THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	
Employee	)	OEA Matter No. 1601-0033-23
	)	
v.	)	
	)	
D.C. DEPARTMENT OF CORRECTIONS	)	Date of Issuance: June 7, 2024
Agency,	)	
	)	Michelle R. Harris, Esq.
	)	Senior Administrative Judge
	)	

Jenatt P. Henry, Esq., Employee Representative
Connor Finch, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 8, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Corrections' ("Agency" or "DOC") decision to terminate him from his position as a Sergeant (Correctional Officer), effective February 10, 2023. Following a letter from OEA dated March 9, 2023, requesting an Agency Answer, Agency filed its Answer on April 5, 2023, This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on April 5, 2023. On April 6, 2023, I issued an Order Convening a Prehearing Conference in this matter for May 17, 2023. Prehearing Statements were due on or before May 10, 2023. On May 9, 2023, Agency filed a Consent Motion to Continue the Prehearing Conference and Extend Deadlines. Agency cited therein that an additional sixty (60) days were needed for the parties to engage in and complete discovery in this matter. Further, that Motion requested the Prehearing Conference be rescheduled to July 2023.

On May 11, 2023, I issued an Order granting Agency's Motion. The Prehearing Conference was rescheduled to July 20, 2023, and Prehearing Statements were due on or before July 7, 2023. On July 6, 2023, Agency filed a Second Consent Motion to Extend. Agency cited that the parties needed more time for discovery and requested an extension through August 2023. On July 11, 2023, I issued

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

an Order granting the Motion, in part. That Order converted the July 20th Prehearing Conference to a Status Conference so that the undersigned could inquire further about the parties' request for another extension of time.

On July 20, 2023, both parties appeared for the Status Conference as required. The parties described the schedule conflicts that currently were preventing the completion of discovery and renewed their request for more time. Following that conference, I issued a Post Status Conference Order that same day which required the parties to provide Status Update regarding discovery on or before August 21, 2023. That report required the parties to include all information about the status of depositions at that time and any other outstanding discovery. Further, that Order noted that the undersigned would issue an Order rescheduling the Prehearing Conference following the receipt and review of the status update. On August 21, 2023, the parties filed a Joint Motion to Extend the Deadline to submit the Status Update. The parties requested time up to August 28, 2023. On August 22, 2023, I issued an Order granting the Joint Motion and required the status update be due on or before August 29, 2023. The parties filed the Status Update as required. The parties explained therein that discovery had been completed and depositions had been conducted. Further, the parties cited that they were awaiting the transcripts from the depositions and would submit Prehearing Statements by September 29, 2023. On August 30, 2023, I issued an Order scheduling a Prehearing Conference for October 5, 2023. Prehearing Statements were due on or before September 29, 2023.

On October 5, 2023, a Prehearing Conference was convened in this matter. A Post Prehearing Conference Order was issued on the same day, and the parties were ordered to submit briefs in accordance with the briefing schedule agreed upon during the conference. Agency's brief was due on or before November 13, 2023. Employee's brief was due on or before December 18, 2023, and Agency had the option to submit a sur-reply brief by January 12, 2024. Agency submitted its brief as required. On December 8, 2023, Employee filed a Consent Motion to Extend the briefing schedule, citing to schedule conflicts with another matter pending before this Office. On December 12, 2023, I issued an Order granting Employee's Motion. Employee's brief was now due on or before December 22, 2023, and Agency had the option to submit a sur-reply brief by January 19, 2024. Both Employee and Agency submitted their respective briefs by the prescribed deadlines. Upon review of the record and submissions of the parties, I have determined that an Evidentiary Hearing is not warranted. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. Whether Agency followed all applicable laws, rules and regulations in its administration of the adverse action; and
3. Whether the penalty of termination was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 631.2 *id.* states:

For appeals filed under §604.1, 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.

SUMMARY OF PARTIES' POSITION

Agency's Position

Agency contends that there was just cause for the adverse action levied against Employee, and that the penalty of termination was appropriate. Agency asserts that "on August 19, 2022, Employee slept on duty while monitoring a point of ingress and egress of a secure DOC facility…[t]hrough his misconduct, Employee put the safety and security of inmates, his coworkers and the public at risk."[2] Agency cites that Employee "served as a Lead Correctional Officer (LCO) for DOC with the rank of Sergeant from February 12, 2012, until he was removed."[3] Agency further asserts that Employee's job duties included responsibilities for ensuring the "safety and security of inmates in DOC's custody and providing guidance to lower rank Correctional Officers." Agency cites that Employee was assigned to the loading dock at the Central Detention Facility ("CDF"). He was responsible for "ensuring all doors and gates were operable, ensuring that the Loading Dock Area was clear of inmates, inspecting all vehicles entering the loading dock area, x-raying packages entering the CDF, preventing escapes, overseeing trash operations, monitoring all deliveries, maintain the logbook of all loading dock activities, and acting as a first responder in accordance with DOC's sexual abuse, assault and misconduct policy."[4]

