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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	OEA Matter No. 1601-0083-22
	)	
v.	)	Date of Issuance: July 18, 2023
	)	
OFFICE OF THE CHIEF TECHNOLOGY OFFICER,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Senior Administrative Judge

Donna Williams Rucker, Esq., Employee Representative
Folashade Bamikole, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 30, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the Chief Technology Officer's ("OCTO" or "Agency") decision to terminate him from his position as an Information Technology Specialist, effective September 2, 2022. Employee was charged with the following: (1) False Statements – knowing submission of (or causing or allowing the submission) falsely stated time log, leave forms, travel or purchase vouchers, payroll, loan or other fiscal document(s);[2] and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations.[3] On September 30, 2022, 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 October 31, 2022.

Following an unsuccessful attempt in mediation, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on December 22, 2022. A Status/Prehearing Conference was held in this matter on February 15, 2023. Both parties were present for the scheduled Status Conference. Thereafter, I issued a Post Status/Prehearing Conference Order on February 17, 2023, requiring the parties to submit written briefs addressing the issues raised at the Status/Prehearing Conference. Both parties submitted their respective briefs as required. Thereafter, on April 24, 2023, Agency filed Additional Evidence in Response to Post

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] 6-B District Municipal Regulations ("DCMR") §1607.2(c)(1).
[3] 6-B DCMR §1607.2(b)(2).

Status/Prehearing Conference Order, to add a thumb drive which contains video recordings of the investigation interviews into the record. Subsequently, Employee emailed an Opposition to Agency's Motion on April 25, 2023. This document is admitted into the record as filed.[4] After considering the video recordings and the parties' arguments as presented in their submissions to this Office, I have decided that there are no factual issues in dispute, and as such, an Evidentiary Hearing is not required. 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 Employee's actions constituted cause for adverse action; and

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

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as an Information Technology Specialist ("IT Specialist") in 2013. Employee received Employee Self Service ("ESS") Exception Time Reporting ("ETR") training on September 26, 2014.[5] Prior to the COVID-19 pandemic, OCTO employees only reported "time exceptions" on their timesheet and the payroll system ("PeopleSoft") automatically created the "Regular time code" ("REG") hours payable to the employee, in the absence of any time exceptions.[6] Employee complied with the ESS Exception Time Reporting training policy from 2014 to 2020.[7]

In March of 2020, Employee and other OCTO employees began exclusively working remotely due to the Covid-19 pandemic, and as a result, their way of entering time changed. These employees had to enter their time manually with the time code "Situational Telework Pay" ("STWP"), instead of relying on PeopleSoft to automatically input the REG time code. Employee again complied with the time reporting policy during the COVID-19 telework period. When the District government required its employees to return to in-person work in August 2021, Agency required all its employees to return to their designated worksite. Agency then instructed its employees to switch their time reporting from 'STWP' to 'REG'. Employee continued reporting his time manually by entering the 'REG' time code as instructed. However, the PeopleSoft payroll started automatically creating 'REG' time code again in August 2021, causing Agency to credit Employee overtime hours for the additional hours that were automatically inputted by the system. Employee's immediate supervisor approved Employee's time entry during this timeframe, and Employee received an overtime payment of $53,391 pre-

[4] Agency's Motion is Granted, and the thumb drive is admitted into evidence.
[5] Agency's Answer at Exhibit 1 (October 31, 2022).
[6] Agency Response to Post Status/Prehearing Conference Order at Exhibits 10 and 11 (March 27, 2023).
[7] *Id*.

tax and $33,531 pre-tax in regular pay for the period of August 4, 2021, to February 11, 2022.[8] Because Employee did not elect to receive an electronic copy of his W-2 tax document, Agency mailed a copy of Employee's W-2 tax document to him on or around January 31, 2022. During a regularly scheduled Performance Oversight Hearing on February 17, 2022, Agency was notified that a small number of OCTO employees had received large amounts of overtime payments for the 2021 calendar year. Agency met with these employees, including Employee, and their supervisors to correct the time entry error moving forward. Employee complied with Agency's directive. He stopped entering his time manual into the payroll system in February of 2022.

