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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

| | | |
|-----------------------------------------------|---|-----------------------------|
| ILBAY OZBAY, |) | |
| Employee |) | OEA Matter No. 1601-0073-09 |
| |) | Date: March 18, 2011 |
| v. |) | |
| |) | Rohulamin Quander |
| DISTRICT OF COLUMBIA |) | Senior Administrative Judge |
| DEPARTMENT OF TRANSPORTATION, |) | |
| Agency |) | |
| |) | |
| Clifford Lowery, Employee Representative | | |
| Melissa Williams, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Ilbay Ozbay (“Employee”) was hired by the D.C. Department of Transportation (the Agency”) in December 1987. He was serving in the position of Civil Engineer DS 12, Step 10 on November 21, 2008, the effective date of his termination. Agency based its separation action upon a charge of unsatisfactory job performance. On January 22, 2009, Employee filed his Petition for Appeal with the D.C. Office of Employee Appeals (the “Office” or “OEA”), challenging Agency’s decision and denying the allegation. Employee’s Notice of Final Decision letter was dated November 18, 2008. However, it neglected to state an effective date for Employee’s termination, contained no appeal rights information, and did not advise Employee that an appeal must be filed within 30 days of the effective date of Agency’s action.

During the Prehearing Conference, this Administrative Judge (the “AJ”) inquired of Employee regarding the untimely-filed appeal, and was advised by the Employee that he was initially unaware of the 30-day appeal requirement.¹ Based upon Employee’s proffer of inadequate notice, and the documents of record, the AJ determined that Agency’s notice to Employee of his rights was inadequate. Therefore, due to the lack of proper 30-day notice, the AJ granted Employee a waiver for the filing date of the appeal.

On or about December 20, 2007, Agency conducted an unscheduled/unofficial interim performance evaluation (“interim evaluation”) for the period April 1, 2007 - March 31, 2008, prompted by an observation that Employee’s job performance was allegedly deficient in several

¹ The D.C. Official Code § 1-606.03, provides that any appeal shall be filed within 30 days of the effective date of the appealed agency action.

areas of his responsibility. The interim evaluation yielded a rating of “Unsatisfactory.” In addition, Employee was purportedly² issued a letter of warning (the “letter”), likewise dated December 20, 2007, which further advised Employee how his job performance failed to meet the minimum requirements of his position. The letter warned Employee that if there was no improvement, that he could face further disciplinary action, including a possible termination. The letter recited the efforts that Agency anticipated offering to assist Employee in improving his performance during the 90-day period of observation.

At the end of the 90-day period, Agency determined that Employee had not achieved the goals as outlined in the letter. He was then issued his annual official performance rating, which was “Unsatisfactory” for the period April 1, 2007, through March 31, 2008. Subsequently, on September 2, 2008, the Agency issued an Advanced Written Notice letter to the Employee of its intention to terminate his employment based upon unsatisfactory job performance. He was terminated on November 21, 2008, although that date was not recited in his letter of termination as the effective date of Agency’s action.

The matter was assigned to this AJ on August 19, 2009. Employee left the country to attend to personal business. His extended absence delayed a more timely processing of this matter. Upon his return to the United States, the AJ convened an Evidentiary Hearing on October 7, 2010. Both Agency and Employee presented evidence, witnesses and accompanying exhibits as a component of their respective efforts to address the issue of the quality of Employee’s work performance. Both parties filed their respective closing briefs. 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 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

² During his sworn testimony, herein, Employee will subsequently deny that he was ever given such a letter.

ISSUES

The issues presented before this AJ at the hearing were:

1. Whether the evidence presented would support a finding that, pursuant to D.C. Personnel Regulations § 1608, General discipline, the Agency had sufficient basis to remove Employee for cause based upon proof of neglect of duty, an act which constituted unsatisfactory job performance as defined by the D.C. Personnel Regulations §1603.2.
2. Whether the Agency gave sufficient consideration to both the mitigating and aggravating factors and circumstances that have been determined to exist, as deemed appropriate, consistent with the provisions of DPM § 1603.8.

