THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HANSEL AGUILAR,	)	OEA Matter No. 1601-0055-19
Employee	)	
	)	Date of Issuance: August 6, 2020
v.	)	
	)	JOSEPH E. LIM, ESQ.
D.C. OFFICE OF POLICE COMPLAINTS,	)	Senior Administrative Judge
Agency	)	

Laura Nagel, Esq., Employee Representative
Bradford Seamon, Jr., Esq., Agency Representative

INITIAL DECISION[1]

PROCEDURAL HISTORY

On June 13, 2019, Hansel Aguilar ("Employee"), an Investigator with the D.C. Office of Police Complaints ("OPC" or "Agency"), filed a Petition for Appeal with the Office of Employee Appeals ("OEA") challenging Agency's final decision to terminate his employment for Failure to Follow Instructions and Conduct Prejudicial to the District Government. This matter was assigned to the undersigned Administrative Judge on or around September 17, 2019. After postponements requested by the parties, I held a Prehearing Conference on December 2, 2019, and Evidentiary Hearings on February 18, 2020, and February 24, 2020. I closed the record after receiving the parties' closing arguments.

JURISDICTION

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

ISSUES

1. Whether Agency committed procedural error(s) in its summary removal of Employee, and if so, whether it is reversible error.

2. Whether Agency's action to summarily remove Employee was for cause.

UNCONTROVERTED FACTS[2]

1 This decision was issued during the District of Columbia's Covid-19 State of Emergency.
2 Derived from the parties' joint stipulations of facts and uncontested documents and exhibits of record.

1. Employee has been an Investigator, Grade 9, with Agency since October 31, 2016. That same day, Employee attended the New Employee Orientation and signed the Appointment Affidavit promising to faithfully execute the laws of the District of Columbia.

2. Employee received training on OPC Body-Worn Camera ("BWC") Video Usage Policy and signed the BWC Video Usage Agreement and Training Log.

3. Employee's duties included investigating complaints from the public regarding police conduct or events, writing reports on his investigation, and making recommendations for resolution. He is a former police officer, and holds degrees in Criminal Justice and Sociology.

4. On or about March 8, 2018, Employee complied with OPC's (Michael Tobin, Director, Rochelle Howard, Deputy Director, and Kimberly Ryan, DCFMLA coordinator) request to change his work schedule in order to be approved for intermittent leave on an as-needed basis.

5. On February 19, 2019, Employee was served with a notice of violation of District Personnel Manual § 1607.2(d)(2): Failure/Refusal to Follow Instructions—Proposed Suspension ("Notice of Proposed Suspension") by his supervisor.[3] The nature of Employee's alleged failure to follow instructions involved his repeated failure to complete tasks pursuant to his duties as an Investigator. Employee was given until February 25, 2019 to submit his response to his supervisor's proposed corrective action.

6. On February 21, 2019, Employee submitted a written request for an extension of the time allowed to submit his response to the Notice of Proposed Suspension. OPC granted the extension, allowing Employee until February 27, 2019 to submit his response. Also, OPC advised that per DPM § 1621.2, Employee was authorized four (4) hours of administrative leave to draft his response.

7. On February 27, 2019, OPC received Employee's response to his proposed suspension via email from Employee's attorney, Reshad Favors ("Attorney"). The written response to the Notice of Summary Removal argued that the proposed termination should be rescinded, or that the penalty should be mitigated. Employee's arguments against termination included: 1) the information Employee shared with prior counsel was necessary to exercise his right to respond to the proposed suspension, 2) the Proposing Official improperly charged Employee with violations of 6B DCMR § 1607.2(a)(3)(10), 6B DCMR § 1607.2(d)(1), and 6B DCMR § 1607.2(d)(12).

8. On February 28, 2019, OPC reviewed the response submitted by the Attorney and conducted an inquiry into the exhibit's origin and extent of use. Following the inquiry, OPC determined that the Employee committed four violations of the District Municipal Regulations ("DCMR"), specifically provisions of 6B DCMR § 1601 and § 1607.

9. Agency considered Favors as a member of the public as he was not an Agency employee. The email from Favors contained two attachments—a letter entitled "Aguilar Response to

3 Agency Exhibit Tab 2, Violation of DPM 1607.2(d)(2): Failure/Refusal to Follow Instructions-Proposed Suspension.

Proposed Suspension" and 65 pages of unredacted exhibits. These exhibits contained audit reports relating to an open OPC case, confidential information pertaining to MPD officers who were involved in open OPC cases, confidential information pertaining to potential civilian suspects, and BWC video reports containing confidential information.

10. On March 4, 2019, OPC Deputy Director Rochelle Howard issued a Final agency decision imposing a three-day (3) suspension, as proposed.

