THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DONALD PILSON	)	OEA Matter No. 1601-0027-04R07
Employee	)	
	)	
v.	)	Date of Issuance: August 6, 2009
	)	
D.C. CHILD AND FAMILY SERVICES	)	Muriel A. Aikens-Arnold
Agency	)	Administrative Judge
	)	

Lawrence H. Huebner, Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On January 15, 2004, Employee, a Social Worker, filed a Petition for Appeal ("PFA") of Agency's action to remove him from service effective December 19, 2003 based on a charge of negligence, (i.e., poor performance and failure to complete assigned duties) which threatened the integrity of the Child and Family Services Agency ("CFSA") operations.[1] On April 2, 2007, the OEA Board reversed the Initial Decision (ID) and remanded the matter to the undersigned Administrative Judge ("AJ" or "Judge") to consider the case on its merits. Thereafter, a Prehearing Conference was scheduled and held on July 20, 2007, at which time the parties requested referral of this matter to Mediation. Following unsuccessful attempts to resolve this matter through mediation, this matter was returned to this Judge and ultimately scheduled for an evidentiary hearing on April 24, 2008, July 10. 2008 and July 29, 2008. After completion of the hearing, the parties were directed to submit closing briefs by September 29, 2008.[2] The record

[1] The initial PFA was dismissed on 11/15/04 for Employee's failure to prosecute. On 12/20/04, Employee filed a Petition For Review ("PFR") with the Office of Employee Appeals (OEA) Board requesting reversal of the Initial Decision (ID).

[2] The record was officially closed on 01/23/09, after several requests from the parties for extensions of time. Specifically, Employee's Counsel requested recent extensions from 12/02/08 to 01/16/09 and from 01/16/09 until 01/23/09, which were granted without objection of opposing counsel (who filed Agency's Brief on 01/16/09). However, no brief was filed on Employee's behalf. On April 29, 2009, this Judge contacted Agency's Counsel to determine whether or not he had received a copy of Employee's Brief. He had not. On the same date, this Judge contacted Employee's Counsel to determine whether or not a Brief had been otherwise submitted to this Office. Employee's Counsel responded that, due to medical reasons,

is closed.

JURISDICTION

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

ISSUES

1) Whether Agency's action to remove Employee was taken for cause; and

2) If so, whether the penalty was appropriate under the circumstances;

STATEMENT OF CHARGES AND PARTY POSITIONS

Statement of Charges.

In a letter dated September 30, 2003, Agency notified Employee of a 30-day advance notice of proposed removal from his position based on the charge of negligence, i.e., poor performance and failure to perform assigned duties. Specifically, Employee was issued a 30-day work plan to complete specific case-related tasks.[3] Upon completion of said plan, Employee continued to demonstrate his inability to complete required tasks. Further, Employee failed to file required court reports in a timely manner; and sent an e-mail to a Magistrate Judge which resulted in expression of the Judge's concern about the safety and well-being of the children and families for whom Employee was responsible, repeated missed deadlines, difficulty in handling his assignments, and a request to remove Employee from the case before that Judge. On December 18, 2003, a Notice of Final Decision was issued affirming Employee's removal effective December 19, 2003.[4]

Agency's Position.

Agency contends that it met its burden of proof in establishing, by a preponderance of evidence,that Employee was properly removed for the cause of negligence. Specifically, Employee: 1) failed to perform home visits and enter required documentation in the FACES

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he had not submitted a Brief.

[3] See Agency Exhibit ("AE") 4, Memorandum, dated 6/18/03, Subject: Time Frames for Completion of Case Related Tasks; June 18-July 18, which, *inter alia*, enumerated the following requirements: 1) Court reports will be submitted no later than 5 days prior to the court hearing; 2) complete (12) contacts with 29 individual children and enter data in FACES within 72 hours of the visit; 3) complete no less than 4 case plans; 4) transfer four identified cases to Progressive Life Agency and PSI.