STATEMENT OF THE CHARGES

The single charge upon which this case is based is that the overall quantity and quality of Employee's work has been unsatisfactory and below the acceptable standard for a Civil Engineer, DS 12, Step 10.

Agency's Case

Testimony of Zahra Dorriz, Transcript (Tr.), Pages (Pp.) 18-95

Zahra Dorriz ("Dorriz" or "the witness") is employed by the Agency as a Supervisory Civil Engineer with Infrastructure Project Management Administration (the "IPMA") and has worked in this capacity for more than six years. She was Employee's immediate supervisor from approximately 2005 through 2008, including at the time of his termination. Employee was expected to perform the duties of a civil engineer, as outlined in the position description. *Agency Exhibit #1*. However, Employee was deficient in several respects, and did not perform his duties as mandated. As his supervisor, she noted that Employee was only handling one project. Considering that he was a professional engineer, Agency expected that someone at Employee's professional level should be independently able to handle more than one project at a time. In comparison, other engineers employed by the Agency, many of whom had much less experience than Employee, were satisfactorily handling more projects than he.

Beyond not assuming the responsibility of handling multiple projects, Employee neglected to prepare task orders for the contractors, to reflect whether contractors had satisfactorily completed certain components of their contractual obligations. He also failed to complete field reports and to maintain a mandated diary of construction activities on his assigned projects on a scheduled and regular basis, largely prompted by his failure to personally go out into the field to manage, inspect, and monitor construction activities and to confer with construction managers to address and direct construction-related issues as needed. Employee's duties also included review of documents, plans, and specifications for projects and to ensure that the construction that he managed was conducted according to the plans and specifications. As a qualified and experienced professional engineer, Employee had long demonstrated that he understood plans, designs, and specifications on various project. However, he came to a point

where he simply refused to continue performing those duties. Despite her attempts, and the urgings of two other supervisors Messrs. Okpala and Shakeri, Employee routinely remained in the office doing other work at times when he clearly should have been inspecting and monitoring the work site.

With Employee not consistently performing his duties, and likewise refusal to go out into the field on regular occasion, his overall job performance was viewed as unsatisfactory. This situation prompted the need to prepare a mid-term Report of Performance Rating, the interim unsatisfactory performance evaluation, issued in late December 2007. Employee was evaluated with respect to his work quantity, quality, work habits, personal relationships, and adaptability. The evaluation notice also served as a notice and outlined the need for corrective action to address the shortcomings. *Agency Exhibit #2*. She also prepared a Letter of Warning (the "letter"), which recited the specifics of Employee's deficiency in many areas, and Agency's anticipated efforts to help Employee improve during the 90-day evaluation period. *Agency Exhibit #3*.

Attempting to monitor Employee, the witness relocated him closer to her own work area, hoping to help him concentrate more on his job. She then observed that Employee appeared to be devoting a significant portion of his working hours to a project(s), other than his job-related assignments, using his personal hand-held device. He was also deficient in observance of established working hours, failing to adhere to the office procedure of signing in upon arrival to work, and inaccurately reporting his time, to represent that he reported for duty earlier than he actually did. When confronted by upper management about this activity, Employee engaged in a verbal altercation with administrative staff who was responsible for maintaining the sign-in sheets. On at least one occasion, when Employee attempted to change the sign-in sheet to a time earlier than he actually reported to work, and the staff assistant would not allow him to do so, he became aggressive towards the assistant. The administrative staff memorialized the incident in an email communication to this witness. *Agency Exhibit #5*.

