Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. 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[1]	)	OEA Matter No. 1601-0048-18
	)	OEA Matter No. 1601-0015-18-R19
	)	
v.	)	Date of Issuance: June 17, 2021
	)	
DEPARTMENT OF HUMAN SERVICES,	)	MONICA DOHNJI, Esq.
Agency	)	Senior Administrative Judge
	)	

Daniel Trujillo Esmeral, Esq., Employee Representative[2]
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION
INITIAL DECISION ON REMAND[3]

INTRODUCTION AND PROCEDURAL HISTORY

On November 27, 2017, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Human Services'("Agency") decision to suspend her for thirty (30) days effective October 30, 2017. Agency filed its Response to Employee's Petition for Appeal on December 29, 2017. This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on April 4, 2018. The undersigned issued an Initial Decision ("ID") in this matter on August 24, 2018, dismissing this matter for Employee's failure to prosecute.[4] Employee filed a Petition for Review appealing the ID to the OEA Board on September 28, 2018. Agency filed an Answer to the Petition for Review on November 2, 2018. The OEA Board issued its Opinion and Order in this matter on February 26, 2019, granting Employee's Petition for Review and remanding the matter to the undersigned for further consideration.[5]

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee was represented by attorney Matthew Estes from when the decision was remanded to the undersigned by the OEA Board until the end of the Evidentiary Hearing. Current counsel entered his appearance in this matter after the Evidentiary Hearing.
[3] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[4] *See Employee v. Department of Human Service*, OEA Matter No. 1601-0015-18 (August 24, 2018).
[5] *See Employee v. Department of Human Service*, OEA Matter No. 1601-0015-18, Opinion and Order on Petition for Review (February 26, 2019).

On May 18, 2018, Employee filed a second Petition for Appeal with this Office, contesting Agency's decision to remove her from her position effective April 20, 2018. Agency filed an Answer to Employee's Petition for Appeal on June 20, 2018. Following a failed mediation attempt, this matter was also assigned to the undersigned SAJ on September 4, 2018.

Subsequently, the parties agreed that the suspension and removal actions be consolidated for efficiency purposes. Thereafter, a virtual (via WebEx) Evidentiary Hearing was held on August 3 & 4; November 30 and December 1, 2020.[6] Both parties were present for the Evidentiary Hearing. Later, the undersigned issued an Order requiring the parties to submit written closing arguments. Both parties have filed their respective closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Agency violated the ninety (90) day rule;
2) Whether Agency's action of suspending Employee for thirty (30) days was done for cause;
3) Whether Agency's action of terminating Employee was done for cause; and
4) Whether the penalties of suspension and removal were within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Agency hired Employee effective March 30, 2009, as a Social Worker.[7] On December 6, 2009, Employee was reassigned to the position of a Case Manager within Agency. Employee accepted the reassignment to the Case Manager position on December 9, 2009. On October 20, 2013, Employee was again reassigned to the position of Social Worker, after she became licensed as an Independent Clinical Social Worker ("LICSW"). On October 5, 2014, Employee was promoted to the position of Social Worker in Agency's Family Services Administration division. On September 19, 2017, Agency issued an Advanced Notice of Proposed 30-day suspension ("Suspension Notice") to Employee.[8] Employee was suspended for the following causes of action[9]:

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[6] Throughout this decision, Vol. I denotes the transcript for Day 1 (August 3, 2020); Vol. II denotes the transcript for Day 2 (August 4, 2020); Vol. III denotes transcript Day 3 (November 30, 2020); and Vol. IV denotes the transcript for Day 4 (December 1, 2020).
[7] Prior to joining Agency, Employee was employed by the D.C. Child and Family Services Agency.
[8] Agency Answer at Tab 4 (December 29, 2017).
[9] *Id*.

1) Neglect of Duty – Failure to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; 6B DCMR.

   Proposed Penalty: 30-day Suspension.

2) DPM 1607.2(d) (1) (2) Failure/Refusal to follow instructions – Negligence; including the careless failure to comply with rules, regulations, written procedures or proper supervisory instructions; and (2) Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions.

   Proposed Penalty: 30-day Suspension.

3) DPM 1607.2(f)(1)(a); (3) Attendance related offenses – Unexcused tardiness; Unauthorized absences of one (1) workday or more, but less than five (5) days.

   Proposed Penalty: 30-day Suspension.

On October 27, 2017, Agency issued its Final Agency Decision, suspending Employee for 30-days, effective October 30, 2017 through November 28, 2017.[10] Thereafter, Employee filed a Petition for Appeal with OEA contesting the 30-day suspension. This matter was dismissed in an ID dated August 24, 2018, due to Employee's failure to prosecute. Employee appealed the ID to the OEA Board. On February 26, 2019, the OEA Board issued its Opinion and Order in this matter granting Employee's Petition for Review and remanding the matter to the undersigned for further consideration.

Following Employee's return to work after the 30-day suspension, Agency issued an Advanced Notice Proposed Termination ("Termination Notice") to Employee on March 1, 2018.[11] Employee was charged with the following causes of actions and specifications:

1) DPM 1067.2(f)(1)(a); (3) Attendance related offenses – Unexcused tardiness, including delay in reporting at the scheduled starting time; Unauthorized absence of one (1) workday or more, but less than five (5) workdays.

2) DPM 1607.2(d) (1)(2) Failure/refusal to Follow instructions – Negligence; including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions; and (2) deliberate or malicious refusal to comply with regulations, written procedures, or proper supervisory instructions.

[10] *Id*.
[11] *See* Agency Answer at Tab 7.

Employee emailed a response to the Advanced Notice of Termination on March 11, 2018. Thereafter, the removal action was assigned to a Hearing Officer who issued her findings on April 17, 2018, recommending that Employee be terminated from her position as proposed.[12] On April 18, 2018, Agency issued its Notice of Final Decision on Proposed Removal terminating Employee from her position as a Social Worker effective April 20, 2018. Employee filed a second Petition for Appeal with OEA on May 18, 2018. Since the Petition for the suspension matter was still pending before the undersigned, the parties agreed to consolidate these matters.

Analysis

1) Whether Agency violated the ninety (90) day rule

Employee argues that many of the allegations and specifications in the charges levied against her in the suspension and termination matters were barred by the "ninety-day rule" established by District of Columbia law, which mandates that corrective and adverse actions against District of Columbia employees be commenced within ninety days of the date that the employer knew or should have known of the employee conduct supporting the corrective or adverse action. Employee asserts that Agency disregarded this legal mandate and based its charges on conduct occurring outside the ninety-day window.

District Personnel Manual ("DPM") §1602.3(a) provides as follows:

> §1602.3: Corrective and adverse actions taken against employees are subject to the following limitations:
>
> a. A corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action;

In the instant matter, I find that Agency violated the ninety-business-day rule with regards to some of the conduct supporting the thirty (30) days suspension matter. With regards to the charge for Neglect of Duty for the suspension action, Agency noted in its Suspension Notice that on April 25, 2017, Eddie Lindler, Employee's former supervisor met with her to discuss her failure to meet with her clients twice a month, and Employee agreed during the April 25, 2017, meeting that she needed to meet with her clients twice each month. Agency also noted in the Suspension Notice that it became aware of Employee's performance deficiency after a review of her cases was conducted on July 3, 2017. Agency used both the April 25, 2017, conduct and what it discovered on July 3, 2017, to support the Neglect of Duty cause of action against Employee. Accordingly, I find that Agency knew or should have known of this conduct on April 25, 2017, when Employee's supervisor, Lindler met with Employee. Pursuant to DPM §1602.3(a), *supra*, I find that Agency violated the ninety-business-day rule as it relates to the April 25, 2017, conduct, because Agency commenced adverse action more than ninety-days after Agency became aware of the conduct. Agency issued the Suspension Notice on September 19,

[12] *Id*. at Tab 5.

2017, 102 business days from when it knew or should have known of the April 25, 2017, incident.

Regarding the misconduct discovered during the July 3, 2017, review, I find that Agency did not violate the ninety-business-day rule in this instance as it issued its Suspension Notice on the 54th day from when the review was conducted. As such, Agency cannot use the April 25, 2017, conduct or performance in support of its Neglect of Duty cause of action for the suspension matter.

For the second cause of action under the suspension matter - Failure/Refusal to follow instructions, I find that Agency did not violate the ninety-day rule. All the specification conduct in support of this action commenced within ninety business days from when Agency knew or should have known of the conduct, to when Agency issued the Suspension Notice. Specifically, the earliest conduct in support of this action commenced on June 13, 2017. Agency commenced adverse action on September 19, 2017, the 67th business day from when it knew of the alleged conduct. Consequently, I conclude that, all the performance or conduct in support of this cause of action are not in violation of the ninety-business-day rule.

For the third cause of action under the suspension matter - Attendance related offenses, I find that Agency violated the ninety-business-day rule with regard to some of the conducts that support this action. Specifically, all the conduct that Agency knew or should have known occurred before May 11, 2017, are in violation of the 90-day rule. The time period between May 11, 2017, to September 19, 2017, is exactly ninety business days. These conducts include the March 2, 2017, incident (139 business days); the April 10, 2017 incident (112 business days); and the April 19, 2017 incident (106 business days). Agency knew of these specific instances of conduct more than ninety-business-days, before Agency issued the Suspension Notice, on September 19, 2017. The OEA Board in *Keith Bickford v. District of Columbia Department of General Services*, OEA Matter No. 1601-0053-17, Opinion and Order on Petition for Review (January 14, 2020) found that the 90-day rule was mandatory and not discretionary. Therefore, I find that Agency is barred from using these conducts to support this cause of action. I also find that all the specifications in support of the termination action are within the 90-day period.[13]

1) Whether Agency had cause for adverse action

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency suspended and eventually terminated Employee for violating the following actions: Neglect of Duty; Failure/Refusal to follow instructions; and Attendance related offenses.

[13] *See* District of Columbia Department of General Services v. Office of Employee Appeals, 2020 CA 001096 P(MPA), February 5, 2021.

30-day Suspension

Neglect of Duty

Agency charged Employee with Neglect of Duty – Failure to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; 6B DCMR. Specifically, Agency noted that:

> As a Social Worker with the Teen Pregnancy Assessment Program you are required to meet with each client two times a month. You have not been meeting this requirement and on April 25, 2017, Eddie Lindler, who was your supervisor at that time, met with you to discuss this and you agreed that you needed to meet with your clients twice each month. On July 3, 2017, a review of your case notes reveal that you have not been meeting with each of your clients twice per month. In fact, your case notes reveal that you did not meet with *any* of your clients twice a month. Your case notes reveal that you did not meet with many of your clients for months. (Emphasis added).
>
> Proposed Penalty: 30-day suspension.

In this matter, since Agency violated the ninety-business-day rule with regards to the April 25, 2017, incident, Agency is barred from using this conduct to support this action. Agency also stated that upon a review of Employee's case notes on July 3, 2017, it discovered that Employee had not been meeting with each of her clients twice per month. However, the Suspension Notice does not specify which clients Employee did not meet with twice a month, and the specific months that Employee did not meet with her clients.

