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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE, Employee	OEA Matter No. 1601-0039-20
v.	Date of Issuance: April 2, 2024
DISTRICT DEPARTMENT OF CONSUMER & REGULATORY AFFAIRS, [1] Agency	ERIC T. ROBINSON, ESQ. SENIOR ADMINISTRATIVE JUDGE

E.L. Pugh, II, Esq., Employee Representative
Christine Gephardt, Esq., Agency Representative

INITIAL DECISION[2]

INTRODUCTION AND PROCEDURAL HISTORY

On March 23, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office') contesting the former District of Columbia Department of Consumer and Regulatory Affairs ("DCRA", "DLCP" or the "Agency") action of removing him from service due to an Agency sustained charge of Neglect of Duty.[3] Employee received his Final Notice sustaining Agency's removal action on February 24, 2020. Employee's last position of record was Investigator with an approximately 40-year tenure with DCRA. By letter dated June 16, 2020, the OEA Executive Director notified DCRA that Employee had appealed his termination

[1] This agency no longer exists. On October 1, 2022, DCRA split into two new agencies, the Department of Buildings and the Department of Licensing and Consumer Protection ("DLCP").
[2] This Initial Decision is being reissued in order to fully incorporate certain typographical errors.
[3] 6-B DCMR §§1605.4(e) and 1607.2(e) "Neglect of Duty" – "Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; sleeping or dozing on-duty, or loafing while on duty."

and Agency was required to submit an Answer to Employee's Petition for Appeal by July 16, 2020. On July 14, 2020, DCRA filed its Answer along with a Motion to Dismiss.[4]

This matter was assigned to the Undersigned in or around March 2021. A prehearing conference and several status conferences were then held. The disposition of this matter was delayed due to number of circumstances including the emergency posture the District government was operating under due to the Coronavirus Covid-19 pandemic, the agency's dissolution into two smaller entities through the impetus of the District of Columbia Council and its Mayor, the onboarding of the Department of Licensing and Consumer Protection into this removal action undertaken by its predecessor agency, and the change in legal counsel for the Agency during the supplantation of DCRA by DLCP. Eventually, an Evidentiary Hearing was held on June 6, 2023. Thereafter, a delay with receiving the transcripts ensued. Ultimately, the parties were Ordered to submit written closing arguments. Both parties timely complied. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for 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 631.2 id. States:

> For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

ISSUES

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

[4] It bears noting that Agency's Motion for Summary Judgment and Motion to Dismiss that were submitted as part of its Answer are hereby Denied. This Initial Decision will focus on providing a ruling based on the merits of this matter.

<u>*Summary of Relevant Testimony*</u>

<u>Derek Brooks ("Brooks") Transcript (Tr.) pp. 39 – 99.</u>

Brooks was called as part of Agency's case in chief and testified in relevant part that he works for the Alcoholic Beverage and Cannabis Administration ("ABCA") as its Chief of Enforcement. He has been with ABCA since August 2022. Prior to his current stint with ABCA, Brooks worked for DCRA from November 2018 – July 2022. His last position of record with DCRA was Program Manager ("PM"). As a PM, he was responsible for the entire division "ensuring staff performance, meeting obligations of the division, enforcing district regulation in the unfair and deceptive trade practices."[5] Brooks recalled supervising Employee since June 2019 in the Regulatory Investigation section. Brooks noted that on April 24, 2018, MPD Officer Davis contacted his agency via email requesting that DCRA investigate alleged derelict properties at 708 Kennedy Street, NW[6] and 5410 14th Street NW.[7] Officer Davis's request was initially sent to Annette Tibbs, a DCRA Program Analyst and work colleague. In response, Tibbs assigned this investigation to Employee. Regarding Employee's responsibility and duty for this assignment, Brooks testified as follows:

> Q Okay. So, when this investigation was assigned to [Employee], what exactly was his assignment, what was he supposed to do?
>
> A Go out to the location to see what was going on at that location. See about the merit of the complaint filed by the police officer.
>
> Q And when you said that Investigator Allen's duty was to investigate the complaint, specifically as an investigator with the agency, what specifically is he looking for when he goes to this property? What is his job to look for?
>
> A Prior to going he would search for licenses, permits, see what was associated with the property, and then he would go to the property to see if in fact there were people living on the property, working on the property, that sort of thing. So, he's seeing who is in the location, is there anyone that he could speak with, that sort of thing.[8]

