THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0032-21
EMPLOYEE[1],	
Employee	
	Date of Issuance: June 29, 2022
v.	
D.C. DEPARTMENT OF AGING AND COMMUNITY LIVING,	MICHELLE R. HARRIS, ESQ.
Agency	Administrative Judge

Johnny Barnes, Esq., Employee Representative
Jhumur Razzaque, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 1, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Aging and Community Living's ("DACL" or "Agency") decision to terminate her from service effective April 30, 2021.[2] OEA issued a letter dated July 20, 2021, requesting an Agency Answer by August 19, 2021. Agency filed its Answer to Employee's Petition for Appeal on August 31, 2021.[3] Following an unsuccessful attempt at mediation, I was assigned this matter on December 2, 2021. On December 7, 2021[4], I issued an Order Convening a Prehearing Conference for January 13, 2022. On January 3, 2022, Agency filed a Consent Motion to Continue, citing that more time was needed. On January 5, 2022, I issued an Order granting Agency's Motion and rescheduled the Prehearing Conference to February 15, 2022. Prehearing Statements were due on or before February 8, 2022.

Both parties appeared for the Prehearing Conference as scheduled. Following the conference, I issue an Order that same day requiring the parties to submit briefs in this matter. During the conference,

---

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee was terminated for the following causes of action: **DPM § 1605.4(m)** - *"**Failure to meet established performance standards**';* **DPM §§ 1604.5(d) and 1607.2(d)(1)** – *"**Failure/Refusal to Follow Instructions**, specifically; negligence, including careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions."; and **DPM § 1607.2 (e)** – **"Neglect of Duty**, specifically failing to carry out duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; carless work habits; conducting personal business while on duty; abandoning an assigned post; sleeping or dozing on-duty, or loafing while on duty."*
[3] Agency filed a Motion for an Extension of Time to File its Answer on August 19, 2021.
[4] A subsequent Order was issued on December 8, 2021 to include the correct Agency representative in this matter.

the undersigned advised Employee's counsel that the issues regarding the adverse action must be addressed in these briefs.[5] Because Employee's previous submissions had not addressed those issues, Employee's brief was due on or before March 15, 2022. Agency's brief was due on or before April 14, 2022. Both parties submitted their briefs as required. Upon consideration of the parties' arguments as presented in their submissions to this Office, I have determined that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee for**:** 1) DPM § 1605.4(m) - "Failure to meet established performance standards; 2) DPM §§ 1604.5(d) and 1607.2(d)(1) – "Failure/Refusal to Follow Instructions and 3) DPM § 1607.2 (e) – "Neglect of Duty; and
2. If so, whether termination was the appropriate penalty under the circumstances.

BURDEN OF PROOF

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

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

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

SUMMARY OF THE PARTIES' POSITIONS

Employee began working for Agency in 1988 as a Public Affairs Specialist.[6] In April 2017, Employee's title was changed to Community Relations Specialist. In a Final Written Notice dated April 30, 2021, Agency terminated Employee from service pursuant **to DPM § 1605.4(m)** - *"Failure to meet established performance standards';* **DPM §§ 1604.5(d) and 1607.2(d)(1)** – *"Failure/Refusal to Follow Instructions, specifically; negligence, including careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions."; and* ***DPM § 1607.2 (e)*** – *"Neglect of Duty, specifically failing to carry out duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in*

[5] During the Prehearing Conference, Employee raised issues regarding discrimination, disparate treatment, retaliation, wage issues and other claims. These were also presented in Employee's Prehearing Statement. The undersigned advised Employee's counsel that the brief required by the February 15th Order, should not be a recitation of the issues cited in the Prehearing Statement as discussed during the conference but should address Employee's response to the adverse action before this Office.

[6] Employee began her tenure at Agency in 1988 as a Public Affairs Specialist. In September 2009, her title was changed to Customer and Information Service Specialist.

completing assigned tasks or duties; carless work habits; conducting personal business while on duty; abandoning an assigned post; sleeping or dozing on-duty, or loafing while on duty." The effective date of the termination was April 30, 2021.

