

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

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
CLARENCE STANBACK, JR.,	)	
Employee	)	OEA Matter No. 1601-0023-18
	)	
v.	)	Date of Issuance: January 31, 2020
	)	
DEPARTMENT OF HEALTH,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
_____	)	
James E. McCollum, Jr., Esq., Employee Representative		
Nada Paisant, Esq., Agency Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL HISTORY

On January 16, 2018, Clarence Stanback Jr. (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the District of Columbia Department of Health’s (“DOH” or the “Agency”) adverse action of removing him from service. Employee’s last position of record was Public Health Analyst, CS-685-13, Grade 13 Step 10. Employee’s last duty station was within the DOH’s Office of Health Equity (“OHE”). Apparently, DOH started to become dissatisfied with Employee’s work performance. On or around January 2017, Agency presented Employee with an Individual Performance Plan (“IPP”). According to Agency, the IPP, not to be confused with the Performance Improvement Plan (“PIP”) which will be detailed *infra*, had the following objectives:

- Identify opportunities and enroll in trainings to build quantitative data analytical skills and methods.
- Identify opportunities to build and strengthen qualitative data analytical skills.
- Take a class on ArcGIS to increase knowledge of the application.

- Continuously stay up to date on current literature and applicable recent events relevant to health equity to further job knowledge.<sup>1</sup>

Part and parcel with the IPP were measurable goals that were envisioned to be completed over the course of the next few months. However, according to DOH, Employee did not meet these goals within the timeframe envisioned by the IPP and his Supervisor. Accordingly, DOH took the next step in allegedly attempting to rehabilitate Employee's work performance by instituting a Performance Improvement Plan ("PIP"). The PIP was formally presented and received by Employee on June 21, 2017.<sup>2</sup> The following excerpt from Agency's Brief succinctly details Agency's point of view as this situation unfolded:

After a number of weekly meetings over a five-month period, and observing issues with Employee's performance, on June 19, 2017, Agency placed Employee on a PIP. The Agency presented the fully executed PIP to Employee on June 21, 2017. Employee refused to sign, and instead, made a notation at the bottom of the PIP. The PIP informed Employee that he was failing "to meet the minimum requirements of the position." It also set out five goals for Employee to improve his performance. The five goals specified the following: (1) by July 17, 2017, develop and complete OHE Records Management Plan, in collaboration with DOH Administration Partners. Include Strategy for Health Equity Data Management & Platform; (2) by July 17, 2017, implement OHE Data Management Strategy-including platform and dashboard. Demonstrate Functionality in terms of access, analysis, manipulation and storage of OHE Baseline Health Equity Data; (3) by August 14, 2017, use multiple statistical analysis tools, methods, and research practices to support development of the Office of Health Equity's Analytical and Evaluation Capabilities, by expanding and leveraging baseline data developed for the Health Equity Report (HER), to include key Health Equity Indicators; (4) by September 4, 2017, use specialized techniques to statistically combine Health Equity Indicators into a composite measure of social determinants of health; and (5) by September 30, 2017, combine composite measures of social determinants of health, to produce an integrated Health Opportunity Index (HOI) for the District of Columbia. The goals were identical to the goals identified in the IPP; however, the deadlines were extended for goals 1-4 to allow Employee sufficient time to demonstrate his efforts, diligence, commitment, competence and efficacy. (Internal Citations Omitted)<sup>3</sup>

On October 6, 2017, DOH made the fateful conclusion that Employee had failed to successfully complete the PIP. And, after due consideration, made the decision that removal from service was the only viable option. On November 1, 2017, Agency issued Employee a notice of proposed separation. The proposal was assigned to a hearing officer, who determined that the

---

<sup>1</sup> Agency Brief p. 2 (August 10, 2018).

<sup>2</sup> *Id.* p. 3; *See also* Tab 9.

<sup>3</sup> *Id.* pp. 3 – 4.

removal was sustainable. On December 18, 2017, Agency issued its final decision, removing Employee from his position with Agency.