Agency asserts that on August 19, 2022, "Employee assumed his post at 6:00am as noted in the logbook that he maintained. In the logbook, he noted a series of deliveries and security checks from 6:00am through 2:00pm." [5] However, Agency cites that what Employee did not note "was that at approximately 9:30am two representatives of the United States Marshals Service (USMS), John Gradiska and James Burgess, entered the Loading Dock Area." Agency contends that Employee did "not log their presence because, as both Mr. Gradiska and Mr. Burgess observed, Employee was asleep…Mr. Gradiska took a photograph of Employee while he slept and emailed that photograph to Gloria Robertson, Agency's Compliance Review Officer."[6] Agency avers that in response to the email sent by Mr. Gradiska,"Employee completed an Employee Report of Significant Incident/Extraordinary Occurrence ("Incident Report") documenting what happened." Further, Agency argues that "Employee did not dispute the allegation that he was sleeping, writing that he was "extremely exhausted" and that [he] had dozed off for a few minutes." Agency further cites that on August 25, 2022 "Major Namon

[2] Agency's Brief at Page1. (November 13, 2023).
[3] *Id.*
[4] *Id* at page 2.
[5] *Id*.
[6] *Id.*

Reid III proposed that Employee be suspended for 5 days for neglecting his duty in violation of 6-B DCMR § 1607.2 (e), and violating DOC Policy and Procedure 3300.1F, Employee Code of Ethics and Conduct, Section 11 (a). The proposed suspension did not reference Section 10(p) of that policy which specifically addresses sleeping or dozing while on duty."[7] Agency asserts that on September 6, 2022, "DOC Director Thomas [sic]Foust[8] issued a memorandum to All Corrections Staff" stating that, consistent with DOC Policy 330.1E, Employee Code of Ethics and Conduct, Section 10(p), sleeping at an assigned duty "was a major rule violation."[9] Additionally, that memorandum cited that it would be "cause for termination." Agency also avers that on that same day (September 6, 2022), "Major Reid rescinded the proposed 5-day suspension." Agency asserts that "no final, reviewable action was ever taken as to the proposed suspension, nor has a hearing ever convened to consider the merits of the proposed action."[10]

On November 16, 2022, Agency issued its Advance Notice of Proposed Removal ("Advance Notice"). Agency maintains that the Advance Notice charged Employee with "1) prejudicial conduct, 2) failure/refusal to follow instructions, 3) neglect of duty, and 4) violations of DOC internal policies regarding sleeping or being inattentive and prejudicial conduct."[11] Agency asserts that "two days later, Agency provided the Advance Notice and supporting documentation" to the Hearing Officer assigned to this matter."[12] Agency maintains that Employee responded to the Advance Notice through his union and argued that the proposed termination was improper due to the earlier proposed suspension and that the penalty was too harsh. Agency contends that Employee "did not dispute that he engaged in the misconduct." Agency further notes that on January 9, 2023, the Hearing Officer completed the review and agreed that Agency had established cause for discipline, but noted that Agency should reconsider the *Douglas* factors "finding that some of the factors were not supported by sufficient analysis and that the factor addressing length of service was misapplied."[13] Agency asserts that "Director Faust addressed [Hearing Officer's] concerns regarding the application of the *Douglas* factors by fully explaining Agency's reasoning to all factors…[n]otably, Director Faust properly determined that Employee's tenure at DOC was a mitigating factor, but the severity of Employee's conduct still supported the proposed penalty of termination."[14]

Agency further asserts that it had cause to discipline Employee and that there is no doubt that Employee committed the acts based on his own admissions and photographic evidence. Agency also contends that "because Employee was on a post guarding a point in ingress and egress from DOC's facility, his inattention put the security of the institution at risk, constituting a "major rule violation."[15] Agency argues that it does not "need to demonstratively show the employee is asleep because that is "practically impossible." Agency avers that "Employee admitted that he "dozed off for a few minutes" while on duty and the photographic evidence shows Employee leaning back with his eyes closed…[t]o doze is to sleep lightly, and both dozing and sleeping expressly violate DOC Policy 3300.1F."[16] Agency contends that Employee committed a major rule violation "of the rules to sleep at a *post* if sleeping at the post would put the institution, inmates or employees at risk…[t]here is no exception for