11. On March 5, 2019, Deputy Director Howard issued a Notice of Summary Removal, effective immediately. The Notice of Summary Removal charged Employee with one count of Failure to Follow Instructions in violation of 6B DCMR § 1607(d) and three counts of Conduct Prejudicial to the District Government in violation of 6B DCMR § 1607(a). Specifically, Agency alleged that Employee 1) on or about February 21-27, 2019, violated OPC's Body Worn Camera Use Policy, an alleged violation of 6B DCMR § 1607.2(d)(1); 2) on or about February 21-27, 2019, shared confidential open case information with a member of the public, an alleged violation of § 6B DCMR § 1607.2(a)(3) and (10); 3) on or about February 21, 2019, used government time and resources outside of the four hours of administrative time allotted for him to respond to the proposed suspension in alleged violation of 6B DCMR § 1607.2(a)(12); and 4) on or about February 21-27, 2019, shared confidential open case information with a member of the public, an alleged violation of § 6B DCMR § 1607.2(a)(3) and (10).

12. The Notice of Summary Removal advised Employee that he was being removed from his position pending the decision of the Agency's Administrative Hearing Officer, who was investigating Employee's four alleged violations of the DCMR. The notice also informed Employee that OPC was proposing the disciplinary action of removal for each of the violations. This notice advised Employee that he had the right to challenge the action, to secure an attorney to do so, and that any written response should be submitted to Hearing Officer Shawn Brown for review.

13. OPC provided the Hearing Officer, Shawn A. Brown, with redacted versions of the relevant documents in support of its position.

14. Hearing Officer Brown reviewed the documents in the matter and, on May 1, 2019, issued a Memorandum of his review. In Mr. Brown's May 1, 2019, "Memorandum of Administrative Review of Proposed Notice of Summary Removal," the Hearing Officer found that OPC met its burden in showing that Employee was guilty of the four violations and that removal was within the range of possible disciplinary actions for each violation. However, he opined that, although the charges in the Notice of Summary Removal were sustained by a preponderance of the evidence, the proposed termination action was too severe and not a reasonable penalty and, therefore, recommended penalties for each charge ranging from counseling to five-day suspensions.

15. On May 14, 2019, Michael Tobin, Director, issued a final agency decision removing Employee from his position and District service. The decision enumerated Agency's reasons for choosing termination as its penalty and notified Employee of his appeal rights.

16. On June 13, 2019, Employee filed the instant Petition for Appeal with OEA.

17. On July 8, 2019, Agency filed an Answer to Employee's Petition for Appeal, requesting that the matter be scheduled for an evidentiary hearing.

SUMMARY OF EVIDENCE[4]

The hearing in these matters occurred on February 18, 2020, and February 24, 2020. "Tr." stands for transcript.

February 18, 2020 Transcript:

Rochelle Howard ("Howard") Tr. 16-129.

Howard worked as a Deputy Executive Director for the D.C. Office of Police Complaints ("Agency"). She explained that Agency is an independent agency and has statutory jurisdiction to investigate the community complaints against any officer of the Metropolitan Police Department ("MPD"), the Office of Unified Communications, and the D.C. Housing Authority Police Department. With that authority, Agency investigates several allegations such as harassment, failure to ID, retaliation, and excessive force. Howard stated that Agency hired staff members and trained them as administrative investigators to conduct work within its authority.

Howard testified that Agency was part of the National Association for Civilian Oversight of Law Enforcement and that Agency is often referred to as a model agency on how to conduct civilian oversight within that organization. Agency is regularly consulted by other cities and other civilian oversite entities on how they operate. Each year Agency participates in the annual conference that the National Association hosts and regularly serves as panelists in the conferences. Howard explained that Employee was a panelist and presenter at one of the conferences.

Howard testified that the body-worn camera footage is one of the tools used to investigate officer-public interactions for the work conducted at Agency. MPD was the first large urban metropolitan police department to receive the body-worn cameras. Agency's office was prominent in the conversations in the city regarding how MPD should gain access to the body-worn camera footage. Additionally, there were discussions with MPD, the City Council, and the Mayor on how accessing the footage would help investigate police misconduct.

By December 2016, the body-worn cameras were fully implemented in the District. Prior to this implementation, there was a three-year backlog in Agency's cases. Once the body-worn camera policy was fully implemented, the backlog was eliminated through several different actions that Agency took. Now, investigators complete cases on an average of one hundred twelve days.

Every investigator hired by Agency goes through the District new employee orientation and go through a performance of duty training. On the first day of employment with Agency, investigators are trained for two (2) months on the body-worn camera footage usage policy and sign their promise to comply. The agreement provides that the employee understands what the

4 Obtained from the witnesses' testimony, exhibits, and supplemented by the parties' joint stipulation of facts and other undisputed written submissions.

policy states and how it is used before they are given an individual account on the evidence.com website to access the body-worn camera footage. Howard explained that Agency retains a log of employees that have been trained. As custodian of the video footage, Agency is restricted to solely viewing the actions of an officer. She explained that Agency expressly negotiated viewing access to view the video footage so that Agency would not interfere with the chain of custody.

