THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0043-22
	)	
v.	)	
	)	Date of Issuance: September 7, 2023
UNIVERSITY OF THE DISTRICT OF COLUMBIA,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Student Program Development Specialist with the University of the District of Columbia ("Agency"). On February 3, 2022, Agency issued a final notice of removal to Employee. It charged her with insubordination; failure or delay in carrying out orders, directions, assignments, instructions, etc.; failure or refusal to follow instructions; failure to meet performance standards; inability to carry out assigned responsibilities or duties; and neglect of duty.[2]

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

[2] Specifically, Agency alleged that Employee was provided a written reprimand for poor job performance because of her inability and refusal to complete Microsoft Suite trainings and the subsequent demonstration of her ability to use the tools learned. Agency asserted that Employee was provided with deadlines and extensions to complete the trainings in April, May, and June. However, Employee failed to provide proof that she completed the trainings. Consequently, she was placed on a sixty-day Performance Improvement Plan ("PIP"). However, she did not complete the trainings by the PIP deadline. *Petition for Appeal*, Exhibit #3, March 4, 2022.

On March 4, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She argued that she worked for Agency for fifty-two years and was never subjected to any disciplinary actions, nor did she receive any negative performance reviews. Employee contended that despite her capably using various systems, Agency engaged in age discrimination by terminating her. Accordingly, she requested that Agency's final decision be dismissed and that she be reinstated with back pay and attorney's fees.[3]

In response to Employee's petition, Agency filed a Motion to Dismiss. It provided that OEA lacked jurisdiction to consider discrimination claims.[4] Additionally, Agency filed a response to Employee's Petition for Review on August 31, 2022. It argued that as part of Employee's duties and responsibilities, she was required to demonstrate oral and written skills. However, it explained that she struggled to use the Microsoft Word, Adobe, and PowerPoint programs; had trouble locating and responding to emails; and failed to proofread her emailed communications. According to Agency, Employee's inability to perform her duties came to a head during the COVID-19 pandemic when it pivoted to remote work. To assist Employee with performing her job duties, Agency requested that she complete online training courses.[5] Despite Agency's assistance and extension of deadlines, it claimed that Employee failed to complete the trainings. Consequently, Agency issued a Notice of Proposed Written Reprimand on June 30, 2021. On July 8, 2021, Agency issued a sixty-day PIP, which provided an action plan.[6] Agency provided that it met with Employee five times during the course of the PIP; however, Employee failed to satisfy the terms of the PIP, even with a sixty-day extension.[7] Accordingly, Agency terminated Employee.

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[3] *Id.*, p. 5-9.
[4] *Agency's Motion to Dismiss for Lack of Jurisdiction*, p. 2-3 (August 31, 2022).
[5] On May 21, 2021, Agency issued a Memorandum of Counseling to Employee, which outlined that she was to complete Microsoft Word training by May 31, 2021; Microsoft Outlook training by June 1, 2021; and Microsoft PowerPoint training by June 14, 2021. *Agency's Answer to Employee's Petition for Appeal*, p. 6 (August 31, 2022).
[6] Employee was given until September 8, 2021, to demonstrate improvement. *Id.*, Exhibit #20.
[7] *Id.*, Exhibit #16.

It is Agency's position that OEA lacked jurisdiction to consider Employee's discrimination claims and that its termination action was taken in accordance with all applicable laws, rules, and regulations. Therefore, it requested that OEA dismiss Employee's Petition for Appeal.[8]

Employee subsequently filed a Motion for Summary Disposition on March 17, 2023. She argued that she was unaware of the PIP extension and that the extension of her PIP for an additional sixty days was thirty days longer than what was permitted by 8-B District of Columbia Municipal Regulations ("DCMR") § 1910.3. Additionally, Employee contended that Agency failed to notify her of the PIP results within fourteen days, as required in 8-B DCMR § 1910.4. Finally, she provided that Agency mailed her Notice of Proposed Termination to the wrong address; that its decision to terminate her was an abuse of discretion; and that it failed to properly weigh the *Dougals* factors.[9]

Agency filed its Opposition to Employee's Motion for Summary Disposition on March 30, 2023. It asserted that it complied with 8-B DCMR § 1910.3. Agency argued that it placed Employee on a sixty-day PIP on July 18, 2021. According to Agency, 8-B DCMR § 1910.3 provided that a PIP may be extended in thirty-day increments up to a maximum of ninety days. It offered that at the conclusion of Employee's initial PIP, it extended the PIP for an additional sixty days. Agency contended that if the 120-day PIP violated the regulation, then the violation was harmless error because it did not harm or prejudice Employee's rights or significantly affect its final decision. As for Employee's arguments that she did not receive a copy of the PIP and was unaware that she was formally on a PIP, Agency provided that it emailed Employee copies of the PIP and discussed the PIP during a meeting with Human Resources and her Union Representative. Moreover, Agency argued that 8-B DCMR § 1910.4 is discretionary and not mandatory because it