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[7] *Id*. at Page 3.
[8] Agency refers to the Director initially as "Foust" and later as "Faust". The undersigned finds that this is the result of a typo, and that the Director's last name is spelled as "Faust" as cited in Agency's Exhibit 11 – September 6, 2022, Memorandum.
[9] *Id.*
[10] *Id.*
[11] *Id*. at Page 4.
[12] *Id.*
[13] *Id.*
[14] *Id*. at Page 5.
[15] *Id.*
[16] *Id*. at Page 6.

times when the immediate prospect of a security incident at the post is relatively low."[17] Agency also asserts that Employee's actions evince a failure to carry out rules and follow supervisory instructions in violation of 6-B DCMR §1607.2(d), as well as neglect as noted in §1607.2(e). Agency also avers that Employee violated §1607.2(a)(4) because "District regulations require discipline when an employee engages in on-duty conduct that an employee should reasonably know is a violation of law or regulation." Agency asserts that "sleeping on duty violates both District regulations and DOC policies" and as a result, Employee engaged in conduct prejudicial to the District Government.[18]

Agency maintains that it followed all applicable laws in its removal of Employee from service, and that there was no harmful procedural error. Agency avers that Employee was provided due notice and opportunities to respond, and that it was reviewed by a neutral Hearing Officer. Further, Agency asserts that the five (5) day proposed suspension is immaterial to OEA's review.[19] Agency argues that "OEA cannot directly review the proposed 5-day suspension because its review is limited to final agency decisions, not proposed disciplinary actions." Additionally, Agency cites that the "District's regulation governing proposing adverse action, like its federal counterpart, does not explicitly address the question of the recission of a proposed adverse action by a proposing official before adverse action is taken."[20] Agency refers to the Merit Systems Protection Board's ("MSPB") findings that "while an agency may not punish an employee twice for the same offense, there is no error in an agency reconsidering a proposed action before imposing it." Agency avers that "deviation from the MSPB authority establishing that an agency may rescind proposed actions without precluding a new action based on the same facts would be highly detrimental to both the efficiency of Agency operations and its employee." Further, Agency asserts that "DOC must, consistent with statute, be ultimately under the command of its Director." As such, Agency argues that "the Director cannot maintain control of Agency as required by statute if, by proposing a minor penalty for serious misconduct, a single lower-ranking manager could bar consideration of adverse action by senior managers with the authority to consider adverse action."[21] Agency also argues that "even if the proposed and rescinded suspension was improper, it is not a basis for reversing Agency's Final Decision because it did not prejudice Employee…[t]he rescinded corrective action did not prejudice Employee because Agency never finalized the action, such that it did not [sic] in affect Employee's rights in anyway."[22]

Agency contends that "the selection of penalty is a matter of management prerogative and must be left undisturbed when it is within the law, is based on consideration of the relevant factors, and is not clearly an error of judgment." Agency maintains that its actions were legitimate and warranted given the Agency's "clear orders for the procedures required to safely and securely fulfill DOC's critical mission, and Employee held a leadership position entrusted to execute these procedures."[23] Further, Agency cites that Employee's conduct was serious and warranted adverse action. With regard to any notions of disparate treatment, Agency avers that Employee has not provided evidence of such as required to establish a disparate impact claim.[24] Agency asserts that Employee did not identify "a single comparator who served in the same role and engaged in the type of extensive misconduct that

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[17] *Id.*
[18] *Id.* at Page 6-7.
[19] *Id*. at Page 7 -8.
[20] I*d*. at Page 8.
[21] *Id*. at Page 9-10.
[22] *Id.* at Page 10.
[23] *Id*. at Page 11.
[24] Agency's Sur-Reply brief at Page 4-6. See Page 5 – Agency cites to *Sheri Fox v. Metro. Polic Dep't*, OEA Matter no. 1601-0040-17 (January 13, 2020).

he did…and he did not "establish that he was disciplined by the same supervisor as a comparator employee."[25]

Agency argues that "the undisputed facts, including photographic evidence and Employee's admissions demonstrate that Employee engaged in acts of misconduct for which termination is an appropriate penalty."[26] Wherefore, Agency maintains that its action of termination was appropriate under the circumstances; that it followed all applicable laws, rules and regulations; and that its action of removing Employee from service should be sustained.

Employee's Position

Employee avers that the termination should be reversed or rescinded because "he did not engage in misconduct justifying discipline as alleged and imposed…[t]he security of and safety of coworkers, residents and inmates at DOC were never threatened by [Employee's] work performance and/or the alleged misconduct attributed to him for a single day- August 19, 2022."[27] Employee further asserts that he has worked at Agency for over 20 years and has been rated as a valued performer.

Employee asserts that on August 19, 2022 (the date of the incident) he arrived to work for his usual tour of duty which began at 6:00am. That day, Employee asserts that a Sara Lee truck came to deliver bread prior to 9:00am and that at 9:00am, Employee performed a "security round."[28] Employee cites that following the security round, he returned to his office. Employee avers that "the PA system was on, and he could hear vehicles if they pull up to the loafing [sic] dock, but he was momentarily preoccupied with thoughts of a cousin who was dying from cancer." Further, Employee asserts that his office was "hot with temperatures of about 87-88 degrees and the air conditioning unit was not working but blowing hot air."[29] Employee maintains that "he did not see when the individual from the USMS took the photo, but a co-worker called his name and he rose from his chair." Employee avers that he worked the remainder of his shift that day, and when he returned to work on August 22, 2022, "he learned about the complaint from the USMS and Landerkin relieved him from working on the loading dock and reassigned him elsewhere throughout the jail."[30]

Employee asserts that in his experience "over the years at DOC, officers doze or sleep on the job all the time, mostly on the 4pm-12am and the midnight to 8am shift." Employee further avers that "he recalled incidents when he and a captain came to a unit they couldn't get in initially because the control module officer didn't see to let them in, and they often had to call the sally port or the command center."[31] Employee maintains that in those instances "they would verbally counsel the officer who was suspected to have been sleeping or dozing." Employee avers that the first time he was aware that "DOC management decided to take dozing on the job "seriously" was when Director Faust issued his September 6, 2022, memorandum, and the captain discussed it at roll call."[32]

Employee cites that on August 22, 2022, "Deputy Warden Landerkin forwarded John Gradiska's email with the photograph of [Employee] to Major Reid and requested that he propose

[25] *Id.* at Page 6.
[26] *Id*. at Page 7.
[27] Employee's Brief at Page 1 (December 26, 2023).
[28] *Id.* at Page 2.
[29] *Id.*
[30] *Id.*
[31] *Id* at Page 3.
[32] *Id.*

appropriate discipline for the incident."[33] Employee asserts that "Landerkin discussed with Reid that suspension would be an appropriate recommendation for discipline." Further, Employee asserts that "prior to Reid preparing the advance notice, Landerkin also discussed with Deputy Director Patten that Reid's plan was to propose a 5-day suspension (with Landerkin's concurrence), and Patten concurred." Employee avers that after a Director's meeting was held, which included the deputy directors and two (2) deputy wardens, that "Landerkin told Reid to rescind the advance notice of the propose to suspend [Employee] for 5 days." Additionally, Employee asserts that the Director issued his September 6, 2022, memorandum following the Directors' meeting which was held on September 5, 2022. That memorandum noted that anyone who was found to have been asleep on the job would be terminated, even on a first offense.

Employee maintains that during his tenure with Agency that he was never aware of anyone being terminated for sleeping, dozing, or being inattentive on the job. Further, Employee avers that after his August 25, 2022, advance notice of the five (5) day suspension, there were several incidents of employees sleeping or dozing on job.[34] Employee cites to incidences occurring on August 26, 2022, where two officers were assigned to a medical outpost to watch an actively suicidal and violent inmate. The officers were asleep and didn't know when a technician had entered the room. That technician reported what they saw to the nurse and the nurse went in and found the officers asleep as well. Employee asserts that termination was proposed in October 2022, and that the final termination was issued in December 2022. Another incident occurred in December 2022, where an officer was found to be sleeping and the proposed termination in that matter included the September 6, 2022, memorandum. Employee argues that Agency did not do an appropriate *Douglas* factor analysis in its November 16, 2022, Advance Notice for termination. Employee asserts that while the Hearing Officer assigned to his matter found cause for discipline, that they noted that the *Douglas* Factor analysis "was somewhat cursory and therefore problematic."[35] Employee further avers that Agency "paid lip service" to the Hearing Officer's recommendations to re-examine and reconsider before issuing its final decision and changed its assessments in Factors 3, 4 and 10 of the analysis.

Employee contends that Agency violated applicable laws in the administration of the instant adverse action. Specifically, Employee asserts that he was charged with seven (7) violations of the DPM for the August 19, 2022, incident where it is alleged he had dozed or was inattentive. Employee avers that he did not violate the DOC policies regarding these charges. Employee argues that DOC Policy 3300.1F Section 10(p) includes "sleeping, dozing or being inattentive on a post" all fall under the neglect of duty for which the recommended penalty range is from reprimand to removal.[36] Employee asserts that given that the penalty is a range, "it follows that consideration must be given to the degree and quality of the misconduct, especially for assessing seriousness of the offense."[37] Further, Employee argues that violation of this policy rises to a "major violation where the security of the institution, the inmate population, or other employees is at risk."

Employee maintains that his alleged misconduct on August 19, 2022, "did not put the institution, inmate population, or other employees at risk for their safety." Employee avers that "there were no inmates permitted on the dock level of the jail." Additionally, Employee asserts that "the facility was not at risk either because all the gates were secured; only [Employee] could open the gate

[33] *Id.*
[34] I*d.* at Page 4-5.
[35] *Id.* at Page 6.
[36] *Id*. at Page 7.
[37] *Id*.

from inside the dock." [38] Further, Employee argues that "John Gradiska from the United States Marshal Service (USMS) reported the incident to DOC via email, not by way of a phone call or in person report while he was at the jail, suggesting that he didn't find the incident to be a security risk but surely a matter that should be brought to DOC's attention."[39] Employee also asserts that on August 22, 2022, after the incident, he was removed from his duties on the dock, but "was assigned to work elsewhere in the jail where he would definitely have contact with more people including inmates and employees."

Employee avers that even if it was determined that he had "dozed off for a few seconds, this was apparently a widespread occurrence on the 8:00pm to midnight and midnight to 8:00am shifts at the jail."[40] Employee asserts that sleeping, dozing or being inattentive did not become a "major incident" until after "Director Faust's September 6, 2022, memorandum to all correctional staff with the title "Sleeping While on Duty." Employee maintains that prior to the issuance of that memorandum, that staff were "routinely counseled and in 2021 two officers were suspended."[41] Employee asserts that this new policy "could not change or override or supersede the DPM and even if it had or could have had any effect on discipline, it could only apply prospectively to give fair notice to employees that moving forward any confirmed cases would be cause for termination upon the first offense."[42]

Employee further avers that he did not violate DOC Policy 330.1F, Section 10(p). He maintains that he "executed his duties in accordance with rules, regulations, and accepted practice." He asserts that he did not engage in misconduct that warranted discipline. Furthermore, Employee argues that "even if he closed his eyes for a few seconds, as he explained he could still hear what was going on in and around the dock, which was secured, and he knew that from having completed a security round at 9:00am after he did the bread delivery to culinary staff." Employee avers that for this same reason, he did not neglect his duty. Employee also cites that he did not engage in conduct prejudicial to the District Government. Employee contends that "even if [he] is determined to have closed his eyes or dozed for a few seconds, he did "not reasonably" know that was a violation of law and basis for discipline as practiced at Agency."[43] He again avers that he was not given notice of this policy until the September 6, 2022, memorandum which addressed sleeping while on duty.[44] Employee argues that his "alleged misconduct preceded the Director's memorandum by three (3) weeks)…[a]ccordingly [Employee] did not engage in conduct prejudicial to the District Government.

Employee also avers there was harmful procedural error when Agency did not engage in progressive discipline in the administration of this instant action. Employee contends that the Agency initially proposed a five (5) day suspension for the alleged misconduct. Employee further cites that "Director Faust was so enraged by the negative publicity" that accompanied the issue of the officers who were caught sleeping at the hospital, that he then had a "visceral reaction and determined that all employees already in the pipeline for charges related to sleeping, dozing or being inattentive on the job and all future like incidents, regardless of the degree or circumstances must be terminated for the first violation."[45] Employe also contends that Agency's action was arbitrary and capricious because

[38] *Id*. at Page 8.
[39] *Id*.
[40] *Id*.
[41] *Id*. at Pages 8 – 9.
[42] *Id*.
[43] *Id*. at Page 9.
[44] *Id*. at page 10
[45] *Id*. at Page 10.

the same day that Director Faust issued the memorandum, was the same day that Employee's five (5) day suspension was rescinded.

Employee asserts that the suspension is material because it relates to the reasonableness of the penalty, as well as the arbitrary and capricious nature of the charges.[46] Employee avers that the proposed suspension also "directly contradicts the position Agency later took in the proposal to terminate him, particularly with consideration of *Douglas* Fact 6 where Agency falsely claimed that it proposed termination "in all first offense instances in which an employee admitted to or who has been documented sleeping while on duty."[47] Employee cites that he does not dispute that Agency has "the power to rescind a proposed discipline and subsequently re-charge the employee…[h]owever, the instructive caselaw shows that this has generally occurred in circumstances where there has been a more fulsome follow up investigation and/or new evidence."[48] Employee avers that there was no follow up investigation between the recission of the proposed five (5) day suspension (September 6, 2022) and the issuance of the advance notice of proposed removal (November 16, 2022). Employee avers that the Director "has statutory authority to command Agency"...[h]owever statutory authority does not give the Director authority to change the District's disciplinary process set forth in the [sic] DMP and approved by the CBA with issuance of his September 6, 2022 memorandum that mandated termination for a first offense of sleeping, dozing, or being inattentive on the job, thereby circumventing the DPM and the CBA provisions for progressive discipline and a penalty range of counseling to termination for the offense."[49]

Employee maintains that Agency's action was arbitrary and capricious and that Agency's *Douglas* factor analysis was misapplied. Employee cites that with regard to *Douglas* Factor 1, "assuming that he actually dozed off for a few minutes at his post on the loading dock, it is unreasonable for the Director to conclude that this action fell at the great end on the seriousness spectrum."[50] As a result, Employee avers that termination was not appropriate.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[51]

Employee was employed by Agency as a Lead Correctional Officer. In a Final Written Notice of Removal dated February 6, 2023, Employee was provided notice of termination for the following causes of action: 1) Violation of DPM §1607.2 (a)(4) Conduct Prejudicial to the District Government – On duty conduct that an employee knew or should have known was a violation of law or regulation.; 2) Violation of DPM§ 1607.2 (d) (1) -Failure or Refusal to Follow Instructions – Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions.; 3) Violation of DPM § 1607.2 (e) – Neglect of Duty- "**sleeping or dozing on duty, loafing while on duty**.[52]; 4) Violation of DPM § 1607.2 (m) – Performance Deficits – Failure to meet

[46] *Id.* at Page 11.
[47] *Id.*
[48] Employee's Brief at Page 12.
[49] *Id.* at Page 13.
[50] *Id*. at Pages 14-15.
[51] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[52] The Final Notice included the entirety of the language in this code provision, but emphasized "sleeping or dozing on-duty, or loafing while on 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 an assigned post

established performance standards.; 5) Violation of DPM § 1607.2(n)- Inability to carry out assigned duties.[53]; 6) Violation of DOC Policy and Procedure 3300.1F: Employee Code of Ethics and Conduct Section 10p Personal Accountability.[54]; and 7) Violation of DOC Policy and Procedure 3300.1F: Employee Code of Ethics and Conduct, Section 11a Professional Conduct.[55] Employee's termination was effective February 10, 2023.

ANALYSIS

Whether Agency had cause for adverse action

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. *(Emphasis added).*

Pursuant to OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1602.1 provides that "no employee may be reprimanded, suspended, demoted, placed on enforced leave, or removed without cause." Employee's removal was levied pursuant to the aforementioned causes of action.

Neglect of Duty

OEA has consistently held that there is a neglect of duty where an employee has been found to have failed to carry out duties as expected, careless work habits,[56] and *when an employee has been found to be sleeping or dozing on duty* (emphasis added).[57] In the instant matter, on August 19, 2022, Employee was observed in his office with his eyes closed and leaned back in his chair by two (2) US Marshals who were on site that day. One of the US Marshals, John Gradiska, was able to capture a picture of Employee in this state and emailed the Agency's Compliance Review Officer to report what they witnessed. The photographic evidence in the record clearly shows Employee was sitting with his eyes closed and him leaned back in the chair in his office.[58] Further, there is no dispute that Employee

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[53] "Any circumstance that prevents an employee from performing the essential functions of his or her position, and for which no reasonable accommodation has been requested or can be made, unless eligible for leave protect under the D.C. Family Medical Leave Act."

[54] "Employees shall not sleep or be in an inattentive condition at their assigned duty station. Sleeping or being in an inattentive state at a post where the security of the institution, the inmate population, or other employees is at risk shall be considered a major rule violation."

[55] "No employee shall exhibit conduct that would adversely affect his/her job duties or the efficiency of the agency's operation, or violate any Federal law, municipal ordinance, or regulation of the District of Columbia."

[56] *Karen Falls v. Department of General Services*, OEA Matter No. 1601-0044-12R14 (August 12, 2014). *See also* DPM §

[57] *Martin Harris v Department of General Services*, OEA Matter No. 1601-60-16 (April 5, 2017).

[58] *See.* Agency Brief at Exhibit 7.

was on duty at the time of the incident. Additionally, Employee initially admitted to having "dozed off/closing his eyes for a minute", but later revised that claim citing to fatigue, personal issues, hot temperatures in the room where he was assigned and other environmental factors. The undersigned finds that the photographic evidence along with Employee's initial statements regarding the incident, overwhelmingly invalidates any claim that he was not sleeping/dozing or that "he only closed his eyes for a few minutes." The picture captured by the US Marshals visiting on site that day, clearly reflect Employee sitting in the chair of the office with his eyes closed in a manner that the undersigned believes a reasonable person would find consistent with sleeping and/or dozing, and at the very least, being inattentive to the duties and responsibilities for which he was assigned. The undersigned also finds that Employee's assertions regarding the temperature of the room and the personal matters he was dealing with at that time are not sufficient to support a finding to the contrary. Wherefore, I find that Agency had cause to discipline Employee for Neglect of Duty.

Conduct Prejudicial to District Government & Violation of DOC Policies

For the same reasons previously outlined, the undersigned finds that Agency had cause to discipline Employee for prejudicial conduct. The DOC policy clearly noted that sleeping, dozing or being inattentive on the job was not an acceptable practice. Employee asserts that it was not until Director Faust's September 6, 2022, Memorandum that he was aware that sleeping was a cause for termination, however, I find that the record belies that claim. The DPM and DOC Policies both explicitly cite sleeping and/or dozing as misconduct. I find that given Employee's length of service and position that he knew or should have known that sleeping or dozing on the job was in violation of the DOC policies, as well as the District Personnel Manual regulations. The undersigned finds Employee's argument that his incident "must not have been that serious" since the U.S. Marshals only sent an email with a picture, and that he had initially received a proposed notice of a 5-day suspension, to be wholly misguided and irrelevant. Employee's position responsibilities included the management of the loading dock which the undersigned finds are a part of the overall security measures of the DOC facility. While there might not have been any inmates present at that time, an incidence of sleeping or inattentiveness could result in disastrous effects if for any reason an unauthorized person or persons were able to access the facility. Sleeping and/or dozing is a violation of the DOC policies and the DPM regulations. Wherefore, I find that Agency had cause to discipline Employee for Conduct Prejudicial to District Government for on duty conduct that an employee knew or should have known was a violation of law or regulation. Likewise, I find that Agency has shown cause to discipline Employee for violation of DOC 3300.1F Employee Code of Ethics and Conduct Sections 10p, and 11a.

Failure/Refusal to Follow Instructions/Performance Deficits/Inability to Carry Out Duties

Based upon the aforementioned reasons, I also find that Agency had cause to discipline Employee for failure/refusal to follow instructions. Likewise, I find that because Employee was not participating in his duties as required at the time of the incident, this evinces a deficit of his performance/failure to meet performance standards. The DOC policies, along with the DPM, explicitly note that sleeping or dozing or being inattentive is not acceptable conduct for an employee. Thus, I find that Employee's dozing as captured as witnessed and captured in photographic evidence, clearly demonstrate that he did not meet the established performance standards.

Accordingly, the undersigned also finds that Employee was sleeping/dozing while on the job and therefore was not engaged in behavior conducive to carrying out his duties. Employee's arguments that his actions did not interfere with government operations or that his actions were not "serious" or

put people in danger are wholly unpersuasive. Upon consideration of the aforementioned findings, I find that Agency has met its burden of proof in this matter, and it has adequately proven that there was proper cause for adverse action against Employee.

Whether the Penalty was Appropriate

Based on the above-mentioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[59] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM § 1607; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[60] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[61]

Disparate Treatment

Employee raised a disparate treatment argument in his assertions regarding Agency's examination of *Douglas* Factor 6 and averred that prior to Director Faust's September 6, 2022, Memorandum, that other employees who were sleeping or loafing were not penalized with removal.[62] Employee asserted that in 2021, there were two correctional officers who received suspensions for sleeping or loafing. Further, Employee asserted that the proposed terminations for other officers who were disciplined for sleeping or loafing were those involved with: 1) an incident where an officer "who fell asleep on August 26, 2022 at Washington Hospital Center, with his weapon visible while guarding a suicidal patient/inmate; and 2) "relates to the employee who fell asleep on September 8, 2022, in the medical supply closet in the Infirmary and did not wake up even though a few people came through to get supplies."[63] Employee argued that those terminations were not similar offenses for which he was charged. Agency averred that Employee has failed "to show that discipline of other employees mitigate his conduct."[64] Agency also asserted that Employee's claims fail to meet the requirements for

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[59] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[60] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[61] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[62] Employee Brief at Page 17-18 (December 26, 2023).

[63] *Id*. at Page 19.

[64] Agency's Sur-Reply at Page 5 (January 19, 2024).

consideration of comparative discipline.[65] Agency cited that "not only is District law clear that the consideration of comparative discipline must be limited to cases where the above-referenced factors are comparable, but the Merit Systems Protection Board ("MSPB" or "Board") has recently made clear that comparative discipline should not be overemphasized in disciplinary decisions."[66]

"OEA has held that, to establish disparate treatment, an employee *must* show that [they] worked in the same organizational unit as the comparison employees (Emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (Emphasis added). Further, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty." (Emphasis added). An employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly situated employees differently." If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue."[67]

Accordingly, an employee who makes a claim of disparate treatment has the burden to make a prima facie showing that they were treated differently from other similarly situated employees.[68] To support this contention, Employee provided that prior to Director Faust's September 6, 2022, Memorandum, that employees with similar charges (sleeping/dozing) as Employee were disciplined through suspensions. Additionally, Employee proffered that employees who were terminated following the Director's Memorandum for sleeping or dozing, were of a different nature than Employee's incident. Essentially, Employee asserted that the other officers' actions of sleeping/loafing were of a more serious nature than his. The undersigned finds this argument to be unpersuasive. Further, I find that these arguments fail to meet the burden of proof to support a claim to prove a prima facie showing of disparate treatment.

Douglas Factors & Proposed Five (5) Day Suspension

Employee averred that Agency did not give due consideration to the *Douglas* factors in this instant matter. Employee also cited that Agency's revisions to the *Douglas* Factor analysis following the recommendation of the Hearing Officer, were only "lip service" and not reflective of a true consideration of the *Douglas* factors in its administration of the adverse action. In particular, Employee argues that while Agency changed the consideration of length of service from 'neutral' to 'mitigating', it did not really consider Employee's tenure with Agency in determining termination was appropriate. Employee made similar claims for all the *Douglas* factors, iterating that Agency's consideration was not genuine and was arbitrary. Likewise, Employee asserted that the proposed five (5) day suspension

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[65] *Id.* Agency cites to *Sheri Fox v Metropolitan Police Departme*nt, OEA Matter No 1601-0040-17 (January 13, 2020), which references *Mills v D.C. Dep't of Public Works*, OEA Matter Not. 1601-0001-09, *Opinion and Order on Petition for Review* (December 12, 2011)

[66] *Id.* at Page 5.

[67] *Sheri Fox v. Metropolitan Police Department*, OEA Matter No. 1601-0040-17 (January 13, 2020). Citing to *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, *Opinion and Order on Petition for Review* (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, *Opinion and Order on Petition for Review* (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

[68] *See. John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing to Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994). See also. Sheri Fox v Metropolitan Police Department, OEA Matter No. 1601-0040-17 (January 13, 2020).

that was initially issued to him in this matter is material to this review, as it exhibits that Agency's termination action was arbitrary and capricious and that the removal action was unduly harsh. Employee conceded that Agency had the right to rescind actions but averred that Agency's ultimate decision of termination was unwarranted. Agency asserted that the proposed five (5) day suspension is immaterial to OEA's review of this matter and contended that its recission was within the scope of its authority. Further, Agency argued that its consideration of the *Douglas* factors was appropriate, and that the Director has the authority with regard to the discipline for DOC. Agency maintains that Employee's misconduct warranted termination and that its administration of the instant action was in accordance with all applicable laws, rules and regulations.

As was previously cited, OEA has consistently held that "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[69] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[70] [71] In the instant matter, I find that Agency's consideration and assessment of the *Douglas* factors was appropriate. I also find that Agency's revisions following the recommendation of the Hearing Officer support an appropriate consideration of those factors as required. Additionally, I find that while Employee does not agree with the *Douglas* factor assessment, it does not undermine the assessments made Agency. I also find that the prior five (5) day suspension is not material to OEA's review, as suspensions under 10 days are not in this Office's jurisdiction. Further, Employee conceded Agency's right of recission of proposed actions, but disagreed with the imposition of the penalty of removal. This Office has held that consistent with the *Douglas* decision, that "certain misconduct may warrant removal in the first instance."[72] As a result, I find that Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.[73] Further, Chapter 16 §1607 of the District Personnel Manual Table of

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[69] *See. Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[70] *Love* also provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (Citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

[71] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[72] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing E*mployee v. Agency*, OEA Matter No. 1601-0012-82, Opinion and Order on Petition for Review, 30 D.C. Reg. 352 (1985).

[73]*Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;

Illustrative Actions ("TIA") provides that the appropriate penalty for a first offense for neglect of duty and failure/refusal to follow instructions ranges from counseling to removal.[74] Additionally, the TIA provides that the appropriate penalty for a first offense of conduct prejudicial to District government ranges from reprimand to removal. Further, the penalty range for performance deficits are reassignment, reduction in grade or removal, and for a first offense of inability to carry out duties the penalty is removal.[75] Wherefore, upon consideration of the applicable DPM guidelines and the aforementioned *Douglas* factor analysis, I find that it was within Agency's discretion to terminate Employee from service.

Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of a termination is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to remove Employee from service. As a result, I conclude that Agency's action of removing Employee from service should be UPHELD.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee from service is **UPHELD.**

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Senior Administrative Judge

4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[74] 6-B DCMR §§1607.2 (d)(4), 1607.2(e)(2019).
[75] 6-B DCMR§§ 1607.2 (a)(4); 1607.2(m) and 1607.2 (n).