Approximately three (3) months later, Agency conducted a video interview with Employee on June 24, 2022, wherein Employee informed the investigator that he would repay the entire sum of overtime payment in installments.[9] Thereafter, Agency filed a request to extend the 90-business day deadline to initiate adverse actions against Employee. This timeline was extended for an additional 30-days. Agency had until August 10, 2022, to commence adverse action against Employee.[10] Agency did not inform Employee if it accepted Employee's offer to repay the overpayment in installments, thus, he did not make any payments in June or July of 2022. The record is void of any repayment information and whether Employee made any payments toward the overpayment. On August 1, 2022, Agency conducted a subsequent interview with Employee.[11] Agency issued a notice of Proposed Separation to Employee on August 8, 2022.[12] Subsequently, on August 31, 2022, Agency issued a notice of Final Agency Decision – Separation, terminating Employee effective September 2, 2022.[13]

Agency's Position

Agency asserts that based on 6-B DCMR §1607.2 and the factors listed in § 1606.2, it carefully considered the totality of circumstances in coming to the decision that separation was the most appropriate action to Employee's conduct.[14] Agency explains that it weighed Employee's conduct under the *Douglas* factors[15] to determine the remedial action applicable to this case. Agency provides that the penalty of termination is appropriate in this instance due to the serious nature of the offense, the clarity with which Employee was put on notice of the rules he chose to violate, and the lack of an alternative penalty to deter similar conduct in the future.[16]

Agency avers that Employee's actions fall squarely within the prohibited conduct in 6-B DCMR §1607.2(c)(l), forbidding "Knowing submission of (or causing or allowing the submission of) falsely stated time logs, leave forms, travel or purchase vouchers, payroll, loan, or other fiscal document(s)." Agency cites that Employee continued to fraudulently bill Agency and used the funds, until he was caught. It notes that prior to its discovery of Employee's false

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[8] *Id*.
[9] *See* Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order - Video recording of the June 2022 and August 22 investigation interviews between Employee and Investigator Smith (April 24, 2023).
[10] Agency Response to Post Status/Prehearing Conference Order, *supra*, at Exhibit 5.
[11] *Id*. at Exhibit 6.
[12] *Id*. at Exhibit 7.
[13] *Id*. at Exhibit 8.
[14] Agency Answer (October 31, 2022).
[15] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).
[16] Agency Answer, *supra*. *See also* Agency Response to Post Status/Prehearing Conference Order, *supra.*

overtime sheets submissions, Employee had been trained on the ETR policy and appeared to follow the policy correctly until August 2, 2021. Agency also maintains that Employee seamlessly transitioned to reporting his time as 'STWP' during the COVID-19 pandemic. Agency notes that Employee's lengthy history of complying with the ETR policy proves he was aware of how to accurately report his time.[17]

Agency states that during Employee's June 24, 2022, interview, Employee admitted to manually inputting his time for days he reported to work in-person, which is a direct violation of the ETR policy. Agency maintains that Employee had notice of the huge difference in his earnings when he received his 2021 W-2 on January 31, 2022. Agency contends that it provided Employee a chance at rehabilitation by giving him multiple opportunities to correct what Employee argued was an 'innocent mistake'. Rather than taking these opportunities and following through on his offer to pay back the overpayment, Employee cut communications with OCTO for a period of one (1) month. Agency avers that upon his return, Employee became uncooperative and admitted that the entire overpayment sum was gone. Agency concluded that Employee's conduct confirmed that the falsified overtime sheets submission and subsequent overpayment he received was not a harmless mistake; but intentional conduct to falsify official records, as he had received training on the ETR policy, was aware that manually entering his regular hours on the days he reported to work in person was a violation of the policy and could result in overpayment. Agency notes that Employee's admission after he was caught provides additional proof that Employee knowingly submitted false timesheets to unjustly increase his salary.[18]

