

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup>	)	
	)	
v.	)	OEA Matter No.: 1601-0010-21
	)	
	)	Date of Issuance: August 25, 2022
DEPARTMENT OF	)	
FOR HIRE VEHICLES,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Employee worked as a Vehicle Inspection Officer with the District of Columbia Department of For Hire Vehicles (“Agency”). On September 2, 2020, Agency issued Employee a Proposed Notice of Separation, charging her with “failure/refusal to follow instructions” and “false statements – knowingly and willfully reporting false or misleading material information” in violation of Chapter 6B, §§ 1607.2(d)(2) and 1607.2(b)(4) of the D.C. Municipal Regulations (“DCMR”). Agency alleged that Employee failed to complete online trainings and knowingly provided false or misleading information to her superior regarding her scheduling accommodation

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

for her son's remote learning schedule. Agency issued its Final Notice of Separation on December 4, 2020. The effective date of her termination was December 4, 2020.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 4, 2021. In her appeal, Employee argued that Agency erred in initiating its termination action because it failed to meet with her regarding the alleged misconduct as required by the District Personnel Manual ("DPM"). She also contended that Agency based its termination action on conduct that was not specifically stated in the proposed notice. Since Employee believed that her termination was improper, she posited that Agency failed to meet its burden of proof in this matter. As a result, she requested to be reinstated to her position with back pay and benefits.<sup>2</sup>

In its answer, Agency contended that Employee's allegations were unfounded and unsupported by the evidence. It opined that the reasons for Employee's removal were explicitly stated in the notice of proposed removal and the final notice of removal. As it related to the penalty, Agency reasoned that termination was appropriate under the Table of Illustrative Actions and the DPM because Employee made false representations to her supervisor and failed to complete and submit training assignments. Therefore, it maintained that Employee's termination was proper.<sup>3</sup>

An OEA Administrative Judge ("AJ") was assigned to the matter in July of 2021. On July 29, 2021, the AJ held a prehearing conference to assess the parties' arguments.<sup>4</sup> During the conference, it was determined that the contested issues warranted an evidentiary hearing. After several continuances, a hearing was held on January 25, 2022, wherein the parties submitted documentary and testimonial evidence in support of their positions.<sup>5</sup>

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<sup>2</sup> *Petition for Appeal* (January 4, 2021).

<sup>3</sup> *Agency Answer to Petition for Appeal* (April 8, 2021).

<sup>4</sup> *Order Scheduling Prehearing Conference* (July 8, 2021).

<sup>5</sup> *Order Rescheduling Evidentiary Hearing* (December 15, 2021).

The AJ issued an Initial Decision on April 20, 2022. As it related to the charge of making false statements regarding her son’s remote learning schedule, the AJ held that this cause of action required an agency to prove that the employee knowingly and willfully reported false or misleading, material information, or purposefully omitted material facts, to any superior. The AJ noted that in a May 6, 2020, correspondence, Employee relayed that her son’s remote learning schedule required her presence with him from 9:00 a.m. until 3:30 p.m., because her son had an Individual Education Plan (“IEP”). Additionally, she explained that Agency provided Employee with the requested schedule accommodation by giving her an additional two hours to complete her daily trainings – no later than 7:00 p.m. However, Employee believed that she was treated differently in receiving training assignments as compared to her coworkers because they were able to attend live training sessions and she was not. The AJ further acknowledged that Employee notified Agency on May 14, 2020, that she no longer needed the accommodation.<sup>6</sup>

Moreover, the AJ stated that Employee provided proof of her son’s schedule after Agency became skeptical of Employee’s request. Ultimately, the AJ disagreed with Agency’s position that Employee provided false or misleading information when requesting her schedule accommodation. According to the AJ, Agency did not ask Employee for proof of her child’s schedule until after she requested to revoke the accommodation. The AJ went on to explain that Employee provided a screenshot from her son’s teacher which reflected his schedule for a particular day. Employee also gave permission to Agency to contact the teacher directly to make additional inquiries into the son’s learning schedule, if needed. She further concluded that Agency failed to contact the son’s teacher, but instead later relied on a general email correspondence from the child’s school administrator who stated that there was “no one schedule” and that having a Pre-

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<sup>6</sup> *Initial Decision* (April 20, 2022).

