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

In the Matter of:	)	
	)	OEA Matter No.: 1601-0031-22
EMPLOYEE, <sup>1</sup>	)	
Employee	)	
	)	Date of Issuance: November 29, 2023
v.	)	
	)	
D.C. DEPARTMENT OF FORENSIC SCIENCES,	)	MICHELLE R. HARRIS, Esq.
Agency	)	Senior Administrative Judge
	)	

J. Barrett Kelly, Esq., Employee Representative  
Hillary Hoffman, Esq., Agency Representative<sup>2</sup>

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On December 21, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Forensic Sciences’ (“Agency” or “DFS”) decision to terminate her from service effective November 19, 2021.<sup>3</sup> OEA issued a letter dated December 21, 2021, requesting Agency file an Answer on or before January 20, 2022. Agency filed its Answer to Employee’s Petition for Appeal on January 20, 2022. Following an unsuccessful attempt at mediation, I was assigned this matter on May 3, 2022. On May 4, 2022, I issued an Order Convening a Prehearing Conference for June 7, 2022. On May 16, 2022, Employee by and through her representative, filed a Consent Motion to Continue the Prehearing Conference and to extend the timeline for discovery in this matter. On May 17, 2022, I issued an Order granting Employee’s Motion and rescheduled the Prehearing Conference to July 12, 2022. On June 23, 2022, Employee filed a second Consent Motion to Continue and extend discovery citing that more time was needed for production of responsive documents. That same day, I issued an Order granting Employee’s Motion and rescheduled the Prehearing Conference to August 30, 2022. Prehearing Statements were due on August 23, 2022.

On August 11, 2022, Agency filed a Motion to Dismiss, citing therein that Employee had moved, and that this Office no longer had jurisdiction over this matter.<sup>4</sup> Employee filed an Opposition to this

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.  
<sup>2</sup> During the course of this matter, the Agency representative of record was Rachel Coll, Esq. However, on August 24, 2023, Ms. Coll notified the undersigned via email that her last day with Agency would be August 25, 2023, and that Hillary Hoffman, Esq. was the newly designated representative.  
<sup>3</sup> Employees was terminated for the following causes of action: DPM § 1607(b) False Statements/Records; § 1607(d) Failure/Refusal to Follow Instructions; § 1607 (e) Neglect of Duty and § 1607.2(m) Performance Deficits.  
<sup>4</sup> In support of this Motion, Agency asserted that Employee’s husband, who was a current Agency employee had provided information that he was moving. Thus, it was Agency’s assertion that because Employee was married that she too would be leaving the area. Agency’s Motion also included personal information pertaining to Employee to include her marriage certificate,

Motion on August 19, 2022. On August 15, 2022, Agency filed a Motion for a Protective Order regarding Depositions. On August 19, 2022, Employee filed an Opposition Motion to Agency's Motion to Dismiss, and a Motion to Compel Discovery. Both parties filed their Prehearing Statements on August 23, 2022. On August 29, 2022, Agency filed a Sur-Reply to Employee's Opposition to the Motion to Dismiss, along with an Amended Motion to Dismiss, and a Motion to Strike.

Both parties appeared for the Prehearing Conference as scheduled. Following the conference, I issued an Order on August 31, 2022, codifying the verbal orders provided during the conference. In that Order, I ordered that Agency's Motion to Dismiss was denied, citing that Agency's assertions had no legal basis and that the attachments filed along with that Motion with Employee's personal identifying information were unwarranted and would be stricken from the record. Additionally, in that Order, I denied Agency's Motion for a Protective Order and ordered that Amended Prehearing Statements should be filed on or before September 30, 2022. In that Order I also noted that I was inclined to grant Employee's Motion to Compel, but that more information was needed, so I scheduled a follow-up Status/Discovery Conference for September 21, 2022. On September 21, 2022, both parties appeared for the Status/Discovery Conference. During that conference, the parties requested additional time, as they had engaged in settlement discussions. Accordingly, I issued an Order that same day scheduling a Status Conference for October 19, 2022, to provide time for a potential settlement. On October 17, 2022, Agency filed a Consent Motion to Postpone that conference. Agency cited therein that it had received notice from the Mayor's Office of Legal Counsel that there was a backlog of settlement requests, and more time was needed to approve Agency's request for settlement authority. Accordingly, on October 18, 2022, I issued an Order granting the extension and required the parties submit a status update by November 18, 2022, regarding settlement.

On November 18, 2022, the parties notified the undersigned that settlement had been unsuccessful. That same day, I issued an Order scheduling a Status Conference for November 30, 2022. Both parties appeared at the Status Conference as required. During that conference, the undersigned provided a verbal ruling regarding the outstanding LIMS<sup>5</sup> data in Employee's previously filed Motion to Compel. On November 30, 2022, I issued an Order materializing the verbal orders made during that conference. Accordingly, Agency was required to produce the documents by or before January 30, 2023. Further, the Amended Prehearing Statements were due by February 17, 2023, and a Prehearing Conference was scheduled for February 23, 2023. The parties submitted their Prehearing Statements and attended the Prehearing Conference as required. During that Prehearing Conference, I determined that an Evidentiary Hearing was warranted. As a result, on February 23, 2023, I issued an Order Convening an Evidentiary Hearing for May 8, 2023. On March 14, 2023, following submissions from the parties regarding witnesses for the Evidentiary Hearing, I issued an Order denying Employee's request for witness testimony from J.W. and E.S.<sup>6</sup> The Evidentiary Hearing was held on May 8, 2023, as scheduled. On May 25, 2023, following the receipt of the transcript in this matter, I issued an Order requiring the parties to submit their closing arguments by or before July 7, 2023.

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home address, new home valuations etc. The undersigned addressed Agency's Motion during the Prehearing Conference held on August 30, 2022. There, the undersigned cited that Agency's Motion was unfounded and that the inclusion of the personal information of Employee was not only unwarranted, but was without cause/legal basis. I advised during that Status Conference that all those materials would be wholly stricken from the record. In a subsequent Order issued on August 31, 2022, I also noted that Agency's Motion to Dismiss was denied, as there was no legal basis for its assertion regarding jurisdiction in this matter.

<sup>5</sup> LIMS is the acronym for the Laboratory Information Management System. The causes of action in this instant matter arise out of Employee's alleged alteration of the distribution date in that system.

<sup>6</sup> For the purposes of this Initial Decision and its subsequent publication to the OEA website and D.C. Register; the names of all other employees who testified (employees who are not supervisors or agency leadership) and/or were included as a part of the parties' submissions to this Office have been redacted to only reflect the initials of their first and last names.

On June 20, 2023, Employee filed a Consent Motion for an Extension of Time to File Closing Arguments. Employee's counsel cited therein that he had conflicts with other substantive briefs due and also wanted to spend time with family for the July 4<sup>th</sup> Holiday. As a result, Employee requested that closing arguments be due on or before July 14, 2023. On June 22, 2023, I issued an Order which granted Employee's Motion and required that closing arguments be submitted on or before July 14, 2023. On July 12, 2023, Employee filed a Second Consent Motion to Extend the time to file, citing therein that Employee's counsel was on leave the week of July 3<sup>rd</sup>, and was preoccupied until midnight of June 30<sup>th</sup> with two other matters and needed more time to fully respond to the closing arguments. Employee's counsel requested that the closing arguments be due on July 17, 2023. On July 14, 2023, I issued an Order granting the Motion and required closing arguments be submitted on or before July 18, 2023. Both parties complied with the prescribed deadline. The record is now closed.

### JURISDICTION

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

### ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. Whether all applicable laws, rules and regulations were followed in the administration of the adverse action; and
3. If so, whether termination was the appropriate penalty under the circumstances.

### BURDEN OF PROOF

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

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

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

OEA Rule 628.2 *id.* states:

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

### SUMMARY OF TESTIMONY<sup>7</sup>

On May 8, 2023, an Evidentiary Hearing was held before this Office. 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 Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their

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<sup>7</sup> For the purposes of this Initial Decision and its subsequent publication to the OEA website and D.C. Register; the names of all other employees who testified (employees who are not supervisors or agency leadership) and/or were included as a part of the parties' submissions to this Office have been redacted to only reflect the initials of their first and last names.

positions. During the Evidentiary Hearing, the undersigned had the opportunity to observe the poise, demeanor, and credibility of the witnesses.

*Agency's Case in Chief*

Erin Price ("Price") Tr. Pages 20 – 60

Price is the Deputy Director of the Crime Scene Sciences Unit ("CSSU") at Agency and has been in that role for approximately six (6) months. She has been employed with DFS since 2013, and with the District government since 2009. In her current role, she oversees the CSSU, the supervisors in the CSSU, as well as the Central Evidence Unit ("CEU"). She also has administrative responsibilities, reviews reports and assists the director of the CSSU. In October 2020, Price was one of six (6) Crime Scene Sciences supervisors in the CSSU. Price testified that in that role, she was responsible for supervising eight (8) team members. Price noted that Employee was not one of her direct supervisees. In March 2021, Price was still a CSSU supervisor. She testified that "LIMS" is the Laboratory Information Management System and that it is the system where all of the documents regarding case information and evidence are entered into. It tracks dates and times of response to crime scenes and includes all paperwork associated with cases. Price explained that crime scene scientists place reports in LIMS so that anyone within the laboratory can access and distribute case files to their stakeholders. Price further cited that the stakeholders included the Metropolitan Police Department, the US Attorney's Office and other police districts.

Price explained that the LIMS system does not automatically distribute reports to stakeholders, so they must document distribution in LIMS to verify information is complete. Price testified that the distribution date in LIMS has a specific barcode that is printed and entered by the attendant for the scene and is scanned and distributed with that date. Tr. 26. Price noted that the date populates automatically when the barcode is scanned. Price also explained that in the past, the dates always automatically populated in LIMS and could be changed, but presently, the dates cannot be changed Tr.27. Price explained that as of the date of Evidentiary Hearing, the dates cannot be changed, but that back in October 2020 through the Spring of 2021, the dates could be altered- but that the dates still automatically populated when the barcode was scanned. At the time in which the date could be changed, Price explained that it was just a "fill-in" such that it could be highlighted, and the date could be entered. Price testified that she was not aware of any way that date could be changed other than by someone going in and changing it.

Price also cited that "turnaround time" was the timeframe that their unit provided information about the case to the stakeholders. The turnaround for them was fourteen (14) calendar days and that was the case in October 2020 and March 2021. Price asserted that this has been the turnaround time for some time, but that she was not aware of when that 14-day timeline first started. She testified that it is a key performance indicator and a part of their SMART goals.