Furthermore, during the Evidentiary Hearing, Hillary Cairns ("Cairns"), the Deputy Administrator over the Youth Services Division and the proposing official of the 30-day suspension stated that Employee did not meet with her clients twice a month because the case note review done by Employee's former supervisor, Lindler and current supervisor, Deborah Harper ("Harper") did not have documentation. She explained that the supervisors know a meeting occurred based on the information put in the case notes. Tr. Vol. I. pgs. 66-67. Harper also affirmed during the Evidentiary Hearing that she was Employee's supervisor on July 3, 2017. Tr. Vol. II. pg. 39. She confirmed that based on her review of Employee's case notes on July 3, 2021, Employee had not met with many of her clients for months. Tr. Vol. II. pgs. 39 - 40.

However, on cross-examination, Harper noted that she does not recall the months referred to in the proposed suspension. While referencing Employee's Exhibit 1, the Advanced Notice of Proposed 30-day suspension, Harper affirmed that when she reviewed Employee's case notes on

July 3, 2017, she was looking back to June and previous months. Tr. Vol. II. pgs. 119 -120. Harper does not recall if she verified whether Employee made efforts to meet with her clients at least two times a month. She noted that she does not recall making notes of whether Employee's failure to meet with the clients as required was Employee's fault. Tr. Vol. II. 122.

Referencing Agency's Exhibit 7, Bates Stamp 887, Harper stated that the document looked like case notes, but she could not say for sure, if they were case notes that occurred in the CATCH system.[14] Tr. Vol. II. pg. 124. She acknowledged that the information in the document is the type that is found in the CATCH system. Tr. Vol. II. pg. 124. In reviewing the CATCH system, Harper acknowledged the information of one of Employee's clients with initials P.J.[15] She also identified Employee as the person entering the notes in the CATCH system. Harper also acknowledged an in-person interaction date for P.J. dated May 22, 2017. Tr. Vol. II. pg. 125. She again affirmed another in-person interaction with P.J. dated May 25, 2017. Tr. Vol. II. pg. 126. Harper stated that she does not recall seeing the case note on P.J. with an in-person meeting dated June 1, 2017. She affirmed that according to the record, the case note detailing the June 1, 2017, meeting was entered into the system on June 2, 2017, at 7:12 p.m. Tr. Vol. II. pg. 126. Harper noted that she does not recall seeing the June 15, and June 22, 2017, face-to-face interaction between Employee and the client P.J., but noted that it is possible it occurred. Harper confirmed that the June 1, and June 15, 2017, would constitute two face-to-face meetings with P. J. for June of 2017. She explained that P.J. was one of the clients Employee met with twice. Tr. Vol. II. pg. 127.

Harper also testified that she does not recall seeing a June 1, 2017, or June 21, 2017, face-to-face interaction between Employee and a client with initials C.V. during her July 3, 2017, review of Employee's case note. Tr. Vol. II. pg. 128. She also does not recall seeing a face-to-face interaction between Employee and C.V. dated June 26, 2017, during her July 3, 2017, review. She explained that she does not recall specific case notes that she reviewed on July 3, 2017. Tr. Vol. II. pg. 129. Harper acknowledged that for at least two clients (P.J. and C.V.), Employee had at least two face-to-face interactions with each of them in June of 2017. Tr. Vol. II. pg. 130. Harper testified that she indicated to Employee which cases were lacking the required meeting, but she does not recall when. Harper, however, contradicted herself when she explained that she was going to discuss the cases with Employee during the supervisory meeting that Employee did not attend. She reiterated that she does not recall when and how she communicated the information to Employee. Tr. Vol. II. pgs. 130-131. She stated that Employee refused to meet with her to discuss her clients. She explained that she did not remember reviewing Employee's case notes or making notation during her July 3, 2017, review. Tr. Vol. II. pg. 131.

Based on the above testimony, and the evidence in the record, I find that Agency does not have cause to charge Employee with Neglect of Duty. Employee had multiple clients that she worked with, and there is evidence in the record to show that Employee met with at least two of

[14] The CATCH System is a case reporting/management computer system used by Agency employees to document their interaction with their clients.
[15] To protect the individual's privacy, P.J. represents the first and last initial of the client's name.

her clients twice a month, contrary to Agency's assertion that she did not meet with *any* of her clients twice a month (emphasis added). Further, the Suspension Notice failed to specify the clients that Agency asserts that Employee did not meet with for months. Moreover, Agency has not provided this Office with any evidence to the contrary, or with any evidence to support its assertion that Employee did not meet with many of her clients for months. Accordingly, I find that Agency cannot charge Employee with Neglect of Duty.

Failure or Refusal to Follow Instructions

Agency also charged Employee with Failure or Refusal to Follow Instructions. The DPM provides that failure or refusal to follow instructions constitutes cause for adverse action.[16] In addition, DPM §1607.2(d) defines failure/refusal to follow instructions to include (1) *Negligence, including the careless failure to comply with rules, regulations*, *written procedures, or proper supervisory instructions*; (2) *Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions*; (3) Failure to submit required statement of financial interests and outside employment (emphasis added).

In the current matter, Agency suspended Employee for failure or refusal to follow instruction based on several instances of misconduct. Agency stated in the Suspension Notice as follows: "On June 13, 2017, you refused to meet with supervisor at 3:30 p.m., after a home visit, that according to your calendar, concluded at 2:00 p.m. You stated that you don't know why a meeting was scheduled for Tuesday when you don't come into the office on Tuesdays. Also, according to your case notes, no home visits to any clients was made on this date."

Employee testified that she did not attend her 3:30 p.m. meeting with her supervisor on June 13, 2017, because she had a client home visit from 12:00 p.m. to 2:00 p.m. She explained that the time block on her calendar was only approximate; she could not guarantee the meeting with the client would be over at 2:00 p.m. Moreover, she asserted that transportation to and from the locations had to also be factored in. Tr. Vol. IV. pgs. 38-39. Employee stated that she emailed Harper while she was out in the community to notify her that she would not be returning to the office. Tr. Vol. IV. pg. 40. Employee also explained that her field day was Tuesdays and Harper was aware of that. And usually, when an employee is in the field, they don't come back to the office. Tr. Vol. III. pg. 200. She further noted that field schedule is flexible, and you cannot plan anything when you are in the field meeting with a teenager. Employee stated that if she received a meeting invitation on her field day, she declined the invitation because the time was not convenient. Tr. Vol. II. pgs. 202 -204.

There is evidence in the record to support the assertion that Employee declined to attend her 3:30 p.m. meeting with her supervisor on June 13, 2017. Employee herself acknowledged that she did not meet with her supervisor on June 13, 2017. However, there is also evidence in the record that Employee was in the field during the scheduled meeting. Harper was notified on June 12, 2017, that Employee declined a YHS Team meeting because she was not in the office

[16] DPM §1605.4(d).

on Tuesdays.[17] Thus, I find that Harper was on notice that Employee was out in the field on Tuesdays and there was a possibility that she would not make the meeting. On June 13, 2017, Employee emailed Harper declining her one-on-one meeting with Harper, stating that she would not be returning to the office that day. She noted that she was available the next day at 9:30 a.m., or on Friday morning.[18] Harper responded to the email at 3:37 p.m. on June 13, 2017, stating that "[Employee] your schedule indicates that you do not have any appointments scheduled at this time. So you should be available to meet with me. Please explain."[19] There is no follow up email or response from Employee in the record.

However, based on the case notes entered into the CATCH system by Employee on June 14, 2017, Employee noted that she had a telephone interaction with a client at 3:30 p.m. to discuss future housing and educational goal with the client.[20] The record shows that (1) Employee was in the field working during the time of the scheduled meeting with Harper; (2) Employee informed Harper that she would not make the meeting and suggested an alternate meeting date; and (3) Harper was made aware prior to the date of the scheduled meeting that Employee was not in the office on Tuesdays because it was her field day. Accordingly, I find that Employee did not refuse to follow instructions when she declined to attend the scheduled meeting because she was out in the field performing work related duties. Moreover, Cairns acknowledged that employees occasionally rescheduled supervisory meetings when they are out in the communities and they have a scheduling conflict. Tr. Vol. I. pg. 90. She explained that these employees are not usually disciplined because it had been discussed and a different time was mutually agreed on. Tr. Vol. I. pg. 90. Although Harper stated that it was possible that Employee was lying about the 3:30 p.m. time listed in the case notes, she has no proof to back up this allegation. Tr. Vol. II. pg. 142. Also, I find that declining a meeting invitation because of a conflict in schedule does not constitute a failure or refusal to follow instructions. Consequently, I find that Agency cannot use this conduct to support this cause of action.

Next Agency stated that on June 26, 2017, "during a supervisory meeting with your new supervisor Deborah Harper, when asked to discuss the cases on your caseload you asked Ms. Harper what her background and experience were and if she was a DC license social worker. Ms. Harper asked you why were you asking this and your response was that you wanted to know if she is qualified to supervise you because you are a Licensed Clinical Social Worker (LICSW). Ms. Harper stated that she was qualified to supervise you and you stated that she wasn't. You further stated that you will discuss administrative tasks but that you would not discuss any of your cases with Ms. Harper. You then left Ms. Harper's office."

There is evidence in the record to support this assertion. Harper affirmed that Employee came to the meeting on June 26, 2017, with her case files, asked about Harper's social work qualifications, then refused to be supervised. Tr. Vol. II. pgs. 149 -150. Harper asserted that

[17] Employee Exhibit 11.
[18] Agency's Exhibit 3 at pg. 27.
[19] Agency's Exhibit 3 at pg. 28.
[20] Employee's Exhibit 3 at pg. 296.

Employee asked about Harper's qualifications and confirmed that Harper was not a D.C. license social worker and that she was concerned about maintaining her own license. Tr. Vol. II. pg. 151. Harper stated that Employee then informed her in a nasty tone, that Harper was not qualified to supervise her and that she was not risking her license to be supervised by Harper. She maintained that Employee spoke to her as if she had no experience in her career. Tr. Vol. II. pg. 150. Harper affirmed that she also raised her voice during the June 26, 2017, meeting with Employee. Tr. Vol. II. pg. 155. Harper explained that she raised her voice so she could be heard when Employee was standing up, talking loud towards her and stating the she was not going to let Harper cause her to lose her license. Tr. Vol. II. pg. 159. Employee asserted that she did not refuse to discuss her cases with Harper. She maintained that Harper became offensive, defensive and annoyed when she asked her background and experience. Employee testified that the meeting ended when she got up and left the meeting because Harper was out of control.

