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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EMPLOYEE ¹)	OEA Matter No. 1601-0083-22R24
)	
v.)	Date of Issuance: September 23, 2024
)	
OFFICE OF THE CHIEF)	
TECHNOLOGY OFFICER,)	MONICA DOHNJI, Esq.
Agency)	Senior Administrative Judge
)	
_____)	
Donna Williams Rucker, Esq., Employee Representative)	
Micheal Goldstein, Esq., Employee Representative)	
Victor Regal, Esq., Agency Representative)	

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On September 30, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Office of the Chief Technology Officer’s (“OCTO” or “Agency”) decision to terminate him from his position as an Information Technology Specialist, effective September 2, 2022. Employee was charged with the following: (1) Knowing submission of (or causing or allowing the submission) falsely stated time log, leave forms, travel or purchase vouchers, payroll, loan or other fiscal document(s);² and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations.³ On September 30, 2022, OEA issued a Request for Agency’s Answer to Employee’s Petition for Appeal. Agency submitted its Answer to Employee’s Petition for Appeal on October 31, 2022.

Following an unsuccessful attempt in mediation, this matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on December 22, 2022. Following a Status/Prehearing, the parties submitted briefs addressing the issues raised at the Status/Prehearing Conference. Thereafter, on July 18, 2023, the undersigned issued an Initial Decision (“ID”) reversing Agency’s decision to terminate Employee.

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

² 6-B District Municipal Regulations (“DCMR”) §1607.2(c)(1).

³ 6-B DCMR §1607.2(b)(2).

On August 23, 2023, Agency filed a Petition for Review with the OEA Board. Employee filed a Response to Agency's Petition for Review on September 27, 2023. The OEA Board issued an Opinion and Order on November 16, 2023, remanding this matter to the undersigned to hold an Evidentiary Hearing to adequately address the material issues of facts in dispute.

Thereafter, the undersigned issued an Order on November 28, 2023, convening a Prehearing Conference for January 30, 2024. Both parties attended the scheduled conference. Subsequently, on January 31, 2024, the undersigned issued an Order scheduling an Evidentiary Hearing for May 7, 2024. Both parties were present for the Evidentiary Hearing held on May 7, 2024. The undersigned issued an Order on May 23, 2024, requiring the parties to submit written closing arguments by July 5, 2024. Both parties have filed their respective closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Employee's actions constituted cause for adverse action; and
- 2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

SUMMARY OF MATERIAL TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Agency's Case in Chief

Tonia Tart ("Ms. Tart") Tr. pgs. 21- 77; 233 - 266.

Ms. Tart is the Lead Human Resources ("HR") Specialist and has been with Agency since 2009. She testified that in this role, she provides assistance to the team if the manager is unavailable. She also handles personnel matters such as staffing and recruitment, performance management, reasonable accommodation, and time and labor. Ms. Tart explained that for time and labor, she ensures that managers approve employees' time in a timely fashion so that employees are in turn paid in a timely fashion. Tr. pgs. 21-22.

Ms. Tart asserted that her role with Agency's time entry procedure was answering questions from employees and ensuring that all new employees take the necessary trainings. She also stated that she was familiar with PeopleSoft, a system that houses employees' personnel information such as their home address, their benefits information, their time sheets, their grade, salary, performance management, and time sheets. Ms. Tart described a time sheet as a record of the time that an employee has worked for the day or the pay period. She stated that employees are responsible to enter their time daily or at the end of the pay period, which is every two (2) weeks. Tr. pgs. 23 – 25.

Ms. Tart testified that Agency uses a system called ‘time exception-based’ reporting (“ETR”) for time entry. Ms. Tart averred that exception-based time reporting is where the PeopleSoft system automatically generates eight (8) hours of regular time for the employee, and the employee is required to enter their exceptions when they're not physically on site. Ms. Tart explained that if the employee is on site at one of their locations working, the system automatically generates eight (8) hours of pay for that day with the time code ‘REG’. Ms. Tart affirmed that with the exception-based time reporting system, employees enter an exception any time they are not physically present on site because they are out sick, on annual leave, and telework (routine or situational telework). She explained that telework is when an employee is allowed to work remotely from their home. Ms. Tart testified that routine telework is when employees regularly telework, for instance, two (2) designated telework days, whereas situational telework is temporary, and used when something happens. Tr. pgs. 25 –28.

Ms. Tart noted that Agency employees are not allowed under any circumstance to enter the time code ‘REG’, and this has been the case since Agency’s adoption of the exception-based time reporting in October 2014. She testified that if an employee entered the time code ‘REG’, it would trigger the system to double the amount of time the employee should be paid for. For example, eight (8) hours are already in the system, and if an employee puts eight more hours in the system, it is going to be a total of sixteen (16) hours per day, which is more than the required number of hours to be entered in the system. Tr. pgs. 26, 28. Ms. Tart acknowledged that all Agency employees were trained on how to use the exception-based time reporting before it was adopted in October 2014. She asserted that new Agency employees were informed of the required training during New Employee Orientation (“NEO”), and receive the training immediately after NEO. When asked if Agency has changed how exception-based time reporting works since 2014, Ms. Tart said ‘no’. Tr. pgs. 29 – 30.

Ms. Tart cited that in March 2020, during the COVID pandemic, there was a time when employees worked full time out of the office. She testified that Agency expected employees to enter situational telework on their time sheets when they went out temporarily due to the Covid pandemic, which is one of the exceptions for exception-based time reporting. When asked if this procedure was different than it had been before COVID, Ms. Tart said ‘no’. Tr. pgs. 32 – 33.

Ms. Tart identified Agency’s Exhibit 18 as an email Agency sent out to its staff reminding them that they had one (1) week until they were due to return to work in-person on February 22, 2022. She stated that Agency employees returned to in-person work in February 2022. Tr. pg. 34. Ms. Tart described Agency’s Exhibit 19 as an email sent by Agency to its staff reminding them of how to enter their time and provided them with a ‘cheat sheet’ on doing so. She explained that they were to enter their time in the same way they coded their time during the COVID pandemic, but they were no longer using situational telework reporting code because they were physically back in the building. However, they could continue using the other exceptions such as sick leave, annual leave and routine telework. Ms. Tart identified Agency’s Exhibit 17 as a sample of the ‘cheat sheet’ that was provided to employees, and it contained the same time entry procedure from October 2014. She asserted that if there had been any changes to the exception-based time reporting policy she would have been aware. Tr. pgs. 37-39. Ms. Tart testified that in her capacity as lead HR, she would have been aware of any Agency meeting wherein anyone was instructed to use the time code ‘REG’ for any reason. She explained that if such a meeting occurred at the Agency level, she would have been aware. However, if it occurred at a departmental level meeting with the individual departments, then she would not be aware. Tr. pgs. 39-40.

Ms. Tart identified Agency's Exhibit 1 as the training summary of all the training Employee has completed. She testified that Employee completed the ETR training via PeopleSoft in September of 2014, before the ETR system went live in October 2014. Tr. pgs. 40 – 42. Ms. Tart identified Agency's Exhibit 2 as part of the ETR training. When asked if different information was provided to employees during and after the COVID pandemic, Ms. Tart said 'no'. She affirmed that there has been continuity between the beginning of the ETR system in October 2014 and the present day. Tr. pgs. 42 – 43.

Upon review of Employee's timesheet for the period of Summer 2021 to February 2022, Ms. Tart testified that an additional eight (8) hours were placed on the time sheet per day, which caused the system to pay Employee overtime. Tr. pg. 44. Ms. Tart identified Agency's Exhibit 4 as Employee's pay stub for the check date, December 30th, 2021. She stated that Employee's annual salary was \$67,062. Tr. pgs. 45-46. She asserted that Employee had a total overtime for this pay period of eighty (80) hours and eighty (80) regular earnings hours. She explained that this was unusual because employees generally don't work 160 hours in a pay period. She cited that Employee received earnings of \$6,448.26, for that pay period. Ms. Tart averred that Employee received total earnings of \$107,293.89, for that year to the date, which was almost double his salary, and it was unusual for an employee to work that much overtime. She affirmed that this could happen if an employee inappropriately entered the 'REG' code. Tr. pgs. 47-49.

Ms. Tart identified Agency's Exhibit 5 as a paystub for check date March 25th, 2022, and it reflects a year-to-date overtime amount of \$12,380.68. She affirmed that Employee made about the same amount of money in overtime as he did through his regular salary, which she found unusual. Tr. pgs. 49 – 51.

When asked if employees who began teleworking during the pandemic, entered their time differently than they did before the pandemic, Ms. Tart said "Right, because it was an exception." Tr. pg. 56. Ms. Tart explained that prior to the pandemic, Employee would only enter his exceptions for any pay period, and the exception was anything beyond regular work. She agreed that if Employee's job included working around the school district with the D.C. Public Schools ("DCPS"), to assist with the schools' technological needs, Employee would not be teleworking. Ms. Tart also affirmed that prior to the pandemic, Employee did not have to enter anything on his time sheets when he went into the schools and OCTO to work. Ms. Tart was asked if the way Employee entered his time every pay period during the pandemic changed and she said "Yes, because it was an exception." She further stated that it was a situational telework and Employee had to enter the time code 'STTW'. Tr. pgs. 57-58, 73. However, Ms. Tart noted that the ETR policy did not change during the pandemic. She also noted that employees situationally teleworked prior to the pandemic if there was a need to do so. Ms. Tart affirmed that the only thing that changed during the pandemic was more people situationally teleworked more often. Tr. pgs. 72-73.

Ms. Tart testified that OCTO employees returned to in-person work on February 22, 2022, post-pandemic. She affirmed that some Agency employees returned to work before that time. She stated that Employee was one of the OCTO employees that returned to work in August 2021, because they worked for schools. Tr. pg. 59. Ms. Tart did not recall if there were any meetings held by OCTO with respect to these employees who were returning to in-person work at that time. Ms. Tart stated that she did not return to the office in August 2021. Tr. pgs. 60.

When asked if she had any personal knowledge of Employee fraudulently entering his time for an overpayment in this matter, Ms. Tart stated that “I don't -- the knowledge that I have is from working in human resources, that he had put additional time on his time sheet.” Tr. pgs. 62-63. Additionally, when questioned if she knew if Employee incorrectly entered his time during the relevant period here on purpose, Ms. Tart stated that “I do not know.” Tr. pg. 64.

According to Ms. Tart, when an employee submits their time sheet, it goes to a supervisory manager for approval. Ms. Tart testified that if a supervisor notices an inaccuracy on an employee's time sheet, the supervisor can do one of two things: (1) the supervisor can inform the employee of the mistake on their time sheet and ask them to make the necessary corrections and resubmit, or (2) the manager can make the changes, submit it and then approve it on the employee's behalf. She stated that she did not know if Employee's supervisor took any of these steps. Tr. pgs. 64 -65.

Ms. Tart asserted that Employee was informed of the overpayment in February or March of 2022, by Mr. Henry Lofton. Tr. pg. 69. Ms. Tart stated that once Employee was notified about the overpayment, he stopped making inaccurate time entries. She noted that she never reached out to Employee regarding his efforts to repay the overpayment. Tr. pgs. 71-72.

Rebuttal Testimony

Referencing Agency's Rebuttal Exhibit 1, Ms. Tart identified the pay period beginning June 20th and ending on July 3rd, 2021, which covers a two-week pay period. Ms. Tart explained that “...there was a combination of situational and regular time entered by [Employee]. So the time -- regular time began on June 28th. So June 28th, 29th, 30th, and July 1st. Those were regular hours entered.” She noted that OCTO employees are not allowed to enter time code ‘REG’. Ms. Tart testified that Employee received overtime pay for this pay period because of the ‘REG’ time code entered by Employee. She testified that Agency's work status on June 28, 2021, was situational telework and there was no Agency policy at that time allowing employees to enter time code ‘REG’. Tr. pgs. 247- 250.

Ms. Tart also identified Agency's Rebuttal Exhibit 2, as Employee's timesheet for the pay period beginning July 18th and ending July 31st, 2021. She stated that Employee entered 80 hours ‘REG’ on this time sheet. She explained that Employee entered eight (8) hours of ‘REG’ in addition to the eight (8) hours the system automatically generated, causing the system to generate overtime which was paid out to Employee. Ms. Tart acknowledged that as of June 28th, 2021, Employee was entering time code ‘REG’, and he received overtime payment as a result. Tr. pgs. 250 - 253.

Referencing Agency's Rebuttal Exhibits 1 and 2, Ms. Tart affirmed that a supervisor could also enter an employee's time into the system. When asked if she did not know for sure that Employee entered the time as shown on the rebuttal Exhibits, Ms. Tart stated that “This is fair, but employees are the first line of individuals that entered their time.” Tr. pgs. 257-258.

Ms. Tart cited that she was uncertain if the overtime entry in Employee's June and July 2021, time sheets were brought to Employee's attention. She also noted that Employee received overtime payment for that period, but she does not know if the amount was included in the calculation of the sum of the overpayment amount Employee was charged with. Ms. Tart also noted that she had no knowledge if anyone at Agency communicated with Employee about the alleged over payment for June and July. Tr. pgs. 258-259, 262-263.

Employee's Case in Chief**Employee Tr. pgs. 79 - 223.**

Employee was initially employed by Agency in 2012, as a contractor and became a full-time Agency employee in November 2013, classified as an Information Technology (“IT”) Specialist. He noted that prior to the current cause of action, he had never been disciplined. Employee averred that he was given a training on timekeeping in 2014. Employee testified that his understanding of the timekeeping policy was that his time would be automatically entered, and he did not have to enter time, except for entering annual leave or sick leave. Tr. pgs. 80-82, 186. Employee affirmed that he understood that telework was an exception that he needed to enter. Employee acknowledged that he entered eight (8) hours of situational telework with a sub dropdown for COVID-19 pandemic on his timesheets in PeopleSoft. Tr. pg. 187-189.

Employee testified that the way he entered his time changed during the pandemic. Tr. pg. 82. He explained that because they started working from home, they had to manually enter their time into PeopleSoft using the time code ‘STTW’ for the approximately year and a half that they were teleworking. Employee affirmed that as part of his duties, he worked with the DC Public Schools, and he would be on site at some of those schools to perform his duties. He noted that during the pandemic he was doing all that from home. Employee stated that he returned to in-person work in August 2021. Employee testified that when he returned to in-person work, he had daily meetings at 10:00 a.m. with his colleagues in the school district team, team leads and managers (Melissa Taylor, Alex Ahorrio, and Al-Jerome Wolo), where discussions on how to continue entering their time took place. He stated that they were told to use the code ‘REG’ and not ‘STTW’, and to continue entering their time manually. Employee averred that he was instructed to enter ‘REG’ and not ‘STTW’ because they were not working remotely anymore. Tr. pgs. 83-86, 189-190, 193-194, 222-223. Employee averred that the manager at the time who instructed them to enter ‘REG’ when they got back to the office was Alex Ahorrio. Tr. pg. 190.

When asked why it was only Employee and one other person that began entering ‘REG’ when they returned to the office in Agency 2021, Employee stated that the other person “was one of the other persons that was on the call.” He further explained that “everyone wasn't an [Full Time Employee] that worked for us. There was a lot of contractors as well.” Tr. pgs. 194-195. Employee cited that he was told that an employee with initials DH and one other employee, also entered the ‘REG’ time code during the same period. Tr. pg. 222.

Employee noted that none of the managers instructed them to return to pre-pandemic procedures. He affirmed that when they returned to work in-person, they were instructed to use the time code ‘REG’ to enter time upon their return, which is what he did for approximately six (6) months. Employee stated that he had six (6) people underneath him, and he reported to Al-Jerome Wolo (“Mr. Wolo”). Employee asserted that his manager, Mr. Wolo approved his time from when they returned to the office from teleworking to February 2022, and he never raised any concerns with Employee’s timekeeping. Employee asserted that he was notified of his incorrect time entry in February 2022 via a phone call from Melissa Taylor, a manager, inquiring as to who approved his timesheet. Thereafter, he received a second call from Henry Lofton (“Mr. Lofton”) who was angry and asked Employee if he knew that he was being overpaid. Employee testified that he informed Mr. Lofton that he was not aware that he was being overpaid. He explained to Mr. Lofton that he did not live check to check, and that he did not check his statement every two (2) weeks when he got paid.

He affirmed that he was put on notice of the overpayment for the first time through the phone calls. Tr. pg. 86 -90, 191-192.

Employee also testified that he received a call from Mr. Wolo the following week, around mid-February of 2022, notifying him that he was overpaid, he no longer had to enter his time manually, and that PeopleSoft automatically enter the time for me. Employee further testified that he stopped entering his time from that moment and he would only enter his time if he took time off. Employee averred that Mr. Wolo apologized to him, stating that he wasn't aware that they no longer had to enter their time. Employee cited that Mr. Wolo stated that the first time he heard about it was at the 'all-hands meeting' with Ms. Tart. Tr. pgs. 90 -91.

According to Employee, in May or June 2022, he received an email from Mr. Todd Smith, ("Mr. Smith) the lead Counsel for OCTO, about the investigation into the overpayment. He asserted that he had a virtual meeting with Mr. Smith around June 23rd or 24th, 2022. Tr. pgs. 92 -93. Employee stated that he told Mr. Smith he did not notice he was being overpaid because he had plenty of money in the bank from the recent sale of his mother's home in Washington, DC, and that he did not live check to check. He also informed Mr. Smith that he had a landscaping business, and he did not have to look at his check. Employee testified that he also told Mr. Smith that he did not handle the finances in his home, his wife did. Employee testified that he does not have a joint bank account with his wife, but the money is automatically transferred to his wife's account biweekly from Employee's account to pay for bills. Tr. pgs. 94 – 96.

Employee testified that during the virtual meeting with Mr. Smith, he suggested paying a lump sum of \$25,000, and then paying \$125 per pay period. Employee stated that he was informed by Mr. Smith that he wasn't authorized to make that decision and that he would take that offer to management and see whether they would accept the repayment offer. Employee cited that Mr. Smith did not get back to him before he took his month-long vacation in July 2022. Employee stated that he informed Mr. Smith during the June 2022, meeting that he would be going on a month vacation in July, which was scheduled back in January or February of 2022, before he was made aware of the overpayment. Tr. pgs. 96-98, 199.

Employee asserted that he heard again from Mr. Smith on August 1, 2022, when he returned from his vacation. He stated that he had not heard from Mr. Smith since the June 23rd or 24th meeting. Employee noted that he did not hear from anyone from OCTO about the investigation or the overpayment during that time frame. Tr. pgs. 98-100.

Employee averred that upon his return from vacation, he had a lot of work, which included over 1,400 emails, a new more complex computer updating task, and the investigation. He was stressed out by all these upon his return from vacation. Employee affirmed he had a TEAMS call with Mr. Smith on August 1, 2022. Employee testified that this second meeting with Mr. Smith was harsh. He explained that he was being asked the same questions that he answered before in June repeatedly, in the same or in a different way. Specifically, about what happened to the money, where the money was, how he spent the money, who had access to the money, and who was on the account. Employee stated that he explained to Mr. Smith that this was not a lump sum that was deposited in his account overnight and that this happened over a course of a period of six (6) months, but he kept asking the same questions and Employee stated that he got frustrated with Mr. Smith. He affirmed that Mr. Smith asked the same questions during the June 2022, meeting. Tr. pgs. 100 – 107.

Employee noted that he brought up his offer to repay the overpayment during the August 1, 2022, meeting but Mr. Smith ignored it and kept badgering him with questions of what happened to the money. Employee testified that “I felt like I was being attacked based upon the color of my skin, as if I wasn't able to live check to check or I mean, not live check to check, or I should have known that I was being overpaid and it was very frustrating to me.... I refused to answer the same questions that he kept asking because I answered those questions the first time.” Tr. pgs. 107 - 108.

Referencing page 40 of Agency's Exhibit 7, Employee noted that Agency did not give him any opportunity to make a payment towards the overpayment in this matter and he did not hear from anyone from OCTO about setting a payment plan to repay the overpayment. Employee affirmed that he informed Mr. Smith that he was going on vacation. Tr. pgs. 113 -114. When asked if anyone at Agency attempted to schedule a time for Employee to drop off the repayment check or mention the check to Employee when he returned from vacation on August 1, 2022, Employee said ‘no’. Tr. pg. 115. Employee state that he did not hear anything from Agency after his second meeting with Mr. Smith, until he received the proposed termination package. He noted that the hearing officer in this case recommended that suspension and repayment of the overpayment. Tr. pgs. 115-118, 129.

Employee affirmed that he told Mr. Smith in the first interview that he had \$25,000 available to pay immediately and that he could easily pay back the overpayment. Tr. pg. 132. When asked if he told Mr. Smith during the second interview that he no longer had the money, Employee stated that “I still had the money. He was asking me what happened to the 53,000, the whole lump sum.” Employee asserted that Mr. Smith implied during the second interview that it was a lump sum, but he kept reiterating that a lump sum was not deposited into his account. Tr. pg. 133. Employee cited that the sum of \$53,000 for overtime payments was deposited into his bank account over a six-month period. Tr. pg. 134.

Employee testified that the first interview on June 22, 2022, was Mr. Smith's attempt to find out what caused the unearned overtime payment. Employee acknowledged that Mr. Smith told him the purpose of the June 22, 2022, interview and that failure to respond fully to every question honestly could result in discipline under the District Personnel Manual (“DPM”). Employee does not recall what Mr. Smith said at the beginning of the August 1, 2022, interview. Tr. pgs. 139- 140.

Referencing the June 22, 2022, interview between Employee and Mr. Smith, Mr. Smith is heard at the 00.30seconds, telling Employee the purpose of the call and that the investigation could lead to discipline. He encouraged Employee to be truthful in his response to all the questions “because failing to tell the truth can be an independent basis for discipline under the DPM.” Tr. pg. 145. Employee affirmed receiving this warning during the June 22, 2022, interview. Tr. pgs. 145-146.

Referring to the August 1, 2022, interview between Employee and Mr. Smith, Mr. Smith informed Employee that the second interview was a disciplinary interview regarding an overtime overpayment that occurred from August 2021 to February 2022, for about \$53,391.66. Mr. Smith informed Employee that failure to tell the truth could be a separate basis for discipline. After watching and listening to the August 1, 2022, interview, Employee affirmed that he was warned by Mr. Smith at the beginning of the second interview that the purpose of the interview was for discipline and that Employee was expected to tell the truth. Tr. pgs. 147 -150, 167-169.

Mr. Smith is also heard in the August 1, 2022, interview telling Employee that the repayments of the \$53,391.66 was a separate issue from discipline. Mr. Smith then asked Employee what happened to the money that was deposited into his account biweekly, and if the account was in Employee's name, his wife's name or held jointly. Employee responded that "It -- I just need to know how are we going to pay it back. Like, this is redundant to me." Tr. pg. 151. Employee also stated during the interview with Mr. Smith that "Sir, the question -- I'm willing to set up the payment plan and move forward. I don't have the money." Tr. pg. 181. Employee testified during the evidentiary hearing that "I felt like I answered that question in the first interview. And if you rewind the video back some, you could see where I told him I had already answered those questions." Employee further stated that "...I answered Todd's questions to the best of my ability." Tr. pgs. 152-153.

Employee affirmed that the account where the money was deposited into was in his name. He stated that once Agency deposits his salary into his bank account, that the money was set to automatically be transferred into his wife's account bi-weekly because she handled the finances and that all his bills are on autopay. Tr. pgs. 153-155, 177, 220. Employee affirmed that the account was accessible to his wife and daughter. He also agreed that because there were lots of activities going on with that account, the balance could change without him personally knowing about it or without him withdrawing or depositing any money into it. Tr. pg. 221.

Employee is heard in the August 1, 2022, investigation interview video stating that "I -- I'm not -- I -- I'm giving you the options like, hey, I don't know. I don't have the money. I don't have any money. I don't have any money. I have family members that's willing to gift me to get it paid back. All I'm asking, what are the options so that I can attack this accordingly." Tr. pg. 155. When asked during the Evidentiary Hearing why he had previously told Mr. Smith during the June 22, 2022, interview that he had \$25,000 he could pay, and during the August 1, 2022, interview he stated that he did not have any money, Employee cited that "I didn't say that I didn't have the money to pay it back." Tr. pg. 156. Employee testified during the Evidentiary Hearing that "I told [Mr. Smith] I don't have any money." Tr. pg. 158.

During the August 1, 2022, interview, Mr. Smith asked Employee if the \$53,000 was sitting in his account, to which Employee responded that "I don't know what happened to the money, Todd. I don't know what happened to the money." Employee further stated in the video that "I don't know what happened to the money. There's no money in the account." Tr. pgs. 158-160, 196. Mr. Smith also asked Employee if he had looked at the balance of the account and Employee said "No, I haven't." Tr. pg. 161. Mr. Smith asked Employee how he knew the money was gone and Employee stated that "Because I'm telling you that the money is gone." Tr. pg. 162. Employee testified during the Evidentiary Hearing that "I answered the question to the best of my ability." Employee explained that he believed he answered Mr. Smith's questions and that he was frustrated with Mr. Smith's questions. Tr. pgs. 163-165, 173-174. Employee also explained to Mr. Smith during the August 1, 2022, interview that he knew the money was gone from speaking with his wife who handles the finances. Tr. pg. 165.

Employee stated during the Evidentiary that "Like, it's not that I can't pay the 25 back. You -- I'm talking about the 53,000. That's what we are talking about." Employee explained that during the August 1, 2022, investigation interview, Mr. Smith was talking about the \$53,000 being deposited as a lump sum, and he kept reiterating to him, it wasn't deposited as a lump sum. Tr. pg. 166, 172. Employee testified during the Evidentiary Hearing that as of the day of the hearing, he did not know what happened to the \$53,000. Tr. pg. 170, 186. Employee cited that his money went towards "...

house bills, mortgage, electricity, utilities, car notes, insurance.” Tr. pg. 171. According to Employee, Mr. Smith told him during the investigation interview that his job was finding out how Employee entered his time and whether Employee intentionally directed that money toward his account. Tr. pgs. 173.

Mr. Smith asked Employee during the August 1, 2022, interview the name on the account the money was deposited into and Employee responded that “there's no need to know who the account name is in.” Tr. pg. 178, 181. Employee stated during the Evidentiary Hearing that “At that time, I gave Mr. Smith my best answer because I was frustrated with the questions that he asked. Because I felt like he asked that in the first interview. And I felt as though that was irrelevant about who named the accounts in. We know that the money was being deposited.” Employee noted that “... I felt like I answered those questions in the first interview.” When asked during the evidentiary hearing if Employee now acknowledged that his refusal to answer the question of the account ownership was interfering with this investigation, he stated that “I see now that it is.” Tr. pg. 179-180, 183, 185-186. He testified that “I answered -- by me answering his questions. I answered his questions. He didn't like my answers that I gave him. I answered his questions.” Tr. pg. 201.

In the August 1, 2022, video, Employee noted that he was done, and Mr. Smith asked Employee if he was refusing to answer any more questions, to which Employee asserted that “I'm done speaking. I've answered the questions about -- I just need to know moving forward, what are the options on my resolving this.” Tr. pgs. 184-185.

Employee testified that “I offered to pay back \$125 per pay period and with an addition of the lump sum. That was my goal of attacking the 53,000 and getting it paid off, is paying a lump sum and 125 per pay period.” Tr. pg. 196. When asked if he mentioned the \$25,000 during the August 1, 2022, interview with Mr. Smith, Employee stated that “I probably did. I may have not. I'm not sure. I don't recall. But my initial offer was still on the table to pay the lump sum. That was the only way that I knew I could get it paid off in a reasonable amount of time. [\$]125 per pay period is not doing anything. That's only about three grand or six -- close to six grand a year. That's not doing anything. I don't want that bill on my head. So that's how I was going to attack it. Pay the lump sum, pay [\$]125, and keep attacking it until I get it paid off”. Employee cited that he told Mr. Smith before the recording began that he was still going to pay the lump sum. Tr. pgs. 197-200.

During the August 1, 2022, interview, when Mr. Smith stated that the investigative report would reflect that Employee refused to answer his question and asked what the money might have been spent on, Employee responded that “I don't know what the money was spent on. Your job is -- you're doing your job as investigating on what happened. So as far as -- if there was any facetious, malicious activity involved. It was not. I submitted my time like I do every two weeks. The time was approved. The money was deposited in the account. What happened to the money, I don't know. I don't manage the funds. What I'm willing to do today, and like I said before, is to set up a payment plan and repay the money.” Employee argued that “I knew I was under investigation for putting in the time. We're talking about the ETR. That's what he talked about. Not that I stole \$53,000 from the government.” Employee maintained that “I was under investigation for putting in time, manually putting in time.” Tr. pgs. 209 -210.

Mr. Smith asked Employee during the August 1, 2022, meeting, “Do you recall the offer to write a \$25,000 check the date after our interviews?” and Employee responded that “I recall the offer of writing the check prior to me speaking to my wife. You know, so like I said, she handles the

finances. I was not aware of the money being overpaid on the check. All I know is that, like I said, submitted my time, it's been approved, going about my day, come to work, and that was it. Only thing is now I've been asking about repaying it, like to set it up and get going, and get this out of my hair." Tr. pgs. 212-213. Employee affirmed that Mr. Smith asked him about the \$25,000 offer, and he testified during the Evidentiary Hearing that "I was willing to still pay. That offer was still on the table. I was -- I did not take that offer on the table of the repayment." He reiterated that "My offer of still paying the lump sum and 125 per pay period was still on the table." Employee testified that "I spent some of the money" and that "I was still able to pay the lump sum." Employee also stated that "I don't know if I spent all the money" and that "I was able to pay the lump sum and 125 per pay period." Tr. pgs. 212-214. Additionally, Employee asserted that "I can't give you an itemized list on what I spent money on." Tr. pg. 215.

When asked why he kept saying "the money was gone" during the August 1, 2022, interview with Mr. Smith, Employee testified that "... at that time, I was just frustrated with the questions that was being asked. I thought I answered those questions the first -- in the first interview and we never talked about a repayment, and I wanted to get to the point where what are we going to do about this? How are we going to get this resolved." Tr. ph. 219.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW⁴

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Furthermore, the District Personnel Manual ("DPM") regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Employee was terminated for (1) Knowing submission of (or causing or allowing the submission) falsely stated time log, leave forms, travel or purchase vouchers, payroll, loan or other fiscal document(s); and (2) False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations.

1) Whether Employee's actions constituted cause for discipline

Knowing submission of (or causing or allowing the submission) falsely stated time log, leave forms, travel or purchase vouchers, payroll, loan or other fiscal document(s):

Here, Agency charged Employee with falsifying his time log/payroll, asserting that between August 2, 2021, and February 11, 2022, Employee consistently submitted false time records for hours he did not work, resulting in an overpayment of \$53,391.66. Employee submitted his time manually into the PeopleSoft system using the time code 'REG' when he returned to work post-COVID-pandemic. His time was approved by his supervisor, Mr. Wolo. The PeopleSoft system automatically generated time records for the same period that Employee submitted his time, thereby forcing the payroll system to consider the additional time created by Employee as overtime pay and Employee was paid the amount of \$53,391.66 in excess of his regular pay from August 2021 to February 2022.

⁴ 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").

Agency asserted that Employee was trained on proper ETR time submission policy in 2014. It also averred that Employee's lengthy history of complying with the ETR policy from 2014 to 2020, proves he was aware of how to accurately report his time. Employee acknowledged receiving ETR training in 2014, and he asserted that in compliance with the ETR policy, prior to the Covid-19 pandemic, he only entered time exceptions such as sick or annual leave into the payroll system, and the payroll system would automatically generate his timesheet for regular hours work. Employee however argued that during the Covid-19 pandemic, he worked full time from home, and Agency's time reporting procedure for full time telework employees changed, as they were now required to manually enter their time using the code 'STTW' for situational telework. Therefore, he manually recorded his time into the PeopleSoft system from March 2020 to August 2021 with time code 'STTW'.

According to Ms. Tart, in 2014, Agency began using a system called 'time exception-based' reporting, ETR, for time entry. She explained that ETR is the PeopleSoft system that automatically generates eight (8) hours of 'REG' (regular) time for its employees. With the ETR system, employees enter an exception any time they are not physically present on site because they are out sick, on annual leave, and telework (routine or situational telework). She explained that telework is when an employee is allowed to work remotely from their home. Tr. pgs. 25 –28.

Ms. Tart noted that the ETR policy did not change during the pandemic. She also noted that employees situationally teleworked prior to the pandemic if there was a need to do so. Ms. Tart affirmed that the only thing that changed during the pandemic was more people situationally teleworked more often. Tr. pgs. 72-73. She explained that because employees worked full time out of the office during the pandemic, Agency required employees to enter situational telework code 'STTW' on their time sheets which is one of the exceptions for exception-based time reporting. Ms. Tart reiterated that this procedure was the same as the pre-Covid-19 pandemic time entry procedure. Tr. pgs. 32 – 33. Employee testified that the way he entered his time changed during the pandemic. Tr. pg. 82. He explained that because they started working from home, they had to manually enter their time into PeopleSoft using the time code 'STTW' for the approximately one and a half year that they were teleworking.

Ms. Tart provided that, a week before OCTO employees returned to work in-person on February 22, 2022, Agency sent out an email to its staff reminding them of how to enter their time and provided them with a 'cheat sheet' on doing so. She explained that they were to enter their time in the same way they coded their time during the COVID-19 pandemic, and they were no longer using situational telework reporting code because they were physically back in the building. However, they could continue using the other exceptions such as sick leave, annual leave and routine telework. Tr. pgs. 37-39. Employee acknowledged that situational and routine telework were ETR exceptions he needed to enter. Tr. pg. 187-189.

Based on the record, I find that Agency's ETR time entry procedure did not change during and after the Covid-19 pandemic. Instead, the employees were now required to use the ETR exception of 'STTW' during the period of remote work during the Covid-19 pandemic. I further find that when Employee returned to in-person work in August 2021, he should have returned to Agency's ETR policy wherein, the system automatically generated eight (8) hours of 'REG' for the employee and only enter an exception as he did pre-Covid-19 pandemic. Instead, Employee manually entered eight (8) hours of 'REG', causing the system to generate another eight (8) hours and triggering overtime payment for Employee.

Employee was terminated pursuant to 6-B DCMR § 1607.2 (c)(1), knowingly submitting false time records. OEA has held that, to sustain a falsification charge, “agency *must* prove by preponderant evidence that employee *knowingly* supplied *incorrect information* with the *intention of defrauding, deceiving or misleading the agency.*”⁵ (Emphasis added). Additionally, in *Leatherbury v. Department of Army*,⁶ the Court of Appeals for the Federal Circuit opined that:

“In order to sustain a charge of intentionally submitting false information, the agency “must prove by a preponderance of the evidence that the employee *knowingly supplied wrong information*, and that he did so with the intention of defrauding the agency.” *Naekel v. Dep't of Transp.*, 782 F.2d 975, 977 (Fed.Cir.1986). In *Naekel*, we explained that the charge of falsification requires proof “not only [of a false statement], but also that [the false statement] was given with intent to deceive or mislead the agency.” *Id.* at 978. A false statement alone “cannot control the question of intent.” *Id.* Otherwise, “the ‘intent’ element of the charge would be subsumed within the distinct inquiry of whether the employee’s [statement] adheres to the true state of facts.” *Id.* The agency may establish an employee’s intention to deceive or mislead the agency by *circumstantial evidence*. *Kumferman v. Dep't of Navy*, 785 F.2d 286, 290 (Fed.Cir. 1986).

A charge that an employee knowingly supplied wrong information with an intent to defraud the agency requires first that the agency prove that the information submitted included a false statement. The test here is objective and is made without regard to the employee’s subjective understanding or knowledge. Second, the agency must prove that the false statement was material. Third, the agency must show that the employee acted with the requisite intent. Our cases confirm that the intent element itself requires two distinct showings: (a) that the employee intended to deceive or mislead the agency, and (b) that he intended to defraud the agency for his own private material gain. *See Bradley*, 900 F.2d at 237 (finding the false statement motivated by a desire for privacy rather than a desire to defraud). Under the first intent prong (a), it is sufficient that the employee either knew that the submission included a false statement of material fact, or was reckless with respect to ascertaining the truth of the statement. *See Kumferman*, 785 F.2d at 290.

However, *an employee’s good faith explanation can negate an inference of intent to deceive or mislead the agency.* *See Naekel*, 782 F.2d at 979-80; *Kumferman*, 785 F.2d at 290; *Dennis v. Dep't of Health & Human Servs.*, 804 F.2d 670, 673 (Fed. Cir.1986) (finding credible an employee’s explanation that she relied on supervisor instructions). Thus, *a reasonable good faith belief in the truth of a statement precludes a finding that an employee acted with deceptive intent.*”

(Emphasis added).

In the current matter, I find that there is evidence in the record that Employee violated Agency’s ETR time entry policy when he returned to work in August of 2021. Employee entered

⁵ *John J. Barbusin v Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), citing *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).

⁶ 524 F. 3d 1293 - Court of Appeals, Federal Circuit 2008.

eight (8) hours of ‘REG’ time while he was physically present at work. However, I find that the record is void of any evidence to suggest that Employee *knew* that manually entering eight (8) hours of ‘REG’ time into the system during the relevant time period would trigger the system to create overtime pay. (Emphasis added).

Additionally, Employee asserted that when he physically returned to work around August 2021, Agency held a meeting where supervisors offered instructions to him and his colleague on time reporting. Employee testified that he relied on his supervisor’s instructions from the meeting to enter the time code ‘REG’ manually. Specifically, Employee testified that when he returned to in-person work, he had daily meetings with his colleagues in the school district team, team leads and managers where discussions on how to continue entering their time was had. He stated that they were instructed by Alex Ahorrio (“Mr. Ahorrio”), a manager to use the code ‘REG’ and not ‘STTW’, and to continue entering their time manually because they were not working at home anymore. Tr. pgs. 83-86, 189-190, 193-194, 222-223. Ms. Tart averred that she would not be aware of a meeting that occurred at a departmental level with the individual departments. Tr. pgs. 39-40.

Agency contended that no one instructed Employee to manually enter time code ‘REG’. Agency stated that Mr. Ahorrio himself never entered time code ‘REG’. Agency cited that no one corroborated Employee’s assertion that he was instructed to enter time code ‘REG’ when he returned to work.⁷ Agency has the burden of proof in this matter, and but for its assertion that Mr. Ahorrio entered his time correctly, Agency did not provide any testimonial or written evidence from Mr. Ahorrio to contradict Employee’s assertion. Agency had the opportunity to, at the very least, call Employee’s colleagues, team leads or managers who returned to work in August 2021, and who accurately entered their time to rebut Employee’s assertion at the Evidentiary Hearing, but it chose not to do so. Therefore, I find that Agency did not meet its burden of proof in this instance. Accordingly, I also find that Employee provided a plausible explanation to his conduct and this explanation negates an inference of intent to deceive or mislead Agency.

Moreover, Employee was not the only OCTO employee within Employee’s team that entered the time code ‘REG’ manually when they returned to work in August 2021. While Agency cited that only one other employee in Employee’s unit was similarly situated as Employee, Mr. Smith stated in his June 24, 2022, Report of Investigation that “[o]n February 22, 2022, ... it was brought to OCTO’s attention that a small number of unnamed OCTO employees had received uncharacteristically large overtime payments in calendar year 2021.”⁸ Agency further noted in footnote 2 of its closing argument that “another employee made similar *erroneous submissions* and was paid a similar amount

⁷ Agency asserted that Employee was entering ‘REG’ time code as far back as June 2021, prior to returning to in-person work and well before any alleged meeting could have taken place and that he received overtime payment. Employee testified that he did not enter ‘REG’ in his time sheet in June 2021, while he was teleworking during the pandemic. Ms. Tart affirmed that a supervisor could also enter an employee’s time into the system. She stated that she was not certain if Employee entered the time as shown on Agency’s rebuttal Exhibits. Tr. pgs. 257-258. Ms. Tart cited that she was uncertain if the overtime entry in Employee’s June and July 2021, time sheets were brought to Employee’s attention or if the amount was included in the calculation of the sum of the overpayment amount Employee was charged with. Tr. pgs. 258-259, 262-263. Absent any concrete evidence to prove that Employee actually entered ‘REG’ on his time sheet in June and July 2021, prior to returning to the workplace, I am unable to address this assertion. Moreover, I find that the June and July 2021, time entry is outside of the relevant time period. I further find that Agency’s decision to omit these dates and not require Employee to repay the alleged overtime payments he received for June and July 2021, is very telling.

⁸ Agency’s Answer, at Exhibit 3 (October 31, 2022). Mr. Smith did not disclose the exact number of employees who were similarly situated as Employee during the investigation interview or in the Report of Investigation.

during the same period of time, ...”⁹ (Emphasis added). On March 10, 2022, Agency provided time entry directives or ‘cheat sheet’ to the employees that returned to work in February 2022.¹⁰ Therefore, it can be reasonably assumed that OCTO was aware that there was some level of confusion amongst its employees on how to accurately enter time when they returned to the workplace after working exclusively from home and manually inputting their time for over a year and a half due to the COVID-19 pandemic.

Furthermore, Employee’s timesheet was approved by his supervisor, Mr. Wolo for *six (6) months* and no one brought the incorrect time entry issue to Employee’s attention (emphasis added). Agency only alleges, without providing any evidence that Employee and his supervisor, Mr. Wolo might have been working together in this alleged ‘fraud scheme’. However, Mr. Smith stated in his June 24, 2024, report that “[t]hough [Employee’s] contention that he never once noticed that his direct deposits had more than doubled is near impossible to believe, *in the absence of any affirmative proof to the contrary, it is difficult to conclude that he had actual notice of these overpayments before February 17, 2022.*”¹¹ (Emphasis added). Agency had the burden of proof, and it failed to call Mr. Wolo, Mr. Ahorrio or any other employee from the school district team to rebut Employee’s assertions. Accordingly, based on the foregoing, and consistent with 6-B DCMR § 1607.2 (c)(1) and case law, I find that Agency has not met its burden of proof because it has failed to establish that Employee *knowingly* supplied incorrect information on his time sheet with the *intention of defrauding, deceiving or misleading* Agency. (Emphasis added).

False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations:

Agency also charged Employee with False Statements: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations pursuant to 6-B DCMR § 1607.2(b)(2). Agency noted in the Notice of Proposed Separation that “[d]uring the investigation in this matter, you gave conflicting answers and refused to answer multiple necessary questions relating to your dissipation of the erroneously paid overpayment of funds.”¹²

Employee acknowledged during the Evidentiary Hearing that he declined to answer Mr. Smith’s questions during the August 1, 2022, interview because Mr. Smith kept asking the same questions and he got frustrated with Mr. Smith. Tr. pgs. 100 – 107. Employee testified that “I felt like I was being attacked based upon the color of my skin, as if I wasn’t able to ... not live check to check, or I should have known that I was being overpaid and it was very frustrating to me.... I refused to answer the same questions that he kept asking because I answered those questions the first time.” Tr. pgs. 107 - 108. Employee also testified that “I answered the question to the best of my ability.” Employee explained that he believed he answered Mr. Smith’s questions and that he was frustrated with Mr. Smith’s questions. Tr. pgs. 163-165, 173-174. Employee noted that he brought up his offer to repay the overpayment during the August 1, 2022, meeting but Mr. Smith ignored it and kept badgering him with questions of what happened to the money.

⁹ Agency also noted in *Douglas* factor No. 1, that Employee “*erroneously* billed his time and was overpaid \$53,391.66”. (Emphasis added).

¹⁰ Agency Response to Post Status/Prehearing Conference Order at Exhibit 14 (March 27, 2023).

¹¹ Agency’s Answer, *supra*, at Exhibit 3.

¹² Agency’s Answer at Exhibit 8.

Mr. Smith asked Employee if the \$53,000 went into his direct deposit account to which Employee responded that "... *that is correct*. And then it is distributed to other places."¹³ (Emphasis added). Mr. Smith also asked Employee if he knew when the money left the account, and Employee stated that "*No, I do not*."¹⁴ (Emphasis added).

Additionally, Employee stated that "I don't know what happened to the money, Todd," and that "I don't know what happened to the money, there's no money in the account."¹⁵ He also noted that "No, the funds were not coming in sitting undisturbed."¹⁶ Mr. Smith asked him where the money went and Employee responded, "I don't know."¹⁷ Employee also stated that "I guess a college kid is not great with finances, I don't know."¹⁸ Employee further stated that "I don't know what the money was spent on."¹⁹ Employee asserted that "Todd, you pay bills rights... so okay, that's what it means, it is diverted and rerouted. Bills are paid, automatic bill pay, I mean, the money comes in, bills go out... so funds come in they get distributed out..."²⁰ Mr. Smith asked if Employee had any idea where the \$53,000 went and Employee responded that "No I do not."²¹ Employee also stated that "Like I said Todd, I don't handle the finances, you asked me how it was distributed, I know some of our bills are set up on autopay, so, funds come in they go out, that's it... I don't handle the finances..."²² Employee further explained that "I submitted my time like I did every two weeks, time was approved, the money was deposited in the account, what happened to the money I don't know. I don't manage the funds."²³ At some point during the August 1, 2022, video interview, Employee refused to answer any further questions from Mr. Smith. Employee acknowledged during the Evidentiary Hearing that he declined to answer Mr. Smith's questions during the August 1, 2022, interview because Mr. Smith kept asking the same questions and he got frustrated with Mr. Smith. Tr. pgs. 100 – 107. While Employee did appear frustrated during the August 1, 2022, interview with Mr. Smith, I find that Employee had a duty to answer all Mr. Smith's questions which he did not, and some of his answers to Mr. Smith's questions during the August 1, 2022, interview were evasive.

Agency also argued that Employee offered conflicting statements regarding the repayment of the funds. Specifically, Mr. Smith stated that during the first interview, Employee offered to repay a large portion of the funds in one (1) installment of \$25,000, followed by the rest of the money in smaller installments. However, during the August 1, 2022, interview, Employee stated that he could only pay \$125 per pay period until the overpayment amount was satisfied. During the August 1, 2022, interview, Mr. Smith stated, "Do you recall the offer to um., write a \$25,000 check the day after..." to which Employee responded, "I recall the offer of writing a check prior to me speaking with my wife. You know as I said, she handles the finances."²⁴ Agency did not ask Employee whether his offer to pay the \$25,000 was still on the table after speaking with his wife. Instead, it assumed, based on Employee's statements that Employee's original offer to pay a lump sum was no longer available. I find that Employee maintained during that same second interview, that, "Like I

¹³ August 1, 2022, interview at 5.40 -5.51minutes.

¹⁴ *Id.* at 14.38 -14.42 minutes.

¹⁵ *Id.* at 10.00 – 10.40 minutes. Employee stated the same multiple times throughout the interview.

¹⁶ *Id.* at 7.24- 7.29 minutes.

¹⁷ *Id.* at 11.00 – 11.15 minutes.

¹⁸ *Id.* at 11.24 – 11.28 minutes.

¹⁹ *Id.* at 13.05 – 13.14 minutes.

²⁰ *Id.* at 15.55 – 16.38 minutes.

²¹ *Id.* at 14.07 – 14.18 minutes.

²² *Id.* at 16.40 – 17.08 minutes.

²³ *Id.* at 13.20 – 13.35 minutes.

²⁴ *Id.* at 3.40 – 4.00 minutes.

said before, is to set up a payment plan, and repay the money, *starting off with a lump sum* to at least get me my foot in the door, *and then attacking it as I go about.*²⁵ (Emphasis added). Therefore, I conclude that while Employee did not mention the amount of the lump sum during the second interview, he maintained that he could repay the overpayment in one (1) lump sum and smaller payments thereafter.

Further, when asked during the Evidentiary Hearing if he told Mr. Smith during the second interview that he no longer had the money, Employee stated that “I still had the money. He was asking me what happened to the 53,000, the whole lump sum.” Tr. pg. 133. Employee testified that “I offered to pay back \$125 per pay period and *with an addition of the lump sum*. That was my goal of attacking the 53,000 and getting it paid off, is *paying a lump sum and [\$]125 per pay period.*” (Emphasis added) Tr. pg. 196. When asked if he mentioned the \$25,000 during the August 1, 2022, interview with Mr. Smith, Employee stated that “I probably did. I may have not. I'm not sure. I don't recall. *But my initial offer was still on the table to pay the lump sum*. That was the only way that I knew I could get it paid off in a reasonable amount of time. [\$]125 per pay period is not doing anything. That's only about three grand or six -- close to six grand a year. That's not doing anything. I don't want that bill on my head. So that's how I was going to attack it. *Pay the lump sum*, pay [\$]125, and keep attacking it until I get it paid off”. (Emphasis added). Employee cited that he told Mr. Smith before the recording began that he was still going to pay the lump sum. Tr. pgs. 197-200.

In addition, the record is void of any attempt by Agency to collect Employee's initial offer of a \$25,000 payment prior to the second interview. Employee asserted that Mr. Smith informed him during the first interview that he would get back to Employee on setting up a repayment plan since he did not have the authority to agree to the payment arrangement. This is corroborated by the June 2022, interview wherein, Mr. Smith informed Employee that his job was to develop the record and DCHR or OAG handled recoupment of payments.²⁶ Employee averred that he never heard back from Mr. Smith about the repayment offer. Mr. Smith noted in his second investigative report, that following Employee's offer to immediately repay a portion of the overpayment, and make payment plans to pay the balance in installments; OCTO got approval to extend the deadline to discipline Employee and provided Employee with multiple opportunities to make payments. He further noted that Employee went on a prescheduled annual leave in July of 2022. This supports Employee's statement that the investigator was not authorized to make payment arrangement, and that Employee did not hear back from Agency after the interview on the issue of the payment arrangement as he was out on approved leave for all of July 2022.

The Merit Systems Protection Board (“MSPB”), this Office's federal counterpart, found in *Boo v. DHS*, 2014 MSPB 86, that “in order to sustain a charge of misrepresentation, an agency must prove by preponderant evidence that the appellant *intended to defraud, deceive, or mislead the agency for his own private material gain.*”²⁷ (Emphasis added). This Board further found that; “the charges of misrepresentation, falsification, and lying require the same elements of proof.”²⁸ It continued that, “[t]o establish a charge of falsification, the agency must prove by preponderant

²⁵ *Id.* at 13:36 – 13:49

²⁶ See Agency's Additional Evidence in Response to Post Status/Prehearing Conference Order, *supra*, June 24, 2022, video recording of the investigation interview at 23 to 28 minutes (23-28); and at 51-54 minutes (51-54).

²⁷ Internal quotation omitted.

²⁸ Citing *See Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 9 (2007) (misrepresentation and falsification have the same elements of proof); see also *Tackett v. Department of the Air Force*, 80 M.S.P.R. 624, ¶ 13 (1999) (lying is synonymous with falsification).

evidence that the appellant: (1) supplied wrong information; and (2) knowingly did so with the intention of defrauding, deceiving, or misleading the agency. ... *The intent to defraud or mislead the agency may be established by circumstantial evidence or inferred when the misrepresentation is made with a reckless disregard for the truth or with conscious purpose to avoid learning the truth. ... A finding that an appellant provided incorrect information, alone, however, cannot control the question of intent for purposes of adjudicating a falsification charge...* Rather, whether intent has been proven must be resolved by considering the totality of the circumstances, including the appellant's plausible explanation, if any." (Emphasis added).

While it is evident that Employee's answers to Mr. Smith's questions during the August 1, 2022, video interview were evasive and he acknowledged that he declined to answer some of Mr. Smith's questions, I find that Employee genuinely believed that Mr. Smith was asking the same questions he had already provided responses to repeatedly, hence one of the reasons he felt badgered, frustrated and refused to answer the questions again. This is supported by the record:

Mr. Smith: "I know it's not fun and I know it's not pleasant..."

Employee: "No it's not. *I feel like the same questions are being asked, the same questions are being asked, the same questions are being asked*, but there's no option to this, no resolution heading towards getting this done, getting the pay back. It's just questions, questions, questions and questions..." (Emphasis added).

Mr. Smith: "So you'll get a copy of the recording, and *you'll know whether or not I'm asking the same question again and again.*" (Emphasis added).

Employee: "okay."

Mr. Smith: "*We can agree to disagree on whether they are the same question...*"²⁹ (Emphasis added).

It should also be noted that the August 1, 2022, video interview was conducted on the day Employee returned to work, after being away for about a month. He testified that he was stressed as he had over 1,400 emails, a new more complex computer updating task, and the investigation. Additionally, Employee was informed of the meeting on his way back from lunch, he had to pull to the side of the road for the interview, and he was not provided with any advance notice of the interview. Furthermore, I find that there appears to have been a disconnect in the parties understanding of the questions asked and the purpose of the interview. Moreover, I find that Employee's answers were not intended to defraud or mislead Agency for his *own private material gain*, because he had already accepted to repay the overpayment in one (1) lump sum, followed by multiple smaller payments. Consistent with the MSPB Board's reasoning in *Boo* and given the totality of the circumstances, the undersigned finds that the mere fact that Employee's answers were evasive, and he refused to answer some of Mr. Smith's questions, is insufficient to prove intent for purposes of adjudicating a falsification charge. The MSPB Board in *Boo* stated that "an agency must prove by preponderant evidence that the appellant intended to defraud, deceive, or mislead the

²⁹ August 1, 2022, interview at 17:30 – 18:07.

agency “for his own private material gain.”³⁰ (Emphasis added). Here, there is no such evidence in the record, thus, I find that Agency’s “Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations” charge must fail.³¹

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

Based on the foregoing, I find that Agency did not have cause for adverse action against Employee. As a result, I also find that the penalty of termination was inappropriate under the circumstances. The undersigned further finds that because Agency has failed to meet its burden of proof for the causes of action in this matter, the action against Employee cannot be sustained.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency’s action of terminating Employee from service is **REVERSED**.
2. Agency shall reimburse Employee all back and benefits lost pay (less the overpayment amount of **\$ 53,391.66**), as a result of the termination.
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/ Monica N. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge

³⁰ See also *Harrison v. Department of Agriculture*, 411 F. App’x 312, 315 (Fed. Cir. 2010) (citing and relying on *Leatherbury*) (“To prevail on [a charge of falsification], the agency was required to prove that the statement was false, that it was material, and that the employee acted with the intent to deceive the agency for her private gain.”).

³¹ Although not binding, it should be noted that the Hearing Officer in the instant matter cited in their August 24, 2022, Hearing Officer’s Report that, “[t]he Hearing Officer finds that there was no evidence provided of any misrepresentation, falsification, or concealment of material facts or records in connection with an official matter, including investigation. Thus, charge number 2 cannot be substantiated.” She further noted in the Conclusion section of the Report that “[t]he Hearing Officer does not substantiate a violation of 6B DCMR §1607.2(b)(2) because no evidence of this was provided.” See Agency’s Answer, *supra*, at Exhibit 9.