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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
EMPLOYEE ¹)	OEA Matter No. 1601-0049-20
)	
v.)	Date of Issuance: September 27, 2023
)	
DISTRICT OF COLUMBIA)	MONICA DOHNJI, ESQ.
DEPARTMENT OF TRANSPORTATION,)	Senior Administrative Judge
Agency)	
_____)	
Stephen Pershing, Esq., Employee’s Representative	
Shawn Brown, Esq., Agency’s Representative	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On June 29, 2020, Charlene Dickens (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Transportation’s (“DDOT” or “Agency”) decision to terminate her from her position as a Transportation Engineer, effective May 29, 2020. Employee was terminated for (1) failure to meet established performance standards pursuant to District Personnel Manual (“DPM”) §§ 1605.4(m) and 1607.2(m); and 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; pursuant to DPM §§ 1605.4(e) and 1607.2(e). On August 24, 2020, OEA issued a Request for Agency’s Answer to Employee’s Petition for Appeal. Agency submitted its Answer to Employee’s Petition for Appeal on September 21, 2020.

Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on December 17, 2020. On January 6, 2021, I issued an Order Scheduling a Status/Prehearing Conference for February 18, 2021. Both parties were in attendance. After several requests for extensions, and Status/Prehearing Conference, the undersigned determined that there were material factual issues in dispute that warranted an Evidentiary Hearing. Accordingly, a virtual (via WebEx) Evidentiary Hearing was held on April 19, 2023, and April 27, 2023. Subsequently, on May 23, 2023, the undersigned issued an Order requiring the parties to submit

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

written closing arguments. Following several requests for extensions of time to file written closing arguments, both parties have filed their respective closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Agency complied with DPM §1410 in implementing the PIP; and
- 2) Whether Agency had cause to discipline Employee for failure to meet established performance standards pursuant to DPM §§1605.4(m) and 1605.4(e); and
- 3) Whether the PIP was in retaliation for Employee's 2019, EEO complaint; and
- 4) Whether Agency engaged in disparate treatment; and
- 5) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW²

The following findings of fact, analysis, and conclusions of law are based on the documentary and testimonial evidence presented by the parties during Employee's appeal process with OEA. According to the record, Employee was a Transportation Engineer Grade 13, with Agency at the time of her termination. Employee returned to work from an approved leave on October 1, 2018. Upon her return, all her previous cases had been reassigned to other employees,

² Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

thus she did not have to manage any pending or overdue tasks. Employee was assigned new cases at a reduced workload to meet her limited tour of duty as authorized by her doctor. A mid-year review of Employee was conducted by her supervisor – Levon Petrosian (“Dr. Petrosian”), on April 2 and 12, 2019. Employee was informed during the mid-year review that her performance was deficient. On June 28, 2019, Employee was notified that she would be placed on a thirty (30) days Performance Improvement Plan (“PIP”) upon her return to work on July 2, 2019.³ The first PIP meeting was held on July 3, 2019. This was followed by weekly PIP meetings which were held on July 12; July 19; July 26; and August 2, 2019, during the initial thirty (30) day PIP period.

On August 14, 2019, Employee was provided with a written assessment and outcome of the 30-day PIP, wherein, she was informed that she had successfully improved in two (2) out of the five (5) performance areas.⁴ Specifically, Employee was informed that she was successful in Core Competency: (1) Communication and (2) Customer Service. She was further informed that she failed to meet Core Competency: Accountability; and the performance requirements of two (2) SMART Goals, namely Timeliness of Plan Review and Quality of Plan Review. Accordingly, she was informed that the PIP would be extended for another thirty (30) days, during which time, her performance would continue to be assessed on a weekly basis. The extended PIP ended on September 27, 2019, and Employee’s supervisor, Dr. Petrosian recommended that Employee be removed from her position with Agency for failing to heed instructions provided during the PIP and for failing to demonstrate sufficient improvement in her performance of her duties as a Transportation Engineer.⁵

On January 29, 2020, Agency issued an Advance Written Notice of Proposed Removal to Employee charging Employee with two (2) causes of actions. Specifically, Employee was charged with (1) failure to meet established performance standards pursuant to DPM §§1605.4(m) and 1607.2(m); and (2) 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; pursuant to DPM §§1605.4(e) and 1607.2(e). Each cause of action had one (1) specification stemming from Employee’s deficient performance during Fiscal Year (“FY”) 19, and the subsequent PIP.⁶ On February 18, 2019, Employee, through her Union, filed Employee’s response to the Advance Written Notice of Proposed Removal.⁷ This matter was referred to a Hearing Officer who issued a report on April 15, 2020, upholding the proposed action to remove Employee from her position.⁸ On May 26, 2019, Agency issued a Notice of Final Decision for Proposed Removal to Employee, with a termination effective date of May 29, 2019.⁹ Thereafter, Employee filed this Petition for Appeal with OEA.

SUMMARY OF RELEVANT TESTIMONY

As part of the appeal process within this Office, an Evidentiary Hearing was convened to address the issue of whether Agency’s action of terminating Employee was in accordance with

³ Petition for Appeal. *See also* Agency’s Answer to Employee’s Petition for Appeal (September 21, 2020).

⁴ *Id.* at Exhibit 3, pg. 3 (Ex.A.04.006). *See also* Petition for Appeal.

⁵ *Id.* at Exhibit 1 (September 21, 2020).

⁶ *Id.* at Exhibit 2.

⁷ *Id.* at Exhibit 4.

⁸ *Id.* at Exhibit 5.

⁹ *Id.* at Exhibit 6.

applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee.

Volume I: April 19, 2023

Agency's Case in Chief

Levon Petrosian ("Dr. Petrosian") Tr. Vol. I. pgs. 32-303.

Dr. Petrosian has been employed by Agency for twenty (20) years. He is currently the Supervisory General Engineer, and Plan Review Branch Manager of Public Space Regulation Division. Dr. Petrosian has a Bachelor's degree in Civil Engineering; a Master's degree in Civil Engineering and Transportation Engineering; a PhD in Structural Mechanics; and a Doctoral degree in Structural Engineering and Structural Mechanics. Tr. Vol. I pgs. 32 -33.

Dr. Petrosian affirmed that he supervised Employee from 2018 -2020. He explained that his supervision of Employee included assigning her work and reviewing her performance on environmental safety with respect to construction projects within the District. He stated that he had ten (10) direct supervisees when Employee was under his supervision. Tr. Vol. I pg. 35. Dr. Petrosian affirmed that Employee had job performance issues related to core competencies such as Accountability, timelines, and SMART Goals during later 2018 to early 2019. Tr. Vol. I. pgs. 36-37.

Dr. Petrosian identified Agency's Exhibit 1 as a customer complaint. This exhibit contained several emails pertaining to Employee's customer service and some mark-up drawings. Dr. Petrosian stated that the red colored mark-ups on Exhibit 1 were made by him. He affirmed that Agency's Exhibit 1 proved that Employee was having performance related issues. Tr. Vol. I. pgs. 39 -41.

Dr. Petrosian identified Agency's Exhibit 6, page 1, as the position description for Transportation Engineers. Tr. Vol. I. pg. 44. He also identified Agency's Exhibit 6, page 1 – "Annual Performance Document", as Employee's 2019 Annual Performance document. Dr. Petrosian also identified the Weingarten Right for union employees as part of Agency's Exhibit 6. Tr. Vol. I. pgs. 45-46. Dr. Petrosian affirmed that Employee annual performance document as found in Agency's Exhibit 6 reflects the performance issues that Employee had during late 2018 and early 2019. Tr. Vol. I. pg. 47.

Dr. Petrosian identified Agency's Exhibit 3 as a list of applications assigned to Employee in performance year 2019. He affirmed that the documents in Exhibit 3 conveyed the status of different applications assigned to Employee. He noted that the mark-ups on the documents were done by Matthew Marcou ("Mr. Marcou"). Tr. Vol. I. pgs. 49 – 52.

Dr. Petrosian testified that Agency's Exhibit 3 also contained emails, workload reports, and other reports of applications assigned to Employee that had statuses of 'no response'. Tr. Vol. I. pg. 53. Dr. Petrosian affirmed that Agency's Exhibit 3, page 10, is an email he sent to Employee on February 12, 2019, at 11:03 a.m. He testified that the email was sent to show Employee that she had a lower number of applications assigned to her compared to those assigned to other Maintenance of Traffic, and Transportation Management Plan ("MOT/TCP") reviewers during the same period. Dr. Petrosian further stated that the email informed Employee of the number of 'no response applications' assigned to her. He referenced pages 10 -12 of Agency's Exhibit 3, which showed that

Employee had less applications assigned to her (417) than other members of her team, over the same period and to prove that Employee had a higher number (38) of ‘no response applications’ than the other members of her team. He noted that even with less assigned applications, Employee still had issues with timeliness. Dr. Petrosian asserted that the plan review applications assigned to Employee were not more difficult or complex than those assigned to other reviewers. He asserted that the plans were randomly assigned to the reviewers. Dr. Petrosian explained that the Traffic Control Plan is a main component of the Maintenance of Traffic. Tr. Vol. I. pgs. 55-56, 104-105. According to Dr. Petrosian, Employee and the rest of his team had all the necessary information to properly do their jobs, including engineering standards, traffic operation standards, safety, safety standard. Tr. Vol. I. pg. 57.

Dr. Petrosian identified Agency’s Exhibit 2, pages 1-11, as the preliminary design review meeting for transportation management plan. He affirms that this is a guideline for performing certain plan reviews for the Plan Review Branch. Dr. Petrosian stated that this was a new function he created in the District of Columbia to address multiple construction projects. Dr. Petrosian explained that with lots of construction projects in the city, coordination is one of the most important things between different construction project within same location. Thus, they go to transportation management plan which will show ongoing construction project within the vicinity. Tr. Vol. I. pgs. 59-60.

Dr. Petrosian identified page 12 of Agency’s Exhibit 2, as the “Attendance Sheet” for the Plan Review Branch’s meeting/training in connection to the new function - training the design review meeting for transportation management plan. Tr. Vol. I. pg. 61. He identified page 13 of Agency’s Exhibit 2 as the Standard Operation Procedure for Plan Review Branch. Dr. Petrosian stated that the Plan Review Branch conducts civil engineering and traffic engineering reviews for all construction projects within the District of Columbia. He also identified page 14 of Agency’s Exhibit 2, as the 18th Edition of the drawing guidelines for the implementation maintenance of traffic control plans in the field environment. Tr. Vol. I. pgs. 61-63.

