

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 ¹)	
)	OEA Matter No. 1601-0049-20
v.)	
)	Date of Issuance: May 30, 2024
D.C. DEPARTMENT OF)	
TRANSPORTATION,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Transportation Engineer with the District of Columbia Department of Transportation (“Agency”). On May 26, 2020, Agency issued a final notice of removal to Employee. It charged Employee with performance deficits – failure to meet established performance standards, pursuant to District Personnel Manual (“DPM”) §§ 1605.4(m) and 1607.2(m) and neglect of duty – failure 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; or careless work habits, pursuant to DPM §§ 1605.4(e) and 1607.2(e). The causes of action stemmed from a

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

sixty-day Performance Improvement Plan (“PIP”).²

On June 29, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). She claimed that Agency placed her on a PIP in retaliation after she filed a complaint with the Equal Employment Opportunity (“EEO”).³ She argued that Agency’s PIP process was deficient and explained that she performed her duties in accordance with the requirements of her position description.⁴ Employee provided that she was not provided with clear goals for the PIP. As a result, she requested that she be reinstated to her position.⁵

Agency filed its Answer to Employee’s Petition for Appeal on September 21, 2020. It argued that its termination action was based on Employee’s failure to meet the required standards of the PIP. Agency asserted that Employee neglected her duties by failing to carry out her official duties or responsibilities as expected of a reasonable person in her position; her delays negatively impacted her productivity and led to customer complaints; she was untimely in responding to tasks; and her work lacked clarity. Additionally, Agency contended that Employee’s performance deficiencies adversely impacted the Public Space Plan Review and Permit Application process; it undermined the construction work in public spaces; and it impeded the progress of Agency’s customers. Consequently, it implemented the PIP to address Employee’s performance deficiencies in three Core Competencies and two S.M.A.R.T goals.⁶ It contended that because Employee failed to meet the requirements of the PIP, it had cause for disciplinary action. Agency opined that it

² *Agency’s Answer to Employee’s Petition for Appeal*, Exhibit #6 (September 21, 2020).

³ Employee alleged that after she filed an EEO complaint she was subjected to a hostile work environment; discriminated against on the basis of sex and race; and subjected to harassment, retaliation, and bullying by her supervisor.

⁴ Employee argued that Agency did not comply with the PIP procedures provided in DPM Chapter 14.

⁵ *Petition for Appeal*, p. 2-8 (June 29, 2020).

⁶ At the conclusion of the thirty-day PIP period, Employee had only demonstrated improvement in two of the five areas requiring improvement. The PIP was extended for another thirty-day period. However, Agency argued that at the end of the sixty-day period, Employee’s performance remained inadequate.

considered the *Douglas*⁷ factors before reaching its decision to terminate Employee. Therefore, it requested that Employee's termination be upheld.⁸

After holding a two-day evidentiary hearing and receiving written closing arguments, the OEA Administrative Judge ("AJ") issued an Initial Decision on September 27, 2023. She held that Agency complied with the requirements for implementing a PIP, in accordance with DPM § 1410. Moreover, she found that Agency established cause for Employee's failure to meet the performance standards and neglect of duty. The AJ noted that Agency provided emails from its clients about Employee's deficiencies during the sixty-day PIP. Additionally, it submitted documentation showing that Employee did not meet the quality of review SMART goals. The AJ relied on testimony from Dr. Petrosian who outlined Employee's failure to submit timely applications. She reasoned that removal was within the range of penalties for a first offense for neglect of duty and performance deficits; thus, Agency could impose termination as a penalty. She

⁷ The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 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;
- 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.

⁸ *Agency's Answer to Employee's Petition for Appeal*, p. 3-7 (September 21, 2020).

also determined that Agency adequately considered the *Douglas* factors. As a result, the AJ upheld Agency's termination action.⁹

Employee makes many of the same arguments in her Petition for Review that she presented to the AJ.¹⁰ She also argues that the AJ's decision was based on an erroneous interpretation of statute, regulation, or policy and that the findings of the Initial Decision were not based on substantial evidence. Employee contends that progressive discipline is not optional and was not applied in the instant matter. According to Employee, Agency failed to provide any rationale for foregoing counseling or other forms of progressive discipline. As a result, she requests that the Board reverse the Initial Decision; that the disciplinary action be removed from her personnel record; and that she be reinstated with back pay and benefits.¹¹

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.¹²

⁹ *Initial Decision*, p. 23-30 (September 27, 2023). As for Employee's arguments regarding retaliation, the AJ held that Agency's termination of Employee was not in retaliation of her 2019 EEO claims and that her removal was based on her poor performance. She noted that assuming that Employee could establish a prima facie case for retaliation, Agency had a legitimate reason to impose the adverse action. *Id.*, 26-27. As for Employee's disparate treatment allegations, the AJ found that Employee was not similarly situated; did not have the same job title; was not in the same unit; and was not disciplined by the same supervisor as those employees she claimed were treated differently. *Id.*, 27-28.

¹⁰ Employee alleges that Agency did not comply with the PIP requirements, pursuant to DPM Chapter 14. Employee renews her claims that Agency issued the PIP in retaliation of her EEO complaint. Additionally, she argues that she was denied union representation when issuing the PIP. Finally, Employee disagrees with the AJ's judgment on disparate treatment.

¹¹ *Petition for Review*, p. 5-8, 13 (November 2, 2023).

¹² *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).