Employees access LIMS by and through the use of a specific log in username and password. Price explained that employees might have access to other employees' login, but it is not a practice to share LIMS usernames and passwords. Tr. 30. Price testified that technically, LIMS usernames and passwords should not be shared because any information entered into LIMS should have your name and documentation. Price believed that this information was provided in the LIMS user guide. Price also noted that LIMS requires a separate log in from when an employee logs into their computer. There are shared computers at the crime scene unit, so if an employee is logging in from a shared computer, then a separate identifier/username has to be used. Price cited that members documents are loaded into the

United States Attorney's Office (USAO) portal through scanning the case jackets and using a specific naming convention for entry. Price testified that she has access to the USAO portal and that they are not able to tell which crime scene scientists uploaded documents by just looking at it. Price explained that determinations are made by looking at actual case numbers (CCN), and the evidence collection log and by reviewing what type of case jacket it is for (autopsy, vehicle etc.). Tr. 33. Price noted that the same case number used in the USAO portal is maintained in the LIMS system. Price went further to explained that a "distribution date" is the date that they distribute the information to the stakeholders and send it to them for their review. Tr. 34. This date column is not available on the USAO portal. She noted that the USAO portal will capture the distribution date automatically when it is uploaded into the system. This was not created by DFS, but by the USAO, as a result, crime scene scientists at DFS are not able to change that date and never have been able to. However, that date is intended to match the distribution date recorded in the LIMS database. Tr. 35-36. Price noted that the distribution date should be entered into LIMS before putting the case into the USAO portal and that it should happen on the same day. Tr. 37. Price testified that this process was in place within the time period of October 2020 to March 2021. Price explained that this information was in the LIMS user guide, as well as the Department Operation Manual ("DOM"). Tr. 37-38. Price further noted that the DOMs are based on a department level.

In identifying Agency's Exhibit 3, Price testified that it represented the Standard Operating Procedure ("SOP") for Procedures for Case notes, Reports and Administrative functions, which included directions regarding distribution. Tr. 39. Price affirmed that this was the SOP in the relevant time frame of October 2020 through March 2021. Price also identified Agency's Exhibit 2 as a Memorandum dated April 26, 2017, that was sent out regarding how to do the distribution dates. Price testified that this Memorandum included instructions for barcode scanning into LIMS. Price further testified that this Memorandum was in effect during the October 2020 through March 2021 time period.

Price cited that in March 2021, she became aware that the automatically populated LIMS distribution dates could be changed. She was told by another scientist about this and upon hearing of this, she reported it to her then director, Christopher LoJacono ("LoJocano"). Price testified that LoJacono noted that an audit would be needed to identify if this was an issue they would have to address. Tr. 43. For the audit, Price was responsible for pulling information for specific individuals from both the LIMS and USAO portal to determine whether dates matched. Tr. 43-44. Specifically, Price was looking for inconsistencies with the actual distribution date that was uploaded to the USAO portal versus what was documented in LIMS. Tr. 44. In conducting the audit, Price found issues for some scientists where the distribution date in LIMS did not match the date in the USAO portal. Price further explained that the distribution dates in LIMS were earlier than the date was in the USAO portal. There were also instances where there were no cases uploaded at all. Price testified that she did not have access to the audit of the metadata stored in LIMS nor did she know that was available at that time. Tr. 45-46. Price did not speak with Hillary Hoffman ("Hoffman") about her audit findings. Price testified that she believed that the audit found that there were approximately seven (7) individuals who were identified with having had date changes. Price cited that Employee was one of those Employees.

On cross-examination, Price reiterated that there was a 14-day turnaround for distributing reports. Price also testified that while she did not specifically pull the audit information for Employee, that Employee was one of those individuals identified with date changes. Price testified that she did not have any information regarding Employee's specific audit. She cited that all information for the audit was reported to LoJacono. Price cited that she conducted the audit by pulling information from the dashboard and looking for the distribution dates in LIMS and then pulling the information from the USAO portal to see whether the dates matched. Price explained that the dashboard was a system in LIMS where

information can be accessed. It is a separate application used to pull information from LIMS. The information in the dashboard is presented in an Excel spreadsheet. Tr.51-52. Price also explained that once she gathered the information, it was documented as part of the audit. Price did not know specifically how the audit was conducted for Employee. Tr. 54. Price iterated that the process from obtaining information from the USAO portal was manual given that it was not an internal database. Price identified in Agency's Exhibit 3 that the date of processing is the date it gets assigned to the individual in LIMS. Tr. 57-58. Price also testified that employees, including Employee, were required to submit reports for supervisory review. Tr. 58. Price reiterated that the processing date is the date it is assigned in LIMS. All of the evidence or anything collected for a case has to be entered the same day, outside of midnight if it switches over to the next day. Tr. 59. Price noted that this timeframe would be before an employee would submit paperwork to be reviewed because those items are needed to create the report, then be reviewed and distributed. Price additionally noted that the processing date is the date that the forensic scientist went to the scene and collected evidence and when the scene attendance within LIMS is assigned. Tr. 59-60. Price also noted that all the steps in the SOP are required to be completed within 14 calendar days of the date of processing.

Christopher LoJacono ("LoJacono") Tr. Pages 62 – 125

LoJacono retired from Agency in September 2021. At the time of his retirement, he served as the Director of Crime Scene Sciences Unit at Agency for approximately three (3) years. Before that role, he was with the Metropolitan Police Department (MPD), and then worked for private entities before starting with Agency in 2018. At the time of his tenure as director, LoJacono cited that there were about 58 employees within the CSSU- all of which were crime scene scientists. LoJacono noted that MPD had to supplement because there weren't enough crime scene employees at DFS to handle all the crime scenes. DFS would take on major crimes and MPD was responsible for "lesser crimes." Tr. 65. LoJacono testified that it was his role to ensure that they go to crime scenes and process evidence. Initially, LoJacono's director was Dr. Jennifer Smith who left Agency in 2021. At the time when LoJacono retired, the acting director of DFS was Anthony Crispino ("Crispino").

LoJacono testified that he did not have a lot of interaction with the LIMS system, but that LIMS was where evidence and reports were uploaded, and it was a system utilized by Agency to track chain of custody and the movement of evidence and reports. Tr. 66. It was the expectation of all in the CSSU to log reports and the like in the LIMS system. LoJacono testified that the timeline for distribution of reports was created by his predecessor and that the time required to submit reports was fourteen (14) days. Tr. 67-68. LoJacono noted that initially, he thought that the distribution date in LIMS was automatically populated upon upload of reports. However, in March 2021, he was made aware by Price that personnel who were distributing reports cited that there were employees who were just "putting in a date" for when they distributed reports. Tr. 68-69. After hearing this information, he and Price went into LIMS and discovered that the field for the distribution date was not locked and that dates could be changed. Tr. 69.

LoJocano also testified that employees have their own usernames and passwords and are not supposed to share it. He was not sure if someone from IT might be able to override and cited that there was a LIMS administrator who had full rights to the system. He also noted that JusticeTrax was the vendor who supported LIMS. Tr. 70. LoJacono iterated that it was against the rules for employees to share their LIMS usernames and passwords with each other. LoJacono said there were several cybersecurity training courses through the District government which highlighted the rules about not sharing passwords etc. LoJacono also explained that DFS is a "secure agency" which meant that information that's used could be used for criminal investigations, so the information can be sensitive and not to be shared with unauthorized persons. LoJacono explained that employees shared computers, in the

sense that they logged in with their own identifications. There was also a processing room where scientists all worked to log in information after returning from a crime scene. LoJacono iterated that scientists were to log into the LIMS systems as themselves.

Once he was notified that the distribution date field was changeable, LoJacono directed Price to do an audit of approximately 25 records, starting alphabetically, auditing each scientist in the unit. He specifically asked her to audit each scientist because he was not sure how extensive the problem was at that point. Tr. 73. LoJacono said it was a time-consuming task, as Price also had other responsibilities. He explained that there were six squads, and each squad was comprised of approximately nine (9) to ten (10) people and each had a supervisor along with a manager responsible for auditing their own people. During this time frame, he recalled that the audit went back approximately six months or maybe longer. Tr. 74. Additionally, the dates were looked at to see when it was a distribution date and then when it “actually hit the US Attorney portal.” Tr. 74-75. In review of those dates, LoJacono cited that there were inconsistencies. Specifically, the dates in the USAO portal and LIMS should have aligned, however the audit revealed several instances of the dates not matching. Tr. 75. LoJacono testified that the goal of the audit was to identify when documents were distributed in LIMS and when they were scanned and uploaded into the USAO portal. These actions were supposed to be completed within fourteen (14) days. Through the audit, there were approximately ten (10) employees who were identified with having inconsistencies. Of those, it was determined that two (2) were not changing dates, but instead were not distributing their reports in the USAO Portal as required. Tr. 79. It was also determined that those persons were entering in LIMS but did not complete the distribution to the USAO portal.

LoJocano testified that he notified the director about the results of the audit and the general counsel was also brought in because there was an obligation to report these findings to the U.S. Attorney’s Office. The general counsel at that time was Todd Smith. Tr. 80. Ultimately not all ten were investigated. The investigator in this matter was Hoffman. She came in from another agency to serve as the investigator in this matter and LoJocano worked with her. Tr. 81. Additional information was requested from LIMS as part of the investigation and was sent as a spreadsheet. LoJocano identified Agency’s Exhibit 1 as the spreadsheet from LIMS. LoJocano affirmed that he personally reviewed this information, and it informed him of his findings as the proposing official in the discipline in this matter. Tr. 83. Specifically, LoJocano stated that the dates of the LIMS reports were different than dates in the USAO Portal, and he believed those dates were supposed to be the same. LoJocano identified Agency’s Exhibit 7 as the memo he wrote regarding the issue of the distribution dates being changed in LIMS and in talking with the then director of DFS, he cited that she wanted to come up with a way for LIMS to lock those dates. LoJocano said that work was done to try to fix the issue and make it such that the dates could no longer be changed. Additionally, there was a Crime Scene SOP that dealt with distribution, and it added steps about notifying supervisors for reports Tr. 85. LoJocano also stated the 14-day distribution deadline was the standard when he arrived at DFS. Tr. 86. This timeframe was to ensure timely distribution to MPD and the USAO. LoJocano testified that changing a date relates to the veracity and integrity of the person and could call into question whether a person lied about other aspects of the collection of evidence. Tr. 87.

LoJocano testified that the audit determined that the date changes were primarily found within one squad and a few within another squad, which resulted in ten (10) people who were initially investigated, and at least six or seven were in one squad – the squad supervised by John Allie. Tr. 87-88. LoJocano noted that Employee was in the squad supervised by Keith Slaughter. LoJocano cited that he recommended Employee be terminated because they had “in essence lied about the dates that they were distributing, which [they] had to report to the U.S. Attorney’s Office.” Tr. 88. LoJocano explained that it was required that they report this information to the USAO because this information had to be disclosed

to defense attorneys whenever they called a witness. Tr. 89. LoJocano identified Agency's Exhibit 4 as the Proposing Official's Rational Worksheet. He testified that someone created the document and that he reviewed it and signed it. LoJocano believed that he discussed portions of this document with his point of contact at that time, Ms. Hoffman. Tr. 94. LoJocano reiterated that he proposed Employee's termination because based on the information in the record, she had falsified dates on reports that she distributed. Tr. 96. LoJocano noted that it questioned her veracity and trustworthiness, particularly for testifying in court (Lewis List). LoJocano testified that he would have proposed termination even if her duties had not included testifying in court. Tr. 97.