As was stated previously, Employee then filed his Petition for Appeal with the OEA. This matter was then assigned to the Undersigned on April 4, 2018. Thereafter, the parties appeared for a Prehearing/Status Conference. During this conference, the Undersigned was initially unsure as to whether this matter could be decided as a matter of law or whether an Evidentiary Hearing was warranted. Employee contends that Employee's removal from service due to his allegedly not completing the PIP was procedurally deficient. Unsurprisingly, DOH refutes that claim. The parties were Ordered to brief whether the instant PIP (and Employee's subsequent removal) was conducted within the bounds of applicable law, rule and regulation. After thorough review of the parties' positions, the Undersigned has determined that no further proceedings are necessary. The record is now closed.

### JURISDICTION

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

### 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.

### ISSUES

Whether the Agency's adverse action was taken for cause. If so, whether the penalty was appropriate under the circumstances.

### FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of Employee's appeal process with this Office. 6-B District of Columbia Municipal Regulations ("DCMR") § 1410 states as follows:

**1410.1** This section shall not apply to probationary employees in the Career Service.

**1410.2** A Performance Improvement Plan (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 the opportunity to demonstrate improvement in those areas and his or her ability to meet the specified performance expectations.

**1410.3** 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.**

**1410.4** An employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, as the term is defined in Section 1499, shall complete a PIP when the employee's performance has been observed by the immediate supervisor as requiring improvement.

**1410.5** Within 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.

**1410.6** If 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.

**1410.7** The written decision may serve as a notice of proposed reassignment, reduction in grade, or removal and be provided to the employee when the decision complies with the provisions of Chapter 16. Alternatively, the agency may issue a written decision and subsequently

issue a separate notice of proposed reassignment, reduction in grade or removal.

**1410.8** If a PIP is extended pursuant to Subsection 1410.6(a), the additional period shall begin on the date provided in the written decision. However, no employee shall be subject to a PIP for more than ninety (90) days inclusive of any extension(s). For the purposes of this subsection, the ninety (90)-day time limit excludes:

- a. The time between the end of a PIP period and the issuance of a written decision to extend that PIP; and
- b. The time period between the issuance of a written decision and the start of an extension of a PIP.

**1410.9** Within ten (10) business days after the end of any additional period of time provided to further observe the employee's performance, the employee's immediate supervisor or, in the absence of that individual, the reviewer, shall issue a written decision to the employee as to whether the employee has met the requirements of the PIP.

**1410.10** 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.

**1410.11** Whenever 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).**

Interpreting the preceding regulation is seminal to this matter. Prior to implementing the PIP, Employee was given an Individual Performance Plan which included the following objectives:

- Identify opportunities, and enroll in trainings to build quantitative data analytical skills and methods.
- Identify opportunities to build and strengthen qualitative data analytical skills.
- Take a class on ArcGIS to increase knowledge of the application.
- Continuously stay up to date on current literature and applicable recent events relevant to health equity to further job knowledge.

Pursuant to 6B DCMR § 1407.1, the IPP identified the following “Specific, Measurable, Attainable, Realistic and Time-Related” (“S.M.A.R.T.”) goals: 1) by February 28, 2017, develop and complete OHE Records Management Plan, in collaboration with DOH administration partners. Include strategy for health equity data management & platform (10% of S.M.A.R.T. goals); 2) by April 30, 2017, implement OHE Data Management Strategy including platform and dashboard. Demonstrate functionality in terms of access, analysis, manipulation and storage of OHE baseline health equity data (10% of S.M.A.R.T. goals); 3) by June 30, 2017, use multiple statistical analysis tools, methods, and research practices to support development of the OHE's analytical and evaluation capabilities, by expanding and leveraging baseline data developed for the Health Equity Report (HER), to include key health equity indicators (30% of S.M.A.R.T. goals); 4) by August 31, 2017, use specialized techniques to statistically combine health equity indicators into a composite measure of social determinants of health (40% of S.M.A.R.T. goals); 5) by September 30, 2017, combine composite measures of social determinants of health, to produce an integrated Health Opportunity Index (HOI) for the District of Columbia (10% of S.M.A.R.T. goals). Additionally, Employee's supervisor scheduled weekly one-on-one meetings to monitor Employee's progress with the IPP.<sup>4</sup>