Dr. Petrosian also stated that page 29, of Agency’s Exhibit 2 was the submittal guideline drawing for maintenance of traffic and traffic control, and guidelines for reviewers and for developers. Tr. Vol. I. pgs. 63-64. Dr. Petrosian affirmed that the content of Agency’s Exhibit 2 would provide a plan reviewer with the standards and guidelines for conducting a plan review. He also affirmed that Employee received the documents in Agency’s Exhibit 2, and Employee attended the meeting where the guidelines were discussed, as apparent by her name on the second line of the attendance sheet. Tr. Vol. I. pgs. 65-66.

Dr. Petrosian admitted that he placed Employee on a Performance Improvement Plan (“PIP”) due to her performance deficits. Tr. Vol. I. pgs. 66-67. He identified page 1 of Agency’s Exhibit 4 as the cover letter of the 2019 PIP document mailed to Employee. Dr. Petrosian identified page 2 of Agency’s Exhibit 4, as the actual PIP documents issued to Employee, showing the core competencies - communication, customer service and accountability. Tr. Vol. I. pgs. 68-69. Dr. Petrosian admitted that informing Employee of the PIP in writing was consistent with Chapter 14 of the District Personnel Manual (“DPM”). Tr. Vol. I. pg. 70.

Dr. Petrosian acknowledged that the initial 30 days PIP period began on July 2, 2019.¹⁰ He testified that the PIP focused on core competencies to include communication, customer service, and accountability. Tr. Vol. I. pgs. 70-71. He stated that the PIP covered the following SMART goals: (1) quality of plan review - pertaining to all applications which were submitted to Employee; and (2) timeliness of plan review. Dr. Petrosian affirmed that the initial PIP period of 30 days was consistent with Chapter 14 of the DPM, and that Agency management (either Dr. Petrosian or Mr. Marcou) conducted weekly meetings with Employee during the PIP period, also consistent with Chapter 14 of the DPM. He noted that although Employee attended the weekly meetings, she did not show a willingness to be part of the discussion regarding her Performance Improvement Plan. Dr. Petrosian explained that these meetings were held to provide Employee the opportunity to improve her performance and ability to do her job appropriately. Tr. Vol. I. pgs. 73-75. Dr. Petrosian testified that Employee's customer service improved during the initial 30 days of the PIP. However, she failed to improve the other components – accountability, timeliness of plan review, and quality of review. As a result, Employee failed the initial thirty (30) days PIP. Tr. Vol. I. pgs. 76, 89-90. Dr. Petrosian affirmed that Employee was notified of the outcome of the initial PIP on August 14, or 15, 2019, in compliance with the ten (10) business days requirement of Chapter 14 of the DPM. Tr. Vol. I. pgs. 91-92, 111-112.

Dr. Petrosian testified that after Employee failed the initial thirty (30) days PIP, Agency decided to give Employee an additional chance by extending the PIP for another 30 days to provide Employee an opportunity to improve her competencies and smart goals. Tr. Vol. I. pgs. 90-91. Dr. Petrosian averred that Employee's performance in accountability, timelines and quality of review did not improve after the second PIP period. Tr. Vol. I. pgs. 92-93. Dr. Petrosian identified Agency's Exhibit 5 as the written decision on performance improvement plan issued to Employee, and the outcome of the PIP after the 60-day period. He also identified page 4, of Agency's Exhibit 5, as the PIP document that was provided to Employee at the beginning of the PIP period. Tr. Vol. I. pgs. 93-95. Dr. Petrosian affirmed that the PIP outcome letter issued to Employee and dated September 27, 2019, was within the timeline required by Chapter 14 of the DPM for a PIP outcome. He stated that Employee failed to correctly apply Agency standards and policies, and the Public Space Regulation Division standard operation procedures for traffic control plan, maintenance of traffic review, the process. He also noted that Employee did not improve her timelines and a lot of applications assigned to her were not completed, so he often had to reassign the applications to other reviewers, or he did the review by himself, which was problematic for the team. Tr. Vol. I. pgs. 103-104, 147-151.

Dr. Petrosian identified pages 1-13 of Agency's Exhibit 7, as the occupancy permit application handout, management comments, and reviewer comments. Tr. Vol. I. pg. 77. He identified pages 14-63 of Agency's Exhibit 7, as the maintenance of traffic and traffic control plan drawings, which also include red colored mark ups of the drawings, made by Dr. Petrosian. Tr. Vol. I. pg. 78. Dr. Petrosian identified pages 64-70 of Agency's Exhibit 7, as Employee's work performance report for the period of May 19 through September 18, 2019 – which covers the PIP period. Tr. Vol. I. pg. 79. Dr. Petrosian testified that Agency's Exhibit 7 showed that Employee failed to complete her assigned work in a timely manner. He noted that Employee failed to timely review the applications assigned to her. Tr. Vol. I. pg. 83.

Referencing Agency's Exhibit 7, page 14, Dr. Petrosian stated that Employee failed to correctly apply DDOT standards and policies, and Public Space Regulations standard operating

¹⁰ The parties also stipulated to this.

procedure for traffic control plan approval process. He explains that page 14 included a drawing of a traffic control plan application which was submitted for review. He also notes that he made the red mark-ups on the drawing during the PIP period, and the mark-ups showed that Employee was doing a poor job. Tr. Vol. I. pgs. 85-86. Dr. Petrosian stated that pages 1-13, of Exhibit 7, shows that Employee failed to timely review applications. He explained that the timeframe for the review process is ten (10) working days, but Employee had 15 days. Tr. Vol. I. pgs. 86-87.

Dr. Petrosian testified that Agency Exhibit 7, pages 65-70 contain a report of Employee's work for the period of May 19, to September 7, 2019. He stated that the illustrations showed the number of applications Employee approved, how many were revised and resubmitted. He affirmed that Employee's performance was poor during the PIP period. Tr. Vol. I. pgs. 87-88. Dr. Petrosian identified Agency's Exhibit 9, as Employee's 2019, Annual Performance document. Tr. Vol. I. pg. 105. He acknowledges that Agency terminated Employee because of her performance deficits and failure of the PIP. Tr. Vol. I. pg. 107.

Dr. Petrosian affirmed that he was aware that Employee filed an EEO complaint against him in 2019. Tr. Vol. I. pg. 108. He stated that he does not recall receiving a request for accommodation from Employee in 2015. Dr. Petrosian noted that he did not place Employee on a PIP because of any previous complaint or request for accommodation, but because of Employee's poor performance and performance deficiency. Tr. Vol. I. pgs. 109 -110. He noted on cross-examination that he recalled Employee requesting a sit/stand desk as accommodation for her neck and back pain in 2015 and Agency provided her with the requested accommodation. Dr. Petrosian stated that he did not refuse Employee's request for accommodation. Tr. Vol. I. pgs. 116, 118-119, 121-125.

Dr. Petrosian affirmed that a PIP was a legitimate way to deal with severe performance issues. He highlighted that an employee should be removed from their position if they failed to improve during a PIP. When asked if he had any other employees who exhibited severe performance deficiencies in 2019, Dr. Petrosian said 'no'. He asserted that if he had an employee like that, they would have received the same treatment as Employee. Tr. Vol. I. pgs. 112 - 113. He affirmed that Agency was correct in removing Employee from her position. Tr. Vol. I. Pg. 114.

Dr. Petrosian asserted that technicians and engineers in the TCP review team did the same work with regards to functionality/review process and they had the same requirements and were governed by the same regulations. He affirmed that engineers were paid more than technicians. Tr. Vol. I. pgs. 127 -128. Dr. Petrosian affirmed telling engineers in his team that he held them to a higher standard of thoroughness than technicians because the engineers should be more knowledgeable, and more professional in doing their jobs compared to the technicians. Tr. Vol. I. pgs. 132-134.

Referencing Agency's Exhibit 5, pages 11-12, Dr. Petrosian stated that Employee failed to provide substantive and specific comments on plans she reviewed before the plan review deadline. He explained that Employee repeatedly provided incomplete and inconsistent review of plans. Tr. Vol. I. pgs. 139-140. Dr. Petrosian explained that he considers accountability to include timeliness, Employee's specific job, her attitude towards the job/customer service, and quality of review. Tr. Vol. I. pgs. 144-146.

Dr. Petrosian testified that they had multiple reviewers for specialist construction permit applications. He noted that when a reassignment occurs via a reviewer's own initiative, the ten (10)

day clock does not stop. Dr. Petrosian explained that when this happens, the application that was reassigned to the other reviewer will be in the other reviewer's queue for them to work on. Tr. Vol. I. pg. 157. He further explained that if the initial reviewer changes the status of the application and reassigns it to another reviewer, the new reviewer becomes responsible for the review. Tr. Vol. I. pg. 158.

When asked if only the supervisor and not the initial reviewer could stop the ten (10) days time clock, Dr. Petrosian said that was not true. When asked if Employee could stop the clock by herself if she thought that one of her TCP plans had to be reviewed by a civil or electrical engineer, Dr. Petrosian testified that Employee would not be able to stop the clock and she should not do so. He explained that Employee was only responsible for the maintenance of traffic and traffic control plan and not the electrical part. He also stated that pertaining to work zone group, Employee was only responsible for the maintenance of traffic and traffic control plan drawing and it was not her responsibility on work with civil engineering part since another team was responsible for that. Dr. Petrosian reiterated that Employee was only responsible for the maintenance of traffic, traffic control, and she should not involve engineering drawing, or electrical drawings. He affirmed that when work assigned to Employee goes past ten (10) days it is classified as 'non-response.' Tr. Vol. I. pgs. 162-173.

Dr. Petrosian asserted that when a reviewer finds a problem or insufficiency in the plan as submitted by the customer, the reviewer should make modifications on the traffic control sign. He explained that if it was an unacceptable drawing – for example the application was missing some figures, the reviewer can change the status to 'revise and resubmit', plus maybe objections to the application, and the reviewer is considered to have done their job for that application once the status is changed. He further provided that to avoid delays, per their policy, and depending on the traffic control plan, often, instead of going to the revision process, the reviewer has the authority to make minor modifications and add comments to prove that was not the official way to do that, instead of changing the status to 'revise and resubmit.' Tr. Vol. I. pgs. 175 -177.