A review of the record shows that this is not the first time Employee raised the issue of being supervised by a non LICSW supervisor. In 2013, Employee raised the same issue when she was supervised by Cairns. In January of 2014, Agency informed Employee via email that Cairns was fully qualified to supervise the work of subordinates in the program assigned to her. Employee was advised that Cairns was qualified to supervise the work Employee did, which was largely case management. Employee was also informed that while she may hold a social work license, the nature of her work, case management, does not require a social work license to perform.[21] Additionally, Harper testified that one of the employees she supervised, and who performed the same duties as Employee, Willie Comer, was not a licensed social worker, but a case manager. She added that Henry Jones, Willie Comer and Employee were under her direct supervision when she started at TPAP. Tr. Vol. II. pg. 12. Harper also noted that all the TPAP staff performed the same role. Tr. Vol. II. pg. 12. Harper stated that Comer was a bachelor's level social worker, and Jones and Employee were master's level social workers. Tr. Vol. II. pgs. 12 - 13. Harper affirmed that when he started at TPAP, Jones, Comer and Employee all performed the same tasks – went into the community, made contact, and updated the CATCH system/notes for TANF clients. Tr. Vol. II. pg. 14. She confirmed that she performed the same supervisory role for all three (3) TPAP staff for a period of time. Tr. Vol. II. pg. 15. Harper affirmed that Employee and Jones had the same license credentials. Harper also noted that Jones and Comer never had issues with being supervised by Harper. Tr. Vol. II. pg. 16. Clearly, Employee was on notice as far back as 2014, that whomever was assigned as her supervisor did not require a social work license to supervise her given the nature of her work – case management. As Agency clearly stated in the January 2014, email that while Employee was a licensed social worker, a social work license was not required to perform her job.

Harper was assigned to supervise Employee, however, Employee refused to be supervised by Harper, claiming that Harper did not have the qualification and experience to supervise her. Employee made this claim even though she had been made aware in the past that the nature of her work did not required a social work license. Employee went as far as walking out of a scheduled supervision meeting stating that she would discuss administrative tasks, but she would not discuss any cases with Harper. Cairns testified that based on the information they

[21] Agency Answer, *supra*, at Tab 1. Pg. 116.

got from Agency's Human Resources ("HR") division and the Board of Social Work; Harper was qualified to supervise Employee. Tr. Vol. I. pg. 56. Cairns highlighted that the licensed independent social worker credential was not required to perform the job. She also noted that a licensed independent social worker credential was not required to perform administrative supervision of people who performed the work that Employee did. Tr. Vol. I. pg. 172.

Cairns explained that Employee is a LICSW, but she did not have to be supervised in a Clinical way. She noted that there is a difference between clinical and administrative supervision. Tr. Vol. I. pgs. 55-56. Cairns testified that Harper was an administrative supervisor. Tr. Vol. I. pg. 56. Harper's supervisory duties was ensuring that employees were meeting the basics of their job – whether the employee was seeing their clients the required amount of time; the status of the young people they are working with; time and attendance; team discussion and policies. Tr. Vol. I. pgs. 56-57. According to Cairns, Employee claimed that she could not be supervised by someone who did not have a license. Cairns reiterated that based on the information they got from HR and the Board of Social Work; this assertion was incorrect, and Harper was qualified to supervise Employee. Tr. Vol. I. pg. 56. Sharon Kershbaum ("Kershbaum"), Chief Operating Officer at Agency, testified that she researched Employee's claimed that her supervisor needed to be clinically licensed by contacting the Department of Health ("DOH") that oversaw the Boards of licensure to receive clarity regarding the issue. The DOH concurred with Kershbaum's and Harper's assessment that the work performed was case management, not clinical work. Thus, Employee was not required to have a licensed supervisor as she requested. Tr. 130-131. Based on the foregoing, I find that by walking out of the supervision meeting with her supervisor, and refusing to be supervised by her assigned supervisor, Employee failed or refused to follow instructions.

Lastly, Agency provided that Employee was suspended because "[o]n July 3, 2017, you were scheduled for a supervisory meeting with Ms. Harper at 3:30 p.m. At approximately 3:45 p.m., Ms. Harper walked by your desk and stated that she was expecting to meet with you at 3:30 p.m. You responded "the building closes at 3". She reiterated the scheduled 3:30 p.m. meeting, to which you responded "they told me I could leave at 3." When asked who told you this, you proceeded to shrug your shoulders and say "they did". When asked what supervisor told you that you could leave at 3:00 p.m., you responded "Daisy told me." When asked if Daisy was a supervisor, you responded "I don't know what her position is." You were told only a supervisor could authorize an early dismissal. You remained at your desk, (eating grapes) and refused to meet with your supervisor."

In the instant matter, there is evidence in the record to support Agency's contention that Employee refused to meet with her supervisor on July 3, 2017, despite being aware of a scheduled supervisory meeting with the supervisor. Employee stated that on July 3, 2017, the staff was informed that they would receive early dismissal. Subsequently, Harper asked Employee when they were going to meet and Employee informed Harper that she was off duty because the staff was dismissed early for the day. Employee testified that because Agency closed early and Employee was off duty, she did not believe that she was required to meet with Harper. She also explained that she did not meet with Harper because she submitted an email to management on June 30, 2017 expressing that she did not want to have further contact or meet

with Harper alone until there was an impartial witness present at their meetings. Tr. Vol. IV. pgs. 42-49.

Harper on the other hand recalled that she and Employee were supposed to meet on July 3, 2017 in her office. But when Employee did not show up for the meeting, she walked over to Employee's cubicle and Employee informed her that she was leaving for the day, because they said they could go home. Tr. Vol. II. pg. 31. When she asked Employee who told her she could go home, Employee stated that Daisy Carr told her she could go home. Harper informed Employee that Carr is not a supervisor and specifically not her supervisor. She also told Employee that only her supervisor had the authority to tell her to go home. Harper stated that the meeting did not take place. Tr. Vol. II. pg. 31. Harper asserted that after she informed Employee that Carr did not have the authority to tell her to go home, Employee stayed at her desk eating grapes while she, Harper, sat in her office and the two never met. Tr. Vol. II. pg. 32.

I disagree with Employee's argument that because Agency closed early and she was off duty, she did not believe that she was required to meet with Harper. Employee was fully aware that Carr was not a supervisor and she did not have the authority to dismiss the staff. I find that Employee refused to follow instructions from her supervisor when she refused to meet with her alleging that she had been informed by a non-supervisory staff that Agency was closing at 3:00 p.m. Moreover, even after Harper informed Employee around the time of the scheduled meeting that only her supervisor had the authority to tell her to go home early, and that Carr was not an Agency supervisor or Employee's direct supervisor; and she did not have the authority to tell her to go home, Employee stayed at her desk and did not meet with Harper. Therefore, I find that Employee's conduct supports Agency's charge for failure/refusal to follow instruction.

Employee also attempted to provide additional justification for not attending the meeting with Harper on July 3, 2017, by arguing that she submitted an email to management on June 30, 2017 expressing that she did not want to have further contact or meet with Harper alone until there was an impartial witness present at their meetings. Tr. Vol. IV. pgs. 42-49. Cairns acknowledged that Agency expected Employee to continue attending the one-on-one meetings with Harper, while it was investigating Employee's allegations from the June 26, 2017, meeting. Tr. Vol. I. pg. 103. Cairns confirmed that while waiting to get a response from HR about Employee's safety concerns, Agency attempted to accommodate Employee by informing her via email dated June 27, 2017, that she could bring her union representative to the July 3, 2017, meeting with Harper. Still, Employee did not attend the scheduled meeting. Tr. Vol. I. pgs. 167 – 168. Based on the above, Employee was made aware of the July 3, 2017, meetings in advance, and was also provided the option to bring a union representative to the meeting. There is no information in the record indicating that Employee had made arrangements for the union representative to be present at the July 3, 2017, which could only lead to the conclusion that (1) Employee had no intention of attending the July 3, 2017, meeting or (2) Employee did not have genuine safety concerns being around Harper. Whatever the reason behind Employee's decision, I conclude that Employee's conduct on July 3, 2017, constituted cause for this adverse action.

Attendance Related Offenses

Agency also suspended Employee for violating DPM 1607.2(f)(1)(a); (3) Attendance related offenses – Unexcused tardiness; Unauthorized absences of one (1) workday or more, but less than five (5) days. Because I find that Agency violated the 90-day rule with regards to the charges that it knew or should have known prior to May 2017, I will not address the March 2, 2017; April 10, 2017 and April 19, 2017, conduct.

In this matter, Agency alleged that Employee was late to a mandatory all-staff meeting on May 22, 2017. Cairns acknowledged that Employee worked fifteen (15) hours on May 22, 2017. However, she also noted that she was not responsible for time, and her responses are based on Employee's Exhibit 9. Tr. Vol. I. pg. 110. Cairns explained that the allegations under Charge Three are based on Employee's attendance at meetings and not her work hours for the day. Tr. Vol. I. pg. 111. DPM 1607.2(f)(1)(a) specifically provides as follows:

(1) Unexcused tardiness, including delay in:

(a) Reporting at the scheduled starting time.

Here, Agency alleges that Employee was late to a mandatory all staff meeting, however, Agency did not provide any evidence in support of this assertion, such as the sign-in sheet stating the time the meeting started and when Employee arrived at the meeting. Moreover, Agency did not disclose if the mandatory meeting was scheduled for the start of Employee's scheduled tour of duty. Accordingly, I find that Agency cannot use this conduct in support of this action.

Next, Agency asserted that Employee missed a mandatory training on May 24, 2017. It noted that Employee sent a text 20 minutes after the start time that she would be absent. Employee could not recall missing any mandatory trainings on May 24, 2017. Harper affirmed that if an employee failed to report that they will be late within one hour, their conduct is considered a time and attendance offense. Tr. Vol. II. pgs. 170 -171. Based on Harper's assertion, I conclude that Employee complied with Agency's attendance policy as she notified Agency within 20 minutes of the scheduled start time of the training. Therefore, I find that Agency cannot use this conduct to support this cause of action.

Agency also stated that Employee arrived late to a mandatory training on May 31, 2017. However, Agency does not disclose if the mandatory meeting was scheduled for the start of Employee's scheduled tour of duty. Absent this information, I conclude that Agency has failed to provide evidence in support of this assertion. Consequently, I find that Agency cannot use this conduct in support of this action.

Agency further asserted that Employee arrived late to a mandatory meeting on June 7, 2017. Employee could not recall missing a mandatory or a regular meeting on June 7, 2017. Agency has not provided any evidence in support of this assertion, such as the sign-in sheet stating the time the meeting started and when Employee arrived at the meeting. Harper testified that a sign-in sheet in placed at the front of the room wherein, the employees are supposed to put the time that they signed-in. Tr. Vol. II. pg. 172. Moreover, Agency has not disclosed if the

mandatory meeting was scheduled for the start of Employee's scheduled tour of duty. Accordingly, I find that this conduct does not support this action.

For the June 14, 2017 conduct, Agency stated that Employee arrived an hour and 20 minutes late for a mandatory training. Employee testified that she could not recall missing mandatory trainings held on June 14, 2017. Here, I find that Agency has not provided any evidence in support of this assertion, such as the sign-in sheet stating the time the meeting started and when Employee arrived at the meeting. Moreover, Agency has not disclosed if the mandatory meeting was scheduled for the start of Employee's scheduled tour of duty. Accordingly, I further find that Agency cannot use this conduct in support of this action.