After several months of being dissatisfied with the pace that Employee was completing his Individual Performance Plan, Agency decided to place Employee on a PIP in an attempt to improve his on-the-job performance to an acceptable level. According to Agency, Employee was presented with the fully executed PIP on June 21, 2017.<sup>5</sup> Employee was informed that his on-the-job performance was severely lacking, and he was presented with five goals which included the following:

(1) by July 17, 2017, develop and complete OHE Records Management Plan, in collaboration with DOH Administration Partners. Include Strategy for Health Equity Data Management & Platform; (2) by July 17, 2017, implement OHE Data Management Strategy-including platform and dashboard. Demonstrate Functionality in terms of access, analysis, manipulation and storage of OHE Baseline Health Equity Data; (3) by August 14, 2017, use multiple statistical analysis tools, methods, and research practices to support development of the Office of Health Equity's Analytical and Evaluation Capabilities, by expanding and leveraging baseline data developed for the Health Equity Report (HER), to include key Health Equity Indicators; (4) by September 4, 2017, use specialized techniques to statistically combine Health Equity Indicators into a composite measure of social determinants of health; and (5) by September 30, 2017, combine composite measures of social determinants of health, to produce an integrated Health Opportunity Index (HOI) for the District

---

<sup>4</sup> Agency Brief pp 2 – 3 (August 10, 2018).

<sup>5</sup> Agency Answer Tab 9 (March 26, 2018).

of Columbia. *Id.* The goals were identical to the goals identified in the IPP; however, the deadlines were extended for goals 1-4 to allow Employee sufficient time to demonstrate his efforts, diligence, commitment, competence and efficacy.<sup>6</sup>

Agency maintains that the PIP was carried out to in accordance with DPM guidelines particularly when interpreted through tangential case law from the OEA.<sup>7</sup> Employee presents two arguments attacking the PIP. First, his removal should be invalidated because Employee satisfied the PIP as provided for in DPM § 1410.11. Lastly, the goals that needed to be attained through the PIP could not be done with the time and resources provided to him.

As noted *infra*, DPM § 1410.2 provides as follows: “[a] Performance Improvement Plan (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 the opportunity to demonstrate improvement in those areas and his or her ability to meet the specified performance expectations.” Generally speaking, a PIP is an employee management tool whereby workplace performance can be improved to a point that is satisfactory for continued employment at said employee’s current grade. With that said, a PIP is a powerful tool that cannot be used indefinitely in order to keep a constant check on employee performance.

The Undersigned notes that Employee was placed on the PIP on June 17, 2017. On October 6, 2017, Employee’s supervisor notified him that he had not adequately fulfilled all parameters of the PIP.<sup>8</sup> On November 1, 2017, Employee was presented with a written Notice of Proposed Separation. On December 18, 2017, Agency presented Employee with its Final Notice of Termination. According to the PIP as presented to Employee, he was afforded 90 (ninety) days in which to complete said PIP. According to DPM § 1410.3, a PIP can last for a period of 30 (thirty) to 90 (ninety) days. DPM § 1410.8 provides in part that: “no employee shall be subject to a PIP for more than ninety (90) days inclusive of any extension(s).” I find that since Agency initially decided to place Employee on a 90 (ninety) day PIP, it was precluded from offering any extension to the PIP deadline.

Employee aptly argues (in the alternative) that he satisfied the cumbersome PIP due to Agency failing to provide written notice within the time frame mandated by DPM § 1410.11. This section states that “Whenever 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.”

Agency asserts that the PIP, and Employee’s subsequent removal, were properly conducted. It notes the decision in *Michael Jackson v. D.C. Department of General Services*, Opinion and Order on Petition for Review, OEA Matter No. 1601-0034-11 (March 29, 2016), for

---

<sup>6</sup> Agency Brief pp. 3 – 4.

<sup>7</sup> *Michael Jackson v. D.C. Department of General Services*, Opinion and Order on Petition for Review, OEA Matter No. 1601-0034-11 (March 29, 2016).