Dr. Petrosian asserted that Employee failed to change the status of applications assigned to her to 'under review' or open the applications in some cases within the required two (2) days timeframe. He stated that for the six (6) months period between October 2018 and the Spring of 2019, Employee failed to change the status of seventeen (17) of the 474 applications assigned to her to 'under review' within two (2) days. Tr. Vol. I. pgs. 178-180. Petrosian asserted that the reviewer is not required to approve all applications assigned to them. However, their comments on the original applications must be clearly understood by the applicant. Tr. Vol. I. pgs. 181-183. Dr. Petrosian explained that when the reviewer's comments to the applicant are clear, yet the applicant resubmits the application without making the requested changes, the reviewer can reject the license application. Dr. Petrosian testified that the reviewer has the authority to add the street dimension to the application, depending on the type of project. He explained that the reviewer should be familiar with the location of the review, and they possess all the required information for the review such as streets and classifications. Dr. Petrosian averred that the reviewer can approve a traffic control plan with minor modifications. Tr. Vol. I. pgs. 183-186, 188-189.

Dr. Petrosian responded in the affirmative when asked if it would be proper for a reviewer to send back an application to the applicant with a 'revise and resubmit' if the applicant omitted the street dimension, the drawing was not to scale, and the reviewer could not readily ascertain how wide the obstruction was. He explained that this would be applicable for some, but not all applications. Tr.

Vol. I. pg. 190. Referencing Agency's Exhibit 1, at page 6, Dr. Petrosian explained that Employee waited until the very last day that her review for the application was due, to include some extensive comments that were not relevant to the project or TCP. Tr. Vol. I. pgs. 192, 194. Dr. Petrosian asserted that he reassigned the application, and he made some minor modifications to the application with regards to the pedestrian access road, included his comments and approved the application, instead of sending it back. He explained that traffic control plans changed. He stated that if this same application was submitted in 2023, he might have rejected it for some reason. Dr. Petrosian testified that if the applicant was unable to comply with his request for modification to the pedestrian access road, the work would be shut down because the application goes to the inspector, who ensures compliance on behalf of the traffic control plan. Dr. Petrosian explained that the inspector gets the application immediately after it is approved. Next, the review inspector is expected to go out to the field to provide a site observation while considering everything he sees on the drawing. Tr. Vol. I. pgs. 194 – 197.

Dr. Petrosian testified that 99% of applications are approved with conditions. Dr. Petrosian averred that, for TOPS comments, reviewers should provide clear, and not vague comments or traffic control plan. When asked if TOPS system has 'canned notes', Dr. Petrosian said 'no. He explained that TOPS reviewers should add the comments. He stated that they had inspection criteria and guidelines such as TCP submittal guidelines, the UMTCD, the DDOT manual for traffic control plan and maintenance of traffic. Tr. Vol. I. pgs. 202 – 210, 248-269, 272-275.

Dr. Petrosian stated that depending on the type of project or scope of work, a reviewer can 'reject', 'revise and resubmit', or 'approve with condition' a project that is not scaled. He noted that whatever option the reviewer chooses, it is important for the reviewer to use appropriate variables for each project. Tr. Vol. I. pgs. 221-222, 224.

Referencing Exhibits 7 pages 14-18, Dr. Petrosian averred that the last drawing of the three (3) drawings submitted is wrong. He explained that the reviewer should have caught the error in the last drawing, made modifications, included additional comments, and approved the application. Dr. Petrosian further explained that if the reviewer was not comfortable approving the application, upon review of the application, they should have made comments and provided recommendations. Tr. Vol. I. pgs. 237, 243-262.

When asked if any other reviewer in the TCP Plan Review Unit besides Employee had been placed on a PIP by Dr. Petrosian, he said 'no'. Dr. Petrosian testified that everyone, including the reviewer made mistakes; however, if any of the other reviewers made as many mistakes as Employee, they would also be placed on a PIP. Tr. Vol. I. pg. 230.

Howard Ways ("Mr. Ways") Tr. Vol. I. pgs. 306-352.

Howard Ways has been employed by Agency for approximately four (4) years. He is the Chief of Operations, and his responsibilities include leading and managing staff in their day-to-day maintenance and operations of District of Columbia's public infrastructure. Mr. Ways has 770 employees under his chain of command. Tr. Vol. I. pgs. 307 – 308.

Mr. Ways does not know Employee personally, but rather as an Agency employee. He stated that he first became aware of Employee when the issue of her performance was brought to his

attention by the Associate Director of the Public Space Regulation Division, Mr. Matthew Marcou (“Mr. Marcou”). Mr. Ways also affirmed being familiar with Dr. Petrosian. Tr. Vol. I. pgs. 309-310.

Mr. Ways affirmed that he issued a final decision of removal to Employee in 2020. He identified Agency’s Exhibit 12 as the notice of final agency decision of removal that he signed and executed. Mr. Ways asserted that Employee was removed from her position due to her poor performance. He acknowledged reviewing the PIP in this matter and the written decision relating to the instant PIP to include the advance notice of proposed removal and its supporting documentation, Employee’s response, and the Hearing Officer’s report, before issuing his final decision. Mr. Ways affirmed that he noted his findings in his final notice of removal. Tr. Vol. I. pgs. 310 – 311, 313 -315.

Mr. Ways acknowledged that based on his review of the documents presented in this matter, he found that Employee neglected her duties, and Employee’s removal from her position at Agency was an appropriate penalty for Employee’s performance deficiencies and neglect of duty. When asked if he made the determination to remove Employee for reasons other than her performance and neglect of duty, Mr. Ways said ‘no’. He affirmed that removal was an appropriate penalty for failure of a PIP under Chapter 14 of the DPM and for neglect of duty under Chapter 16 of the DMP. Mr. Ways affirmed that removal was an appropriate penalty for either cause of action. Tr. Vol. I. pgs. 315 – 317.

Mr. Ways testified that he was not aware of Employee’s EEO retaliation complaint when it was filed in 2019. He stated that he only found out about it during the instant matter. He affirmed that his decision to remove Employee was not based on the EEO complaint she filed in 2019. Mr. Ways averred that EEO Complaints should be fully investigated and should not be a basis for discipline. Mr. Ways did not believe that Dr. Petrosian or Mr. Marcou had any bias towards Employee or that placing Employee on a PIP was a result of retaliation. Tr. Vol. I. pgs. 318, 320 – 321.

When asked if he was aware of any other members of the Plan Review or Public Space Regulation Division who were subjected to discipline between 2018 and 2019, other than Employee, Mr. Ways testified that he was not aware of anyone. He affirmed that he would have placed any other employees on a PIP if their performance was like Employee’s. Mr. Ways also acknowledged that an employee with severe performance issues who failed a PIP should be removed from their position. Tr. Vol. I. pgs. 321-322.

Mr. Ways asserted that the Hearing Officer recommended removal and agreed in her report that Employee failed to meet performance standards and neglected her duty. Tr. Vol. I. pgs. 322-323. Mr. Ways stated that based on his experience working with Dr. Petrosian and Mr. Marcou, neither of them showed any malice, ill will or intent towards Employee. Therefore, he found their recommendations and that of the Hearing Office to reflect their professional opinion and assessment of Employee’s work product while she was at Agency. Tr. Vol. I. pgs. 325-326.

Mr. Ways testified that he was an architect by training, and an urban planner, but he did not have any engineering experience. He noted that he does not review engineering drawings in his current position. He affirmed reviewing some of the engineering drawings that Employee was blamed for incorrect or insufficient review. He stated that he looked at the drawings. When asked if he compared Employee’s drawings with those of the other employees to see if the drawings of the other employees also had errors, Mr. Ways said ‘no’. Tr. Vol. I. pgs. 326-327.

Mr. Ways stated that he had a personal meeting with Dr. Petrosian and Mr. Marcou about Employee's performance issues. He noted that he was shown some examples of Employee's work product and some of her comments. Mr. Ways asserted that they were focused on Employee's performance and not that of the other employees in the Division. He explained that Employee was underperforming, and he was not aware of any other employees who were underperforming. Mr. Ways stated that managers have the responsibility of ensuring that their staff and their direct reports meet their obligations, duties, and responsibilities. He explained that if a manager informed him that a particular employee was underperforming and they provided documentation to support their claim, he would address the complaint as presented. Mr. Ways stated that Employee was placed on a PIP, and he also got an extension to help him improve his performance under the PIP, but she failed to do so. He did not perform any independent investigation into Employee's performance because it was not his responsibility to do so. Tr. Vol. I. pg. 328 -330, 333-336.

Mr. Ways stated that he was aware of some performance issues involving another employee – Mr. P.¹¹ He stated that Mr. P worked at Agency, but he did not know his official job title or function. Mr. Ways asserted that Mr. P worked in the Public Space Regulation Division, just like Employee, Dr. Petrosian and Mr. Marcou. He stated that he would have to look at the organizational chart to identify Mr. P's exact branch within the Public Space Regulation Division. He does not know the alleged performance deficiencies levied against Mr. P or whether he was removed from Agency. Mr. Ways did not recall any employee named JS.¹² Tr. Vol. I. pgs. 338, 342, 344-348. Mr. Ways affirmed that there are technicians and engineers under Dr. Petrosian in the Plan Review Branch. Tr. Vol. I. pg. 348

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Matthew Marcou ("Mr. Marcou") Tr. Vol. II. 7-174.

Matthew Marcou ("Mr. Marcou") is the Chief of Staff at Agency. He has been in this role for about ten (10) months. Prior to that, he was the Associate Director of the Public Space Regulatory Division ("PSRD") at Agency. Mr. Marcou stated that in his previous position, he managed a division with four (4) branches that regulated private users of public space, utilities, developers, and major construction projects. He served as an Associate Director for seven (7) years. Mr. Marcou asserted that he was a Deputy Associate Director for the Public Space Regulatory Division from its inception, and for an additional five (5) years. Mr. Marcou is familiar with Employee. He stated that they started at Agency around the same time and Employee was in his "New Employee Orientation" class in 2004. Mr. Marcou also asserted that he has known Dr. Petrosian for the majority of his tenure with Agency. He is also familiar with Mr. Ways and has known him since 2018/2019, when Mr. Ways joined Agency. Tr. Vol. II. pgs. 8 – 10, 96-97.

Mr. Marcou affirmed that Employee had neglect of duty issues during his time as Associate Director at PSRD. He testified that Employee had several components related to her neglect of duty, specifically, the timeliness of her reviews as a member of the Plan Review Branch of the PSRD, as well as her improper reviews creating safety issues in a right-of-way. Tr. Vol. II. pg. 11.

¹¹ To protect this employee's identity and privacy, his initial "P" will be used throughout this decision.

¹² To protect this employee's identity and privacy, his initials "JS" will be used throughout this decision.

Mr. Marcou provided an overview of the application review process. He explained that submitted applications are assigned to permit technicians who then review the application for completeness and accuracy. Thereafter, the permit technicians assign the applications to different reviewers based on the type and scope of work involved. Upon assignment of these applications, reviewers get automated emails notifying them that the application has been assigned to them. The reviewers have an online system dashboard that identifies the applications in the queue, as well as when the application deadline is approaching. He testified that reviewers must review the application within a certain period to ensure that the applications are processed in a timely manner. Mr. Marcou stated that the reviewers do a substantive review of the application. Once their review is complete, the permit technicians process the application by ensuring that the application contains complete comments. He stated that all employees who review applications in the Plan Review Branch are called 'reviewers.'