[8] *Id.*, 1-16.
[9] *Employee's [ ] Motion for Summary Disposition*, p. 8-16 (March 17, 2023)

does not provide a consequence for failure to comply with this provision.[10] Agency provided that its termination action was proper, and it properly weighed the *Douglas* factors. As for Employee's argument that she did not receive the Notice of Proposed Adverse Action, Agency opined that Employee's representative submitted a response to the notice and Employee provided a copy of the notice during discovery. Therefore, it requested that Employee's Motion for Summary Disposition be denied.[11]

The OEA Administrative Judge ("AJ") issued an Initial Decision on June 16, 2023. She provided that in accordance with 8-B DCMR § 1910.3, a PIP may be issued for thirty, sixty, or ninety days, at the sole discretion of the supervisor; additionally, a PIP may be extended in thirty-day increments up to a maximum of ninety days. Therefore, she determined that Agency had the discretion to select the length of the PIP and that Agency's extension of sixty days was less than the ninety-day maximum. Consequently, she held that Agency did not violate the regulation.[12]

Regarding Employee's argument that Agency failed to notify her of the PIP results within fourteen days, as required in 8-B DCMR § 1910.4, the AJ determined that Agency had to provide Employee with a written determination by November 19, 2021. However, it issued its notice in January of 2022. The AJ opined that as the OEA Board held in *Kyle Quamina v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0055-17, *Opinion and Order on Petition for Review* (April 19, 2019), because 8-B DCMR § 1910.4 provides a time limit but no consequence for failing to adhere to the deadline, the language of the regulation is directory, opposed to

[10] Agency also noted that Employee was ill and out of the office from mid-November through December of 2021. Therefore, it did not believe that it was appropriate to terminate Employee during this time, given her personal circumstances.
[11] *Agency's Opposition to Employee's Motion for Summary Disposition*, p. 11-20 (March 30, 2023).
[12] As for Employee's argument that she was unaware of the PIP extension, the AJ provided that Agency submitted evidence in the record to show its weekly PIP follow-up meetings with Employee from July 19, 2021, through September 2, 2021. *Initial Decision*, p. 8-9 (June 16, 2023).

mandatory in nature. Thus, Agency's failure to comply was harmless error because it did not cause substantial harm to Employee, and it did not significantly affect Agency's final decision.[13]

Moreover, the AJ held that Agency did have cause to remove Employee. She found that Employee refused to follow her supervisor's instructions; she failed to complete assigned tasks; she did not complete the Microsoft trainings over the 120-day PIP period; and she neglected her duties. The AJ determined that in accordance with 8-B DCMR §1910.7, if an employee fails to improve during the PIP, separation was within the range of penalties. She also determined that Agency adequately considered the *Douglas* factors. As a result, the AJ upheld Agency's termination action.[14]

Employee filed a Petition for Review on July 21, 2023. She requests that the record be reopened for new and material evidence that was not available when the record closed.[15] According to Employee, the evidence shows her efforts to complete the Microsoft Office trainings. She explains that she discovered the evidence on her personal laptop through a forensic examination, and it shows that she completed or made substantial progress on the trainings. Therefore, Employee contends that the AJ's findings were not based on a complete record. Consequently, she requests that the record be reopened; that the Initial Decision be vacated; and that the matter be remanded for further consideration based on the new and material evidence presented.[16]

On August 24, 2023, Agency filed its Answer to Employee's Petition for Review. It contends that the training documents and presentations provided by Employee were not new and

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[13] *Id.*, 9-10. The AJ also determined that despite Agency's mistake of mailing the Notice of Proposed Adverse Action to the wrong address, Employee timely responded to the proposed action, and she was not prejudiced by the mistake.
[14] *Id.*, 12-15.
[15] It is Employee's position that the evidence shows that she took training on Microsoft Word, PowerPoint, and Outlook. Employee also provided a draft presentation on the history of Agency and its student groups.
[16] *Petition for Review*, p. 3-6 (July 21, 2023).

were available before the record closed. However, it asserts that even if the documents were new and unavailable before the record closed, it does not change the outcome of the Initial Decision. Agency argues that the training documents actually supports its position that Employee did not complete her assigned trainings. According to Agency, the documents reflect that Employee started to watch five training videos, but they do not show that she completed the courses by taking a test and achieving a test score of at least seventy percent. It opined that the AJ reasonably determined that Employee neglected her duty and did not complete the trainings that she was assigned. Accordingly, Agency requests that Employee's Petition for Review be denied.[17]

Substantial Evidence

According to OEA Rule 637.4(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[18]

Completion of Training

In her Petition for Review, Employee argues that "she made substantial efforts to complete the Microsoft Office trainings . . . [and] discovered multiple copies of documents showing her efforts to complete trainings. . . ."[19] However, efforts to complete trainings do not equate to actually completing trainings. As provided in the documents submitted by Employee, a minimum

[17] *Agency's Answer to Employee's Petition for Review of Initial Decision*, p. 13-19 (August 24, 2023).
[18] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[19] *Petition for Review*, p. 3-4 (July 21, 2023).