On cross examination, LoJocano testified that he did not prepare the proposed separation notice, but he signed it. LoJocano further testified that in consideration of the Douglas factors, a "neutral" as opposed to a "mitigating" designation was given for the past corrective action, because he did not know whether that would be mitigating, given that there's an expectation that people do not have corrective or adverse action. Tr. 104. LoJocano said in his opinion that it was neutral. He did not examine her personnel file regarding any commendations or recognition of successful work. Regarding the other factor about deterring others, LoJocano said he agreed with it. Tr. 106. LoJocano also testified that he was the proposing official on all seven (7) of the individuals including Employee, and he could not recall whether he made any edits or changes to any of those individuals rationale worksheets. Tr. 107-108. LoJocano also testified that he relied upon the investigative report (Employee's Exhibit 11) in proposing Employee's termination. He stated that he may have had some conversations with Ms. Hoffman about the report etc. Tr. 110.

LoJocano testified that he believed that Employee had intentionally changed the dates to mislead the Agency. Tr. 110. He based that assertion given the dates were different than the distribution dates in LIMS. LoJocano also explained that the audit was conducted by more than one individual and involved six squads in the Crime Scene Sciences Division, which has six supervisors and two managers. He believed that Employee's supervisor, Keith Slaughter, had conducted her audit. LoJocano was not aware of how many times it was alleged that Employee had changed dates. Tr. 112. LoJocano was not aware if Employee's date differences changed her 14-day turnaround time. LoJocano had no recollection of whether Employee had met her 95% performance goal during the time period in the proposed removal (October 1, 2020, through March 8, 2021). He testified that he proposed removal because Employee lied. Tr. 115. LoJocano stated that he did not inquire about the performance deficiency in the document.

LoJocano testified that two other employees (E.S. and J.W.) received official reprimands. Tr. 117-118. LoJocano noted that E.S. and J.W. failed to upload reports into the USAO portal. LoJocano testified that it was his understanding that if someone is on the "Lewis List", the USAO will not call them to testify in court. He did not know whether Employee was on the Lewis List. Tr. 123.

On redirect, LoJocano testified that even if Employee's date changes had not affected her 14-day turnaround, that he still would have proposed termination because the falsification of the dates was the basis for separation. He noted that E.S. and J.W. were not terminated for their actions because they had not falsified any information, but had just failed to perform their job functions as required. Tr. 124. He cited that falsification warrants termination because it is about truthfulness and that when testifying, you are presenting information for the government in criminal cases.

#### Hillary Hoffman ("Hoffman") Tr. Pages 129 – 178

Hoffman currently works at Agency as the supervisory attorney advisor and has been in this position for approximately 20 months. Her current responsibilities include oversight of three (3) attorneys and a paralegal and handling of matters in the General Counsel's office. In March of 2021, Hoffman was



working as an attorney with the D.C. Office of the State Superintendent of Education as a litigation attorney. Tr. 131. In June of 2021, she was called to investigate a matter at DFS of which Employee was involved. Tr. 131. Hoffman testified that she was told that in March of 2021, they had received a tip that dates were being changed in the Agency's LIMS system and that up until that time, management was not aware that those dates could be changed. She was not employed by DFS at that time, she was called in as an investigator. At the time she conducted the investigation for Agency, she had conducted approximately 200 investigations in her capacity as an attorney with the District government. Tr. 133.

Hoffman testified that in June 2021, she was provided data based on the anonymous complaint received in March 2021, that Crime Scene Services was looking into changes of distribution dates. Hoffman explained that to determine if dates were changed, they looked at dates that could not be changed within the USAO portal. Tr. 134. Hoffman further testified that the process for distribution was that a Crime Scene Services person would go to a crime scene, pick up evidence, come back and log that information and write a report. That report was supposed to be distributed to the USAO, MPD and OAG if it was a juvenile crime. Tr. 134. Hoffman received a list of nine (9) employees which included Employee, that had discrepancies. It was later determined that two (2) of the nine (9) employees did not have date changes but had failed to distribute the report as required. Tr. 135. Hoffman went on to explain that distribution was the "end" of the processing of reporting and that the employees had 14 days to complete and distribute the report to the USAO. That 14-day requirement is a part of all the employees' performance plans. So, it was an individual as well as a group benchmark for performance. Tr. 136-137.

Hoffman testified that in review of the data of date changes in LIMS, 100 percent (100%) of the time, the date in LIMS was earlier than the distribution date that actually occurred in the USAO portal. Tr. 137. Hoffman stated that because of how LIMS and the USAO portal work, it was determined that even if someone had "backdated" the dates of distribution in LIMS and the USAO portal, the dates were supposed to be the same. Hoffman asserted that there would never be a scenario where it would have been a different date in the USAO portal unless someone was doing something they were not supposed to do. Tr. 138. Hoffman also explained that because of the performance plan requirements that the distribution date in LIMS should not be different from the date in the USAO portal. She explained that different dates are incorrect and would be a lie for them to have said that they were distributed when they were not distributed. Tr. 138. Hoffman stated that when she arrived at Agency, data had already been pulled from the USAO. She requested information from LIMS which is run by JusticeTrax and asked them if they could tell who changed the dates and JusticeTrax said they could provide that information. Tr. 139. The information was in metadata that they kept, and which could not be changed in the DFS system because it was held in the JusticeTrax system. She also noted that JusticeTrax cited that each person/user had their own password and user identification to log into LIMS, so that it was never someone else doing this for someone else. Tr. 139. Additionally, Hoffman noted that this was a pre-populated date that should have never been changed. As a result of this, JusticeTrax was able to specifically provide information about who changed it, when it was changed and what it was changed to. Tr. 140. Hoffman testified that they were able to see when Employee had logged into the system and what she had done in that system. Tr. 140. Hoffman identified Agency's Exhibit 1 as the data that JusticeTrax provided which showed each time Employee logged in and whether she modified a date. The data showed exactly what was modified and when it was modified for each period of time. Tr. 141. Hoffman affirmed that this was the data she relied upon in her investigation. The data came through DFS but was provided by JusticeTrax. Hoffman also affirmed that this was consistent with the data she had requested through LIMS. Tr. 141.

Hoffman also identified the columns and persons associated with Agency's Exhibit 1. Hoffman explained that it is OCTO security requirement that passwords are not shared with anyone – not just for

LIMS, but for any D.C. government system. Tr. 142. Hoffman testified that this is a part of OCTO training that all District employees are required to do each year. Hoffman testified that at Agency, there is a separate login for the computer itself and for the LIMS. Hoffman reiterated that no other person should use another person's credentials. Hoffman identified Employee as the username in Agency's Exhibit 1. She explained that the column which is named "Distribute to USAO" was referencing the USAO portal which no DFS employee had the access to change and for which they used to compare that date in the LIMS system to determine if a change had been made. Tr. 144. Hoffman noted that the USAO portal was a system that only the USAO had access to, and dates in that portal could not be changed by any Agency employee, as it is housed within the federal government. Tr. 144. Hoffman did not know exactly how documents were uploaded to the USAO portal but cited that the dates captured in the USAO portal are the date it was sent to that system. Tr. 145. Hoffman went on to explain that the column noted as "Updated Date" in Agency's Exhibit 1, showed the date that was change from the original date that was in the distribution column in LIMS. She noted that the first change reflects October 6, 2020, and that it was changed by Employee to September 30, 2020. Tr. 145. She affirmed that the modified date reflects the date the change was made in the system. Hoffman went on to explain that the "Mismatch Indicator" column in Agency's Exhibit 1, was used to determine whether or not there was a difference in the dates. Hoffman explained that this was provided by JusticeTrax to show how big of a difference the change had been. Hoffman further explained how this documentation was examined to determine the date changes. Tr. 147. She also highlighted that Employee had not distributed the report that had been changed to September 30, 2020. Tr. 148.

Hoffman testified that in reviewing the data pulled from the system, Employee made at least four (4) changes to dates. Hoffman also explained that the modified date is not visible to the end user, but the updated date is visible because it was pre-populated and then intentionally changed. Tr. 149. Hoffman testified that in consideration for the 14-day turnaround requirement, that considerations were given that if an employee was consistently submitting on time or earlier, that they might receive a better performance rating. Conversely, if they were taking longer than 14 days, it might have resulted in lower performance rating. Tr. 150. Hoffman iterated that the termination charge against Employee was also in consideration of the 14-day timeline and the failure to meet that performance. She cited that since Employee and others were changing the distribution dates, they were improving their performance, but that it was false because they were not actually meeting the 14-day deadline. Tr. 151 -152. Hoffman noted that this was a Key Performance Indicator ("KPI"). Hoffman testified that she drafted a report based on her investigation into this matter, which she identified as Agency's Exhibit 5. She asserted that no one assisted her in writing this report. She did not interview Employee, because she was out on leave. Tr. 153. Hoffman cites that Employee was given the opportunity to come in and interview, but Employee declined to do so. Tr. 154.

On cross-examination, Hoffman affirmed that the spreadsheet was prepared by Brandy Kramer (or Cramer)<sup>8</sup>, a DFS employee who downloaded it from JusticeTrax and added the column "Distributed to USAO." Tr. 156. Hoffman explained that Kramer did this because Hoffman did not have access to JusticeTrax since she was not a DFS employee at that time. Hoffman also testified that her communications with JusticeTrax prior to becoming a DFS employee were related to the audit and inquiring about their metadata. Tr. 157. Hoffman cited that she asked JusticeTrax to provide the metadata about the distribution date changes. Tr. 158. Hoffman reiterated that JusticeTrax provided the information to Brandy Cramer and the information was provided to her. Hoffman testified that the spreadsheet reflects

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<sup>8</sup> Initially, the court reporter spelled this name with a "K", but later changed to a "C". For the purposes of this decision, it will be noted that both refer to the same person.

that Employee changed distribution dates four (4) times in the LIMS system. Hoffman also explained that the “mismatch indicator” and the “size of the mismatch” were reference points to the change that had been made and reflected the difference between the modified date and the updated date that showed whether a change was made. Tr. 160. Hoffman testified that the spreadsheet data which reflects the dates, exhibited where Employee made changes to the distribution date. Hoffman also noted that she did not know how often Employee logged into LIMS or any other changes made, because they did not pull that data because they were solely looking at whether the distribution date had been changed. Tr. 162.

Hoffman affirmed that there are entries that do not reflect a mismatch. She cited that even dates that did not reflect a mismatch were included as they were trying to examine everything JusticeTrax provided in the report. Tr.162-163. Hoffman testified that the data reflects that Employee changed distribution dates four (4) times. Tr. 164. Hoffman further explained that the four date changes were those that showed an “explicit change by the person.” The date was pre-populated and had to be intentionally changed, representing four (4) specific intentional changes by Employee to the distribution date within LIMS. Tr. 165. Hoffman also explained that in the instances where the spreadsheet reflects “null” that it was just the way the report pulled the information, and that the system repeated itself. So those were not included in the count of four date changes. Tr. 165-166.