Mr. Marcou asserted that reviewing the applications in a timely manner is crucial to the process because if the reviewer does not complete their review of the application within the review deadline, the permit technician will be unable to notify the applicant of any potential changes to the application which are required for approval. He reiterated that the timeliness of the application review is crucial to the efficient operation of the permitting process for everyone using the public space. Tr. Vol. II. pgs. 12 – 14, 132-135.

Mr. Marcou affirmed that Employee's neglect of duty also included her carelessness in completing her plan reviews. He explained that Employee exhibited the carelessness in her review in that, (1) in situations where Employee had applications that required the applicant to make revisions, Employee did not provide the applicant with clear and accurate comments on what changes were needed, and (2) when the plan itself required minor revisions that Employee could perform, she made modifications and approvals to plans that were not in compliance with Agency standards and regulations, thereby creating unsafe conditions. Tr. Vol. II. pgs. 14 – 15.

Mr. Marcou acknowledged that Employee's neglect of duty included her failure to respond to customers' requests for meeting and discussions about the plan review. He noted that this was a critical component as applicants used Agency's online system frequently to contact technicians and reviewers for additional information about the review comments they received or to schedule technical meetings with the reviewers to go over material. However, Employee consistently failed to respond to customers either via phone or email in a timely manner. Tr. Vol. II. pgs. 15-16, 166-168.

Mr. Marcou affirmed that Employee's neglect of duty affected the efficiency and functioning of Agency. He explained that Employee's neglect of duty affected Agency's reputation with applicants to a point where they would ask not to have their applications submitted to Employee. Mr. Marcou stated that Employee's neglect of duty also had cascading affects in the right-of-way because utilities could not do their work if they were connecting to a property, and property developers were also delayed in their ability to provide service connections within their building. He asserted that Employee's neglect of duty meant that when one party was not able to complete its work in a timely manner, another party using an area of right-of-way nearby would also not be able to do their work in a timely fashion, thus impacting the schedules for contractors and subcontractors. Mr. Marcou also affirmed that Employee's neglect of duty created safety issues from time to time and threatened public safety. Tr. Vol. II. pgs. 16 – 18.

Mr. Marcou affirmed that Employee should have been placed on a PIP in 2019. He stated that Employee was placed on a PIP because of her failure to perform her duties and responsibilities appropriately across a variety of components, after repeated written and verbal counseling from Dr. Petrosian. He asserted that Employee's performance failed to improve, therefore, a PIP was warranted. Mr. Marcou stated that Employee had performance issues in core competencies such as accountability, customer service to both internal and external customers, and communication. He stated that Employee also had performance deficiencies in two (2) SMART goals – timeliness of her reviews and the quality of her reviews. The focus of the PIP was to improve these five (5) areas. Tr. Vol. II. pgs. 19 – 21.

Mr. Marcou affirmed that Agency followed the PIP guidelines outlined in Chapter 14 of the DPM. He acknowledged that Agency (Dr. Petrosian, Mr. Marcou and occasionally Eliot Garrett or Walter Graham)¹³ held weekly meetings with Employee during the initial thirty (30) day period to discuss the observed and documented performance deficiencies, as well as ways to improve those areas of performance. Mr. Marcou asserted that although Employee would attend the meetings, she did not participate. He noted that Employee did not articulate her reasons for not participating, but to reserve her Weingarten rights. Mr. Marcou explained that the Weingarten rights guaranteed union employees like Employee, the right to union representation in meetings related to discipline or disciplinary actions. He highlighted that the weekly PIP meetings were not disciplinary or investigatory meetings. Tr. Vol. II. pgs. 21- 24.

Mr. Marcou testified that Employee's performance did not improve in the areas where she was deficient during the first thirty (30) days of the PIP, as such, the PIP was extended for another thirty (30) days. He affirmed that Employee improved in communication and customer service, but not in accountability, timeliness in plan reviews and quality of plan reviews. Mr. Marcou stated that Agency informed Employee of her failure to successfully complete the PIP on August 15, during the PIP meeting, which was within the timeframe required by the DPM. Mr. Marcou asserted that Employee's performance during the extended PIP period was similar to her performance during the first thirty days of the PIP and Employee's performance did not improve. Mr. Marcou stated that Employee was informed in writing during a meeting at the end of the extended PIP of her failure to successfully complete the 60-day PIP. He averred that because of Employee's failure to demonstrate any improvements in her performance, Agency decided to remove Employee from service. Tr. Vol. II. pgs. 24 – 28.

Mr. Marcou cited that an Advanced Notice of Removal was issued to Employee in 2020. He identified Agency's Exhibit 11 as the Advance Notice of Removal he signed and that was delivered to Employee because the record demonstrated that removal was appropriate in this case. He asserted that, after her manager, Dr. Petrosian had documented Employee's performance failures, discussed these failures with her and provided her with feedback and guidance during an extended period, Employee's steadfast and resolute lack of engagement at every step of the way, combined with her continuous performance failures in these areas, the associated safety issues presented by her failure, Mr. Marcou determined that removal was appropriate. He noted that the two (2) causes of action levied against Employee were independent causes for removal. Tr. Vol. II. pgs. 28 – 32.

Mr. Marcou testified that the governing Collective Bargaining Agreement ("CBA") did not require a separation of the mitigating factors and the *Douglas* factors. He affirmed that he considered

¹³ Elliot Garrett was a Senior Public Space Manager at the time and Walter Graham was the Head of Customer Relations within Public Space Regulation Division.

both the Douglas factors and mitigating factors. He acknowledged that both causes of action against Employee were independent and removal was appropriate for each independent cause of action. Tr. Vol. II. pgs. 32 – 34.

Mr. Marcou highlighted that he did not dislike Employee, nor did he propose her removal because she was a woman. He recounted some of Employee's impressive work/achievements at Agency such as her participation in the DC One Fund Campaign, the Halloween and Christmas events. He cited that Employee was very engaged in those events, which built greater community and culture within the PSRD. Mr. Marcou stated that Employee, however, did not demonstrate that level of commitment or interest in her daily duties, particularly during the performance year. Tr. Vol. II. pgs. 39 – 44.

Mr. Marcou acknowledged that he was aware that Employee filed an EEO complaint in 2019 against him and Dr. Petrosian. He also affirmed that Employee made a request for reasonable accommodation for a sit-stand desk in 2015. Mr. Marcou highlighted that his decision to remove Employee from her position was not because of the EEO complaint Employee filed against him or because of Employee's 2015 reasonable accommodation request. He explained that reasonable accommodation requests are not handled by his office. He also noted that Employee's request for reasonable accommodation was granted, and the requested equipment was installed. Tr. Vol. II. pgs. 44 – 45, 121-125, 165-166.

Mr. Marcou affirmed that if an employee had similar performance issues as Employee, a PIP would be the correct response by Agency. And if they failed the PIP and their record was similar to Employee's he would recommend removal. Mr. Marcou cited that the typical procedure for Agency, which is followed by the PSRD is to extend a PIP for another 30 days when an employee fails the initial 30 days PIP period. Tr. Vol. II. pg. 46.

Mr. Marcou testified that an employee would not be placed on a PIP for making just one (1) bad comment or note on a review plan. He stated that Agency had hundreds of examples of Employee's performance failures in the record. He explained that Employee's failure to meet the 10 days review deadline goes towards the accountability and customer service components. Mr. Marcou asserted that Employee approved a traffic control plan for 14th Street NW directing pedestrians into an unsafe condition. According to Mr. Marcou, Employee's conduct was not consistent with Agency's pedestrian and safe accommodation regulations, nor was it consistent with the pedestrian safety and work zone standards. Mr. Marcou testified that the record of the proposed action included a variety of locations and examples of Employee's reviews that were both untimely, inconsistent, and in violation of the Pedestrian Safety Work Zone Standards, other highway regulations, the Manual and Uniform Traffic Control Devices and other published guidelines and standards. Mr. Marcou cited that these issues were well documented in the record and were part of the discussions with Employee during her weekly PIP meetings. Tr. Vol. II. pgs. 49-51, 54-55, 165.

Mr. Marcou identified Employee's Exhibit 1 as the approved traffic control plan for Washington Gas – 335974 as reviewed by a permit technician in the Construction Permit Group within the Public Space Permitting Branch, and the traffic control plan approved by Employee, with some comments. Mr. Marcou testified that the impeachment Exhibit 1, was part of Agency's Exhibit 7, page 2 of 3, and it indicates the review completed by Dr. Petrosian as part of Employee's PIP. Mr. Marcou testified that Employee caused the drawing to go to the public by approving an inappropriate plan. He testified that Dr. Petrosian does not perform a Quality Assurance ("QA") or Quality Control

("QC") review of the work done by his team for every single plan they review. He stated that the reviewer is responsible for following Agency standards and guidelines, as well as ensuring that the plans they approve are legible. He affirmed that Management does not check all plans before a reviewer approves it and releases it to the public. Tr. Vol. II. pgs. 83 – 89, 92-93, 165.

Mr. Marcou testified that prior to getting the negative feedback from Employee's direct supervisor about Employee, he was aware that Employee's work was "spotty", and that she would perform good, adequate, and appropriate work occasionally; but she was either careless or negligent, and she was periodically untimely in contacting customers and keeping up to date with her work. Mr. Marcou explained that in his roles as Deputy Associate Director and Associate Director, he would be contacted occasionally by technicians, and applicants with concerns about Employee's work product, her timeliness, the accuracy of the reviews, her demeanor and customer relations, specifically that her comments were too vague. He explained that she did not put specific notes about material that needed to be added to a plan or modified in the plan. She only put canned notes regarding following the Manual on Uniform Traffic Control Devices or Agency standards or guidelines. He provided an example where instead of Employee saying something along the lines of "on page 2 of your traffic control plan, please note the size of the sign that you are installing, she would say... follow the Manual on the Uniform Traffic Control Devices." Tr. Vol. II. pgs. 98 - 101.

