THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 1601-0021-23
EMPLOYEE[1],	)	
Employee	)	
	)	Date of Issuance: July 9, 2024
v.	)	
	)	Michelle R. Harris, Esq.
D.C. DEPARTMENT OF CORRECTIONS,	)	Senior Administrative Judge
Agency	)	
	)	

Jeantt P. Henry, Esq., Employee Representative
Connor Finch, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 12, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Corrections' ("Agency" or "DOC") decision to terminate him from his position as a Lead Correctional Officer. The effective date of Employee's separation from service was December 14, 2022. Following a letter from OEA dated January 12, 2023, requesting an Agency Answer, Agency filed its Answer on February 6, 2023. This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on February 8, 2023. On February 9, 2023, I issued an Order Convening a Prehearing Conference in this matter for March 9, 2023. Prehearing Statements were due on or before March 3, 2023. On March 1, 2023, Employee, by and through his representative, filed a Motion to Amend his Petition for Appeal. Employee included attachments to answer Section C, Questions 14-19 on the Petition filed on January 12, 2023.[2] On March 1, 2023, Agency filed a Consent Motion to Continue the Prehearing Conference and Extend Deadlines. Agency cited therein that an additional sixty (60) days were needed for the parties to engage in and complete discovery in this matter.

On March 2, 2023, I issued an Order granting Agency's Consent Motion. The Prehearing Conference was rescheduled to May 11, 2023, and Prehearing Statements were due on or before May 3, 2023. On May 4, 2023, Agency filed a Second Consent Motion to Extend. Agency cited that the parties needed more time for discovery and requested an extension through July 2023. On May 5,

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee's Motion is hereby granted.

2023, I issued an Order granting the Motion. The Prehearing Conference was rescheduled to July 20, 2023, and Prehearing Statements were due on July 3, 2023. On June 28, 2023, Agency filed a Third Consent Motion to Extend. Agency requested an extension of an additional thirty (30) days noting that the parties were engaged in discovery and that due to schedule conflicts and the like, depositions had not yet been completed. Further, Agency cited that time was needed for the parties to discuss possible settlement of the matter. On July 6, 2023, I issued an Order granting Agency's Motion, in part. That Order stayed the rescheduling of the Prehearing Conference and converted the July 20th Prehearing Conference to a Status Conference so that the undersigned could inquire further about the parties' request for another extension of time.

On July 20, 2023, both parties appeared for the Status Conference as required. The parties described the schedule conflicts that currently were preventing the completion of discovery and renewed their request for more time. Following that conference, I issued a Post Status Conference Order that same day which required the parties to provide Status Update regarding discovery on or before August 21, 2023. That report was required to include all information about the status of depositions at that time and any other outstanding discovery. Further, that Order noted that the undersigned would issue an Order rescheduling the Prehearing Conference following the receipt and review of the update. On August 21, 2023, the parties filed a Joint Motion to Extend the Deadline to submit the Status Update. The parties requested time up to August 28, 2023. On August 22, 2023, I issued an Order granting the Joint Motion and required the update be due on or before August 29, 2023. The parties filed the Status Update as required. The parties explained therein that discovery had been completed and depositions had been conducted. Further, the parties cited that they were awaiting the transcripts from the depositions and believed that they could submit Prehearing Statements by September 29, 2023. On August 30, 2023, I issued an Order scheduling a Prehearing Conference for October 5, 2023. Prehearing Statements were due on or before September 29, 2023.

On October 5, 2023, a Prehearing Conference was convened in this matter. A Post Prehearing Conference Order was issued the same day, and the parties were ordered to submit briefs in accordance with the briefing schedule agreed upon during the conference. Agency's brief was due on or before November 6, 2023. Employee's brief was due on or before December 8, 2023, and Agency had the option to submit a sur-reply brief by December 21, 2023. Further, a Status Conference was scheduled for October 17, 2023, to discuss the transmission of the video surveillance footage in this matter. On October 19, 2023, Agency filed a Praecipe regarding the video surveillance. Agency filed its brief on November 6, 2023. On December 8, 2023, Employee filed a Consent Motion for an Extension of Time to File the brief. On December 12, 2023, I issued an Order granting Employee's request. Employee's brief was now due on December 15, 2023, and Agency had the option to submit a sur-reply brief on or before January 5, 2024.[3] Employee's brief was filed at OEA on December 19, 2023. On January 5, 2024, Agency filed a Consent Motion for an Extension of time to file its sur-reply brief. An Order was issued on January 9, 2024, granting Agency's request and required the sur-reply be filed on or before January 12, 2024. Agency's sur-reply brief was filed on January 16, 2024. Based on the record, I determined that an Evidentiary Hearing was not warranted. The record is now closed.

JURISDICTION

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

[3] The Order cited the date as January 5, 2023, however that was a typo.

ISSUES

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

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for 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 631.2 *id.* states:

For appeals filed under §604.1, 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 PARTIES' POSITION

Agency's Position

Agency asserts that there was just cause for the adverse action levied against Employee and that termination was the appropriate penalty under the circumstances. Agency avers that Employee was terminated for violation of both District Government regulations and Department of Corrections' ("DOC") polices. Specifically, Agency asserts that Employee engaged in misconduct including "sleeping, loafing or dozing while on duty."[4] Agency further avers that "Employee served in a leadership role required to fulfill DOC's core mission…[d]espite his responsibilities Employee sat idly for hours on each of his shifts from May 31 to July 21, 2022, in a small office with the lights off."[5] Agency argues that Employee's actions resulted in security rounds that were not performed and inaccurate records produced by his unit. Agency cites that these actions "put the safety and security of the public, his coworkers, and the inmates in DOC's custody at risk."