Brooks recalled that Employee went to the property in question. No one answered the door, so he took pictures of the property and left his business card before leaving. Brooks further elaborated that at the time of this investigation, there was no Agency established system of recording notes from investigations. He could not recall whether Employee checked to see if the subject property had a certificate of occupancy on file with DCRA. When investigating a certificate

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[5] Tr. p. 41.
[6] The crux of Agency's action concerns Employee's conduct as he investigated this property. Going forward, it will be referred to as the "subject property" or the "property in question."
[7] *See* Agency Exhibit No. 1. *See also*, Tr. pp. 46.
[8] Tr. pp. 52 – 53.

of occupancy, the investigators are tasked with ensuring that the subject property is not overcrowded and that it is being used for its intended zoning purpose (e.g. a housing unit operating as a restaurant). He examined a portion of Agency's Exhibit No. 1, which included an operations manual. Brooks did not recognize it and could not recall using or following a manual during his stint with the Agency.[9] Brooks recalled discussing the subject property with Employee and Employee noted that he could not gain entry and that he was going to refer the matter to the inspections and compliance administration so that they could gain entry onto the subject premises.[10] As it relates to Employee creating an investigative report, Brooks stated as follows:

> Q Now, do you know if Mr. Allen drafted an investigative report in this case?
>
> A No, I don't.
>
> Q You don't know, or he didn't?
>
> A I don't know. I never received one.
>
> Q Was he required to draft an investigative report?
>
> A Back then there were cases where people, if they found nothing, they didn't make a report.[11]

Brooks, as Employee's supervisor, did note that Employee was cited as a marginal performer as part of his S.MA.R.T.[12] goals, partially due to his inability to timely submit his investigative reports.[13] Brooks recalled closing the investigation of the subject property in August 2019 due to it having been aged out (90 plus days) in the system. Brooks noted that Employee told him that he had been to the property three times and was unable to gain entry. Per DCRA policy, at that time, they could not force entry into a property, someone must voluntarily let them in. If this does not occur, their policy (at that time) was to refer the matter to the Inspection and Compliance Administration ("ICA"). They had broader authority to effectuate an inspection.

During cross examination, Brooks clarified that certificate of occupancy is not required if it's a one family rental.[14] During redirect examination, Brooks reiterated that Employee did not provide him with any notes regarding his investigation into the subject property.

<u>Tiffany Crowe ("Crowe") Tr. pp. 104 – 216.</u>

Crowe testified in relevant part that she works for the Office of the Chief Technology Officer ("OCTO") as its Associate Chief Technology Officer for Enterprise Applications. She has

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[9] Tr. pp. 61 – 63.
[10] Tr. pp. 65 – 66.
[11] Tr. pp. 66- 67.
[12] S.M.A.R.T.: Specific, Measurable, Attainable, Realistic, and Timely.
[13] *See generally*, Agency Exhibit No. 1 and Tr. pp. 71 – 73.
[14] Tr. pp. 88 – 89.

been in this position since November 2021. Prior to this, she worked for DCRA from 2019 to 2021. For part of her time at DCRA, Crowe was its Chief Administrative Officer. A portion of her duties included labor relations and human resource management. Crowe was the proposing official involved in recommending the instant adverse action against Employee. Crowe explained that Employee was removed from service due to a sustained charge of neglect of duty and she described it as “the person was not carrying out the duties as expected of that position, right, and that can be, range from job abandonment to failure to complete the duties as assigned, sort of a general carelessness. There’re several things that could be considered neglect of duty.”[15] She recounted that a fire occurred at the subject property and a woman and child tragically perished as a result. Looking back, it was noted that an MPD officer had alerted DCRA to possible concerns that were not adequately investigated prior to the fire. In proposing Employee’s removal from service, it was asserted that he failed to conduct a proper investigation into this property prior to the fire. She opined that the resulting tragic loss of life partly supported Employee’s removal; but she also noted the lack of Employee’s investigative efforts was the primary driver resulting in his termination. Crowe elaborated that she never saw an investigative report from Employee on the subject property.[16] There was no evidence that Employee had undertaken any of the necessary steps to investigate the concerns voiced by MPD Officer Davis. Crowe asserted that DCRA conducted a thorough Douglas Factor Analysis which contributed to the decision to terminate. The notoriety of this tragedy was not lost on DCRA management and how poorly this predicament reflected on the Agency. Crowe asserted that there was a training manual for the Regulatory Investigative Section that should have been circulated to Employee and his peers. This manual detailed how an Investigator (like Employee) should conduct investigations. Crowe noted that this manual predated her stint at DCRA and was presented to her as indicative of how this division of DCRA should operate.[17]