Mr. Marcou did not recall being asked by Jeffrey Powell to raise Employee's annual performance evaluation scores. He also did not recall the specifics of Employee's 2017 performance evaluation, but he stated that he would have signed off on Employee's 2017 performance evaluation. Mr. Marcou stated that he does not recall Employee filing an appeal about her performance evaluation score for 2017. Mr. Marcou noted that such an appeal may not have come to him since they would not have been subject to his review. Mr. Marco asserted that he does not recall receiving directions from the RRC committee to raise Employee's performance evaluation scores for 2017. He explained that the RRC committee was a body that heard appeals from employees regarding their performance evaluations. He averred that as Employee's direct manager, Dr. Petrosian might have been the one notified by the RRC of the outcome of Employee's appeal. Tr. Vol. II. pgs. 125 -132.

Mr. Marcou testified that Employee had the highest pay grade in the Traffic Control group of the Plan Review Branch. He explained that management had explained to Employee that because of her position description and having the highest pay grade, she was given more independence and she was expected to be subject to less management review. He asserted that there is a higher expectation of independent, professional, appropriate performance as employees go through their grades. Mr. Marcou noted that Employee was expected to apply the same standards as the other traffic control reviewers. When asked if he had ever heard anyone tell Employee that they did not want her to review a plan because her review was going to be too exacting and they wanted somebody who was going to rubber stamp it, Mr. Marcou said 'no'. Tr. Vol. II. pgs. 137 – 140, 142-143.

Mr. Marcou reiterated that he received complaints regarding Employee's review for lack of timeliness, lack of clarity, lack of communication, failing to follow standards in certain circumstances. He noted that these issues were discussed with Employee during her mid-year performance evaluation, and she failed to address them, which was why she was placed on a PIP and ultimately terminated. Mr. Marcou affirmed that he has had an external customer request that their plan which was initially assigned to Employee be assigned to another reviewer. Mr. Marcou testified that generally, they try not to reassign applications because they want employees to perform their duties. He also stated that reassigning applications to other employees would impact their deliveries,

but there have been times when they have had to reassign applications to other employees. He cited that he cannot recall the number of times that applications originally assigned to Employee had to be reassigned; however, he noted that it has been done repeatedly over a period, even prior to Employee requesting reasonable accommodation in 2015. Mr. Marcou stated that Employee's performance was not as substantially deficient back in 2015. Tr. Vol. II. pgs. 144-149, 166-168.

Mr. Marcou testified that Mr. P is a Permit Technician in the Public Space Regulation Division and not a traffic control plan reviewer. Tr. Vol. II. pgs. 36 – 38. He noted that Mr. P was placed on a PIP in 2020. He stated that Mr. P is an African American male. He explained that Mr. P's direct manager was Tiffany Tenbrook ("Ms. Tenbrook") and she developed Mr. P's PIP to monitor his performance. Mr. Marcou further explained that Ms. Tenbrook's manager was Elliott Garrett ("Mr. Garrett") and Mr. Garrett would be familiar with Mr. P's performance plan and overall rating. He does not recall if he has signed off on Mr. P's evaluation. Mr. Marcou asserted that as the Associate Director, he allows the direct managers to manage their groups. He noted that he was not aware that Mr. P had an overall evaluation score of '2.0' and he was not placed on a PIP in 2020. He recalled that Mr. P's manager recommended a ten (10)-day suspension against him, which Mr. Marcou reviewed and signed off on. Tr. Vol. II. pgs. 149 – 151, 153, 156.

When asked if evaluations with overall scores of '2.5' or below generally subjected to a PIP, he said 'no'. He explained that if the score is '2.5' and above, it is considered a '3' and any score below a '2.5' will require a PIP. He does not recall signing off on any overall evaluation scores below '2.5' during his time at Agency. He stated that if there were any, it would be a handful and a PIP would have been imposed. Tr. Vol. II. pgs. 152 -153.

Mr. Marcou acknowledged that JS was a Permit Technician under his supervision. He stated that JS was placed on a PIP, and he was unsuccessful in the PIP. He explained that the PIP was conducted by Courtney Williams ("Ms. Williams"), who reported to Mr. Garrett at the time, and they managed the PIP. Mr. Marcou stated that he was not familiar with the specifics of JS's PIP. He does not recall a Notice of Proposed Removal to JS in September of 2020, and he does not recall signing off on one. He explained that to the best of his knowledge, JS was still at Public Space Regulation Division and was not under any disciplinary action when he left PSRD in the summer of 2022. Tr. Vol. II. pgs. 159-162.

Employee's Case in Chief

Employee – Tr. Vol. II. pgs. 174-328

Employee has a Bachelor's degree in Electrical Engineering and has taken the engineering oath which requires that she follow the engineering standards and guidelines to the best of her ability to ensure public safety. Prior to joining Agency, Employee was a patent examiner reviewing patent applications in arts. Employee was employed by Agency in 2004 to perform traffic control reviews. She stated that she was later reassigned to the Traffic Control Branch from the DDOT Officer of Civil Rights, where she worked with the ADA coordinator, Brett Rouillier ("Mr. Rouillier") to ensure that all Agency infrastructure was ADA compliant. She stated that she knew Mr. Rouillier personally. Tr. Vol. II. pgs. 174 -178.

Employee affirmed that she needed ADA accommodation at the beginning of 2015, pursuant to a letter for accommodation from her treating chiropractor. Employee testified that she gave the

chiropractor's note to her immediate supervisor, Dr. Petrosian, who 'shrugged' at her and said nothing. According to Employee, she escalated her request to Mr. Marcou, and he informed her that he would investigate it. Employee stated that when she did not hear back from Mr. Marcou, she contacted Mr. Rouillier, the ADA coordinator, who informed her that it appeared Agency was not willing to provide her with the requested accommodation, for reasons unknown to him. Employee state that Mr. Rouillier escalated the request to the Associate Director of Public Space and Regulation Division, Mr. Powell, who approved Employee's ADA accommodation requests and Employee received the recommended accommodation sometime in October 2015. Employee stated that after she received her accommodation, Dr. Petrosian's and Mr. Marcou's attitude changed towards her. They became less chatty with her and would rarely ask about her work as they typically did before her request for ADA accommodation. Tr. Vol. II. pgs. 178 – 189, 210.

Employee testified that in 2016, she was a transportation engineer within the plan review branch. She stated that she started in this role as a grade GS-13, and she remained in this grade until her termination and the other members of her team had grades ranging from GS-09 – GS-12. Employee provided that the traffic control plan review team had a total of nine (9) members, with several position titles from engineering technicians, transportation specialists, transportation engineers. Employee explained that as she was required to take the engineering oath, while her lower grade level team members were not required to do so. She noted that she was also bound by the 'Gold book' and the engineering design manual in conducting her analysis. Employee stated that while the technicians were also required to consult the 'Gold book' and engineering manual in executing their jobs, she did not believe they had the ability to do so because they are not engineers by training. Employee cited that she approached/reviewed applications differently and from a more complex level than the technicians because of her engineering training and skill set. She explained that she reviewed the entire application, including all the engineering drawings, and not just the traffic control plans before making her decisions. Employee asserted that although she was a traffic control plan reviewer, she could not examine just the traffic control plan when the application contained other information. She stated that she had to ensure the engineering drawings matched the traffic control plan and the reason for the application before making her analysis and her decision on the application. Tr. Vol. II. pgs. 189 – 197.

Employee cited that in reviewing the engineering drawings, she discovered issues that needed the attention of the civil engineer. She explained that because she was not a civil engineer and she was not tasked with reviewing the civil plan, she would walk the plan to the civil engineer, Edwin Edokwe's cubicle, ("Mr. Edokwe") and have him review that part. Employee stated that she took plans to Mr. Edokwe frequently for review. Employee asserted that in the beginning of 2019, she, and Mr. Edokwe informed Dr. Petrosian of the issues Employee was finding with the drawing in her assigned applications that needed her to consult with Mr. Edokwe, because the permitting technician was not assigning the drawings to him. Tr. Vol. II. pgs. 197 – 201.

Employee stated that the permit technician's failure to assign applications to the appropriate reviewers before assigning them to her affected her review because the clock continued to tick on her, and she could not move the review forward without getting feedback from the other reviewers. She testified that her input depended on the input of the other reviewers although the clock was still ticking on her. Employee asserted that there was no way to stop the clock from ticking while another reviewer was reviewing an application assigned to her unless she 'approved', 'denied', 'reject the application' or put it in 'revise and resubmit'. Employee stated that those options were not appropriate for such reviews. Employee stated that because of her skill set, she was the only member

of the Plan Review Branch who consulted with other reviewers. Employee testified that Dr. Petrosian informed her that her reviews were taking too long, and she informed him that she was waiting on Mr. Edokwe's decision before she could proceed. She also noted that she would put a similar note in the system to inform the applicants of the status of the review, but this did not stop her clock from ticking. Tr. Vol. II. pgs. 203 – 209. Employee reiterated that her reviews took longer because she did an in-depth analysis and not rubber stamp like the other reviewers. Tr. Vol. II. pg. 210.

Employee testified that her 2017 performance evaluation rating which she received on December 31, 2017, was lower, although her work habit had not changed, and she was doing the same work that she had done the previous year. She noted that the evaluation period was October 1, 2016 – September 30, 2017. She highlighted that the evaluation was not proper because she received it one (1) full quarter year after the plan year and past the November deadline to issue evaluations. Employee asserted that she appealed the evaluation to the RRC, and her overall performance rating was raised from a '2.6' to a '2.9'. Employee stated that the RRC informed Agency management of their decision. She stated that she was later placed on a PIP in June 2018, about three (3) months after the RRC decision to raise her score. Tr. Vol. II. pgs. 210 -215.

According to Employee, after the RRC decision, Dr. Petrosian and Mr. Marcou's attitude towards her changed, and that everything she did was considered wrong, and she got nothing but complaints from them. Employee averred that she was placed on a PIP in 2018. Tr. Vol. II. pgs. 215 – 217. Employee asserted that she contacted the performance officer, Dorinda Floyd ("Ms. Floyd") as well as D.C. head of personnel, Ventris Gibson ("Ms. Gibson") on the same day, July 2, 2018. Tr. Vol. II. pgs. 217 – 224.

Employee testified that she had a PIP meeting with Dr. Petrosian on July 26, 2018, and Mr. Edokwe as her witness. Thereafter, she went on approved leave to October 1, 2018, following a car accident. She noted that when she returned to work from her approved leave, the July 2018 PIP had disappeared, and she had zero reviews in her review queue. Employee returned to part-time work from October 1, 2018, to mid-November 2018, and she got assigned more cases. Tr. Vol. II. pgs. 225-226, 229 -230, 234.

Employee testified that she was placed on a second PIP on June 28, 2019, after she filed an EEO complaint against Dr. Petrosian and Mr. Marcou. She stated that the PIP was for 30 days and after the 30 days, she got a decision notifying her that she met two (2) out of the five (5) PIP components. Employee averred that the PIP was extended for another 30 days, and at the end of September 2019, she was informed by management that she did not meet the conditions of the PIP. She was immediately placed on administrative leave pending a decision and she was eventually terminated in May 2020. Tr. Vol. II. pgs. 236-238.