Agency notes that at the time of his removal, Employee served as a Lead Correctional Officer with the rank of Sergeant. "Employee was responsible for ensuring the safety and security of inmates in DOC's custody and providing guidance to lower-rank Correctional Officers."[6] Employee's specific responsibilities also included serving as the "Officer in Charge (OIC)" of the Northwest 2 (NW2), a unit of the District of Columbia Center Dentition Facility (DC Jail)." "As OIC, it was Employee's responsibility to provide guidance and leadership to lower ranking officers on NW2, including by

[4] Agency's Brief at Page 1 (November 6, 2023).
[5] *Id.*
[6] *Id.* at Page 2.

disseminating all the activities and mission to accomplish the day's duty."[7] Agency provides that to fulfil the NW2 requirements, it was Employee's responsibility to "effectuate the Post Order, which governed all general housing cell blocks, including NW2." Agency further maintains that as an OIC, Employee's duties included:

"3) The [OIC] shall assign unit officers their responsibilities to include but not limited to:
a) Control Module
b) Left/Right tier
c) Guard 1 rounds

4) The OIC will be positioned on the floor with the Unit Officers to directly supervise the daily activities of the shift.

8) All [OICs] shall:
a) Ensure that detail inmates perform their assigned duties.
b) Monitor and supervise the use of and control of cleaning supplies and equipment.
c) Ensure that all cleaning supplies and equipment are maintained in a secured area when not in use. Chemicals will not be in the cells of inmates.
d) Ensure sanitation of the unit is conducted by inmates housed on the unit and screened and cleared in accordance to PP4210. There shall be detail inmates assignments to each side of the unit. Post Order (6)(A)"[8]

Agency avers that "while Employee disputes that he engaged in any misconduct, he admitted during his deposition that he did not do what was expressly required in the Post Order."[9] Agency asserts that as an OIC, Employee also failed to assign Correctional Officers to other duties as required in Post Order 6(A)(3) and Post Order 6(B). Specifically, Agency cites that Employee failed to assign a Control Module Officer and another as a Unit Officer and that "Employee admitted that he did not do this, claiming it was not his practice to assign officers."[10] Agency also asserts that Employee failed to do his responsibilities as outlined in Post Order 6 (A)(4), in that he did not position himself on the floor with unit officers to ensure that daily shift activities were completed. Agency maintains that "because he was not positioned on the floor, Employee could not and did not monitor the activities on NW2 as required."[11] Agency also argues that Employee failed to conduct one of his most important tasks which was "PIPE" rounds.[12] Agency avers that Employee "did nothing to ensure that the PIPE rounds were completed on NW2 when he served as its OIC." Agency avers and notes that Employee testified that "irregular PIPE rounds on 30-minute intervals are critical to Agency's mission."[13] Agency avers that instead of conducting his duties, "at least between the hours of midnight and 4:00a.m. each day, Employee would go into the case manager's office and sit there….[o]ften, the lights, which were controlled from the Control Module NW2, were off in the case manager's office while Employee sat idly."[14] Agency also avers that Employee

[7] *Id.*
[8] *Id.* at Pages 2-3.
[9] *Id.* at Page .
[10] *Id.*
[11] *Id.*
[12] *Id.* at Page 4. Agency cited that the "PIPE is an industry standard device used by over 100,000 organizations to document proof of presence. Agency asserted that it was not "aware whether PIPE" is an acronym, but the device physically looks like a small metal pipe with a rubber or plastic grip."
[13] *Id.* at Page 4.
[14] *Id.*

would allow other unit officers to accompany him while he sat in the case manager's office and that hours of surveillance video show this behavior over several different days and shifts.[15]

Agency further asserts that it was grievances filed by inmates which revealed Employee's misconduct. The grievances resulted in an investigation initially conducted by Lieutenant Tyrone Nelson ("Lt. Nelson"), in which he "completed an official DCDC2 Report documenting apparent episodes of Correctional Officers sleeping and failing to perform duties that occurred from May through July 2022…[t]hat report was sent up the chain of command to Deputy Warden Kathleen Landerkin for further review."[16] Agency cites that Deputy Warden Landerkin reviewed surveillance videos from NW2 from May 31, 2022 through July 21, 2022. "On May 8, 2022, Deputy Warden Landerkin completed her investigation based on the downloaded surveillance video and BWC video taken on July 21, 2023, as well as the PIPE data and Unit Logbook entries."[17] Deputy Warden Landerkin determined that Employee had engaged in misconduct and that adverse action was warranted. Deputy Warden Landerkin's findings included the following notations: "[Employee] violated DCMR Chapter 6-B 16, Section 1605.4(e) Neglect of Duty and DCMR Chapter 6-B 16, Section 1605.4(d) Failure/Refusal to Follow Instructions when: 1) for the days reviewed, he was seen in the case manager's office for extended periods of time, with his shoes off and legs up on a desk or in another chair; 2) when he allowed subordinate staff to sleep, doze or loaf in the case managers office while he was in the office with them and while he was not.; 3) when he failed to perform assigned tasks or duties by ensuring that all pipe rounds took place every 30 minutes as required by the post order and rounds tracking (Guard 1 plus) policy.; 4) when he failed to have detail inmates clean the unit."[18] Landerkin's report also noted that Employee failed to make logbook entries.

Agency asserts that after Deputy Warden Landerkin's investigation, on September 29, 2022, Wanda Patten, Deputy Director of Operations for DOC, issued Agency's Advanced Written Notice of Proposed Removal (Advance Written Notice) to Employee. The Advanced Written Notice was forwarded to a Hearing Officer for review on September 30, 2022. Agency notes that the Hearing Officer held a hearing on October 26, 2022, to give Employee an opportunity to respond.[19] Agency avers that "Employee, through a union representative, submitted a written response and orally presented his defense at the hearing….Employee did not directly refute the allegations, but alleged various procedural violations by the DOC, asserted that the PIPE system can be inaccurate, complained that there is sometimes smoke in the DOC's facilities and asserted that the penalty was too severe."[20] The Hearing Officer completed his report on November 1, 2022. The Hearing Officer found that Agency "had established that Employee (1) slept or dozed while on duty; (2) allowed others to sleep or doze while on duty; (3) failed to ensure PIPE rounds took place; and (4) submitted false Unit Logbooks."[21] The Hearing Officer provided that Agency had not established that Employee failed to have inmates clean the unit. The Hearing Officer otherwise determined that the evidence supported the proposed penalty of termination. Agency issued its Final Notice of termination on December 9, 2022.