Hoffman testified that the 14-day distribution requirement is the amount of time a forensic scientist has to complete the report on the evidence retrieved from the crime scene. Hoffman cited that the spreadsheet does not necessarily show whether Employee’s four dates would have brought her within the 14-day requirement but noted that it did not matter. She iterated that either way, it would have improved her performance, so it did not matter whether it was in the 14-day, as each earlier day would improve performance. Tr. 168. Hoffman identified Agency’s Exhibit 5 as the investigative report that she prepared. Hoffman testified that she specifically noted in that report that changing distribution date would directly impact the smart goal of a positive direction for an employee making it appear that the distribution date had occurred timely. She also affirmed that she wrote that Employee’s actions “provided the reasoning behind changing the distribution date within the LIMS system.” Hoffman testified that she did not know whether the date changes fell within 14 calendar days. Tr. 170. Hoffman further noted that she believed Employee had made these changes because each employee had their own LIMS ID and password. JusticeTrax could pull this information and the metadata showed what happened. Further, this system was not housed at Agency, but at JusticeTrax, so the information was specific to her. Tr. 171-172.

Hoffman testified that she didn’t know why Employee changed the date, but guessed it was to improve her performance rating. When asked whether Employee’s action could have been the result of an “innocent mistake or a technological glitch”, Hoffman testified that she asked JusticeTrax and they noted that it was a pre-populated date that had to be intentionally changed. Tr.172-173. Hoffman cited that JusticeTrax checked for glitches to ensure this was the case, and that there were none. The date was consistently pre-populated, so the change was intentional and could not have occurred but for the deletion of the pre-populated date and changing it to something else. Tr. 173.

On redirect, Hoffman explained that in Agency’s Exhibit 1, the modified date was the date that Employee went in and made the change. Hoffman testified she did not know if the number six in the mismatch column impacted Employee’s 14-day turnaround because the pre-populated date in LIMS was gone. Employee changed the date from October 6<sup>th</sup> to September 30<sup>th</sup>. For this instance of date changes, Employee did not distribute to the USAO. Tr.176. She was not terminated for not distributing but was charged for falsifying official documents because LIMS is considered an official District record. She was also charged with performance because there was a 14-day turnaround and every day that was earlier would benefit an employee. Hoffman iterated that the DFS supervisors relied on the accuracy of the

LIMS data. Hoffman testified that managers were able to determine whether their staff were meeting the turnaround time because they used the distribution date in LIMS to determine from the date assigned to the distribution date whether it fell within 14 days. Tr. 178. Hoffman noted that the distribution to the USAO was a part of the 14 days, with the assignment/going to the scene being the first day and the distribution being the 14<sup>th</sup> day at the longest. Tr. 178.

Tom Fontenot (“Fontenot”) Tr. 180 – 206

Fontenot is the Chief Information Officer (“CIO”) at Agency and has been in that role for approximately nine (9) months. He has been with District government since the year 2000 in various IT roles. Prior to this position, he was the CIO at the Department of Employment Services (“DOES”). Currently, Fontenot is responsible for the day-to-day activities for all IT related matters at DFS, including systems, cell phones, budget etc. He is the in-house point of contact for the LIMS. Fontenot explained that JusticeTrax LIMS is the Laboratory Information Management System, and its where DFS tracks all evidence and information regarding crime scenes. Tr. 182. The only outside stakeholder to have access to LIMS is MPD because there are officers that DFS is assigned to work with. Those MPD officers can only make changes to cases they are assigned to inside the LIMS program. Tr. 182. Everyone has their own login and password for LIMS. Fontenot cited that LIMS has been used at Agency since 2015. The Crime Scene Services Division and Forensic Science Lab utilized LIMS. Crime scene scientists collect evidence from a scene. They use LIMS to track and barcode the evidence. Tr. 183. Barcodes are placed on the information about the evidence. LIMS does not communicate with other systems directly. Fontenot explained that the USAO portal is an independent file sharing system where distributed reports from LIMS are placed for members of the USAO to pull. Distribution to the USAO is done manually by crime scene scientists. Tr. 184.

Employees who have access to LIMS currently have a two-factor authentication to log into the system. Fontenot explained that back in 2020, there was only a single factor authentication to log in. Tr. 185. This was when LIMS was using Microsoft SQL. Microsoft SQL is the database in which LIMS resides. Tr. 185-186. LIMS was a secure system in 2020. Every user at DFS with access to LIMS must authenticate with JusticeTrax each time they sign in. Tr. 187. Fontenot testified that all employees have their own unique username and password. Fontenot explained that the District’s chief technology officer is responsible for overall security of all systems, and the policy is that under no circumstances should usernames and passwords be shared. Every year, all District Government employees are required to complete cybersecurity training which covers this policy. Tr. 188. Fontenot further testified that DFS is a secure agency, which means that every user that accesses an Agency network resource has unique credentials to do so. This creates a footprint where they are able to see what each user has done from a historical perspective. Tr. 188. All employees have access to the OCTO website where password and username policies are housed. Tr. 189.

Fontenot identified Agency’s Exhibit 1 as an extract from LIMS. He explained that within LIMS, any add, change, or delete to the record creates a log. This log was based on case IDs. Tr. 189-190. Fontenot explained that the document that lists Employee’s name and then “null” shows that Employee was logged in. Tr. 190. There are two columns for each based on the specific column names that were pulled from the extract. Tr. 191. Fontenot affirmed that the mismatch reflects four entries. He also testified that the modified date was the system recorded date, which is when the change to the column occurred, or in the case of when the person logged in, it’s the date they logged in. Tr. 192. Fontenot cited that the columns reflect that on October 6, 2020, Employee logged in and then updated the date to September 30, 2020. The updated date was manually entered. Tr. 193. Fontenot also noted that this

information is pulled from the metadata. He also identified Employee as the person who made the change. Tr. 194. Fontenot does not know Employee and has not worked with her at all.

As the CIO, if someone forgot their password for LIMS, he could reset their password, however he cannot see passwords because they are encrypted in the database. Tr. 195. No admin or manager has access to the password. There is a password reset functionality in LIMS. Regarding the mismatch indicator, if there is a one (1) there, then it is a mismatch. If it shows a zero "(0)", then it was the same date. Tr. 196. The information from LIMS did not contain the column marked "Distribute to USAO", he testified that it was manually entered into the spreadsheet. Tr. 197. Fontenot testified that he has access to the USAO portal so he could confirm or check whether the reports were uploaded on those dates. Tr. 197.

On cross-examination, Fontenot testified that he first saw the spreadsheet within the last couple of months. It was shared by Ms. Coll when he was asked questions similar to what he was being asked during the hearing. Tr. 198. Fontenot could not confirm whether the spreadsheet was Excel or not, but perhaps it was formatted as a CSV since it was an extract from LIMS. Tr. 198. He reiterated that the extract was from LIMS. He did not know if the extract was done by DFS. Tr. 199. Fontenot testified that JusticeTrax does not have access to the production system today but could not say whether they did back in 2020. Fontenot cited that if someone provided JusticeTrax with the logs or access that they could have looked at LIMS and determined whether an employee had changed a date in the system. Tr. 199. Fontenot testified that two-factor authentication for the system began in March 2022. Tr. 200. Prior to this, employees were using what was called a "client server", so the application was installed and then accessed from a local computer to the server. Tr. 200. When asked by the AJ about access in 2020 and 2021, Fontenot noted that users could access the application while on VPN. Tr. 203.

On redirect, Fontenot testified that the distribution date can now be changed later but is called the 'redistribution date.' Tr. 204. On recross examination, Fontenot testified that the mismatch indicator and size of mismatch appeared to him to be columns that were added to show the difference between the modified date and the updated date and the size of the mismatch if there was one. Tr. 205. When asked by the AJ whether metadata could not be retained, Fontenot testified that there would be no reason it would not be there. Tr. 206.

#### Quiyana Hall ("Hall") Tr. 208 – 230

Hall currently works as the Human Resources and Labor Relations Director at Agency and has been in that position for almost two (2) years. Hall has been with District government for 13 years in a human resources ("HR") capacity the entire time. Her duties include overseeing the functional areas for HR and labor relations, including recruitment and talent, compliance, employee relations, payroll etc. Tr. 209. Adverse actions/terminations fall under the employee relations part of her responsibilities. Hall testified that her role with adverse actions is the facilitator of the process and documentation. She does not serve in any capacity to recommend, propose or decide discipline. In March 2021, Hall worked at OSSE. Hall was not personally involved with Employee's proposed termination. Tr. 210. She was however involved with Employee's the final termination. Hall testified that she started working at DFS in September 2021, and Employee's termination was within her first week or two of that role. Hall identified Agency's Exhibit 12 as the administrative review which was the report and recommendation from a hearing officer in Employee's removal. Tr. 212. Hall explained that after a hearing officer reviews the case materials and the employee's response, then a report with recommendation is written and provided to the deciding official. Tr. 212. Hall was not a part of the proposing process for Employee because she was not employed with Agency at that time. Hall identified that Agency's Exhibit 12 was signed by then DFS interim director, Anthony Crispino. Tr. 213. Hall testified that the hearing officer must be an attorney.

Hall explained that upon receipt of this document, it is typically reviewed. In this matter, the hearing officer recommended termination and the deciding official accepted that. This meant that an issuance of a final notice for removal had to be completed. Hall identified Agency's Exhibit 13 as the final notice of removal. Tr. 216. Hall signed this document on behalf of Director Crispino. Hall testified that she has "delegated authority" and signed documents for the director. Tr. 217. Hall cited that in some instances, she is able to issue final notices without the director's approval on HR-related matters, like discrimination, EEO, or sexual harassment matters. Tr. 219. Hall did not recall speaking with the proposing official, LoJocano in this matter. Tr. 219. Hall testified that prior to her arrival, the HR director at Agency was Michael Hodge who is no longer with DFS. Tr. 221.

On cross examination, Hall testified that a deciding official could mitigate or reduce a penalty made by the hearing officer. Tr. 228. Hall identified Agency's Exhibit 4 as the rational worksheet. Hall explained that in her role, she does not consider the proposing official's worksheet, because she is not the deciding official. She did not make the decision or any decision related to Employee's termination. Tr. 229 -230.

### *Employee's Case-In-Chief*

#### Employee Tr. 233 – 286

Employee testified that she has a Bachelor of Science in forensic and investigation sciences from West Virginia University, which she earned in 2013. Following this, she worked at American Systems, a government contracting company where she gained top-secret clearance. She began working at DFS in 2016 as a forensic scientist with the Crime Scene Sciences Unit. Her duties included going to crime scenes, taking photos, taking other evidence, preparing reports, and testifying if needed. Tr. 239. She would testify in the District of Columbia for cases for scenes she worked on. Employee cited that she enjoyed her work.