Employee stated that she could not drive after her accident in 2018 and she informed management of that. However, management restricted her use of Uber or assistance from colleagues to get to site visits as a PIP condition. Employee highlighted that the PIP conditions were not achievable. Employee testified that she worked hard to meet all the PIP requirements, including the review deadline and she rarely missed them. She stated that less than five (5) percent of her reviews were between 10 to 15 days, instead of the required 10 days. Employee stated that she had a few reviews that were over 15 days because she was waiting on response from Mr. Edokwe, and she noted that in the Transportation online Permitting ("TOPs") system. Tr. Vol. II. pgs. 239-245.

Employee asserted that for the quality of review component of the PIP, she was consistently notified that her comments had to be substantive. He explained that management wanted her to make corrections on the drawings and approve them, which was unethical. She stated that if the applicant did not have the right drawing, the application goes back to them to make changes to their drawings. Employee highlighted that the drawings were signed by licensed architects and engineers, and she did not have the authority to sign over their credentials. Employee cited that although the other reviewer under Dr. Petrosian followed this directive, the only one who could legally make changes to the drawings was Agency's chief engineer. Tr. Vol. II. pgs. 245 – 247. Employee testified that often, when applicants are directed to 'revise and resubmit' their TCP, they simply resubmit the same TCP without revision. Employee stated that she knew the other reviewers approved the resubmitted TCPs by looking at how fast they handled their queues. Tr. Vol. II. pgs. 247 -249.

Employee stated that reviewers could put comments in the 'written comment' section or put the comments on the drawing. Employee explained that her team had a TCP guideline sheet with all the requirements, provided by Dr. Petrosian. Employee noted that she would review an application and provide comments in the system based on her review of the application. She further stated that she would modify the comments is needed, then copy and paste the applicable comments to the drawing. Employee asserted that they have canned notes on the TOPs system that can be modified and used on applications if applicable. Tr. Vol. II. pgs. 263-265, 267-269.

Employee testified that she met JS at DDOT and they worked in the same administration. She stated that JS was reassigned to public safety after Employee was assigned to public space as a permitting technician. Employee asserted that JS was placed on a PIP, and that his removal was recommended but rescinded. Tr. Vol. II. pgs. 273, 281.

When asked if Agency received complaints about Employee in 2019, she stated that they were not complaints but inquiries. Referencing Agency's Exhibit 1, page 11, Employee stated that she was not surprised to learn that Agency received multiple complaints against Employee, similar to those in Agency's Exhibit 1. Employee asserted that the complaints were not sent to her, and she could not recall the number of times she reviewed the drawings since she did not have them in front of her to properly respond to the questions. She also noted that she had not seen the June 10, 2019, email from D.C. Water before the current litigation. Employee asserted that she provided the applicants with the same response to the 'revise and resubmit' comment because they did not change the TCP drawing as instructed. Employee stated that this happened often whereby clients would resubmit the same drawings as before. She testified that she reviews the resubmitted drawings, compares them with the previously submitted drawings, and provide her engineering analysis. Employee did not recall receiving an email from a client, Cheryl Al-Bakri, prior to the start of the current litigation. Tr. Vol. II. pgs. 286-290, 310-314, 316-317.

Employee testified that management said she had performance deficits in 2019, but she did not agree with their assessment. Referencing Agency's Exhibit 7, page 5, application number 1310747118, Employee acknowledged that the manager's comments for this application expressed that she had performance deficits during performance year 2019. Employee affirmed that Dr. Petrosian was not the only one who had problems with her reviews. Referencing Agency's Exhibit 1, pages 21, and 27, Employee affirmed that the emails reflected customer complaints with the quality of her plan reviews. Tr. Vol. II. pgs. 290 – 292, 294-299.

Employee asserted that she participated in the 2019 weekly PIP meetings as an active listener. She highlighted that she did not ask any questions during the 2019 PIP weekly meetings. Employee noted that Dr. Petrosian's actions proved that he placed her on the 2019 PIP in retaliation for her filing an EEO complaint in 2019 against Dr. Petrosian. Employee testified that the 2019 PIP was a repeat of the 2018 PIP except for the changes in some of the SMART goals. She stated that the core competencies on both the 2018 and 2019 PIP were the same. Employee averred that she did not have a performance rating that fell within the PIP level. Employee affirmed that the 2019 PIP was a reprise of what the RRC already rejected the previous year. She testified that she filed three (3) formal complaints, including the April 2019 EEO complaint prior to being placed on the PIP. Employee stated that she was never formally presented with a 2018-2019 performance plan. She noted that management never discussed her performance plan with her, and she notified Mr. Marcou of that. Employee stated that Dr. Petrosian asked her to look it up in the system and nothing was discussed until her mid-year review in April 2019. Employee testified that she checked the system in February or March 2019 and that's when she realized that Dr. Petrosian had changed her plan. She maintained that she had never had the SMART goals that were included in the plan, and she voiced her concerns to Dr. Petrosian. Employee averred that the plan was created by Dr. Petrosian in January 2019, and revised in March and April 2019. She reiterated that she got new SMART goals in April 2019, and she was placed on a PIP in June 2019, proving that the PIP was retaliatory, especially because all these happened in proximity and the PIP was baseless. Tr. Vol. II. pgs. 299 - 304, 308, 318-322, 325-326.

Jeffrey Powell ("Mr. Powell") Tr. Vol II. pgs. 328-341.

Jeffrey Powell ("Mr. Powell") worked for Agency until 2015. He stated that he's known Employee since 2009, while he was employed by Agency. Mr. Powell stated that Employee was on his team when he was the chief of staff. He noted that he worked with Employee in the training department and later at the Public Space Regulatory Administration where Employee worked as an engineer. He cited that he was familiar with Employee's work, and that Employee was a good person with a great character. Tr. Vol. II. pgs. 328 -330. Mr. Powell does not recall Employee's 2015 request for accommodation. He recalled that Mr. Rouillier worked in the Civil Rights Office. He affirmed authorizing the purchase of a sit-stand desk for Employee following an ADA request, but he could not recall the specifics of the request. He stated that Tr. Vol. II. pgs. 331-333.

When asked if he noticed a change in attitude from Dr. Petrosian and Mr. Marcou towards Employee after she made the ADA request, Mr. Powell said 'no'. He affirmed that he knew Mr. Marcou and Dr. Petrosian personally while he was at Agency. Mr. Powell stated that Dr. Petrosian was Employee's direct supervisor, while Mr. Marcou was Mr. Powell's deputy. Mr. Powell stated that he ran into Employee in 2021, and that's when he found out that she had been terminated from Agency. He stated that he was surprised to hear that Employee was fired from Agency because she had tenure and she was efficient. Tr. Vol. II. pgs. 335 - 340.

Betty Ward ("Ms. Ward") Tr. Vol. II. pgs. 343 -358

Betty Ward ("Ms. Ward") testified that she has known Employee for approximately six (6) to eight (8) years, first as a coworker on the Emergency Preparedness and Risk Management team, and later when she recruited Employee as a member of the Building Emergency Response Team

("BERT").¹⁴ She stated that due to Employee's great performance on the BERT program, she again recruited Employee as an Emergency Liaison Officer. She noted that she also recruited Employee to train senior managers on 'NIMs', a management system. Ms. Ward averred that she was not Employee's direct supervisor at Agency, but rather, a program manager for the abovementioned programs. She stated that she was not consulted by management when they decided to place Employee on a PIP. Tr. Vol. II. pgs. 344 -345, 355-356.

Edwin Edokwe ("Mr. Edokwe") Tr. Vol. II. pgs. 365 - 389

Edwin Edokwe ("Mr. Edokwe") is employed by Agency. He is a civil engineer, and he reviews civil structural engineer plans. Mr. Edokwe has known Employee for over twelve (12) years as a coworker. He acknowledged having frequent contact with Employee at work while reviewing plans. Mr. Edokwe also stated that Employee sits not far from him in the office. He affirmed that he was under Dr. Petrosian's supervision for the entire time he worked with Employee. Tr. Vol. II. pgs. 365-357.

Mr. Edokwe asserted that his work was completely different from Employee's work; however, he stated that he was familiar with Employee's work to the extent that she discussed it with him. Mr. Edokwe testified that he was the only civil engineer on the Traffic Control Planned Review Unit at the Public Space Regulatory Division. He stated that he was familiar with the permit technician job functions. He explained that the permit technicians assign documents for reviewers to review, and they choose which Traffic Control Plan reviewer to assign a particular plan to review. Tr. Vol. II. pgs. 367 – 369.

Mr. Edokwe stated that JS was a technician who assigned work to reviewers. He stated that when applicants send in occupancy permit applications, they would not put in information that would trigger construction. Thus, when Employee gets such plans, she brings that to Mr. Edokwe's attention to see if it needs engineering review, construction review, or civil engineering. He would review the application and provide Employee with appropriate feedback. Mr. Edokwe stated that Employee was the most likely person to bring such issues to his attention because she is also an engineer, while most of the people she worked with were not engineers. He affirmed that Employee was a more scrupulous reviewer than all the reviewers in her team and this affected her timeliness as she was trying to get clearance from him before proceeding. Mr. Edokwe testified that Employee did her work as an engineer, without compromising on safety. Tr. Vol. II. pgs. 371-372, 374 -376, 377-379, 383.

Mr. Edokwe stated that he never heard Dr. Petrosian raise his voice at Employee, and he never saw Dr. Petrosian exhibit anger towards Employee, not even during Employee's 2018 PIP meeting that he attended with Employee as a witness. Mr. Edokwe also noted that he never heard Dr. Petrosian say anything disparaging about the quality of Employee's work. When asked if he Dr. Petrosian had an overall negative attitude towards Employee's work, he replied 'no'. Tr. Vol. II. pgs. 384 – 387.

Agency's Position

¹⁴ She explained that the BERT program is responsible for ensuring that DDOT has a firewall against any kind of the emergencies and disasters declared by FEMA.