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[15] *Id*. at Pages 4-5.
[16] *Id*. at Page 5-6.
[17] *Id*. at Page 6.
[18] *Id*. at Pages 6-7.
[19] *Id*. at Page 8.
[20] *Id*. at Pages 8-9.
[21] *Id*. at Page 9.

Agency maintains that it had cause to discipline Employee and that termination was appropriate. Agency asserts that the video surveillance of Employee provides clear evidence of Employee's misconduct. Agency avers that "rather than dispute the clear video evidence that he was sleeping, loafing, or being inattentive, Employee argues that the video evidence does not show any misconduct…[f]irst he argues that he was allowed to be in the case manager's office and second, he argues that his conduct conformed to 'accepted work practices' for the first shift."[22] Agency further asserts that Employee was allowed in the case managers office in NW2. However, Agency avers that Employee "was not charged with entering an area he was forbidden from entering…[r]ather, he was charged with among other things, neglecting duties that could not be performed in the case manager's office."[23] Agency also argues that "Employee does not offer a good reason for why he was in the case manager's office for long periods of time, rather than on the floor of NW2 near the inmates that he should have been monitoring." Agency also disputes Employee's claims regarding the presence of inmates on the tiers during certain shifts. Agency asserts that ultimately Employee was "expected to attentively monitor inmates and ensure every activity on his unit was executed throughout his shift…[t]he undisputed fact that Employee spent hours in a dark room away from inmates on numerous shifts necessarily establishes that he failed to act in accordance with his duties as a Sergeant entrusted to serve as an OIC."[24]

Agency also notes that Employee attempts to shift blame to the "shift captain" and that those claims are irrelevant. Agency asserts that "whether Agency should have also disciplined someone else for not intervening earlier to address the safety concerns created by Employee's misconduct is wholly immaterial to whether Employee engaged in misconduct."[25] Agency also asserts that Employee's complaints that he had a health condition that was made worse by inmates smoking, do not excuse his misconduct. Agency avers that 'if arguendo, Employee could not work in an environment with smoking because of a disability, his remedy was to request an accommodation."[26]

Agency maintains that Employee's conduct was serious, and that termination was the appropriate penalty. Agency asserts that "Employee baselessly asserts that even if he was sleeping or being inattentive, the dereliction was not serious because inmates were in their cells."[27] Agency avers that it "considers all sleeping on post by Correctional Officers to be serious misconduct, as there is always a potential for escape, medical emergencies, inmate suicides, fights between inmates, and other incidents regardless of the time of day or night."[28] Agency also avers that Employee's claim that it failed to appropriately consider all the *Douglas* factors is not supported by the record. Agency asserts that it did not misapply most of the *Douglas* factors in this matter, but "even if Agency misapplied one or more factors, Employee is only entitled to a remedy if the ultimate decision as to penalty is beyond the outermost bound of reasonableness."[29] Agency avers that "to the extent that OEA determines that Agency's

[22] Agency's Sur Reply Brief at Page 2 (January 16, 2024).
[23] *Id* .
[24] *Id*. at Page 3.
[25] *Id*. at Pages 3-4.
[26] *Id*. at Page 4.
[27] *Id*. at Page 5.
[28] *Id*. at Pages 5-6.
[29] *Id.* at Page. 5.

alleged misapplication of the *Douglas* factors is beyond what is permissible, it should remand with specific instructions for Agency to reconsider the *Douglas* factors."[30]

Agency further assert that Employee has failed to establish a disparate treatment claim and has not met the prongs required to meet that standard.[31] Agency avers that "Employee does not identify a single comparator employee who served in the same role and engaged in the type of extensive misconduct that he did- shirking his duties for weeks at a time…[s]econd, he does not establish that they were disciplined by the same supervisor… and [f]inally, Employee, unlike all comparator employees, was disciplined under the authority of the Agency's new head, Director Thomas Faust."[32] Agency maintains that Director Faust determined that "sleeping, loafing or being inattentive on duty has long been a major rule violation" when occurring on duty at any post involving the security of the institution or the safety of any person." Agency contends that "Director Faust has consistently used his authority to terminate all employees engaged in such misconduct and that the "video evidence and Employee's admissions, demonstrate that Employee engaged in multiple acts of misconduct for which termination is an appropriate penalty."[33] As such, Agency avers that this Office should sustain its action of removing Employee from service.

Employee's Position

Employee contends that Agency's action of terminating him from service was not justified. Employee asserts that he was singled out for discipline and that "inmates at DOC were never threatened by [his] work performance and/or the alleged misconduct attributed to him during the period of May 31, to July 21, 2022…[o]therwise, Agency would have seen fit to discipline a host of managers to whom [Employee] reported and who had superior responsibilities to his."[34] Employee asserts that after serving in the US Marine Corps, he joined Agency in 1995, and has been with DOC until he was terminated on December 14, 2022.[35]

Employee cites that he was assigned to the Northwest 2 housing unit (NW2) in January 2022 and that his supervisors at that time were Lt. Ekwonna and Lt. Oladaopo.[36] Employee avers that "the shift ran from 11:30pm to 8:00am the next day, the first half hour of the shift (11:30pm to midnight) used f or roll call and distribution of assignments."[37] Employee also avers that "by the time the number one shift started the inmates had been secured in their cells for the night by no later than 10:30pm and remained in their cells for the duration of the shift, except for inmates who may have cleaning detail, or beginning around 4:00am inmates who have to be escorted to the infirmary and to the pickup area for court."[38] Employee contends that "as a lead correctional officer or officer in charge ("OIC") [his] role was to assign tasks and provide guidance to corporals and privates he led." Employee avers that "according to Deputy Warden Landerkin, [Employee] was not a supervisor because he could not