On February 26, 2019, Howard received an email from Employee's attorney Reshad Favors ("Favors"). The email included a response to the Notice of Proposed Suspension issued to Employee, unredacted documents that were in reference to body-work camera footage, and other exhibits in support of Employee. Howard was concerned that Favors had obtained access to the confidential information since he never signed a confidentiality agreement with the District or Agency. Subsequently, Howard conducted an investigation.

Employee also downloaded audit trails that did not pertain to his investigative duties on February 21, 2019. Employee's user ID and IP address were logged on the audit trail that he printed. Furthermore, Howard stated that Agency does not have access to download information from body-worn camera footage as Agency's agreement is only for usage for accessing and viewing. Howard stated that if MPD were alerted of this violation, they could rescind Agency's access to body-worn camera footage, since Agency did not uphold their trust. Ultimately, the violation could affect Agency's entire operations if access was restricted as Agency would no longer be able to investigate cases expeditiously. Employee was given four hours of administrative leave to respond to the corrective action and logged those hours on February 26 and February 27, 2019.

Howard reviewed the policies within D.C. Human Resources ("DCHR"), consulted with Agency counsel, and notified Agency's director. Additionally, she reviewed the District Personnel Manual ("DPM"), which provided her with guidance on the possible disciplinary actions. Howard reasoned that removal was warranted due to Employee's failure to follow the body-worn camera video usage policy by releasing classified information to a member of the public, his attorney. She reiterated that removal was the appropriate penalty for Employee due to his blatant disregard for all of Agency's rules. She explained that Employee violated the body-worn camera footage policy; the District Government's ethic rules for rules in confidential information; and made an unauthorized charge on Agency's purchase card. Howard stated that Employee could have consulted with his supervisors and discussed how he could access the information without violating the rules. For example, Employee could have accessed the documents in redacted form or Agency could have asked MPD if they could download the information.

Howard testified that to her knowledge, Employee had never been disciplined or counseled for failure to maintain confidentiality or for misuse of the body-worn camera video footage usage policy prior to him receiving the notice of summary removal. She stated that she did not have Favors retroactively sign a confidentiality agreement. She also noted that Employee was a prior law enforcement officer, which led Agency to recruit him due to his relevant experience in the field.

Howard testified that the process for removing an employee was to provide a notice of removal from their position. The employee is not terminated from the District until the hearing officer makes their determination. The final decision authority reviews the entire notice and the

hearing officer's memorandum.

February 24, 2020 Transcript

Rochelle Howard ("Howard") Tr. 5-65.

Howard stated that in her proposed summary removal of Employee, she did not consider Employee's personal issues as a mitigating factor as Employee's FMLA was not relevant to Agency's removal action. Furthermore, Howard stated that Employee could have explained his extenuating circumstances in his response to the notice. Howard stressed that while the downloading and sharing of documents from evidence.com were violations of Agency's policy, Agency only charged Employee with sharing confidential documents with a member of the public. She reiterated that the agreement that Agency has with MPD only allows for accessing and viewing of documents. Moreover, Agency is not the custodian of that evidence; thus, they only have authorization to view it.

Howard recapped employee's charges. She stated that Charge Number 1 was a violation of the video usage policy; Charge Number 2 was sharing the open case information; Charge Number 3 was Employee's access or use of government time and resources outside of what he was allotted; and Charge Number 4 was sharing confidential email communications with a member of the public, Employee's attorney, Favors. Had Employee redacted the information and submitted it to Favors, she would not have considered it egregious. Agency's concern was that Favors could divulge the information that he obtained through Employee and take it to the media or exploit the information that they had access to. Howard stated that Employee did not provide an explanation as to why he did not redact the documents that he submitted to Favors.

Michael Tobin ("Tobin") Tr. 66-172.

As Executive Director of Agency, Tobin was responsible for investigating police misconduct within MPD. Additionally, he advised the police chief, the Mayor, and the City Council on policies and procedures and training of the police department. Tobin explained that Agency's mission was to improve community trust in the police department. They were successful with this by offering the community a system to provide a fair, accurate way of investigating police misconduct.

Several years ago, Agency issued a recommendation to the Mayor and the District Council that MPD should start a body-worn camera program. The Council followed Agency's recommendation and they created a pilot program. Tobin testified that an agreement was made between MPD and Agency that their office would have direct access to the cameras, solely because of the trust with the community that they were building at the time. Additionally, the community supported the program which held accountability of the MPD officers engaged in misconduct. Tobin explained that employees are initially trained on confidentiality of all documents and work performed. He explained that most of the information that they encounter is confidential by nature.

