

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:)	
)	
TAMEKA GARNER-BARRY,)	
Employee)	OEA Matter No. 1601-0083-14
)	
v.)	Date of Issuance: May 25, 2016
)	
D.C. DEPARTMENT OF PUBLIC WORKS,)	Monica Dohnji, Esq.
Agency)	Senior Administrative Judge
_____)	
Clifford Lowery, Employee's Representative)	
Milena Mikailova, Esq., Agency's Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 6, 2014, Tameka Garner-Barry (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Public Works’ (“DPW” or “Agency”) decision to suspend her for fifteen (15) days from her position as a Parking Enforcement Officer (“PEO”) effective June 1, 2014. Employee was charged with violating District Personnel Manual (“DPM”) section 1603.3.¹ On July 9, 2014, Agency filed its Answer to Employee’s Petition for Appeal.

This matter was originally assigned to Administrative Judge (“AJ”) Harris. AJ Harris held several Conferences in this matter. Following AJ Harris’ departure from OEA, this matter was reassigned to the undersigned AJ. Thereafter, an Evidentiary Hearing was held on November 18, 2015. Both parties were present for the Evidentiary Hearing. Subsequently, I issued an Order dated January 15, 2016, notifying the parties that the transcript from the Evidentiary Hearing was available at OEA. The Order also provided the parties with a schedule for submitting their written closing arguments. The written closing arguments were due on or before February 19, 2016. On February 4, 2016, Agency filed a Joint Motion to Extend Deadline for Filing Closing Arguments. This Motion was granted in an Order dated February 10, 2016.

¹ (1) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious – Sleeping on the job; and (2) any other on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations – Neglect of Duty failure to carry out assigned tasks and careless or negligent work habits.

Pursuant to this Order, the deadline for submitting closing arguments was extended to April 4, 2016. Subsequently, Employee requested additional time to file her written closing argument. Employee's request was granted. Both parties have now submitted their written closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Agency had cause to take adverse action against Employee; and
- 2) Whether the penalty of fifteen (15) days suspension is within the range allowed by law, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.² "Preponderance of the evidence" shall mean:

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

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.³

SUMMARY OF MATERIAL TESTIMONY

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

Agency's case in chief

1) Wayne Means

Wayne Means (Mr. Means) has been employed with Agency for eleven (11) years. He is currently the Supervisory Parking Enforcement Officer. His responsibilities include, but are not limited to supervising a team of mobile units who patrol the entire city for Registration of Out-of-State Automobiles ("ROSA") violation. He was Employee's supervisor at the time of the alleged incident that occurred on April 1, 2014.

² 59 DCR 2129 (March 16, 2012).

³ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

Mr. Means explained that Employee's tour of duty on April 1, 2014, was from 10:00 p.m. to 6:30 a.m. Employee was partnered with Ms. Toya King. Mr. Means testified that he received a text message from Ms. King stating that Employee was taking a long time to write down vehicles, which was part of her duty at night, because Employee kept falling asleep while doing so. Tr. at pg. 15. Mr. Means also stated that Ms. King requested to come back to the building to use the bathroom. Mr. Means granted Ms. King permission to come to the facility to use the bathroom. Mr. Means told Ms. King that he would meet them at the building. Tr. at pg. 15. Employee was a passenger in the vehicle when Ms. King requested to come and use the facility. Mr. Means further stated that because he granted permission for Ms. King to come back to the facility to use the bathroom, they were on a restroom break from the time they were in route to the building from their post. Tr. at pgs. 32-33.

Mr. Means testified that as he arrived at the building at approximately 1:28 a.m. on April 1, 2014, Ms. King was already in the building, and once he arrived and parked, he notice the vehicle was sitting out front running. As he approached the vehicle, Mr. Means noticed that Employee was asleep in the passenger side and her window was cracked opened. . Tr. at pgs. 16 & 33. Mr. Means stated that he could tell that Employee was asleep because he called her name and tapped on the window several times, but she did not wake up. He took two pictures of Employee sleeping before he started knocking on Employee's window. Employee only woke up at the third tap of the window, and stated that she was praying. Tr. at pg. 17. He testified that he did not find Employee's statement that she was praying credible because Employee did not have her hand in a certain manner, nor was she verbally praying. Moreover, Employee did not respond to him taping the window and calling her name. Mr. Means stated that while he believed Employee when she said she was okay to go back to work after she woke up, he did not believe her when she said she was not sleeping based on his observation of her mannerism. Tr. at pgs. 19 & 40-41.