[30] *Id*.
[31] *Id*. at Page 6. Agency cites to *Sheri Fox v Metropolitan Police Departmen*t, OEA Matter No 1601-0040-17 (January 13, 2020), which references *Mills v D.C. Dep't of Public Works*, OEA Matter Not. 1601-0001-09, *Opinion and Order on Petition for Review* (December 12, 2011).
[32] *Id*. at Page 7-8.
[33] *Id*. at Page 8.
[34] Employee's Brief at Page 1.
[35] *Id*. at Page 2. Employee notes that he was subject to a Reduction-in-Force ("RIF") in in 2002 and he was separated from Agency for approximately eight (8) months.
[36] *Id*. at Page 2.
[37] *Id*.
[38] *Id.*

discipline coworkers, only lead them."[39] Employee asserts that there "were several different policies governing operations of the unit, include the Post Order and Guard 1Plus for conducting PIPE rounds.,,[u]nder the Post Order, the state united officers' responsibilities include control module, left/right tier, and Guard 1 rounds with the OIC positioned on the floor with officers to supervise the daily activities of the shift."[40] Employee also avers that the "historical practice for left/right tier security monitoring is different between the 1st shift where the inmates are securely locked in their cells for the night versus the 2nd and 3rd shifts because the inmates are generally out of their cells during the 2nd shift and for most of the 3rd shift through about 10:30p.m."[41] Employee asserts that the "section of the post order requiring that officers be posted on the tier or floor relates to the requirement for security monitoring of inmate activities while the inmates are out of their cells, which does not occur on the midnight shift, to ensure inmates are not congregating as the move from tier to tier, fighting, harassing other inmates, tampering with locks, in any type of distress, or trying to cause mischief on the unit." Employee contends that "the main function for officer on the unit, particularly from the beginning of the shift through around 4:00a.m., is to conduct PIPE rounds at irregular 30-minute intervals."[42]

Employee asserts that "several circumstances and/or incidences could interfere or impede the frequency of conducting PIPE rounds." Further, Employee provides that "the officer in the control module is responsible for making all entries in the logbook, including recordation of when PIPE rounds are conducted."[43] Employee asserts that "PIPE round reports were/are generated daily to the major's office, but OICs, including [Employee] do not get the opportunity to review the reports."[44] Employee also asserts that "the PIPE round system was plagued with problems that cause malfunction in operations and issuance of unreliable reports."[45] Employee asserts that the union filed several grievances regarding the inaccuracy of the PIPE round system. Employee contends that Agency did not produce any maintenance records in discovery, nor did it produce any disciplinary action in the three-year period prior to the instant adverse action against Employee. Employee also avers that for PIPE round violations, "DOCs practice has been to verbally counsel officers repeatedly before proceeding to document the violation by way of a letter of counseling up to an official reprimand…[t]his disciplinary practice of verbal counseling up to correction action was used with line officers, OICs and even captains." Employee asserts that on "September 6, 2022, Director Faust issued a memorandum to all correctional staff with the subject line "Sleeping While on Duty"…[t]his memorandum provides that "**Any confirmed and verified incident of sleeping while on duty or any assigned post <u>will be cause for termination</u>."** (emphasis and double emphasis in the original)."[46] Employee further contends that "Landerkin explained that the Director put out the memorandum because there seemed to be a lot of allegations of sleeping on duty around that time."[47]

Employee provides that "after roll call and [Employee's] arrival on the unit, his practice was to either assign the first pipe round to one of his officers or he would conduct the first pipe round himself." Employee avers that he "often worked with the same team of officers so they developed a rhythm when they came on shift they would say which shift they wished to do and [Employee] would

[39] *Id.*
[40] *Id*. at Page 3.
[41] *Id.*
[42] *Id*.
[43] *Id*. at Page 4.
[44] *Id*.
[45] *Id*. at Page 5.
[46] *Id.* at Page 6.
[47] *Id*.

approve or disapprove so long as there is full coverage to do pipe rounds, but for officers coming on shift to work in an overtime capacity [Employee] would assign them times to do pipe rounds."[48] Employee asserts that "because the PIPE round is the most basic assignment for all correctional officers, [Employee] did not find it necessary to micro-manage the officers in this task."[49] Employee further asserts that he "learned OIC functions and operating the late shifts over his 26 year service at DOC, 98% of the time work the 4:00pm to midnight shift and overtime on the midnight shift, and the practice has never been to post officers on the tiers during the midnight shift because the inmates are secured in their cells and not moving about the tiers."[50] Employee contends that "for the period covered by the charges, no major or zone supervisor has ever notified [Employee] of any issue or concern that pipe rounds were not being conducted on his shift."[51] Employee asserts that zone supervisors are required to "come through twice during the shift to check the logbook for accuracy and walk the tier to conduct a pipe round, using the same pipe [Employee] and his officers use."[52] Employee asserts that Lt. Ekwonna "acknowledged that he has never reviewed pipe round reports to ensure officers were conducting pipe rounds within the irregular 30-minute intervals." Further, Employee avers that during a deposition, Agency counsel advised Lt. Ekwonna not to answer a question as to whether he had been disciplined for failure to review pipe rounds.[53]

Employee also avers that he had a disability (neck related injury) and that his assignment caused him to be around inmates who smoked, even though smoking at the jail is prohibited. Employee asserts that many times the "smoke fumes on NW2 unite were often overwhelming and burned his eyes and throat, to the point where he would take leave for several days at a time to recover.[54] Employee asserts that he complained repeatedly to his zone supervisors, but to no avail. Employee also sent a request to Deputy Warder Landerkin in February 2022, asking for treatment for smoke. Employee also sent correspondence to Major Reid in March 2022 as for an AWOL to be converted to annual leave because Employee was absent from work several days in February due to the smoke levels.[55] He also contends that in July 2022, he sent a letter to the director.