Testimony of Ali Shakeri, Transcript 95-204

Ali Shakeri ("Shakeri" or "the witness") is a Program Manager at the Agency, employed with IPMA since April of 2004. He was not Employee's immediate supervisor, but the Employee worked as a civil engineer under Shakeri's direction. There were two supervisors under Shakeri who worked directly with Employee, to wit, Sylvester Okpala and Zahra Dorriz. Prior to his being terminated, Employee did not satisfactorily perform the duties as outlined in the position description of a civil engineer. The Employee had more than ten years experience as a civil engineer, which was the equivalent of a project engineer, and was expected to perform those duties, accordingly. One of the biggest issues with Employee was attendance. Shakeri established a sign in/out procedure at the administrative desk in the office, with all employees directed to sign in upon arrival in the morning. From the outset, Employee was consistently late in the morning, and would misrepresent his arrival time by writing in a time earlier than his actual arrival. Despite multiple counseling sessions by his supervisor(s), Employee continued to be late and to misrepresent his arrival time.

Another issue that Shakeri had with the Employee was his failure to submit a daily report of his work, which all project managers were expected to provide, in order to document and

explain what they had worked on that day. Employee was the only project manager who resisted compliance with this directive. At the time in question, Employee was assigned to work on two projects, i.e., Kenilworth Avenue project and the 35th Street Bridge project. Employee would never go to the field or the job site, neglecting to personally monitor what was going on in the field. Instead, Employee would copy the daily reports of the construction management (the “CM”) consultant, and then submit the consultant’s report as his own. Shakeri explained that Employee’s role was to oversee the CMs, individuals who are hired to monitor the third-party contractors, who are actually doing the work. There may be more than one CM assigned to monitor a particular project. CMs must assure that the contractors are doing the work according to the plans and specifications for the job, and are hired to monitor the daily work in the field. When a contractor submits a bill for payment, the Agency has to verify that the work has been done, and was correct. Employee, as a civil engineer, was responsible for monitoring the site’s CMs. Inspecting the sites to verify that the CMs have properly monitored the contractors was a part of Employee’s job. For example, if the CM represents that there were four contract personnel working on a project, the project engineer would have to verify that there were in fact four such people working on the project for that day. Employee’s responsibility was to regularly visit the work site to make certain that both the CM and the contractor are doing their work correctly.³

Another job-related requirement was that Employee be able to confirm that the documentation that the CMs and the inspectors prepare for their own respective reports is true. It is important to avoid any coercion or improper influence between the contractor and the CM, which could happen if those parties know that the project engineer does not visit the field to personally observe or check the work. Employee never produced the daily reports as requested, or any other documentation to reflect that he had visited the construction sites. Despite repeated counseling on this issue, Employee still refused to comply, advising Shakeri that he would not do anything further required of him until he was promoted. Shakeri explained to Employee that, considering the poor level of his job performance, it was not realistic to expect a promotion under the circumstances.

Skakeri testified to one instance in detail, as supportive of his assertion that Employee failed to perform his job-mandated duties. Sylvester Okpala was the project manager for the 35th Street Bridge project. He brought Employee into the project to complete the final punch list, and document whether the contractor had performed the work correctly, a requirement before Agency could release payment to the contractor. Although Employee was not the only engineer to work on the project, he signed off on the project, subsequently providing documentation that everything was done correctly. The additional effect was that Employee’s sign-off also meant that Agency could finalize payment to the contractor. It was soon discovered that the contractor had not done the work correctly, or that some of it was incomplete, despite Employee’s prior certification and sign-off that the bridge work was properly completed. When the bridge was subsequently re-inspected by Modjeski and Masters (“M&M”), a company certified to conduct bridge inspections in Washington, D.C., in compliance with the law and safety regulations, major deficiencies and defects in construction of the bridge were discovered. Had Employee conducted a site inspection before or when the bridge came into service, he would have readily observed

³ Despite the witness’s enthusiasm for visiting the site “every day,” the wording of the job description anticipates regular, periodic, but not necessarily daily visits to the construction site(s).

that the project was either incorrect or incomplete. The bridge initially cost \$3.5 million dollars to construct. The estimated cost of repairing the defects ranged from \$700,000 to one million dollars. Further, the government is engaged in an extended dispute with the bridge builder over the quality of their work and the funds paid by the government which should have been withheld until the project was done completely and correctly.

