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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0020-20
SHARI ACOSTA,)	
Employee)	
)	Date of Issuance: February 25, 2021
v.)	
)	ARIEN P. CANNON, ESQ.
D.C. DEPARTMENT OF RENTAL HOUSING)	Administrative Judge
Agency)	
_____)	
David A. Branch, Esq., Employee Representative		
Ryan Martini, Esq., Agency Representative		

INITIAL DECISION¹

INTRODUCTION AND PROCEDURAL HISTORY

Shari Acosta (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on December 12, 2019, challenging the District of Columbia Rental Housing Commission’s (“Agency” or “the Commission”) decision to suspend her for twenty (20) days from her position as a Staff Assistant. Agency filed its Answer on January 16, 2020. The undersigned was assigned this matter on March 5, 2020.

A virtual prehearing conference was convened on July 7, 2020. At the prehearing conference it was determined that an evidentiary hearing was warranted. Thus, this matter convened for a virtual evidentiary hearing held over two (2) days on November 4th and 5th, 2020. On December 3, 2020, an Order was issued which required the parties to submit written closing arguments/briefs. Both parties submitted their written closing arguments/briefs on January 11, 2021, after being granted a one-week extension of time. The record is now closed.

JURISDICTION

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

¹ This decision was issued during the District of Columbia's COVID-19 State of Emergency.

ISSUES

1. Whether Agency had cause to take adverse action against Employee for: (1) three separate charges of “Failure/Refusal to Follow Instructions”; (2) seven separate charges for “Neglect of Duty”; (3) Providing misleading and inaccurate information to superiors; and (4) two separate charges of “Conduct Prejudicial to the District Government,” all pursuant to Chapter 16 of the District Personnel Manual.²
2. If so, whether the Agency’s decision to suspend Employee from service for twenty (20) days was the appropriate penalty under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.³ “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.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.⁴

SUMMARY OF TESTIMONY⁵

The following represents a summary of the relevant testimony given during the virtual evidentiary hearing held on November 4th and 5th, 2020, as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding.⁶ During the evidentiary hearing, I was able to observe the witnesses’ poise and demeanor. As a result, I was able to determine the credibility of the witnesses.

² See Bates Stamp 36-54

³ 59 DCR 2129 (March 16, 2012).

⁴ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

⁵ Dorothy Grier, Dan Mayer, and Janice Blassingame were all called to testify; however, shortly after their testimony was underway the undersigned found the testimony to be irrelevant, unhelpful, or not probative of the issues before this Office.

⁶ Tr. Vol. 1 denotes the first day of the hearing, November 4, 2020, while Tr. Vol 2. denotes the second day of the hearing, November 5, 2020. The summary of testimony reflects the witnesses’ testimony as of November 4-5, 2020—the date of the evidentiary hearing.

Agency's Case-in-Chief⁷

Michael T. Spencer ("Spencer") Tr. 47-240

Spencer is the Chief Administrative Judge with the D.C. Rental Housing Commission and has held this position since October of 2019. He has been Chair of the Commission since October of 2017. Approximately eight to nine employees work at the Commission, which is responsible for enforcing the District's Rental Housing Act.

Spencer supervised Employee, a former Staff Assistant at the Commission. Spencer described Employee's responsibilities as set forth in two different position descriptions. In summary, Employee's job was to provide confidential, high level administrative support to Spencer in his role as the Chief Judge and Agency Director, as well as provide administrative support to others in the Agency.

Prior to October 1, 2019, the Department of Housing and Community Development provided administrative support to the Commission. Prior to October 2019, everyone who worked at the Commission were technically staff of the Department of Housing and Community Development. Effective October 1, 2019, the Commission became an independent agency and the city council also made the Agency Director the personnel authority. In this case Spencer became the Agency Director as well as its personnel authority. In preparation for this transition, Spencer contacted District of Columbia Department of Human Resources ("DCHR") in March of 2019 in hopes of entering a Memorandum of Understanding ("MOU") where the Commission would give DCHR a set amount of money and they would provide the Commission with HR support. Spencer testified that the policy was for everyone at the Commission, including himself, to contact certain people at DCHR for assistance with certain matters.

In the instant matter, Spencer took disciplinary action against Employee by issuing a Final Notice of Suspension for 20 days on November 15, 2019. This final decision was made after receiving a response to the October 29, 2019, Advance Notice of Propose Suspension. Spencer also served as the proposing official of Employee's twenty-day (20) suspension.

Spencer testified that Employee was suspended after a lot of counseling through progressive discipline, but Employee continued to act in a rude and unprofessional manner at work. Spencer further asserted that Employee continuously lied and misrepresented the truth and provided inaccurate statements. Additionally, Spencer testified that Employee failed to do assignments timely and in a manner that was reasonably expected of someone of her grade and experience.

Testimony on Failure/Refusal to Follow Instructions

The first cause of action that served as a basis for Employee's suspension was **"Failure/Refusal to Follow Instructions:** Deliberate refusal to comply with rules, written

⁷ The parties provided a joint exhibit list which includes Bates Stamps. The Table of Contents for the Joint Exhibits list Exhibits 1-15; however, the associated Bates Stamp number will be referenced throughout the decision in identifying exhibits.

procedures and proper supervisory instructions.”⁸ Spencer provided examples of ways in which he believed satisfied this cause of action. Spencer stated that this charge was based in part on Employee’s contact with the District of Columbia Human Resources (“DCHR”) and contact with Angela Nottingham who worked at the Department of Housing and Community Development (“DHCD”). Spencer also testified that this charge was based on Employee’s failure to adhere to explicit instructions regarding a docket sheet and other related materials regarding assignments that she was provided. It was also based on Employee’s failure to adhere to his request for Employee to complete a training and travel form in a timely manner.

Spencer testified about his response to an email from Employee where numerous other names were on the email thread, including the Director of DCHR.⁹ In the email, Spencer reminded Employee that the Commission is an independent agency and that the Commission would be entering into a MOU that will outline the services that DCHR will provide to the Commission. Spencer instructed Employee to refrain from including DCHR’s director on future email communications.

Despite his instructions to Employee not to communicate with individuals at DCHR, Employee continued to do so. However, Spencer could not name all the individuals with whom Employee may have spoken to within DCHR. In an email dated October 10, 2019, Employee informed Spencer that she was consulting with Jacinda Miller, who is an employee relations specialist at DCHR, about Employee’s Family and Medical and Leave Act (“FMLA”) request paperwork.¹⁰ Spencer testified that during this time period, he had instructed Employee to contact Shaquana Carter instead, who was Ms. Miller’s colleague. Spencer stated that Ms. Carter was the identified contact person for the Commission to contact for employee relations matters at DCHR. This was communicated to Employee several times via email and verbally. Spencer stated that the Commission itself did not designate Ms. Carter as the contact person. Rather, DCHR designated Ms. Carter as the Commission’s contact person and he relayed this information to Employee.¹¹

In an October 16, 2019 email, Employee informed Spencer that Ms. Miller had been her contact person for FMLA issues and other HR matters since July 2018.¹² In the email, Employee was protesting the designation of Ms. Carter as her point of contact with DCHR because of a conflict of interest and Employee’s belief that Ms. Carter inappropriately handled confidential HR matters related to Employee. Employee also requested to continue communicating with Ms. Miller because of an ongoing employment discrimination complaint filed in D.C. Superior Court, where Ms. Miller would be a potential witness. Spencer did not find Employee’s reasons and request compelling enough for Employee to refuse to follow his instructions regarding who to contact at DCHR. Spencer reiterated his instructions in an email for Employee to contact Ms. Carter and Ms. Carter only at DCHR.¹³

⁸ Bates Stamp 5-6.

⁹ Bates Stamp 68-69.

¹⁰ Bates Stamp 71-76.

¹¹ Tr. Vol. 1 at 61.

¹² Bates Stamp 206-207.

¹³ Bates Stamp 205.

Spencer also testified that Employee contacted the DCHR's General Counsel's Office despite being advised to only contact Ms. Carter.¹⁴ Spencer sent an email to Gregory Evans, DCHR's General Counsel, and Justin Zimmerman, DCHR's Associate Director for Policy, reiterating that Employee should contact Ms. Carter if she needed any assistance from DCHR. Spencer reminded Employee of the importance of following the proper chain of command for the efficient, effective, and orderly administration of the District government regarding the impending MOU with DCHR. Spencer found it frustrating that Employee continued to openly defy his instructions by contacting people outside the Agency.

Spencer believed Employee's communication with individuals within DCHR impacted his negotiations regarding the MOU with DCHR. Spencer stated that later in the year while negotiating with DCHR regarding the MOU, they quoted him a number that was higher than they initially quoted. Spencer acknowledged that he offered a low number to DCHR and they laughed and were offended and said they spent more money dealing with Employee than he was offering DCHR for an entire year to handle HR matters.¹⁵

Testimony on Neglect of Duty

The second charge that served as the basis of Employee's twenty-day suspension was three separate charges for **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, and Undue delay in completing assigned tasks. Spencer stated that the big picture related to these charges was that the energy that was required to manage Employee did not align with what one should expect of a staff assistant with her pay grade and experience.

Spencer testified about an incident where Employee informed him that a constituent identified as Mr. Maurice Sams called and had a question for the Clerk of Court, Latonya Miles, who was out of the office at the time. In a follow up email to Spencer, Employee summarized the nature of the call with Mr. Sams.¹⁶ During the phone call, Mr. Sams asked Employee about a case and indicated that he was not an attorney of record but that he worked as a legal associate for a firm that was representing one of the parties in the matter. Mr. Sams requested that Employee send him a Rental Housing Commission docket list and any filings since March 9, 2016, in the case he was calling about. Employee wanted to check and see what information could be provided to Mr. Sams or whether she needed to request a call or email from an attorney of record. Spencer found it weird that Employee would need to make this inquiry because all filings at the Commission are open to the public.

Spencer believed that this request was something that Employee should reasonably be able to handle without supervision. Spencer did not believe that Employee needed to contact him about how to handle this request. In response to Employee's email regarding Mr. Sams' request, Spencer sent an email asking Employee for the docket sheet and other materials that Mr. Sams requested. Spencer also asked Employee several questions in his follow up response. Employee sent her email summarizing the phone call on October 21, 2019, at 12:00 p.m.;

¹⁴ Bates Stamp 269.

¹⁵ Tr. Vol. 1 pp. 69-70.

¹⁶ Bates Stamp 290-291.

Spencer responded at 12:14 p.m. and requested that Employee respond by 3:00 p.m. that afternoon. Spencer cannot recall whether he extended this timeframe; however, Employee responded to Spencer's set of questions at 12:00 p.m. on October 22, 2019. Spencer testified that Employee did not complete the docket sheet that was requested by Mr. Sams despite being instructed to do so. In an email dated October 23, 2019, Spencer also instructed Employee to prepare a docket sheet or any other information requested by Mr. Sams and requested that Employee provide him (Spencer) a copy by close of business the same day.

Next, Spencer testified regarding the travel document assignment for Judge Lisa Gregory ("Gregory").¹⁷ Specifically, in an email dated October 8, 2019, Spencer informed Employee that one of her new duties would be to coordinate travel arrangements, reconcile travel records, and the like. Gregory was scheduled to attend a conference in October of 2019, and Spencer instructed Employee to complete a one-page training and travel request form relating to Gregory's travels. In an October 10, 2019 email, Spencer sent Employee a past travel document from Gregory's previous travels to another conference to help guide Employee in completing the new form. Spencer testified that he provided Employee approximately 55-60 pages of material that would help her in completing the travel form and gave her approximately nine business days to look over the information and complete the travel document for Gregory.

Spencer testified that the Training and Travel Request Form completed by Employee for Gregory's travels were not completed to his satisfaction and he stated that Employee never completed the forms correctly.¹⁸ In an October 16, 2019 email sent at 10:29 a.m., Spencer informed Employee that the travel form contained incorrect information regarding baggage and per diem.¹⁹ In the email, Spencer asked Employee to review the materials that he provided to her related to work travel and to correct the information in the form. Employee responded to this email and indicated that she was not clear on Spencer's instructions and requested clarification. Employee also asserted that the deadline provided by Spencer did not allow her enough time to review the materials and make the changes as requested. Spencer responded and extended the deadline to noon on October 18, 2019.

Employee responded on October 18, 2019, with a revised training and travel form for Gregory attached.²⁰ Spencer testified that the main issues with the form provided by Employee were that the per diem and baggage amounts were not correctly captured on the travel form.²¹

Spencer also reminded Employee that Gregory had already booked her traveling arrangements and that she needed to be reimbursed.²² Spencer stated that one of the main issues regarding the per diem amount listed by Employee was that a person does not get a full per diem if the conference registration includes certain meals. If a conference registration includes certain meals, then that amount needed to be deducted from the per diem. There was also an issue regarding the baggage fees, but Spencer could not recall the specifics. The dollar amounts

¹⁷ Bates Stamps 133.

¹⁸ Bates Stamps 101; Tr. Vol 1. at 86.

¹⁹ Bates Stamps 189.

²⁰ Bates Stamp 215.

²¹ Bates Stamp 232

²² Bates Stamp 232.

pertaining to baggage and per diem on all the training and travel forms provided by Employee were incorrect. Spencer was of the opinion that Employee needed very descriptive directions on assignments after being given numerous opportunities and a reasonable amount of time to figure out the correct information. Because Spencer gave “major hints” as to the incorrect information, he felt that Employee should have been able to figure out what should have been corrected.

Spencer believed that the 55-60 pages of documents provided to Employee were sufficient for her to correct the training and travel forms regarding per diem and baggage.²³ He noted that Bates Stamps 136 of the Joint Exhibits specifically addressed the per diem costs that an employee can claim for travel.

*Testimony regarding misleading statements*²⁴

Spencer testified about **misleading statements** by Employee. Specifically, Employee stated in an email that she was not aware or advised that she was designated as the travel officer for the Commission and that a travel officer role was not identified in her position description. Employee also stated in an email that she had not received training or hands on experience that would qualify her to be a travel officer on behalf of the Commission. Spencer felt that Employee’s comments made it appear that one had to be a travel officer to do the assignment that Employee was tasked with doing regarding the travel forms. Spencer acknowledged that an employee could complete their own travel form, but also iterated that a travel officer can complete the form for another individual. Spencer felt that if Employee had read the form, she would have known that she did not need to be a travel officer to complete the assignment related to the travel forms.

Employee also stated that she did not have Gregory’s completed additional documentation and receipts, but Spencer felt that Employee did not need that information to complete the travel and training request form. Spencer acknowledged that the additional documentation and receipts would have been required for the reconciliation form, but they had not reached that step in the process. Employee stated to Spencer what she believed the intention of the training and travel policy to mean and that the person traveling should complete their own form because they are the only person who can attest to the validity and accuracy of the expenses. Spencer believed these statements in emails from Employee to be misleading and inaccurate.²⁵

Conduct Prejudicial to District Government:

Spencer testified that this charge was related to Employee’s failure to follow his instructions regarding her contact with Ms. Nottingham after being instructed not to contact her, Employee’s failure to not adhere to Spencer’s instructions not to contact DCHR, and Employee carrying herself in a rude and unprofessional manner in a work meeting to the point Spencer ended up canceling the meeting. This meeting was with Spencer, Employee, and Gregory, where

²³ Bates Stamp 135-187.

²⁴ Bates Stamp 230-231; *See also* Bates Stamp 19 (Advance Notice of Proposed Suspension); *See also* Tr. Vol 1. at 112.

²⁵ Tr. Vol.1 pp. 111-112.

Spencer wanted to talk about the training and travel assignment and described Employee's behavior as belligerent and rude. Spencer did not feel that Employee was being courteous or professional during the meeting.

Spencer considered all twelve Douglas factors when choosing to impose a twenty-day suspension of Employee and considered the response submitted by Employee's counsel to the Advanced Proposed Notice.²⁶

*Cross Examination*²⁷

Employee physically returned to the Commission on September 30, 2019, and returned to Spencer's supervision in late July/early August of 2019, while she was on leave. The Advance Notice of Proposed Suspension was issued on October 29, 2019. The position description issued to Employee on October 17, 2019, explicitly stated that Employee would be responsible for making travel arrangements. When the Commission became its own separate independent agency in October of 2019, a lot of position descriptions changed for employees.

Regarding the District's policy on meals and incidental expense rates (M&I per diem), Spencer stated that generally on a full day an employee gets money for breakfast, lunch, dinner, and a small amount for incidentals. Spencer provided an example that if an employee was going to a conference where breakfast was provided, an employee cannot charge for breakfast, and the amount allocated for breakfast would have to be deducted from the overall per diem. On the first and last day of travel, an employee can only claim 75% of the full day value of the per diem.

Spencer believed that the error regarding baggage on the travel form was regarding the amount Employee listed for reimbursement. He surmised that the amount should have been for \$60 rather than \$30 because the baggage fee was roundtrip. Additionally, Employee was expected to get the information from the General Services Administration's list of per diem for Los Angeles, California in the travel materials and documents that Spencer provided. Spencer stated that Employee was faulted for not deducting meals from the per diem for days in which meals were provided to attendees of the conference attended by Gregory. Spencer explained that Employee iterated to him that she did not find the instructions regarding per diem and the relevant deductions clear.

According to Spencer, when Employee requested permission to contact Angela Nottingham ("Nottingham"), who was the training manager from DHCD—the agency in which the Commission had recently separated from and where Spencer had obtained the documents that provided guidance on employee travel—Spencer denied the request.²⁸ There was one instance where Spencer told Employee that she could contact Nottingham, but only by email and required Employee to also copy him (Spencer) on the email. Spencer could not recall if he ever told Employee specifically what was wrong with the form regarding per diem and baggage fees. Spencer felt that it was Employee's job to figure out what the error was as an employee at a Grade 11 salary.

²⁶ Tr. Vol. 1 at p. 128.

²⁷ Tr. Vol. 1 at p. 142.

²⁸ See Bates Stamp 256.

Spencer described the travel reimbursement process as two steps: first, the Training and Travel Request form, followed by the reconciliation forms. Employee never got to the reconciliation process in this matter because of the issues with the initial training and travel form. Spencer stated that the receipts for Gregory's travel were only needed for the reconciliation forms.

As the Chief Judge and Agency Director, Spencer became involved in Employee's FMLA issues because he was the personnel authority for the Commission. In this capacity, he was responsible for administering personnel regulations that generally the Mayor or DCHR would handle. Spencer was advised that Employee should contact Ms. Carter with DCHR, and not Ms. Miller, regarding any FMLA issues after October 1, 2019. Spencer stated that Employee violated the Commissions procedures regarding FMLA by speaking with Ms. Miller instead of Ms. Carter.

In an October 22, 2019 email, Spencer emailed Gregory Evans, DCHR's General Counsel and Justin Zimmerman stating that he had been informed that Employee had reached out to them. Spencer stated that he became aware of this either by Employee who stated that she was waiting to hear back from the general counsel's office or by Ms. Carter.

Spencer reiterated that he became aware of the phone call with Mr. Sams when Employee told him after the phone call. Employee also sent Spencer a summary of the phone call in an email. In response to the email, Spencer emailed Employee a list of several follow-up questions. When asked why it was important for Employee to explain to him what important task she was working on when Mr. Sams called, Spencer explained that Employee would often times say that she was working on important tasks but Spencer did not recall giving her any task to work on that was time-sensitive. Spencer believed that sometimes Employee lied about working on some assignments.

Mr. Sams originally requested to speak with Ms. Miles, the Clerk of Court, and wanted a docket list and any filings made on a particular case since March 9, 2016. Spencer subsequently asked Employee to prepare the docket sheet, however, Ms. Miles ended up preparing the docket list for Mr. Sams upon her return the following day. Spencer stated that Employee did not follow his instructions regarding preparing the docket sheet and he wanted to ensure that she knew how to prepare one in case the issue came up again.

Spencer was aware that prior to Employee's return to the Commission in September 2019, Employee had complained to other District officials that he was abusing his authority as Employee's supervisor. Spencer believed it was the Deputy General Counsel at DCHR who had made a complaint about how much Employee was contacting different people in their office and Miles also complained about the fact that Employee would also ask for help in doing her work.

Lisa Gregory ("Gregory") (Vol 2. Tr. 4-51)

Lisa Gregory ("Gregory") is an Administrative Judge with the Rental Housing Commission and has been with the agency since January of 2018. Gregory was present during

the October 21, 2019 meeting between Spencer and Employee that formed part of the basis for Employee's suspension.²⁹ The meeting was convened so that Spencer could provide instructions to Employee on completing the training and travel form for Gregory to attend a training. Gregory was the direct beneficiary of this work product. Gregory described the meeting as "very short," less than five minutes, and they were unable to spend any time talking substantively about the assignment. The meeting was thrown off track because Employee was not comfortable with the way the meeting was set up. Employee did not feel that a formal meeting was necessary for Spencer to provide her instructions on an assignment. Employee also felt that it was unnecessary for Gregory to be present and serving as a witness for Spencer.

Gregory described Employee as frustrated and upset during the meeting. Gregory surmised that Employee's frustrations stemmed from the fact that Spencer was trying to give Employee instructions on an assignment that she had not done in the recent past and Employee was uncomfortable with the instructions, the assignment, and the presence of Gregory. Because they were unable to get past Employee's concerns regarding the setup of the meeting, Spencer ended it.

Gregory did not believe that someone needed training to complete the training forms. She also did not ask Spencer for assistance in completing the training and travel request form needed for her training. Gregory did not recall who completed the form ultimately, but she testified it was not her. Gregory never told Spencer that the numbers provided on the training and travel request form were incorrect and Spencer never asked Gregory for assistance in completing the forms.

Gregory did recall that she was approached by Employee after the meeting to ask about the training and travel request form. Gregory responded by saying she needed to speak with Spencer because the nature of the question was beyond her understanding.³⁰ Regarding other travel during her tenure with the Commission, Gregory testified that the Clerk of the Court for the Commission, Latonya Miles, and the HR person for DHCD, Ms. Nottingham, assisted her in completing training and travel forms for her other travels.³¹ Gregory was unsure whether Spencer completed her other training and travel forms but he was at least involved in the process. Gregory asserted that Nottingham's involvement included receiving the forms and sending them back if there were any problems. Gregory stated that Miles was involved by actively getting the information needed to complete the forms and Spencer was involved because he reviewed and signed the forms. There were no restrictions placed on Gregory regarding her contact with Nottingham for the completion of the travel and training forms.

Employee's Case-in-Chief

Shari Acosta ("Employee") Tr. Vol. 2, pp. 54-206

Employee was employed with the District government for 18 years. She began as an intake officer with the Office of Human Rights in 2001. She began working at the Rental

²⁹ Tr. Vol. 2 at 9; See Bates Stamp 23.

³⁰ Tr. Vol. 2, pp. 23-24.

³¹ Tr. Vol. 2, pp. 35-36.

Housing Commission in 2011 when it was still under the purview of the Department of Housing and Community Development. Spencer became a Commissioner at the Rental Housing Commission in 2016 when the Commission was still under DHCD.

Employee was detailed from the Commission from July 2018 through July 2019, where she worked at DHCD. After her detail, she was placed on administrative leave and then went on personal and FMLA leave before returning to the Commission on September 30, 2019. Prior to returning to the Commission on September 30, 2019, Employee had previously filed a complaint against Spencer with the D.C. Office of Human Rights. This complaint was transferred to D.C. Superior Court as an employment discrimination and retaliation complaint. A separate complaint was filed in D.C. federal court against Spencer as well. Employee had also previously filed an internal complaint against Spencer with DHCD for an incident that occurred in June of 2017.

While Employee was detailed to DHCD, she contacted the District of Columbia Department of Human Resources (“DCHR”) for assistance with some of her HR related matters. Employee eventually got in contact with Jacinda Miller (“Miller”), whom Employee believed was the FMLA coordinator with DCHR. When Employee filed for a new FMLA request, it was initially denied by DHCD. Employee eventually was able to get assistance with her FMLA request through DCHR and Miller overruled DHCD’s denial of her FMLA request. Employee found Miller to be helpful for various HR related issues that she had while she was on detail.

On one occasion when Miller was out on leave Employee was put in contact with Shaquana Carter (“Carter”). Employee was initially hesitant to share some of the confidential details with Carter regarding her HR matter but she eventually engaged with Carter regarding her issues. Employee later learned that Carter had contacted Spencer about her confidential HR issues.

On her first day back from detail on September 30, 2019, she went into what she described as a “hostile work environment.”³² Employee acknowledges that she reached out to Miller and that when Spencer found out, he instructed her to only deal with Carter, and not Miller about her FMLA issues. Employee testified about an email correspondence that occurred a few days after her return to the Commission.³³ The email exchange was initiated by Haydn Demas seeking to schedule a meeting with Employee and Spencer regarding an ADA request made by Employee. Because the Commission had recently become an independent agency, Spencer requested that the D.C. Office of Disability Rights serve as the Commission’s ADA Coordinator. Employee responded to this email and cc’d several individuals that were not originally on the thread, including DCHR’s Director, Ventris Gibson. Spencer responded to this email and told Employee to refrain from including DCHR’s Director on future communications regarding this issue.

Employee also testified about an email exchange where she told Spencer that it would be a conflict of interest for her to continue speaking with Carter regarding her HR matters because Carter was a potential witness in her pending and/or future employment litigation.³⁴ Spencer

³² Tr. Vol. 2 at 68.

³³ Bates Stamp 68-69.

³⁴ Bates Stamp 72.

responded that he did not believe that was a sufficient reason for Employee to claim that Carter could not assist her with employee relations matters. Spencer also noted that several other government employees at DCHR, DHCD, ODR, and the Commission may also be potential witnesses in any employment litigation regarding Employee. Spencer further indicated that it was the Commission's policy for Employee to contact Carter only at DCHR for "employee relations matters." Employee testified that Spencer prohibited her from speaking to Miller.

Employee testified that Spencer also told her that she needed to re-file her FMLA request with him and provide the documentation to two other attorneys at the Commission. Employee expressed concern about turning over this confidential information to Spencer for fear that he would use it against her. Employee stated that prior to Spencer asking her to complete the training and travel forms relating to this case, she had not completed these forms before. Employee testified that Spencer was aware that she had never completed these forms before and that he included it as a new duty of hers to coordinate travel arrangements shortly upon her return to the Commission.³⁵

On October 8, 2019, Spencer sent Employee an email with attachments that included documents used by DHCH regarding travel arrangements for District employees. Employee testified that Spencer's initial instructions were for Employee to contact Nottingham. However, because Nottingham did not quickly respond to emails, Employee called her instead, which Spencer found to be a violation of his instructions to only email Nottingham (and cc him), but not to call.

Employee had concerns about completing the travel forms for Gregory's travels. Based on Employee's experience in working at DHCD, the actual traveler completed their own forms so that there would be no errors on the form. Employee had questions regarding the particulars of Gregory's travel and sought to speak with Gregory to accurately fill out the form. When Employee requested to speak to Gregory about the travel forms, Spencer denied her request to do so. Employee also requested to ask Spencer on Gregory's behalf and Spencer declined to do so and instructed her to "figure it out."³⁶ Employee acknowledges sending multiple copies of the training and travel forms and Spencer kept telling her that something was wrong with the form. Despite Employee's effort to speak to Gregory directly, Gregory told her that she would have to speak with Spencer and then get back with her regarding her questions. Gregory never got back to Employee regarding the travel and training forms.

Bates Stamps 134-187 are documents regarding "travel and training policies" that Spencer provided to Employee. Employee communicated to Spencer several times, in-person and via email, that she had additional questions because the instructions on filling out the forms were not clear. Spencer informed Employee that the baggage fees amount on the form was incorrect but he did not tell Employee how or why it was incorrect.³⁷ Employee testified that she would have no way of knowing the correct amount since she was unable to speak with Gregory.

³⁵ See Bates Stamps 77.

³⁶ Tr. Vol 2. at 86.

³⁷ Bates Stamp 189.

Employee asserted that Spencer gave her three days to review the documents related to the travel and training policies to try and address the issues with the baggage and per diem. However, Employee testified that the information she needed was not in the travel policy documents, but she would need to get the information directly from Gregory, or from Spencer since he was aware of exactly what needed to be corrected.

Employee further testified about the meeting that took place on October 21, 2019, between herself, Spencer, and Gregory that served as another basis for the instant adverse action. Employee was uncomfortable with Gregory being in the meeting because she initially thought it was a disciplinary meeting, but it turned out to be related to the travel and training form assignment. Employee objected to Gregory being in the meeting and insisted that she wanted to invoke her *Weingarten* rights.³⁸ During Spencer's line of questioning during the meeting, Employee became upset and asked to get a bottle of water. Employee testified that Spencer then slammed his notebook shut and ended the meeting. She described Spencer's behavior as belligerent and rude. This meeting lasted less than five minutes.

Employee averred that Spencer restricted her from contacting DCHR's General Counsel, Gregory Evans and DCHR's Associate Director for Policy and Compliance, Justin Zimmerman.³⁹ Employee further testified about the incident regarding a phone call with a constituent, Mr. Sams, who requested a docket list from a case before the Commission while working on multiple tasks for Spencer, under tight deadlines. Employee had never prepared or provided a docket list to anyone, but she could access the Commission's database which contained files from cases. During her time at the Commission, Employee stated that Ms. Miles had always told her that they cannot give out information on an active case unless the person requesting it is a party to the case. Employee stated that Mr. Sams was not an attorney of record, and he described himself as a law clerk or associate, but because he was not an attorney of record, she did not believe she was authorized to provide him the information requested. At the end of the call, or shortly after hanging up with Mr. Sams, Spencer walked by Employee's desk to inquire more about the phone call. Employee described the phone call and followed up by sending Spencer an email.⁴⁰ Employee did not provide the information to Mr. Sams because she did not want to send something she was unauthorized to send and she also did not know what format in which the information should be provided. To document the request from Mr. Sams, Employee sent a voicemail to Latonya Miles stating Mr. Sams's request.

The following day, Employee asked Miles if she received her voice message and Miles confirmed that she had. Miles also confirmed that she spoke with Mr. Sams and provided the information that he requested. Miles told Employee that there was nothing additional she needed to do regarding the request. By the end of the following day, Spencer sent Employee an email asking about the status of Mr. Sams request and other questions that he had for Employee. Employee informed Spencer that Mr. Sams had been given the requested information and to let her know if any further action was necessary.

³⁸ Tr. Vol. 2 at 104

³⁹ Bates Stamp 269. *Weingarten* rights afford union employees the right to union representation at an investigatory interview.

⁴⁰ Bates Stamp 290.

On cross-examination, Employee stated that she was not a legal analyst so she was unable to say with certainty how the regulations should be interpreted. In an email, Employee stated that she “believed it is the intention of the travel and training policies that employees personally fill out their own travel and training forms to ensure accuracy.”⁴¹ Employee testified that she interpreted the regulations differently than Spencer regarding what was required of the training and travel forms.

Jacinda Miller (“Miller”) Tr. Vol. 2, pp. 243-254

Miller is employed with DCHR as an Employee Relations Specialist and has held this role since May of 2018. In this role, she provides guidance to District government employees and agencies on a variety of HR related matters, including discipline, leave management, performance management, FMLA guidance, and general policy interpretation and guidance. Miller provides guidance and assistance to all District government employees.

Miller became acquainted with Employee in 2018 when she provided assistance to Employee on a variety of HR matters, including her FMLA. Miller engaged in regular conversations with Employee to help address these issues. Miller never requested that Employee not contact her for help and she never made a request to DCHR management or anyone outside of DCHR that Employee cease contacting her. There were occasions when Miller informed her management team when she was having issues answering Employee’s HR related questions. Out of all the District government employees that Miller assisted, she stated that Employee was the one who contacted her most regularly.

Miller knows Shaquana Carter because they used to work in the same office. Around October 2019, Employee informed Miller that she (Employee) was not permitted to contact her and that the Commission only wanted Employee to contact Carter. Miller further testified that it was not abnormal for the Employee Relations team to be assigned to different agencies based on how their team clusters were divided. Miller was not aware of any other District employee being prohibited from speaking with her. Miller stated that she had no reason to believe that Carter could not adequately assist Employee with her HR related matters.

Zimmerman was previously Miller’s supervisor from May 2018 through October 2019. Miller was not aware of any requests by Mr. Zimmerman or any of her other colleagues requesting that Employee refrain from contacting them regarding any employment-related matters.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The undersigned was able to examine both the testimonial and documentary evidence presented by the parties throughout the evidentiary hearing and the documents of record. Employee was suspended for twenty (20) days from her position based on the following charges: (1) three separate charges of Failure/Refusal to Follow Instructions; (2) seven separate charges

⁴¹ Employee’s statement was based on her understanding of a subsection in the proposed regulations provided in regulations 4201.3 of Bates Stamp 145.

for Neglect of Duty; (3) Providing misleading and inaccurate information to superiors; and (4) two separate charges of Conduct Prejudicial to the District Government, all pursuant to Chapter 16 of the District Personnel Manual.⁴²

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 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.

Agency cited four different causes, including several specifications, for its basis to impose a twenty (20) day suspension against Employee. Each charge and associated specifications are addressed in turn below.

Failure or Refusal to Follow Instructions

Employee was charged with Failure or Refusal to Follow Instructions for allegations that she failed to comply with rules, written procedures and proper supervisory instructions regarding (i) interactions with officials at D.C. Human Resources; (ii) Spencer's request for Employee to provide him with a training and travel document; and (iii) Spencer's request for Employee to provide him with a docket sheet and other related materials.

Interactions with DCHR

The first specification regarding this charge centers on Agency's assertions that Employee failed or refused to follow Spencer's instructions regarding her interactions with officials at DCHR. While Agency does not cite a specific regulation in reliance on this charge, it can be deduced that it is based on DPM § 1607.2(d)(2), which cites as cause "Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions."⁴³ Spencer testified that this policy was for everyone at the Commission, including himself, to contact certain people at DCHR for assistance with certain matters.

⁴² Bates Stamp 36-54.

⁴³ In its Advance Notice of Proposed Suspension, under the "Explanation of Cause of Action" section, Agency sets forth this cause as "deliberate" rather than the "negligence" charge.

Shortly after Employee's return from detail to the Commission on September 30, 2019, she received an email from Haydn Demas ("Demas") informing her that Demas was acting as the ADA coordinator regarding the interactive process for Employee's reasonable accommodation request. Because the Commission was a newly-formed independent agency and did not have a designated ADA coordinator, Spencer requested that Demas serve in this capacity.⁴⁴ Demas also attempted to schedule a time to discuss Employee's ADA needs; however, Employee requested that the meeting be postponed until further notice. In Employee's October 3, 2019 email requesting that the meeting be postponed, she copied DCHR's Director, Ventris Gibson.⁴⁵ In response, Spencer reminded Employee that the Commission was an independent agency and that the Commission would be entering into a MOU outlining the services that DCHR will provide to the Commission. Spencer instructed Employee to refrain from including DCHR's director on future email communications.

After Spencer instructed Employee not to communicate with individuals at DCHR, Employee continued to do so although Spencer could not name all the individuals with whom Employee may have spoken to within DCHR.⁴⁶ In an email thread between October 9-11, 2019, Employee informs Spencer that she was consulting with Jacinda Miller about issues and concerns she had regarding her FMLA.⁴⁷ In an October 10, 2019 email, Spencer responded and told Employee not to contact Ms. Miller and that he would find out who the Commission's assigned employee relations contact person was at DCHR and let her know. Later that day, Spencer notified Employee that Ms. Carter was the Commission's DCHR contact for employee relations matters. Spencer testified that the Commission itself did not designate Ms. Carter as the contact person, rather DCHR designated Ms. Carter as the Commission's contact person and Spencer relayed this information to Employee.⁴⁸

Employee acknowledges that she continued to reach out and attempt to work with Miller after Spencer instructed her to only contact Carter. Employee initially began working with Miller regarding an FMLA request while she was detailed with DHCD. Her request was initially denied by DHCD; however, Miller was able to assist Employee with this FMLA request and get DHCD's denial overruled. Employee found Miller to be helpful for various HR related issues while she was on detail and found comfort in contacting her after returning to the Commission.

After returning from her detail and while working with Miller on HR related issues, Miller went out on a leave for a short period of time. While Miller was out on leave, Employee was put in contact with Shaquana Carter ("Carter"). Employee was initially hesitant to share some of the confidential details with Carter regarding her HR matters, but she eventually engaged with Carter regarding her issues. Employee testified that she later learned that Carter contacted Spencer about her confidential HR issues.

After learning that Carter had shared confidential information with Spencer, Employee believed she could no longer continue to speak with Carter because she felt it would create a

⁴⁴ See Bates Stamp 68-69.

⁴⁵ Bates Stamp 68.

⁴⁶ Tr. Vol. 1 at 58.

⁴⁷ See Bates Stamp 71-76.

⁴⁸ Tr. Vol. 1 at 60-61.

conflict of interest because Carter was a potential witness in her pending and/or future employment litigation regarding Spencer. Employee communicated this concern to Spencer; however, Spencer did not believe this was a sufficient reason for Employee to claim that Carter could not assist her with employee relations matters.⁴⁹ Spencer further indicated that it was the Commission's policy for Employee to only contact Carter at DCHR for "employee relations matters" and continued to prohibit Employee from speaking to Miller.

Here, Spencer testified that DCHR designated Ms. Carter as the Commission's contact person for employee relations matters for all employees of the Commission. There is no testimonial or documentary evidence in the record to reflect this designation by DCHR other than Spencer's own testimony. The only DCHR representative who testified in this matter was Miller, who is an Employee Relations Specialist with DCHR. Miller testified that she provides guidance to all District government employees and agencies on a variety of HR related matters. Miller engaged with Employee on a regular basis on a variety of HR issues and never requested that Employee cease contacting her.⁵⁰ Miller was also unaware of anyone else within DCHR requesting that Employee cease any contact with her.⁵¹ I found Miller's testimony extremely credible and helpful in assessing the issues presented.

While Spencer testified that it was DCHR who assigned Carter to assist with the Commission's employee relation issues, Miller, the only person to testify from DCHR, did not indicate that she was prohibited from speaking with Employee. Spencer's prohibition on Employee from speaking with anyone other than Carter at DCHR seems to have been a unilateral position taken by Spencer and it is unclear why this restriction was imposed. Miller's testimony evinces that other people besides Carter were willing to assist Employee with her FMLA and other HR related issues. To the extent that Agency maintains that Employee's contact with Miller and other individuals within DCHR impaired its ability to enter a MOU with DCHR for HR related issues, I find this argument unpersuasive. Spencer testified that he initially began discussions with DCHR in March of 2019 to handle HR related issues for the newly formed independent agency. As of the date of the evidentiary hearing—November 4-5, 2020—Agency had yet to enter a MOU with DCHR.⁵² I find that the HR issues raised by Employee to Miller or anyone else within DCHR—regardless of Employee's persistence—was not the cataclysm for the Commission's inability to enter a MOU with DCHR.

Employee's explanation for continuing to reach out to Miller despite Spencer's instructions to only contact Carter was reasonable under the circumstances. The FMLA issue that Employee was attempting to sort out with DCHR required her to divulge sensitive and confidential information. Employee testified that the sensitive information she provided to Carter was relayed to Spencer. Spencer's testimony seems to corroborate this fact.⁵³ Employee felt this breach of confidentiality created a conflict of interest and she no longer felt comfortable speaking with Carter. Employee also felt this breach of confidentiality would make Carter a potential witness in ongoing discrimination litigation in other forums. Because of the apparent

⁴⁹ See Bates Stamp 71-72

⁵⁰ Tr. Vol 2. at 248.

⁵¹ Tr. Vol 2. at 254.

⁵² Tr. Vol. 1 at 189.

⁵³ Tr. Vol. 1 at p. 63, 191.

conflict of interest with Employee continuing to speak with Carter, and Spencer's treatment of Employee's concerns to a sensitive matter, I find that Employee was justified in continuing to speak with Miller who was willing to assist with her FMLA issues.

Furthermore, Agency also maintains that Employee failed to follow Spencer's instructions regarding her contact with DCHR's Director, Ventris Gibson, General Counsel, Gregory Evans, and Associate Director for Policy, Justin Zimmerman; however, the record does not reflect that Employee contacted these individuals after Spencer's October 22, 2019 email.⁵⁴ Accordingly, this specification associated with Agency's charge for "Failure or Refusal to Follow Instructions" cannot be sustained.

Request for Employee to provide a training and travel document

The second specification under this charge stems from Agency's assertion that Employee failed to complete a Training and Travel Request form for Judge Gregory as instructed by Spencer. Based on the testimonial and documentary evidence presented, this specification results from Spencer's dissatisfaction with the various revisions pertaining to Gregory's baggage and per diem on the training and travel form completed by Employee. I find this specification and the associated charge to be without merit.

In an October 8, 2019 email, Spencer informed Employee that one of her new duties would be to coordinate travel arrangements, reconcile travel records, and the like.⁵⁵ Here, Spencer tasked Employee with completing a training and travel form for Gregory who was scheduled to attend a conference in October of 2019. Spencer instructed Employee to complete a one-page training and travel request form relating to Gregory's travels. Agency's charge is based on the assertion that Employee failed to correct and complete the training and travel form and provided the incorrect dollar amounts for the baggage and per diem for Gregory's travels. The record demonstrates that Employee provided Spencer at least three versions of the training and travel form, although Spencer found none of the iterations correct.⁵⁶ Upon review of the documentary and testimonial evidence, the record is still unclear as to what the correct dollar amount should have been for Gregory's baggage and per diem allotment.

As Spencer states in an October 18, 2019 email, he instructed Employee to put all of the dollar amounts in the "Total Cost on Travel/PCard" column and that Gregory had "already booked everything and needed to get reimbursed."⁵⁷ It appears that at least one version of the training and travel form provided by Employee listed \$30 for the baggage fees.⁵⁸ However, Spencer believed that amount should have been \$60 "because it was probably \$30 each way" for the bag.⁵⁹ Despite Spencer having asserted that Gregory was seeking reimbursement for this expense, the record does not reflect any receipts provided by Gregory that would have relieved Employee from guessing the dollar amount owed for Gregory's baggage. The record is also

⁵⁴ Bates Stamp 269.

⁵⁵ Bates Stamp 132.

⁵⁶ See Bates Stamp 101, 107, and 193.

⁵⁷ Bates Stamp 232

⁵⁸ Bates Stamp 101

⁵⁹ Tr. Vol 1 at 160.

devoid of any baggage fee policy by the airline used by Gregory during her travels. The record reflects that Employee was left to guess the dollar amount for Gregory's baggage fees. Without this information, Agency imposed unreasonable barriers for Employee to obtain the appropriate information pertaining to Gregory's baggage, particularly Spencer prohibiting Employee from speaking with Gregory about the training and travel form.⁶⁰

In addition to Gregory's baggage fees, Spencer also stated that the per diem amount listed on the form was incorrect. One of the main issues with Gregory's per diem according to Spencer was his contention that a person is not entitled to a full per diem if the conference registration includes certain meals. If a conference registration includes meals, then that amount should be deducted from the traveler's per diem. Additionally, the per diem for the first and last day of travel is only 75% of the published per diem rate. While Spencer's testimony regarding per diem is generally true, his rationale for taking adverse action against Employee for this specification fails to consider the exceptions provided in the District's regulations regarding per diem for employees on travel.⁶¹ These exceptions leave open the possibility that a traveling employee may be entitled to the entire per diem.

Without addressing the exceptions provided in the regulations regarding per diem, Spencer felt that Employee should have been able to determine that Gregory's per diem amount should have been reduced because meals were included as part of Gregory's registration fee.⁶² Spencer believed that the "major hints" he provided Employee should have led her to figuring out the correct dollar amount for Gregory's per diem. By continuing to engage in a guessing game with Employee and providing "major hints" regarding Gregory's per diem, Spencer made Employee's task of completing the training and travel form unreasonably difficult. The record is devoid of the actual per diem amount that Gregory was entitled, thus it is unclear what dollar figure should have been provided in the per diem section. To help "guide" Employee in completing the travel form, Spencer provided Employee documents that contained "proposed" amendments to the District's regulations on travel and related expenses.⁶³ Under Section 4227 of

⁶⁰ Tr. Vol 2. at 93; Tr. Vol 2 pp. 87-89; *See also* Vol 2. Tr. pp 23-24.

⁶¹ Interestingly, in the Advance Notice of Proposed Suspension, Spencer cites to the proposed regulation section that addresses when per diem should be reduced when a meal is furnished as part of registration fees. However, he stops short of addressing the following section that speaks on the exceptions to this general policy. *See* Bates Stamps 22.

⁶² *See* Bates Stamps 113-124 (Luncheons listed as part of the itinerary)

⁶³ Bates Stamp 141-185. It is unclear why *proposed* amendments to District regulations were provided to Employee to help "guide" her in preparing the training and travel form for Gregory when there were regulations in effect during the relevant time periods which addressed travel policies for District government employees. The language in the proposed amended regulations and the regulations in effect at the time are identical; the only difference is the section number in the District Personnel Manual ("DPM"). For purposes of this decision, the undersigned will provide an analysis of the proposed regulations which were provided as "guidance" to Employee (*See* Bates Stamp 159). Under the proposed amended regulations, § 4227.5, provides:

Notwithstanding § 4227.4, an agency may, at its discretion, allow an employee to claim the full daily meal and incidental expense rate even if a meal is furnished by the government or included in a registration fee or as part of another event or activity that the employee is attending if:

- (a)(1) The employee is unable to consume the furnished meal because of a medical requirement or religious belief;
- (2) The employee made a reasonable effort to make an alternative meal arrangement, but was unable to do so; and
- (3) The employee purchased a substitute meal in order to satisfy his or [her] medical requirement or religious belief; or

the proposed regulations, a formula is provided to calculate per diem when meals are provided as part of a registration fee.⁶⁴ However, without considering the exceptions to the general policy on per diem, any dollar amount listed by Employee was still subject to being inaccurate. The undersigned declines to partake in a guessing game regarding the correct per diem for Gregory's October 2019 travels without the consideration of any potential exceptions.

The record is clear that Employee attempted to complete the single-page travel form that is a subject of this adverse action. Employee's efforts to accurately complete the travel and training form appear to have been hampered by Spencer prohibiting Employee for speaking directly with the Gregory. While Gregory's testimony does not explicitly state that Employee was prohibited from speaking with her, she does recall an occasion where Employee sought to ask her a question about the travel form. In response to Employee's question, Gregory stated that she needed to speak with Spencer because the nature of the question was beyond her understanding.⁶⁵ Spencer's restriction of Employee speaking with the actual traveler—Gregory—initiated a guessing game that Employee was forced to partake in regarding the correct amount of baggage fees and per diem. Spencer declined to allow Employee to speak with Gregory so that she could adequately complete the single-page document with two simple dollar amounts: baggage fees and per diem. Instead, Spencer sent Employee Gregory's previous travels documents from another conference, to help "guide" Employee in completing the new travel form. Spencer also provided Employee approximately 55-60 pages of material that he insisted would help her in completing the travel form.

The undersigned finds that the restrictions imposed on Employee regarding the training and travel form were unreasonable and unnecessary. Despite not having provided the correct dollar amounts for baggage and per diem sought by Spencer, the record demonstrates that Employee put forth a good faith effort in completing the single page document regarding Gregory's travels. I find that Agency has failed to meet its burden that Employee "failed to follow instructions" pertaining to the training and travel form, specifically regarding the baggage fees and per diem. Accordingly, I find that Agency has not satisfied its burden that Employee failed to follow instructions regarding Gregory's training and travel form.

*Request to provide a docket sheet and other related materials.*⁶⁶

The third specification under this charge stems from Agency's assertion that Employee failed to provide Spencer a docket sheet that he requested Employee prepare and provide to him. Spencer's request came after Employee handled a phone call from a constituent, Mr. Sams, requesting all filings made in a particular case. Initially, Sams requested to speak with Ms. Miles; however, she was not in the office that day. To document Mr. Sams' request, Employee sent a voicemail to Miles explaining what Mr. Sams had requested. Shortly after this phone call, Employee also sent an email to Spencer summarizing the call and indicated that because Mr.

(b)The employee was unable to take part in the meal furnished by the government or included in a registration fee or as part of another event or activity that the employee is attending due to the conduct of official business.

⁶⁴ Bates Stamp 158-159.

⁶⁵ Tr. Vol. 2, pp. 23-24.

⁶⁶ Bates Stamp 290-291

Sams was not an attorney of record for the case, she needed to verify what information she was authorized to provide him. Employee then went into the Commission's Quickbase system to research the case further, but she had never prepared a docket list before and needed to inquire about the format in which such document should be prepared. Employee asked Spencer how he would like for her to handle Mr. Sams' request.

In response to Employee's email, Spencer instructed Employee to prepare and provide him (Spencer) the docket sheet or any other information requested by Mr. Sams. Employee responded that the docket sheet was prepared by Ms. Miles and that Mr. Sams was provided a copy. Because Miles informed Employee that there was nothing else that needed to be done regarding Mr. Sams' request, Employee did not believe that she needed provided anything further to Spencer.

I find Employee's response to Spencer's request for the docket list requested by Mr. Sams to be credible. The following day, once the docket list was provided to Mr. Sams, it was not clear that Spencer was still requesting a copy from Employee. After Employee was informed that Miles had provided this document to Mr. Sams, Employee did not believe that anything further needed to be completed on her end regarding the docket list. Spencer testified that he wanted Employee to complete the docket list requested by Sams even after it was provided to him to ensure that Employee knew how to complete such a task in the event it came up in the future. However, the record does not show that Employee truly understood that the requested docket list needed to be provided to Spencer despite it already being provided to Sams. Thus, I find that this specification related to the charge of "Failure or Refusal to follow instructions" cannot be sustained.

Neglect of Duty

Employee was charged with Neglect of Duty for the following allegations: (i) failure to carry out duties or responsibilities as would be expected of a reasonable individual in the same position when Employee did not provide a docket sheet and other related materials as requested; (ii) failure to carry out duties or responsibilities as would be expected of a reasonable individual in the same position when Employee did not complete a training and travel document; (iii) failure to carry out duties or responsibilities as would be expected of a reasonable individual in the same position when Employee did not provide a training and travel document to her supervisor, Spencer, as requested; (iv) failure to perform assigned tasks or duties regarding docket sheet and other materials; (v) failure to perform assigned tasks or duties regarding failure to complete training and travel forms in accordance with guidelines; (vi) failure to perform assigned tasks or duties regarding failure to give her supervisor, Spencer, training and travel forms as requested; and (vii) Undue delay in completing assigned tasks or duties when Employee failed to timely submit a training and travel document after being given reasonable extensions and direction.

Failure to carry out duties or responsibilities as would be expected of a reasonable individual in the same position regarding a docket sheet and other related materials as requested—(i) and (iv)

As explained above regarding the docket sheet and other related materials, I find that Agency has failed to establish cause for the charge. The analysis set forth above also applies here.

Failure to carry out duties or responsibilities as would be expected of a reasonable individual in the same position regarding the training and travel document—(ii), (iii), (v), (vi), and (vii)

The same analysis set forth above regarding the training and travel documents under “Failure or refusal to follow instructions” apply here. I find that Employee made a good faith effort to complete the training and travel documents assigned to her. For the reasons explained above, I find that the charge for neglect her duty pertaining to the training and travel documents fails.

Providing misleading and inaccurate information to superiors

OEA has held that to sustain a falsification charge, an “agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency.”⁶⁷ In the instant case, this charge stems from a single specification regarding Employee’s task of completing the travel and training form on behalf of Gregory. While Agency does not cite to any District Personnel Manual (“DPM”) section it is relying upon, it can be deduced that it is relying on § 1605.4—False Statements, including knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any supervisor.

Ample testimony was provided regarding Employee’s assignment to complete a training and travel form for Gregory’s travels. As the basis for this charge, Agency cites to an October 18, 2019 email, in which it maintains that Employee provided “several misleading statements.”⁶⁸ Specifically, Spencer believed that Employee’s email was misleading when she stated that she was not aware or advised that she was the travel officer for the Commission and that a travel officer role was not identified in her position description. Employee also stated in an email that she had not received training or hands-on experience that would qualify her to be a travel officer on behalf of the Commission. Spencer also believed that these statements were misleading because Employee made it appear that one had to be a travel officer to do the assignment that Employee was tasked with it. Spencer acknowledged that an employee could complete their own travel form or that a travel officer could complete the form for another individual. However, Spencer felt that if Employee had read the documents provided with the training and travel form, she would have known that she did not need to be a travel officer to complete the assignment related to the travel forms.

⁶⁷ *Charis Toney v. Department on Disability Services*, OEA Matter No. 1601-0053-16 (February 21, 2018). Citing to *John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); See also *Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

⁶⁸ See *Bates Stamp 230-231*; See also *Bates Stamps 19* (Advance Notice of Proposed Suspension); See also Tr. Vol 1. at 112.

I do not find Employee's statements in her October 18, 2019 email to be an intentional effort to defraud, deceive, or mislead Spencer. I found Employee's testimony regarding her understanding and interpretation of the documents associated with the training and travel form credible. Employee's explanation regarding these documents was rational and reasonable under the circumstances. Employee had never completed this type of travel form previously where she was required to do the calculations needed to generate the dollar amount required for baggage and per diem. Employee was provided over 50 pages of documents to serve as a "guide" to completing a single-page form. A mere misunderstanding of the travel regulations and associated documents that Employee was tasked with interpreting does not equate to an intentional or misleading statement to a superior. Employee expressed her concerns in providing a dollar amount pertaining to baggage and per diem given the unnecessary hurdles implemented by Spencer. I find that Employee's misunderstanding of what was being asked of her under the circumstances reasonable. Accordingly, I find that Agency has failed to establish that Employee provided misleading or inaccurate information to her superior.

Conduct Prejudicial to the District Government

Employee was charged with Conduct Prejudicial to the District Government for allegations that she was unprofessional and exhibited distracting behavior when she failed to adhere to direct instructions regarding contacts with officials at D.C. Department of Human Resources. This charge is also based on Agency's assertion that Employee exhibited unprofessional and distracting behavior when she carried herself "in such a rude and unprofessional manner in a working meeting" that caused the meeting to be canceled.

Contact with DCHR

Regarding Employee's contacts with DCHR officials, the same analysis set forth above under "Failure or Refusal to Follow Instructions" applies here. Employee's explanation for continuing to reach out to Miller was reasonable under the circumstances. To the extent that Agency maintains that Employee's contact with Miller and other individuals within DCHR was prejudicial to its ability to enter a MOU with DCHR for HR related issues, I find this argument unpersuasive. I further find that Employee's contact with DCHR officials was not an obstruction to Agency's ability to enter a MOU with DCHR and thus not prejudicial to the District government.

Work meeting

Regarding Agency's assertion that Employee exhibited unprofessional and distracting behavior when she carried herself in a rude and unprofessional manner in a meeting, I find that this charge must also fail. The meeting referenced in this specification centers on the meeting held between Employee, Spencer, and Gregory where Spencer wanted to speak with Employee about the training and travel assignment. Spencer described Employee's behavior during this meeting as "belligerent" and "rude." I find that Agency has failed to meet its burden regarding this charge and associated specification.

The contentious history between Spencer and Employee is clear throughout the record. Exacerbating their relationship were complaints of harassment and a lawsuit filed by Employee against Spencer in D.C. Superior Court.⁶⁹ All three eyewitnesses who were in attendance to this meeting testified— Spencer, Employee and Gregory. All agree that it was a very brief meeting. Spencer described Employee’s behavior as “rude” and “belligerent” while Employee maintains that she became “upset” but was “holding it together.”⁷⁰ Most credible out of the three eyewitnesses, was Gregory who described Employee as “very frustrated.”⁷¹ While Spencer was questioning Employee, she asked to go get some water, and this caused Spencer to end the meeting. Based on consideration of the testimony from all three individuals present, I do not find Employee’s “behavior” in this meeting to be prejudicial to the District government. Given the contentious history between Employee and Spencer, it is understandable that Employee became upset in this meeting that she initially believed was regarding a disciplinary action. As such, I find that Agency has failed to meet its burden that Employee’s conduct at this meeting was prejudicial to the District government.

Due Process

Employee argues that her due process rights were violated because Spencer served as the proposing official and deciding official. However, DPM § 1623 provides that a proposing official may not serve as the deciding official for the same matter, *except when the size of the agency mandates otherwise*. Here, given the Commission’s small size of approximately eight to nine employees, I find that Spencer serving as the proposing and deciding official does not violate the spirit of the DPM. Accordingly, I find that Employee’s Due Process claim is without merit.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency’s decision to suspend Employee for twenty (20) workdays is **REVERSED**;
2. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of her twenty workday suspension; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge

⁶⁹ Tr. Vol. 2 at 61; *See also* Petition for Appeal, Attachments (D.C. Superior Court Complaint).

⁷⁰ Tr. Vol. 2. at 104.

⁷¹ Tr. Vol. 2 at 7.