Mr. Means stated that he called his supervisor, Ms. Kathy Harrison-Crews to come out and witness the incident before he started knocking on Employee's window. After Ms. Harrison-Crews arrived, he, (Mr. Means) started tapping at Employee's window. Tr. at pg. 20. Mr. Means later testified that Employee stated that she was praying once she exited the vehicle and also when he took Employee inside to ensure that she was capable of returning to duty. Tr. at pg. 21. He noted that he counseled Employee about sleeping while on duty, and asked if she needed a drink to assist her, to which Employee stated that she was okay, and that she was just praying. Tr. at pg. 21. He allowed Employee to go back to her duty because he could see that Employee was going to be okay since she was awake.

Mr. Means stated that he did not question Employee about the text message he received from Ms. King with regards to Employee falling asleep while performing her duties. He also testified that Employee performed her assigned tasks on the date of the incident. However, based on Ms. King's text, Employee could not have performed all her tasks because she was falling asleep while inputting vehicle numbers into the system. Therefore, she wasn't able to perform all her tasks, which means she was missing vehicles. He did not confront Employee about the non-performance of her duties after he received the text from Ms. King. Tr. at pgs. 34-35.

Mr. Means identified the computer system used by PEOs to document citations, warnings, times, locations, and areas. Between 11:18 p.m. to 12:56 a.m. on the night in question, the computer entries made were assigned to Employee. However, per Ms. King's text, it was taking them twenty (20) minutes to complete a block because Employee was falling asleep. Mr. Means testified that it should not take twenty (20) minutes to complete a block. He explained that if he calls a vehicle out to you, you can still be asleep, and when he mentions to you that there's a vehicle right there, you can then wake up and input the vehicle and thus, have consistent numbers even with the complaint. He testified that Employee was consistently entering tag numbers as she was assigned. He did not counsel Employee about her work production on the night of the alleged incident. Tr. at pgs. 38 - 39.

Mr. Means stated that when he was first notified by Ms. King that Employee was sleeping, they were not on a break. He explained that with the way the break system works, employees are allowed a lunch break and two (2) fifteen (15) minutes break. Tr. at pg. 22. Pursuant to the Standard Operation Procedures, employees are not allowed to sleep regardless of whether they were on a break or not. However, employee can take breaks to smoke, or get a drink or something of that nature. Further, employees shouldn't take a lunch break until four (4) hours into duty. Tr. at pgs. 22-23.

With regards to the fifteen (15) minute breaks, Mr. Means testified that employees could take those a little earlier than four (4) hours into duty. Mr. Means again stated that pursuant to the Standard Operating Procedure, which is made available to all employees, regardless of whether an employee was on a break, there is no sleeping. He noted that the Standard Operating Procedure is approved through the Union, and issued to all employees, and because Employee has worked with Agency for several years, he is quite sure Employee had several Standard Operating Procedures. Tr. at pgs. 23-24. Mr. Means asserted that, the no sleeping on duty policy is reiterated during roll calls and team meetings. Roll calls happen at the start of every tour of duty, and it is where they discuss pertinent information for the day before officers go out into the street and field. Tr. at Pg. 24.

Mr. Means explained that the reason it is important for Parking Enforcement Officers not to sleep while on the job is because, they use a tandem – having PEO tandem with another PEO so that, one PEO is on the computer and the other one is identifying vehicles that need to be recorded, and for safety reasons too. The tandem is used for productivity and safety. Because they work at night, while one person is on the computer, the other person is watching the surroundings, so nobody can walk up on the officers and the vehicles. Tr. at Pg. 25. Mr. Means stated that both partners must break together because of the productivity and safety.

Mr. Means was Employee's supervisor for approximately six (6) months. He testified that during that period and prior to the April 1, 2014, incident, he was informed by two (2) officers who worked with Employee, that Employee sometimes gets tired while driving, dozing off at the wheel. He was also informed by the two (2) officers that Employee takes multiple bathroom breaks or to get a soda to help keep her awake, she doesn't know how to read the map, or consistently need to be directed on which street to observe. On February 10, he reported these to his supervisors after checking on the productivity for February 9. Tr. at pgs. 27-28.