Agency also averred that Employee arrived 40 minutes late to a mandatory training on July 11, 2017. Employee argued in her closing argument that Agency failed to produce any evidence to substantiate this allegation. She also noted that not arriving to a training is not the same thing as not arriving to work and therefore this should not be considered an attendance-related offense. Employee explained that there is no allegation that she failed to report to work or reported to work later than her scheduled time without an excused absence.[22]

With regards to the July 11, 2017, incident, Cairns confirmed that Employee was late for a mandatory meeting. She noted that she or someone else tracked this. She explained that if it was Harper who provided her the information, she had no reason to doubt its accuracy. Cairns could not recall what training Employee was late for on July 11, 2017. Tr. Vol. I. pgs. 111-112. Harper acknowledged that it was possible she was the one who informed Cairns that Employee was 40 minutes late for a meeting. She however explained that if it was a mandatory all-staff training, Employee might have signed in 40 minutes late. Tr. Vol. II. pg. 172. She stated that the sign-in sheet is placed in front of the room and employees are supposed to put the time that they signed-in. Tr. Vol. II. pg. 172. While referring to Employee's Exhibit 1, page 33, Harper noted that she does not recall receiving the email, however, she acknowledged that Employee's Exhibit 1, page 33, was an email from Employee to Harper, dated July 11, 2017, indicating that Employee would not be in the office and should be placed on sick leave. Tr. Vol. II. pg. 173. When asked how Employee could have been 40 minutes late to a meeting or training when she was out on sick leave, Harper stated that it might have been the wrong date. Tr. Vol. II. pgs. 173 -174. Here, based on Harper's testimony, and the evidence in the record proving that Employee was out sick on July 11, 2017, I find that Agency cannot use this conduct in support of this cause of action.

Agency additionally stated that: "[o]n July19, 2017, you sent an email to Ms. Harper, Supervisor, at 9:40 a.m., stating that you were having car trouble and would be late. At 3:10 p.m., you sent another email stating you would not be coming into work, which meant that you would miss you scheduled supervision meeting at 3:30 p.m. In response, D. Harper sent an email asking for your schedule for July 20, 2017, so that your supervisory meeting could be rescheduled. You responded that you were on leave the following day. Ms. Harper queried when you submitted a leave request and to whom. To date, you have not responded."

[22] Employee's Closing Argument (April 19, 2021).

With regard to this specification, Employee testified that on July 19, 2017, she experienced car trouble and notified Harper of the issue and explained that she would arrive at work later in the day. Once Employee realized her car would not be fixed in time, she contacted Harper requesting that she use her administrative leave for the day. Harper agreed and her leave was approved. Referring to Employee's Exhibit 11, Cairns acknowledged that Employee contacted Agency to notify them that she would not be making into the office on July 19, 2017, due to car trouble, and requested that she be placed on annual leave. Tr. Vol. I. pg. 115. Cairns also acknowledged that the Time and Attendance record reflects that Employee was placed on Unscheduled Annual Leave on July 19, 2017.[23]

Harper asserted that she did not question Employee's car issues, rather, her problem was with regard to Employee's lack of communication to let her know if she was going to be in for the day. Tr. Vol. II. pg. 174. Harper acknowledged that based on the information in the exhibit, Employee was on annual leave on July 19, 2017. Tr. Vol. II. pgs. 175 – 176. Harper testified that Employee was given leave on July 19, 2017, just so she does not miss getting paid, and the leave was approved after the fact. Harper asserted that since Employee's leave was approved, the July 19, 2017, dare was not an unauthorized absence. She also testified that because she did approve Employee's leave after the fact, it was not an unauthorized tardiness. Tr. Vol. II. pg. 177. Based on Harper's own testimony and the evidence in the record, I conclude that because Employee's request for unscheduled leave was granted, this specification cannot be used to support this cause of action.

Agency also argued that "[o]n September 1, 2017 – You arrived at the office at approximately 9:45 a.m., and you were asked to meet with your supervisor. You stated that you were leaving to meet with a new client at 11:00 a.m. You agreed to meet with your supervisor at 2:00 p.m., and advised to contact her if you were delayed. You did not return to the office or contact your supervisor until 5:33 p.m., when you sent an email."

Employee explained that on September 1, 2017, she met with a new client and conducted an intake. There was a lot of paperwork that took time to complete. After the intake was completed, the client expressed that she did not have any food in their home. The client asked Employee if she could take her to Safeway, a grocery store. Employee testified that she was hesitant to drive her client, her client's girlfriend, and their baby in Employee's car. However, she obliged and drove them to Safeway. The entire intake and grocery run took over three hours. After she dropped of her client, she went to get something to eat. After Employee ate, she contacted Harper to let her know the events that transpired that day. Employee stated that the staff had Agency cell phones and Harper did not contact her that day to see what her estimated time of arrival was back to the office. Tr. Vol. III. pgs. 217-221. Accordingly, Employee concluded in her closing argument that since she was working on September 1, 2017, she was not absent or tardy.

Harper acknowledged that Employee had an initial appointment with a new client on September 1, 2017 and the process could last a long time. Tr. Vol. II. pg. 182. Referencing

[23] *See* Employee Exhibit 9.

Employee's Exhibit 11, page 460, Harper identified an email from Employee to Harper on September 1, 2017, at 5:33 p.m. Tr. Vol. II. pgs. 184 -185. She stated that she does not recall receiving the email. She explained that although Employee emailed her stating that she was working, she cannot vouch for what anyone was doing, so she cannot confirm whether the statements in the email were true. Tr. Vol. II. pgs. 185 -186. Harper identified her email to Employee dated September 1, 2017 at 3:59 p.m. She stated that she was supposed to meet with Employee at 2:00 p.m. on that day, but Employee did not show up, so she sent Employee an email at 4:00 p.m. Tr. Vol. II. pg. 186. She does not recall if she attempted to call Employee before sending the email. She explained that based on historic data with Employee, this was not unusual. Tr. Vol. II. pgs. 186 – 187; & 189. Harper stated that she did call Employee on September 1, 2017. Tr. Vol. II. pgs. 187 & 189. She affirmed that if an employee is meeting with a client and is unable to return to the office for a meeting because of those duties, that would be a legitimate reason not to attend the meeting. Tr. Vol. II. pg. 190. Here, both Harper and Employee testified that Employee was meeting with a new client on September 1, 2017. Based on Employee's testimony, her meeting with the new client went longer than expected. Thus, she missed the scheduled meeting with Harper. Harper affirmed that if an employee is meeting with a client and is unable to return to the office for a meeting, that would be a legitimate reason not to attend the meeting. Tr. Vol. II. pg. 190. Consequently, because Employee could not meet with Harper because her meeting with the client went longer than expected, I find that Agency cannot use this conduct to support this cause of action.

Agency also averred that on September 5, 2017, "client (known as A.L) contacted the agency office to complain about the lack of assistance that was being provided to her by [Employee]. She stated that she rarely sees you, that you insist on her meeting with you in your car and that you are very late to show up. The last appointment was for 7:30 p.m., and that you didn't arrive until 8:30 p.m. She requested a new case worker."

Harper acknowledged that a client with initials A.L. spoke to her about concerns with Employee's service. She stated that she reported the incident to Employee at some point shortly thereafter. She does not recall if the client A.L. had mental health issues. Tr. Vol. II. pgs. 190 - 191. Harper stated that she was sure that she looked at A.L.'s case record. Tr. Vol. II. pg. 191. She testified that she does not recall what was in the case record. She stated that she would have raised the issues regarding A.L. with Employee during their next interaction, and she does not remember Employee's response. Tr. Vol. II. pg. 192. Other than A.L.'s statement, Harper does not remember if there was any other evidence to support the allegations made by the client on September 5, 2017, about Employee arriving late for a meeting. Tr. Vol. II. pg. 192. Harper does not recall speaking with the client A.L. prior to September 5, 2017. Tr. Vol. II. pg. 193.

Here, I find that Agency has not provided this office with evidence in support of this assertion. Specifically, Agency did not provide this Office with the specific date the client alleged that Employee was one (1) hour late to their scheduled meeting. The September 5, 2017, date is the date the client called to report the incident and not the date of the alleged incident. Moreover, there is no credible evidence in the record to support the client's assertion that Employee was one (1) hour late to their scheduled meeting. Further, Employee's case notes which highlights her interaction with this client suggests that the client suffered from mental

illness. Absent the exact date of the incident, and additional information to support the client's allegation, I find that Agency cannot use this conduct in support of this cause of action.

Additionally, Agency asserted that on September 6, 2017, "[Employee] arrived late and missed the TPAP team meeting." Cairns noted that Harper led the TPAP Team meetings and Harper informed Cairns that Employee missed the September 6, 2017, meeting. Cairns identified Agency's Exhibit 3, page 79, as a follow-up initiated by Harper regarding a missed meeting scheduled for September 6, 2017, with Employee. Tr. Vol. I. pg. 178. She acknowledged that page 80 of Agency's Exhibit 3, was a request by Harper to Employee to complete the calendar in advance. Tr. Vol. I. pg. 179. Cairns also confirmed that page 89 of the same Exhibit was an email she was copied on, from Harper to Employee. Tr. Vol. I. pg. 179. Cairns asserted that the email was a follow-up from Harper to Employee inquiring why Employee missed a meeting, and there was nothing on her calendar. The email also reminded Employee that she had to be in the office on time the next day. Cairns affirmed that this was used as a basis for the instant suspension, under charge three. Tr. Vol. I. pg. 180.

Harper explained that the TPAP meetings were mandatory and they usually started at 10:00 a.m. and lasted for an hour. Harper stated that if Employee missed the meeting, then she arrived after 11:00 a.m. Tr. Vol. II. pg. 199. Employee testified that on September 6, 2017, the meeting was scheduled for 1:00 p.m. However, there was confusion about the meeting because there was a cancelled meeting notice that was sent around the office. Employee stated that when she arrived at the meeting. She was informed that the meeting lasted five minutes. She was unsure why she was late to the meeting on that day but recalled working prior to the start of the meeting. Tr. Vol. III. pgs. 229-230. Here, Agency has not provided any evidence to prove that the TPAP meeting was indeed scheduled for 10:00 a.m. and Employee missed the scheduled meeting. Moreover, Agency failed to provide the meeting sign-in sheet for the scheduled meeting or when Employee arrived at the meeting – how late Employee was for the meeting. It simply alleges that Employee was late for the meeting, without providing any specifics or evidence in support of the assertion. Therefore, I find that Agency cannot use this conduct in support of this cause of action.

Additionally, Agency stated that "[o]n September 8, 2017 – You declined a supervisory meeting scheduled for September 11, 2017, stating that you would be in an all-day training that was recommended by me. I did not recommend this training to you, nor did you request to attend this training and did not receive approval to do so." I find that simply declining a meeting or training invitation for a future date is not an attendance related offense. Agency has not provided any evidence to show that Employee was tardy or absent to any activity or to work on September 8, 2017. Accordingly, I conclude that Agency cannot use this conduct in support of this cause of action.