Employee avers that he was permitted to use the case manager's ("CM") office along with the other officers who work on the first shift of NW2. Employee asserts that when he "arrived on duty the lights were generally off in the CM's office and those lights were controlled by the office in the control module."[56] Employee cites that while he "awaited his turn to do a PIPE round, he often sat in the CM's office to escape the cigarette smoke on the unit and lean his head back on the chair to take the pressure off his neck injury for which he had surgery."[57] Employee contends that he never slept or dozed while on duty and that he was always alert and responsive to give guidance to subordinate officers. Employee avers that he could hear inmates calling for assistance, and that the video surveillance reflects that he would "leave the CM office for a few minutes and return." Employee argues that "there is no evidence that any supervisor ever told [Employee] that he could not use the CM office or stay in the office while he waited to conduct PIPE rounds, or that he could not allow others to be there."[58]

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[48] *Id*. at Page 6-7.
[49] *Id*. at Page 7.
[50] *Id*.
[51] *Id.*
[52] *Id*. at Page 8.
[53] *Id.*
[54] *Id*. at Pages 8-9.
[55] *Id*.
[56] *Id*. at Page 10.
[57] *Id.*
[58] *Id.*

Employee cites that Agency's investigation began as part of Lt. Nelson's investigation of two grievances filed by inmates. Employee avers that Agency provided documentation which reflected different signatures from the inmates named. Employee asserts that these grievances were mentioned in Landerkin's August 8, 2022, report of investigation and September 29, 2022, Advance Notice, but that Lt. Nelson did not include the grievances in his July 7, 2022, Official Report of Extraordinary Occurrence. Employee avers that the "report references inmate complaint on May 30th and May 31st that [Employee] was sleeping in the CM office." Employee contends that "Landerkin claimed she did not investigate the inmate grievances against [Employee]; her investigation was "like an offshoot" of the grievances because Lt. Nelson told her he reviewed surveillance video that showed [Employee] sleeping in the case manager's office."[59] Employee avers that he had no knowledge of the grievances until he received the September 29, 2022, Advance Notice. Employee asserts that the union sent a response to the Hearing Officer on his behalf and challenged all of the discipline "premised on events that predated June 3, 2022, as violative of the 120-day rule provided for under the CBA."[60] Employee asserts that the response also provided rebuttals to all of the dates of the alleged misconduct. The response also included "19 letters of termination to show that [Employee's] termination was inconsistent with discipline of other employees for failure to conduct PIPE rounds or ensure that others do so."[61] Employee contends that the Hearing Officer found that the May 2022 grievances fell outside of the 120-day window, along with one from July 11, 2022. Employee argues that during the deposition, DOC's counsel obstructed and didn't permit an answer for whether any shift captains had been disciplined for any of the dates, and instead agreed to provide redacted documents. [62]

Employee avers that "the surveillance videos confirm that he spent some of his tour of duty sitting in the CM's office, sometimes leaning his head back and his feet elevated, as he waited to conduct a PIPE round and/or the beginning of the flurry of activities on his shift around 4:00a.m."[63] Employee contends that "no one ever told [him] that he or any of the other officers couldn't be in the CM's office while on duty and his zone supervisor and other supervisors obviously knew from their visits to the unit that [Employee] and other officers had been spending time in the CM's office." Employee argues that because of this "DOC tacitly acquiesced in employees on the 1st shift spending time in the CM's office while they waited their turn to conduct PIPE rounds and until activities picked up on the shift around 4:00a.m."[64] Employee asserts that the "surveillance tapes show that [Employee] exited the CM's office for short periods of time to address issues with inmates and/or subordinate officer….[f[urther the tapes show that consistently around the 4:00/4:30am time frame if [Employee] were in the CM's office at that time he left to supervise the activities of the remaining half of the shift, such as ensuring inmates going to court get requested showers, escorting inmates to the infirmary and for court pick-up, inmate feeding, facilitating daily cell search, security checks, contract cleaning etc."[65] Employee reiterates that Agency "had not disciplined anyone for sleeping, dozing, or being inattentive on the job in the three-year period preceding [Employee's] discipline."[66] Additionally, Employee argues that "because [Employee] and his fellow officers were following accepted work

[59] *Id*. at Page 11.
[60] *Id*.
[61] *Id*. at page 12.
[62] *Id.*
[63] *Id*. at Page 13.
[64] *Id*. at Pages 13-14.
[65] *Id.* at page 14.
[66] *Id.*

practices for the 1st shift at the jail, there is no basis for finding [he] engaged in misconduct," and Agency has not disciplined anyone else who work the same shifts as Employee.[67]

Employee also avers that he did ensure that PIPE rounds were completed and would assign himself to do rounds during the first hours of the shift.[68] Employee argues that the "Agency robbed [him] of the opportunity to defend against the charges because after 4 months too much time had elapsed for anyone to say what cause PIPE round gaps or rounds to be missed – system malfunction, or event on a shift that made it impractical to do some rounds, or employees not doing their jobs."[69] Further, Employee asserts that "it was the actual shift captain's responsibility to look at their particular shifts and take action when there were gaps and missing PIPE rounds." Employee further avers that he did not falsify any logbooks for June 28-29, 2022. Employee states that "the control module officer is the person charged with making entries in the logbook, including PIPE rounds conducted, who conducted them and at what time."[70] Employee maintains that "there is no evidence that [he] made those entries or reviewed or approve the entries in the logbook, or that the control module officer was the subject of disciplinary action…"[71] Additionally, Employee argues that "he exercised correctional judgement in releasing detail inmates to clean unit."[72] Employee provides that the "inmate grievances dated May 20, 2022 and May 23, 2022 were resolved by Lt. Nelson without any notification to [Employee] because Lt. Nelson concluded that [Employee] did not have to release the inmates to clean the unit."[73] Employee notes that regarding the July 3, 2022 grievance that "aside from the fact that the paperwork was incomplete [Employee] permitted the inmate detail to clean the unit around 4:30a.m., over 2 hours before the end of the shift."[74]