score of seventy percent (70%) on the test is required to complete the course.[20] The submitted documents provide that Employee either "completed watching" or "started watching" trainings, and one document indicated that she "started" the Office 2020 tests.[21] Employee does not provide any documentation showing that she achieved a score of seventy percent on any of the trainings. Therefore, Employee's argument regarding documentation of trainings lack merit.[22]

Cause

In its final decision, Agency provided that it had cause to terminate Employee under 8-B DCMR §§ 1503.4(d), (e), (m), and (n).[23] Agency explained that the PIP was implemented because of Employee's inability and refusal to carry out directions and assignments; her refusal to complete the Microsoft trainings; and her failure to demonstrate the ability to use Microsoft tools. During the PIP, it alleged that Employee failed to complete her Microsoft suite courses; she failed to proofread and edit documents and emails; she was unable to draft a letter; and she was incapable of utilizing systems like Navigate, Presence, and Outlook, which were necessary for her to do her job. Moreover, Agency provided that Employee failed to process remitted tuition for students, which jeopardized them receiving financial aid and scholarships.[24]

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[20] *Id.*, Exhibit #8.
[21] *Id.*, Exhibits 8-10.
[22] This Board agrees with Agency's argument that the evidence that Employee submitted is neither new nor material.
[23] *Agency's Answer to Employee's Petition for Appeal*, Tab #20 (August 31, 2022).
[24] Agency listed Employee's specific performance issues giving rise to her termination as:

1. Poor communication in emails to include errors in spelling, grammar, and syntax, resulting in unclear communication to university internal stakeholders.
2. Unable to meet deadlines and follow instructions.
3. Lack of self-assessment to improve abilities to communicate properly and with accuracy.
4. Employee does not consistently complete work assignment by the stated deadline.
5. Does not prioritize duties in a manner consistent with the unit's or organizational objective.
6. Does not complete tasks accurately and within the stated deadline.
7. Unable to prioritize office needs such as travel arrangements, budget letter approvals, or 25 Live submissions.
8. Employee is reluctant to accept supervision, correction. She has been unable to maintain a collegial attitude. When confronted with her behavior, she becomes defensive and accepts no responsibility for her actions/behavior.
9. Does not anticipate adverse stakeholder reactions and develop better alternatives.

Agency submitted several documents to prove cause for removing Employee. It provided a document entitled Sixty-day Extension for Improvement which stated that Employee made little progress and continued to struggle with technology, her work, and follow through.[25] Additionally, Agency submitted four PIP follow-up memorandums on July 29, 2021; August 19, 2021; August 26, 202l and September 2, 2021. Each form provided that Employee was either in progress or did not achieve the performance skills outlined by Agency.[26] Furthermore, Agency offered four emails from Employee's supervisor with requests for her to work on specific tasks to update or correct assignments and to submit her progress of completed courses, including the tests.[27] Therefore, Agency established cause for neglect of duty; failure or refusal to follow instructions; failure to meet performance standards; and inability to carry out assigned responsibilities or duties.

Penalty Within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985).[28] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there

10. Employee does not demonstrate job-relevant knowledge and skills needed to perform the duties and requirements of the position.
11. Does not demonstrate competency in the use of methods, practices, and equipment needed to do the job such as using the tools (software programs) provided by the university. Employee is unable to describe and/or apply new job-relevant techniques.
12. Employee is also unable to write a written plan of action before implementing a project or task.

[25] *Agency's Answer to Employee's Petition for Appeal*, Tab #20 (August 31, 2022).
[26] *Id.*, Exhibits #10-12 and 14-15.
[27] *Id.*, Exhibits # 3, 6, 7, and 13.
[28] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01*, Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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).

is clear error of judgment by the agency. As it relates to penalties, 8-B DCMR § 1910.7 provides that "if an employee fails to improve their performance . . . during the PIP, . . . the supervisor . . . must propose one of the following actions: (a) demotion to a lower graded position . . . or (b) separation from the University." In accordance with section 1910.7, Agency had the choice to demote or terminate Employee. Thus, pursuant to this section, Agency could impose termination as a penalty.

The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[29] Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[30]

Removal was within the range of penalty 8-B DCMR § 1910.7(b). Thus, Agency's penalty

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[29] *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 and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[30] *Love* also provided the following:

> [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 the agency'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 the agency did conscientiously consider 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 the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

determination was appropriate. Furthermore, the record shows that Agency adhered to 8-B DCMR § 1504.2, which are the *Douglas* factors. There is evidence in the record that Agency adequately weighed the factors before imposing its penalty of removal.[31]

Conclusion

Agency had cause to terminate Employee. The penalty was appropriate, and Agency adequately considered the *Douglas* factors. As a result of these findings, this Board must deny Employee's Petition for Review.

[31] *Agency's Answer to Employee's Petition for Appeal*, Tab #18 (August 31, 2022) and *Agency's Opposition to Employee's Motion for Summary Disposition*, Exhibits CC and EE (March 30, 2023)

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.