Tobin summarized the four charges that Employee received. Tobin stated that Employee improperly accessed the evidence.com account, and during Agency's investigation, it found that these documents were distributed outside of the office in an unredacted format. Tobin testified that

the evidence.com system was not owned by Agency, but by MPD, who were the custodians of those records. He asserted that the document as it was released outside of Agency would have never been released in that form absent a court order, an *ex parte* review by a judge in response to a FOIA request. Furthermore, Employee's actions were considered egregious and Employee's lack of veracity lost Tobin's confidence in him as an investigator.

Tobin explained that the third charge against Employee provided that Employee went beyond the four administrative hours that Employee was given to conduct his response to the charges at the time. Moreover, Employee used a system that Agency had in house that conducts an automated generation of transcription services. Employee used the government purchase card without authorization to order a transcription of a Police Complaints Board hearing as part of his response. Tobin asserted that Employee blatantly disregarded the rules of procedure. Additionally, Tobin opined that Employee should have asked to purchase the transcript using the purchase card or ask for another alternative to obtain the information that he was seeking. According to Tobin, the hearing officer recommended reprimand for Charge Number 1; five-day suspension for Charge Number 2; counseling for Charge Number 3; and a five-day suspension for Charge Number 4. However, the hearing officer determined that the proposed penalty of removal was consistent with the range of possible disciplinary actions for the violations. Consequently, Tobin concurred with the recommendation of removal on each of the four allegations.

Tobin testified that Agency did not have a written policy requiring a random auditing of investigators use of evidence.com. Tobin was unsure whether the confidential information was shared with other members of the public outside of Employee and Favors. He argued that once it was released from Employee to his attorney's firm, he did not know who had access to Agency's information. Tobin testified that on several occasions, Employee's direct supervisors notified him of Employee's performance issues, including the following of policy guidelines and timeliness with completing tasks. This was one of his determining factors in rendering his final decision of removal.

Tobin stated that Agency's investigation of complaints from the public regarding alleged police misconduct ties to MPD since Agency worked directly with MPD Internal Affairs on cases. By law, a community member can file a complaint with Agency or MPD. No matter where the complaint is filed, the complaint is directed to Agency. Agency typically conducts the investigations, with some limited exceptions. He also explained that primary job of MPD's Internal Affairs is to conduct their own internally generated investigations outside of the complaint process.

If Agency found an officer was guilty of the complaint made by the public, the recommendation goes to an independent hearing examiner. If the hearing examiner concurred with Agency's recommendation, it would be submitted to the Chief of Police, and in turn the Chief of Police would issue the discipline. Issuing a discipline less than removal would not have alleviated Tobin's lack of confidence and trust in Employee's ability to perform his job.

Robert Rowe ("Rowe") Tr. 174-189.

Rowe worked for the D.C. Office of Risk Management. Prior to this position, he worked as a Supervisory Investigator with Agency for six years where he was one of the two supervisors

of Employee. Rowe described Employee as very interested in getting into all aspects of a complaint investigation, and provided that Employee was good at interviewing, tracking down complaints, canvassing for witnesses or video, and seeing alternative possibilities. Agency's goal was to have eighty percent of cases completed in one hundred eighty days, and Employee was at ninety-four percent. However, Rowe noted that one of Employee's flaws was being bogged down with less important details. Employee engaged in outreach in the Hispanic communities. Additionally, Employee was one of two investigators that were Spanish-speaking and thus was able to provide assistance with translation.

Rowe testified that he took part in drafting the policy for the body-worn camera. There was a lot of talk about having a specific policy regarding how the videos could be viewed and shared. The principal objective of the policy was to make sure that video footage did not get out to the public. He claimed that the primary fear was video footage of a matter appearing on a website like YouTube. Therefore, the policy ensured that the videos did not end up with unauthorized viewers.

Rowe stopped working for Agency in August of 2018, and did not have direct knowledge of either a corrective action or disciplinary action that occurred with Employee in 2019. Rowe did not agree that the video usage policy and sharing data from evidence.com with a member of the public was considered a violation. He explained that when the policy was written, the investigation managers and executive director were not concerned about downloading the video footage. Rowe stated that initially, Agency officials were not aware that the video footage could be downloaded.

Hansel Aguilar ("Employee") Tr. 189-259.

Employee worked an Investigator with Agency from October 31, 2016, until March 4, 2019. He was responsible for conducting intakes of new complaints lodged against MPD officers and those of the D.C. Housing Authority Agency. Additionally, Agency engaged in community outreach. Because he was bilingual in Spanish and English, Employee served as the in-house interpreter and translator for the Latino communities that they engaged in. Moreover, Employee made presentations at the National Association of Civilian Oversight of Law Enforcement conference and contributed to the quarterly newsletter.

When his mother's health started to deteriorate, Employee took time off to care for her. After his paid leave was exhausted in early 2018, Employee requested and was approved for Paid Family Leave (PFL) and intermittent leave under the Family and Medical Leave Act (FMLA). Initially, Employee used intermittent FMLA leave to care for his mother. When his mother got thyroid cancer, Employee took continuous FMLA leave from January 2nd, 2019 to February 4th, 2019.

During Employee's tenure with Agency, he received routine performance evaluations. He recalled receiving a 3.49 score for the two years that he worked for Agency, which was classified as a valued performer. Employee asserted that he was never put on a performance improvement plan.

However, in early 2018, Employee stated that during a routine mid-year interview, Mr.

Tobin and his supervisor, the chief investigator, informed him that he was not turning around cases as quickly as the other investigators and that his case submission numbers were declining. This was the first Employee had heard of any performance concerns. Employee explained that he was unable to turn cases over at the same rate as other investigators due to him taking considerable time off from work to care for his ill mother. He said that his supervisor did not factor the days he was on leave into her calculations.

On February 19, 2019, his supervisor proposed to suspend Employee for three (3) days for alleged Failure/Refusal to Follow Instructions. Specifically, Agency alleged that on February 14, 2019, he "deliberately and purposefully" refused to comply with her instruction regarding an OPC case he was investigating and failed to provide an explanation for his failure. She further stated that, she had given him specific instructions since March 8, 2018, to complete investigative tasks and report content on this case. She had returned the case to him on November 21, 2018 to complete and revise, but that he had repeatedly failed to meet his own stated deadlines to complete his work.

Employee stated that when he received the three-day Notice of Proposed Suspension, he was provided an opportunity to submit a response. The notice of the proposed suspension memorandum provides that an employee has a right to challenge the proposed action and may secure an attorney or representative at their own expense. Furthermore, the notice encouraged him to fully review any company material supporting the proposed action. He stated that the documents that were attached to the proposed suspension were not redacted. So he submitted these documents that he received from Agency to his attorney Favors for assistance in forming a response to the proposed suspension. Submitting the documents to Favors allowed him to see that there was significant communication between him and the chief investigator about his timeliness issues of working the case.

Employee said the emails and documents showed that he was effectively communicating with Agency regarding his work, since the notice alleged that he had not been in communication with his supervisors. The notice indicated that Employee had not followed directions of the chief investigator for an eleven-month period. He wanted to demonstrate that he had continuously worked on the case. The body-worn camera audit trail allowed him to demonstrate the dates when he accessed the particular body-worn cameras for the different officers in question. To support his arguments, he submitted exhibits that included: 1) emails regarding the open investigation that served as the basis for the proposed suspension, 2) reports generated from the Body Worn Camera video footage archive showing his login and viewing history, and 3) a transcript of a January 18, 2018 agency meeting. The emails regarding the investigation and his login and viewing information of body worn camera footage showed that he worked appropriately on the investigation when he was in duty status and not on FMLA leave.

Employee testified that he was aware of the body-worn camera video usage policy and recalled signing the acknowledgement form. He did not believe that he violated the policy because the policy states that employees were not to distribute any of the videos. Employee did not believe that he was violating the video policy or any other confidentiality policy because it was his understanding that the information that he disclosed with an attorney would be confidential. Additionally, he argued that the meta user data that he was trying to access was not in violation of that policy. Employee used Agency software to generate the transcripts and related interviews. He

stated that there were no written policies in effect. TEMI is a website used by Agency to record interviews of the complainant or the officer. Employee did not believe that he was violating any policy because it was his understanding that the Board meetings were public. Additionally, there was a court reporter to transcribe the meetings.

Employee testified that he was not aware that he had to redact the documents since it was submitted to him unredacted in the notice of proposed suspension. He admitted that those documents contained confidential information and that he could have redacted the documents and still be able to defend himself. He admitted that he did not ask permission to use Agency's purchase card for printing a Board meeting transcript. Employee said that he was not forewarned about the potential for being suspended for three days. He admitted that he received fewer cases than other investigators while he was out on FMLA. Employee stated that while Agency made some accommodations for his FMLA leave, he did not believe that they were sufficient.

Employee testified that he believed that information shared with an attorney was considered privileged and confidential. He noted that Agency's suspension notice provided that he may use any documents and the DCHR manual provides that if he did not submit or present any evidence in his response, he would not be able to include other information. Employee claimed that he was within the guidelines provided by DCHR and Agency. He only shared the information that Agency provided to him, which was unredacted. Employee did not inform his attorney that he had signed Agency's body camera policy acknowledgment form. Based on his past interactions with his superiors, he also did not feel comfortable asking permission from them.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

1. Whether Agency committed procedural error(s) in effectuating its summary dismissal of Employee, and if so, whether it is reversible error.

Employee alleges that Director Tobin erred in not making his own *Douglas* factors analysis.[5] Instead, Tobin had simply reviewed and adopted his deputy's *Douglas* factor analysis.