Employee contends that "the evidence shows that [Employee] did not engage in sanctionable misconduct because he was fulfilling his functions as OIC based on his training, the dynamics of the 1st shift when the inmates are securely locked in their cells for the whole shift except for the few who may have had detail assignments to help with cleaning and distribution of meals." Employee further asserts that his use "of the CM's office was not to loaf but to escape the smoke on the tiers, which caused him to cough and his throat to hurt and relieve stress in his neck caused by multiple recent surgeries…"[75] Employee further argues that "Agency violated the letter and the spirit of the DPM and CBA in terminating [Employee's] employment after 26 credible years of service." Employee further cites that "a bedrock principle of disciplinary processes, enshrined in the DPM and CBA is that employees, like [Employee], be subject to progressive discipline." (Emphasis included in citation).[76] Wherefore, Employee avers that the termination is arbitrary and capricious and was unreasonable under the circumstances. Employee further notes that Agency failed to give appropriate consideration to the *Douglas* factors in its administration of the adverse action. Employee denies that he was sleeping, loafing or being inattentive, but also cites that his alleged inattentiveness was at a time where there was no threat to security and inmates were in their cells.[77] Employee also asserts that the past disciplinary action factor was noted as neutral, but should have been considered otherwise. Employee argues that

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[67] *Id*.
[68] *Id.* at Page 15.
[69] *Id.*
[70] *Id*. at Pages 15 -16.
[71] *Id*. at Page 16.
[72] *Id*. at Page 16.
[73] *Id.*
[74] *Id*.
[75] *Id*. at Pages 16 -17.
[76] *Id.* at Page 17.
[77] *Id*. at Page 18.

there were deficiencies in the considerations for all the *Douglas* factors, thus proving that Agency's termination was arbitrary and capricious.

Further, Employee asserts that Agency was aware of his medical conditions, and this termination is "Agency's retaliation in violation of the ADA and DCHRA."[78] Employee avers that in early 2022, he and Agency "exchanged communication" about ADA accommodations and his request for accommodations."[79] Employee had requested that previous notations of "absence without leave" (AWOL) be converted to annual leave because he had to miss work due to the smoke on the unit. Employee asserts that Agency's inaction to provide accommodation and its handling of this investigation "confirm that Agency used this process as pretext to rid [Employee] from the workplace permanently for his temerity in trying to force his employer to accommodate his physical disabilities, some caused by Agency's work environment."[80] Employee avers that Agency's action to terminate him from service was improper and that even if OEA were to find any misconduct that the penalty of termination was too harsh. Employee avers that his termination should be reversed.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[81]

Employee was employed by Agency as a Lead Correctional Officer. In a Final Written Notice dated December 9, 2022, Employee's termination was based upon twelve (12) charges of misconduct: (1) ***Violation of DCMR Chapter 6-B-16 Section 1607.2(a)(4) Conduct Prejudicial to District Government*** – on-duty conduct that an employee should reasonably know is violation of law or regulation; (2) ***Violation of DCMR Chapter 6-B-16, Section 1607.2(b)(3) False Statements/Record*s - knowingly and willfully making an incorrect entry on an official record or approving an incorrect official record.; (3) ***Violation of DCMR Chapter 6-B-16 Section 1607.2(d)(1) – Failure/refusal to Follow Instructions*** – Negligence, including the careless failure to comply with rules, regulations, written procedures or proper supervisory instructions.; (4) ***Violation of DCMR Chapter 6-B-16 Section 1607.2(e) – Neglect of Duty*;** (5) ***Violation of DCMR Chapter 6-B-16 Section 1607.2(m) – Performance Deficits –*** Failure to meet established performance standards.;(6) ***Violation of DCMR Chapter 6-B-16 Section 1607.2(n) – Inability to carry out assigned duties –*** Any circumstance that prevents an employee from performing the essential functions of his or her position, and for which no reasonable accommodation has been requested or can be made, unless eligible for leave protected under the D.C. Family Medical Leave Act.; (7) ***Violation of DOC Policy and Procedure 3300.1F – Employee Code of Ethics and Conduct, Section 10p. Personal Accountability*.;** (8) ***Violation of DOC Policy and Procedure 3300.1F – Employee Code of Ethics and Conduct, Section 11a. Professional Conduct*.;** (9) ***Violation of DOC SOP 5008.1-18 Rounds Tracking (Guard 1 Plus), Section 11. Daily Inspection Rounds*.;** (10) ***Violation of DOC Central Detention Facility General Population Housing Unit Post Order, dated November 11, 2021, Paragraph 4 Definitions*.;** (11) ***Violation of DOC Central Detention Facility General Population Housing Unit Post Order, dated November 11, 2021, Paragraph 6 Staffing*.;** and (12) ***Violation of DOC Central Detention Facility General Population Housing Unit Post Order, dated November 11, 2021, Paragraph 14, Guard 1 Plus Rounds Tracking System (Pipe Rounds).*** The effective date of Employee's termination was December 14, 2022.

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[78] *Id.* at Page 27.
[79] *Id.*
[80] *Id*. at Page 27-28.
[81] 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").

ANALYSIS

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 631.1, 6-B DCMR Ch. 600 (December 27, 2021), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee's termination was levied for the aforementioned causes of action and the effective date of the termination was December 14, 2022.

In the instant matter, Employee's termination was based on twelve (12) charges. The charges were largely based upon hours of video surveillance footage captured over the time period of May 31, 2022, through July 21, 2022, wherein Employee appeared.[82] In review of the entirety of the record, the undersigned finds that there is an overwhelming body of video evidence which clearly demonstrates that Employee spent hours of time during his tour of duty in the NW2 case manager's office. While the record is clear that Employee had permission to access to that case manager's office, the undersigned finds that video surveillance footage of his presence and activity in that office, exhibit a pattern consistent with the charges for which the termination was administered. Specifically, the hours of video surveillance show numerous instances where Employee was in the office with his shoes off, leaned back in a chair and sitting/exhibiting a posture consistent with what the undersigned determines that a reasonable mind would consider consistent with sleeping or dozing. At the very least, the video footage exhibits a pattern of inattentiveness to duties prescribed by his position requirements of a Lead Correctional Officer (also known as Officer in Charge OIC).