K student at home during the COVID-19 Public Health Emergency (“COVID-19 PHE”) meant that many parents were precluded from being able to work as they normally would. Therefore, the AJ found it incongruous for Agency to conclude that Employee made false statements in light of evidence presented and the ongoing challenges of remote learning during this time. Further, she surmised that Agency’s position did not align with the testimony provided by Human Resources Supervisor, Shalonda Frazier (“Frazier”), who reiterated several times during her testimony that they were informed to be as flexible as possible during the unprecedented times. Consequently, the AJ held that absent more specific confirmation regarding Employee’s son’s schedule, Agency failed to meet its burden of proof in establishing the false statements charge.<sup>7</sup>

Concerning Agency’s Notice of Proposed Action, the AJ stated that DPM § 1618.4 requires that the notice be approved and signed by a proposing official, who must be a manager within the employee’s chain of command, or a management official designated by the personnel authority. While Employee asserted that it was improper for Frazier to prepare the Proposing Official’s Rational Worksheet because she did not serve in any managerial capacity, the AJ could not conclude whether Frazier’s actions were impermissible. However, she did note that Agency’s practices regarding the preparation of proposed notices raised genuine questions about the efficiency and accuracy of its processes related to the administration of the instant adverse action.<sup>8</sup>

As for the failure to follow instructions, the AJ stated that this charge includes a deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions. She clarified that Agency charged Employee with failure to follow instructions as a result of email communications over the course of several days in May of 2020, including a May 12, 2020, correspondence wherein Employee informed Agency that she did not complete her

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

training for that day because of her son's all-day remote learning schedule. However, after reviewing the record, the AJ determined that the evidence supported a different conclusion because Agency's witness, Amber Sigler ("Sigler"),<sup>9</sup> and the Hearing Officer, both confirmed that Employee did in fact submit her May 12, 2020, training certificate on time. Thus, the AJ reasoned that notwithstanding Employee's initial representation, Agency provided no evidence to support its assertion that Employee failed to submit the training certificate in a timely manner.<sup>10</sup>

The AJ agreed with Agency's argument that Employee failed to submit the May 13<sup>th</sup> training certificate in a timely manner. However, she opined that Agency failed to accord due weight and consideration to the *Douglas* factors, discussed *infra*, namely the mitigating factor of unusual job tensions given the challenges that the Covid-19 State of Emergency presented during 2020. Further, the AJ noted that Employee's direct supervisor did not oversee her daily activities and was detailed to another agency. Thus, Employee's supervisor responded to her emails after the official tour of duty hours. As a result, the AJ surmised that Employee's actions, along with Agency's responses to her inquiries regarding the completion of the pertinent training certificates, did not amount to a deliberate refusal to comply with supervisory instructions. Rather, she believed that the record simply reflected Employee's untimely completion of one training assignment on May 13, 2020.<sup>11</sup> Accordingly, she opined that Agency lacked cause to initiate its termination action.

Regarding the selection of a penalty, the AJ explained that because Agency failed to meet its burden of proof in establishing that it had cause to initiate an adverse action against Employee, the penalty of termination was inappropriate. However, she noted that while it was determined that

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<sup>9</sup> Sigler, an Agency representative, was responsible for disseminating training assignments and collecting completed training certificates.

<sup>10</sup> *Initial Decision* at 18.

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

Agency's charges could not be sustained, assuming *arguendo* cause was properly established regarding Employee's failure/refusal to follow instructions on May 13, 2020, the penalty of termination exceeded the realm of reasonableness. Highlighting the *Douglas*<sup>12</sup> factors, the AJ reiterated that the COVID-19 PHE created unusual job tensions; thus, serving as a mitigating factor that Agency failed to adequately consider. Also, she believed that Agency did not give proper deference to the fact that Employee's supervisor was detailed to a different agency during the relevant time period and did not supervise Employee's daily activities. As such, the AJ opined that Agency's termination action was excessive based on Employee's failure to submit one assignment in a timely manner.<sup>13</sup>

Lastly, the AJ considered Employee's previous discipline and noted that the range of penalty for a subsequent offense of failure/refusal to follow instructions ranged from a fourteen-day suspension to removal. Thus, assuming Agency established cause to initiate a termination action based on this charge, the AJ stated that she would have reversed the penalty and invoked a fourteen-day suspension pursuant to the DPM. However, because Agency failed to meet its burden of proof in this matter, the AJ instead determined that the charges against Employee could not be

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<sup>12</sup> The factors are provided in the matter *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The court held that an agency should consider the following when determining the penalty of adverse action matters: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