<sup>8</sup> Agency Answer Tab 15.

interpretation of how its conduct is acceptable in this matter. *Jackson* involved an employee who was found, *inter alia*, not to have satisfied the mandates of a PIP. *Jackson* maintained that his PIP lasted for 92 days in violation of DPM § 1410.4. However, I find that the holding in *Jackson* does not align with this matter in that Employee herein is not pressing a claim regarding DPM § 1410.4, but rather is stating that DPM § 1410.8 was violated due to an untimely served dissatisfactory PIP assessment. Moreover, *Jackson*'s PIP argument related to a PIP that was initially slated for 60 (sixty) days but was elongated an additional 30 (thirty) days. Employee herein was initially given a 90 (ninety) day PIP. Moreover, *Jackson* did not have reason to discuss the import of DPM § 1410.11, due to Jackson having received his letter noting non-PIP completion within ten days of the end of his PIP. This is certainly not the case in the matter at hand as will be discussed more fully below.

It is axiomatic that “the starting point in every case involving construction of a statute is the language itself.”<sup>9</sup> Moreover, “[a] statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language.”<sup>10</sup> It is abundantly clear to the Undersigned that DPM § 1410 in its entirety is rife with mandatory language. This mandatory language is shielded from crafty interpretation by its plain language and inclusion of intended result if its mandates are not fully carried out. The word “shall” is used 15 (fifteen) times within DPM § 1410. Accordingly, I find that if an Agency decides to institute a PIP, they have no more than 90 (ninety) days in order to assess an employees’ performance.<sup>11</sup> I further find that an Agency has no more than 10 (ten) days, after the conclusion of the PIP, in which to render a decision noting dissatisfaction with the PIP.<sup>12</sup> Failure to note, in writing, dissatisfaction with an employees’ PIP performance shall result in said employee being deemed to have satisfactorily completed the PIP.

Accordingly, I find that Employee’s PIP ended on September 15, 2017. Therefore, in order to be timely, Agency’s written notification about the (unsatisfactory) PIP was due no later than Monday, September 25, 2017. However, Employee’s supervisor notified him in writing on Friday, October 6, 2017. I find that this was 21 (twenty-one) days after the conclusion of the PIP and 11 (eleven) days past the mandatory deadline imposed by DPM § 1410.11. I further find that since Agency failed to serve Employee with a written notice expressing dissatisfaction with his PIP performance within 10 (ten) days of the end of his PIP, that Employee *satisfactorily* completed the June 21, 2017 PIP. Per DPM § 1410.11, I further find that the October 6, 2017, letter noting dissatisfaction with the instant PIP was untimely, making it wholly ineffective as adequate notice.

Agency has the primary discretion in selecting an appropriate penalty for Employee’s conduct, not the undersigned.<sup>13</sup> This Office may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency’s judgment clearly exceeded limits of reasonableness.<sup>14</sup> When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency,

---

<sup>9</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975).

<sup>10</sup> *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980).

<sup>11</sup> See DPM § 1410.8.

<sup>12</sup> See DPM 1410.11. Conversely, pursuant to DPM § 1410.11, if an Agency is satisfied with an employee’s PIP performance, it has the option of staying silent thereby noting its acceptance with its completion.

<sup>13</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

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



but rather ensure that managerial discretion has been legitimately invoked and properly exercised.<sup>15</sup> In the matter at hand, Employee was removed from service due to an unsatisfactory PIP evaluation. However, as noted above, Employee's PIP evaluation has been retroactively changed to satisfactory. Accordingly, I find that Agency has failed to meet its burden of proof in this matter.<sup>16</sup> I further find that Agency's removal action should be reversed.

### CONCLUSION

As noted above, I CONCLUDE that DOH did not meet its burden of proof in this matter. Considering as much, I further CONCLUDE that Employee was improperly terminated.

### ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing Employee from service is **REVERSED**; and
2. Agency shall reimburse Employee all back-pay and benefits lost as a result of his removal; and
3. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

---

ERIC T. ROBINSON, Esq.  
Senior Administrative Judge

---

<sup>15</sup> *See Id.*

<sup>16</sup> In light of the decision rendered in the with respect to Employee's primary argument against DOH's removal action, I further find that his alternative argument that the parameters for the PIP were to wide-ranging to be completed with the given time and resources has been rendered moot.