Conduct Prejudicial to District Government/Failure/Refusal to Follow Instructions/Neglect of Duty

This Office has consistently held that there is a neglect of duty where an employee has been found to have failed to carry out duties as expected, *careless work habits*,[83] and when an employee has been found to be *sleeping or dozing on duty*.(Emphasis added).[84] In the instant matter, there are hours upon hours of video surveillance footage where Employee was found to be in the case manager's office,

[82] There is also a Body Worn Camera (BWC) video which exhibits an interaction with Employee and Lt. Nelson on July 21, 2022, at the case manager's office wherein Employee cites that he didn't know why the door to the office was unlocked/open and why music was on. When Lt. Nelson indicates that he will be locking the case manager's office, Employee becomes upset and argues that he was permitted to be in the office.
[83] *Karen Falls v. Department of General Services*, OEA Matter No. 1601-0044-12R14 (August 12, 2014). *See also* DPM §
[84] *Martin Harris v Department of General Services*, OEA Matter No. 1601-60-16 (April 5, 2017).

with his shoes off, leaned back in a chair in a posture consistent with a person sleeping, dozing and or loafing. In many of those instances, the lights in the office were off and there is little to no activity from Employee consistent with the completion of his assigned duties. While the record reflects that Employee was allowed to be in the case manager's office, the undersigned finds that the extensively long periods of time for which Employee was in the office, particularly times with his shoes off, leaned back in chairs, or with feet in chairs consistent with sleeping or dozing, are not consistent with the performance of his job duties. In review of the hours of surveillance, the undersigned further finds that Employee's action reflected a pattern of "lounging/loafing" in the case manager's office. The DOC regulations provide that Employee's position required him to do PIPE rounds and ensure monitoring of inmates on NW2. Employee's actions in the case manager's office clearly exhibit a neglect of duty and exhibit a violation of the DOC and DPM policies of which Employee knew or should have known were a violation of those policies, thus evincing conduct prejudicial to District Government.

For these same reasons, I conclude that Employee's action also exhibits a failure to follow instructions including the careless and negligent failure to comply with rules. Employee's contentions that he was not a "micromanager" or that he went along with the practices on NW2 are disingenuous and without sufficient merit. The undersigned finds that as a Lead Correctional Officer, Employee had the responsibility not only to ensure his own compliance with the regulations, but also to those who reported to him. For these reasons, I find that Agency has met its burden of proof for the charges of Neglect of Duty, Failure/Refusal to Follow Instructions and Conduct Prejudicial to District Government.

Performance Deficits/ Violation of DOC Polices/ False Statements/Records

Employee's position requirements at Agency were mostly informed by "Post Orders." The record reflects that as an OIC, Employee was required, in accordance with the applicable post orders, to ensure assignments were made, including assignment of an officer as a Control Module Officer, and another as a Unit Officer. Employee was also required to ensure that all officers completed the activities required for the floor and ensure completion of logbook entries. The record reflects that because Employee was not present on the floor and instead was occupying time in the case manager's office, that he was not appropriately monitoring the activities for the NW2. Employee avers that in practice, because of the timing of his shift (1st shift) that they operated with different monitoring because inmates were secured in their cells for the majority of that shift. Employee asserts that because of this, the post order requirement that he be posted on the tier or floor was for shifts when inmates were out of their cells, which did not happen on his shift. Employee also asserted that there could be several things that might interfere with completion of PIPE rounds as required and that it is the responsibility of the shift captains to review PIPE rounds and address any issues. He also asserts that he was never notified by a major or a zone supervisor of any issue with PIPE rounds not being conducted on his shift, also noting that "during his 26 years of service at DOC, that none of his supervisors throughout the jail micromanaged officers as they conducted pipe rounds."[85] The undersigned finds that the Post Orders and PIPE rounds applied to all the shifts at Agency. To that end, I find Employee's assertions regarding practice and lack of "micromanaging" to be unpersuasive regarding the requirements of the DOC policies and procedures. For these reasons, I find that Agency has met its burden of proof regarding the charges of Performance Deficits and Violation of DOC Policies.

[85] Employee's Brief at Page 7. (December 19, 2023).

As was previously noted, Employee's responsibilities included ensuring that the unit logbook was completed. Employee avers that there is no evidence to cite that he made any entries and further asserts that it was the control module officer's responsibility to ensure the logbook entries. Thus, Employee concludes that the charges of False Statements/Records related to the logbook for the dates of June 28 – June 29, 2022, have not been supported by evidence. The undersigned finds that in accordance with the Post Orders, specifically the Post Order (6)(A)(4) and (6)(B)(7), that Employee retained the responsibility to ensure that the unit logbook was completed as required and to supervise the entries. Deputy Warden Landerkin's report notes that Employee "did nothing to address instances when the Unit Logbook reflected that PIPE rounds were done when they were not actually done, including on the June 28-June 29 shift." This noted, the undersigned finds that while Employee may not have made false entries himself, the record reflects that his position responsibilities required him to ensure the accuracy of entries made. Wherefore, I find that Agency has shown that as an OIC, Employee's inattention to ensure the logbook was accurately completed, warrants the charge of "approving an incorrect official record." As a result, I find that Agency has met its burden of proof regarding the charge of false statements/records.

