enforce safety and health regulations or to perform duties in a safe manner. [See Section 1607.2(i)(4) of Chapter 16 of the Regulations. integrity of government operations, to include Neglect of Duty." See also DPW's Vehicle Operator's Policy, Section V(A): "An employee driving a vehicle while on District government business shall comply with all applicable traffic, parking, and other vehicle used related laws and regulations; and See DPW Safety Policy, Section VI(1): "All DPW employees who operate agency motor vehicles or equipment shall: Comply with all District, Federal or other local laws when operating motor vehicles and equipment; and VI(2): Adhere to all DPW policies regarding the operation of vehicles and equipment].

§ 1607.2(e): Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; careless work habits.

§ 1607.2(d)(2) Failure/Refusal to Follow Instructions: Deliberate or Malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions.

July 12, 2019, Findings of Fact

Agency argues that Employee neglected her duty on July 12, 2019, when she abandoned one of her crew, Kenneth Battle, on their work route in 90-degree heat after their trash pickup rounds. Employee's supervisor, Booker, testified that Battle had called him to complain that Employee abandoned him in the summer heat after an argument without any means to get back to their workstation many miles away. Booker also alleged that when he then contacted Employee and instructed her to go back for Battle, Employee cursed at him, refused his order, and hung up on him. When he called Employee again, Employee did not answer. Associate Administrator Simpson testified that he had to get someone else to retrieve Battle. He asserted that Employee violated work policy of taking care of one's crew and that Employee's action was unsafe.

Employee did not deny that she left Battle behind but blamed Battle for not communicating with her. Employee asserted that her abandonment of Battle was not deliberate, as she had the impression that Battle had his own vehicle parked nearby to use. Employee denied hanging up on her supervisor and contradicted Booker's testimony that she was ordered to go back to pick up Battle. Employee admitted that she may have cursed Booker, but attributed it to her frustration with the whole situation. She testified that both she and her crew, Lawrence Wolfe, had assumed that Battle did not need a ride. While Employee did not produce Wolfe as a witness, she introduced Wolfe's two handwritten notes.³⁰ The note did not mention that Employee ever inquired of Battle if he needed a ride.

I find Booker and Simpson to be more credible than Employee. I therefore find that Employee failed to ascertain that Battle had a way to get back to their workstation and had simply assumed Battle had his vehicle with him. As a crew leader, Employee is responsible for the safety and welfare of her crew. Instead of accepting her responsibility as crew chief to ascertain all her crew members are safe, she cast blame on Battle for not taking the initiative to inform her that he needed a ride at the end of their route. I also find that Employee refused Booker's instruction to go back and pick up Battle. Even if Employee was not aware initially that Battle needed a ride back to their workstation, she was certainly made aware by her supervisor once she got to their workstation. Despite this, Employee still refused to go back and retrieve Battle. Even if Employee had not intentionally abandoned Battle initially, her continued defiance to Booker and indifference to Battle's plight lead credence to Agency's charges. Based on a preponderance of the evidence, I find that Employee neglected her duty to her crew member and was insubordinate.

July 19, 2019, Findings of Fact

Agency also charges that on July 19, 2019, Employee violated safety protocols when she crossed a non-operational scale and bypassed a line of waiting dump trucks at Agency's Benning Road Transfer Station to dump her trash load without prior permission. Agency further specifies that Employee failed to notify the Disposal staff of her excuse beforehand that she needed to use the restroom. Employee admitted that she discarded her trash load without having her truck weighed but stated that she could not wait in line as she urgently needed to void her bladder. While her emergency use of the bathroom was understandable and excusable, it does not excuse her bypassing the line and certainly does not excuse her dumping her trash load without permission, without first obtaining a weigh ticket, and without weighing. Instead, Employee could

³⁰ Employee Exhibit 2, Wolfe statement.

have exited her truck, emptied her bladder, and then go back in line to await her turn at the weighing scale. I therefore find that Employee violated Agency's safety protocols by failing to follow instructions.

August 15, 2019, Findings of Fact

Lastly, Agency charges that on August 15, 2019, Employee was observed by Sanitation Supervisor Richardson of failing to stop at a stop sign before crossing a four-way intersection located at the corner of 13th and Taylor Street, N.W. Richardson testified that she was positive it was Employee who blew past a stop sign without pausing. Agency also introduced Barber-Lewis's signed Affidavit attesting that she also witnessed Employee ignoring the stop sign and driving past it without stopping. Simpson testified that he received a call that day from Richardson regarding Employee's conduct.

For her part, Employee denied even being in the same vicinity, saying that it was not her route that day. She also asserted that Richardson may have mistaken her for Flowers, another employee who looked like her. However, Employee did not produce any photograph of Flowers.