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5 In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
>
> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> 3) the employee's past disciplinary record;
> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> 7) consistency of the penalty with any applicable agency table of penalties;
> 8) the notoriety of the offense or its impact upon the reputation of the agency;

However, Employee does not cite any statute or regulation that prohibits Tobin's adoption. In this matter, Agency did perform a *Douglas* factor analysis. In fact, the Notice of Summary Removal analyzes all *Douglas* factors in great detail using an attached *Douglas* Factor Worksheet. Although Employee disagrees with Agency's *Douglas* analysis, there is no requirement that Agency perform its analysis to Employee's liking or preference. Agency is given a lot of leeway in the way it performs its *Douglas* analysis.

Employee also argues that Agency failed to comply with 6B District of Columbia Municipal Regulations ("DCMR") §1616 when it summarily dismissed Employee from employment. Specifically, Employee points out that Agency Director Tobin had testified that he was not involved with the March 5, 2019, notice of summary removal until after he received the hearing officer's report and recommendation. Employee asserts that this is a violation of 6B DCMR §1616.3 and thus the summary removal action is invalid.

6B DCMR §1616.3 states:

> *Any decision to take a summary action* under this section *must be approved in writing by the agency head.* [emphasis added]. All such approvals must identify: a. Sufficient facts relied upon by the agency head to support the actions; b. The specific paragraph(s) of § 1616.2 established by those facts; and c. The specific misconduct, consistent with § 1605, warranting suspension or removal.

6B DCMR §1616.4 states:

> When the agency head is satisfied that the conditions of § 1616.2 are present, the agency may order the employee to immediately leave his or her duty station. Additionally, the agency may order the employee to stay away from any District government owned or occupied properties, to the extent reasonably necessary to ensure the safety of District employees and property, the integrity of government operations, and the public health, safety, and welfare.

6B DCMR §1621.1 states:

> Whenever an employee is served a *notice of proposed or summary action*, he or she may submit a written response to the appropriate official identified in the notice. [emphasis added]. In the case of removals, the appropriate official shall be a hearing

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9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

officer appointed pursuant to § 1622. Otherwise, the appropriate official shall be the deciding official.

The relevant regulation above understands that a summary action may be proposed or immediate, as noted in § 1621.2. However, 6B DCMR §1616.3 does not differentiate between a proposed or immediate summary action. A plain reading of the regulation states that any summary action must be approved in writing by the agency head.

In the instant matter, the evidence shows that this was not done. The proposing official, Deputy Director Howard, testified that she signed the summary removal notice without notifying the agency head, Director Tobin.[6] The March 5, 2019, summary removal notice shows only Howard's signature. Director Tobin himself testified that he had nothing to do with the initial summary notice.[7] Tobin's signature appears only in the May 14, 2019, Notice titled "Final Agency Decision-Separation." Although 6B DCMR § 3201 allows the agency head to sub-delegate this role to his deputy director, §3201.2 and 3201.3 states that such delegation must be submitted to the Director of the D.C. Department of Human Resources and must be in writing.[8] However, Agency presented no evidence that this was done.

6-B DCMR § 1623.2 states: "In making the final decision, *the deciding official shall: Consider* the notice of proposed or summary action and supporting materials, the *employee's response* (if any), and any report and recommendation of a hearing officer… [emphasis added]. Again, the evidence shows that this was not done. Director Tobin testified that he did not receive or review Employee's written response to the Notice of Summary Removal or any other information that was submitted to the hearing officer on behalf of Employee before making his decision to remove Employee.[9]

I find that the evidence shows that Agency committed procedural errors in summarily removing Employee. However, such is not necessarily fatal to Agency's adverse action against Employee. For the adverse action to be reversed, such error or errors must be harmful. It must substantially prejudice Employee or significantly affect Agency's final decision to take the action. Chapter 6-B DCMR § 631.3 defines "Harmless error" as "an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action."

In the instant matter, the evidence shows that both Deputy Director Howard and Director Tobin carefully considered the allegations and determined that Employee's offenses were so egregious that they had lost confidence in him as an employee of the Agency. Based on Tobin's testimony, he would still remove Employee as he agreed with Howard's analysis and recommendation.[10] Even if Tobin had been initially consulted on the March 5, 2019, summary removal notice, he still would have consented and signed off on the summary removal.

Additionally, I find that there is no evidence that these omissions caused substantial harm

6 February 24, 2020, Transcript p. 65 line 1-6.
7 *Id*, p. 105 line 17-22 and p. 106 line 1-4.
8 59 DCR 14966 (December 21, 2012).
9 February 24, 2020, Transcript p. 129 lines 14-22 and p. 130 lines 1-8.
10 February 24, 2020, Transcript p. 131 lines 3-18 and pgs. 151-153.

or prejudice to Employee's right to defend himself. The evidence shows that Employee was properly notified of his rights and was given the four hours of official time to work on his defense as mandated by 6-B DCMR § 1620.2 and §1621.2.[11] The evidence also shows that he mounted a vigorous defense and submitted it to the hearing officer.