Inability to Carry Out Assigned Duties

In the instant matter, Employee noted that the reason he spent a lot of time in the case manager's office was due to his intolerance for the smoke on the unit (cigarette smoking of the inmates). Employee asserts that he made notifications regarding his issues and had previously requested that times where he had been documented as Absence Without Leave (AWOL) be changed to annual leave instead due to his medical challenges in this regard. Agency avers that the appropriate course of action for Employee would have been to request an accommodation, as opposed to Employee's action of spending lengths of time in the case manager's office. The record is void of any accommodation processes regarding Employee's claims. The undersigned finds that as it relates to this charge, the record is not clear whether Employee was unable to carry out his assigned duties with or without accommodation, since there is not a record of the process or considerations for an accommodation request. Wherefore, I find that Agency has not met its burden of proof related to this charge as currently presented, and therefore cannot be sustained.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that eleven (11) of the twelve (12) charges Agency levied against Employee were taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. 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).[86] 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 DPM § 1607; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of

[86] *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).

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."[87] 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."[88]

Disparate Treatment

"OEA has held that, to establish disparate treatment, an employee *must* show that [they] worked in the same organizational unit as the comparison employees (Emphasis added)." They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (Emphasis added). Further, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty." (Emphasis added). An employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly situated employees differently." If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue."[89]

Accordingly, an employee who makes a claim of disparate treatment has the burden to make a prima facie showing that they were treated differently from other similarly situated employees.[90] To support this contention, Employee provides that during discovery, he requested that Agency provide information of other officers. Employee asserts that "Agency cross-referenced to documents produced in response..."[91] Further, Employee asserts that the information provided by Agency, that Employee's September 29, 2022, advanced notice of proposed termination **predates** all of these records on which Agency supposedly relied (Emphasis added in original)." Agency avers that Employee's claims fail to meet the requirements for a disparate treatment claim. Namely, Agency asserts that Employee "does not identify a single comparator employee who served in the same role and engaged in the same type of extensive misconduct that he did....and Employee "does not establish that they were disciplined by the same supervisor." Agency asserts that Employee, unlike all comparator employees, was disciplined under the new DOC Director Thomas Faust."[92] The undersigned agrees with Agency's assertions. The undersigned finds that Employee's contentions fail to meet the burden of proof to support a claim of disparate treatment. Upon consideration of the aforementioned findings, I find that Agency has met its burden of proof in this matter, and it has adequately proven that there was proper cause for adverse action against Employee in sustaining all the aforementioned charges, with the exception of the charge of the Inability to Carry Out Assigned Duties.

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[87] *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).
[88] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[89] *Sheri Fox v. Metropolitan Police Department*, OEA Matter No. 1601-0040-17 (January 13, 2020). Citing to *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, *Opinion and Order on Petition for Review* (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, *Opinion and Order on Petition for Review* (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[90] *See. John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing to Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994). See also. Sheri Fox v Metropolitan Police Department, OEA Matter No. 1601-0040-17 (January 13, 2020).
[91] Employee's Brief at Page 20. (December 19, 2023)
[92] Agency's Sur-Reply Brief at Page 7. (January 16, 2024).

Douglas Factors

Employee avers that Agency did not give due consideration to the *Douglas* factors in this instant matter. In particular, Employee argues that while Agency changed the *Douglas* factor consideration of length of service from 'neutral' to 'mitigating', it did not really consider Employee's tenure with Agency in determining termination was appropriate. Employee made similar claims for all the *Douglas* factors, iterating that Agency's consideration was not genuine and was arbitrary. Agency argues that its consideration of the *Douglas* factors was appropriate, and that the Director has the authority regarding the discipline for DOC. Agency maintains that Employee's misconduct warranted termination and that its administration of the instant action was in accordance with all applicable laws, rules and regulations. Agency also asserts that it did not "misapply most of the *Douglas* factors in this matter." Further, Agency cites that "even if Agency misapplied one or more factors, Employee is entitled to a remedy if the ultimate decision as to the penalty is beyond the outermost bound of reasonableness."[93] Agency avers that given the serious nature of Employee's misconduct that termination "was not beyond the outermost bound of reasonableness and Employee is not entitled to a remedy." Further Agency avers that "to the extent that OEA determines that Agency's alleged misapplication of Douglas is beyond what is permissible, it should remand with specific instructions for Agency to reconsider the *Douglas* factors."

As was previously cited, OEA has consistently held that "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[94] 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." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[95] [96] In the instant matter, I find that Agency's consideration of the *Douglas* factors was appropriate. I also find that while there may have been a change regarding the status of a *Douglas* factor consideration from "neutral" to "mitigating", this Office has held that consistent with the *Douglas* decision, that "certain misconduct may warrant removal in the first instance."[97] In this matter, Agency has asserted that Employee's misconduct warranted termination on a first instance. As a result, I find that Agency reasonably relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313

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[93] Agency's Sur-Reply Brief at Page 5. (January 16, 2024).

[94] *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).

[95] *Love* also provided the following:

> [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, it is 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, 5 M.S.P.R. 280 (1981)).

[96] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[97] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing E*mployee v. Agency*, OEA Matter No. 1601-0012-82, Opinion and Order on Petition for Review, 30 D.C. Reg. 352 (1985).

(1981), in reaching its decision to terminate Employee from service.[98] Further, Chapter 16 §1607 of the District Personnel Manual Table of Illustrative Actions ("TIA") provides that the appropriate penalty for a first offense for neglect of duty and failure/refusal to follow instructions ranges from counseling to removal.[99] Additionally, the TIA provides that the appropriate penalty for a first offense of conduct prejudicial to District government ranges from reprimand to removal. Further, the penalty range for performance deficits are reassignment, reduction in grade or removal and for a first offense false statements/records the penalty range is counseling to removal.[100] Wherefore, upon consideration of the applicable DPM guidelines and the aforementioned *Douglas* factor analysis, I find that it was within Agency's discretion to terminate Employee from service.

Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to remove Employee from service. As a result, I conclude that Agency's action of removing Employee from service 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

[98] *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 it's 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.

[99] 6-B DCMR §§1607.2 (d)(4), 1607.2(e)(2019).
[100] 6-B DCMR§§ 1607.2 (a)(4); 1607.2(m) and 1607.2 (n); 1607.2(b)(3).