Shakeri's testimony included M & M's report and several photographs, both depicting the readily visible multiple defects in the bridge work. *Agency Exhibits # 7A, and # 7B*. In certain spots the concrete was already deteriorating. Other defects required an inspector to go under the bridge. Still, in other areas of the bridge, the exposed steel reinforcement should have been covered by concrete. This failure was considered a major defect, and required partial demolition to correct. Had Employee fulfilled his duties and then alerted the contractor to address and correct the problems, much of the ensuing problem could have been avoided. Instead, the contractor was paid for 90% of the project, and has now brought a claim against Agency for release of the remaining 10% of the funds. The contractor's legal argument is that Agency's project engineer (Employee herein) signed off on the project, which the contractor interprets to mean that on the date of his sign off, the project must have been at least up to industry standard, regardless of what has subsequently developed to cause an adverse impact upon the site.

During a meeting convened for that purpose, Employee was issued and personally served the interim evaluation, i.e. the Unsatisfactory Performance Evaluation and the Letter of Warning. Later, because Employee's performance did not improve in the areas and tasks outlined, Shakeri prepared and executed the Advanced Written Notice of Proposed Removal of Employee letter, dated September 2, 2008. *Agency Exhibit #8*.

Testimony of Kathleen Penney Tr. Pp. 225 – 242.

Kathleen Penney ("Penney" or the "witness") was the Chief Engineer for the Agency at the time of Employee's termination. She began serving in that capacity in November of 2007. Her duties included the delivery, design and construction of all of Agency's transportation projects. As Chief Engineer, she learned that over a course of the prior two years there had been complaints of problems with Employee's performance. She recalled that it was repeatedly brought to her attention that Employee was never on the project site when he was supposed to be, as well as his belligerence toward other employees while on the job. Further, she recalled that Employee received an unsatisfactory rating on an interim evaluation as well as a letter of warning. With respect to the areas identified in the letter pertaining to Employee's quantity of work, Penney recalled a problem related to holding Employee accountable for actually being at the project and job, making certain that he produced a daily diary. Another concern was that e-mails asserted that Employee very quickly passed off to others tasks that he needed to do, not taking responsibility himself for anything that needed to be accomplished.

It was repeatedly brought to her attention that Employee was cheating on the time sheets, not signing in at the time of his actual arrival. Later, he would sign in, claiming to have been there earlier than he clearly was. There were also problems with two projects that Employee worked on, the 35th Street Bridge project and Kenilworth Avenue. With respect to the 35th Street Bridge, the total outcome was a complete and utter failure to observe any engineering standards.

Penny characterized the end product as, “ ... criminally underbuilt. It was the worst workmanship that I have ever seen on a project, and clearly was done with absolutely no representation of the government’s interest.”⁴ Employee’s responsibility was to protect the government’s interests, which he failed to do, to make sure there were adequate inspection services, to assure that the inspectors did their jobs, and to conduct independent assessments to make certain that the workmanship was as it should have been, and that the documentation was accurate.

The letter was issued to accord Employee a 90-day period to improve his performance. However, there was no demonstration of an effort to improve or address and correct that job-related deficiencies that had been outlined to him. Her decision to terminate Employee was based upon her previous engagement with her managers and the input and advice which was solicited from the time she became Chief Engineer. As a consequence she remained engaged and kept abreast of what was happening and to make sure that his supervisors were addressing the issues with Employee that has been raised in the 90-day letter. In addition to her personal observations, Penney relied upon her subordinate supervisors, Ali Shakeri, and Zahra Dorriz, in making the final decision to terminate Employee. Penney executed the notice of final decision that ultimately terminated Employee. She felt that, considering that Employee had been given the letter and had a reasonable opportunity to change and improve his performance, termination was the proper remedy. She felt comfortable that no matter what else happened, Agency could view Employee’s termination as a justified action, and that the documentation did show pretty soundly that his performance was inadequate.