Additionally, Agency contends that during the investigation into Employee's unearned overtime payment, Employee consistently gave conflicting answers to questions about the whereabouts of the funds. Agency highlights that Employee initially stated that he was unaware that he received any overpayment because his wife handled all his finances. However, during his interview on August 1, 2022, Employee admitted that he routinely drew money out of the bank account in which he received direct deposits of the overpayment. Agency further notes that when its investigator followed up with Employee after his first interview to inquire if Employee received his 2021 W-2 mailed to his address of record, Employee replied "I don't recall". Further, Agency states that when asked if he had received ETR training during his first interview, Employee denied receiving training on the ETR policy, however, when he was shown evidence of his training record, Employee changed course and admitted that he had in fact received training on the ETR policy. Agency avers that Employee correctly followed the ETR policy until August 4, 2021, six (6) months after Agency began a hybrid of in-person and teleworking on February 22,2022.[19]

Agency also asserts that when asked why he decided to manually input his regular hours starting August 4, 2021, Employee did not provide a direct answer. Next, Agency avers that, during Employee's second interview, Employee refused to answer directly relevant questions and gave conflicting explanations on why the overpayment amount was no longer in his bank account. Agency explains that Employee initially stated that the funds were diverted to a

[17] *Id*.
[18] *Id*.
[19] *Id*.

personal account. But when asked about the identity of the owner of the account, Employee refused to answer. Agency also maintains that Employee refused to answer questions as to how he knew the funds were being diverted to a different account when he initially cited that his wife handled his finances. Agency notes that the questions it asked Employee were follow-up questions to clarify Employee's previous statements. Agency concluded that Employee's uncooperativeness and inconsistent statements during the investigation demonstrate that Employee misrepresented, falsified, or concealed material facts during an official investigation.[20]

Agency argues in its brief that before, during and after the COVID-19 pandemic, it used the same ESS-ETR policy for its employees' time reporting. It asserts that the ETR policy did not change during the COVID-19 pandemic. Agency reiterates that it trains all its employees on the ETR policy, and Employee received that training in 2014. It maintains that Employee correctly inputted his time in PeopleSoft as 'STWP'. According to Agency, when its employees returned to the office for in-person work on [sic] February 22, 2022[21], it issued a 'cheat sheet' to all employees, explaining the ETR policy and reminding them that the time reporting system remained the same.[22] Agency maintains that despite these efforts, Employee continued to double bill his time by manually entering eight (8) hours of 'REG' pay to each workday, in addition to what was automatically credited to his timesheet by the ETR system, resulting in overtime payments.[23]

Agency avers that out of the twenty (20) employees in Employee's unit, one (1) other employee also violated Agency's ETR policy during the relevant time period, for a total of two (2) employees Agency wide. It asserts that it could not complete disciplinary action against the other employee because the employee resigned on April 18, 2022, prior to Agency taking any action against him.[24]

Agency explains that it does not know why Employee's supervisor wrongfully approved Employee's incorrect timesheet for six (6) months. Agency highlights that it lacks the investigative authority required to determine whether Employee and his supervisor conspired to defraud the District of Columbia, or if the supervisor's actions were simply due to incompetence or a neglect of his duties. Agency notes that it questioned the supervisor, but he failed to provide a satisfactory explanation for his wrongful approval of the timesheet, consequently, he was terminated.[25]

Employee's Position

Employee asserts that Agency erred by failing to prove the charges levied against him. He maintains that he did not knowingly or intentionally submit false time logs. According to Employee, in August of 2021, PeopleSoft began automatically inputting his time without notice

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[20] *Id*.
[21] Pursuant to the record, OCTO employees return to the office in-person in August 2021, and not February 22, 2022, as stated by Agency in its submission to this Office. Thus, the undersigned will use the August 2021, date when referencing the post Covid-19 pandemic return to in-person work date in this decision.
[22] Agency Response to Post Status/Prehearing Conference Order, *supra* at Exhibits 13 and 14.
[23] *Id*.
[24] *Id*.
[25] *Id*.

of the automatic update to Employee, his supervisor or his other colleagues. Employee highlights that the hearing officer found that there was no evidence that Employee intentionally submitted false time logs. Employee cites that he had recently sold his mother's house and he had a cushion of money in the same account where his paycheck was deposited. Thus, he did not have to regularly check his account balance or bank statement and he did not realize that his paycheck was much more than he was owed. Employee contends that Agency cannot show by a preponderance of the evidence that he knowingly submitted false time logs. [26]