Similar Arguments Raised on Review

Employee alleges that Agency did not comply with the PIP requirements pursuant to DPM Chapter 14. Employee renews her claims that Agency issued the PIP in retaliation of her EEO complaint. Additionally, she argues that she was denied union representation when issuing the PIP. Finally, Employee disagrees with the AJ's judgment on disparate treatment.¹³

These arguments were presented to the AJ and thoroughly addressed in the Initial Decision. This Board has consistently held that merely disagreeing with the AJ's ruling is not a valid basis upon which a Petition for Review can be granted.¹⁴ Therefore, in accordance with *Baumgartner*, we find that the AJ's rulings on each of these issues were based on substantial evidence.

Cause

In its notice of final decision, Agency provided that it had cause to terminate Employee under DPM §§ 1605.4(e) and (m).¹⁵ As it relates to cause, DPM § 1605.4 provides the following:

Though not exhaustive, the following classes of conduct and performance deficits constitute cause and warrant . . . adverse action:

- (e) neglect of duty¹⁶
- (m) failure to meet performance standards

As the AJ provided in the Initial Decision, there are emails, documents, and testimony evidence in

¹³ *Petition for Review*, p. 5-8 (November 2, 2023).

¹⁴ *Michael Dunn v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for Review* (April 15, 2014); *Gwendolyn Gilmore v. D.C. Public Schools*, OEA Matter No. 1601-0377-10, *Opinion and Order on Petition for Review* (September 16, 2014); *Garnetta Hunt v. Department of Corrections*, OEA Matter No. 1601-0053-11, *Opinion and Order on Petition for Review* (July 21, 2015); *Carmen Faulkner v. D.C. Public Schools*, OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (July 11, 2017); and *Georgia Stewart v. D.C. Office of Human Rights*, OEA Matter No. J-0006-17, *Opinion and Order on Petition for Review* (March 22, 2018).

¹⁵ *Agency's Answer to Employee's Petition for Appeal*, Exhibit #6 (September 21, 2020).

¹⁶ DPM § 1607.2(e) provides that "Neglect of duty" as used in Section 1605.4(e) is defined as carrying out or failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position. Neglect of duty includes a failure to perform assigned tasks or duties, undue delay in completing assigned tasks or duties, careless work habits, wasting time, conducting personal business while on duty, abandoning an assigned post, sleeping or dozing on the job, and loafing.

the record provided by Agency which establishes cause for neglect of duty and performance deficits. In Employee's Performance Improvement Plan, Agency outlined various examples of her inadequate performance in customer service, communications, and accountability during the sixty-day PIP period. The PIP documents showed that Employee failed to ensure that work sites affecting use of public space were permissibly planned, documented, and implemented in accordance with regulations for activities in public spaces. It showed that her failure to perform her duties had a negative impact on pedestrians, cyclists, and vehicular safety. Additionally, the documents showed that her performance impeded and delayed public utilities, property developers, and contractors from performing necessary construction. The documents also provided that applicants for permits were denied timely and substantive permits and plan reviews to carry out their work.¹⁷

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).¹⁸ 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

¹⁷ The documents provided by Agency offer that Employee's negligence and deficient performance resulted in a request to have nine matters that were assigned to Employee be reassigned. Additionally, over the course of several weeks in February of 2019, in over thirty-eight of Employee's construction permit applications, she failed to review plans within a timely manner. Moreover, customers complained about Employee's unclear notes which delayed their projects, as well as her lack of responsiveness to emails and phone calls. *Agency's Answer to Employee's Petition for Appeal*, Exhibits #1, 2, 3, and 6 (September 21, 2020).

¹⁸ *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.¹⁹ DPM § 1607.2(e) provides that the penalty for the first offense of neglect of duty ranges from counseling to removal. Pursuant to DPM § 1607.2(m), the penalties for a first offense of performance deficits are reassignment, reduction in grade, or removal. Thus, in accordance with DPM Section 1607, removal was within the range of penalties.

Furthermore, the record shows that the *Douglas* factors were weighed by Agency before imposing its penalty of removal.²⁰ Additionally, there is no evidence of abuse of discretion. Thus, Agency's penalty determination was appropriate.

Progressive Discipline

Employee argues that the AJ's decision failed to consider if progressive discipline was applied in this matter. According to Employee, the District of Columbia Human Resources Issuance I-16-18 and DCHR Issuance I-2021-8 provide that management must use the progressive

¹⁹ 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. *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).

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. *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)).

²⁰ *Agency's Answer to Employee's Petition for Appeal*, Exhibit #6 (September 21, 2020).

disciplinary system, which includes verbal counseling, reprimand, correction action, and adverse action. She contends that given the language provided in both issuances, progressive discipline is not optional for agencies.²¹

However, Issuance I-16-18 and Issuance I-2021-8 clearly provide that “while the District employs a progressive disciplinary process, strict adherence to the progressive steps will not always be appropriate. The resulting agency action will be dictated by applying the factors outlined at § 1606.2 of the regulations, which may produce an action that skips one or more of the progressive discipline steps.”²² Therefore, Agency was not required to impose counseling or other forms of progressive discipline before deciding to remove Employee from her position. It was within Agency’s authority to skip any of the progressive steps in the disciplinary process.

Conclusion

Agency had cause to remove Employee for neglect of duty and deficient performance. The penalty of removal was within the range allowed by law, regulation, and any applicable table of penalties. The penalty was also based on relevant factors, and there was no clear error of judgment by Agency. Moreover, Employee’s argument on progressive discipline lacks merit. Accordingly, Employee’s Petition for Review is denied.

²¹ *Petition for Review*, p. 1-3 (November 2, 2023).

²² <https://edpm.dc.gov/issuances/discipline-2020-update/> and https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_16_18_discipline.pdf

ORDER

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

FOR THE BOARD:

Clarence Labor, Jr., Chair

Peter Rosenstein

Dionna Maria Lewis

Arrington L. Dixon

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.