[4] See Joint Exhibit ("JE") 1, Tabs 1 and 3; The deciding official referenced his extensive review of all the submitted documentation, the hearing officer's report, and Employee's disciplinary history in making his decision that the charge of negligence was substantiated by a preponderance of the evidence and warranted Employee's removal.

contact screen; 2) failed to complete case plans; 3) failed to transfer or close cases; 4) failed to submit timely court reports; 5) a Magistrate Judge expressed concern regarding Employee's judgment in sending her an inappropriate e-mail message, repeatedly missing court deadlines, performing court assignments in an unsatisfactory manner and the Judge requested Employee's removal from the case before her. Relative to Employee's claim that medical problems affected his work performance, his illness did not excuse his failure to perform. Employee's Disability Compensation Claim was denied.[5]

Employee's removal was the appropriate penalty under the circumstances. As a Social Worker, Employee was a part of an overall effort to provide essential services to those unable to care for themselves. His failure to visit children was gross negligence and exposed the city to liability. Despite Agency's considerable efforts to assist Employee, he failed to improve his work performance.[6]

Employee's Position.

After Agency rested its case, during the Hearing, Employee made an oral motion for summary judgment in his favor based on Agency's failure to prove its case by [a preponderance of evidence]. That motion was denied based on a determination to further review Agency's presentation and to allow Employee an opportunity to present his case. As previously noted, no closing brief was submitted on Employee's behalf.

Nevertheless, this Judge's review of the evidence of record reveals a number of arguments made by Employee that were considered in evaluating the merits of the instant adverse action. Such arguments included: Agency's failure to accommodate Employee's medical needs; that Ms. Hankerson was not available to assist Employee one-on-one to the extent represented by Agency; that Employee tried to succeed under the work plan, but eventually failed due to additional assignments given prior to, and during the course of the work plan; and that Agency did not follow-through with or allow Employee's transfer to a non-case carrying position.[7]

SUMMARY OF MATERIAL TESTIMONY

Hubert A. Kelley, PhD., Supervisor, In-home and Reunification Division

Dr. Kelley (Proposing Official) testified that he supervised Employee, whose job required him to visit children, who had various medical and psychological needs, develop case and family

[5] See Agency's Closing Argument ("ACA") filed on 01/16/09; also JE-1 at Tab 5. Employee's claim of an on-the-job injury on 10/03/03 was denied on 04/02/04.
[6] See ACA at pp. 12-14.
[7] See Hearing Transcript, Volume 3, dated July 29, 2008 (hereafter referred to as "Tr.-Vol.-3") at pp.299-301), Employee's Opening Statement which is not considered evidence, but reflects Employee's arguments.

plans and provide court-ordered services to them. Based on Employee's minimal compliance completing assignments over the prior year, Dr. Kelley developed a 30-day work plan for Employee to afford him an opportunity to improve his performance between June 18 and July 18, 2003. The plan consisted of case related tasks including required home visits, transfer of previous cases, the preparation of case/family plans and the submission of timely court reports. Cases which were not transferred, prior to Employee's reassignment to Dr. Kelley's unit, impacted his new caseload as well as other employees, who were continually assigned new cases, knowing that Employee was not receiving new assignments.[8]

Many of the required tasks were previously mandated for completion within the last year, but not completed. Employee, who was provided training on the FACES program, which required computer input by all social workers, was minimally used by him. Relative to the 30-day plan, Dr. Kelly testified that Employee completed visits with five (5) children of the twenty-nine (29) listed; did not complete the four (4) case plans required; and only transferred one (1) of the four (4) cases required to be transferred. Dr. Kelly transferred the remaining cases and assigned other employees to assist in making required home visits and closing cases (reflected in the June 18, 2003 work plan) on Employee's behalf.[9]

On February 14, 2003, Dr. Kelly issued a proposal to issue an official reprimand to Employee based on his lack of performance (sic) routine social work duties and his inability and unwillingness to improve; citing, *inter alia,* the transfer/closure of no more than six cases during the period beginning April 15, 2002 and ending on February 13, 2003. In lieu of the official reprimand, Dr. Kelly subsequently issued a letter of warning, on February 24, 2003, with specific job-related tasks to complete within thirty (30) days.[10]

On cross-examination, Dr. Kelly testified that Employee advised that his workload was a reason for why cases had not been transferred; and that Employee had a machine that filtered air, in his work area, but he did not discuss anything specific regarding chronic illnesses. The witness remembered seeing a doctor's note, at the time that personnel actions were being considered, about an ADHD [Attention Deficit Hyperactivity Disorder] condition and depression. Although Dr. Kelly recalls seeing letters from Dr. Barbara Solomon, he did not recall discussing the medical conditions with Employee or recall the diagnosis. Nor did he discuss the medical conditions outlined in Dr. Nora Galil's letter [dated April 30, 2003] with Employee " . . . because that was only presented near the end as we were moving forward with the personnel action." On June 21, 2003, Dr. Kelly signed Employee's evaluation, which reflected a satisfactory evaluation for the period April 1, 2002 to March 31, 2003. Dr. Kelly answered "yes" when asked if he recalled writing a recommendation that Employee be transferred to a non-case carrying position, as " . . . he could no longer function in this fast-paced and multifaceted unit, the demand stressors and pressure are too intense for him." Employee

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[8] See Tr.-Vol. 1, dated 04/24/08 at pp.35-36; 40-47; and see AE-4.

[9] See Tr.-Vol. 1 at pp. 65-76. Employee did not dispute the late submission of court reports.

[10] See Hearing Transcript, Volume 2, dated 07/10/08 (hereafter referred to as "Tr.-Vol. 2") at pp. 105-111; also see AE- 6 and AE- 8, which were admitted into evidence over Employee's objection.

was not transferred to a non-case carrying position. Dr. Kelly advised Employee that Fonda Rae Hankerson would assist him exclusively, but that never happened. [11]

During the time period from October 2002 until September 2003, Dr. Kelly did not recall how many cases Employee had been assigned, whether cases in show cause status were transferred to him, or whether he re-assigned Employee to other duties, e.g., court appearances or in-office meetings, when home visits were scheduled or Employee was writing court reports. Dr. Kelly assigned very few cases to Employee until he had gotten rid of cases he had brought with him to this unit.[12]

On redirect, Dr. Kelly testified that he assigned other workers to assist Employee; and that he was not able to assign Employee a comparable amount of work that was going to other social workers, who also had large caseloads. Employee had cases, for well over a year, that had not been transferred or closed.[13]

Denise Trotter Glynn, Program Manager.

Ms. Glynn supervises five supervisors, who in turn, supervise five social workers. On July 10, 2003, she was in court with Employee before Magistrate Judge Breslow, who expressed her dissatisfaction with the lack of progress in Employee's case [Johnson] and requested his removal from the case. Diligent search efforts were not made in order to reach the goal of guardianship. Reunification efforts were generally delayed due to Employee's lack of visitations, lack of follow-through with court orders and lack of completion of tasks in a timely manner. After that court appearance, Ms. Glynn and her supervisor reviewed all of Employee's cases, which confirmed the aforementioned observations. This witness verified the information in Specifications numbered 3 and 4 in the notice of proposed adverse action..[14]

On cross-examination, Ms. Glynn testified that she did not know whether, in the Johnson case, Employee submitted a referral to the Diligent Search Unit, did not know whether Employee ubmitted licensing paperwork to the prospective caregivers; and did not contact the licensing department or the Diligent Search Unit to make pertinent inquiries. Ms. Glynn testified that she was not familiar with Employee's medical history. Yet, she saw Dr. Galil's April 17, 2003 letter and discussed it with Mr. Winston. Before and after the letter, Employee was offered extra help by a Social Service Assistant and, help with reducing his caseload. This witness signed Employee's satisfactory rated evaluation covering the period April 1, 2002 to March 31, 2003 and favored his transfer to a non-case carrying position.[15]

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[11] See Tr.-Vol. 2 at pp. 122-136; also Employee's documentary submission to this Office on 07/20/07 at Tabs 14 and 19.
[12] See Tr.-Vol. 2 at pp. 137-142.
[13] See Tr.-Vol. 2 at pp. 142-152.
[14] See Tr.-Vol. 2 at pp. 159-161, 165-175; also see JE-1 at Tabs 9 (witness statement) and 10 (Judge Breslow's e-mail message to Jesse Winston re: Employee's conduct).
[15] See Tr.-Vol. 2 at pp. 176-212.

On redirect, Ms. Glynn testified that Employee was encouraged to transfer cases to a contracting agency which the District was also paying to do the same work. Numerous efforts to assist him were to no avail.[16]

Jesse A. Winston, Program Administrator

Mr. Winston, the Deciding Official, explained the child welfare information computerized system (FACES) which enables managers to monitor the staff's activities, i.e., court hearings, court records, case plans, dates they were done, children who were visited/not visited, and whether visits were attempted or completed. It is recommended that the social worker enter data into the FACES system 72 hours after a contact is made. Between June 18, 2003 and September 30, 2003, someone, other than Employee, made contacts with children assigned to him. During that same time period, Employee completed two (2) child case plans (brothers), Case ID number 17747, on July 16, 2003; and Denise Trotter Glynn completed one (1) child case plan, Case ID number 70287 (on June 27, 2003) that was assigned to Employee.[17]

This witness testified that, between June 30, 2003 and September 30, 2003, Employee completed only one family case plan. However, since the documented exhibit reflected the name "McCallum" as a case plan completed on July 16, 2003, he could not verify that the case represented the same or different family from the "R" family case plan reflected in the notice of charges. As reflected in the record, Employee failed to transfer cases numbered 509885, 196465, 871273 and 850511 within the 30-day period as required. Employee failed to timely submit various court reports, which are significant to achieving permanency in a timely manner for children who are in foster care.[18]

Mr. Winston received an e-mail from Judge Breslow, who advised that she received a faxed court report the night before a hearing and e-mails from Employee, which she felt were inappropriate in nature. She also expressed grave concerns about the safety and welfare of children before her as well as other children who may have been assigned to Employee and wanted him taken off of her cases.[19] .

When Mr. Winston issued the final decision, Employee had not appealed or submitted any information/documents to the Hearing Officer. Consequently, Mr. Winston supported the

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[16] See Tr.-Vol. 2 at pp. 212-218.

[17] See AE- 9 and AE-10; also Tr.-Vol. 2 at pp. 219- 243.

[18] See Tr.-Vol. 2 at pp. 244-246; and AE's 3, 11, 12, and 13. Although the pertinent information in AE-11 appeared to be inconsistent with AE-3, it was admitted into evidence over Employee's objection. Exhibit 13 was also admitted over Employee's objection. However, the Judge notes that the "Stanton" report listed as being late within the 30-day period identified in the notice of charges, may or may not be the same as the "Staton" (closest spelling) report listed in AE-13. Notwithstanding, the "Staton" court dates listed in AE-13 are 01/10/2003 and 09/03/2003, one prior to, and the other subsequent to, the 30-day period enumerated in the work plan and, therefore not relevant or material to Specification No. 2.

[19] See Tr.-Vol. 2 at pp. 261-262.

decision. Considering Employee's twelve (12) years' experience, he should have been able to meet the minimum performance requirements. Newly hired workers with one or two years' experience were outperforming Employee. His failure to visit children caused concern about their safety and welfare, placed the District of Columbia and the agency at liability and was gross negligence. Employee's prior corrective actions were considered. Even though a Social Services Assistant was made available, efforts were made to reduce his workload, appointment books were issued to help manage his time, and the supervisor sat down with him to help map out itineraries in order to complete the work plan, there was no improvement in Employee's performance.[20]

On cross-examination, Mr. Winston testified that, although Employee did not request accommodations, the recommendations made by Dr. Galil were impossible to implement. Non-case carrying positions are posted on Agency's employee website and in the Human Resources Department. It was incumbent upon Employee to apply for such a position.[21]

Fonda Roy Hankerson, Social Services Assistant (SSA).

Ms. Hankerson testified that she was the SSA for five (5) Social Workers in Dr. Kelley's unit, and was specifically assigned to assist Employee in performing home and school visits with children under a 90-day work plan in 2002. While Employee was inputting data in FACES, Ms. Hankerson would go through stacks of paper, cleaning up his records to be sent to central files.

As the union representative, Ms. Hankerson arranged two (2) meetings among Employee, Ms. Glynn and Dr. Kelley to present medical letters and request an accommodation for Employee. However, no accommodation was made.[22] Attempts to transfer Employee to Administrative Review failed because he was suspended and subsequently terminated. An alternative placement would have been Quality Assurance, but no openings were available. This witness further testified that she and Ms. Glenn worked together to get Employee out of the unit, but Mr. Winston declined to release him.[23]

On cross-examination, Ms. Hankerson testified that Employee should not have brought prior cases with him when he came to Dr. Kelley's unit; and that Dr. Kelley made numerous requests to Employee to transfer all of those cases. The time spent directly with Employee was time taken away from working with other social workers in the unit. She was not directly assigned to other social workers under Dr. Kelley and periodically assisted Employee as a part of

[20] See Tr.-Vol. 2 at pp. 266-285.
[21] See Tr.-Vol. 2 at p. 297.
[22] See Tr.-Vol. 3 at pp. 303-323; and Employee's submission on 07/20/07 at Tab 9 (Dr. Galil's letter date 11/11/03 recommending, *inter alia*, Workers' Compensation) and Tab 19 (Dr. Galil's letter dated 04/17/03 containing, but not limited to, Employee's diagnosis of ADHD, and several recommendations, including decreasing his workload to a manageable number).
[23] See Tr.-Vol. 3 at pp. 333-342.

the unit.[24]

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq*. (September 1, 2000).[25]

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). OEA Rule 629.3, id., reads as follows: "[F]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction."

An evaluation of the record reflects the following significant evidence:

Specification No. 1: Employee admitted that, although he was required to make data entries in FACES after each home visit, he did not recall entering data in FACES for completed visits he made with five (5) children listed in the 30-day work plan. Nor did he recall specific efforts to visit various children or recall making notations regarding attempted visits. In fact, five (5) children (Client ID's 855740; 836009; 836008; 826957; and 82695) whose names were listed on the 30-day work plan for required visits, were otherwise contacted/visited by other agency employees. Further, Employee's excuse for his failure to use FACES based on his lack of understanding how, was conflicting and unconvincing. Specifically, he testified that " . . . for a long time, I didn't understand how to do that. At a certain point, I did understand how to do it, but I can't tell you now how it's done." Relative to the June 2003 time frame, Employee testified, " . . .I was finally given training on that and learned how to do it, but I don't know at what point that was related to this." Further, in a prior statement, dated March 13, 2003, Employee admitted to having been successfully trained in the year prior to his removal: "[A]lthough I was slow in learning to navigate FACES, thanks to sustained sessions with FACES technician Erin Sweeten last Spring-Summer (after less consistent work with other technicians), I have finally gotten a handle on this over the past year." Based on all the

[24] See Tr.-Vol. 3 at pp. 380-382.

[25] Section 1603.3, id. at 7096, sets forth the definition of cause for which a disciplinary action mat be taken. Here, Employee was removed from service for "negligence" which is one of the causes set forth therein.

evidence, Employee failed to make required visits and subsequent required entries in FACES.[26]

S*pecification No. 2:* Employee did not recall the number of case plans he was required to complete within the 30-day period. Nevertheless, the notice of charges reflects that, during the 30-day time period, he completed two (2) child case plans for "QR and RR" and one (1) family case plan (Case ID 177747) rather than the four (4) case plans required.[27] Relative to the requirement to transfer cases, Employee claimed that a bureaucratic logjam and extenuating circumstances over responsibility prevented the transfer of various cases listed in the 30-day work plan. However, Employee had no memory regarding the details. Nor did he present evidence to support his contentions.[28]

Specification No. 3: Here, Employee did not dispute the submission of late court reports.[29] The agency's burden of proof is met when an employee admits to the factual allegations underlying the charge.

Specification No. 4: Although Employee confirmed that, on July 10, 2003, Judge Breslow removed him from an assigned case, he insisted that he was "very involved with [that] case, visiting children more than required, these two brothers", but does not recall documenting those visits in FACES. It is significant to note that Ms. Hankerson gave unrefuted testimony that "Our motto was, if it's not in FACES, it didn't happen . . ." Five years ago, Employee diligently pursued guardianship for the same two brothers, but did not recall the process; nor did he present evidence to support that claim. Judge Breslow was admittedly frustrated with Employee, but not, as Employee claims, for his lack of resolve to close the case.[30]

Substantial evidence is "relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Mills v. Dep't of Employment Services,* 838 A.2d 325, 328 (D.C. 2003) (quoting *Black v. D.C. Dep't of Employment Services,* 801 A.2d 983, 985 (D.C. 2002). Here, the evidence of record substantially supports Agency's charges. In contrast, Employee's claims that he did not understand the use of the FACES system or that the bureaucracy impeded his ability to perform required tasks, were unsupported and, therefore, not

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[26] See AE-9. To preserve the confidentiality of the children, client identification numbers (which appear beside each name) will be utilized. See AE-1 at pp 52-61; PFA, Item 17; and Employee's submission on 07/20/07 at Tab 21. This Judge notes that said Employee statement, made in response to the 02/14/03 Notice of Proposed Action (A-6, initially rejected as evidence, but subsequently admitted as record evidence on 07/10/09), further explained, *inter alia,* the increasing demands, over the years, of his excessively large caseload which overwhelmed him, resultant stress and illnesses, and additional assignments by Dr. Kelley which preempted him from scheduled tasks.

[27] See AE-10 and AE-11. Although Employee's completed family plan dated 07/16/03 listed in AE-11 is different from the one listed in the notice of charges (RR family), there is no adverse inference given as the number of completed case plans remains the same.

[28] See AE-1 at pp. 71-73.

[29] *See Employee v. Agency,* OEA Matter No. 1601-0047-84, 34 D.C. Reg. 804 (1987).

[30] See AE-1 at pp. 106-115; Tr.-Vol. 3 at p. 332.

credible reasons for his poor work performance. In fact, Employee's repeated lack of recall, throughout his deposition regarding details of his work performance, was evasive and particularly disconcerting. Employee's testimony that there were no clearly defined time limits in which to complete the work required, conflicts with other evidence that various court ordered services were normally mandated within specific time frames. Indeed, Employee's admission to Specification No. 3 further supports the fact that time limits existed. While this Judge takes notice that Employee's job was quite challenging, his repeated bare assertions that other social workers did not, or could not, meet the job requirements does not weigh in his favor. After careful consideration of all the evidence, this Judge concludes that Agency met its burden of proof, based on the charge of negligence, i.e., Employee's poor performance and failure to complete his assigned duties, and had cause to take adverse action against Employee.[31]

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

Employee's primary argument that his removal was unwarranted based on Agency's failure to accommodate his medical conditions, as recommended by doctors who were treating him for various ailments, is not convincing. Except for three (3) medical statements, dated approximately six (6) years prior to Employee's removal, the record reflects that Employee began submitting medical statements after warnings of possible adverse action in early 2003.[32] Employee admitted that his receipt of the notice of charges triggered his filing of the Workers' Compensation stress claim, which was subsequently denied.[33] According to Dr. Winston's unrefuted testimony, Employee's recently received medically-related job recommendations, if allowed, would significantly undermine the functions of his position and were impossible to meet.

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[31] Negligence is defined as "the failure to use such care as a reasonably prudent person would use under similar circumstances." *Black's Law Dictionary*, Fifth Edition.

[32] See Employee's submission on 07/20/07 at Tabs 18(d), 18(g) and 29 (identical statements dated 07/30/97, 01/28/98 and 06/04/98, respectively, from Dr. Solomon, reflecting general statements regarding her treatment for "allergies, a viral condition, and a stress induced condition . . . " Also, PFA , Item 17: "[B]eginning April, 2003, I submitted medical statements . . . documenting disabilities of Attention Deficit Disorder, Inattentive Type, and Major Depressive Disorder, as well as other stress-related medical conditions . . ."

[33] See AE-1 at pp. 161-164.

Second, Employee blames Agency for its failure to transfer him to a non-case carrying position. To support that contention, Employee referenced his Overall Performance Evaluation which addressed limited options; one of which was to transfer him to a non-case carrying position. That argument also has no merit based upon Mr. Winston's unrefuted testimony that it was incumbent upon Employee to apply for a non-case carrying position. Further, Ms. Hankerson's testimony that she and Ms. Glenn, together, attempted to facilitate such a transfer demonstrates that the union was active in trying to improve Employee's work situation. However, according to Ms. Hankerson, their attempts were unsuccessful due to the lack of available positions and Employee having been disciplined at the time.[34]

Further, Employee's past performance history is also relevant and material. For example, the June 18, 2003 work plan listed seventeen (17) children who were previously listed in the Letter of Warning, dated February 24, 2003, for required in-home visits; nine (9) children who were previously listed for required out-of-home visits; and two (2) cases (#509885 and #196465) which were required to be transferred to the Progressive Life Agency. In spite of Dr. Kelly's prior e-mail message, dated March 8, 2002, which reflects his instruction to transfer the aforementioned cases, Employee had again failed to accomplish that task. Ms. Hankerson's testimony, as well, supported the fact that Mr. Kelley had repeatedly instructed Employee to transfer cases that he brought with him from his prior unit.[35]

Relative to Employee's overall performance rating, it is significant to note that the written justification reflects, in part, "Mr. Pilson's performance can best be characterized as uneven and episodic." Even though the evaluation acknowledged that, during the rating period, Employee " . . . had one of the largest caseloads in this administration," the evaluator also noted that " . . . the demands, stressors and pressures are too intense for him." Employee's job requires "being in good physical and emotional health." For example, Employee's Position Description reads, in part, "[T]he emotional stress of constantly dealing with problematic situations necessitates being in good physical and emotional health . . . "[I]ncumbent works independently within assigned service area and is accountable for the development and maintenance of services therein . . . Completed work reflects accurate and competent practice without need for review . . ."[36]

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[34] See footnote #21; JE-1 at Tab 5; also AE-1 at pp. 152-153 where Employee testified that, except for going to the union, he did not file a complaint with anyone else when Agency did not give him the assistance promised. While Employee asserted, in his PFA, item 17, that an active worker's compensation claim (due to job-related stress) was initiated on 10/03/03, said claim was denied on 04/02/04 based on his failure to show that the actual conditions of employment were the cause of his emotional condition.

[35] See AE-1 at Tab 15, AE-4 and AE-8; also Tr.-Vol. 2 at pp. 112-115. The Judge notes that Employee was, at that time, afforded a 30-day time limit from 02/24/03 until 03/24/03 to complete specific job-related tasks and warned that failure to complete said tasks would result in the recommendation for adverse action.

[36] See JE-1 at Tab 23, Position Description, DS-185-11, which was not contested. However, it is noted that AE-15 is an updated Position Description, DS-185-12 (Career Ladder DS-9/11/12) published pursuant to Agency's realignment effective 4/20/03, which was admitted into evidence over Employee's

Despite Agency's attempts to warn Employee through progressive discipline, afford him additional opportunities to improve his job performance, and assist him in other ways, he did not improve after a reasonable time to do so. The record shows that Employee required much closer supervision than other social workers, particularly those with much less experience. Further, Employee's assertion that he had the highest case load does not, in itself, attenuate his poor performance. Rather, his health issues, particularly the ADHD diagnosis, appear to have independently contributed to his poor performance. Nevertheless, repeated instances of his dereliction of duty could no longer be tolerated as his job involved timely and comprehensive representation of vulnerable children, many of whom had special needs.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the evidence of record and consideration of the totality of circumstances, this Judge concludes that removal was the appropriate penalty which promoted the efficiency of the service, was within the parameters of reasonableness, and the penalty should be upheld.[37]

ORDER

It is hereby Ordered that Agency's action in removing Employee is UPHELD.

FOR THE OFFICE:

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MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

objection as to its necessity. According to Mr. Winston's unrefuted testimony, the latter PD is the same as the previously cited PD, but for, higher licensure and higher expectations. (Tr.-Vol. 2 at pp 274-283)

[37] Chapter 16, Adverse Action and Grievances, §1618.3(a) and (b), Table of Penalties provides a range of penalties from Reprimand to Removal for Inefficiency (Negligent or careless work performance; Failure to satisfactorily perform one or more major duties of his or her position), District Personnel Manual, Transmittal No. 22, January 10, 1991).