Employee explains that regarding Agency's assertion that he refused to answer questions, it was only after the investigators began 'badgering' him with the same questions he had already answered, that he informed them that he had already answered their questions and he had nothing else to say. Employee notes that he did not misrepresent, falsify, or conceal any material facts or records in connection with the official investigation.[27]

Employee also avers that the Deciding Official failed to follow the recommendations of the Hearing Official for a suspension and a payback plan. Employee further provides that Agency failed to follow the progressive discipline guidelines under 6-B DCMR § 1607.2(c)(1), which requires that the first adverse action be suspension to removal.[28] Employee maintains that Agency inappropriately removed him from his position by "rendering an unjust and harsh judgement based on wholly lacking evidence."[29]

Additionally, Employee asserts that prior to the Covid-19 pandemic, PeopleSoft would automatically create and send his timesheet to his supervisor for approval with time code 'REG'. He was only required to submit his time manually if he had leave to enter for that pay period.[30] According to Employee, during the Covid-19 pandemic which began in March 2020, Employee and some of his colleagues began working from home exclusively and their time entry process changed. Employee explains that they now had to manually submit their timesheet to the supervisor with the code 'STWP', instead of relying on PeopleSoft to automatically do so.[31]

Employee states that in August 2021, all employees were required to stop telework and return to their designated worksite. The employees had a Microsoft Teams meeting with Agency and they were instructed by their supervisor that they needed to use time code 'REG' instead of 'STWP'. Employee asserts that he and his colleagues did not receive any further instructions regarding whether they would continue submitting their time manually or automatically. Thus, Employee and a few of his colleagues continued submitting their timesheet manually as they had done since March of 2020 through August 2021. Employee avers that apart from the Microsoft Teams meeting, there was no official training upon their return to the worksite. Employee notes that he was only notified of the time entry procedure in February of 2022, when his supervisor, Mr. Jerome, had a call with Employee and another colleague to inform them to stop submitting

[26] Petition for Appeal (September 30, 2022).
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] Employee's Post Status/Prehearing Conference Brief (April 14, 2023).
[31] *Id*. *See also* Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, June 2023 investigation interview at 30 -40minutes.

manual timesheets, and they immediately complied.[32] Employee explains that in February of 2022, he had two (2) phone calls with two (2) Agency managers – Melissa Taylor ("Ms. Taylor") and Henry Lofton ("Mr. Lofton"). Ms. Taylor called Employee to find out which supervisor had approved Employee's timesheet the past few months. Employee asserts that Mr. Lofton called to 'yell' at Employee about not checking his timesheet for irregularities. Employee maintains that thereafter, he logged on to PeopleSoft to view his paystub, and that's when he saw that he had been getting paid more than he was entitled to receive.[33]

Employee also asserts that Agency's statement that only Employee and one (1) other employee within Employee's unit incorrectly recorded their time is inaccurate. Employee provides that of the twenty (20) employees within his unit, some were contractors and did not enter their time worked into PeopleSoft, so using them to prove that other employees were aware of the correct time entry policy is misleading. Employee also avers that not all the employees in his unit who were serving the DC Public Schools teleworked like he did during the Covid pandemic. Employee explains that while he worked from home serving Agency's call center, many of his colleagues worked onsite for in-person troubleshooting and equipment return, therefore, the onsite employees probably did not have to change the way they inputted their time during the Covid-19 period of March 2020, to August 2021.[34] Employee asserts that even his supervisor was approving the manual timesheets which proves that Agency did not clearly communicate the reverting back to the automatic timesheet.[35]

Employee further argues that Agency's claim that he violated 6-B DCMR §1607.2(c)(1) is unsubstantiated. Employee notes that Agency's argument that Employee received ETR policy training in 2014 to prove he knowingly submitted false time entries is irrelevant. Employee also cites that Agency's reliance on the W-2 issued to Employee on January 31, 2022, as apparent knowledge of his incorrect timesheet is irrelevant as he does his taxes in April of each year, and he only opened his W-2 after he was informed that there was a problem with his timesheets sometime in March or early April of 2022.[36]