Agency asserts that Employee was removed for cause and in accordance with all applicable laws, rules, and regulations. Agency explains that it placed Employee on a PIP due to performance deficiencies during FY 2019.¹⁵ Agency further argues that while the initial PIP letter informed Employee that the PIP would commence on July 2, 2019, Employee did not show up for work until July 3, 2019, as such, the PIP commenced on July 3, 2019.¹⁶ Agency maintains that it properly informed Employee of the performance expectations but Employee failed to meet the established performance standards.¹⁷

In addition, Agency argues that Employee neglected her duties by failing to carry out her official duties or responsibilities as would be expected of a reasonable individual in her position. Agency maintains that Employee did not perform her assigned tasks or duties; she failed to assist the public; and she unduly delayed her assigned tasks or duties, which negatively impacted her productivity, and led to customer complaints by members of the public.¹⁸ Agency further avers that the *Douglas* factors support Employee's removal. Agency asserts that it considered all relevant *Douglas* factors and determined that Employee's removal was warranted based upon her action.¹⁹ Agency maintains that it acted within its discretion as the DPM provides for removal for a first offense under DPM §§1607.4(m) and 1607.2(e).²⁰

Employee's Position

Employee acknowledges that she was placed on a PIP, however, she argues that Agency did not comply with the PIP procedures as stated in the District Personnel Manual ("DPM"). Employee further asserts that the PIP was issued while she was absent on approved leave and without her signature, in violation to PIP requirements.²¹ Employee also stated that the dates of the 2019 PIP are inconsistent. She explained that on August 14, 2019, she signed a PIP extension for thirty (30) days, dated June 27, 2019, which is inconsistent with the executed 2019 PIP date of June 28, 2019.²² Additionally, during the February 18, 2021, Status/Prehearing Conference, Employee asserted that she was not informed in a timely manner if the first thirty (30) days of the PIP was successful or not in accordance with PIP regulation.

Employee also asserts that she requested accommodation in 2015, and it was denied by her supervisors Dr. Petrosian and Mr. Marcou. She avers that she was later placed on a PIP in 2018, in retaliation for requesting reasonable accommodation. Employee avers that Dr. Petrosian retaliated against her for filing a reasonable accommodation request. She explains that Dr. Petrosian gave her a performance rating of '2.6' in 2018. Employee states that she appealed the 2018 Performance evaluation score to the RRC committee, and her score was increased from 2.6 to '2.9'. Employee also contends that she was treated differently than other similarly situated employees.

¹⁵ Agency's Answer to Petition for Appeal, *supra*.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See*. Petition for Appeal, *supra*.

²² *Id.*

1) Whether Agency complied with DPM §1410 in implementing the PIP

Pursuant to DPM §1410.2, a PIP is designed to facilitate constructive discussion between an employee and his or her immediate supervisor to clarify areas of work performance that must be improved. Once the areas for improvement have been identified, the PIP provides the employee with the opportunity to demonstrate improvement in those areas and his or her ability to meet the specified performance expectations. Additionally, DPM §1410.3 provides that a PIP issued to an employee shall last for a period of thirty (30) to ninety (90) days and must: (a) Identify the specific performance areas in which the employee is deficient; and (b) Provide concrete, measurable action steps the employee can take to improve in those areas.

In the instant matter, Employee was placed on a thirty (30) day PIP effective July 2, 2019, following a deficient performance review in April of 2019.²³ The PIP identified performance goals for Employee to work on within the PIP period. Upon the end of the first thirty (30) days, the PIP was extended for another thirty (30) days on August 14, 2019.²⁴ Employee does not dispute that she was placed in a PIP during this period. However, she argues that Agency did not give her timely notice of the result of her PIP following the expiration of the initial thirty (30) days of the PIP. Specifically, Employee argues that Agency did not provide her with the outcome of the first thirty (30) days of the PIP within the ten (10) days period after the expiration of the PIP, as provided in the PIP regulations.

DPM § 1410.5 provides that, “[w]ithin ten (10) *business days* after the end of the PIP period, the employee’s immediate supervisor or, in the absence of the employee’s immediate supervisor, the reviewer, *shall* issue a written decision to the employee as to whether the employee has met or failed to meet the requirements of the PIP.”²⁵ (Emphasis added). DPM § 1410.6 further stated that “[i]f the employee fails to meet the requirements of the PIP, the written decision *shall* state the reason(s) the employee was unsuccessful in meeting those requirements and: (a) *Extend the PIP for an additional period, in accordance with Subsection 1410.8*; or (b) Reassign, reduce in grade, or remove the employee.” (Emphasis added). In addition, DPM 1410.11 highlights that “[w]henver an immediate supervisor or, in the absence of the immediate supervisor, a reviewer, *fails to issue a written decision within the specified time period as provided in Subsections 1410.5 or 1410.9, the employee shall be deemed to have met the requirements of the PIP.*” (Emphasis added).

In the instant matter, DPM § 1410.5 establishes a clear timetable for issuing a written decision regarding whether an employee has met the requirements of the PIP. Additionally, DPM § 1410.6 establishes a consequence for the failure to comply with § 1410.5. Thus, an agency’s failure to issue a written decision within ten business days will result in the employee’s performance having met the PIP requirements.

Here, the relevant date is August 1, 2019, the day on which the first thirty (30) days of the PIP ended. Employee was placed on a thirty (30) days PIP effective July 2, 2019. Under DPM § 1410.5, Agency was required to issue a written decision within *ten (10) business days* of the end of the PIP period, or no later than August 15, 2019. (Emphasis added). On August 14, 2019,

²³ Agency’s Answer to Petition for Appeal at Exhibit 3, *supra*. See also. Employee’s Petition for Appeal, *supra*.

²⁴ *Id.*

²⁵ The rule was amended on May 10, 2019, wherein, the deadline was changed from ten (10) calendar days to ten (10) business days. The current PIP began on July 2, 2019, which is after the May 10, 2019, rule amendment. See 66 DCR 00586 (05/10/2019) 6DPM Transmittal No. 237.

Employee's supervisor, Dr. Petrosian, provided Employee with a written decision of the first thirty (30) days of the PIP, noting that the PIP will be extended for an additional period, in compliance with DPM 1410.6(a). This written decision was issued within ten (10) business days and it informed Employee that she was successful in two (2) out of the five (5) performance goals. Consequently, I find that Agency complied with the above PIP regulations as it applies to the timeline.

Employee's PIP was extended for another thirty (30) days, effective August 14, 2019. The thirty (30) day extension ended on September 13, 2019. Agency again had ten (10) business days from September 13, 2019, to provide Employee with an outcome of the PIP. Ten (10) business days from September 13, 2019, is September 27, 2019. Employee's supervisor, Dr. Petrosian again issued a written decision to Employee on September 27, 2019, notifying her of the outcome of the PIP. The written decision informed Employee that she was unsuccessful in the PIP, and a recommendation for her removal was made by her supervisor, Dr. Petrosian.²⁶ Because the September 27, 2019, written decision was issued within ten (10) business days from September 13, 2020, I find that Agency was in compliance with the applicable DPM § 1410 provision in performing the FY2019 PIP in this matter.

2) Whether Agency had cause to discipline Employee for failure to meet established performance standards pursuant to DPM 1605.4(m) and 1605.4(e)

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 terminated Employee for violating (1) DPM §1605.4(m) – failure to meet established performance standards; and (2) §1605.4 (e) 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.

Whether Agency had cause to discipline Employee for failure to meet established performance standards and Neglect of duty

Agency charged Employee with failure to meet established performance standards, in violation of DPM §1605.4(m) and DPM §1607.2(m). Agency also charged Employee with neglect of duty, pursuant to DPM §1605.4 (e) and DPM §1607.2 (e). Agency explained that the original 30-days PIP was implemented because of complaints it received from both external and internal customers on Employee's job performance.²⁷ At the end of the thirty (30) day period, Agency

²⁶ Agency's Answer to Petition for Appeal at Exhibit 1, *supra*.

²⁷ *See*. Agency's Answer to Petition for Appeal, *supra*, at Ex. A.04.023 – 038; *See also*. Agency's Answer, *supra*, at Ex.A.03.001; 010-014. The PIP criteria as set forth in the initial 30-days June 28, 2019, PIP document included the following Core Competencies and SMART GOALS:

Core Competency:

- (1) Customer Service.
- (2) Communications.
- (3) Accountability.

SMART Goals:

- (1) Timeliness of Plan Review.
- (2) (2) Quality of Plan Review.

extended the PIP for another thirty (30) days citing that Employee had only demonstrated progress in two (2) of the Core Competencies – Customer service and Communications. It noted that Employee’s performance was still deficient in ‘Accountability’ and the two (2) SMART Goals – Timeliness of Plan Review and Quality of Plan Review. As a result, Agency extended the PIP for an additional thirty (30) days.²⁸ At the conclusion of the sixty (60) day PIP, Agency alleged that Employee failed to meet three (3) of the five (5) PIP standards and recommended removal from her position.²⁹ Agency also stated that it met with Employee weekly during the PIP period to discuss her progress, and it provide a summary of the outcome of the sixty (60) day PIP.³⁰ Additionally, Agency included emails it received from its clients about Employee’s continued deficiencies during the sixty (60) day PIP period.³¹

Dr. Petrosian testified during the evidentiary hearing that pages 1-13, of Exhibit 7, demonstrate that Employee failed to timely review applications. He explained that the timeframe for the review process is ten (10) working days, but it took Employee 15 days to complete the review process.³² Tr. Vol. I. pgs. 86-87. He affirmed that when work assigned to Employee goes pass ten (10) days it is classified as ‘non-response.’ Tr. Vol. I. pgs. 162-173. Employee acknowledged during the evidentiary hearing that her reviews took longer, she however explained that her reviews took longer because she did an in-depth analysis and not rubber stamp like the other reviewers. Tr. Vol. II. pg. 210. Employee testified that she worked hard to meet all the PIP requirements, including the review deadline and she rarely missed them. She however, admitted that less than five (5) percent of her reviews were between 10 to 15 days, instead of the required 10 days. Employee admitted having some reviews that were over 15 days because she was waiting on a response from Mr. Edokwe, and she noted that in the Transportation online Permitting (“TOPs”) system. Tr. Vol. II. pgs. 239-245.³³

Furthermore, Agency provided documentation to prove that Employee did not meet the Quality of review SMART Goal. Agency highlighted that Employee failed to properly apply DDOT standards and policies in her reviews, as well as PSRD standard operating procedures for traffic plan control reviewers, which resulted in potentially unsafe conditions in the right of way. Agency averred that Employee’s quality of review was inadequate and she did not provide substantive comments.³⁴ Employee argued that she followed all the engineering standards in executing her duties. She noted that she used approved ‘canned’ notes found in the TOPs system.

Employee provided plan reviews completed by other employees to justify the quality of her review. Employee further attempted to justify the comments made on her reviews, as well as the reasons why other reviewers met the required plan review timeline, and she did not. I find that it is within the Administrator’s discretion to reach a different conclusion about an employee’s performance, as long as the Administrator’s opinion is supported by substantial evidence. The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*³⁵ explained that “it would not be

²⁸ Agency’s Answer to Petition for Appeal, *supra*, at Ex.A.04.006.

