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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EMPLOYEE)	OEA Matter No. 1601-0026-22
)	
)	Date of Issuance: October 11, 2022
v.)	
)	
DEPARTMENT OF PUBLIC WORKS)	Joseph E. Lim, Esq.
_____)	Senior Administrative Judge
Agency)	
Vincent Enriquez, Esq., Agency representative)	
Vanessa Dixon-Briggs, Employee Representative)	

INITIAL DECISION

PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on December 6, 2021, challenging the D.C. Department of Public Works (“Agency” or “DPW”) decision to terminate him from his position as a Sanitation Worker, Grade 4, based on the following causes: (1) Conduct Prejudicial to the Government, (2) Failure/Refusal to Follow Instructions, and (3) Neglect of duty. In response to OEA’s December 14, 2021, request, Agency filed its Answer on February 4, 2022. After a failed attempt to resolve this matter through mediation, this matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on April 12, 2022. A Prehearing Conference was held on May 2, 2022. A virtual Evidentiary Hearing was held via WebEx¹ on June 8, 2022. Both Agency and Employee presented documentary and testimonial evidence during the hearing to support their positions. Documentary evidence entered into the record at the Evidentiary Hearing are noted as Exhibits in the footnotes. The record is now closed.

JURISDICTION

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

¹ WebEx is a software program that enables participants to engage in a hearing or meeting remotely via an electronic device.

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the penalty of termination was appropriate under the circumstances.

UNDISPUTED FACTS²

Employee's permanent employment with Agency's Solid Waste Management Administration ("SWMA"), began on March 2, 2008. Employee was working as a Sanitation Worker, Grade 4, Step 9 at the time of his removal on November 5, 2021.³ Employee was a member of AFSCME 2091 Collective Bargaining Unit ("Union").⁴ At the time Employee was removed, he had three (3) prior disciplinary matters within the prior three (3) year period.⁵

As a Sanitation Worker assigned to the Solid Waste Disposal Division ("SWDD") of SWMA, Employee's responsibilities included cleaning the trash from roadways, assisting in maintaining the flow of traffic, cleaning the yard, working under the general supervision of a crew leader or immediate supervisor, picking up operation where routes are established, the daily disposal operations, and other assigned duties.⁶

On August 27, 2021, Employee was mailed an "Advanced Written Notice of Proposed Removal" based on conduct that occurred between May 5, 2021, through July 27, 2021.⁷ Agency alleged that Employee's misconduct was directed towards DPW staff and management and was related to his position as a Sanitation Worker for the District government. The proposed action was based upon the following causes and specifications:

Cause No. 1: Conduct Prejudicial to the District Government: Use of abusive language, offensive, unprofessional distracting, or otherwise unacceptable language, gestures, or other conduct; quarreling; creating a disturbance or disruption; or inappropriate horseplay. *See* D.C. Mun. Regs. tit. 6, Subt. 6-B, § 1607.2(a)(16) (2017).

Cause No. 2: Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions. *See* D.C. Mun. Regs. tit. 6, Subt. 6-B, § 1607.2(d)(2) (2017).

Cause No. 3: 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 post; sleeping or dozing on-duty or loafing while on duty. *See* D.C. Mun. Regs. tit. 6, Subt. 6-B, § 1607.2(e)

² Based on admitted and uncontroverted exhibits.

³ Employee Exhibit 4.

⁴ Agency Exhibit 7 depicts the agreement between the Union and Agency.

⁵ Agency Exhibits 9, 11, and 13.

⁶ Agency Exhibit 1.

⁷ Agency Exhibit 17 and Employee Exhibit 2.

(2017).

Specifically, Agency alleges that on Wednesday, May 5, 2021, Employee was charged with one (1) hour of AWOL after he could not be found during a search by his supervisors, Eugene Leach and Jose Saravia, while on the job premises between 4:00 pm and 5:00 pm. This time slot is during the Employee's tour of duty, where he assisted with the daily sanitation duties. Employee eventually was found at 5:15 pm in the employee break area in full civilian clothing. Employee aggressively told Mr. Leach that he had been inside the tunnel cleaning and that he was "working both sides of the scales." The supervisors informed Employee they had been in the tunnel and did not see him. Employee shouted that he was there and did not care if he was written up. Employee stated, "you'll [*sic*] are going to make me go back to jail." Employee went to former Administrator Terrence Reese's office, but Mr. Reese was not present. Employee entered a supervisor's office, shouting aggressively that he was cleaning in the tunnel. Then Employee slammed the door behind himself, loosening the door frame and knocking papers off both the desk and the wall.

On May 11, 2021, Mr. Leach witnessed Employee sitting at the entry of the tunnel and asked him to meet in Mr. Leach's office. Employee questioned Mr. Leach, who told Employee to sign Employee's AWOL notice. Employee refused to sign, stating "I'm not signing nothing [*sic*], that's how much you are doing your job."⁸ Later that day, AFSCME 2091 Union representative Nichole Davall met with Mr. Leach to discuss Employee's progressive discipline. The topics discussed were his aggressive behavior, slamming the office door, making idol threats, creating disturbances, refusing to comply with assigned work duties, and destruction of governmental property. Additionally, they discussed the way Employee's actions had become a distraction to other employees in the workplace and the ways in which he caused a hostile work environment were also discussed.

On June 17, 2021, at approximately 4:33 pm, Mr. Leach made rounds to ensure employees were completing daily tasks. Employee was not found during another search. After the search, Mr. Leach found Employee inside the break room watching television during his tour of duty. Mr. Leach instructed the Employee to assist with cleaning up debris and material around the facility. Employee responded, "I cleaned up five times today, you're not checking the morning shift. I'm not doing anything else." Mr. Leach told Employee that those areas still had a large amount of debris. Employee refused to follow the directive. Employee replied to Mr. Leach, "y'all are going to stop playing with me." While Employee got up from his chair and left the break room area, his supervisor was still speaking to Employee and communicating his additional concerns. Employee showed insubordination toward his supervisor.⁹

On June 29, 2021, at approximately 2:35 pm, supervisor Eugene Leach was standing at the citizen's line. Employee approached Mr. Leach, and asked, "did you changed [*sic*] my lunch schedule?" Mr. Leach responded in the affirmative. Employee replied, "this is some faggot stuff!" Mr. Leach turned away and continued monitoring the citizen's line.¹⁰

⁸ Agency Exhibit 2.

⁹ See also, Agency Exhibit 3.

¹⁰ Also see Agency Exhibit 4 and 5.

On July 13, 2021, Employee reported to the office around 11:50 am. In front of Mr. Saravia, Mr. Leach informed Employee that Employee needed to go home until Employee heard from the Safety and Occupational Health Officer and Risk Manager, Mark Cancelosi, regarding Employee's workers' compensation claim. Employee replied, "y'all some fags!" Employee requested Mark Cancelosi's number, which Mr. Leach provided. Mr. Cancelosi stated Employee could stay. Mr. Cancelosi also requested that Mr. Leach speak with him without Employee present. Mr. Leach called Mr. Cancelosi about the options for Employee's workers' compensation claim and light duty.

Later on July 13, 2021, Mark Cancelosi received a call from Employee regarding Employee's workers' compensation claim. According to Mr. Cancelosi, Employee said that the supervisors at the Fort Totten Transfer Station "was fucking with me and that I am going back to jail because of those [N word]." ¹¹ Employee allegedly told Mr. Cancelosi that he went to the workers' compensation doctors, and his medical documentation states he can perform light duty. Mr. Cancelosi said he would discuss Employee's note with the Workers' Compensation Program and his supervisor. Employee stated, "I want to go back to sweep." Mr. Cancelosi informed Employee that it was not his decision. Employee restated his threat, "I will go back to jail if they keep fucking with me." Mr. Cancelosi told Employee to keep his personal comments to himself and focus on doing his job.

Agency issued its Notice of Final Decision on Proposed Removal on October 27, 2021. ¹² Included in this notice was Agency's analysis of the *Douglas Factors*. ¹³

¹¹ None of the exhibits or the witnesses ever explicitly stated what the N word was. However, everyone understood it to be a derogatory and offensive term towards a person.

¹² Employee Exhibit 4.

¹³ In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

- 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or 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 the 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

POSITION OF THE PARTIES

Agency states that its action of removing Employee from his position was supported by cause pursuant to D.C. Code 1-616.51 (2006), the implementing regulations set forth in the District Personnel Manual ("DPM"), Title 6-B of the D.C. Municipal Regulations ("DCMR"), and Article 7 of the applicable collective bargaining agreement between the District of Columbia and Employee's Union, AFSCME 2091. Agency deemed Employee's conduct a threat to DPW, District government, its employees, and the public. Specifically, Employee made threats towards supervisors, walked off and disappeared during his tour and could not be located by supervisors, and was insubordinate, all of which constitute violations of Chapter 16 of the DPM permitting removal of the Employee. As a result of the Employee's actions, DPW decided to move forward with Employee's Advanced Written Notice of Proposed Removal. The hearing officer upheld the Agency's recommendation for removal. Agency determined that each one of these charges and specifications warranted termination.

Employee denies Agency's allegations and points out that he had only favorable performance evaluations during his 15-year tenure until he was assigned to his last two hostile supervisors. He alleges that these supervisors have harassed him at work.

May 5, 2021, Incident

Eugene Leach ("Leach"),¹⁴ Employee's Supervisor, testified that Employee was very upset with him and their supervisor, Jose Saravia ("Saravia"). Leach explained that he and Saravia were looking for Employee to assign him his work duty. Once they located Employee, Employee told them that he was on the premises in the tunnel where he was assigned earlier. Leach told Employee that he was not in the tunnel. According to Leach, Employee told he and Saravia that they were lying. Employee also stated that Leach and Saravia were going to make him go back to jail. Subsequently, Employee stormed out the office and went down the stairs cursing and banging on the walls and doors, ultimately damaging the door. Leach testified that he was intimidated by Employee's remarks made about returning to jail as he interpreted it as a threat of bodily harm against him.

Saravia¹⁵ was Employee's supervisor at the Agency's Disposal Division for two years. Saravia testified that on May 5, 2021, Leach asked him to assist in looking for Employee. Saravia explained that he searched for Employee from 4:00 p.m. until 5:00 p.m. down the roadway, the yard, tunnel, and the break room, but Employee was nowhere to be found. Around 5:15 p.m., Saravia found Employee in the breakroom in civilian clothing. He noted that Employee's tour of duty was from 9:30 a.m. until 6:00 p.m. Saravia explained that Agency policy is that employees should remain in their uniform for the duration of their tour of duty.

12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

¹⁴ Leach's testimony is found on Transcript pages. 5-78.

¹⁵ Jose Saravia's testimony is found on Transcript pages 91-117.

Saravia notified Leach and Leach spoke with Employee. Saravia recalled that Employee exhibited a bad attitude towards Leach and heard Employee tell Leach that he was going to make him go back to jail. Saravia took that expression as a threat and thought that Employee was likely to do something to hurt or kill another individual.¹⁶ Prior to Employee receiving the adverse actions, Saravia stated that he spoke to Employee about his actions before writing Employee up for any of the incidents. He further explained that because supervisors do not write letters to employees, he wrote a letter to Employee Relations regarding Employee's actions.

Regarding prior adverse actions against Employee, Saravia testified that on December 18, 2018, Employee received an Advanced Written Notice of Proposal of Reprimand. The cause of the reprimand was conduct prejudicial to the District Government. According to Saravia, Employee used offensive language. Saravia said that when he reminded Employee that lunch hour was at 11:30 a.m. and Employee responded "Don't say shit to me, man. You're a motherfucker, sir." Tr. 97. As it related to the incident that occurred on March 16, 2019, Saravia testified that Agency proposed a three-day suspension for Employee's refusal to follow instructions for not reporting to his assigned post. Additionally, Employee received a fourteen-day suspension on April 1, 2019, for another refusal to follow instructions. Saravia's observation of Employee was that he was disrespectful towards his superiors and that he refused to be advised on areas that required improvement.

Asad Sadiq ("Sadiq")¹⁷ worked as a Technician with Agency and served as Chapter Chair for Local 2091, AFSCME. He explained that he was present at a meeting with Leach and they discussed Employee's Absent Without Official Leave ("AWOL"), and time attendance. Sadiq testified that the AWOLs were overturned because Employee brought in documentation from his doctor's office that coincided with the dates he was charged with AWOL. Once Agency was able to compare notes, five (5) of the AWOL charges were removed.

Employee¹⁸ worked as a Sanitation Worker with Agency for fifteen years. He testified that during his tenure with Agency he received good performance evaluations. Employee stated that he has numerous medical conditions such as asthma, seizures, and sinus infections, that often prevent him from cleaning the tunnels that he was assigned to. Twice, the ambulance was called for him to receive medical attention. Subsequently, Employee was assigned to light duty work, which was why he was assigned to the dump. He explained that he was unable to lift more than five pounds, another reason Agency had employees who were on light duty work there.

Employee testified that he was charged one-hour of AWOL after not being found during a search by his supervisors. He explained that he was in the tunnel cleaning even as his superiors asserted that they did not see him in the tunnel. Employee argued that his supervisors did not go into the tunnel and that is why they were unable to locate him. He explained that there are four tunnels and each one is seven yards long, five yards wide. Therefore, someone only looking straight into the tunnel would not be able to see him. The only way to find Employee would be to physically enter the tunnel. Employee added that because the tunnels and the weather were hot in

¹⁶ Also see Agency Exhibit 14.

¹⁷ Asad Sadiq's testimony is found on Transcript pages 164-175.

¹⁸ Employee's testimony is on Transcript pages 182-270.

May and June, he would often sit in his car that was parked along one of the tunnels or go to the break room for cool air.

Employee insisted that when he made the comment “Y’all gonna make me go back to jail...,” he was not threatening anyone. He explained that if he were to lose his job he would return back to the streets to hustle. Employee stated that no one asked him what he meant by the comment he made. Later in his testimony, Employee admitted that he had been incarcerated for assault. He further testified that most of Agency’s employees were previously incarcerated. He explained that former convicts are allowed to apply for a job and work at Agency. As for the slammed door incident, Employee stated that if he had really broken the door, Agency would have submitted a work order request to have it fixed. However, Employee insisted that no request was made to have the door fixed.

May 11, 2021, Incident

Leach stated that on May 11, 2021, he requested that Employee meet him in the office to sign his AWOL document. Employee refused to sign an Absent Without Official Leave (“AWOL”) document and retorted that is how much Leach is doing his job before walking away. According to Leach, Employee’s demeanor was very aggressive and demeaning toward him. Regarding Employee’s refusal to sign an AWOL, Leach admitted that employees were not obligated to sign documents. Employee contested Agency’s assertion of his speaking in a disrespectful tone when his supervisor asked him to sign the AWOL. He explained that he was not disrespectful, he merely told his supervisor that he was not signing the document because he was not AWOL.

Employee was also aware that he had the right to not sign the document. However, Employee claimed that Leach was not aware of his rights because Leach threatened to write Employee up for not signing it. Moreover, Leach did not contact Employee’s union representative.

Employee testified that had a supervisor physical entered the tunnel, they would have seen Employee working. Additionally, Employee claimed that Agency waited until he came back to work after three months from being out on Worker’s Compensation, to have him clean the tunnel. He argued that it was wrong for Agency to not have another employee clean the trash that accumulated in the tunnel during his absence from work. And when he returned to work after being on Worker’s Compensation leave, he did not receive assistance from other employees to clean up the accumulated debris. Employee stated that he took pictures to show his managers, but no one seemed to care about the evidence that he provided. Additionally, Employee believed that Leach and Jose Cancelosi were biased against him and that both supervisors treated him poorly.

June 17, 2021, Incident

Leach further testified that on June 17, 2021, he completed his rounds and noticed that Employee was in the breakroom watching television. Leach approached Employee and informed him that there was debris in the area Employee was responsible for cleaning. Leach asked Employee to clean up the area. However, Employee replied that he had already cleaned the tunnel five times and was not going to clean it again. Employee angrily yelled, “Y’all gonna make me

go back to jail...” Leach testified that cleaning the area five times was not sufficient because debris should be cleaned from 4:00 a.m. until 6:00 p.m. and Employee’s tour of duty was from 9:30 a.m. until 6:00 p.m.

Regarding June 17, 2021, Employee stated that Leach did not take pictures at the end of the day to confirm that Employee’s work was complete. He said that Agency only took pictures of the site as proof that the work was not completed, and that Agency should have added more people to clean the area. However, Employee then stated that the additional people that Agency did have were not doing their jobs. He added that Agency had been made aware of his work injuries. Employee also introduced his photos of the areas he did clean.¹⁹ However, the photos showed lots of debris in his work area.

June 29, 2021, Incident

Another incident occurred on June 29, 2021. Leach stated that he did not often change the lunch schedules of employees; however, Employee’s lunch schedule was changed due to Agency’s staffing needs. Leach recalled walking by the tunnel that Employee was assigned to. An angry Employee asked Leach if his lunch schedule was changed, and Leach confirmed that it was. Employee then aggressively yelled, “Y’all some fags,” “Y’all some fags,” and turned around and walked away. According to Leach, this was not the first instance of Employee calling someone a faggot. Leach explained that Employee’s derogatory language was uncomfortable and caused a distraction to other employees, creating a hostile work environment. Further, he opined that Employee breached the relationship between management and employees.

Employee recalled that on June 29, 2021, he approached Leach to inquire why his lunch schedule was changed. Employee explained that he typically had the same lunch hour schedule every day in order to pick up his wife from work. In turn, his wife would drop him back at Agency and pick him back up at the end of his tour of duty. He claimed that Leach intentionally changed the lunch schedule to pick on him because Leach knew his routine of picking up his wife.

Employee denied calling Leach a fagot or any derogatory name. Instead, Employee insisted that what he said was, “That’s some fake stuff.”²⁰ Moreover, he did not use the “N” word in anyone’s presence at work. Employee was well aware that if he spoke to any supervisor in that manner, it would be grounds to lose his job. Employee claimed that he never received documentation that he was issued a three-day or fourteen-day suspension. Additionally, he was not aware of any of his past disciplinary records.

July 13, 2021, Incident

Leach testified that on July 13, 2021, Employee came into the office on crutches with a doctor’s note. Leach could not recall the contents of the note, but remembered that he emailed his manager, Mark Cancelosi (“Cancelosi”). Cancelosi could not accommodate Employee with the doctor’s note and told Leach to send Employee home. According to Leach, Employee was upset and stated that Leach and Jose Savaria (“Savaria”) were going to make him go back to jail. Once

¹⁹ Employee Exhibit 2, pages 23 to 26.

²⁰ Transcript pg. 229.

again, Employee loudly called them fags and that they were going to make him go back to jail. Savaria told Employee that he would have to report this incident of the derogatory use of language.

Leach testified that the tone and body language of Employee was threatening as he made the statement about him returning to jail. As a supervisor, Leach wrote Employee up for the way that he spoke to him. Leach stated that he was not notified that an accommodation was to be provided to Employee.

Cancelosi²¹ worked as a Safety and Occupational Health Officer and Risk Manager for Agency. In his role, he oversaw all matters related to occupational safety and health, and Worker's Compensation. Cancelosi recalled that on July 13, 2021, he received a telephone call from Employee regarding his Worker's Compensation doctor's note. He explained that Employee "communicated that the supervisors on the premises were "f'ing" with him and he would be going back to jail because of those "N" words..." Tr. 82. Cancelosi further testified that Employee explained that he had a doctor's note for light duty work and that he wanted to return to his previous duties at sweep. Cancelosi also confirmed that he notified Employee's supervisor of Employee's demeanor.

Sheila Colclough ("Colclough")²² worked as an Associate Administrator for Solid Waste Disposal at Agency. In this management position, Colclough ensured that the inbound and outbound loads were loaded in and out of the facilities. Prior to working in that capacity, she was an attorney for Operations Management with Agency. Additionally, she was responsible for any disciplinary actions against employees. For instance, if an employee violated the District Government's policies, she was required to provide the progressive discipline.

Colclough testified that a Final Decision on a Proposed Official Reprimand was issued for Employee on January 24, 2019. She was the official who signed off on the report and stated that Employee did not contest this decision. Subsequently, a Final Decision on Proposed Suspension for Three Days was issued to Employee. The cause of actions was for failure/refusal to follow instructions and attendance related offenses. Employee also did not contest the Advance Written Notice issued on April 12, 2019. As it related to the Notice of Final Decision on Proposal for a Fourteen-day Suspension, she did not sign off on the document because changes were made to it while she was not there. This suspension was issued because Employee refused to follow instructions and had committed attendance-related offenses. Employee also did not contest the Advanced Written Notice issued on April 2, 2019. She felt that Employee's continued employment with the Agency posed a threat to the safety of his fellow employees.²³

Marlon Wright ("Wright")²⁴ worked as Interim Administrator. Prior to this position he worked as a Deputy Administrator in which he was responsible for day-to-day operations of the disposal unit. Wright testified that the Rational Worksheet for Proposing Official was used when providing discipline to employees to ensure that they are considering all twelve *Douglas* factors. He explained that this was the guidance used to consider the discipline for Employee. The causes

²¹ Mark Cancelosi's testimony is on Transcript pages 79-90.

²² Sheila Colclough's testimony is on Transcript pages 118-130.

²³ Agency Exhibit 15.

²⁴ Marlon Wright's testimony is on Transcript pages 131-144.

he had to consider were conduct prejudicial to District government-abusive language, threatening behavior, failure and refusal to follow instructions, and neglect of duty. Wright opined that the most serious offenses were conduct detrimental to the workforce and abusive language. Thus, his recommendation for Employee's adverse actions was removal.

Wright stated that he was not made aware of Employee's fourteen-day suspension until after he issued the Rational Worksheet document. Had he known about the suspension when he initially drafted the document, it would have bolstered his decision for removal. Additionally, Wright confirmed that he signed off on the Advanced Written Notice of Proposed Removal. According to the document, he recommended removal.

Christine Davis ("Davis")²⁵ worked as the General Counsel for Agency. She was responsible for supervising the employee labor relations advisor who prepares and gathers the documents from Agency's program. Davis considered the *Douglas* factors when providing progressive discipline for Employee's actions. While she was aware of his January and April 2019 reprimands, she was unaware that he was suspended for fourteen-days. Had Davis been made aware of this suspension, it would have bolstered her removal decision. She opined that it depicted an increasing pattern of misconduct.

According to Davis, the Hearing Officer supported the removal of Employee based on all three causes. She explained that the hearing officer reviewed the Advance Written Notice of Proposed Removal and supporting documents; and documentation submitted by Employee on his own behalf. Davis further explained that the Hearing Officer would generate a report with their summary of findings and send the Deciding Official a copy of the file.

Davis stated that she reviewed the documents, including evaluations provided by Employee and previous supervisors. She noted that Employee received glowing recommendations from prior supervisors; however, she did not equate Employee's misconduct with his new supervisor. Davis explained that an employee is responsible for their conduct on the job, and how they respond to supervisors and others is their responsibility, not the responsibility of the other party.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency's adverse action was taken for cause

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

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in

²⁵ Christine Davis ("Davis")'s testimony is on Transcript pages 146-161.

grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1605.4 of the District Personnel Manual (“DPM”) sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Employee’s termination was based on:

§ 1607.2(a)(16): Conduct Prejudicial to the District Government: Use of abusive language, offensive, unprofessional distracting, or otherwise unacceptable language, gestures, or other conduct; quarreling; creating a disturbance or disruption; or inappropriate horseplay. *See* D.C. Mun. Regs. tit. 6, Subt. 6-B, § 1607.2(a)(16) (2017).

§ 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; careless work habits.

§ 1607.2(d)(2) Failure/Refusal to Follow Instructions: Deliberate or Malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions.

May 5, 2021, Findings of Fact

Agency argues that Employee was inexcusably absent without leave from his work area for an hour, was belligerent and threatening, and damaged a worksite door after slamming it hard. Employee denied not cleaning the tunnels and denied damaging any door. He admitted saying that his superiors are making him go back to jail but denied that it was a threat of violence to them.

I find Leach and Saravia to be more credible than Employee. During the Evidentiary Hearing, I observed that Employee exhibited a hot temper and a threatening manner during his testimony. I therefore find that Employee failed to thoroughly clean his assigned tunnels, threatened his superiors, and intentionally damaged a door that belonged to the District Government. Based on a preponderance of the evidence, I find that Employee neglected his duty to clean, was insubordinate, and used abusive language.

May 11, 2021, Findings of Fact

Agency charges that on May 11, 2021, Employee refused to sign his AWOL notification. However, Agency admits that Employee is not obligated to sign his notice. I therefore find that Employee did not violate any regulation on May 11, 2021.

June 17, 2021, Findings of Fact

Agency also charges that on June 17, 2021, Supervisor Leach observed Employee watching television during his tour of duty instead of finishing the cleaning of the Agency facility and was

disrespectful towards his supervisor. Employee asserted that he had cleaned the facility. However, Employee did not address the allegations of watching television during his tour of duty or of using disrespectful language towards Leach.

I find Leach to be more credible than Employee. While testifying, Employee was disruptive and would exhibit flashes of belligerence when questioned. Based on a preponderance of the evidence presented, I find that Employee failed to finish cleaning his assigned area and of using disrespectful language towards his supervisor.

June 29, 2021, Findings of Fact

Agency alleged that in response to it changing his lunch schedule due to staffing needs, Employee angrily responded to his supervisor using the word “faggot stuff.” Employee denies this and insists that he used the word “fake stuff” as he was upset that he could no longer pick up his wife during his lunch period. Based on his courtroom demeanor, I do not find Employee to be credible. I therefore find that Employee used abusive and offensive language toward his supervisor.

July 13, 2021, Findings of Fact

Agency’s witnesses testified that in an angry response to Cancelosi’s decision to send Employee home instead of giving him light duty, Employee yelled the N word, called them faggots and threatened them by stating his superiors were forcing him to take actions that would make him go back to jail. Everyone who witnessed and heard Employee interpreted his words as a threat to do bodily harm to them. Employee denied using abusive language and tried to downplay his words by giving an alternative and much more benign explanation. I find Agency’s witnesses to be much more credible than Employee. The undersigned noted that every one of them believed Employee was a physical threat to them due to their prior interactions with him.

I also noted that even while testifying before this Office, Employee often bristled and reacted with barely contained hostility to questioning. I therefore find that Employee used derogatory, abusive, and threatening language towards his workmates, was insubordinate, and created a hostile work environment. Accordingly, apart from the May 11, 2021, incident, I find that Employee was guilty of all the other charges and specifications leveled by Agency.

Whether the penalty of termination was appropriate under the circumstances.

As discussed above, all the charges and specifications apart from the May 11, 2021, incident, were upheld. 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). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency.

Chapter 16 of the DPM and the D.C. Municipal Regulations (“DCMR”) outlines the Table of Illustrative Actions (“TIA”) for various causes of adverse actions taken against District

government employees. DCMR § 6-B1607.2(a)(16) provides that the penalty for a subsequent offense of “Use of abusive language, offensive, unprofessional distracting, or otherwise unacceptable language, gestures, or other conduct...” ranges from a five day suspension to removal. The penalty for the first offense for DCMR § 6-B1607.2(e) Neglect of Duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; careless work habits” ranges from counseling up to removal. The penalty for the first offense for DCMR § 6-B1607.2(d)(2) Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions ranges a 3-day suspension to removal.

It is undisputed that Employee had a prior offense of Conduct Prejudicial to the District Government for using abusive language dated January 24, 2019;²⁶ a prior offense of Failure/Refusal to Follow Instructions dated April 1, 2019;²⁷ and another prior offense of Failure/Refusal to Follow Instructions dated May 14, 2019.²⁸ In short, based on Employee’s disciplinary record, the allowable penalty for his offenses includes removal.

Based on the foregoing, I do not find that Agency exceeded the limits of reasonableness with the penalty imposed against Employee. Accordingly, in light of the testimony and evidence presented, I find that Agency’s penalty of removal was appropriate for the sustained charges of conduct prejudicial to the District Government, failure/refusal to follow instructions, and neglect of duty.

ORDER

Accordingly, it is hereby **ORDERED** that Agency’s removal of Employee is UPHELD.

FOR THE OFFICE:

s/ Joseph Lim
Joseph E. Lim, Esq.
Senior Administration Judge

²⁶ Agency Exhibit 9.

²⁷ Agency Exhibit 11.

²⁸ Agency Exhibit 13.