Employee explained that her duties to prepare reports included the use of specific templates with items that were required to be completed on the nature of evidence was that they collected at the crime scene. Reports were prepared by using Microsoft Word. Employee explained that LIMS is the system that tracks chain of custody of evidence and some case information. Tr. 241. After she prepared a report, she would affix a barcode on the case jacket which would include the report. There was also a review sheet that was given to the supervisor, the supervisor reviews it and return it back to be distributed. Tr. 242. Employee testified that once she got back the report signed off by the supervisor, she would take it to a copier or scanner, scan it in and those would be emailed. Then she would take the email, download the attachment and rename it to the proper name with the CCN and describe what type of scene it was. After this, it was uploaded to the USAO portal, to LIMs and sent to two (2) email addresses. Tr. 242. Employee identified Employee's Exhibit 28 as CSSS35- Procedures for Case Notes, Reports, and Administrative Functions. Employee explained that this document was the SOP for case notes reports etc. She believed she saw this document when it first cat. Tr. 244. Employee further explained that Section 7.50 was the step that described uploading the report into the USAO portal. Employee noted that once the report was scanned and emailed, it was downloaded and renamed to a specific case number. She would save it to her desktop and click and drag it to the portal. Tr. 245. She further explained that they were sent a link to the USAO portal and that it could be saved as a shortcut. She did not use LIMS to complete this part of the process. She identified Section 7.51 as the part of the process of sending the report via Outlook email to a specific email address. She did not know who those email addresses belonged to, but assumed they belonged to someone at MPD and to DFS CSS supervisors. Employee described Section 7.52 – 7.55 of Exhibit 28 as a part of the LIMS process.

Employee testified that for LIMS, she would upload the case jacket by clicking on a picture, which would then create a folder with her name on it. Then she could upload the actual case – the scanned case jacket—to the folder with her name on it. Tr. 248. She then would go to the request tab in LIMS, go to her specific request and clicked to request report. A new image would pop up with a bar code which she could scan as they had scanners at their desk. Then the case jacket could be transferred to the R1149 distribution completed and placed in distribution. Tr. 248. Employee testified that there was a distribution date filed that could be changed. She explained that she knew it could be changed because she could visually see that you were able to change it because it was not “grayed out” like other fields. Tr. 249. She said that different LIMS users had different access abilities, so if there were things you were not allowed to do in the system, it would be “grayed out.” Tr. 249. Employee cited that if it was not grayed out, then you were able to access that function. She further testified that to her knowledge, only one distribution date filed could be edited or changed in LIMS. Tr. 249.

Employee also testified that Sections 7.48 through 7.55 of the distribution process took about five or ten minutes to complete – if you were not pulled away while doing it. Tr. 249. She noted that this was 100% administrative in process and was not a part of her duties when she was originally hired. She also noted that most of the distribution process steps could be done all at once. Typically, she would try to complete the distribution process all within one shift. Tr. 251. She could not specifically recall instances where she completed one step in the distribution process on one day and another step on a different day or shift. She explained that sometimes during their shift they would get a call to respond to a scene. She noted that they were required to get to a crime scene within 30 minutes. Tr. 252. Employee testified that no one ever told her that the distribution steps had to be completed on the same day. Tr. 252.

Employee identified Employee’s Exhibit 11 as the notice and cited that it arrived at her home via FedEx on July 16, 2021. She also identified the investigative report completed by Hillary Hoffman. Tr. 254. She received this report along with her proposed removal notice. Employee testified that she received a letter in the mail saying that the Agency was conducting an investigation and that they wanted to interview her. She cited that she was not aware that she was the target of the investigation. Tr. 255. She also noted that Agency said that because she was on maternity leave, she was not required to interview, so she emailed Michael Hodge and said that she was on maternity leave and that she chose not to interview. Tr. 255.

Employee testified that it was not her practice to change the date during the report distribution process. She said it was her practice to just hit apply and move on, and that would result in that date field’s reading or to be whatever date was already in there. Tr. 257. When asked whether she changed the date field when distributing reports, Employee answered that she did not recall changing any date fields. Tr. 257. She cited that she did not change the date field at any time. She did not instruct anyone to change the date filed on her behalf. She testified that she did not make any misleading entries in LIMS during her employment at Agency nor did she attempt to mislead the Agency management into believing that she was distributing her reports earlier than she actually was. She testified that she did not falsify any records including entries or information within the LIMS system. Tr. 258. Employee identified Employee’s Exhibit 13 as a copy of the Excel spreadsheets that were sent to her in her termination packet. Tr. 259. Employee cited that they were sent to her in a CD format. Employee identified a date sequence involving a date for November 24, 2020, that had a USAO distribution date of November 17, 2020. Tr. 261. When asked whether in her experience as a forensic scientist distributing reports if there was any way for her to have distributed a report to the USAO before being assigned a case, Employee responded that “no, that [she] wouldn’t be able to write the report before [she] went to the actual scene.” Tr. 262. Employee testified that she had not been subject to any previous discipline. Tr. 268.

Employee, in review of previous performance evaluations in Employee's Exhibit 12, cited that she was aware of the 14-day turnaround, but did not know what was meant by the "metrics" that would be reviewed by supervisors. Tr. 269. She did not know how supervisors calculated it. She cited that the smart goal for that section comprised 20 percent. Tr. 270. Employee also noted that all the smart goals comprised 50% of the annual evaluation. Employee testified that she was never told that the 14-day turnaround time would be evaluated exclusively on the LIMS metrics and that it was a supervisor task to calculate, and she was not aware of how it was done. Tr. 270-271.

Employee testified that she was asked to testify by a USAO attorney following this matter, but that she did not testify because she was told that the matter had been continued. Tr. 272-273. She had conversations with this attorney and told them about her termination from DFS. Tr. 274. Employee explained that the USAO attorney supported her. Tr. 275. Employee testified that there were others who were issued notices of termination. Tr. 277. She knew because some were in the union. She stated that some of those terminated employees had testified at criminal trials post-termination from DFS. Tr. 278.

On cross examination, Employee testified that the materials in Agency's Exhibit 1 were included in her termination packet, and they were included on a CD. Employee attested that the modified dates were made on October 6, 2020. Employee also testified that she did distributions in 2020, and that she did not have administrative assistants who were distributing her reports in October 2020. Employee testified that she did not know how the dates were changed, that she really did not remember changing the date. Tr. 283. Employee did not share her login credentials with anyone. She did not recall taking the OCTO training but explained that "if it was a yearly requirement, then yes, they're pretty strict on that." Tr. 284. Employee reiterated that she did not share her login credentials with anyone. Employee also testified that she did not work with all the individuals who were terminated. Those employees were in on opposite days and shifts than she was. She averred that she did not discuss changing dates in LIMS with them, and she sat on a completely different floor than them. She noted that she almost never saw them. Tr. 284. Employee did not ask the other terminated employees whether they had made date changes. Employee cited that she did discuss the termination with them, but nothing specific to any person. Employee stated that once she received the termination packet, she was cut off from communications with DFS. Tr. 286.

#### Anthony Crispino ("Crispino") Tr. 287- 292

Crispino testified that he does not know Employee personally, but that she was an employee at DFS during his tenure. Crispino identified Employee's Exhibit 4 as a document that Quiyana Hall signed on his behalf. Tr. 289-290. Crispino said he made the final decision to terminate Employee. He based that decision on the information provided by the general counsel in the HR unit. Crispino identified Agency's Exhibit 4 as the proposing official's rational worksheet for Employee. He cited that this is also known as the Douglas Factor worksheet and that he incorporated it in the decision to terminate Employee. Tr. 292.

#### **Brief Summary of Agency's Position**

Agency asserts that it had cause to terminate Employee from service and that it did so in accordance with all applicable laws, rules and regulations. Agency avers that in March of 2021, it was alerted that employees in the Crime Scene Science Unit were changing pre-populated dates in the internal data system – the Laboratory Information Management System. The dates that were being changed were the distribution dates that reflected when the evidentiary reports were sent to the USAO. The employees had a 14-day timeline for which to distribute their reports to the USAO for the cases that they were assigned. As a result of this information about employees' potentially changing dates, the then director, Christopher LoJocano, tasked supervisor Erin Price to conduct an audit of the employees in that division to see whether these claims could be substantiated. The audit pulled information from around October



2020 through March 2021. An initial result of the audit revealed employees that had changed the dates. An investigation was conducted by Hillary Hoffman (who at the time was not employed at Agency), and the results of her investigation, which included obtaining specific data from JusticeTrax, revealed that Employee was one of nine (9) employees<sup>9</sup> identified as having changed the distribution dates in LIMS. The results of the audit and investigation revealed that Employee had made four (4) date changes within the audit timeframe and the dates were backdated to an earlier date than the day the modification was made.

Agency asserts that Employee's termination was for cause as her actions were a breach of trust and integrity. Further, Agency avers that changing the distribution dates, which were all backdated, was done to improve the performance as it related to the 14-day timeline for the distribution of the reports to the USAO. Agency maintains that LIMS is an official government system and that Employee's actions of changing the pre-populated distribution dates amounted to making false statements on an official government record/document. Agency avers that the number of times Employee made change is irrelevant because "crime scene scientists are required to be transparent and credible in all facets of their work, but particularly in connection with evidence sharing obligations."<sup>10</sup>

Agency also argues that it appropriately considered the *Douglas* Factors in this matter, and that all other applicable laws, rules and regulations were followed. Agency further maintains that it determined that Employee could not be rehabilitated or continue in any duties associated with her position.<sup>11</sup> Agency also notes that this was supported by an "external and objective Hearing Officer." Agency further asserts that Employee's claims of disparate treatment are without basis. Agency asserts that two other employees who were identified in the audit did not have the same conduct as Employee. Agency asserts that the two other employees did not manually change any dates, but instead, failed to distribute the documents as required, thus their actions did not warrant the same action as Employee and the other employees who had been identified as having manually changed the distribution dates. As a result, Agency asserts that its penalty of termination was appropriate under the circumstances.

### **Brief Summary of Employee's Position**

Employee avers that Agency's action of terminating her from service was without cause and that the penalty of termination was inappropriate. Employee asserts that the dates for which Agency has alleged she changed all occurred on the same day.<sup>12</sup> Employee aver that Agency has failed to produce evidence to prove that the changed dates would have been within the 14-day turnaround thus making their case against her implausible. Further, Employee argues that the spreadsheets relied upon in the audit and investigation were unreliable. Employee also asserts that she was never told that the 14-day distribution timeline was a part of her performance evaluations, nor was she told the metrics of how that was considered.

Employee also asserts that Agency violated the '90-Day Rule' in this matter because while the Proposed Separation was dated July 15, 2021, she did not receive it until the following day on July 16, 2021 (via FedEx Overnight).<sup>13</sup> Employee also argues that she received four (4) separate individual disciplinary charges and that the fourth charge which was related to not meeting the 14-Day turnaround

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<sup>9</sup> The record reflects that it was ultimately determined that seven (7) of those nine had actually altered dates.