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

sustained. Therefore, Agency's termination action was reversed, and it was ordered to reinstate Employee with backpay and benefits.<sup>14</sup>

Agency disagreed and filed a Petition for Review with the OEA Board on May 25, 2022. It argues that Employee deliberately refused to comply with proper supervisory instructions by not submitting trainings assigned on May 13, 2020; therefore, it established cause to remove Employee. Additionally, it asserts that Employee knowingly and willfully reported false information to Agency by representing that she was not able to take assigned training classes at the time they were posted because of her remote learning session with her son. It also opines that the selected penalty of termination was reasonable under the circumstances. Thus, it asks that this Board reverse the Initial Decision and uphold its termination action.<sup>15</sup>

#### Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

#### False Statements/Records

Agency charged Employee with violation of 6B DCMR § 1607(b)(4) for providing false statements and for knowingly and willfully reporting false or misleading, material information or purposely omitting material facts to a supervisor. Specifically, Agency alleged that on May 6, 2020, Employee requested a written accommodation to complete assigned trainings because of her son's remote learning schedule, which was purported to be Monday through Friday, from 9:00

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<sup>14</sup> *Id.*

<sup>15</sup> *Petition for Review* (May 25, 2022).

a.m. to 3:30 p.m. Agency claims that after reviewing the Zoom schedule, consulting with the Director of Employee Policy for the son's school, KIPP DC, and referencing the school's website, it was determined that Employee provided misleading information regarding her child's distance learning schedule. It claims that Employee's representations were knowingly untruthful because after learning that her trainings differed from those of her peers who were able to participate in live webinars, Employee withdrew her initial request for an accommodation soon after it was granted. After requesting evidence of her son's learning schedule, Agency provides that Employee only produced a January 14, 2020, IEP that predated the COVID-19 PHE, and did not explain that she was required to monitor her child from 9:00 a.m. to 3:30 p.m. Therefore, it maintains that Employee made false statements in an effort to avoid completing assigned trainings and avers that the AJ's conclusion to the contrary was erroneous.

The AJ held that Agency failed to provide sufficient evidence to show that Employee knowingly provided false statements/records to Agency regarding her son's learning schedule. After reviewing the record and the testimonial evidence during the evidentiary hearing, she concluded that Agency did not ask for any written proof regarding her child's school hours until after Employee requested that the scheduling accommodation be revoked. The AJ noted that Employee provided Agency with a screenshot from her son's teacher which reflected a specific schedule for one date. Employee further granted Agency permission to contact her son's teacher to inquire about the specifics of the distance learning schedule. In support thereof, the AJ relied on an email correspondence from the Director of Employee Policy at KIPP DC indicating that there was no one schedule that students were to abide by and acknowledged that many parents were precluded from being able to work as they normally would in light of the PHE. Thus, the AJ deemed it unreasonable that Agency would determine that Employee knowingly provided false



statements in light of the evidence presented and the ongoing challenges of remote learning in 2020. Further, she opined that Agency's allegations did not comport with the testimony provided by Human Resources Supervisor, Shalonda Frazier, who testified consistently that District agencies were told to be as flexible as possible during the unprecedented times.<sup>16</sup>

This Board agrees with the AJ's assessment of this charge and finds that her conclusions are supported by substantial evidence. The D.C. Court of Appeals in *Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989), provided that great deference to any witness credibility determinations is given to the administrative fact finder. Similarly, the courts in *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) and *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 683 A.2d 470, 477 (D.C.1996), provided that due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. The *Okyiri* Court held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary.

Here, the AJ was the administrative finder of fact and was therefore in the best position to evaluate the veracity of witness testimony. She found Employee's testimony to be credible in that her son had varying schedules because of his IEP needs. The AJ further concluded that absent more specific confirmation regarding the son's daily schedule, Agency failed to produce sufficient evidence that Employee knowingly provided false or misleading information. We believe that the AJ provided a thorough and reasonable assessment of this charge and that her conclusions of law flow rationally from the facts. Therefore, we will leave her findings undisturbed. Consequently,

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<sup>16</sup> *Evidentiary Hearing Transcript*, pgs. 129-178.

there is substantial evidence in the record to support a finding that Agency failed to meet its burden of proof that Employee violated 6B DCMR § 1607(b)(4) by willfully providing false statements/records.