Employee's Position

Employee avers that Agency's action of terminating her from service was without cause. Employee asserts that she was wrongfully terminated because of her age and other discriminatory practices. Employee also cites that other employees were not terminated for similar actions. Further, Employee asserts that Agency did not follow the "90-Day Rule" in the administration of this action. Additionally, Employee avers that Agency did not rely on substantial evidence. Employee also argues that consideration of "major offenses versus "lesser offenses" were not given due consideration.

Employee asserts that she made "minor slip ups" that are common in an office setting, but do not warrant termination.[7] Employee asserts that she is neither perfect or imperfect and that her time and longstanding service with Agency evinces her ability to complete her work as required. Additionally, Employee avers that was not neglectful in her work and that she made "extraordinary efforts to comply with every request, command, demand or order of [her supervisor] Ms. Richardson and all others within the Agency."[8] Employee provides definitions for "neglect," including "to pay little to no attention or omission of proper attention to a person or thing, which can be inadvertent, negligent or willful. She further defined neglect as the act or condition of disregarding. It also refers to the failure to give proper attention, supervision or necessities, especially to a child, to such an extent that harm results or is likely."[9] Pursuant to those definitions, Employee maintains that none of the claims made about her work performance caused harm to the Agency. Employee cites that Agency has made no findings of fact in this matter and that it relied totally on the "perceptions and claims of Ms. Richardson."[10] Employee asserts that Richardson is under the age of 40 and that "the perceptions of Ms. Richardson would not lead a reasonable mind to accept as adequate to support the conclusions embodied in the charging documents."[11] Further, Employee asserts that Richardson did not supervise her for more than six (6) months in 2020, and when Employee returned from a detail, Richardson placed her on a Performance Improvement Plan (PIP), four (4) months later.[12] Employee also adds that Agency failed to make conclusions of law, and thus have "breached their duties," providing "pages of paper but without any real record."[13]

Employee maintains that Agency's actions against her were based on her age. In that same vein, Employee argues that there were other wage and hour discrimination actions committed by Agency. Employee notes that "all of the individuals involved in the circumstances that led up to her termination are under 40" years of age and she is over age 55.[14] Employee asserts that the claims of her misconduct and performance deficits are subterfuge and pretext for age discrimination, were retaliatory in nature and done in bad faith. Further, Employee argues that Agency treated her differently from other similarly situated employees, and thus engaged in disparate treatment against her. Employee argues that she is in a

[7] Employee's Brief at Page 13 (March 18, 2022). It should be noted that while Employee titled this brief "Prehearing" this brief was required following the Prehearing Conference in this matter and was to address the cause of action in this matter.
[8] *Id*. at Page 14. (March 18, 2022). Ms. Richardson refers to Angela Richardson, Employee's supervisor.
[9] *Id*. at Pages 14-15. Employee also cites to D.C. Code §4-1341-01 (referring to Child Abuse and Neglect).
[10] *Id*. at Page 15.
[11] *Id*. at Page 5.
[12] *Id.*
[13] *Id.* at Page 16.
[14] *Id.* at Page 21

protected class and that she suffered wrongful actions and that other employees were provided more favorable treatment.[15]

Employee also argues that the Hearing Officer in this matter failed to apply the twelve Douglas factors in their consideration of this matter.[16] Further, Employee avers that the Hearing Officer failed to make considerations that she was subject to a hostile work environment. Employee also asserts that Agency engaged in human rights violations, violations of public policy and failed to abide by "intervening changes in law."[17] Employee also avers that she constantly worked overtime without pay while employed by Agency. For these reasons, Employee argues that she was wrongfully terminated, and that Agency's actions have caused damages and the infliction of emotional distress. Employee iterates that she was not terminated for cause and that Agency's actions should not be upheld.

Agency's Position

Agency asserts that it had cause to terminate Employee from service and that it did so in accordance with all applicable laws, rules and regulations. Agency avers that following a Performance Improvement Plan (PIP), Employee was separated from service. Agency asserts that all three (3) causes of action against Employee were due to misconduct while Employee was on the PIP from January 7, 2021 through March 7, 2021.[18] Agency cites that it also provided evidence of Employee's poor performance for Fiscal Years 2018 and 2019, as well as other documentation related to emails and other correspondence related to her performance deficits. Further, Agency avers that Employee received all the notices required regarding her PIP, including notice of her failure to meet the PIP requirements. Agency asserts that this notice was provided within ten (10) days after the end of the PIP on March 19, 2021, in accordance with statutory guidelines found in 6-B DCMR §1410.