Employee also points out that several of Agency's Exhibits attached to its March 27, 2023, brief, are not relevant to the current matter – specifically Exhibits 13 and 14, as they were dated after Employee had returned to the workplace and had corrected the issue with his timesheet submission. Employee asserts that Agency's Exhibit 2 supports his claim that he was not aware that he did not have to manually record his time when he returned to the office, as he and his colleagues did while they were on an exclusive telework schedule during the Covid-19 pandemic. Employee concludes that Agency cannot prove that he intended to submit excess time to obtain excess funds, accordingly, this charge should be reversed.[37]

Employee also contends that Agency does not have cause to charge him with misrepresentation, falsification, or concealment of material in connection with an official matter

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[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.

to include investigations, pursuant to 6-B DCMR §1607.2(b)(2). Employee provides that Agency's argument regarding his alleged misconduct for giving conflicting answers and refusing to answer multiple questions regarding the overpayment he received is unavailing. Employee provides that Agency's statement that he lied about being trained on the ETR policy is irrelevant. He explains that he did not recognize the acronym when he was asked by the investigator. Employee notes that Agency's entire argument for this charge rests on speculation and the investigator's second investigative report.[38]

Employee asserts that during the first interview, he offered to repay a large portion of the funds in one (1) installment of $25,000, followed by the rest of the money in smaller installments. Employee notes that the investigator, Mr. Smith, informed him that he would get back to Employee since as the investigator, he did not have the authority to agree to the payment arrangement. Employee stated he never heard back from the investigator or Agency in this regard. Employee notes that he also told the investigator he was going on vacation in July of 2022. He states that there is no evidence in the record to prove he was not willing to pay the excess amount back to Agency.[39]

Employee further argues that even if OEA sustains the allegations against him, the penalty of termination is unreasonable, and ignores the District's system of progressive discipline. He avers that Agency punished him with the most severe form of adverse action, removal, in violation of the progressive discipline mandate of Chapter 16.[40] Employee also states that Agency misapplied the *Douglas* factors.[41]

1) Whether Employee's actions constituted cause for discipline[42]

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Furthermore, 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. Employee was terminated for (1) False Statements – knowing submission of (or causing or allowing the submission) falsely stated time log, leave forms, travel or purchase vouchers, payroll, loan or other fiscal document(s); and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations.

False Statement: knowing submission of (or causing or allowing the submission) falsely stated time log, leave forms, travel or purchase vouchers, payroll, loan or other fiscal document(s):

[38] *Id*.
[39] *Id*.
[40] 6-B DCMR §§1605 and 1610.
[41] Employee's Post Status/Prehearing Conference Brief (April 14, 2023).
[42] 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").

Here, Agency charged Employee with falsifying his time log/payroll, asserting that between August 2, 2021, and February 11, 2022, Employee consistently submitted false time records for hours he did not work, resulting in an overpayment of $53,391.66. 6-B DCMR § 1607.2 (c)(1) notes that this cause of action includes knowingly submitting false time records. OEA has held that, to sustain a falsification charge, "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency."[43] Upon review of the video recordings provided by Agency of Employee and investigator Smith, and the evidence as submitted by the parties, I find that this is not the case. In this instance, Employee accurately submitted his time manually into the PeopleSoft system, which was approved by his supervisor.[44] However, the PeopleSoft system automatically generated time record for the same period that Employee submitted his time, thereby forcing the payroll system to consider the additional time created by Employee as overtime pay and Employee was paid the amount of $53,391.66 in excess of his regular pay from August 2021, to February 2022. Agency notes that Employee's lengthy history of complying with the ETR policy proves he was aware of how to accurately report his time. While Agency attempts to argue that Employee knowingly submitted his time manually despite being aware and trained on the proper time submission policy, I find that Agency failed to consider the impact of the Covid-19 pandemic to its time recording policy.

Employee asserts that prior to the Covid-19 pandemic, he only entered time exceptions such as sick or annual leave into the payroll system, and the payroll system would automatically generate his timesheet for regur hours work. Agency admitted that from 2014 to 2020, Employee successfully followed this time recording policy. What Agency failed to consider was the fact that during the Covid-19 pandemic, a majority of the District government workforce (nonessential employees) worked full time from home. Employee avers that he was one of such employees, and Agency does not dispute this fact.