I find Richardson to be more credible than Employee. Based on a preponderance of the evidence presented, I therefore find that Employee failed to stop at the stop sign, thereby neglected her duty to adhere to all vehicular safety laws. Accordingly, I find that Employee was guilty of all charges and specifications leveled by Agency.

Whether the penalty of a thirty-day suspension was appropriate under the circumstances.

Untimeliness of Agency's Actions

In her closing argument, Employee argues that Agency was untimely in its adverse action. In essence, Employee is accusing Agency of violating D.C. Official Code § 5-1031 (a) (2004), otherwise known as the "90-day rule" in suspending Employee.

§ 5-1031. Commencement of corrective or adverse action states as follows:

(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 or the Metropolitan Police 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 or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period

for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

However, Employee's own argument belies her assertion. She states that Agency proposed its discipline two months after the July 12, 2019, incident. Two months or sixty (60) days certainly does not violate the 90-day rule. Thus, Employee's argument must fail.

Disparate Treatment

Next, Employee alleges that Agency imposed discipline that is not consistent with the same discipline imposed on another employee for the same infraction. She states that Booker had a different discipline imposed from that of Employee. A number of factors are important in determining whether a penalty is reasonable. Among these factors is whether the agency has used similar penalties for similar offenses.³¹

The principle of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity or perfect consistency regardless of variations, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where genuinely similar cases are presented.³² Employee bears the burden of showing that the circumstances surrounding the misconduct are substantially similar to the circumstances in the cases being compared.³³ In order to show disparate treatment, the employee must show that he or she worked in the same organizational unit as the comparison employees and that they were subject to discipline by the same supervisor within the same general time period.³⁴

Here, Employee presented no evidence at the hearing to show disparate treatment. Employee's own arguments has shown that she was not similarly situated to Booker and therefore Agency did not treat her disparately from Booker. Employee was on a different level from Booker. In fact, Employee worked under Booker's supervision. Thus, Employee's argument must fail.

Douglas Factors³⁵

³¹ See *Giacobbi v. United States Postal Serv.*, 30 M.S.P.R. 39 (1986); *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

³² See *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 306-307 (1981); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ ().

³³ See *Bess v. Department of the Navy*, 46 M.S.P.R. 583 (1991).

³⁴ See *Carroll v. Department of Health and Human Services*, 703 F.2d 1388 (Fed. Cir. 1983); *Kuhlmann v. Department of Health and Human Services*, 10 M.S.P.R. 356 (1982); *Mille v. Department of the Air Force*, 28 M.S.P.R. 248 (1985); *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ().

³⁵ In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

Lastly, Employee makes a blanket statement that Agency failed to properly consider Douglas Factors four to eleven. In her argument, she fails to delineate exactly how these factors were improperly considered. My perusal of the Final Decision Notice on Proposed Suspension of Thirty (30) Days show that Agency performed a thoughtful and detailed Douglas Factors analysis. There is no requirement for Agency to perform such analysis to an employee's satisfaction. As such, this argument fails.

Counting of Days in a Suspension

Lastly, Employee states that the thirty (30) days suspension was imposed from January 6, 2020, to February 14, 2020. She contends that this is a total of 39 days instead of just 30 days. However, Employee cites no regulation that mandates a suspension period to be counted in calendar days. Pursuant to 6B DCMR § 1614.2, “[a]n adverse action shall be a suspension of ten (10) or more *workdays*...”. (Emphasis added). Therefore, Employee's last argument has no merit.

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- 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
 - 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
 - 3) the employee's past disciplinary record;
 - 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
 - 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
 - 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 - 7) consistency of the penalty with any applicable agency table of penalties;
 - 8) the notoriety of the offense or its impact upon the reputation of the agency;
 - 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 - 10) potential for the employee's rehabilitation;
 - 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 - 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

As discussed above, all the charges were upheld. In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency.

Chapter 16 of the DPM and the D.C. Municipal Regulations ("DCMR") outlines the Table of Illustrative Actions ("TIA") for various causes of adverse actions taken against District government employees. DCMR § 6-B1607.2(i)(4) provides that the penalty for a first offense of "Safety and Health Violations: (4) Failure or refusal to observe and/or enforce safety and health regulations or to perform duties in a safe manner" ranges from suspension to removal. The penalty for the first offense for DCMR § 6-B1607.2(d)(2) Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions ranges a 3-day suspension to removal. The penalty for the first offense for DCMR § 6-B1607.2(e) Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; careless work habits" ranges from counseling up to removal. In short, even if Employee was guilty of only one of the charges or specifications, the allowable penalty for a first offense includes suspension.

Based on the foregoing, I do not find that Agency exceeded the limits of reasonableness with the penalty imposed against Employee. Accordingly, in light of the testimony and evidence presented, I find that Agency's penalty of a thirty (30) days suspension was appropriate for the sustained charges of safety and health violations, failure/refusal to follow instructions, and neglect of duty.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's 30-day suspension of Employee is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administration Judge