Agency asserts that the specific acts of misconduct are well documented in email and other correspondence that took place during the PIP period. Agency notes Employee's repeated failures to complete her duties as assigned and her failure to communicate with her supervisor. Specifically, Agency cites that on January 8, 2021, Employee sent an email that failed to include information pertinent for an MLK Day event. Further, Agency states that Employee was required to update the External Affairs and Communications (EAC) Tasks Tracker every Tuesday by noon. However, on January 26, 2021, Employee did not complete this task. When advised of such, Employee noted that she forgot to do so before she went on leave and made the updates after the noon deadline. Agency avers that this was unacceptable as there are multiple calendar reminders for employees to update the EAC Tracker.[19] Agency asserts that there is a calendar reminder on the Friday before the deadline and an additional alert on Tuesdays at 11:30am. Employees are also advised to make updates during the weekly 3:30pm team meetings. Agency also asserts that on January 28, 2021, Employee was tasked with organizing Agency's photo archive. On February 4, 2021, Employee had not provided a written action plan as required and was advised by her supervisor, Ms. Angela Richardson ("Richardson"), to submit one by the close of business that day.

However, Agency notes that as of February 5, 2021, Employee still had not submitted the document, and Ms. Richardson emailed Employee to ascertain the status. Agency avers that "Employee replied that the recapitulation of their meeting did not include an action plan with a deadline and that if Ms. Richardson was referring to the photo project, she could give the action plan to Ms. Richardson the

[15] *Id*. at Pages 22-23.
[16] *Id*. at Page 28.
[17] *Id*. at Pages 34 – 38.
[18] Agency's Brief at Page 7. (April 18, 2022).
[19] *Id*. at Page 8.

following Monday, February 8, 2021 after she completed other written deliverables for the day."[20] Agency notes that Ms. Richardson emailed that same day and advised Employee to submit it by noon on February 8, 2021. However, Employee replied on February 8, 2021 at 11:31am and stated that she had just seen the email and that she would submit the assignment by the end of the day.[21]

Agency also avers that during the PIP period, Employee failed to attend a mandatory staff meeting on February 1, 2021, without proper notification to her supervisor. Agency explains that during the PIP period, Employee also failed to check the Agency's communications inbox twice a day as required, and when asked by her supervisor why, Employee replied that "she had a lot going on."[22] Additionally, Agency notes that from February 10, 2021, to February 12, 2021, Employee did not submit summaries of her professional development training by the deadlines set forth by her supervisor. Agency cites that Employee noted again that she had a lot going on and forgot to send the summary.[23] Agency asserts that the issues mentioned are not totally inclusive of Employee's failures to meet performance measures, follow instructions and neglect of her duties, and there are numerous other instances where this occurred, even during the PIP period.

Regarding Employee's claims of age discrimination and human rights violations, Agency avers that OEA is not the appropriate forum for consideration of those matters. That said, Agency avers that it did not engage in any discriminatory practices against Employee. Further, Agency asserts that Employee's claim of its violation of the 90-Day rule is without merit. Agency avers that Employee's cause of action were not initiated at the time frame for which Employee claims in 2018, but that the instant action occurred due to Employee's failure to successfully complete the PIP during the period of January 7, 2021, through March 7, 2021. Further, Agency avers that Employee's claim of breach of contract, breach of duty of good faith and intentional infliction of emotional distress, subterfuge and violations of public policy are also claims that are not under the jurisdiction of OEA.[24] Agency also asserts that Employee's neglect of duty argument and the definition of neglect is aligned with the neglect as defined in the District code provisions applicable to Child Abuse and Neglect, and are not relevant or applicable to matters pending before District employees at OEA. Agency also avers that Employee's claims of disparate treatment are without merit or substantive evidence to exhibit such actions. Further, Agency notes that Employee's claims regarding wage compensation for overtime work are also without merit. Agency asserts that Employee was advised on several occasions not to work overtime, and was not approved for such, but did so on her own accord. As a result, Agency avers that it had cause to terminate Employee from service and did so in accordance with the applicable regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

ANALYSIS

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

---

[20] *Id.* at Page 8-9.
[21] *Id* at Pages 8-9.
[22] *Id.* at Page 9.
[23] *Id*.
[24] *Id*. at Pages 13-14.