During cross examination, Crowe explained that Employee should have created a document trail memorializing his investigative efforts; he should have uploaded the photographs that he took to DCRA’s QuickBase; he should have reached out to the complaining MPD Officer to get more clarity on the problem. This tragedy resulted in improved processes and coordination with sister District government agencies. She admitted that three days prior to the fire, Brooks (Employee’s manager) had closed out his office’s investigation into the subject property.[18] She further admitted, that the QuickBase method of record keeping was new and had not been fully implemented at the time of the fire. In essence, both old and new methods of record keeping were being used at the time of the incident.[19] Crowe could not conclusively state if or when Employee received any on-the-job training.[20] Employee’s lackluster note taking was never the subject of a reprimand or included in a Performance Improvement Plan prior to the tragic fire.[21]

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[15] Tr. p. 117.
[16] Tr. pp. 122 – 124.
[17] Tr. pp 147 – 152.
[18] Tr. pp. 159 – 169.
[19] *Id*.
[20] Tr. pp. 171 – 193.
[21] *Id*.

Monique Bocock ("Bocock") Tr. pp. 220 – 248.

Bocock was called as part of Agency's case in chief and testified in relevant part that she works for the Department of Buildings ("DOB") as a Senior Policy Advisor. During the end of 2019 through the beginning of 2020, she also worked for DCRA as a Senior Policy Advisor. From time to time, the Director of DCRA would delegate to her the responsibility of being the Deciding Official. Pursuant to the delegation, Bocock was the Deciding Official that effectuated Employee's removal from service. She reviewed the proposed action authored by Crowe and the Hearing Officers report[22] and agreed with its analysis and outcome. She authored and executed Agency Exhibit No. 4, which is the Notice of Final Decision.

During cross examination, the following excerpt is relevant to this matter:

> Q Say you're my boss –
>
> A Mm-hmm.
>
> Q -- and I report to you, and I tell you we have a house that has an issue.
>
> A Mm-hmm.
>
> Q And you close the investigation. Do I still have a duty under my employment guidelines to continue the investigation after you say it's closed?
>
> A I honestly don't know. I mean, I would guess no, unless there is some additional information that is learned that would warrant the case being reopened.[23]

Employee Tr. pp. 247 – 294.

Employee testified that he was tasked with investigating the subject property on May 21, 2019. He made his first visit to the property that same day. He was unable to gain entry so he left a business card and researched the history of the property. He found that at various points in its history; the property was used as a tailor shop, photography shop, pharmacy, and as a rental. In August 2019, he was reviewing this assignment with Brooks noting that he had never been able to gain entry, so Brooks decided to close the matter.[24] Employee asserted that he did take notes and photographs of his investigative efforts into the subject property. He further asserted that he does not know where the notes are. He strongly suspects that his notes were lost when his office moved to a different floor in the same building. The office move occurred approximately one week before the subject property burned down. Regarding on-the-job training, he recalled that he received training in 2010 - 2011 where he was taught to close out a housing investigation after two to three

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[22] *See*, Agency Exhibit No. 3.
[23] Tr. pp. 238 – 239.
[24] Tr. pp. 249 -251.

unsuccessful visits.[25] He further noted that he did not receive any other training since. He further explained that once a case is closed out, he did not have the ability to reopen it. Prior to his removal, Employee had worked for the District government for roughly four decades and given his seniority, he was tasked to be his office's lead investigator where he would collaborate with his colleagues assuming other duties such as reviewing his colleagues' investigative reports. His job responsibility was to search for unlicensed activity. He asserts that he did not have the authority to get an administrative search warrant.[26]