#### Failure to Follow Instructions

Employee was also charged with the “Failure/Refusal to Follow Instructions, in violation of 6B DCMR § 1607.2(d)(2). This cause of action includes the deliberate refusal to comply with rules, regulations, written procedures, or proper supervisory instruction. In *Okyiri supra*, the Court interpreted a previous, similar iteration of the DCMR which addressed the charge of insubordination. The Court provided that in order to establish a deliberate or malicious failure to comply with instructions, an agency must show both that the employee was given clear instructions and that the supervisor had the authority to issue the instructions.<sup>17</sup>

In its Notice of Proposed Separation, Agency specified that on May 12, 2020, Employee’s supervisor, Mia Bowden (“Bowden”), received an email from Employee stating that she did not complete her online training that day because of her son’s all-day remote learning schedule. Bowden replied to Employee, reminding her of the special accommodation that was provided to Employee on May 7, 2020, along with the instructions to complete and submit the May 12<sup>th</sup> trainings on May 13<sup>th</sup>, along with that day’s completed training. According to Agency’s notice, Employee intentionally failed to complete the trainings because she claimed that it was unfair to be assigned trainings that differed from her coworkers. As a result, Agency believed that Employee deliberately and maliciously refused to comply with proper supervisory instructions.<sup>18</sup>

#### *May 12, 2020, Trainings*

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<sup>17</sup> *Id.* at 946. *See also* 6-B DCMR § 1619.1(f)(4)(2008)(defining insubordination),

<sup>18</sup> Notice of Proposed Separation (September 2, 2020).

In her decision, the AJ explained that Employee expressed challenges in completing trainings during the PHE because her son, who had an IEP, required Employee's supervision from 9:00 a.m. to 3:30 p.m. During the evidentiary hearing, Employee testified that she completed and submitted proof of the May 12<sup>th</sup> trainings on that day and provided forwarded emails to prove that the trainings were submitted. The record also supports this conclusion. Agency's reviewing Hearing Officer noted the receipt of the forwarded completion certificates for May 12<sup>th</sup>, although Employee initially and inexplicably informed her supervisor that she did complete the training. Moreover, Agency representative Sigler, who was responsible for collecting completed training certificates, testified that the dates reflected on Employee's certificates were the dates on which they completed.<sup>19</sup> While Sigler opined that Employee did not complete the May 12, 2020, trainings on time, she failed to produce any evidence that the trainings were not completed by Employee.

Accordingly, this Board finds that there is substantial evidence in the record to support a finding that Employee successfully completed her assigned May 12<sup>th</sup> trainings. The Court in *Okyiri*, (quoting *Kennedy v. District of Columbia*, 654 A.2d 847, 854 (D.C.1994); and *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 683 A.2d 470, 477 (D.C.1996)), provided that due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. As previously iterated, this is true even if the record also contains substantial evidence to the contrary. In reviewing the record, we can find no credible basis for disturbing the AJ's ruling on this issue. Since Employee provided evidence that she completed and submitted the May 12<sup>th</sup> training certificates, Agency was not permitted to rely on this date as a basis for initiating its adverse action against Employee.

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<sup>19</sup> *Evidentiary Hearing Transcript*, p. 110-111.

*May 13, 2020, Trainings*

Agency's Proposed Notice of Separation also cited to Employee's alleged failure to complete the assigned trainings on May 13<sup>th</sup>. While Agency's proposed notice did not specifically mention May 14<sup>th</sup> as a date Agency relied on in reaching its decision to initiate an adverse action against Employee, the Proposing Official's Rationale Sheet referenced May 14<sup>th</sup> as a basis for imposing the termination action. However, because employees can only be expected to defend against the charges actually levied against them, this Board will determine whether the AJ's conclusions regarding Employee's failure to complete the May 13<sup>th</sup> trainings is supported by the record, as this date is explicitly referenced in the proposed notice. We agree with the AJ's analysis of this issue and find that her conclusions are based on substantial evidence.

The record reflects that on May 13, 2020, at approximately 2:00 p.m., Employee emailed Bowden to inquire about why her assigned trainings differed from those of her peers. Bowden, who testified that she normally answered emails after normal business hours, informed Employee that her trainings were different because of the accommodation that was afforded to her.<sup>20</sup> The following morning, Employee replied to Bowden's email, stating that she did not complete the May 13<sup>th</sup> trainings because she was awaiting an answer to her previous email. Moreover, Sigler confirmed that on May 14, 2020, Employee completed the May 13<sup>th</sup> trainings and submitted her assignments for May 14<sup>th</sup> by 7:00 p.m.<sup>21</sup>

Notwithstanding the lag in communication between Employee and her supervisor regarding the difference in trainings, as well as Employee's rationale for failing to complete the assigned trainings, it is evident from the record that Employee did not submit the May 13<sup>th</sup> trainings by the prescribed deadline. The AJ provided a thorough analysis of this issue and this Board agrees

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<sup>20</sup> *Id.* at p. 214.