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee's termination was levied pursuant to **DPM § 1605.4(m)** - *"Failure to meet established performance standards';* **DPM §§ 1604.5(d) and 1607.2(d)(1)** – *"Failure/Refusal to Follow Instructions, specifically; negligence, including careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions."; and* ***DPM § 1607.2 (e)*** – *"Neglect of Duty, specifically failing to carry out duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; carless work habits; conducting personal business while on duty; abandoning an assigned post; sleeping or dozing on-duty, or loafing while on duty."*

PIP/ Causes of Action

In the instant matter, Employee was placed on a Performance Improvement Plan (PIP) on January 7, 2021. This plan was set for 60 days (through March 7, 2021) and the plan noted performance standards for which Employee would be evaluated and offered the opportunity to improve. Areas that were noted for improvement were: *"improving communication and professionalism with colleagues and supervisors, improving quality and timeliness of communication to colleagues and supervisors, managing assigned tasks and projects from start to finish, meeting deadlines, reporting on activities and/or meetings attended on behalf of the agency within twenty-four (24) hours of completion, receiving approval from supervisor(s) prior to carrying out projects on behalf of the agency and improving professional skills set around project management, interpersonal communication and time management."*[25] Over the course of this PIP, Employee failed to meet deadlines and had performance deficits. Agency provided threads of email chains during this time period related to several assignments, deadlines and other responsibilities for which Employee did not perform as expected.[26] Agency also provides specific instances where Employee submitted assignments in an untimely manner, failed to attend a mandatory meeting (without appropriate notice) and other failures to complete tasks as assigned.

As a result of Employee's failure to meet the required performance standards, she was unsuccessful with the PIP. Agency provided written notice regarding the PIP in Proposed Separation notice dated March 19, 2021. Agency proposed to terminate Employee for Failure to Meet Performance Standards, Failure/Refusal to Follow Instructions and Neglect of Duty. A Final Notice was issued April 30, 2021. Agency averred that its actions were administered appropriately in accordance with PIP requirements as outlined in 6-B DCMR §1410 and under Chapter 16 of the DPM. Employee argued that she was terminated for reasons other than performance, namely that she was terminated in an action of age discrimination. Employee averred that her she has had a long-standing career with the government and that the performance deficits noted in Agency's Final Decision are "minor slip ups" that are common in an office setting and do not warrant termination.

[25] Agency's Brief at Page 4 (April 18, 2022).
[26] *See*. Agency's Answer at Tabs 5-9. (August 31, 2021).

Chapter 14 of the DPM sets forth the guidelines required for the implementation of PIP. Specifically, DPM §§ 1410.1 through 1410.7[27], provide the manner in which a PIP must be administered. DPM §§1410.5 through 1410.7 states:

> "**1410.5** *Within ten (10) business days after the end of the PIP period*, the employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, shall issue a written decision to the employee as to whether the employee has met or failed to meet the requirements of the PIP. (Emphasis added.)
>
> **1410.6** If the employee fails to meet the requirements of the PIP, the written decision shall state the reason(s) the employee was unsuccessful in meeting those requirements and:
>
> a. Extend the PIP for an additional period, in accordance with Subsection 1410.8; or
> b. Reassign, reduce in grade, or *remove the employee*. (Emphasis added.)