Employee’s Case

Testimony of Sylvester Okpala, Tr. 249-296

Sylvester Okpala (“Okpala” or the “witness”) was the Deputy Program Manager assigned to Employee’s work area. He was also Dorriz’s immediate supervisor, and was in charge of approximately 22 to 24 employees, including the Employee. Okpala, when shown Agency’s Exhibit #3, the unsigned letter which accompanied the interim performance rating, denied having ever seen the document previously, stating further that his job duties would have included meeting with the Employee, had an alleged poor job performance been brought to his attention. Okpala was not included in any meetings that addressed Employee’s job performance. Further, he questioned whether any such meetings or efforts to convene such meetings ever took place. Okpala could not recall whether Employee had been placed on leave restrictions, but denied that Dorriz had ever informed him that Employee was having an attendance problem.

Okpala, who initially denied having ever seen the unsatisfactory annual performance evaluation that was issued upon the conclusion of the 90-day period, also claimed to be likewise unaware that Employee had been previously subjected to a 90-day directive to improve or face termination. Okpala stated that it would have been appropriate for him, as the supervisor, to have reviewed the then proposed documents. However, neither Shakeri nor Dorriz ever discussed Employee’s alleged poor job performance or shared the proposed documents with him. At the end of the 90-day period, Shakeri, his supervisor, presented him with Employee’s annual

⁴ See Transcript at Pp.217-218.

performance evaluation and directed him to sign it. He was uncertain about the propriety of the document or the circumstances, and asked Shakeri about it. He got no satisfactory answer, other than a directive to sign the form. Rather than press the matter further, he signed the poor performance evaluation. During the evidentiary hearing he testified, "I was forced to sign it."⁵ He elaborated that, as an MSS (Management Supervisory Service) employee with the Agency, and given his family responsibilities which required that he keep his job, had he not followed his supervisor's directive, he could have been himself terminated without cause. He did not feel that he was in a position where he could have challenged what was occurring at that time.

On cross examination, Okpala admitted that he was no longer employed by the Agency, having served at will, with no vested retention rights. When he inquired regarding why he was being let go, he was told that there was an issue of whether he has some business with the D.C. government that posed a conflict of interest.⁶ When pressed by Agency's counsel whether Shakeri specifically stated to Okpala, "You will loose your job if you do not sign this document," Okpala replied, "I don't recall that. I don't remember." However, Shakeri did say, "Whatever I tell you, it's an assignment, it's a directive, you have to follow my directive."⁷

Agency confronted Okpala with Agency Exhibit #4, an e mail dated February 15, 2008, from Phyllis Barbett, the office time and attendance records keeper. Directed to Okpala, Dorriz, and Shakeri, Barbett's note addressed an incident of earlier that morning between Employee and herself. The note recounted Employee's alleged desire to change his time sheet, and her denying him access to doing the same, absent the knowledge and permission of Okpala, who subsequently did not allow the change(s). When confronted with the specifics of this prior incident which was not in conformity with Okpala's earlier denial of any knowledge of Employee having an attendance problem, Okpala responded that the e mail in question related only to a time issue, and had no bearing upon any alleged job duty deficiency or attendance problems.

Okpala then recalled that he did meet and counsel Employee regarding what was the proper time to place on the sign-in sheet, i.e., not the time you physically arrived at the office, but rather the time that you reported to the sign-in desk, which might be a significant difference. In response to Agency's question about prior offenses of a similar nature, Okpala claimed to be unaware that Employee had been previously cited for this same offense, and received a five-day suspension without pay for this same conduct. Okpala testified that Shakeri gave Employee permission to monitor the consultants from his office, without the apparent need to conduct any field visits to observe the project. This testimony was diametrically opposite of what Shakeri and Dorriz stated in their respective testimonies, to the effect that Employee knew that field visits were a component of his job duties and integral to the project, but refused to make the visits as expected.