<sup>10</sup> Agency's Closing Arguments at Page 8 (July 18, 2023). The Agency did not include page numbers in its submission. Where possible the undersigned has tried to identify the corresponding page numbers.

<sup>11</sup> *Id.*

<sup>12</sup> Employee's Closing Arguments at Page 1. (July 18, 2023).

<sup>13</sup> Employee's Closing Argument at Page 7 (July 18, 2023). Employee also asserts that the 45-Day rule was also violated in Agency's administration of this action.

was not proven by Agency. Employee asserts that she was never told that the 14-day turnaround affected her performance evaluation nor was she made aware of the metrics for which she was evaluated. Further Employee maintains that Director LoJocano "never confirmed whether [she] had met the 14-day 95% of the time goal during that time period." Employee also avers that the four (4) disciplinary charges should have been treated as a single disciplinary cause for false statements and/or falsification of records, specifically Employee asserts that "[d]isciplinary causes 2-4 should be merged into Disciplinary Cause 1."<sup>14</sup>

In addition to Employee's assertions that Agency's accusations of culpability are implausible, Employee cites that *assuming arguendo* that there was cause, that Agency's removal was not an appropriate penalty. Employee asserts that two other similarly situated employees that were identified in the audit did not receive discipline and/or were only given a reprimand. As such, Employee asserts that "Agency's penalty determination is entitled to no deference and should be substantially reduced, to the extent that any penalty is even appropriate."<sup>15</sup> Employee also argues that post termination, she has still been subpoenaed by USAO attorneys to testify in matters for which she collected evidence, thus disproving Agency's allegations regarding her veracity and truthfulness. Employee also avers that Agency failed to appropriately consider and weigh the *Douglas* Factors in consideration of the action against her. For these reasons, Employee avers that Agency's action was not for cause and that it should be reversed.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

### ANALYSIS<sup>16</sup>

#### *Whether Agency had cause for adverse action*

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. (*Emphasis added*).

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012)<sup>17</sup>, Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee's

<sup>14</sup> *Id* at Page 15.

<sup>15</sup> *Id* at Page 21.

<sup>16</sup> Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

<sup>17</sup> It should be noted that the OEA Rules were updated and made effective December 27, 2021. However, Employee's Petition for Appeal was filed prior to the effective date (filed on December 21, 2021), thus the previous OEA Rules are applicable for this matter.

termination was levied pursuant to DPM § 1607(b) False Statements/Records; §1607(d) Failure/Refusal to Follow Instructions; § 1607(e) Neglect of Duty and §1607.2(m) Performance Deficits. In a Final Notice of Separation dated November 16, 2021, Employee was terminated from service effective November 19, 2021. In the instant matter, Employee was a Forensic Scientist in the Crime Scene Sciences Unit (“CSSU”) at DFS and had been at Agency since 2016. Employee’s responsibilities included the submission of evidence and related materials to the United States Attorney’s Office (“USAO”) and documentation of evidence through the use of the Agency’s internal software program, the Laboratory Information Management System (“LIMS”) which was managed by JusticeTrax. Agency avers that in March 2021, it was made aware that some employees were changing the pre-populated “distribution date” in LIMS. Agency asserts that the distribution date was the date in LIMS “which was intended to reflect the date the materials were distributed to the USAO portal.”<sup>18</sup>

Agency asserts that the distribution date was a pre-populated field in LIMS. However, in March 2021, a supervisor Price notified the CSSU Unit Director, LoJocano that she had been made aware by another employee that there were employees in some of the squads in the CSSU who were manually changing the distribution date, such that they were not matching the actual date that materials were distributed to the USAO. LoJocano explained during his testimony in the Evidentiary Hearing, that upon receiving the information about this, he asked Price to conduct an audit to ascertain the frequency in which this was happening in the CSSU. LoJocano and Price were unaware that the distribution date field could be changed prior to the audit. Additionally, both LoJocano and Price cited that the procedures for distribution were captured in Agency’s guidelines noted as the “Procedures for Case Note, Reports and Administrative Functions”, specifically, sections 7.48 through 7.56 addressed the distribution process.<sup>19</sup>

The audit ultimately revealed that Employee was one of nine (9) employees who had manually changed the distribution date.<sup>20</sup> An investigation conducted by Hoffman identified through use of data obtained from JusticeTrax, that there were four (4) instances wherein Employee changed the date. Specifically, Employee made changes to date on October 6, 2020. Agency avers that the data reflected that on that date, Employee changed the dates of October 6, 2020, to September 30, 2020, in the distribution date field.<sup>21</sup> Hoffman noted in her investigation that this data showed that Employee went into LIMS on October 6, 2020 (modified date) and changed the distribution date from October 6, 2020, to September 30, 2020. Hoffman also asserted that this was known because Employee’s username and identification were implicated in the data provided by JusticeTrax. Agency’s chief technology officer, CIO Tom Fontenont, noted in his testimony that the data reflected that Employee logged into LIMS on October 6, 2020, and changed the distribution date to September 30, 2020. Fontenot also testified that the modified date – the day Employee logged in- was system generated and could not be changed.<sup>22</sup> These changes were noted as “mismatch indicators” in the data and spreadsheets utilized for the investigation in this matter. Agency avers that Employee “stood to benefit from the earlier dates reflected in LIMS than the actual distributions reflected” because this would improve her performance rating and the Key Performance Indicators (“KPI”) for her unit as a whole.<sup>23</sup>

Employee avers that Agency has failed to meet its burden of proof for these charges. Further, Employee argues that even *assuming arguendo* that Agency had met its burden, the penalty of termination was unwarranted, and that Agency failed to appropriately weigh the *Douglas* Factors in its administration of the instant adverse action. Employee asserts that she was charged with changing the distribution dates

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<sup>18</sup> Agency’s Closing Argument at Page 2 (July 18, 2023).

<sup>19</sup> *Id.* at Page 3.

<sup>20</sup> The record reflects that it was ultimately determined that two (2) of the nine (9) employees had not altered dates, such that it was determined that seven (7) employees had altered dates.

<sup>21</sup> *Id.* at Page 8. See also. Transcript at Page 145- 147.

<sup>22</sup> *Id.* See also Transcript at Pages 193-196.

<sup>23</sup> *Id.* at Page 9-10.

–“alleged changes of four days in three instances and six days in another to mislead Agency management into believing that she distributed the four reports in question within 14 days of case assignment, thereby supposedly enabling her to gain an advantage on a performance evaluation criterion that assessed the frequency within which she distributed reports within 14 days of assignment.”<sup>24</sup> Employee avers that despite its access to the data, Agency “failed to produce evidence of the date of case assignment for any of the four cases in question.”<sup>25</sup> Employee also asserts that the data relied upon, specifically the spreadsheets, were unreliable because it was “inconsistent”. Employee avers that she received a CD with three (3) spreadsheets as a part of her proposed removal notice. She notes that the first two spreadsheets are “largely, but not entirely similar” to Agency’s Exhibit 1. She avers that the “third spreadsheet contains data that is internally inconsistent, reflect case assignment dates falling after the corresponding “Distribute to USAO”, a scenario that does not compute.”<sup>26</sup>

Employee asserts that the SOP CSS3 which describes the distribution process did not apply exclusively to actions in LIMS. Employee asserts that while her performance evaluations date for “10/1/2018-9/30/2019 cited that the 14-day 95 percent goal would be evaluated by metrics and supervisor reviews, her evaluations say nothing about what “metrics” would be used to assess her performance to that goal.”<sup>27</sup> For this reason, Employee argues that she had no reason to believe or presume that her evaluation with respect to that goal would be based “exclusively on the editable distribution date at issue.” Employee also asserts that because the date changes occurred all on a single day, October 6, 2020, it would be more plausible to believe that “some innocuous event or action unique to October 6, 2020 – a data sorting error in the preparation of the spreadsheet reflected in Agency Exhibit 1, for example – is the cause for the four date mismatches reflected on that spreadsheet.”<sup>28</sup> Employee also argues that the 90 Day Rule and 45 Day Rule were violated in the administration of this adverse action. Employee also avers that the disciplinary charges, while unfounded, should have been combined such that all the charges 1-4 should have been treated as “a single disciplinary charged for alleged false statements and/or falsification of records.”<sup>29</sup> Employee avers that the “broader structure and language” reflect that the “underlying basis for all four Disciplinary Causes was [Employee’s] alleged falsification of dates in the LIMS system, not mere neglect for duty or failure to follow policy.”<sup>30</sup> Employee also asserts that despite the charges and subsequent termination, she has still been called to provide testimony by the USAO.<sup>31</sup>

### *False Statements/Records*

As was previously noted, Employee was terminated from Agency effective November 19, 2021, pursuant to four (4) charges. The first charge was “False Statements/Records pursuant to DPM § 1607.2 (b)(4). Employee was charged with this cause of action following the Agency’s discovery that she had changed the distribution dates in the LIMS system. Agency asserts that “the manual alteration of LIMS dates by anyone apart from a manager with specific directions to do so, regardless of the reasoning constitutes a report of false information to a superior.”<sup>32</sup> Further, Agency cites that “LIMS entries are used by the Crime Scene Sciences Unit and DFS as a whole to report compliance to the Executive Office of the Mayor and the D.C. Council.”<sup>33</sup> Agency asserts that Employee’s removal under this charge was based on Employee having made four (4) false statements in her LIMS entries. Agency notes that that the

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<sup>24</sup> Employee Closing Argument at Page 1 (July 18, 2023).

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

<sup>26</sup> *Id.* at Page 18.

<sup>27</sup> *Id.* at Page 19.

<sup>28</sup> *Id.* at Page 20.

<sup>29</sup> *Id.* at Page 14.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 13.

<sup>32</sup> Agency’s Closing Arguments at Page 12 (July 18, 2023).

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

reason Employee “intended to mislead is irrelevant; as is the specific benefit of misleading information.”<sup>34</sup> Employee avers that Agency has failed to show cause that she provided false statements and has cited that because the four date changes occurred on the same day, that a more plausible cause was some sort of data error in the spreadsheets relied upon on the investigation.

The undersigned finds that Agency has met its burden of proof with regard to this charge. Here, the record is clear that LIMS is a part of the system for which DFS, specifically the CSSU, utilizes as a part of its distribution process. The record also is clear that the distribution in LIMS was a pre-populated filed, but that was editable at the time. It is also well documented that the LIMS system is a secure system wherein each user must use their own unique identification and passwords to login. The spreadsheets relied upon in this investigation were provided by JusticeTrax and I find that those records were reliable. Further, Agency’s chief technology officer, Tom Fontenot, attested to those records and identified the information during the Evidentiary Hearing held in this matter. Namely, it was identified that Employee logged in on October 6, 2020, using her own unique password and identification. Fontenot iterated passwords and identifications were unique to the individual user and that no one else would have had access to login. Furthermore, Fontenot also highlighted the “mismatch indicators” which noted that Employee had signed in on that date and changed the distribution dates. Thus, while Employee argues that the spreadsheets weren’t reliable, I find that data is reliable and that it shows these date changes were made by Employee while she was logged in on that day. During the Evidentiary Hearing, the undersigned had the opportunity to observe the poise, demeanor, and credibility of the witnesses. I found Mr. Fontenot’s testimony regarding LIMS to be reliable and forthcoming. During direct examination, Employee was asked whether she had made changes to the distribution date field. Employee’s response was that she “did not recall” making date changes.<sup>35</sup> The undersigned would note that Employee’s statement was not declarative regarding these date changes. Employee also testified that she took OCTO security training and did not provide any plausible explanation as to whether anyone would have had access to her login information. That stated, based on the record, and the secured accessibility of the LIMS system, I find that Agency has shown that Employee logged into the system on that date and changed the dates. Because LIMS is used for distribution and is also reviewed and utilized by supervisors, I find that this reflects reporting false information to a supervisor. I also find that LIMS is an official District record, that is also used for reporting to MPD and the USAO.

OEA has consistently held, that to sustain a falsification charge, “agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency.”<sup>36</sup> Here, because the LIMS system had a pre-populated date to reflect the distribution date, I find that any manual alteration of that date field, even in Employee’s case that it was four (4) dates, reflects an intention of providing misleading information. The pre-populated date is the actual date, thus any change to that date amounts to misleading information. As a result, I find that changing the pre-populated distribution date, constituted a knowing and willful reporting of misleading information, given that the date change was not a directive from a supervisor and that this action was a manual alteration of the LIMS’ pre-populated date to reflect that change. Wherefore, I find that Agency has met its burden of proof with regard to this cause of action and charge.

#### *Failure/Refusal to Follow Instructions*

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<sup>34</sup> *Id.* at Page 12-13.

<sup>35</sup> Evidentiary Hearing Transcript at Page 257 (May 8, 2023).

<sup>36</sup> *John J. Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); *See also Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

For the same reasons highlighted above, I find that Employee's actions constituted a failure to follow instructions. The SOP CSS35 specifically highlighted the distribution requirements. I find Employee's arguments that the entirety of process did not only happen in LIMS to be irrelevant to the fact that the pre-populated distribution date was manually altered by Employee. The record is clear that the employees were acutely aware that the distribution date was meant to reflect the actual date that the report materials were distributed to the USAO portal. The changing of the pre-populated dates reflect a failure to follow the SOP and managerial directives established for the CSSU. It is also of note that the dates were all modified to reflect an earlier date than was previously cited. This stated, the undersigned finds that any alteration of this date field, whether earlier or later, would constitute a failure to follow instructions for this distribution process. Further, the undersigned would note that Employee's own admissions of her previous work evaluations would highlight that she was aware of the directives and instructions regarding the distribution process and the dates. Accordingly, I find that Agency has met its burden of proof regarding the charge of Failure/Refusal to Follow Instructions.

### *Neglect of Duty*

Again, for the reasons already outlined, namely that Employee's actions were outside the scope of Agency directives and instructions, I find that she failed to carry out her duties as would be expected, thus constituting a neglect of duty. It is clear from the record that accurate reporting was a part of the duties and expectations of forensic scientists in the CSSU. Thus, the alteration of dates, again whether earlier or later, constitutes a failure to abide with those directives as would be expected of an employee. There is nothing in the record to suggest that Employee was unaware of these duties and expectations. Alternatively, the record shows, and Employee's past performance also reflects, that she carried out her duties as was expected. Further, the duties and expectations include truthfulness, particularly given the fact that forensic scientists are called to testify in criminal matters for which they handled evidence. I find that any alteration to these dates in LIMS, constitute a breach of trust and thus also evince a failure to carry out duties as expected. Employee avers that she has still been called by the USAO to testify in criminal matters, thus showing that her veracity and truthfulness were not impacted by these actions and the termination. The undersigned finds that to be irrelevant to the actions itself inasmuch as there could have been (and could be) instances for which Employee was not called to testify or was otherwise impeached during her testimony based upon these actions. As a result, I find that Agency has met its burden of proof with regard to the charge for neglect of duty.

### *Performance Deficits*

Employee was also charged with Performance Deficits. Here, Agency asserts that Employee altered the distribution dates and those alterations were dates earlier than the original date entered. Agency avers that Employee altered the dates "... after the entire unit had been advised of a required 14-Day turnaround time in 95% of cases."<sup>37</sup> As such, Agency argues that "if deficits did not exist, there is no logical reason dates would have been altered to advance the distribution date." Agency asserts that based on Hoffman's testimony, Employee altered the dates, prior to distributing the reports to the USAO. As a result, Agency avers that "[i]n altering the dates in LIMS to reflect that she had distributed reports, and in having those dates reflect an earlier date than the date the modification was made, she made a misrepresentation that surpassed the permissible 5% of case for which the 14-Day turnaround might not have been met."<sup>38</sup> Agency cites that the dates were "altered separately from October 6 to October 2; and from October 6 to September 30, in a manner that could only stand to benefit [Employee's] apparent performance, and her unit's KPI rating."<sup>39</sup> Further, Agency cites that "any misrepresentation of any

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<sup>37</sup> Agency Closing Arguments at Page 15 (July 18, 2023).

<sup>38</sup> *Id.* at Pages 15 -16.

<sup>39</sup> *Id.* at Page 16.

element of performance immediately removes an employee from being within the 95% 14-Day turnaround time performance standard.

Employee avers that Agency has failed to produce any evidence to show that she changed dates to gain advantage on her performance evaluation. Further, Employee asserts that the “14-day report distribution did not apply exclusively to actions taken in the LIMS system.” Employee also argues that “while at least one of [her] performance evaluations for the period of 10/01/2018 through 9/30/2020 states that the 14-day 95% goal would be “evaluated by metrics and supervisor reviews”, her evaluations say nothing about what “metrics” would be used to assess her performance with respect to that goal.<sup>40</sup> Employee also asserts that she was never advised that “her performance with respect to the 14-Day/95% goal would be evaluated on metrics from the LIMS system.” Employee notes that she could have been evaluated based on the metrics pulled from the USAO portal.<sup>41</sup> Employee also avers that the four date changes would have only comprised “a theoretical advantage on a performance evaluation criterion that comprised a mere 10% of her overall performance evaluation” thus making it “illogical that she would have intentionally sought to deceive Agency.”<sup>42</sup>

DPM 1607.2(m) notes that performance deficits are a “failure to meet established performance standards.” In the instant matter, Agency proffers that actions taken to alter any dates would affect the performance standard regarding the 14-Day turnaround and 95%-time frame prescribed in its directives. Employee avers that she was not made aware that these metrics would only be considered based on LIMS data and also avers that Agency has failed to show where her actions constituted a failure to meet the standards. The undersigned disagrees with Employee’s assertions that she was not made aware of the performance standards. Her own evaluation from 10/1/2018-9/30/2019 evince her awareness. I also find it disingenuous to suggest that she was not aware of those standards as it related to LIMS, given her previous performance evaluations and her use of LIMS for her reports and distribution. Further, it is also incongruous to assert that she would not have made those changes since they only comprised 10% of her overall evaluation. Thus, it stands to reason that altering the distribution date would have impacted the performance standards. Accordingly, the undersigned finds that Agency has shown how the alterations would have impacted performance metrics. However, in the instant matter, Agency has not provided the data for the entirety of the evaluative period that would provide definitive proof that Employee’s actions caused her to not meet the performance standards of 95% for the 14-day turnaround. This is not to say that Employee, did meet the performance standards, but that Agency has not provided enough information to confirm that Employee’s four (4) mismatches resulted in such a deficit. As a result, I find that Agency has not fully met its burden of proof in showing performance deficits; though Agency has shown in detail how the alteration of dates would impact the performance as it would exhibit cases as having met the 14-day deadline, where they had not actually done so. This noted, the undersigned cannot sustain a charge based on an “estimation” but must have enough information for it to meet the burden of proof standard of preponderance of evidence. For these reasons, I find that the charge of performance deficits as presented cannot be sustained.

Employee also asserted that all the charges for which she was disciplined were borne out of the one charge for false statements/records and that the subsequent charges should have been merged to reflect that one (1) charge. The undersigned would note that in the assessment of discipline, the DPM does not necessarily preclude or set limitations for how many charges can be assessed against an employee in the administration of discipline. Employee cites to a Merit Systems Protection Board (“MSPB”) case wherein, the MSPB Board cited to how charges should be construed.<sup>43</sup> In the instant

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<sup>40</sup> Employee’s Closing Arguments at Page 19 (July 18, 2023).

<sup>41</sup> *Id.*

<sup>42</sup> Employee’s Closing Arguments at Pages 19-20.

<sup>43</sup> Employee’s Closing Arguments at Page 14 citing to *Boltz v. Soc. Sec. Admin.*, 111 M.S.P.R. 568 §16 (2009). (July 18, 2023).

matter, the charges were borne out of the same action of the alteration of the distribution dates, but I do not find where Agency failed to appropriately construe the other charges for which Employee was disciplined and ultimately terminated. The undersigned would also note that *assuming arguendo* that Employee's claim regarding one charge (false statements/records) was the only charge to be considered, because I found that Agency met its burden of proof with regard to the charge False Statement/Records, the discipline would be sustained in this matter. Accordingly, I find that Agency has met its burden for three (3) of the four (4) charges levied against Employee in this instant action.

#### *90 Day Rule & 45 Day Rule<sup>44</sup>*

It should be noted that Employee raised these issues for the first time in the submission of closing arguments. Employee asserts that Agency violated the 90-Day Rule and the 45-Day rule in the administration of the instant matter. Specifically, Employee cites that based on the investigation report completed by Hillary Hoffman, that the "Agency became aware of the alleged conduct on March 8, 2021." Employee asserts that the Proposed Action was dated July 15, 2021 – which reflects 90 business days from March 8, 2021, did not arrive to her until July 15, 2016. Thus, July 15, 2016 was the date the Proposed Notice was mailed, not when she received it.<sup>45</sup> Additionally, Employee avers that pursuant to DCMR §6B-1623.6, Agency violated the "45-Day Rule." Employee avers that the 45-Day rule requires a final decision within 45 days of the completion of the Hearing Officer's Report. Employee cites that the Hearing Officer, Nagesh Tammara, issued the report on September 30, 2021, so based on the 45-day rule, Agency should have issued the final notice by November 14, 2021. However, the final notice was not issued until November 16, 2021.

The District Personnel Manual ("DPM") §1602.3 (a) provides that a "corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action."<sup>46</sup> Here, Employee asserts that the Agency knew or should have known of the conduct on March 8, 2021. However, the undersigned would note that the March 8, 2021, date reflects the date Agency first became aware of the *possibility* that employees had altered distribution dates, and that a subsequent audit and investigation was launched to substantiate the claims. Hillary Hoffman was the investigator and was assigned to investigate this matter on June 8, 2021, and her final report regarding this matter was dated July 15, 2021. As such, the undersigned finds that the date of final report was the "trigger date" of when Agency knew or should have known that there were employees, including Employee, who had been found to have altered distribution dates. It is of note that during his testimony, Christopher LoJocano specifically cited that when Erin Price told him in March that this might be occurring, that he wanted to do an audit to confirm whether this was actually happening or not. This was corroborated by the testimony of Erin Price as well.<sup>47</sup> These dates noted, I find that Agency's notice dated of July 15, 2021, and the date of Employee's receipt of that notice would fall well within 90 Days of July 15, 2021. The undersigned finds that even if the date "trigger date"

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<sup>44</sup>It should be noted that upon review of the record, Employee did not previously raise these arguments during the course of this matter. Agency did not address this in its closing arguments.

<sup>45</sup> *Id.* at Page. 20.

<sup>46</sup> The OEA Board has held that the legislative intent of the 90-Day Rule provision found in DPM §1602.3 (a) is to "establish a disciplinary system that included *inter alia*, that agencies provide prior written notice of the grounds on which the action is proposed to be taken."<sup>46</sup> The Board noted that prior to this revision, the "courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Code § 5-1031...[t]his statutory language is only applicable to those employed by the Metropolitan Police Department or the D.C. Fire and Emergency Medical Service agencies." That noted, the Board further held that while the intent for the 1602.3 (a) provision was not "spelled out in the DPM, it is reasonable to believe that the intent was similar to that provided by the D.C. Council when establishing the language of the ninety-day rule." The Board referenced a D.C. Court of Appeals decision<sup>46</sup> wherein, the Court found that "the deadline was intended to bring certainty to employees of an adverse action that may otherwise linger indefinitely." The Board has also held that this provision of the DPM 1602.3(a) like its counterpart found in D.C. Code §5-1031, are mandatory in nature.

<sup>47</sup> *See*. Evidentiary Hearing Transcript at Page 43 (Erin Price) and Pages 73-81 (LoJocano). (May 8, 2023).



for the 90-Day Rule was June 8, 2021, the day Hoffman was appointed to investigate the matter, that Proposed Notice receipt date of July 16, 2021, would have also fallen within the appropriate timeline. Assuming *arguendo* that the “trigger date” was March 8, 2021, I would find that Employee’s receipt of the notice, one (1) day late, would constitute harmless error in accordance with OEA 631.3.<sup>48</sup>

Regarding Employee’s claims of Agency’s violation of the 45-Day Rule pursuant to 6B DCMR § 1623.6; the OEA Board has consistently held that the 45-Day rule is directory, not mandatory in nature.<sup>49</sup> The OEA Board has held that “an agency’s violation of a statutory procedural requirement does not necessarily invalidate the agency’s adverse action.<sup>50</sup> Thus, the facts in this matter warrant the invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, this Board will apply a two-prong analysis: whether Agency’s error caused substantial harm or prejudice to Employee’s rights *and* whether such error significantly affected Agency’s final decision to suspend Employee.”<sup>51</sup> Further, the Board has noted that this is directory in nature because there is “no consequence for failure to strictly adhere to the regulation.”<sup>52</sup> Here, Agency’s action did not cause substantial harm nor did it affect the final decision to remove Employee from service. As a result, I find that Agency’s issuance of the final notice on November 16, 2021, constitutes harmless error and does not warrant reversal of the disciplinary action.

### **Whether the Penalty was Appropriate**

Based on the above-mentioned findings, I find that Agency’s action was taken for cause, and as such, Agency can rely on those charges in its assessment of disciplinary actions against Employee for three (3) of the four (4) charges levied against her. In determining the appropriateness of an agency’s penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).<sup>53</sup> According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in the DPM; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, “the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not this Office.”<sup>54</sup> Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercise.”<sup>55</sup> Employee avers that Agency failed to appropriately consider the *Douglas* Factor in this matter. Specifically, Employee asserts that the Agency is “entitled to no deference” and that the penalty should be “substantially reduced to the extent any

<sup>48</sup> OEA Rule 631.3. (2012).

<sup>49</sup> *Kyle Quamina v. DYRS*, OEA Matter No. 1601-0054-17, *Opinion and Order on Review* (April 5, 2019).

<sup>50</sup> *Kyle Quamina v. DYRS*, OEA Matter No. 1601-0054-17, *Opinion and Order on Review* (April 5, 2019). *Citing to Diaz v. Department of the Air Force*, 63 F.3d 1107 (Fed. Cir. 1995).

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

<sup>52</sup> *Id.*

<sup>53</sup> *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

<sup>54</sup> *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>55</sup> *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

penalty is even appropriate.”<sup>56</sup> Employee argues that the Deciding Official, Anthony Crispino, failed to “conscientiously consider the *Douglas* factors in deciding to terminate [Employee’s] employment.”<sup>57</sup>

Employee contends that the Proposing Official noted that Employee had no prior discipline, yet, this factor was assigned as “neutral” rather than mitigating.<sup>58</sup> Employee avers that commendations or recognition for good work were not required for this to be noted as mitigating. Likewise, Employee argues that Agency also assigned *Douglas* Factor 4 – employee’s work record- as neutral, when she had received consistent ratings of “valued performer”. Lastly, Employee asserts that in consideration of *Douglas* Factor 12 – adequacy of alternative actions- the Agency Proposing Official found this to be an aggravating factor because of the “length of time” in entering inaccurate distribution dates.<sup>59</sup> Employee asserts that the record reflects that the alterations were all arose on only one date – October 6, 2020.<sup>60</sup> Employee avers that despite this, the Deciding Official adopted these *Douglas* factor findings. Employee avers that the “official policy of the District to take a positive approach toward employee management by using a progressive system to address performance and conduct issues” and that no progressive discipline was used in the instant action.

The undersigned would note that while Employee correctly cites DPM language regarding discipline, that same manual in DPM §1601.6 cites that “strict application of the progressive steps...may not be appropriate in every situation.”<sup>61</sup> This noted, as was previously highlighted, OEA has consistently held that in assessing the penalty, OEA does not substitute its judgment, but ensures that managerial discretion has been invoked. Here, the penalty range for all the charges levied against Employee have a range that includes removal for a first occurrence. Employee also cites that Agency failed to assign the appropriate *Douglas* Factor categories to some of the factor, particularly when it made *Douglas* Factors 3 – past disciplinary record and *Douglas* Factor 4 – past work record as “neutral”; and *Douglas* Factor 12 – alternative sanctions as aggravating. The undersigned would note that the record reflects that Employee had not been subject to any previous discipline nor had she had any issues noted for her past work record. As such, Employee asserts that these should have been assigned as “mitigating” – as they should have been considered in terms of a lesser penalty or any at all. Employee also argues that making *Douglas* Factor 12 as aggravating ultimately results in an unduly harsh penalty against Employee. Lastly, Employee asserts that factor 6 – consistency of penalty- should have been noted as mitigating as well because two similarly situated employees only received official reprimands whereas she was terminated.<sup>62</sup>

OEA has held that an Agency’s decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.<sup>63</sup> Here, while the record reflects that Employee had no past discipline or any issues in her past work record, I do not find based on the totality of the review of the *Douglas* Factors that Agency categorizing those factors as neutral to constitute an

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<sup>56</sup> Employee’s Closing Arguments at Page 21.

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

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 21-22.

<sup>60</sup> *Id.* at 23.

<sup>61</sup> DPM §1606.1 (2019).

<sup>62</sup> Employee’s Closing Arguments at Page 23 (July 18, 2023).

<sup>63</sup> *Employee v. Dept. of Human Services*, OEA Matter Nos. 1601-0048-18 and 1601-0015-18R19, Initial Decision, (June 17, 2021) *citing* : *Love* also provided that “[OEA’s] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency’s shoes in the first instance; such an approach would fail to accord proper deference to the agency’s primary discretion in managing its workforce. Rather, the [OEA’s] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency’s judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency’s decision should be corrected to bring the penalty within the parameters of reasonableness.” *Citing Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

abuse of discretion that warrants reversal. With respect to the *Douglas* Factor 12 and the notation of the “length of time” in categorizing this as “aggravating”, the undersigned finds that while it was found that Employee altered dates on only one day, the categorization of this as aggravating does not constitute an abuse of discretion. This is of particular note given the previously mentioned DPM section that cites to the notion that progressive discipline may not always be employed. As it relates to *Douglas* Factor 6 – consistency of penalty- Employee asserts that two other employees, J.W. and E.S. received official reprimand. The record clearly reflects and testimony during the Evidentiary Hearing reiterated that J.W. and E.S. were ultimately found not to have altered any dates, but instead, had just failed to follow the SOP C5535 in that they failed to distribute reports as required. This noted, the undersigned finds that these employees’ conduct was substantially different from what Employee was charged with, thus I find no error in the assessment of the *Douglas* factors.<sup>64</sup>

Accordingly, I find that Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.<sup>65</sup> Chapter 16 §1607 of the District Personnel Manual Table of Illustrative Actions (“TIA”) provides that the appropriate penalty for a first occurrence for False Statements/Records<sup>66</sup>, the penalty range is from Counseling to Removal.<sup>67</sup> Additionally, the TIA provides that the appropriate penalty for a first occurrence of Failure/Refusal to Follow Instructions is Counseling to Removal; the range for a first occurrence for Neglect of Duty is Counseling to Removal; and a first occurrence for Performance Deficits is Reassignment/Reduced Grade to Removal.<sup>68</sup> However, as previously cited, I find that the charge for Performance Deficits cannot be sustained. However, since I have found that the remaining charges should be sustained, and they all carry a penalty range up to and including removal; I find that removal is an appropriate penalty under the circumstances. Accordingly, I further find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and

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<sup>64</sup> Employee does not outright make a declarative claim of disparate treatment. However, for the sake of the record, the undersigned notes that based on the record, there was no disparate treatment. Specifically, Employee cites that two other employees, J.W. and E.S., were only given official reprimands. OEA has consistently held that a prima facie claim must be met to substantiate a claim of disparate treatment. See *Jordan v. Metropolitan Police Department* OEA. Matter No. 1601-0285-95, *Opinion and Order on Petition for Review (September 29, 1995)*. The record reflects that J.W. and E.S.’ actions did not include any alteration of dates, but they failed to distribute entirely.

<sup>65</sup>*Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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 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.

<sup>66</sup> DPM §1607.2(b)(4) (2019).

<sup>67</sup> DPM § 1607.2 (d)(1) (2019).

<sup>68</sup> DPM § 1607.2 (e); §1607.2(m)(2019).

not a clear error of judgment. I conclude that Agency had appropriate and sufficient cause to terminate Employee from service. Consequently, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee from service is **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris  
MICHELLE R. HARRIS, Esq.  
Senior Administrative Judge