Employee was provided written notice of the PIP, which lasted for 60 days (January 7, 2021 – March 7, 2021). Employee was provided written notice of the outcome of the PIP on March 19, 2021, within ten (10) business days as required and in compliance with DPM§ 1410.5. Pursuant to the DPM provisions, I find that Agency acted in accordance with DPM Chapter 14 in its administration of the PIP.[28]

Failure to Meet Established Performance Standard; Failure Refusal to Follow Instructions; Neglect of Duty

District of Columbia personnel regulations provide that there is a neglect of duty in the following instances: "failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position and failure to preform assigned tasks or duties.[29] Further, the personnel guidelines provided that a failure to meet performance standards includes when an employee has been unsuccessful in improving work performance following the implementation of a PIP. Additionally, District personnel guidelines also note that a failure to follow instructions includes negligence and the failure to comply with supervisory instructions. Here, Agency cites to specific instances of Employee's misconduct related to these charges. This includes specific instances of missed deadlines after being provided instructions, late assignments and missed meetings. Specifically, Agency noted the following performance issues which occurred during Employee's PIP period:

1) January 8, 2021, Employee sent an email that failed to include information pertinent for an MLK Day event.

2) Employee was required to update the External Affairs and Communications (EAC) Team Task Tracker every Tuesday by noon. However, on January 26, 2021, Employee did not complete this task. When advised of such, Employee noted that she forgot to do so before she went on leave and made the deadlines after the noon deadline. Agency avers that this was unacceptable as there are multiple calendar reminders for employees to update the EAC Tracker.[30]

---

[27] DPM Chapter 14 et. seq. (June 12, 2019).
[28] Employee also raised issues regarding the time frame for which Ms. Richardson supervised Employee. However, the record does not reflect any issue with time of supervision.
[29] *See.* DPM Table of Illustrative Penalties 1607.2 (e) (May 19, 2017). See also *Karen Falls v. Department of General Services*, OEA Matter No. 1601-0044-12R14 (August 12, 2014).
[30] *Id*. at Page 8.

3) On January 28, 2021, Employee was tasked with organizing Agency's photo archive. On February 4, 2021, Employee had not provided a written action plan as required and was advised by Ms. Richardson to submit one by the close of business that day.

4) As of February 5, 2021, Employee still had not submitted the document, and Ms. Richardson emailed Employee to ascertain the status. Agency cites that "Employee replied that the recapitulation of their meeting did not include an action plan with a deadline and that if Ms. Richardson was referring to the photo project, she could give the action plan to Ms. Richardson the following Monday, February 8, 2021 after she completed other written deliverables for the day." Agency notes that Ms. Richardson emailed that same day and advised Employee to submit it by noon on February 8, 2021. However, Employee replied on February 8, 2021 at 11:31am and responded that she had just seen the email and that she would submit by the end of the day.[31]

5) Employee also failed to attend a mandatory staff meeting on February 1, 2021, without proper notification to her supervisor. During the PIP period, Employee also failed to check the Agency's communications inbox twice a day as required, and when asked by her supervisor why, Employee replied that "she had a lot going on."[32]

6) Between February 10, 2021 to February 12, 2021, Employee did not submit summaries of her professional development training by the deadlines set forth by her supervisor. Agency cites that Employee noted again that she had a lot going on and forgot to send summary.[33]

Agency provided numerous email threads and documentation in support of all of the aforementioned performance deficits.[34] Further, Employee does not 'per se' deny some of the actions but notes that they are common office "slip ups" that do not warrant termination.[35] Employee also argues that she is neither perfect or imperfect in her work performance and that she was never negligent in her duties.[36] I find that Agency has provided substantive evidence regarding Employee's neglect of duty, failure to follow instructions and failure to meet performance standards as set forth in the PIP. While Employee's asserts to the "minor or lesser" offense nature of these actions, I find that Agency in its discretion, can discipline an employee for a failure to complete tasks as required. For these reasons, I find that Agency has met is burden of proof and has shown that it had cause for adverse action.

90 Day Rule

Employee avers that Agency violated the 90-Day rule in the administration of this action. Specifically, Employee asserts that Agency included misconduct from a period in November 2018,[37] and as a result, Agency's termination in March 2021 violates the 90-Day Rule in accordance with DC Code. Agency avers that it did not violate this rule. Agency argues that its action was commenced following Employee's unsuccessful completion of the PIP in this matter which went from January 7, 2021, through March 7, 2021. Agency asserts that it gave timely notice to Employee regarding the PIP and initiated the action within the appropriate time frame as well. The undersigned agrees with Agency.