Okpala testified that an engineer can supervise and oversee a project from the office without visiting the field. His answer did not go further, to explain how this would be

⁵ See remark on Tr. P. 261, line 8.

⁶ The witness testified that he has a pending litigation against the D.C. Government, although the nature of the dispute, the venue where the matter is being pursued, and the current status of the action(s) are not stated in this record.

⁷ See remark on Tr. P 274, line 8.

accomplished, other than to say that the Agency hires outside consultants for each project, who make certain that the construction project is ongoing, and being completed in a proper manner.

Testimony of Ilbay Ozbay, Employee, Tr. Pp. 300 to 372

Ilbay Ozbay, the Employee (“Ozbay” or the “Employee”) testified, denying all of Agency’s allegations concerning the quality of his job performance. Beginning in December 1987, Employee worked for the D.C. Government, initially as a junior engineer. He identified his last position as that of “civil engineer” and referred to himself as “senior level.” From the end of 2003, until termination in 2008, Zahra Dorriz was his immediate supervisor. With regard to the Kenilworth Avenue project, he was instructed not to report to the project site, designated to remain in the office and coordinate the work from that location. This testimony was contradicted by both Shakeri and Dorriz. A team of civil engineer technicians were on site, performing the inspection duties, and subsequently prepared reports that were submitted to the Employee. He reviewed the inspection reports and signed off, thus making the report a part of the official project record. As well, he attended weekly progress meetings, which were held in the office.

Employee denied ever being served the letter of warning, Agency Exhibit #3, claiming to having only seen the document after he had been separated from employment. Employee also denied that Agency initiated any plan of action to assist him in improving his performance. Employee did admit that he got into a dispute and sustained a five-day suspension in about February 2008, as a result of being cited for discourteous treatment of a co-worker, after Employee and the office time-keeper got into an argument.

There was little communication between Dorriz and himself, claiming that during this alleged 90-day improvement period, they never meet regarding his job performance. Rather, the few communications they had all related to aspects of the ongoing project, but were not of a disciplinary-related nature. The annual evaluation period (April 1, 2007 – March 31, 2008) ended on March 31, 2008. On May 4, 2008, Agency issued Employee’s annual performance assessment, which classified his overall performance as unsatisfactory. He earned the lowest rating in three areas, Quantity, Work Habits, and Personal Relations. Although he attained a “Satisfactory” rating in three other areas, Quality, Adaptability, and Job Knowledge, Agency’s comments reflected claimed deficiencies in Employee’s overall job performance and initiative.

Conclusions of Law

A. Burden of Proof

Pursuant to 16 DPM § 1603.9, Agency bears the burden of proving, by a preponderance of the evidence, that its actions were taken for cause. The issue, therefore, is whether the Agency can prove, by a preponderance of the evidence, that the disciplinary action that it took was for cause as defined in the DPM. Agency maintains that the facts demonstrate that Employee failed to perform his job-related duties in a satisfactory manner and was therefore terminated for cause. Conversely, Employee denies the job performance allegations, further asserting that, even if Agency wished to cite his job performance, and then subsequently to terminate him, Agency committed several procedural errors which operated as a legal bar to removing him under the plan of action that Agency employed.

B. Analysis

Agency's evidence consisted of the sworn testimony of three supervisory witnesses and several disciplinary action related documents. The objective was to weave a story underscoring Employee's job performance deficiencies. Employee was accused of failing to properly handle and monitor the two job projects that were under his guidance during the disciplinary period covered by this action. This failure included a pattern of not personally visiting the job sites, and neglecting to keep a daily work diary, and to create work-related reports as directed. Instead, he adopted the representations from consultants regarding the state of completion of the project(s), to verify the degree of completion and visual compliance with project expectations. In at least one instance, completion of the 35th Street Bridge project, the inadequacy of the finished product was tied in significant measure to Employee's failure to properly and adequately monitor the site. Employee was also alleged to be frequently tardy and an abuser of the sign-in records, in an effort to conceal his time and attendance.