Moreover, Employee asserts that during the pandemic, Agency's time reporting procedure for full time telework employees changed, as these employees were now required to manually enter their time using the code 'STWP'. Agency did not provide any evidence to dispute or contradict this assertion.[45] Thus, Employee manually recorded his time into the PeopleSoft system from March 2020 to August 2021 with time code 'STWP'. Agency did not dispute Employee's contention that apart from a brief Microsoft Teams meeting, Agency did not instruct them to stop manually recording their time into the PeopleSoft system. Instead, Agency submitted a document dated March 10, 2022, approximately seven (7) months from after Employee returned to work in August of 2021, in support of its assertion that Employee was put

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[43] *John J. Barbusin v Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); *See also Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

[44] Employee stated during the first interview with the investigator that he has never submitted overtime in PeopleSoft and the record does not contradict this. *See* Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, June 24, 2022, investigation interview video at 7minutes, 23 seconds – 8minutes 3seconds. *See also* 15minutes, 6 seconds to 15minutes, 30 seconds.

[45] The undersigned takes judicial notice on this assertion as all District government employees were directed by the District of Columbia Department of Human Resources ("DCHR" via multiple email releases to utilize the 'STWP' time code while working from home during the Covid-19 emergency period.

on notice of its time entry policy.[46] I find this assertion to be flawed and irrelevant to the current matter. By the time this document was issued, Employee was correctly recording his time. Employee highlights that he was only notified of the time entry procedure in February 2022, when his supervisor, Mr. Jerome informed him and his colleagues to stop submit manual timesheets, to which they immediately complied.[47]

Additionally, Agency attempts to argue that Employee had notice of the huge difference in his earnings when he received his 2021 W-2 on January 31, 2022, thus he should have been aware of the issue with his time. Employee provides that he only opened his W-2 in April of 2022, which was after he had stopped manually submitting his timesheet as instructed by his supervisor. Because Agency provided no evidence to contradict this, I find that Agency's argument does not prove intent. Moreover, Agency issued the W-2 by mail, a few days before Employee was notified of his time entry error in February 2022, and approximately six (6) months from after Employee returned to in-person work. Based on the foregoing, I find that Agency has not met its burden of proof in this instance, as it has failed to show that Employee knowingly submitted or allowed the submission of falsely stated time logs into the payroll system.

False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations:

Agency also charged Employee with False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations pursuant to 6-B DCMR § 1607.2(b)(2). Agency provides that during the investigation into the current matter, Employee gave conflicting answers and that he refused to answer multiple necessary questions related to his dissipation of the erroneously paid overpayment of funds. Agency provides that Employee's uncooperativeness and inconsistent statements during the investigation demonstrate that Employee misrepresented, falsified, or concealed material facts during an official investigation. However, Agency has not provided any evidence to show that Employee made the alleged conflicting and nonresponsive statements with the intent to mislead or for private material gain. Employee had already agreed to repay the overpayment and was ready and willing to make a payment plan to repay the overpayment.

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[46] Agency Response to Post Status/Prehearing Conference Order, *supra* at Exhibit14. It should be noted that this is the only document in the record from Agency to its workforce addressing its post-Covid-19 pandemic return to work time processing policy. Therefore, it can be reasonably inferred that Agency was aware that the Covid-19 pandemic impacted its time reporting policy and as such, the purpose of this document was to refamiliarize its workforce of its pre-pandemic time reporting policy. Additionally, it can also be reasonably assumed that Agency released this 'Time Entry for Exception Reporting – Cheat Sheet' because some of its workforce, including Employee's supervisor who approved Employee's time, were all unclear about the time entry policy post pandemic/return to work. While Agency notes that only one other employee in Employee's unit was similarly situated as Employee, Investigator Smith noted in his investigation reports that "[o]n February 17, 2022, [Agency] became aware of a small number of employees who had received an unusually high overtime payment in 2021." Further, Agency failed to disclose if Employee's supervisor also manually entered his timesheet and received overtime payments as well. Agency only alleges, without providing any evidence that Employee and his supervisor might have been working together in this alleged 'fraud scheme'.