---

[31] *Id.* at Pages 8-9.
[32] *Id.* at Page 9.
[33] *Id.*
[34] Agency asserts that the issues mentioned are not totally inclusive of Employee's failures to meet performance measures, follow instructions and neglect of her duties, but there are numerous other instances where this occurred, even during the PIP period. Further, Agency also noted that Employee's annual performance ratings continued to decline. See. Agency's Answer at Tabs 3 and 4 - FY 18 and FY 19 Annual Performance Documents.
[35] Employee's Brief at Page 13 (March 18, 2022).
[36] It should be noted that Employee's argument related to negligence akin this to neglect as noted in in DC Child Abuse and Neglect codes, and not those applicable to Personnel matters.
[37] Employee's Brief at Page 2. (March 18, 2022).

District Personnel Manual §1602.3 (a) provides that a "corrective or adverse action shall be commenced no more than ninety (90) business days after the agency or personnel authority knew or should have known of the performance or conduct supporting the action." The OEA Board has held that the legislative intent of the 90-Day Rule provision found in DPM §1602.3 (a) is to "establish a disciplinary system that included *inter alia,* that agencies provide prior written notice of the grounds on which the action is proposed to be taken."[38] The Board noted that prior to this revision, the "courts have ruled on matters pertaining to the ninety-day rule as it related to D.C. Code § 5-1031…[t]his statutory language is only applicable to those employed by the Metropolitan Police Department or the D.C. Fire and Emergency Medical Service agencies."[39] That noted, the Board further held that while the intent for the 1602.3 (a) provision was not "spelled out in the DPM, it is reasonable to believe that the intent was similar to that provided by the D.C. Council when establishing the language of the ninety-day rule." The Board referenced a D.C. Court of Appeals decision[40] wherein the Court found that "the deadline was intended to bring certainty to employees of an adverse action that may otherwise linger indefinitely."[41] The Board has also held that this provision of the DPM 1602.3(a) like its counterpart found in D.C. Code §5-1031, are mandatory in nature.[42] Here, Employee was subject to a PIP from January 7, 2021, through March 7, 2021. At the end of the PIP, Employee was deemed to be unsuccessful. Agency provided notice of such within the 10 days required and initiated the action for termination pursuant to applicable personnel guidelines. This adverse action commenced on March 19, 2021. Thus, I find that Agency administered the instant action in accordance with applicable rules and was not in violation of the 90 Day Rule in DPM 1602.3(a).

Discrimination Claims[43]

Employee's claims that she was subject to age discrimination. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.[44] Employee's other ancillary arguments regarding wage compensation and hours are also outside of OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA lacks the jurisdiction to hear Employee's other claims.

---

[38] *Keith Bickford v Department of General Service*, OEA Matter No.1601-0053-17 *Opinion and Order on Petition for Review* (January 14, 2020).
[39] *Id.*
[40] *Id.* citing to *District of Columbia Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419,425 (2010).
[41] *Id.* The Board also cited the Court of Appeals as noting that the "D.C. Council, in establishing the ninety-day rule, was motivated by the exorbitant amount of time that the [adverse action] process was taking, such that…employees had to wait months or even years to see the conclusion of an investigation against them."
[42] *Id.* at Pages 9-10.
[43] The undersigned notes that Employee raised several claims that are out of the jurisdiction of this Office. Employee raised claims of age discrimination, pretext, subterfuge, retaliation, disparate treatment, hostile work environment, violations of public policy, breaches of good faith and fair dealing, human rights violations, intentional infliction of emotional distress, and wage/payment claims. These claims were presented in Employee's Prehearing Statement and the subsequent brief required by the undersigned, wherein the undersigned specifically noted that a recitation of these claims should not be reiterated. For the purposes of addressing the instant adverse action and the relevant matters under the jurisdiction of this Office, the undersigned will not address Employee's claims of human rights violations, intentional infliction of emotional distress, wage claims, breaches of good faith or the violations of public policy as presented by Employee. Those claims are not under this Office's jurisdiction and the undersigned finds that they are irrelevant to the instant cause of action in this matter. The undersigned will address the claims of discrimination, retaliation and disparate treatment.
[44] D.C. Code §§ 1-2501 *et seq.*

Retaliation Claims/Hostile Work Environment

Employee also claimed that she was subject to retaliation regarding the instant adverse action. Specifically, Employee submits that she was retaliated against following her actions of "bringing concerns to the attention of senior DACL personnel."[45] To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) (s)he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his/her employer took an adverse personnel action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[46] A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.[47] Here, Employee only states that she was terminated in retaliation for lodging concerns to senior personnel officials.[48] I find that Employee failed to provide any substantive evidence to support this claim or set forth the specifics of the concerns raised. Consequently, I find that Employee's retaliation claims are unsubstantiated, and as such, find that Agency's termination action is not retaliatory.

Disparate Treatment Claims

Employee raises a disparate treatment argument in her assertion that Agency's discipline against her was unduly harsh, and was "far harsher than those charged with similar misconduct."[49] In *Jordan v. Metropolitan Police Department*, OEA's board set forth the considerations regarding a claim of disparate treatment.[50] The Board held that:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surround the misconduct are substantially similar to [their] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

Accordingly, an employee who makes a claim of disparate treatment has the burden to make prima facie showing that they were treated differently from other similarly-situated employees.[51] To support this contention, Employee reiterates claims of age discrimination and violations of public policy in Agency's disciplinary action against her. Employee has not provided evidence of other similarly situated employees or otherwise. She provides ages of other coworkers but does not provide evidence of disciplinary actions or otherwise. As a result, I find that Employee's disparate treatment argument fails to meet the burden of proof for this claim. Upon consideration of the aforementioned findings, I find that Agency has met its burden of proof in this matter, and it has adequately proven that there was proper cause for adverse action against Employee.

---

[45] Employee's Brief at Page 34. (March 18, 2022).
[46] *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).
[47] *Id.*
[48] Employee's Brief at Page 34.
[49] *Id.* at Page 15 (November 17, 2017).
[50] *Jordan v. Metropolitan Police Department*, OEA. Matter No. 1601-0285-95, *Opinion and Order on Petition for Review* (September 29, 1995).
[51] *See John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing to Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994).

Whether the Penalty was Appropriate

Based on the above-mentioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[52] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM § 1607; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[53] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[54] Employee asserts that Agency failed to engaged in progressive discipline in this matter, and that Agency ignored the Table of Illustrative Actions.[55] The undersigned disagrees with Employee's assertions. The record reflects that Employee had previous disciplinary actions. Specifically, Employee was assessed a one-day suspension in November 2018. Employee also had a verbal counseling assessed in February 2020 and had a Final Notice of Reprimand issued on March 1, 2021.[56]

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.[57]

---

[52] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[53] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[54] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[55] Employee's Brief at Page 3-8 (March 18, 2022).

[56] Agency's Brief at Page 2-3. The December 8, 2020 Notice of Proposed Reprimand included charges of Failure to Follow Instructions and Neglect of Duty and was sustained in the Final Noticed dated March 1, 2021.

[57] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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 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;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;

Employee argues that the Hearing Officer failed to appropriately consider the *Douglas* Factors in this matter.[58] However, I find this assertion to be unsupported by the evidence in the record. The Rationale Worksheet in this matter exhibits considerations for the *Douglas* Factors, and this sheet was provided to the Hearing Officer.[59] Further, Chapter 16 §1607 of the District Personnel Manual Table of Illustrative Actions ("TIA") provides that the appropriate penalty for a first occurrence for Failure to Meet Established Performance Standards ranges from Reprimand to Removal. For a first occurrence of Neglect of Duty, the penalty range is from Counseling to Removal, and the range for subsequent occurrences is a five (5) day Suspension to Removal.[60] Additionally, the TIA provides that the appropriate penalty for first occurrence of Failure to Follow Instructions ranges from a Counseling to Removal and subsequent occurrences range from a five (5) Day Suspension to Removal.[61] As a result, I find that removal is an appropriate penalty under the circumstances

Accordingly, I find that Agency had appropriate and sufficient cause to terminate Employee from service. I further find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and not a clear error of judgment. As a result, I conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee from service is **UPHELD.**

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Administrative Judge

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.

[58] Employee's Brief at Pages 27-28. (March 18, 2022).
[59] Agency's Answer at Tabs 11 and 12.
[60] DPM §1607 et.seq. Table of Illustrative Actions. (2019)
[61] *Id.*