I find that the language of Employee's five-page job description anticipated the Employee making inspections of on-going projects. It states that the incumbent civil engineer shall accompany other D.C. government representatives, federal representatives, and private consultants to inspect the construction projects. When viewed *in camera* to assess the magnitude of what the job duties of a Civil Engineer CS-810-12 entailed, it is clear that product knowledge, to include academic training, professional experience, face-to-face meetings, and receiving, evaluating, and utilization of progress reports, is the underlying element of how this job works. I find that periodic on-site personal visits are a significant part of the process, and that Agency's frequently raised issue of Employee's not visiting his job sites, was a justified and reasonable expectation.

Despite Okpala's testimony to the contrary, I find it not credible to believe that Agency would undertake to construct a series of highways, bridges, and other public space construction projects without utilizing the professional services and supervision of its compensated engineer staff. The practice in the industry anticipates and accommodates hiring outside contractors, supplemented by experienced site monitors who would file progress reports, and then the final reports, to reflect that the job has been properly completed. Credible testimony was received that

all of the staff's civil engineers, except for Employee, incorporated personal site visits into their duties and created reports based largely upon their own personal observations, consistent with the job description's enumerated duties for this position.

Not satisfied with the quality of his work product, Agency issued an interim unsatisfactory performance rating. Agency's design was to help the affected Employee significantly improve his job performance during the 90-day interim period. Additionally, the interim notice can also serve as a component step towards the potential issuance of an unsatisfactory performance rating for the entire annual rating period, and a demotion or termination. The procedures are set forth in Title 6, Chapter 14 of the D.C. Personnel Manual, "Performance Management."

Under the general heading, "Performance Improvement Plans" the following is stated:

1414.2 A supervisor shall complete a Performance Improvement Plan when either of the following conditions is met:

- (a) At any time during the rating period that an employee's performance becomes deficient; or
- (b) When a rating of "Does Not Meet Expectations" (Level 1) or "Needs Improvement" (Level 2) is given pursuant to section 1412 of this chapter.

1414.3 The purpose of a Performance Improvement Plan is to offer the employee placed on it an opportunity to demonstrate improvement. A Performance Improvement Plan issued to an employee shall last for a period of thirty (30) to ninety (90) days, and shall:

- (a) Identify the specific performance areas in which the employee is deficient; and
- (b) Provide concrete, measurable action steps the employee needs to take to improve in those areas.

1414.4 At the end of the Performance Improvement Plan, the employee's immediate supervisor or, in the absence of that individual, a higher-level official designated by the agency head, shall make a determination as to whether the employee has met the requirements of the Performance Improvement Plan. If the determination is that the employee has met the requirements of the Performance Improvement Plan, the employee's immediate supervisor or higher-level agency official, as appropriate, shall so inform the employee, in writing. If the determination is that the employee failed to meet the requirements of the Performance Improvement Plan, the employee's immediate supervisor or higher level agency official, as appropriate, shall issue a written decision to the employee to:

- (a) Extend the Performance Improvement Plan for an additional thirty (30) to ninety (90) day period to further observe the employee's performance;
- (b) Reassign, reduce in grade, or terminate the employee, if he or she has failed to meet the requirements of the Performance Improvement Plan; or

(c) Defer any annual performance rating that may be due until thirty (30) days after the completion of any thirty (30) to ninety (90) day period authorized by this section.

1414.5 Any reduction in grade or termination action as specified in section 1414.4 (b) of this section taken against a Career Service employee who has completed a probationary period shall be taken pursuant to Chapter 16 of these regulations.

I find that Agency created the Interim Report, which characterized Employee's job performance as of December 20, 2007, as "Unsatisfactory" in the rating areas of Quantity of work, Quality, Personnel Relations, and Adaptability. *See Agency Exhibit #2*. I find that Agency also served the letter of warning, which contained the intended Performance Improvement Plan. Although the letter presented at the evidentiary hearing was unsigned, Shakeri credibly testified that the original letter was signed, although it apparently could not be found at this time, and was personally served upon the Employee in a meeting called for the purpose of discussing his performance.