[47] Employee stated during the first interview that he never looked at his paystub. *See* Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, June 2023 investigation interview at 20minutes, 20seconds to 22minutes,0seconds.

Furthermore, the notice of Proposed Separation issued by Agency to Employee on August 8, 2022[48], does not provide the specific statements Agency alleges were misleading, false or made by Employee in an attempt to conceal. This omission is in violation of 6-B DCMR §§ 1618.2(c) and (d). Pursuant to -B DCMR §§ 1618.2(c) and (d), "[t]he notice of the proposed action *shall inform the employee of the following*: … (c) *The specific* performance or *conduct at issue*; (d) *How the* employee's performance or *conduct fails to meet appropriate standards*." (Emphasis added). While Agency notes that Employee gave conflicting answers and that he refused to answer multiple questions during the investigation into the current matter, Agency did not specify the answers that it found were conflicting; the questions that it alleges Employee refused to answer; or the particular investigation that Employee gave conflicting answers to - the June 24, 2022 or August 2022 investigation interview.[49] Instead, Agency attached the *Douglas* factors rational worksheet; the June 24, 2022, and August 1, 2022, investigation report to the notice of Proposed Separation. I find these documents to be overly broad and they do not provide Employee or the undersigned with enough specificity of the conduct at issue and how they failed to meet appropriate standards as required by law.

Even the August 1, 2022, Investigation Report does not support this cause of action, as I find that Agency did not meet its burden of proof. Based on Investigator Smith's August 1, 2022, reports attached to the notice of Proposed Separation, Investigator Smith noted under the 'Discrepancies and Clarification' section that Employee's second recorded statement directly contradicts his first recorded statement.[50] Investigator Smith stated that initially, Employee contended that he was entirely unaware that he had been overpaid and that he could easily write a check to cover half of the overpayment. But after failing to make the payment, Employee admitted that the entire overpayment amount had been spent. Employee provided that during the first interview, he offered to repay a large portion of the funds in one (1) installment of $25,000, followed by the rest of the money in smaller installments. Upon review of the August 1, 2022, video recording, I find that Employee continually maintained this assertion throughout the interview.[51]

Employee notes that Mr. Smith, informed him that he would get back to Employee on setting a repayment plan since he did not have the authority to agree to the payment arrangement. Employee stated that he never heard back from the investigator. Investigator Smith's statement in his second investigation report supports Employee's statements. Investigator Smith noted in his second investigation report that following Employee's offer to immediately repay a portion of the overpayment, and make payment plans to pay the balance in installments; OCTO got approval to extend the deadline to discipline Employee and provided Employee with multiple

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[48] Agency Answer, *supra*, at Exhibit 8.

[49] The investigator noted in his report for the June 24, 2022, investigation under the 'Discrepancies and Clarification' section that "there were no apparent discrepancies between statements. [Employee] claim to be ignorant of the ERT policy during his recorded interview, but when he was shown a copy of his training records he did not dispute that he completed that training module." The investigator recommended discipline under DPM 1607.2(d)(1) - Negligence. Agency's Responds to Post Status/Prehearing Conference Order, *supra*, at Exhibit 9.

[50] Agency Answer, *supra*, at Exhibit 7.

[51] Employee stated during the second investigation interview that he recalled stating during the first investigation interview that he was willing to pay the overpayments back to Agency in installments. See Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, August 1, 2022, video recording of the investigation interview at 3 minutes 50 seconds (3.50) to 5 minutes 20 seconds (5.20).

opportunities to make payments. Instead, Employee went on a prescheduled annual leave. This supports Employee's statement that the investigator was not authorized to make payment arrangement and that Employee did not hear back from Agency after the interview on the issue of the payment arrangement as he was out on approved leave for all of July 2022. Moreover, according to the June 24, 2022, video recording, when Employee noted that he could pay $25,000 the next day and make a payment plan with Agency to pay the remaining balance in installments, Investigator Smith informed Employee that his job was to develop the record and DCHR or OAG handled recoupment of payments.[52] Thus, I do not find that Employee's statements were misleading, false, or made to conceal, especially given the fact that he had already agreed to repay the overpayment during the first interview and continued to do so during the second interview.

Although the notice of Proposed Separation does not outline the specific conflicting statements that Agency alleges Employee made, Agency further avers in its submissions to this Office that Employee initially stated that he was unaware that he received any overpayment because his wife handled all his finances. However, during his interview on August 1, 2022, Employee admitted that he routinely drew money out of the bank account in which he received direct deposits of the overpayment. I find that these statements do not contradict each other, nor do they prove that Employee was attempting to conceal, falsify, or misrepresent material facts during the investigation when he made these statements. Moreover, Employee could have still withdrawn money from his account while his wife continued to manage the account. These two actions are mutually exclusive and absent credible evidence that Employee knew that he received any overpayment, and that he, and not his wife managed their finances, the undersigned concludes that Employee did not misrepresent, falsify, or conceal material facts during the official investigation into this matter.[53]

Additionally, Agency avers that when its investigator inquired if Employee received his 2021 W-2 mailed to his address of record, Employee replied "I don't recall." Agency states that when asked if he had received ETR training during his first interview, Employee denied receiving training on the ETR policy. However, when he was shown evidence of his training record, Employee changed course and admitted that he had in fact received training on the ETR policy. Employee on the other hand provided that Agency's statement that he lied about being trained on the ETR policy is irrelevant. He explains that he did not recognize the acronym when he was asked by the investigator. Investigator Smith noted in his June 24, 2022, investigation

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[52] *See* Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, June 24, 2022, video recording of the investigation interview at 23 to 28 minutes (23-28); and at 51-54 minutes (51-54).

[53] After reviewing the August 1, 2022, investigation video, I find that Employee was not attempting to misrepresent, falsify or conceal information. I also find that his statements did not contradict prior statements he made during the June 2022 investigation interview. Employee reiterated that he was willing to make one lump sum payment and then make installment payments thereafter. Employee appeared frustrated after investigator Smith continuously asked him questions about what happened to the overpayments once they were deposited into his bank account. Employee initially responded to the question by stating that after his bi-weekly salary is deposited into his account, his wife, who manages the account, then redistributes funds in the account. He also noted that he had auto-pay for his bills that were linked to the account in question. Investigator Smith questioned Employee further on where the funds were redirected to, and Employee reiterated that his wife managed their finances and that he just wanted to work with Agency to come up with a repayment plan so they could all move on from this overpayment issue. *See* Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, August 1, 2022, video recording of the investigation interview at 7 minutes 10 seconds (7.10).

report under the 'Discrepancies and Clarification' section that "there were no apparent discrepancies between statements. [Employee] claim to be ignorant of the ERT policy during his recorded interview, but when he was shown a copy of his training records, he did not dispute that he completed that training module." I find that Agency has not provided evidence to prove that Employee was attempting to mislead the investigation when he stated that he did not recall if he received his W-2 at his address. In addition, Employee's training was in 2014, about seven (7) years prior to the June 24, 2022, investigation. Further, Employee noted that he did not recognize the acronym when he was asked the question. Moreover, Employee acknowledged he took the training after Agency refreshed his recollection with the training record. At no time did Agency provide that Employee denied receiving the training after he had refreshed his recollection.[54] Consequently, I find that, absent any credible evidence from Agency to the contrary, Employee's lapse in memory does not support the current charge as described in 6-B DCMR § 1607.2(b)(2).

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

Based on the foregoing, I find that Agency did not have cause for adverse action against Employee. As a result, I also find that the penalty of termination was inappropriate under the circumstances. The undersigned further finds that because Agency has failed to meet its burden of proof for the causes of action in this matter, the action against Employee cannot be sustained.

ORDER

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

1. Agency's action of terminating Employee from service is **REVERSED**.

2. Agency shall reimburse Employee all back and benefits lost pay (less the overpayment amount of **$ 53,391.66)**, as a result of the termination.

3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

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

[54] *See* Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, June 2023 investigation interview at 30-40 minutes; and at 43-52 minutes.