Next, Agency stated that "[o]n September 11, 2017 – You sent an email at 1:40 p.m., reporting that you were out sick for the day and would not be in attendance at the previously mentioned training. You failed to report an absence from work within 1 hour of your reporting time." Cairns stated that Employee informed Harper at 1:40 p.m. that she was out sick and would not be attending the training. Cairns noted that Employee was probably granted sick leave,

however, she emphasized that sending an email about being out sick hours after the start of a shift is not considered acceptable communication. Tr. Vol. pg. 137. When asked if an employee can be charged with an attendance related offense for a date that they were out on sick leave, Cairns stated that she did not know. Tr. Vol. 1. pgs. 137-138. She acknowledged that Employee was granted eight (8) hours of unscheduled sick leave for September 11, 2017. Tr. Vol. I. pg. 138. Cairns emphasized that the attendance related offense was due to Employee's repeated failure to communicate as required. Tr. Vol. I. pgs. 138 - 139. Harper acknowledged that Employee was out sick on September 11, 2017. Tr. Vol. II. pg. 201. Harper does not remember if Employee was granted sick leave on September 11, and 12, 2017. Tr. Vol. II. pg. 202. Harper asserted that if the sick leave was granted after the fact so Employee could get paid, then she would still be considered AWOL and she did not report the absence until 1:40 p.m. Tr. Vol. II. pgs. 202 -203. Employee testified that she was sick and granted sick leave on September 11, 2017. Tr. Vol. III. pgs. 232-233. Irrespective of when Employee was granted sick leave, the record shows that Employee was on sick leave on September 11, 2017 and not AWOL.[24] Consequently, I find that Agency cannot use this conduct to support its attendance related offense claim.

Agency also asserted that on September 12, 2017, "[Employee] did not report to work, nor did you contact your supervisor to report that you would be out. You were AWOL. Further, you failed to attend the required Focus Group scheduled for 11:00 a.m." Cairns acknowledged that Employee was given eight (8) hours of sick leave on September 12, 2017. Tr. Vol. I. pg. 140. She explained that although she was not responsible for Employee's time, Employee might have been absent without letting them know. Tr. Vol. I. pg. 140. She acknowledged that the record reflects that Employee requested and was approved for unscheduled sick leave. Tr. Vol. I. pgs. 198 -199. However, Employee was marked AWOL. Employee stated that she was still on approved sick leave on September 12, 2017. Employee explained that pursuant to the District government guidelines, employees have three days to return to work. If an employee was out more than three consecutive days a physician's note was required. Employee stated that Agency did not ask her for a physician's note regarding her absences. Tr. 231-233. Here, the record shows that Employee was granted sick leave on September 12, 2017.[25] Accordingly, I find that Agency cannot use this conduct to justify this cause of action.

Agency further averred that on September 15, 2017, "you did not report to work. Your schedule did not indicate any appointments and you did not call your supervisor to report that you would be out. You were AWOL." The record shows that Employee was marked AWOL on September 15, 2017.[26] Cairns confirmed that Employee was marked as being AWOL based on information received from Harper. Tr. Vol. I. pg. 140-141. Cairns explained that, Employee should have been at the office during her tour of duty on September 15, 2017. She further noted that although Employee's calendar stated that she had a meeting with the Social Work Board, there was no timeframe or description on the calendar. She also asserted that it could have been a personal meeting. Tr. Vol. I. pgs. 145, 148. She also noted that if it was a work-related training,

[24] *See* Employee's Exhibit 9, *supra*.
[25] *Id*.
[26] *Id*.

Employee needed approval for it. Tr. Vol. I. pg. 148. Cairns acknowledged that she proposed the adverse action of suspension the day before she received Jones' response to Harper's September 20, 2017, email stating that he saw and spoke with Employee on September 15, 2017. Cairn also noted that she did not remove the September 15, 2017, specification after receiving Jones' email. Tr. Vol. I. pg. 146.

Employee testified that she worked a full eight (8) hour day on September 15, 2017. She stated that she had a meeting with the National Association of Social Workers to inform them of the issues she experienced at Agency. Tr. Vol. III. pg. 234. Harper identified Employee's Exhibit 11, bate stamp page 0463, as an email she sent to Jones on September 20, 2017, asking him to confirm the time and how long he spoke with Employee on September 15, 2017. Tr. Vol. II. pgs. 204 – 205. She affirmed that Jones confirmed seeing Employee in the office on September 15, 2017. Tr. Vol. II. pg. 205. Harper acknowledged receiving an email from Employee stating that she worked a full eight (8) hours on September 15, 2017. Harper stated that if she did not see Employee the entire day in the office, then she could not verify how many hours Employee worked. Tr. Vol. II. pg. 207. Harper asserted that because Employee had nothing scheduled on her calendar on September 15, 2017, and she did not see her despite Employee's office not being that far from her office, Harper concluded that it appeared that Employee was not in the office. Tr. Vol. II. pg. 208. Harper noted that she does not recall if she was aware that Employee had an all-day meeting with the social works board on September 15, 2017. She stated that such meetings should not be attended without the supervisor's knowledge because it was not a work assignment and had nothing to do with Agency. Tr. Vol. II. pgs. 208 -209.

There is evidence in the record to prove that Employee was in the office on September 15, 2017. Jones informed Harper that he saw and spoke to Employee at the office on September 15, 2017. Also, Employee noted on her calendar that she was attending an all-day meeting with the Social Work Board and National Association of Social Workers. Although Employee is a social worker, Agency is attempting to argue that the meeting might not have been work related, and that Employee should not have attended without her supervisor's knowledge. Be that as it may, I find that Employee was at work at some point on September 15, 2017; she had a conversation with Jones, and she should not have been charged AWOL for September 15, 2017. Therefore, Agency cannot use this conduct in support of this cause of act.

Termination

A few months after Employee returned to work from serving out her thirty (30) days suspension, Employee was terminated for violating: (1) DPM 1067.2(f)(1)(a); (3) Attendance related offenses – Unexcused tardiness, including delay in reporting at the scheduled starting time; Unauthorized absence of one (1) workday or more, but less than five (5) workdays; and (2) DPM 1607.2(d) (1)(2) Failure/refusal to Follow instructions – Negligence; including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions; and (2) deliberate or malicious refusal to comply with regulations, written procedures, or proper supervisory instructions.

Attendance Related Offenses

Agency terminated Employee for DPM 1067.2(f)(1)(a); (3) Attendance related offenses – Unexcused tardiness, including delay in reporting at the scheduled starting time; Unauthorized absence of one (1) workday or more, but less than five (5) workdays.

Agency alleged that on December 6, 2017, "[Employee] arrived late to team meeting without notifying supervisor you were going to be late." Harper confirmed that Employee arrived late to a meeting on December 6, 2017, without notifying her supervisor. Tr. Vol. II. pg. 62. She identified Agency Exhibit 6, Bates stamp 184 as an email she sent to Employee on December 6, copying Crawford, regarding timeliness to meetings. Tr. Vol. II. pg. 62. The email noted that there was a team meeting scheduled for that day, at 9:30 a.m. which Employee was aware of. Employee arrived at 9:48 a.m. without notifying Harper that she was going to be late. Tr. Vol. II. pg. 63. Harper read Employee's response to her email which was found in Agency's Exhibit 5, bate stamp 285, wherein, Employee apologized for arriving late to the Hope meeting and explained that she arrived to work on time but had to make a pit stop on her way to the Hope meeting. Tr. Vol. II. pg. 64. Harper testified that Employee making a pit stop was her way not to abide by what was required and expected of her in the workplace. Tr. Vol. II. pg. 64. Harper explained that, in general, if an employee had to go to the bathroom for some reason on their way to work, and they are delayed to a point where they were late to work, this would not rise to a level of attendance offense. Tr. Vol. II. pgs. 216 – 217. When asked if an employee being late for a meeting because they had to go to the bathroom is an attendance related offense, Harper said no. Tr. Vol. II. pg. 217.

Employee testified that she was late to a meeting because she had to use the restroom. Employee recalled that she was approximately five minutes late. Employee testified that she was not late because her tour of duty began at 9:30 a.m. and asserted that Agency granted employees a fifteen-minute grace period. Thus, she did not consider herself late to the meeting. Tr. Vol. IV. pgs. 90-97. Here, Employee admitted that she was late for the meeting, but explained that she was not late for work. Harper does not allege that Employee was late for work. Thus, regardless of Harper's other assertions, Employee being late for a meeting does not constitute an attendance related offense. Moreover, Harper acknowledged that in general, if an employee had to go to the bathroom for some reason on their way to work, and they are delayed to a point where they were late to work, this would not rise to a level of attendance offense. Tr. Vol. II. pgs. 216 – 217. Also, Agency noted that Employee was 18minutes late to a meeting, and not to her scheduled tour of duty. Employee on the other hand stated that she was about five (5) minutes late to the meeting and that Agency had a fifteen (15) minute grace period. However, Agency did not provide the sign-in sheet for this meeting to support its claim that Employee was 18 minutes and not five (5) minutes late for the meeting. Consequently, I find that Agency cannot use this specification in support of this cause of action.

Next, Agency contends that on January 2, 2018, "after taking annual leave from 12/22/17 to 12/29/17, you failed to return to work on January 2, 2018, and sent an email 16 minutes after her your [sic] start of duty time, in which you indicated that you would not be in to work because you were still out of town. The following day you called out sick." Harper asserted that the

attendance related offense for January 2, 2018, was Employee's failure to return to work and then sent an email after her start of duty. Tr. Vol. II. pg. 67. Harper stated that she does not remember if Employee was granted approved leave for January 2, 20218. Tr. Vol. II. pg. 217. Harper explained that it was the day that Employee was supposed to return from her vacation, but said she was going to be out. She testified that Employee might have gotten approval for that day. Tr. Vol. II. pg. 217. Employee testified that on December 8, 2017, she submitted an annual leave request from December 22, 2017 through January 3, 2018, which was subsequently approved. She claimed she sent a courtesy email on January 2, 2018, reminding Harper that she would not return until January 3, 2018. Employee admitted that she split unscheduled sick leave and scheduled annual leave on January 2, 2018, because she ran out of annual leave. Tr. Vol. IV. pgs. 98-105.

The record shows that Employee in fact requested leave in advance, and her leave was approved for the period of December 26, 2017 to January 2, 2018. When confronted with Employee's Exhibit 10, Bates Stamp 0444 - a document from the PeopleSoft system, Harper acknowledged that Employee indeed requested forty (40) hours leave, for a total of five (5) workdays on December 8, 2017, with a start date of December 26, 2017 and an end date of January 2, 2018. Tr. Vol. II. pgs. 218 – 220. Harper affirmed that Employee requested and was approved leave for five (5) days, to include January 2, 2018. She stated that she was Employee's supervisor during that time and confirmed that she would have been the one to approve Employee's leave. Tr. Vol. II. pgs. 221 - 223. Based on the foregoing, I conclude that Agency cannot use this conduct in support of this cause of action.

Agency also asserted that on January 5, 2018, "[Employee] notified supervisor 1 hour after report time that you would be in the office at noon but you did not arrive until 3:30 pm, and did not contact supervisor to inform her of the delay." Employee testified that she was most likely late to work on January 5, 2018, due to poor weather conditions. Tr. Vol. IV. pgs. Tr. 158-162. Base on the record and Employee's admission that she was late for work on January 5, 2018, I find that Agency can use this conduct in support of this cause of action.

For the January 17, 2018, specification, Agency stated "you failed to attend a team staff meeting. You later sent an email stating that you were having car trouble, but you never arrived to work and was placed on AWOL." Harper affirmed the January 17, 2018, incident wherein, Employee was marked as AWOL for not showing up for work, after she missed a meeting and indicated that she was having car trouble. Tr. Vol. II. pg. 67. Harper identified Agency Exhibit 5, pages 219, 221, and 289, covering January 17, 2018, stating that Employee would be placed on AWOL for not showing up to work after she indicated that she would be at work at noon, and also for failing to communicate with her supervisor. Tr. Vol. II. pgs. 68 -70. Harper explained that Employee was marked AWOL on January 17, 2018 because Employee only informed Harper in the email that she had car problems and she never came into work or called. Tr. Vol. II. pg. 229. Harper affirmed that based on the record, Employee had a face-to-face meeting at 3:30 p.m. on January 17, 2018. Tr. Vol. II. pgs. 228 -229. Harper stated that she does not remember inquiring prior to issuing the proposed termination whether Employee worked and for how long on January 17, 2018. Tr. Vol. II. pg. 229. Harper asserted that she does not remember looking at Employee's calendar on that day. Tr. Vol. II. pg. 230. Referring to Agency's Exhibit

8, Bates Stamp 2292, Harper confirmed that Employee had a client scheduled on January 17, 2018, along with other things on her calendar. Tr. Vol. II. pg. 230.

Employee stated that on January 17, 2018, she did not go into the office because she was out working in the field with clients. According to Employee, it was not uncommon for a social worker to not go into the office if they were going to be in the field. She also recalled recording the client's information in the CATCH notes. Employee asserted that she always had her client's sign off that they met, and she would keep the signed copy in folders that were maintained in her office. Tr. 247-260. Here, contrary to Agency's assertion that Employee was AWOL on January 17, 2018, there is evidence in the record to prove that although Employee had car issues and while she did not report to the office, she met with clients in the field. Therefore, I conclude that the January17, 2018, incident does not constitute cause for the current action.

Agency further averred that on February 8, 2018, "you had one appointment scheduled for the entire day. I emailed you regarding this issue, to which you failed to respond. You arrived at work approximately 4:30p.m." Harper stated that Employee was expected at work at 9:30 a.m. However, for Employee to have been able to flex that day, she should have communicated with her supervisor, but she does not recall that happening. Tr. Vol. II. pgs. 70 – 71. Since Employee did not respond to her 9:00 a.m. email, Harper expected that Employee would start her workday at 2:00 pm and not 9:30 a.m. Tr. Vol. II. pg. 72. Harper considered Employee AWOL on that day because she did not come in or respond to her email. Tr. Vol. II. pg. 72. Harper affirmed that Agency's Exhibit 8, at page 1354, points to case notes from February 8, 2018, and a phone call. Tr. Vol. II. pg. 236. She affirmed that part of Employee's duty involved entering case notes. She also affirmed that the document indicated that Employee attempted a home visit on February 8, 2018. Tr. Vol. II. pg. 236. Harper reiterated that at the time she looked at Employee's calendar, she had only one appointment scheduled for February 8, 2018, so she is not sure when the other information was put on the schedule. Harper testified that Employee only showed up to work at 4:30 p.m. She maintained that Employee did not communicate with her supervisor from 9:30 a.m. to 4:30 p.m. Harper testified that Employee committed an attendance related offense from 9:30 a.m. to 4:30 p.m. on February 8, 2018. Tr. Vol. II. pgs. 237 - 239.

Employee asserted that she met with Human Resources in the morning and then spent the remainder of the day in the community working. Tr. Vol. III. pgs. 255 -258. Based on Harper's own assertion, Employee showed up to work at some point on February 8, 2018. Thus, Agency cannot charge Employee with AWOL on this date. Moreover, there is evidence in the record to prove that Employee actually worked on February 8, 2018. Consequently, I find that Agency cannot use this conduct in support of this cause of action.

For the February 12, 2018, specification, Agency argued that "you emailed me at 10:47 a.m., after the start of your tour of duty, to inform me that you would be out for the day, due to a funeral." Harper testified that it was unusual for a funeral to come up in the morning and that was unknown the day before. She explained that Employee should have informed her supervisor that she was not going to be in the next day. Tr. Vol. II. pg. 73. While referencing to Agency Exhibit 5, Bate number 255, Harper confirmed that there was a mandatory training for all DHS employees in the Youth Service Division, scheduled for 9:30 a.m. on February 12, 2018. She

affirmed that Employee was within that division. Tr. Vol. II. pgs. 73-74. Harper confirmed that Employee's initial contact with Agency on February 12, 2018, was at 10:47 a.m. Tr. Vol. II. pg. 74. Harper stated that she was not aware that Employee was attending the funeral of her father-in-law, when she proposed termination. Tr. Vol. II. pg. 243. Harper affirmed that Agency's Exhibit 5, was an email from Employee to Harper on February 21, 2018, regarding her timesheet being denied for payment for bereavement leave. Harper also acknowledged that she emailed Employee on February 20, 2018, to find out whose funeral she attended. Tr. Vol. II. pgs. 243 – 244. Harper stated that she was only informed of the bereavement leave the day of the funeral. Tr. Vol. II. pg. 247.

The record is clear that Employee was absent on February 12, 2018. However, Employee stated that she was out on bereavement leave for the funeral of her father-in-law. DPM Section 1261.1 provides that, "In accordance with the Funeral and Memorial Service Leave Amendment Act of 2013, effective February 22, 2014 (D.C. Law 20-83; D.C. Official Code § 1-612.03(n) (2014 Repl.)), an employee shall be entitled to not more than three (3) days of authorized absence without loss of or reduction in pay, leave to which otherwise entitled, or credit for time or service, to make arrangements for or attend the funeral or memorial service of an immediate relative, as defined in Section 1299 of this chapter." Section 1299 defines immediate relative to include "an individual who is related to an employee covered by this chapter by blood, marriage, adoption, or domestic partnership as father, mother, child, husband, wife, sister, brother, aunt uncle, grandparent, grandchild, or similar familial relationship; an individual for whom an employee covered by this chapter is the legal guardian; or fiancé, fiancée, or domestic partner of an employee covered by this chapter." Here, Employee is related to her father-in-law by marriage, therefore Employee was entitled to three (3) days of funeral leave. While Agency is correct in asserting that Employee should have requested funeral leave in advance, I conclude that DPM 1261, does not specify when an employee is required to request funeral leave. Employee's funeral leave was eventually granted by Agency's HR. Tr. Vol. III. pg. 269. Accordingly, I find that because Employee had a legitimate reason to be out on February 12, 2018, Agency cannot use this specification in support of this cause of action.

Next, Agency stated that on February 14, 2018, "you did not attend a regularly scheduled team staff meeting and did not contact me or any other supervisor to state that you would miss the meeting. You did not come into the office for the entire day and scheduled a school visit during the time of the meeting." Harper testified that Employee should have come to her, and explained that while she is aware that there was a meeting scheduled for that day, she had a school meeting for one of her clients that was scheduled on that same day and she wanted to be there. Alternatively, she could have stated that she had been trying to reach the young person by going to their house and calling to no avail, so she would try to go over to his school in the morning. Tr. Vol. II. pg. 77. Harper explained that these are things that occur in the normal course of their work. However, none of this was brought to her attention. Tr. Vol. II. pg. 78, 248. Harper also noted that Employee did not come into the office the entire day and she scheduled a school visit during the time of their meeting. Harper explained that outside of an emergency situation, Employee should not schedule a meeting at the time of their meetings. Tr. Vol. II. pgs. 248 -249.

Harper identified Agency's Exhibit 8, page 1320, as a reflection of Employee's calendar for February 14, 2018. Tr. Vol. II. pg. 249. Harper explained that Employee's offense of missing the staff meeting was a failure to comply with the requirements of her job. Harper acknowledged that Employee was working at the time. Harper testified that she does not think Employee's behavior on February 14, 2018, was an AWOL incident. Tr. Vol. II. pg. 250. Harper stated that she was not questioning whether Employee actually worked the entire day of February 14, 2018, but she was concerned that Employee deliberately did not attend the staff meeting. Tr. Vol. II. pgs. 253 - 254. Employee recalled meeting with a client at Anacostia Senior High School on the day of the alleged attendance offense on February 14, 2018, which Agency claimed she missed a regular staff meeting.

There is evidence in the record to show that Employee was not absent from work on February 14, 2018. She was out in the field and missed a mandatory meeting. Harper acknowledged that Employee was working at the time. Harper testified that she does not think Employee's behavior on February 14, 2018, was an AWOL incident. Tr. Vol. II. pg. 250. I agree. I also agree with Harper when she stated that Employee's offense of missing the staff meeting was a failure to comply with the requirements of her job and not an attendance related offense. Therefore, I find that Agency cannot use this incident in support of this cause of action.

Furthermore, Agency contends that on February 22, 2018 "you failed to attend a mandatory staff training. You failed to call or email me or any other supervisor, and there were no appointments on your calendar. You were placed on AWOL for the day." Harper explained that since the February 22, 2018, was a mandatory staff meeting, and Employee did not attend, did not email or call about her non-attendance, and did not have any appointments on her calendar on that day, it was determined that she was AWOL. Tr. Vol. II. pgs. 82 -83, 256. She acknowledged that Employee's email dated February 15, 2018, declining the February 22, 2018, meeting was sent to her. Harper stated that she does not know if that was the day of the mediation. She explained that she did not have an appointment scheduling a mediation for February 22, 2018, so she cannot prove that that's where Employee was. Tr. Vol. II. pg. 258. Harper asserted that Employee was not at the training, and she did not call or email her. Tr. Vol. II. pg. 259. Employee testified that she was at the office on February 22, 2018. She stated that there was a mandatory meeting or training that occurred in the office daily. It was not reasonable for her to attend a meeting and meet with clients simultaneously. Employee also stated that she was not aware of any mandatory meeting or training on February 22, 2018. She noted that the only meeting scheduled for that day was a Black History Month Program with a Guest speaker, which was scheduled for 12:30 p.m. to 1:00 p.m., that she did not attend. Employee testified that she was in the office. Employee identified Employee's Exhibit 0489 dated February 23rd, 2018, for an interaction that occurred on February 22, 2018, 2018, at 10:30 a.m. from an email about receiving documentation of a client and submitting it for case closure. Tr. Vol. III. pgs. 263-266.

Apart from Agency's assertion that Employee was AWOL and missed a mandatory training on February 22, 2018, Agency has not provided this office with any evidence in support of this assertion such as the sign-in sheet for the mandatory meeting that Employee allegedly missed. The record shows that Employee had a scheduled mediation conference at OEA on February 22, 2018, from 10:00 a.m. for the thirty (30) days suspension action. Moreover, based

on the case notes showing an interaction date of February 22, 2018, and the absent of any evidence from Agency in support of its assertion, I find that Agency cannot use this specification in support of this cause of action.

Failure or Refusal to Follow Instructions

Agency also terminated Employee for violating DPM 1607.2(d) (1)(2) Failure/refusal to Follow instructions – Negligence; including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions; and (2) deliberate or malicious refusal to comply with regulations, written procedures, or proper supervisory instructions.

Agency asserted that on January 11, 2018 "a review of the case notes in the CATCH system showed case note entries were late and a case closure that was discussed with you was not completed as discussed." Here, Harper confirmed that she was not aware of any interaction in the CATCH cases that occurred between January 5-8, 2018 and were not entered. Tr. Vol. II. pg. 276. There is evidence in the record stating that a social worker is required to meet with their clients at least two (2) times a month. Harper testified that Employee was required to meet with her clients two times per month or every other week. Tr. Vol. II. pg. 264. She asserted that the client contact requirement is twice a month, but it tends to be every two weeks. Harper reiterated that it is not a late case note, but rather a late case contact. Tr. Vol. II. pg. 267. Harper stated that although the January 11, 2018, specification noted a late case note entry, in essence, it is saying case contact. Tr. Vol. II. pgs. 268 -269. When asked what cases were late based on the January 11, 2018, specification, Harper testified that nothing was late. She was simply informing Employee of what she found upon review of her cases. Tr. Vol. II. pgs. 271 - 272. Harper acknowledged that it was possible that Employee met the first client on January 12, and January 30, 2018 and that would not violate any policy or render any of her case notes late. Tr. Vol. II. pg. 269. Despite Harper's assertion, I find that the record is clear as to the twice a month client interaction requirements and Agency is simply attempting to twist the requirement in this instance to support its cause of action. I therefore find that Agency failed to prove this specification.

The conduct at issue was a late case entry and not a failure to meet with clients at least twice a month. Harper explained that the staff have 48 hours to enter the notes, however, most people enter the notes on the same day they make the visit. Tr. Vol. II. pg. 264. However, she was unable to provide evidence of any late case entries. Harper also acknowledged that the case notes would only have been late if Employee had a client interaction between January 5th and 8th, 2018. Tr. Vol. II. pg. 275. Harper also noted that since Employee returned to work on January 5, 2018, she should have met with the client from the 5th to the morning of the 11th. She agreed that the notes would not be considered late until after 48 hours. Tr. Vol. II. pgs. 264-265. Harper acknowledged that the note would not be considered late if the visit occurred on January 11, 2018. Tr. Vol. II. pg. 265. Based on Harper's confirmation that she was not aware of any interaction in the CATCH cases that occurred between January 5-8, 2018, and were not entered, as well as her assertion that the case notes would not be considered late until after 48 hours, I conclude that Agency failed to prove this conduct in support of this cause of action.

Next, Agency stated that on January 31, 2018 "you were very disruptive during team meeting, challenging and interrupting me on every topic discussed, making it difficult for others to understand the information and processes being presented. Other staff informed me that your behavior caused them annoyance and confusion." Employee contested the allegation that she was disruptive and uncooperative at a team meeting on January 31, 2018. Tr. Vol. III. pg. 276.

Harper on the other hand testified that she had a team meeting for Youth Hope and TPAP programs on January 31, 2018. She explained that Employee challenged everything she said during the meeting, and her demeanor was nasty and outright disruptive. Harper also explained that she could barely talk, as Employee would have an outburst of nasty comments about what she was saying or what she did not know. Tr. Vol. II. pg. 87. Harper affirmed that at least one attendee from the meeting approached her after the meeting. She testified that the attendee expressed that they felt uncomfortable during the meeting, and inquired what it was all about, because that's not the experience they were accustomed to in her meetings. Tr. Vol. II. pgs. 87 - 88. Harper stated that she probably informed Employee at some point during the meeting to stop interrupting her while she was speaking, but she does not recall specifically if she did. Tr. Vol. II. pg. 278, Agency has failed to provide the specific instruction that Employee failed to comply with. The alleged employees whom Agency referred to in this specification did not testify at the Evidentiary Hearing and Agency did not provide a written statement from them. Moreover, the specification does not provide the specific instruction that Employee failed to comply with. While it is plausible that Employee was disruptive during the meeting, I find that absent a specific instruction that Employee failed to comply with, Agency cannot use this conduct to support this cause of action.

Agency averred that on January13, 2018, "during supervisory meeting with me and Henry Jones, your LISCW supervisor, you proceeded to take out your cell phone stating your intention to record the meeting. I requested that you refrain from doing so. Although you responded that it was your right to record what was being said, you knew or should have known that the discussion of your client cases contained confidential and sensitive information, in which the clients have a right to privacy and protection. Further, during the meeting, Mr. Jones informed you that several of your cases needed client visits on a weekly basis. You replied "I won't waste my energy on people who don't want my help." Mr. Jones reminded you of your responsibilities and that it was your job to keep reaching out to the young people and encourage them to get back into school."

Harper testified that when she, Jones and Employee, got into the room for their supervisory meeting, Employee took out her phone, placed it on the table and indicated that she would be recording the meeting. Harper asked Employee not to do that, but Employee responded that it was her right to record what was being said. Harper stated that she informed Employee that they were discussing cases that were sensitive to the clients and confidential, thus recording them would violate their privacy. Harper stated that she might have stayed to the end of the meeting with Jones and Employee. Tr. Vol. II. pg. 278. Harper affirmed that Employee complied with her instruction to stop recording. Tr. Vol. II. pgs. 278 -279. Employee asserted that she did not record the meeting with Harper and Jones on January 13, 2015. Tr. Vol. III. pg. 278-279.

Since Harper admitted that Employee complied with the instruction to stop recording, I find that Agency cannot use this conduct to support this cause of action.

Regarding the second portion of this specification, Harper asserted that as the meeting progressed, Jones explained to Employee that some of her cases needed intense interaction, such as weekly, not bi-weekly meetings with clients. To which Employee replied that she "was not going to waste [her] energy on people who don't want [her] help." Tr. Vol. II. pg. 90. Harper stated that Jones reminded Employee of her responsibilities and her job of reaching out to young people to encourage them to return to school. Tr. Vol. II. pgs. 90 -91. Harper noted that Employee expressed to her supervisors that she had given up on the clients, who were mostly teenagers. Harper highlighted that Employee's attitude did not fit into the framework of Agency's mission. She testified that, Employee's attitude of not being willing to help the clients is in contrast to Agency's goals, of keeping in contact with the young people and keeping them engaged. Tr. Vol. II. pgs. 91 - 92. Jones testified that because there was an issue regarding Employee recording the meeting, the meeting was terminated. Tr. Vol. III. pg. 88. There is no evidence in the record to support the allegation that Employee stated during the January 13, 2018, meeting that she "was not going to waste [her] energy on people who don't want [her] help." Jones testified that the meeting ended when the incident of the phone recording occurred. As such, I find that Agency cannot use this incident to support this cause of action.

Agency also stated that on February 13, 2018, "Mr. Jones emailed you a request to provide a synopsis of your cases to him on each Monday prior to your regular supervision meetings on Tuesdays. The synopsis was to include a summary of each case, including a description of the services that you were providing to the client. You responded via email that he (Mr. Jones) could find the information that he requested that you put in a synopsis, could be found in case records on your desk. Your response was tantamount to insubordination." There is evidence in the record to support this allegation that Jones requested that Employee provide him with a case synopsis.[27] Employee stated in her February 15, 2018, email to Jones that she would not provide the requested case synopsis.[28] Jones testified that Employee's notes were not entered in the CATCH system, and he needed Employee to supply her notes prior to their meetings. Tr. Vol. III. pgs. 80-85. Jones stated that he supervised seven employees and he requested a synopsis from all his supervisees. Employee was the only one who refused to comply. Tr. Vol. III. pg. 55-58, 69. Jones stated that he never received the requested synopsis from Employee. Tr. Vol. III. pg. 65. As Employee's supervisor, I find that Jones' request to Employee to provide him with a case synopsis prior to their meeting was a valid supervisory instruction. Employee refused to comply with her supervisor's instruction. Based on Employee's February 15, email response and Jones' assertion that he never received the requested synopsis, I find that Agency can use this specification to support this cause of action.

Additionally, Agency asserted that on February 20, 2018, "you failed to submit the case synopsis of your cases. Mr. Jones requested this prior to supervision. As a result, supervision was not held. Mr. Jones sent you another email requesting the case synopsis by close of business. To

[27] *See* Agency Exhibit 5 at pg. 265.
[28] *Id*. at pg. 266.

date, you have failed to comply with this instruction." Harper stated that, the information requested by Jones for the case synopsis was basic demographic information and it was not in the CATCH system, and Employee failed to provide Jones with the information. Tr. Vol. II. pg. 101. While referencing page 275 of Agency Exhibit 5, Harper affirmed that the February 20, 2018, email was from Jones to Employee, and Cairns was copied on the email. Tr. Vol. II. pg. 101. Harper stated that Jones was requesting the case synopsis from Employee, and he noted that he would reschedule their weekly supervision after he received the case synopsis. Tr. Vol. II. pg. 102. Jones testified that he had to cancel the supervision meeting scheduled for February 20, 2018, because Employee did not provide him with the requested case synopsis. Tr. Vol. III. pg. 73. As noted above, Jones was Employee's supervisor, and it was within his rights to request that Employee provide him with case synopsis. His request was a valid supervisor instruction, which Employee refused to comply with. Employee's failure to comply with Jones' instruction led to the cancelation of the scheduled supervision meeting. As such, I find that Agency proved this conduct in support of this cause of action.

Agency also argued that on February 21, 2018 "Mr. Jones sent an email notifying you that five clients assigned to you required more intense case management and instructed you to meet with the clients twice per week. He also requested again that you prepare case synopsis prior to supervision meetings and requested that you submit them by 2:00 p.m., the following day (February 22, 2018). You responded as follows:

> *"Again, I will reiterate for your convenience, this is not a Practicum and I am not a first year MSW student. If you are too busy to do the job required of supervision, I respectfully suggest you recues yourself from these duties."*

During the Evidentiary Hearing, Jones recalled the email that he sent to Employee on February 21, 2018. In the email, Jones inquired when Employee planned to submit the case synopsis and wanted to schedule a supervisory meeting. Additionally, he reiterated the importance of the synopsis and explained that documenting one or two paragraphs per client was sufficient. Jones requested that Employee respond back to him with the synopsis by the end of day or the following day. Jones stated that in Employee's reply email to him, Employee questioned if the synopsis was a new policy that was implemented and asked for evidence of when the policy took effect. Employee also asserted that if Jones was too busy to perform the job as a supervisor, she respectfully requested that he recuse himself from his supervisor duties. Tr. Vol. III. pgs. 74-76.

Harper testified that the decision for Employee to meet with some of her clients two (2) times per week was based on the information Employee provided during a supervisory session. Tr. Vol. II. pg. 280. Harper highlighted that Jones made the decision during the supervisory session that Employee would need to meet with these clients face-to-face twice a week. Tr. Vol. II. pgs. 280 -281. When asked if any other social worker was asked to meet face-to-face with their clients two times a week, Harper stated that she did not know. Tr. Vol. II. pg. 279. Harper acknowledged that the information in Agency Exhibit 5, page 297, corroborates the February 21, 2018, incident as stated in the Advanced Written Notice of proposed removal. Tr. Vol. II. pg. 107. I find that this conduct ties in with the previous two specifications for failure or refusal to

follow instruction. Additionally, Jones was Employee's supervisor, and it was within his rights to request that Employee provide him with case synopsis or meet with her clients multiple times, depending on the needs of the clients. I find that his requests were valid supervisory instructions, which Employee refused to comply with. Consequently, I conclude that Agency proved this conduct in support of this cause of action.

Agency also asserted that on February 22, 2018 "you failed to submit a synopsis for the cases as instructed; your conduct was insubordinate." Agency also stated that on February 27, 2018, "Mr. Jones again requested the case synopsis from you prior to the regularly scheduled supervision meeting, to which you responded with an email as follows:

> *"As I informed you on several emails back, I have denied your request regarding the case synopsis."*
>
> You did not submit the synopsis of your cases as instructed and your actions are insubordinate."

There is a plethora of evidence in the record to support Agency's assertion that Employee refused to provide Jones with the requested synopsis in February of 2018. Employee herself indicated in her email to Jones that she would not provide the requested synopsis. Employee stated in an email to Jones that "As I informed you on several emails, I have denied your request regarding the case synopsis. I'm not responsible to do your job for you, Henry. It's your responsibility."[29] Jones testified that he never received the requested documentation. Jones was Employee's supervisor, who gave Employee a valid supervisor instruction and Employee refused to comply with the instruction. Accordingly, I find that Agency can use this conduct in support of its charge for failure or refusal to follow instructions.

In conclusion, although Agency did not meet its burden of proof for Neglect of Duty and Attendance related offenses for the thirty (30) day suspension adverse action, Agency met its burden of proof for the Failure or refusal to follow instruction cause of action. Specifically, Agency proved that Employee refused to be supervised by Harper, and she walked out of the June 26, 2017, supervision meeting, despite being previously informed that she could be supervised by a non-licensed social worker. Agency also proved that Employee refused to meet with Harper on July 3, 2017, despite the fact that she was aware of the scheduled supervision meeting; she was asked to bring her union representative to accommodate her safety concerns; and she was informed that only her supervisor or another Agency supervisor had the authority to tell her to go home early. Agency proposed a thirty (30) day suspension for the failure or refusal to follow instruction cause of action.

For the termination adverse action, I find that under the Attendance Related Offenses, Agency only met the burden of proof with regards to the January 5, 2018, specification as Employee herself admitted that she was tardy on that day. Agency also met its burden of proof with regards to the Failure or Refusal to Follow Instructions cause of action. Employee was

[29] *Id*. at pg. 299.

asked by her supervisor, Jones on multiple occasions to provide case synopsis prior to their scheduled supervision meeting, and Employee blatantly refused to comply with the supervisor's request, none of which were illegal requests. Consequently, I therefore find that Agency can discipline Employee based on these two (2) causes of actions.

Whether the penalty of removal is within the range allowed by law, rules, or regulations.

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).[30] 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 Illustrative Actions; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "Failure/Refusal to Follow Instructions – Negligence; including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions; and (2) deliberate or malicious refusal to comply with regulations, written procedures, or proper supervisory instructions" for both the suspension and termination adverse actions; and the charge of "Attendance related offenses – *Unexcused tardiness, including delay in reporting at the scheduled starting time* (emphasis added) for the termination action. As such, Agency can rely on these charges in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Illustrative Actions. Chapter 16 of the DPM outlines the Table of Illustrative Actions for various causes of adverse actions taken against District Government employees.

Thirty (30) Day Suspension

For the thirty (30) day suspension adverse action, Agency was only able to prove that Employee violated DPM §1607.2(d)(1)(2). The penalty for "Failure/refusal to Follow instructions – Negligence; including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions; and (2) *deliberate or malicious refusal to comply with regulations, written procedures, or proper supervisory instructions*"(emphasis added) is found in § 1607.2(d) (1)(2) of the DPM. The penalty range for a first offense for "Failure/refusal to Follow instructions (1) Negligence" is counseling to removal; and the penalty for the first offense for "(2) deliberate or malicious refusal to comply" is three (3) day suspension

[30] *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).

to removal. The record shows that Employee deliberately refused to be supervised. She was instructed to attend supervision meetings with Harper on June 26, 2017, and July 3, 2017, and she refused to comply. This was Employee's first offense for deliberate or malicious refusal to comply with proper supervisory instructions. Employee was suspended for thirty (30) days, and this penalty is within the allowable range for a first offense.

Termination

For the termination adverse action, Agency proved that Employee violated DPM § 1067.2(f)(1)(a) and DPM § 1607.2(d)(1)(2). The penalty for "[a]ttendance related offenses – Unexcused tardiness, including delay in reporting at the scheduled starting time" is found in DPM 1067.2(f)(1)(a) of the DPM. The penalty range for a first offense for "Attendance related offenses – Unexcused tardiness, including delay in reporting at the scheduled starting time" is counseling to one (1) day suspension. The record also shows that this is Employee's first offense for "Attendance related offenses – Unexcused tardiness, including delay in reporting at the scheduled starting time." Employee admitted to being late on January 5, 2018. Agency terminated Employee for violating this cause of action. As stated above, the penalty for the first offense under this cause of action is counseling to one (1) day suspension. Therefore, Agency's selected penalty for this cause of action cannot exceed one (1) day suspension. Because Agency terminated Employee for this cause of action, I find that this penalty is excessive and as such, will be modified to a one (1) day suspension.

The penalty for "Failure/refusal to Follow Instructions – Negligence; including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions; and (2) *deliberate or malicious refusal to comply with regulations, written procedures, or proper supervisory instructions*"(emphasis added) is found in § 1607.2(d) (1)(2) of the DPM. The penalty for a first offense for "Failure/Refusal to Follow Instructions (1) Negligence" is counseling to removal; and the range for the second offense is five (5) day suspension to removal. The penalty for the first offense for "(2) deliberate or malicious refusal to comply" is three (3) day suspension to removal; and ranges from a fourteen (14) day suspension to removal for the second offense.

The record shows that this is Employee's second offense for violating DPM 1607.2(d) (1)(2) - deliberate or malicious refusal to comply within a one (1) year period. The first offense occurred in 2017, and Employee was suspended for thirty (30) days. For the second offense that occurred in 2018, Employee was terminated, and this penalty is also within the allowable range for a second offense under this cause of action. There is repeated evidence in the record to support Agency's assertion that Employee refused to provide case synopsis prior to the supervision meeting as requested by her supervisor. Thus, Employee's conduct constitutes a deliberate failure/refusal to follow proper supervisory instruction, and it is consistent with the language of § DPM 1607.2(d)(2) of the DPM. Agency terminated Employee for violating this cause of action.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise

of discretionary disagreement by this Office.[31] When an Agency's charge is upheld, this Office has held that it will leave the 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.

Penalty 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.[32] In the instant matter, I find that Agency engaged in progressive discipline. Employee was first suspended for thirty (30) days for her failure or refusal to follow instructions, and then she was eventually terminated. Moreover, the record shows a pattern of Employee's deliberate actions to evade supervision and/or her refusal to comply with a proper supervisor instruction. In *Douglas,* the court held that "certain misconduct may warrant removal in the first instance."

In reaching the decision to suspend Employee for thirty (30) days, Agency included a worksheet of its analysis of the *Douglas* factors to it submission to this office.[33] Referring to Agency's Exhibit 4, Cairns identified the document as the Proposing Official's rationale worksheet – the *Douglas* Factors that they had to take into account. Tr. Vol. I. pg. 61. Cairns agreed that this worksheet was prepared contemporaneously with the advance written notice of proposed suspension and that it accurately reflects Agency's analysis leading to the proposed suspension. Tr. Vol. I. pg. 61.

Cairns confirmed that she reviewed the *Douglas* factors when considering the penalty of suspension. Tr. Vol. I. pg. 150. She also confirmed that she prepared a justification/rationale worksheet. Tr. Vol. I. pg. 151. While referring to Agency's Exhibit 4, page 175, Cairns was asked why she stated that the factor relating to past corrective or adverse action was aggravating and she responded that it was done in consultation with Agency's HR department and they approved the selected categories. Tr. Vol. I. pg. 151. When asked why she marked *Douglas* factor number 4 – Employee's work record, including their years of service and performance rating as neutral, and not mitigating, while noting that Employee's past rating was not indicative of her current performance, Cairns stated that she did not recall how the categorizations were determined. Tr. Vol. I. pgs. 152 – 153. Cairns also explained that because there was no actual

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[31] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." Citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

[32] *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).

[33] Agency Answer, *supra*, at Tab 4.

evaluation in 2014, Employee got a three (3) and this neither improved nor worsen Employee's broad work record. Tr. Vol. I. pg. 153.

Referencing *Douglas* factor 11 - mitigating circumstances, Cairns highlighted that she did not consider Employee's concerns about her safety because the accusation did not seem earnest to her, given the totality of the circumstance. With regard to specification 3, for charge number 2, stemming from the July 3, 2017, meeting, Cairns also noted that while Employee wrote an email about her safety, she, Cairns, had reason to believe that Employee's email about her safety was exaggerated, based on her work experience with Employee over the years. Cairns indicated that she had seen Employee become very elevated at meetings. She also asserted that she had worked with Harper and had not seen such behavior at all. Tr. Vol. I. pgs. 154 -156. Cairns however, testified that she took Employee's safety concerns seriously, reason why she referred it to HR to help her figure out he right solution. Tr. Vol. I. pg. 156. Accordingly, I find that Agency's chosen penalty of thirty (30) days suspension for failure or refusal to follow a proper supervisor instruction is reasonable.

In reaching the decision to remove Employee, Agency also included a worksheet of its analysis of the *Douglas* factors to it submission to this office.[34] Agency concluded that a thirty (30) day suspension followed by termination was the appropriate penalty. I conclude Employee could only be suspended for up to one (1) day for her attendance related tardiness on January 5, 2018. However, because Agency could also terminate Employee for her failure or refusal to follow instructions, for the termination adverse action, I find that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable for the second failure or refusal to follow instruction charge. Consequently, I conclude that Agency's action should be UPHELD.

ORDER

It is hereby **ORDERED** that Agency's actions of suspending Employee for thirty (30) days and subsequently Terminating Employee are both **UPHELD**.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

[34] Agency Answer at Tab 4 (June 20, 2018).