Based on the preponderance of the evidence,[12] I find that even if Agency Director had considered Employee's response, the summary removal would still have occurred. Thus, I conclude that, based on these particular set of facts, Agency's failure to adhere to the summary action regulations is harmless error. Thus, in accordance with 6-B DCMR § 2405.7, I will address the merits of the summary removal.

2. Whether Agency's action to summarily remove Employee was taken for cause.

This Office's Rules and Regulations provide that an agency's action must be supported by a preponderance of the evidence, which is defined as "that degree of relevant evidence which a reasonable mind, considering the matter as a whole, would accept as sufficient to find a contested fact more probably true than untrue."[13] Unlike a regular adverse action which involves a proposed adverse action before such action is effectuated in a final decision, a summary removal is a more immediate and drastic form of adverse action. It is not to be used lightly and is reserved only for instances when certain conditions are met.

6B DCMR §1616 states that:

> An employee may be suspended or removed summarily when his or her conduct: a) Threatens the integrity of District government operations; b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or c) Is detrimental to the public health, safety, or welfare.

In the instant matter, Agency does not invoke the above conditions "b" and "c." Instead, Agency uses condition a to assert that because Employee's actions threatened the integrity of Agency's government operations, his immediate removal was warranted. While it is debatable whether Employee's alleged offenses were so egregious that they threatened Agency's operations

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11 §1620.2 The notice shall inform the employee of the following: a. The nature of the summary action; b. The effective date of the summary action; c. The specific conduct at issue; d. How the employee's conduct fails to meet appropriate standards; e. The specific paragraph(s) of § 1616.2 warranting summary action; and f. The name and contact information of the deciding official, or if a removal, the hearing officer. §1621.2 An agency head shall authorize an employee to use official time to prepare a written response to any notice of proposed action in the following amounts of administrative leave: up to four (4) hours for proposed corrective actions, and up to ten (10) hours for proposed adverse actions.

12 OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. 59 DCR 2129 (March 16, 2012). "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."

13 *Id*.

and required Employee's immediate removal, I will defer to Agency's managerial judgment and proceed to the merits of its action. Based on the uncontroverted testimonies and documents submitted in evidence, I make the following findings of fact with regards to the following charges:

Failure or refusal to follow instructions

For the first cause of action against Employee, Agency states that he was insubordinate, citing 6B DCMR § 1607.2(d)(1) "[n]egligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. Agency alleges that on or about February 21-27, 2019, Employee shared confidential open case information with a member of the public, specifically, Employee's then lawyer Mr. Favors, in violation of Agency's strict policy on confidentiality, particularly as it pertained to the Agreement between the Agency and MPD regarding Evidence.com, as well as his signed oath to adhere to the Agreement. Agency states that the Agreement clearly delineates that "[s]taff members shall only access Evidence.com . . . as necessary in the course of handling an OPC complaint. Access under any other circumstances must be approved in writing by a supervisor." Agency Exhibit 1.

Employee had accessed Evidence.com on February 21, 2019 in order to retrieve the audit trails that he provided to his attorney in support of his defense to a corrective action. Agency states that this access was not in the course of handling an OPC complaint assigned to Employee as an official duty. Rather, it was for personal use, which is specifically prohibited by the Agreement and therefore constitutes a failure or refusal to comply with Agency rules, regulations, written procedures or proper supervisory instructions. Agency asserts that Employee also provided unredacted documents with his attorney that contained the names of accused police officers as well as other confidential information. Agency adds that even if Employee was merely negligent, the violation of the Agreement is still actionable under this section of the municipal regulations/DPM.

Employee does not deny the allegations surrounding his accessing information on Evidence.com.[14] However, he does not believe he breached the Agreement as he understood it according to his training since he shared the documents only with his attorney for the express purpose of defending himself from what he felt were unfair charges connected to his three day suspension. He assumed that the attorney-client privilege is an assurance that his attorney would not divulge any confidential information received from him to anyone outside of Agency.

A reading of Agency's "Office of Police Complaints Body-Worn Camera Video Usage Policy" indicates that any viewing of a video accessed from the website Evidence.com must only be "in the course of handling an OPC complaint."[15] However, there is no allegation, nor was there any evidence produced, that Employee provided any video to his lawyer. I therefore find that Employee did not violate this part of the policy. Rather, Employee is accused of providing confidential documents such as his work product, emails, video reports, and other unredacted documents to his lawyer to assist in his defense against a proposed three-day suspension. The policy is silent on documents such as audit trails, video reports, emails from Evidence.com. Employee cannot reasonably be expected to obey unwritten rules. I therefore find that Employee did not violate the policy as written. Therefore, I conclude that Agency failed to meet its burden of proof that Employee was guilty of insubordination on this particular specification.

14 February 24, 2020, Transcript p. 226-229.
15 Agency Exhibit tab 1 titled "Office of Police Complaints Body-Worn Camera Video Usage Policy."