I take evidentiary notice that an employee's refusal to sign for receipt of a document, especially when they are on notice of the potentially adverse effect associated with the document's contents and purpose, does not erase or remove the seriousness underlying why the document was initially issued, nor negate that service occurred. I find that the interim rating was executed by Zahra Dorriz, Employee's immediate supervisor, and witnessed by Ali Shakeri, who wrote in, "Employee refused to sign. 12/26/07, 2:45 pm." I find that the original letter of warning was signed and personally served upon Employee as an accompanying document.

At the end of the 90-day period, Agency presented Employee with an unsatisfactory performance evaluation, dated May 4, 2008, and executed by Sylvester Okpala, Employee's up-line supervisor. Okpala testified that, despite his own signature and approval certification that was printed on the performance evaluation sheet, he did not consider Employee's performance to be subpar, or believe that Employee's work performance justified either the issuance of the interim deficiency notice or the job termination. When Okpala was presented with a completed unsatisfactory annual performance evaluation for Employee and directed by Shakeri, his supervisor, to sign it, he found it distasteful to be asked to participate in a deed that he believed was incorrect and unjustified. He may have questioned the propriety of the action, but could not recall the specifics of his inquiry.

Having known Employee and working with him for about 20 years, being himself an MSS employee, employed at the will and discretion of the Agency, he felt that his hand was forced, and that his own job was on the line if he did not sign the evaluation. Much of his testimony conflicts with the terms of the job description, which clearly anticipates periodic site visits by the project engineer. I further find much of Okpala's testimony to be largely his suppositions, both speculative and unsupported. There is nothing in this record to indicate that his job tenure and status was on the line with regard to any role he might have played in crafting this evaluation. As a supervisor, one of his roles was to annually evaluate those employees assigned to him. Presumably, he had done so for several prior years. Dorriz rated Employee as unsatisfactory. Any number of up-line supervisors might have served as the reviewer on the

evaluation, but Okpala was directed to sign off in that capacity. I find that he did sign the unsatisfactory performance evaluation, and that his claim of having been forced to do so, is without merit. Having been terminated from the Agency related to a claim of ongoing conflict of interest, he was still in litigation against the Agency at the time he testified in this matter. During his testimony, he appeared disgruntled by the circumstances related to his own termination from the Agency. He also admitted that he is still engaged in litigation related to the disputed allegations of conflict of interest.

Employee served Agency as a civil engineer for several years, and discharged his duties in a professional manner, presiding over construction projects on behalf of the Agency and the municipality. This factor was a mitigation to Employee's benefit, and contributed to why Agency kept him on the employment roles, despite indications of some festering issues that needed to be addressed and corrected. However, I am persuaded that Employee lost his way, and simply ceased to do his job as expected. This was an aggravating factor which directly contributed to his termination. For a period of time before termination, he barely did enough to get by. When his lack of performance attracted notice, and he was directed to improve or be terminated, he failed to act and was fired.

CONCLUSION

Based upon the evidence presented at the evidentiary hearing, and the documents in the record, I conclude that the Agency has shown, by a preponderance of the evidence, that Employee was appropriately terminated for unsatisfactory work performance. The OEA has had prior occasions to determine whether an agency's penalty was appropriate under the circumstances. The Office has maintained that it is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised. See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). The Office has also held that it will leave the Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32D.C. Reg. 2915, 2916 (1985). Here, the penalty of removal is warranted for the charge of unsatisfactory performance, as specified and substantiated by the Agency. The Office has also held that it will leave the Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32D.C. Reg. 2915, 2916 (1985). Therefore, I conclude that the penalty of removal is warranted for the charges specified by the Agency.

ORDER

The foregoing having been considered, it is ORDERED that Agency's action of terminating Employee is UPHeld.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge