THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
NJIDEKA ODIANA,	)	
Employee	)	OEA Matter No. 1601-0269-10
	)	
v.	)	Date of Issuance: November 27, 2013
	)	
DISTRICT OF COLUMBIA CHILD AND FAMILY SERVICES,	)	
Agency	)	STEPHANIE N. HARRIS, Esq.
	)	Administrative Judge

Stephen White, Employee Representative
Margaret P. Radabaugh, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 22, 2010, Njideka Odiana ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Child and Family Services' ("CFSA" or "Agency") decision to terminate her from her Social Worker position based on a charge of Neglect of Duty. The effective date of Employee's termination was December 21, 2009. On February 24, 2010, Agency submitted its Answer in response to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 2, 2012. After reviewing the case file and the documents of record, I issued an Order dated November 6, 2012, wherein I questioned whether OEA may exercise jurisdiction over the instant matter based on Agency's claim that Employee's Petition for Appeal was not timely filed. Employee was ordered to submit a written brief, together with copies of cited statutes, regulations, and cases to address whether this matter should be dismissed for lack of jurisdiction based on Agency's contention. Employee timely submitted her brief on November 19, 2012. Agency submitted an optional brief on November 27, 2012.

On February 1, 2013, the undersigned issued an Order on Jurisdiction, finding that because Agency did not use the specific language of the statute or the OEA rules, its use of the term "working days" in its Final Agency Decision was unclear and therefore, Employee was not provided with adequate notice of her right to contest her termination with this Office. Agency

was required by statute and OEA rules to specifically inform Employee that she had **thirty (30) days** from the effective date of her termination to file with OEA (emphasis added). Agency's use of the term "working days" prevented Employee from receiving adequate notice of her appeal rights. In response to Agency's contention that their error did not confer jurisdiction, the undersigned found that Agency may not benefit from the thirty (30) day jurisdictional bar when it failed to give Employee adequate notice of her appeal rights.[1]

Thereafter, a Prehearing Conference was scheduled in this matter for February 25, 2013. Both parties were present for the proceeding and timely submitted Prehearing Statements. The undersigned issued verbal orders for the parties to submit Post Prehearing Briefs, together with copies of cited statutes, regulations, or cases, and any relevant supporting documentation, to address pending issues in this matter. Agency submitted its brief on March 18, 2013. An Order was issued on March 19, 2013, directing Employee to submit the brief as requested in the Prehearing Conference on or before April 9, 2013. Subsequently, an Order for Statement of Good Cause was issued on April 11, 2013, for Employee's failure to submit her Post Prehearing Brief by the prescribed deadline. Employee timely submitted her brief and Statement of Good Cause on April 22, 2013, both of which were accepted by the undersigned.

On June 10, 2013, the undersigned held a Status Teleconference with the parties to update the posture of the pending matter and to address any outstanding issues. Both parties stated that there were no additional arguments to be presented in this matter. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material issues in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, an Advance Written Notice of Removal ("Advance Notice") based on a charge of negligence of duties was issued to Employee on November 6, 2009.[2] The Advance Notice informed Employee that she was given thirty (30) days' notice of Agency's proposal to remove her from her position of Social Worker and that she had ten (10) days to submit a response for administrative review by a Hearing Officer.

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[1] *See Rebello v. District of Columbia Public Schools*, OEA Matter No. 2401-0202-04, *Opinion and Order on Petition for Review* (June 27, 2008) at p. 4.
[2] Agency Answer, Tab 6 (February 24, 2010).

On November 23, 2009, Employee responded to the Advance Notice, where she denied all charges and requested a hearing. An Administrative Review Hearing was granted on December 16, 2009, wherein Employee and her Representative challenged Agency's proposed removal. Based on a review of the arguments presented during the Administrative Review Hearing, a Hearing Officer concluded that the evidence corroborated that Employee failed to properly manage her caseload, produced incomplete work product, and exhibited poor performance in the courtroom, which amounted to neglect of duty.[3] Consequently, on December 21, 2009, Agency issued its Final Agency Decision, removing Employee from her Social Worker position, effective immediately.[4]

Employee's Position

In Employee's Petition for Appeal, she claims that Agency wrongfully terminated her by ignoring her medical condition, despite being aware of it.[5] In her Prehearing Statement, Employee states that she "is not, and has not in the past, disputed any of Management['s] well documented charges of negligence of duties."[6] She states that she started working for Agency in 2001, left in 2007, and returned in 2008. Upon her return in 2008, Employee claims that "she was told that she would be able to do something other than be a case carrying Social Worker, because she now was a mother of three children and she knew the demands of a Social Worker would not allow her to be able to properly care for her family."[7] She states that she requested to be transferred numerous times and was denied. Employee argues that as her health began to deteriorate, her capacity to perform her job also declined. She notes that she was a good Social Worker during her first tour of duty with Agency, and that this was one of the reasons that she was rehired in 2008.

Employee states that on August 10, 2009, she submitted a letter from Dr. David Katz, to her supervisor.[8] She explains that the letter stated that she had a permanent neurologic condition. Employee claims that she submitted another letter from Dr. Katz on September 28, 2009, requesting a position that would keep Employee off of her feet.[9] She claims that there were numerous jobs that she could have performed other than case carrying Social Worker, including a Licensing Specialist position that she previously held. Employee argues that her termination was improper because Agency received documentation showing that she had a medically diagnosed condition; they ignored her medical documentation; and they "did nothing" and failed to accommodate her while she was going through this difficult time.[10]

Additionally, Employee contends that Agency should have given her a reasonable accommodation, which would have prevented her from being terminated from her Social Worker position. While she did not specifically address whether this Office has jurisdiction to hear her reasonable accommodation claim, Employee argues that if Agency "had in fact give her an

[3] *Id*., Tab 8.
[4] *Id*., Tab 7.
[5] *See* Petition for Appeal (January 22, 2010).
[6] *See* Employee Prehearing Statement, p. 1 (February 25, 2013).
[7] *Id*.
[8] Employee Submitted Documents (February 25, 2013).
[9] *Id*.
[10] *See* Employee Prehearing Statement (February 25, 2013).

accommodation when the received the letter from her doctor stating that she had [a neurologic] condition," she would have still been able to function in some capacity and would not have been terminated.[11] She states that there were several options available to Agency that would have prevented termination, including allowing her to work light duty or providing her with a driver for her home visits. Employee notes that the Office of Risk Management provided light duty for seventy-four (74) District government workers last year, as documented in an uncited 2012 report. She also states that according to the Equal Employment Opportunity Commission, "employers must consider accommodations such as alternative methods of transportation for work-related travel when driving is not an essential function of the job."[12]

Agency's Position

Agency asserts that the evidence in this matter supports its decision to remove Employee for cause from her Social Worker position. After receiving an Official Reprimand in June 2009 and serving a ten (10) day suspension in September 2009, Employee continued to neglect her job duties, including missing court hearings and deadlines, as well as, failing to follow Agency procedures and meeting required benchmarks.[13]

Agency relays that it received outside complaints from a D.C. Superior Court Judge, multiple Assistant Attorney Generals, and a Guardian Ad Litem, regarding Employee's poor work performance, lack of follow through, and the negative impact on the parties involved with her cases.[14] Agency reiterates that on numerous occasions, Employee was counseled and provided training in an effort to emphasize the importance of her position as a Social Worker and the services that she was responsible for securing for children. However, Agency states that Employee's "performance did not improve to a sustainable level whereby she was able to maintain her caseload at an acceptable level."[15] Thus, Agency asserts that Employee's conduct constituted cause for adverse action and based on the Douglas factors and the District Personnel Manual ("DPM") Table of Penalties, Agency's action of removal was appropriate.[16]

Agency also notes that on October 28, 2009, Employee submitted a letter from her Physician, dated September 28, 2009, requesting that Agency remove Employee from her current position and place her into an office position, where she did not have to drive or walk and climb stairs. Agency's Human Resources Manager for Labor and Employee Relations informed Employee that it did not have a vacant position that met the requirements of Employee's Physician's request and/or one that would afford Employee an opportunity to perform the essential functions of her position. Agency submits that Employee was removed from her Social Worker position because of her longstanding inadequate performance and not due to any medical condition that was brought to Agency's attention a few weeks prior to her termination.

[11] Employee Brief (April 22, 2013).
[12] *Id.*
[13] *See* Agency Answer, pp. 1-2 (February 24, 2010); Agency Prehearing Statement, pp. 1-4 (February 19, 2013).
[14] Agency Answer, Tabs 6, 8.
[15] *Id.*, p. 2.
[16] *Id.*, Tab 8.

Agency made the following claims in support of its Neglect of Duty charge in both the Advance Notice and Final Agency Decision:

1) As of August 2009, Employee did not meet the foster care visitation benchmark, as she only completed thirty-six percent (36%) of her visits and missed face-to-face visits for seven cases.
2) A Judge observed Employee to "be sleeping or at least resting [her] eyes," in August 2009. The Judge addressed the problem in open court and at the conclusion of the hearing, the Judge asked Employee's supervisor to approach the bench, where she expressed her dissatisfaction with Employee's performance, lack of initiative, and indifference.
3) Employee's supervisor stated that in October 2009, she attended a court hearing in Employee's absence. However, Employee's failure to prepare a court report caused the hearing to be rescheduled and because of this continuance, the court ordered Agency to pay attorney fees.
4) During another hearing in October 2009 where Employee's supervisor filled in, none of the parties had received the required court report. Employee filed the court report the day before the hearing. The Judge for this hearing expressed frustration, and due to the lateness of the report, the hearing was delayed so that the report could be reviewed. In the court order, the Judge noted that Employee had failed to make a referral, although it had been ordered eight (8) months prior. The Judge also noted that Employee had limited contact with the parent in this case and failed to prepare her court report in a timely manner.
5) In July 2009, Employee's supervisor received an email from one of the judges assigned to Employee's case, who relayed that Employee's court reports are always late and lack detail. The Judge also relayed that Employee's poor performance and attitude made challenging cases even more difficult.
6) The Assistant Attorney General's ("AAG") office sent an email to Employee's supervisor in August 2009, outlining several outstanding court orders and indicating that the supervisor was required to attend an emergency hearing due to the Judge's extreme displeasure with Employee's performance. Subsequently, the AAG's office sent another email in August 2009 relaying that Employee was not present at a required hearing and had to participate by phone.
7) Beginning in August 2009, Employee failed to submit a referral for a psychological evaluation, despite several extensions and emails stating that the task would be completed by a specific deadline. As of October 2009, the referral for the psychological evaluation had not been completed.
8) The AAG's office sent an email to Employee's supervisor stating that similar to an incident in August 2009, a court report had been filed late, one day before the hearing, and none of the parties had received the report, including the Court. As a result, the hearing was once again delayed so that the court report could be reviewed. Additionally, the court report contained a serious mistake, incorrectly stating that a referral had been submitted. The AAG's email also stated that during the court

hearing, it was disclosed that Employee had allowed unauthorized, unsupervised overnight visits, which was in violation of a court order.

9) In October 2009, a Guardian Ad Litem ("GAL") emailed Employee's supervisor to express her concerns about Employee's work performance. The GAL states that Employee exhibited a pattern of unprofessionalism in their case, including not attending court hearings, not completing court reports, filing late reports, and providing minimally acceptable case management services to families.

10) As of October 2009, Employee had not met the required case plan completion benchmark of 95%.

Termination For Cause

Pursuant to OEA Rule 628.2,[17] Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that a disciplinary action against an employee may only be taken for cause. Under DPM §1603.3(f)(3), the definition of "cause" includes [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, including Neglect of Duty. Agency submits that Employee's termination was based on documented evidence showing that Employee did not meet the required visitation benchmarks, failed to submit mandatory documentation and reports for court hearings, and numerous complaints from judges, a Guardian Ad Litem, and the D.C. Assistant Attorney Generals assigned to Employee's cases. In the instant case, the undersigned must determine if the evidence Agency submitted to corroborate Employee's Neglect of Duty is adequate to support termination.

Agency asserts that its decision to terminate Employee was based on her repeated failure to properly handle her cases; failure to produce a work product up to Agency's standards; and continual disregard for Agency and court-imposed deadlines. Further, prior to her termination, Employee received an Official Reprimand in June 2009 and served a ten (10) day suspension in September 2009 for Neglect of Duty. Agency reiterates that Employee was terminated from her Social Worker position because of her "long standing inadequate performance and not due to any medical condition that she brought to [Agency's] attention three weeks prior to the proposal to terminate her employment."[18] Moreover, Employee does not challenge the evidence presented by Agency to uphold the Neglect of Duty charge, and she acknowledge that she "*is not, and has not in the past, disputed any of [Agency's] well documented charges of negligence of duties*" (emphasis added).[19]

Employee has not contested any of the evidence provided by Agency in support of its Neglect of Duty charge; she only argues that she should have been given a reasonable accommodation. Accordingly, I find that Agency's submitted documentation corroborates its charge of Neglect of Duty. Further, based on Employee's own acknowledgment that she does not deny Agency's detailed documentation, I find that Agency had cause to terminate Employee based on a charge of Neglect of Duty.

[17] 59 DCR 2129 (March 16, 2012).
[18] Agency Answer, p. 2 (February 24, 2010).
[19] Employee Prehearing Statement (February 25, 2013).

Reasonable Accommodation Claim

Employee contends that her termination was improper because Agency should have granted her a reasonable accommodation to address her neurologic condition. As stated above, while Employee did not specifically address whether this Office has jurisdiction to hear her reasonable accommodation claim, she argues that if Agency had given her an accommodation she would have still been able to function in some capacity and would not have been terminated.[20] She claims that according to the Equal Employment Opportunity Commission, "employers must consider accommodations such as alternative methods of transportation for work-related travel when driving is not an essential function of the job."[21]

Agency argues that complaints of unlawful discrimination, including the denial of a reasonable accommodation, are set forth in the District of Columbia Human Rights Act, which provides for an administrative remedy with the Office of Human Rights, who retains jurisdiction over these claims. Agency also submits that the Office of Disability Rights assists with unlawful discrimination complaints regarding compliance with disability related laws. Agency notes that Employee is not contesting whether Agency had cause to terminate her based on the charge of Neglect of Duty, rather she is alleging that Agency unfairly denied her a reasonable accommodation. Agency posits that OEA does not have jurisdiction over Employee's reasonable accommodation claim.

The undersigned agrees with Agency's arguments and finds that claims surrounding an Employee's denial of reasonable accommodation are generally outside of the scope of this Office's jurisdiction. D.C. Code § 2-1411.02 and DPM § 1631.1(q), specifically reserves complaints of unlawful disability discrimination to the Office of Human Rights. D.C. Code § 2-1411.02 states that the purpose of the Office of Human Rights is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit."[22] Further, pursuant to D.C. Code §§ 2-1431.03, 2-1431.04, the Office of Disability Rights was granted the responsibility to investigate actions or inactions of district agencies in alleged violation of the American with Disabilities Act ("ADA") and oversees compliance with the ADA and related disability-rights laws.

Based on the preceding, I find that Employee's reasonable accommodation denial claim falls outside the scope of OEA's jurisdiction and this Office is unable to make a determination of whether Employee should have been granted a reasonable accommodation based on her medical documentation.[23] Further, the undersigned is unable to assess whether the granting of a reasonable accommodation would have prevented Employee's termination. However, the undersigned notes that Agency has provided detailed documentation in support of its Neglect of Duty charge and Employee has not disputed any of the actions listed by Agency. Moreover, the majority of Agency's documentation occurred before Employee submitted notes from her

[20] Employee Brief (April 22, 2013).
[21] *Id*.
[22] Complaints classified as unlawful discrimination are also described in the District of Columbia Human Right Act at D.C. Code §§ 1-2501 *et seq.*
[23] A claim alleging denial of a reasonable accommodation requires a showing under the ADA's definition of disability and that the impairment substantially limits a major life activity. *See Lewis v. D.C* , 885 F. Supp. 2d 421, 425 (D.C. 2012); *Jones v. Quintana*, 658 F.Supp. 2d 183, 201-03 (D.C. 2009).

Physician. The undersigned also notes that Employee's reference to an uncited Equal Employment Opportunity Commission policy and estimate of light duty employees in the District government is unpersuasive to show that Agency did not have cause to terminate her or that she should have been granted a reasonable accommodation. Thus, based on the evidence of record, Agency has proved by a preponderance of the evidence that it had cause to terminate Employee.

Further, Employee has provided no documentary evidence to corroborate her allegation that Agency told her that she would be able "to do something other than be a case carrying Social Worker." The record shows that Agency hired her as a Social Worker, and therefore, she was required to perform the duties of this position.

Penalty Within Range

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[24] According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the TAP for various causes of adverse actions taken against District government employees. In this case, Employee was charged with Neglect of Duty under DPM §1603.3(f)(3), which comprises any on-duty act or employment-related act or omission that interferes with the efficiency and integrity of government operations.

The penalty for Neglect of Duty is found in § 1619.1(6)(c) of the DPM. The penalty for a first offense for Neglect of Duty ranges from reprimand to removal. The penalty for a second offense for Neglect of Duty ranges from a fifteen (15) day suspension to removal. The penalty for a third offense for Neglect of Duty ranges from a thirty (30) day suspension to removal or reduction in grade. Agency has provided documentation showing that it engaged in progressive discipline. The record shows that Employee was previously disciplined for Neglect of Duty with an Official Reprimand in June 2009 and a ten (10) day suspension in September 2009.[25] Thus, these actions can be considered under the TAP as prior corrective or adverse actions because

[24] *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).

[25] Agency Answer, Tabs 2-5 (February 24, 2010).

they are within three years from the effective date of the February 19, 2010 termination.[26] As noted above, I find that Employee's conduct constitutes Neglect of Duty, and her termination is within the range listed by the TAP and is consistent with the language of DPM § 1619.1(6)(c) for a first, second, and third offense. Therefore, I find that, by terminating Employee, Agency engaged in progressive discipline, and did not abuse its discretion.

As provided in *Love v. Department of Corrections*[27] selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[28] When an Agency's charge is upheld, this Office has held that it will leave Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law. Accordingly, Agency was within its authority to remove Employee under the TAP.

Penalty was Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[29] The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.[30]

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[26] *See* DPM §1606.2, which states that in determining the penalty for disciplinary action under this chapter, documentation appropriately placed in employee's official personnel file regarding prior corrective or adverse actions, may be considered for not longer than three (3) years from the effective date of the action.

[27] OEA Matter No. 1601-0034-08R11 (August 10, 2011).

[28] *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, 5 M.S.P.R. 280 (1981).

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

[30] 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;

In this case, the penalty of termination was within the range allowed for a first and second offense for this cause of action. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency gave credence to the nature and seriousness of the offense; Employee's type of employment; notoriety of the offense on the reputation of the Agency; Employee's past work record, and mitigating circumstances.[31] In accordance with DPM §1619.1(6)(c), I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

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STEPHANIE N. HARRIS, Esq.
Administrative Judge

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.

[31] *See* Agency Answer, Tab 8 (February 24, 2010).