During cross examination, Employee confirmed that he had pulled a certificate of occupancy where he discovered the business history of the subject property. He admitted that he did not write a Notice of Infraction because he was unable to gain entry and could not get the visual evidence to support that finding. Employe admitted that he was aware that writing investigative reports was a job requirement.[27] He did not personally refer this investigation to other offices within DCRA because he knew that they had received their own investigative complaints.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following findings of fact, analysis, and conclusions of law are based on the testimonial and documentary evidence presented by the parties during the course of Employee's appeal process with OEA. Agency asserts that it has met its burden of proof on its charge of Neglect of Duty. Most notably, Employee's failure to investigate and document an illegal housing complaint at the subject property. Agency further asserts that Employees' failure in this regard partially contributed to the District government's inability to identify the life and safety threatening conditions before the house fire that tragically resulted in the loss of a mother and her child. Employee contends that his removal should be reversed and notes that he is being scapegoated due to the notoriety of the house fire and the loss of life. Of note, he asserts that was unable to do anything further to complete the investigation after his manager, Brooks closed out the investigation. He further asserts that he conducted and completed the illegal housing complaint investigation pursuant to the training that was available at that time and that any evidence of his investigation was lost during his former office's record relocation.

I note that there are no documents showing that Employee researched or obtained a Certificate of Occupancy ("COO"); and he testified that he took notes and created a report but that they were somehow lost during the record room move. During the Evidentiary Hearing, I had the opportunity to observe the demeanor and poise of the witnesses that testified. I find Employee's testimony regarding his lost notes and reports to be self-serving. Employee would have the Undersigned believe the following:

1. During his office's transition to QuickBase (an application platform that allowed for centralized record keeping), his handwritten notes were conveniently lost.
2. That his job did not require him to keep detailed notes and that he was allowed to file investigative reports at his leisure.

[25] Tr. pp. 252 – 254.
[26] Tr. pp. 255 – 258.
[27] Tr. 259 – 261.

3. That his failure to reach out to the complaining officer or take just a few photos (without characterization for review) was not indicative of a lackluster investigative effort.

I disagree. Employee encumbered a position of trust within the District government that when done haphazardly can (and did) allow safety hazards to fester and endanger lives. As an Investigator, Employee was responsible for applying investigative practices and techniques, exploring leads, collecting information in support of all consumer protection regulatory activities under the jurisdiction of DCRA, and completing investigative reports. I find that Employee's testimony was disingenuous and self-serving. I further that all these failures resulted in a poor work product which was collectively worthy of the discipline imposed. Regardless of Employee's contention that others are more to blame for the tragic circumstances; what his removal, and this Initial Decision, resolve is that his actions, regardless of what other persons or entities did (or should have done) was well below par and resulted in in the persistence of an unsafe living environment. I further find that the collective testimonies of Crowe and Bocock were consistent, compelling, and credible in noting that DCRA had a good faith belief that Employee's inaction in this matter was egregious and could not be tolerated moving forward. Given the gravity of the conduct and the proper procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to terminate Employee.[28]

Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate.[29] The "primary discretion" in selecting a penalty "has been entrusted to agency management, not to the OEA."[30] Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in the individual case. OEA's role in this process is not to insist that the balance be struck precisely where the OEA would choose to strike it if the OEA were in DCRA's shoes in the first instance; such an approach would fail to accord proper deference to the Agency's primary discretion in managing its workforce. Rather, the OEA's review of an agency-imposed penalty is essentially to assure that DCRA conscientiously considered the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the OEA finds that the agency failed to weigh the relevant factors, or that DCRA's judgment clearly exceeded the limits of reasonableness, is it appropriate for the OEA then to specify how the DCRA's decision should be corrected to bring the penalty within the parameters of reasonableness.[31] In reviewing the documents of record, I find that DCRA's Douglas factor analysis was thorough and reasonable.[32] I find that the evidence did not establish that the penalty

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[28] Employee also tacitly argued that he is the victim of an age or race discrimination retaliatory firing. Although Employee was provided with an opportunity to put forth any credible evidence or argument regarding this or any other contention relevant to this matter, during the Evidentiary Hearing and closing argument he offered no credible evidence or argument to support this claim. Further, 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 Right Act.

[29] *See*, Douglas v. Veterans Administration, 5 MSPB 313, 328, 5 M.S.P.R. 280, 301(1981)(federal Merit Protection Board case); Raphael 740 A. 2d 945).

[30] *Id*.

[31] *Raphel* 740 A. 2d at 945.

[32] *See*, Agency Exhibit No. 4 and 5.

of termination constituted an abuse of discretion.[33] I conclude that the Agency met its burden of proof in this matter and that Employee's termination should be sustained.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of REMOVING Employee from Service is hereby UPHELD.

FOR THE OFFICE:

/s/ Eric T. Robinson
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

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