²⁹ *Id.* at Ex.A.04.006 – 007.

³⁰ *Id.*, at Ex.A.04.010 – 022 and Ex.A.07.001 – 097.

³¹ *Id.* at Ex.A.01.001 – 027.

³² *Id.* at Ex.A.06.001 – 004.

³³ Dr. Petrosian also noted at the end of the PIP that Employee’s performance was deficient for Timeliness of Plan review because Employee failed to change the review status within two (2) days as outlined in the PIP. He also stated that Employee’s failure to provide substantive reviews in a timely manner impacted productivity and caused the postponement of work schedules. See Agency’s Answer, *supra*, at Ex.A.04.016-017

³⁴ Agency’s Answer to Petition for Appeal, *supra*, at Ex.A.06.005 – 070.

³⁵ Case No. 2012 CA 003606 P (January 29, 2013).

enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [supervisor's] evaluation but that would support a better overall evaluation."³⁶ The court further opined that if the factual basis of the "[supervisor's] evaluation were true, the evaluation was supported by substantial evidence." Additionally, it highlighted that "[supervisors] enjoy near total discretion in ranking their [employees]" when implementing performance evaluations.³⁷ This Office has consistently held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.³⁸ As performance evaluations are "subjective and individualized in nature,"³⁹ this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."⁴⁰ Therefore, based on the foregoing, I find that Agency has established cause for failure to meet established performance standards and neglect of duty.

3) *Whether Agency retaliated against Employee*

Employee argued that she was placed on the 2019 PIP in retaliation for her filing an EEO complaint in 2019 against Dr. Petrosian and Mr. Marcou.⁴¹ Agency argued that it did not place Employee on the 2019 PIP because she filed an EEO complaint against Dr. Petrosian and Mr. Marcou. Agency asserted that Employee was placed on the 2019 PIP because of her performance deficiencies as during her mid-year review in April 2019.

To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) s/he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his employer took an adverse action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.⁴² A *prima facie* showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.⁴³

Regarding the first element, there is no dispute that Employee filed an EEO complaint against Dr. Petrosian and Mr. Marcou in 2019. There is also evidence in the record to satisfy the second element as Agency took adverse action against Employee in 2020, when it terminated Employee's employment with Agency. For the third element, I however find that there is no causal

³⁶ *Id.* at 6.

³⁷ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

³⁸ See *Mavins v. District Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013); *Mills v. District Department of Public Works*, OEA Matter No. 1601-0009-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997); see also *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

³⁹ See also *American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

⁴⁰ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

⁴¹ Employee also asserted that she requested accommodation in 2015, and it was denied by her supervisors Dr. Petrosian and Mr. Marcou. She avers that she was later placed on a PIP in 2018, in retaliation for requesting reasonable accommodation. Because the 2018 PIP was rescinded following Employee's approved absence from work during the 2018 PIP period, the Undersigned will not address the 2018 PIP and any allegations of retaliation related to that PIP.

⁴² *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).

⁴³ *Id.*

connection between the EEO claim and the current adverse action. While there appears to be a temporal proximity between the 2019 protected activity and the 2020 adverse employment action, the undersigned cannot draw an inference that the adverse action was retaliatory in nature. The basis for Employee's 2018 EEO claims includes but are not limited to: (1) sex and race discrimination; and (2) harassment and bullying by Dr. Petrosian because Employee protested her 2017 performance evaluation. On the other hand, Employee was placed on the PIP that led to the current adverse action of termination because of her deficient performance prior to being placed on the PIP, and during the PIP period. There is documentary evidence in the record to support Employee's deficient performance, before she was placed on the 2019 PIP, and during the PIP period. Consequently, I find that there is no causal connection between Employee filing an EEO claim for discrimination, bullying, harassment, and her termination for failing to meet performance standards. I therefore conclude that, Agency's termination of Employee was not in retaliation of Employee's 2019 EEO claims but rather based on Employee's poor performance following the April 2019 mid-year review.

Assuming *arguendo* that Employee established a *prima facie* case for retaliation, I further find that Agency had a legitimate reason for terminating Employee. The Court of Appeals in *Vogel v. District of Columbia Office of Planning, supra*, also provides that a *prima facie* showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, *which the employer may rebut by articulating a legitimate reason for the employment action at issue* (emphasis added). Here, Agency asserted that it had a legitimate reason for the adverse action of termination taken against Employee and she has failed to show that the adverse action levied against her was pretextual. Pursuant to the record, Employee had a mid-year review in April of 2019, and it was determined that Employee's performance was deficient in several performance criteria.⁴⁴ Employee was placed on a sixty (60) days PIP and while her performance improved in two (2) of the five (5) performance criteria, her performance did not improve in the remaining three (3) criteria. Accordingly, Agency terminated Employee for failure to meet established performance standards and neglect of duty. Therefore, I conclude that Agency had a legitimate reason to take this adverse action and its termination of Employee was not in retaliation for Employee's 2018 EEO claims.

4) *Whether Agency engaged in Disparate Treatment.*

Employee argued that Agency engaged in disparate treatment in its decision to terminate her. Employee explained that while she was not the only employee with performance deficiencies, she was the only Employee placed on a PIP. Employee also contended that a comparator employee, JS, was placed on a PIP where removal was recommended, but later rescinded. Employee stated that JS was a permitting technician at public space. Tr. Vol. II. pgs. 273, 281. Employee further highlighted that another comparator employee, Mr. P, was placed on a PIP but was not terminated.

Agency argued that Employee and the comparator employees were not similarly situated. Mr. Marcou acknowledged that JS was a Permit Technician under his supervision. He stated that JS was placed on a PIP, and he was unsuccessful in the PIP. He explained that the PIP was conducted by Courtney Williams ("Ms. Williams"), who reported to Mr. Garrett at the time, and they managed the PIP. Mr. Marcou noted that he was not familiar with the specifics of JS's PIP. Tr. Vol. II. pgs. 159-162. Mr. Edokwe stated that JS was a technician who assigned work to reviewers.

⁴⁴ See. Agency's Answer to Petition for Appeal, *supra*, at Ex. A.04.023 – 038; See also Agency's Answer, *supra*, at Ex.A.03.001; 010-014.

With regard to Mr. P, Mr. Marcou averred that Mr. P was a Permit Technician in the Public Space Regulation Division and not a traffic control plan reviewer. Tr. Vol. II. pgs. 36 – 38. He noted that Mr. P was placed on a PIP in 2020. He explained that Mr. P’s direct manager was Ms. Tenbrook and she developed Mr. P’s PIP, as well as monitor his performance. Mr. Marcou further explained that Ms. Tenbrook’s manager was Elliott Garrett (“Mr. Garrett”). He recalled that Mr. P’s manager recommended a ten (10)-day suspension against him, which Mr. Marcou reviewed and signed off on. Tr. Vol. II. pgs. 149 – 151, 153, 156.

OEA has held that, to establish disparate treatment, an employee *must* show that he worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (emphasis added).⁴⁵ Further, “in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty.”⁴⁶ (Emphasis added). An employee must show that there is “enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently.”⁴⁷ If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.⁴⁸

Here, I find that although Employee and JS were placed on a PIP within the same time period, the two (2) were not similarly situated. They did not have the same job title, they were not in the same unit, and they were not placed on a PIP or disciplined by the same supervisor. Pursuant to the record, JS was a Permit Technician in the Permitting Branch, Construction Team, whereas Employee was a Transportation Engineer within the Plan Review Branch. Additionally, Employee’s direct supervisor was Dr. Petrosian, while JS’s direct supervisor was Ms. Williams. In addition, at the conclusion of the PIP, termination was recommended for both Employee and JS for failing to successfully complete the PIP. However, due to an administrative error on Agency’s part, JS’s termination was rescinded.⁴⁹

Although Employee and Mr. P were placed on a PIP and disciplined within the same general timeframe, I also find that Employee and Mr. P are not similarly situated. Employee and Mr. P were not in the same unit. Mr. P was in the Permitting Branch- Surface Permitting Team, while Employee was a part of the Plan Review Branch. They did not have the same direct supervisors. Employee’s direct supervisor was Dr. Petrosian whereas Mr. P’s direct supervisor was Ms. Tenbrook. In addition, they were not disciplined for the same cause of action. Employee was disciplined for failing to meet performance standards and neglect of duty following a PIP. Mr. P on the other hand was not placed

⁴⁵ *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

⁴⁶ *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).

⁴⁷ *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30, 2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).

⁴⁸ *Id.*

⁴⁹ Agency explained that it rescinded the termination adverse action against JS because he was only placed on a single 30-day PIP period as opposed to DDOT’s preferred longer PIP before termination. Agency averred that if JS failed a 60-day PIP he would have been terminated.

on a PIP. Instead, he was disciplined for failure or refusal to follow instructions and conduct prejudicial to the District of Columbia Government.

Based on the foregoing, I find that Employee has not established a *prima facie* showing of disparate treatment and as such, I conclude that Employee has failed to prove that she was subjected to disparate treatment. Moreover, I find that Agency has established legitimate reasons for terminating Employee as stated above.

5) **Whether the penalty of termination is appropriate under District law, regulations, or the Table of Illustrative Actions.**

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).⁵⁰ According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency. As it relates to penalties, DPM § 1410.10 provides that "If the employee fails to meet the requirements of the PIP after the additional period of time provided, the written decision shall reassign, reduce in grade, or remove the employee." In accordance with section 1410.10, Agency had the choice to demote or terminate Employee. In addition, the penalty for a first offense for neglect of duty under DPM § 1607.4(e) ranges from Counseling to Removal. Consequently, Agency also had the choice to counsel, suspend or terminate Employee. Thus, pursuant to these sections, Agency could impose termination as a penalty.

The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.⁵¹ Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.⁵²

⁵⁰ *Anthony Payne v. D.C. Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

⁵¹ *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

⁵² *Love* also provided the following:

[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in

Removal was within the range of penalty DPM § § 1410.10 and 1607.4 (e). Thus, Agency's penalty determination was appropriate. Furthermore, the record shows that Agency adhered to 8-B DCMR § 1504.2, which are the *Douglas* factors. There is evidence in the record that Agency adequately weighed the factors before imposing its penalty of removal.

Based on the foregoing, I find that Agency had cause to terminate Employee. As a result, I further find that the penalty was appropriate, and Agency adequately considered the *Douglas* factors. Consequently, I conclude that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable. Therefore, I further conclude that Agency's action should be UPHELD.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

/s/ Monica N. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge

managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).