<sup>21</sup> *Id.*, Agency Exhibit A-4.

with her rationale for reaching her conclusions. The evidence does not suggest that Employee's failure to complete that days' assignments constituted a deliberate or malicious refusal to follow instructions. Rather, we believe it was reasonable for her to await a response from Bowden regarding her inquiry as to the difference in assignments. While Agency disagrees with the AJ's rationale, a finding of substantial evidence may still be determined even where there is evidence in the record to reach an alternative conclusion. Accordingly, the AJ's conclusion is supported by the record.

### Penalty

This Board is therefore tasked with determining if termination was proper in light of Employee's untimely submission of her training assignments on May 13, 2020. 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).<sup>22</sup> According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.<sup>23</sup> Here, there is substantial evidence in the record to support the AJ's

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<sup>22</sup> *Anthony Payne v. D.C. Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No.1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

<sup>23</sup> The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. *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 and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011). Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No.

finding that Agency was unable to meet its burden of proof as it related to the charge of False Statements/Records. Since cause was not established, this Board will not discuss the penalty for this charge.

Under the DPM Table of Illustrative Actions, the range for a subsequent charge of Failure/Refusal to Follow Instructions is a fourteen-day suspension to removal.<sup>24</sup> As previously discussed, Agency failed to meet its burden of proof that Employee failed to complete and submit her May 12, 2020, training assignments. Thus, the remaining issue is whether the penalty of termination was appropriate based on Employee's failure to complete her May 13, 2020, trainings in a timely manner, as they were submitted on May 14, 2020.

Douglas Factors

Agency argues that it properly considered the *Douglas* factors as to both causes of misconduct and contends that its decision to remove Employee should be affirmed as a reasonable exercise of Agency's discretion. OEA held the following in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011):

[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)).

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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.

<sup>24</sup> Agency previously charged Employee with Failure to Follow Instructions and received a three-day suspension.

Additionally, in *Garner-Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14, (July 11, 2017), the OEA Board held that an Agency's penalty decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion. In *D.C. Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005), the Court noted that "not all of these factors will be pertinent in every case," but the "[s]election of an appropriate penalty must involve a responsible balancing of the relevant factors. . . ." The Court in *Colbert* further noted that "[w]here the agency failed to do so, the reviewing entity is free to rectify the error by directing an appropriate punishment, if any."<sup>25</sup>

In this case, the AJ concluded that the evidence established an abuse of managerial discretion by Agency and that Agency failed to properly consider mitigating factors, namely the unusual job tensions which existed during the PHE. She noted that Agency listed this factor as "neutral" and stated that Agency believed that there were no mitigating factors. According to the AJ, the penalty of termination exceeded the realms of reasonableness based on Employee's untimely submission of one days' worth of training assignments. She also noted that Agency failed to consider that Employee did not receive an answer to her inquiry regarding her May 13<sup>th</sup> trainings until after the deadline for submission has passed. While this Board understands Agency's position on this matter, pertinent case law supports the AJ's authority to alter the penalty upon finding an abuse of discretion. The AJ carefully considered the record, along with the testimonial evidence, in reaching her conclusion that termination was improper in this case. While Agency disagrees with such a conclusion, there is substantial evidence in the record to uphold her conclusion that the adverse action should be reversed. Consequently, we must uphold the Initial Decision and deny Agency's Petition for Review.

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<sup>25</sup> *Id.* at 361.

Conclusion

Agency did not establish had cause for the charge of False Statements/Record. As it relates to the Failure to Follow Instructions charge, the evidence supports a finding that Employee submitted the May 13, 2020, trainings in an untimely manner, but failed to properly consider the *Douglas* factors. Additionally, Agency's selection of the penalty constituted an abuse of discretion. As a result, this Board finds that the Initial Decision is based on substantial evidence. Consequently, Agency's Petition for Review is Denied.



**ORDER**

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**.

**FOR THE BOARD:**

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.