However, the policy also states that accessing the website "under any other circumstance must be approved in writing by a supervisor."[16] Employee concedes that he did not ask written permission from his supervisor to access the website for his defense. He argues that he did not feel comfortable with asking any of his superiors for permission as he felt it was a hostile work environment.[17] Employee added that it was his experience whenever he asked for guidance, he was referred to an outside agency and did not get any response from his director. Thus, he felt they would not be able to give him guidance.[18]

Nonetheless, the policy is clear that an employee wishing to access the Evidence.com website for anything other than in the course of handling an OPC complaint requires written permission from a supervisor. The evidence shows that Employee failed to do so. However, both of Agency's witnesses, Howard and Tobin, testified that they did not charge Employee for wrongfully accessing the evidence.com website, but for distributing documents obtained from that website. The notices of summary removal, both the March 5, 2019, and May 14, 2019, support this contention. Based on the above, I therefore find that Employee was not insubordinate.

I also note that Director Tobin testified that he verbally authorized a foreign visitor to view video footage from the Evidence.com website without a written authorization from him. This is despite the fact that this policy, the same policy Employee is charged with violating, requires Director Tobin to put his authorization for any purpose other than an OPC investigation in writing.[19] Tobin then tried to justify this by stating he had the authority to do a verbal authorization.[20] However, nowhere in the Agency's "Office of Police Complaints Body-Worn Camera Video Usage Policy" is there any provision allowing a verbal authorization. Nor did Agency present any regulation that allows an exception. I therefore find it unreasonable and inappropriate for Agency to seek to punish Employee for violating its camera video usage policy while excusing its agency head for violating the same policy.

Conduct Prejudicial to the District Government

Employee was also charged with three specifications of "Conduct Prejudicial to the District Government." Specification No. 1 for this charge alleges that, "…on February 21-27, 2019, Employee shared confidential open case information with a member of the public that includes subject and witness MPD officer names and numbers, MPD arrest and incident information including potential civilian suspect charges and other information from MPD and/or OPC open cases."[21] Specification Two states that "…On or about February 21, 2019, you used government time and resources outside of the allotted four administrative hours provided on February 26 and 27, 2019, to generate documents that were then provided to a member of the public for your response to a previous unrelated discipline matter. Your actions generated an unauthorized cost to the District government."[22] The third and final specification of prejudicial conduct states: "On or about February 21-27, 2019, you shared confidential email communications with a member of the

16 *Id.*
17 February 24, 2020, Transcript p. 231 lines 2-8.
18 *Id.,* p. 231 lines 13-20.
19 *Id.,* pgs. 118 -124.
20 *Id.,* pgs.141 line 10.
21 Agency Exhibit Tab 12, March 5, 2019 Notice of Summary Removal.
22 *Id.*

public that included the following information regarding open investigations: subject and witness MPD officer names and badge numbers, MPD arrest and incident information including potential civilian suspect charges and other information from MPD and/or OPC open cases.

With regard to the first specification, as stated above, I find that Agency's "Office of Police Complaints Body-Worn Camera Video Usage Policy" did not clearly prohibit the unauthorized distribution of documents from the Evidence.com website. Thus, I again find that Agency failed to prove by a preponderance of the evidence that Employee is guilty of this specification of prejudicial conduct.

With regard to the second specification of prejudicial conduct where Agency alleges that Employee used more than the allotted administrative hours for his defense, Employee testified credibly that apart from those hours, he only used his lunch and break time to work on his defense.[23] Further, Director Tobin conceded that Employee could use his lunch hour and two fifteen minute work breaks.[24] Agency did not produce any evidence to show any prohibition of how Employee uses his break time. In addition, Agency produced no evidence to contradict Employee's testimony that he only used his free time to work on his defense. As for Agency's charge against Employee for having Agency incur an unauthorized $5.38 purchase of a transcript, this allegation was not specified in Agency's notice and thus cannot be used against Employee. I therefore find that Agency had failed to prove its second specification.

With regard to the last specification of prejudicial conduct where Agency alleges that Employee shared confidential email communications with his attorney, I again note that Agency's "Office of Police Complaints Body-Worn Camera Video Usage Policy" does not prohibit the distribution of emails since it does not even mention emails. Nor did Agency produce any evidence to indicate that these emails came from the Evidence.com website. I therefore find that Agency had failed to prove this specification of prejudicial conduct as well.

In conclusion, I find that Agency failed to meet its burden of proof on all its charges of insubordination and prejudicial conduct against Employee. Based on the foregoing, I conclude that Agency's penalty of a summary removal of Employee must be reversed.

ORDER

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

1. Agency's action of summarily terminating Employee is **REVERSED**; and

2. Agency shall immediately reinstate Employee; reimburse him all back-pay and benefits lost as a result of his termination; 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.

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23 February 24, 2020, Transcript page 234:14-22 to page 235:1-12.
24 February 24, 2020, Transcript page 112.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge