Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE[1],	OEA Matter No. 1601-0036-23R26
v.	Date of Issuance: May 29, 2026
METROPOLITAN POLICE DEPARTMENT, Agency	MONICA DOHNJI, ESQ. Senior Administrative Judge

Employee, *Pro Se*[2]
Anna Kent, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On March 21, 2023, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Metropolitan Police Department's ("MPD" or "Agency") decision to terminate her from her position of Legal Instrument Examiner ("LIE") effective March 6, 2023. Employee was terminated for: (1) "Conduct Prejudicial to the District Government - Indictment or charge of any felony or criminal offense that is related to the employee's duties or his or her agency's mission"; (2) "Conduct Prejudicial to the District Government - Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position"; and (3) "Unethical or improper use of official authority or credentials."[3] On March 21, 2023, 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 March 29, 2023.

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on April 3, 2023. Following a Status/Prehearing Conference with both parties present, Agency filed a Motion to Stay Pending the Resolution of Employee's Criminal Matter. This matter was held in

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] While Employee was represented by a Union representative during the May 19, 2025, Status Conference and Employee's Brief was submitted by the Union, Employee's Union never officially entered his appearance in this matter, despite being notified to do so during the Status Conference.
[3] Employee was also charged pursuant to 6-B DCMR § 1605.5(a).

abeyance until Employee's criminal matter was dismissed on January 27, 2025. A Status/Prehearing Conference was held on May 19, 2025, with both parties present. Thereafter, the parties were required to submit written briefs. Agency's brief was due by June 9, 2025; Employee's brief was due by June 30, 2025; and Agency had the option to submit a sur-reply brief by July 14, 2025. Both parties submitted their respective briefs. Subsequently, the undersigned issued an Initial Decision ("ID") in this matter on September 5, 2025, reversing Agency's decision to terminate Employee.

Agency filed a Petition for Review on October 27, 2025. Thereafter, on January 29, 2026, the OEA Board issued an Opinion and Order ("O & O") on Petition for Review, remanding this matter to the undersigned citing that "[b]ecause the AJ failed to make findings related to 6-B DCMR § 1605.5(a), this Board cannot adequately determine if [the] Initial Decision is based on substantial evidence. Therefore, this matter must be remanded to the AJ for additional fact-finding." Accordingly, on February 4, 2026, I issued an Order setting a briefing schedule for the parties to address whether Agency had cause to charge Employee pursuant to 6-B DCMR § 1605.5(a) and if termination was an appropriate penalty for this cause of action. Both parties have submitted their respective briefs. The record is now closed.

JURISDICTION

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

ISSUE

1) Whether Agency had cause to charge Employee pursuant to 6-B DCMR § 1605.5(a). And if so,

2) Whether the penalty of termination was appropriate under applicable rules and regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

According to the record, Employee was a Legal Instrument Examiner ("LIE") with Agency. On July 17, 2022, Employee was arrested by MPD's Violent Crime Impact Team ("VCIT"). A criminal complaint was filed against Employee on July 18, 2022, at the D.C. Superior Court, charging Employee with Carrying a Pistol Without a License (Outside Home or place of business) in violation of D.C. Code § 22-4504(a)(1). Following an investigation by the MPD Internal Affairs Division ("IAD")[4], on November 15, 2022, Agency issued a 15-day advance notice of termination to Employee, charging her with the following:[5]

Charge No. 1:

[4] Agency's Answer to the Petition at Tab 1 (March 29, 2023).
[5] *Id*. at Tab 2.

Conduct Prejudicial to the District Government - (3) Indictment or charge of any felony or criminal offense that is related to the employee's duties or his or her agency's mission.

Your conduct is also described under D.C. Personnel Regulations, Chapter 16, Section 1605.5(a), An employee of the Department of Correction, Department of Youth Rehabilitation Services, or Metropolitan Police Department; an employee authorized to carry a firearm while on-duty; or a commissioned special police officer shall be deemed to have engaged in conduct prejudicial to the District of Columbia if:

(a) The employee engages in any act or omission that constitutes a criminal offense.

Specification No. 1:

On Sunday, July 17, 2022, you were arrested by members of the Violent Crime Impact Team (VCIT) in the 2300 block of 2nd Street, Northeast, for Carrying a Pistol Without a License (CPWL) outside of home or business, Possession of Unregistered Firearm (UF), Possession of Ammunition (UA) and Possession of a Large Capacity Ammunition Feeding Device (CCN# 22102272).

On July 18, 2022, you appeared before the Honorable Judith Pipe of the DC Superior Court for presentment of case #2022CF2004120. You were formally charged with Carrying a Pistol Without a License (Outside Home or Business) in violation of D.C. Code § 22-4504(a)(1). As an employee with a law enforcement agency, your actions on July 17th and the subsequent filing of formal charges against you demonstrates conduct that is in direct contravention with the goals and mission of the Metropolitan Police Department.

Charge No. 2:

Conduct Prejudicial to the District Government - (5) Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position.

Specification No. 1:

On Sunday, July 17, 2022, you were off duty [and] arrested for Carrying a Pistol Without a License (CPWL) outside of home or business, Possession of Unregistered Firearm (UF), Possession of Ammunition (UA) and Possession of a Large Capacity Ammunition Feeding Device. At the time of your arrest, you were a civilian employee of MPD, assigned to the Technical and Analytical Services Bureau, Records Division, Firearms Registration Section.

Charge No. 3:

Unethical or improper use of official authority or credentials.

Specification No. 1:

On Sunday, July 17, 2022, prior to your arrest, you advised MPD officers that you were going to "call [your] Captain." At the time of the arrest, you were a civilian employee of MPD. You made this statement in an apparent attempt to alert officers that you held a role in some capacity with law enforcement and anticipating that these officers would grant you some sort of courtesy and not take any further actions against you based on the initial traffic stop. This is a clear and improper abuse of your official credentials as an MPD employee.

On November 29, 2022, Employee's Union (NAGE) contacted Agency in response to the notice of proposed termination and the parties had a virtual meeting on December 8, 2022.[6] Thereafter, the assigned Hearing Officer issued her Notice of Hearing Officer's Administrative Review, sustaining Agency's decision to terminate Employee.[7] Subsequently, on March 6, 2023, Agency issued its Notice of Final Decision, terminating Employee from service.[8]

Agency's Position

Agency argues that Employee's appeal should be dismissed and her termination sustained because she was terminated for cause pursuant to 6-B DCMR § 1605.5(a). Agency asserts that Employee's criminal conduct was clearly depicted on the Body-Worn Camera ("BWC") footage of her stop and arrest. Agency contends that Employee acknowledged that everything in the vehicle belong to her and that she did not have a license to carry the firearm found in her vehicle during the stop. Agency avers that the police report created from Employee's arrest provides direct evidence that Employee engaged in prejudicial conduct as defined in 6-B DCMR § 1605.5(a). Agency further cited that Employee's criminal conduct remained pending for two and a half (2.5) years until January 27, 2025, when it was dismissed on the eve of the trial, at the request from the prosecutor. Agency explains that the USAO did not dismiss the case because it was unfounded, but rather because of difficulty prosecuting the case following the death of a key witness. Agency maintains that there is more than adequate proof that Employee engaged in conduct constituting a crime.[9]

Agency asserts that it did not need a conviction to find that Employee's conduct constitutes a crime under 6-B DCMR § 1605.5(a). Agency argues that the DCMR expressly identifies which disciplinary charges require conviction, and 6-B DCMR § 1605.5(a) is not one of them. Agency highlights that 6-B DCMR § 1605.5(a) is only applicable to agencies with a criminal justice mission, armed employees or commissioned special police officers ("SPO") of other District agencies. Agency also avers that Employee does not dispute that her criminal

[6] *Id*. at. Tab 3.
[7] *Id*. at Tab 4.
[8] *Id*. at Tab 5.
[9] *See* Agency's Brief (February 25, 2026). *See also*. Agency's Reply (April 1, 2026).

charges directly conflicted with the duties of a Legal Instrument Examiner at Agency's Firearm Registration Branch and with Agency's mission. Agency asserts that the undersigned's previous findings of fact in the ID support finding cause for discipline under 6-B DCMR § 1605.5(a). Agency also asserts that Employee conceded the issue of whether there was cause, as such, this Office should find that Agency had cause to discipline Employee pursuant to 6-B DCMR § 1605.5(a).[10]

Agency contends that the penalty of termination was a reasonable and appropriate penalty under 6-B DCMR § 1605.5(a). Agency explains that the type of prejudicial conduct under 6-B DCMR § 1605.5(a) is not included in the DCMR's Table of Illustrative Actions ("TIA"). Nonetheless, Agency states that 6-B DCMR § 1607.2 acknowledges that "the illustrative actions in the following table are not exhaustive and shall only be used as a guide..." Agency avers that absent an explicit DCMR penalty for 6-B DCMR § 1605.5(a), the undersigned should be guided by Agency's General Order ("GO") 120.21 which applies to MPD sworn personnel. Agency specifically cites to "any act or omission, whether occurring on or off duty, which constitutes a criminal offense, whether or not such act or omission results in a crime (other than misdemeanor traffic)." Agency maintains that engaging in conduct that constitutes a crime, even if it does not result in conviction, is cause for removal. Agency notes that all MPD employees should be held to a higher standard given the type of work and level of information they are trusted with handling. Agency contends that it weighed all the relevant factors and its judgement did not exceed the limits of reasonableness, therefor, Employee's termination should be upheld.[11]

Agency argues that the three (3) cases that Employee cited for receiving suspension and not termination for serious first offenses are distinguishable from Employee's case. Agency explains that the first case involved a cadet whose misconduct did not involve an arrest or criminal charges. Agency further notes that since the case involved a cadet, they held a 'non-career service' position, thus, Agency avers that this case did not involve a similarly situated employee or misconduct. Next, Agency states that the second case which involved a civilian MPD employee is distinguishable from the current case because that case did not involve an arrest for firearms or any felony offense like in Employee's case. Lastly, Agency asserts that the third cases involved a civilian employee and they were not accused of impersonating a police officer. Agency also notes that the employee in that case was not arrested or charged with any criminal offenses, as such the misconduct in that case is not comparable to Employee's misconduct. Agency contends that because the misconduct in the three (3) cases are not comparable to Employee's misconduct, the different penalties imposed should be unpersuasive. Agency notes that none of these three (3) cases involve similarly situated employees or factually similar misconducts.[12]

Employee's Position

Employee asserts that she does not contest Agency's general authority to discipline her pursuant to 6-B DCMR § 1605.5(a). She avers that although the record reflects that she was arrested and charged in July 2022, all the charges were dismissed prior to the trial not due to a

[10] *Id*.
[11] *Id*.
[12] Agency's Reply, *supra*.

finding that the allegations against her were substantiated. Employee cites that "she recognizes that the standard for discipline under 6-B DCMR § 1605.5(a) is not tied to criminal conviction, but instead, is a broader "conduct prejudicial" standard."[13]

Regarding the appropriateness of penalty, Employee contends that should OEA find that Agency has cause to impose discipline, the penalty imposed by Agency is unduly harsh and inconsistent with both District regulations and Agency's own practice as applied to similarly situated employees. Employee states that under 6-B DCMR § 1607, the penalty for a first occurrence for "Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position" is a 30-day suspension.[14]

Additionally, Employee contends that consistent with GO 120.21, MPD policy requires consideration of mitigating factors, the seriousness of the offense, and the employee's career record. Employee notes that her record is unblemished with consistently positive annual and quarterly reviews, and that she has received favorable evaluations from her direct supervisor throughout her tenure. Referring to the three (3) cases involving other employees, Employee argues that Agency has on at least three (3) occasions imposed a suspension rather than a termination for other employees accused of serious offenses. Employee also maintains that removing her from service without a criminal conviction or aggravating factors, especially since the case was dismissed and her unblemished service record "would be arbitrary, a departure from established practice, and inconsistent application of MPD's own discipline table." Employee cites that under the circumstances; the appropriate penalty should be no more than a 30-day suspension and not termination.[15]

Analysis[16]

Pursuant to OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Agency terminated Employee for (1) Conduct Prejudicial to the District Government - Indictment or charge of any felony or criminal offense that is related to the employee's duties or his or her agency's mission and pursuant to 6-B DCMR § 1605.5(a); (2) Conduct Prejudicial to the District Government - Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position; and (3) Unethical or improper use of official authority or credentials. The undersigned issued an ID in this matter modifying the penalty levied against Employee. Agency appealed the ID to the OEA Board and on January 29, 2026, the OEA Board issued an Opinion and Order remanding this matter to the undersigned citing that "[b]ecause the AJ failed to make findings related to 6-B DCMR § 1605.5(a), this Board cannot adequately

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[13] Employee's Brief on 6-B DCMR § 1605.5(a) and Appropriateness of Penalty (March 5, 2026).
[14] *Id*.
[15] *Id*.
[16] 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").

determine if Initial Decision is based on substantial evidence. Therefore, this matter must be remanded to the AJ for additional fact-finding." [17]

<u>Whether Agency had cause to take adverse action against Employee</u>

> <u>Charge No. 1</u>: 6-B DCMR § 1605.5(a): An employee of the Department of Correction, Department of Youth Rehabilitation Services, or Metropolitan Police Department; an employee authorized to carry a firearm while on-duty; or a commissioned special police officer shall be deemed to have engaged in conduct prejudicial to the District of Columbia if:
>
> (a) The employee engages in any act or omission that constitutes a criminal offense.

Agency argues that it is undisputable that Employee's conduct constitutes a criminal offense and that a conviction was not required to prove this cause of action. Employee does not dispute this fact. Employee provides that "she recognizes that the standard for discipline under 6-B DCMR § 1605.5(a) is not tied to criminal conviction, but instead, is a broader "conduct prejudicial" standard." Pursuant to the record and Employee's own admission, I find that this cause of action does not require a conviction, rather, an indictment, charge of any felony or criminal offense is sufficient to satisfy this cause of action. Employee was arrested, indicted, and charged with four (4) felonies, and these charges constitute a criminal offense. Moreover, Employee is employed by the Metropolitan Police Department. Accordingly, I find that Agency had cause to charge Employee pursuant to 6-B DCMR § 1605.5(a).

<u>Whether the penalty of termination is appropriate</u>

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[18] According to *Stokes*, OEA must

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[17] The undersigned finds that the use of the word "*<u>also described under</u>*" generally signals a connecting cross-reference to another provision section within the same regulation that provides more context or the exact same meaning or an alternate perspective. Moreover, based on my reading of 6-B DCMR § 1605.5, and Chapter 16 of the DCMR, it appears that this provision was not intended as a cause of action but rather to provide more context and/or explanation into how/when employers of some District agencies should charge their employees with '*<u>conduct prejudicial</u>*'. Specifically, 6-B DCMR § 1605.5 provides that "an employee of … the Metropolitan Police Department *<u>shall be deemed</u> to have engaged in <u>conduct prejudicial</u>* to the District of Columbia *<u>if</u>*: (a) *The employee engages in any act or omission that constitutes a criminal offense*; *<u>or</u>* (b) There is any credible evidence that the employee unlawfully used a controlled substance." (Emphasis added). I find that Agency may have been aware of this fact, reason why it did not list this 6-B DCMR § 1605.5 as a separate charge or provide a separate penalty for this charge in the advance notice of termination, its *Douglas* factors analysis or the final Agency decision. Nonetheless, the undersigned will make findings related to 6-B DCMR § 1605.5(a) in compliance with the OEA Board's directive.

[18] *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

decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. 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.[19] Accordingly, when an Agency charge is upheld, this Office will "leave Agency's penalty undisturbed when the penalty is within the range allowed by law regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgement."[20]

In the instant case, I find that Agency has met its burden of proof for Charge No. 1, as described under 6-B DCMR § 1605.5(a):

> An employee of the Department of Correction, Department of Youth Rehabilitation Services, or Metropolitan Police Department; an employee authorized to carry a firearm while on-duty; or a commissioned special police officer shall be deemed to have engaged in conduct prejudicial to the District of Columbia if:
>
> (a) The employee engages in any act or omission that constitutes a criminal offense.

The record shows that this was the first time Employee violated this cause of action. However, the Table of Illustrative Actions ("TIA") is silent as to the penalty for violation of 6-B DCMR § 1605.5(a). Nonetheless, section 1607.2 of the regulations provides the following guidance as it relates to an agency's selection of a penalty:

> The illustrative actions in the following table are not exhaustive and shall only be used as a guide to assist managers in determining the appropriate agency action. Balancing the totality of the relevant factors established in § 1606.2 can justify an action that deviates from the penalties outlined in the table.

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).

[19] *Love* also provided the following:

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

[20] *Id. See also. Sarah Guarin v Metropolitan Police Department*, 1601-0299-13 (May 24, 2013) citing *Stokes supra*.

Since the TIA is silent as to the penalty for violation of 6-B DCMR § 1605.5(a), Agency asserts that the undersigned be guided by GO 120.21 which is applicable to sworn MPD members in deciding the appropriate penalty for 6-B DCMR § 1605.5(a). While Employee is not a sworn MPD member and not covered by the GO, the undersigned will nonetheless look at both GO 120.21 and the regulations for guidance in determining whether the penalty of termination is appropriate for a violation of 6-B DCMR § 1605.5(a).

General Order Series 120.21, Attachment A, Part A-6, lists, "Engaging in conduct that constitutes a crime" as a cause of action. Here, Employee was charged with violating 6-B DCMR § 1605.5(a) - "engag[ing] in any act or omission that constitutes a criminal offense." I find that this is similar to the cause of action pursuant to GO Series 120.21, Attachment A, Part A-6. Therefore, I find that I can rely on GO Series 120.21, Attachment A, Part A-6 in deciding the appropriate penalty under 6-B DCMR § 1605.5(a). The Table of Penalties expressly states that engaging in conduct that constitutes a crime is prohibited conduct and "shall serve as the basis for discipline."

Agency argues that the Table of Penalties as found in GO 120.21 classifies "engaging in conduct that constitutes a crime" as a termination offense. I disagree. A review of the Table of Penalties under GO 120.21, requires a "*Conviction* (Engaging in conduct that constitutes a crime, other than misdemeanor traffic)." (Emphasis added). While Employee was arrested and charged with a conduct that constitutes a crime, it is undisputed that Employee was not convicted. Additionally, the record suggests that Employee was charged with a felony and not a misdemeanor traffic offense. Consequently, I find that this penalty of termination as defined in the GO is not applicable to the current matter.

Because the General Order's Table of Penalties does not provide a penalty for "a conduct that constitutes a crime" absent a conviction, the undersigned finds that the GO Table of Penalty provision is not applicable to the current matter. Therefore, the undersigned will now revert to 6-B DCMR for guidance. Upon review of the record, I find that the cause of action for 6-B DCMR § 1605.5(a) is similar to the cause of action as described in 6B DCMR §1607.2(a)(3) – "Conduct Prejudicial to the District Government - (3) *Indictment or charge of any* felony or *criminal offense* that is related to the employee's duties or his or her agency's mission." (Emphasis added). Moreover, in listing the charges against Employee, Agency listed a violation of 6B DCMR §1607.2(a)(3) and for 6-B DCMR § 1605.5(a) under Charge No. 1., not as separate charges, but with the notation – "*Your conduct is also described under* D.C. Personnel Regulations, Chapter 16, Section 1605.5(a)." (Emphasis added). Furthermore, under its *Douglas* factor No. 7, analysis, Agency cited that the maximum penalty for a first offense for Charge No. 1, (which also included a charge pursuant to 6-B DCMR § 1605.5(a)) is "enforced leave pending criminal prosecution."

The OEA Board in *Edward Morgan v. Fire and Emergency Medical Services Department*,[21] noted that:

> "Additionally, the D.C. Court of Appeals has consistently relied on the Table of Penalties when determining the appropriateness of an agency's penalty.[22]

[21] OEA Matter No. 1601-0039-13, *Opinion and Order on Petition for Review* (September 13, 2016).

> Furthermore, the OEA Board held in *Richard Hairston v. Department of Corrections,* OEA Matter No. 1601-0307-10, *Opinion and Order on Petition for Review* (September 16, 2014)(citing *Power v. United States*, 531 F.2d 505, 507-508, 209 Ct.Cl. 126 (1976) (citing *Daub v. United States*, 292 F.2d 895, 154 Ct.Cl. 434 (1961) and *Cuiffo v. United States*, 137 F.Supp. 944, 950, 131 Ct.Cl. 60, 68 (1955)), that there are two scenarios in which courts will not uphold the punishment imposed by the agency because of an invalid penalty. *The first is where the sanction exceeds the range of permissible punishment specified by statute or regulation*. (Emphasis added). The second scenario is where a court has determined that the discipline is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency."[23]

The OEA Board found that the agency in *Edward Morgan v. Fire and Emergency Medical Services Department* abused its discretion when it terminated Morgan, although the maximum penalty for the first offense was a fifteen (15) day suspension. The OEA Board stated that "As the AJ held, Agency's penalty of removal exceeds the range of penalty outlined for the first offense of incompetence."

Pursuant to the Table of Illustrative Actions ("TIA"), the penalty for a first offense for 6B DCMR §1607.2(a)(3), is <u>Enforced leave pending criminal prosecution</u>. Agency terminated Employee while the related criminal prosecution was pending. Employee was terminated effective March 6, 2023, and the related criminal matter was dismissed on January 27, 2025. Because Agency terminated Employee instead of placing her on enforce leave while the related criminal matter was pending, I find that Agency abused its discretion as termination is not within the penalty range under 6B DCMR §1607.2(a)(3). Consequently, because termination is not within the range of penalties for similar charges under the DCMR and the GO for a violation of 6-B DCMR § 1605.5(a), I conclude that the penalty of termination must be modified.

<u>*Disparate Treatment*</u>

Employee argues that Agency has not been fair in terms of instituting discipline in the current matter. Employee referenced three (3) MPDs cases where the employees received suspensions for similar misconduct. Agency contends that because the misconduct in the three (3) cases are not comparable to Employee's misconduct, the different penalties imposed should be unpersuasive. Agency notes that none of these three (3) cases involve similarly situated employees or factually similar misconducts.

OEA has held that, to establish disparate treatment, an employee *must* show that he 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

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[22] Citing *Department of Public Works v. Colbert,* 874 A.2d 353 (D.C. 2005); *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985); *Brown v. Watts,* 993 A.2d 529 (D.C. 2010); *Hutchinson v. D.C. Office of Employee Appeals,* 710 A.2d 227 (D.C. 1998); and *District of Columbia v. Davis,* 685 A.2d 389 (D.C. 1996).

[23] The OEA Board in *Edward Morgan v. Fire and Emergency Medical Services Department, supra*, noted that although the decisions issued in federal circuit courts are not binding on the OEA Board, it found that they offered sound guidance regarding Table of Penalties.

same supervisor for the same offense within the same general time period (emphasis added).[24] Further, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty."[25] (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."[26] 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.[27] Here, Employee made a blanket assertion that Agency has not been fair in terms of instituting discipline in the current matter. However, she did not offer any evidence in support of this allegation. Employee did not provide the nature of the misconduct, whether they were disciplined by the same supervisor for the same offense within the same general time period. Therefore, I find that Employee has not established a *prima facie* showing of disparate treatment and as such, I conclude that Employee has failed to prove that she was subjected to disparate treatment.

<u>Penalty Based on Consideration of Relevant Factors</u>

An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[28] Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the decision to terminate Employee.[29] The *Douglas* factor analysis included in the record demonstrates that Agency considered all factors in imposing the penalty in this

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[24] *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 *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009).
[25] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).
[26] *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30 ,2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).
[27] *Id*.
[28] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).
[29] In *Douglas v. Veterans Administration*, the Merit Systems Protection Board ("MSPB"), this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

matter. However, for the reasons stated above, I find that Agency's penalty was not within the range allowed by law, regulation, and the applicable TIA, and as such, must be modified.[30]

<u>ORDER</u>

Based on the foregoing, it is hereby ORDERED that:

1. Agency's adverse action of termination is hereby **REVERSED** and Employee shall be **REINSTATED** to her previous position of record.

2. Agency's penalty for violating "Conduct Prejudicial to the District Government - Indictment or charge of any felony or criminal offense that is related to the employee's duties or his or her agency's mission" and 6-B DCMR § 1605.5(a) "An employee of the Department of Correction, Department of Youth Rehabilitation Services, or Metropolitan Police Department; an employee authorized to carry a firearm while on-duty; or a commissioned special police officer shall be deemed to have engaged in conduct prejudicial to the District of Columbia if: (a) The employee engages in any act or omission that constitutes a criminal offense" **is MODIFIED to Enforced Leave from March 6, 2023, to January 27, 2025**.

3. Agency's penalty for "Conduct Prejudicial to the District Government - Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position" is **MODIFIED to a THIRTY (30) DAY SUSPENSION**.

4. Agency shall reimburse Employee all back-pay, benefits lost as a result of the adverse action.

5. 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] Because the undersigned has already addressed the other causes of action in its September 5, 2025, ID and the OEA Board specifically remanded this matter to the undersigned "to make findings related to 6-B DCMR § 1605.5(a)…" the undersigned will not address the other charges levied against Employee in this decision.