Mr. Means testified that Employee's conduct of sleeping on the job affects the reputation and integrity of DPW in that, people could photograph the person sleeping and it becomes a whole big public thing – it could be on the news, which they try to stay out of the media as much as possible. Also, safety wise, not just for the other officer's safety, but for her safety also. They work in teams as much as they can, and when one person is not holding up their end of the bargain, it affects the other person, and that's why Ms. King texted him, to let him know what was going on. Tr. at pgs. 28-29.

When questioned whether Employee was holding a cup and a cell phone in the picture that Mr. Means took on April 1, 2014, Mr. Means stated that Employee was holding a cell phone and a bottle to her side. He testified that he could not tell whether Employee was holding her phone tightly. Tr. at pg. 42. Because he believed Employee was sleeping, he didn't think Employee heard him tap on the window. The vehicle Employee was in was located in front of DPW Parking Enforcement Services at the time of the incident. He stated that it would not be fair to say that Employee was not in the public at that time; however, he agreed that there were no vehicles and no work for Employee to perform at that time. Tr. at pgs. 43-44. Mr. Means testified that according to Ms. King, Employee was asleep all the way from the time that she requested to come back to the building. During this time that Employee was asleep during the travel through traffic, from Ward 7 or 8 back to the building, anybody, including citizens could see her. Tr. at pg. 44. Mr. Means testified that when he saw Employee asleep, the vehicle was already parked and Ms. King was using the bathroom. Tr. at pg. 45.

Mr. Means further testified that he is somewhat familiar with the union contract. He stated that he is familiar with the provisions for breaks in the union contract. He explained that according to the union contract, an employee can take a fifteen (15) minutes break at any time as long as they contact their supervisor if they want to take the break early. However, if they want to take the break an hour or two (2) hours into their shift, it's not a problem. Tr. at pgs. 46-47. Mr. Means reiterated that Employee is not permitted to sleep while on duty period, even if she is on a bathroom break. Tr. at pg. 48. He did not observe Employee sleeping at any time other than what the picture he took represents. Tr. at pg. 49.

2) *Kathy Harrison-Crews*

Kathy Harrison-Crews (Ms. Harrison-Crews) has been employed by Agency for twenty (20) years in the Parking Enforcement Management Administration ("PEMA"). She is the interim Manager for Parking Control. She oversees the whole Parking Control Division. She supervises supervisors and coordinators for Parking Control. She supervised Mr. Means in April of 2014.

She was at her desk at approximately 1:30 a.m. at the 1721 15th Street Northeast building on April 1, 2014. At approximately 1:33 a.m., she received a call from Mr. Means asking her to report outside as soon as possible. As she was exiting the door to go out where Mr. Means was, she observed Employee sitting on the passenger side of the minivan with her head laid up against the chair with her eyes closed. She testified that she assumed Employee was asleep. Ms. Harrison-Crews explained that when she first observed Employee, she asked Mr. Means how long Employee was like that, and he stated that her eyes were closed since he had been standing out there. Ms. Harrison-Crews also testified that she observed Mr. Means attempting to get

Employee's response on three (3) separate occasions by tapping on the window. Employee responded after the third (3) tap that Mr. Means made on the window. Employee was hesitant when she woke up and stated that she was praying. According to Ms. Harrison-Crews, when Employee woke up, Mr. Means asked Employee to step out of the vehicle and come to his office. She was not present during the conversation Mr. Means had with Employee in his office. Tr. at pgs. 52-53.

Ms. Harrison-Crews stated that she completed a report regarding this incident. She testified that Employee's tour of duty started at 10:00 p.m. She explained that Employee could not have been on break because her reporting time started at 10:00 p.m. and by the time she got to her post to start enforcing the area, it would be about 11:20-11:30 p.m. Thus, Employee should be in performance of her duty at 1:00 a.m. Ms. Harrison-Crews testified that even if Employee was on break, she knew, or should have known that she was not permitted to sleep or take a nap. Tr. at pg. 56.

Ms. Harrison-Crews testified that Employee was in uniform and on duty when she observed Employee in her car. She also stated that a copy of the Standard Operating Procedures is provided to Parking Enforcement Officers when they get hired into training, and it is also a topic of their daily roll call. Ms. Harrison-Crews notes that, they talk about what you should do if you fell asleep such as letting management know and they will allow you to take time off to get yourself together. Tr. at pgs. 57-59. Ms. Harrison-Crews testified that even if Employee was on break at the same time that Ms. King was using the bathroom, Employee was not permitted to sleep or take a nap during that time, and this policy has been made very clear to DPW employees. Tr. at pg. 71.

According to Ms. Harrison-Crews, it is important to have both Parking Enforcement Officers awake and alert for protection of each other, as well as productivity. She explained that while one is driving and taking safety precautions, the other one can be inputting the information in the system. Ms. Harrison-Crews testified that sleeping on the job gives a bad perception of the Agency. She additionally, stated that it is also unethical, because you are getting paid to do a job, and when you are sleeping on the job, you are also misusing government resources. Further, the Parking Enforcement Officer that you are working with is doing double duties – inputting information in the system, driving, and looking at the surroundings, and therefore, you are putting them in an unsafe environment, especially in the area that Employee and her partner work in. Tr. at pgs. 59-60.

Ms. Harrison-Crews testified that Employee's driver had permission to come back to the building for a restroom break, which is why Employee was also at the building at approximately 1:30 a.m. on the day of the incident. Tr. at pg. 61. When asked what Employee could have been doing while Ms. King was using the restroom, Ms. Harrison-Crews testified that from her observation, Ms. King had not even exited the vehicle when she was told to come out. As she walked out of the door, Ms. King was coming out of the vehicle, and going into the building. So Employee was positioned that way before Ms. King even exited the vehicle. She stated that she saw Ms. King exit the vehicle, and Mr. Means was present at the scene of the incident before her, and he called her while he was still out there. She stated that she was not sure if Mr. Means tapped on the window before she arrived, but she observed the three (3) taps from when she

arrived. Ms. Harrison-Crews stated that the third tap was a little louder than the first two (2) taps and it startled Employee, and woke her up. She noted that no one asked Employee if she was asleep, when she woke up, her statement was "I was praying." She concluded that Employee was sleeping and not praying, based on her observation of Employee alone. Based on her observation, she could not discern whether Employee was praying or not, but it looked as though Employee was sleeping. Tr. at pgs. 62-64.

According to Ms. Harrison-Crews, it is fair to state that Employee was consistently performing her duties between the times she arrived at work, up until the time she went to the restroom break. She did not have any problems with the performance of Employee's duties on the date in question. Tr. at pg. 65. Ms. Harrison-Crews testified that Employee could have been awake while waiting for Ms. King because she, (Ms. King) was not in the bathroom for a long time. From her knowledge and observation, Ms. King was away from the vehicle no more than ten (10) or fifteen (15) minutes. Tr. at 66.

Ms. Harrison-Crews avers that she is familiar with the union contract provision of an employee having a break. She stated that employees are entitled to two (2) fifteen minute breaks within every two (2) hours of their shift, within a two (2) hours period. She is aware that Mr. Means granted Employee and Ms. King permission to be on break, however, she does not consider using the restroom as a break. Employees are entitled to go to the restroom, and going to the restroom does not normally take fifteen (15) minutes. But because there are no restrooms in the area that Employee works, they are entitled to return to the building to use the restroom. And the Agency was aware that Employee was coming back to the building. Tr. at pgs. 68-69.

3) Cynthia Jones

Cynthia Jones (Ms. Jones) currently works for PEMA as a Program Manager for the Abandoned Vehicle Operations. In this role, she is responsible for the management of the removal and disposition of abandoned vehicles throughout the District of Columbia, as well as the disposal of vehicles through the process of auctioning. At the time of the alleged incident, Ms. Jones was the acting manager for the Parking Enforcement Division. Ms. Jones identified her signature on the Advanced Written Notice of Proposed Suspension of fifteen (15) days for Employee. Tr. at pg. 76. Ms. Jones testified that she relied on photographs from the shift coordinator, the supervisor and a statement from an employee that was working with Employee on the date of the incident in support of Cause Number 1. She further stated that based on her observation of the photo and the statement, she prepared a proposal for suspension for sleeping on the job. Tr. at pgs. 77-78. She explained that her perception was that Employee was asleep. According to Ms. Jones, if an employee is on a break, they are technically still on the job. She stated that it was not appropriate for Employee to be asleep while Ms. King was using the bathroom because Employee was still on the job at that time. Tr. at pgs. 79 & 89.

With regards to Cause Number 2, Ms. Jones testified that she relied on the facts presented by the shift coordinator and the supervisor. She stated that the following facts were presented to her: the Shift Coordinator and the supervisor received a text message from Employee's partner on the night of the incident. Employee's partner, Ms. King, contacted their immediate supervisor and stated that during their patrol activities, Employee would fall asleep (was dozing off) and she, the partner, would have to wake Employee up to put tag or information into the computer

system while they were working. Ms. King stated that she was frustrated, and the supervisor directed her to just bring Employee back to the building. Tr. at Pgs. 78-79, & 82.

Ms. Jones testified that she was not aware and/or does not recall that Ms. King received permission from Mr. Means to come back to the building for the specific purpose of her using the restroom. Tr. at pgs. 86 & 88. Ms. Jones testified that knowing that Ms. King returned to the building to use the bathroom would not have changed any of the causes of action, specifically, sleeping on the job, because Ms. King's going to the bathroom had nothing to do with Employee. She again explained that, regardless of whether Employee was on a break or not, she was not permitted to fall asleep. Tr. at pg. 89-90. Ms. Jones testified that it would be reasonable to assume that because Employee was riding with Ms. King, and she had to come back to the office, Employee had no other choice but to come back to the office with Ms. King since she was the driver. Tr. at pg. 92. Ms. Jones testified that Employee should have waited for her partner to come back if Employee did not have to use the bathroom. She stated that she was aware of Employee's statement that she was praying. Tr. at pg. 93-94.

Ms. Jones testified that the advance written notice referenced an absence without official leave in March of 2014, as a prior disciplinary action against Employee. She notes that Employee was reprimanded for the absence without official leave incident. Ms. Jones testified that based on the District Personnel Manual, a fifteen (15) day suspension was a reasonable penalty as it was within the range of the proposed penalties that she worked off of.

Ms. Jones stated that, because we live in a text-savvy world, you have to really be aware of the fact that you work in the eyes of the public at all times. Thus, sleeping on the job could have a negative impact on the Agency's ability to effectively get the job done. She also noted that since Employee's job is in the public, the time of the day is irrelevant. Tr. at pg. 81.

Ms. Jones testified that employees who work for ROSA operation are partnered at night. One employee drives and the other employee inputs information of vehicles into the system. Residents often complain when employees are out patrolling the area, thus, these employees have to be very careful when performing their jobs because they can inadvertently enter the wrong license plate number.

According to Ms. Jones, Employee interfered with the efficiency of the operation at night because she had to be brought back to the building. She testified that she did not look at the printout of Employee's work performance on the date of the incident. Tr. at pg. 84. She stated that her main concern in the disciplinary process is to ensure that the supervisors and the shift coordinators adhere to the *Douglas* factors. Tr. at pg. 85. She maintained that the only information presented to her were the photographs, a statement from Ms. King, and the supervisor and the shift coordinator's perception of what they saw when they took the photographs. Tr. at pg. 86.

When questioned about the accuracy and correctness of the cars Employee logged into the system on the date of the incident, Ms. Jones stated that they could be accurate and correct. This can be verified by going into the Officer Command System and reviewing the times and run the tags to see if the license plate number entered into the system matches the registered vehicle

to that tag number. She also testified that she did not have the opportunity to use the Officer Command System to determine whether or not Employee was being negligent or efficient in her duties on the date of the incident. Ms. Jones noted that she did not see Employee sleeping on the job. Tr. at pgs. 91-92.

4) **Sheila Jordan**

Sheila Jordan (Ms. Jordan) is currently employed by the D.C. Department of Human Resources. She was previously employed by Agency for approximately five (5) years as a Deputy Administrator. Her duties in this role included overall support, operations, dispatch unit, and all the support activities to keep the administration flowing. She testified that at the time of the alleged incident, she was the Interim/Acting Administrator and a proposal came to her to suspend Employee. She identified the Final Decision for the proposal for a fifteen (15) days suspension. She also identified her signature on the proposal. Tr. at pg. 96.

Ms. Jordan testified that she found that the charges of neglect of duty and sleeping on the job were supported by the evidence. She came to this decision by reviewing the statements made by the parking officer, Ms. King, and the pictures that were taken. She does not recall if the supervisor wrote a statement, but she recalls talking to him. She identified the incident report that is filled out whenever there's an incident, specifically, the one authored by Ms. King. Tr. at pgs. 97-98. According to Ms. Jordan, the most important information she used in her determination was that Employee was asleep while on duty and the pictures that were supplied. She also stated that she relied on Ms. King's indication in her statement that Employee was having a problem staying awake while they were out monitoring the streets. She reviewed the information before making her decision. She stated that she did not find Employee's explanation that she was meditating credible. She explained that, based on the picture, it did not appear to her that Employee was meditating. Tr. at pgs. 100-101.

Ms. Jordan testified that she reviewed Employee's prior disciplinary record. She stated that she was also the deciding official for the reprimand Employee received for being absent without official leave. Ms. Jordan noted that based on the Chart of Penalties in the Progressive Discipline Book, and upon considering the *Douglas* factors, she found that a fifteen (15) day suspension was the appropriate penalty for the current charges. Tr. at pgs. 101-104. In reviewing the *Douglas* factor for this matter, Ms. Jordan stated that she considered the seriousness of the offense, and whether the penalty was consistent with penalties given to other employees. Tr. at pgs. 104-105.

Ms. Jordan testified that sleeping on the job sends a wrong message that they allow their employees to get their rest while they are working. She explained that sleeping during your break is very much like an employee not being on the clock, but they are in uniform, and they go rob a bank. This looks bad on the agency. Tr. at pgs. 105-106.

Ms. Jordan testified that she did not see Employee sleeping on the job. Her decision was based on the totality of the information provided to her. Ms. Jordan concluded that Employee was neglectful of her job because of Ms. King's statement that indicated that Employee was sleeping instead of entering tags, and the pictures.

With respect to the picture taken of Employee at the main parking building, Ms. Jordan explained that although it is not a public area, the public could reach the building. According to Ms. Jordan, it is not illegal for an employee to pray during their break. Tr. at pg. 111. Ms. Jordan testified that a cup of water and strongly gripping a phone, as Employee was doing when the picture was taken, is consistent with being asleep.

Ms. Jordan stated that she did not recall seeing Mr. Means' statement. She further stated that she does not believe Employee was asked for a statement at the time of the incident or during the investigation stage. However, Employee provided a statement when she received the proposal. Ms. Jordan noted that, apart from Ms. King's statement, Mr. Means and another supervisor witnessed Employee sleeping.

Ms. Jordan testified that she received, reviewed and considered a written response from the union wherein the union representative stated that Employee was meditating. She made a credibility determination, based on the evidence from Ms. King, and the supervisors, and the pictures. She found that the statement from the parking officer, the supervisors and the pictures were more credible. The evidence indicated that Employee was sleeping. Ms. Jordan stated that the consistency of the evidence played a role in her decision.

Employee's Case in Chief

1) Tameka Garner Barry

Tameka Garner Barry ("Employee") has been employed by Agency for about nine (9) years as a Parking Enforcement Officer. Her duties as a parking enforcement officer are to enforce the rules and regulations on the streets of the District of Columbia. Currently, she is detailed as a Program analyst, reviewing citations issued by officers on the street.

Employee testified that her performance as a parking control officer has been outstanding, and is reflected in her evaluation. Employee explained that her performance evaluation immediately prior to the current adverse action was "outstanding" and "Role Model." She explained that an employee receives a "Role Model" on a performance evaluation when an employee has successfully completed every task to their best ability, as well as master the task. Tr. at pg. 121. Employee received a rating of five (5) under Section 4, Goal number 4 of Employee's performance evaluation which is described as: "Customer service, punctuality, teamwork, appearance and equipment and vehicle maintenance." The comment section of this evaluation stated that "Ms. Garner Barry is always neat in her appearance, is always on time for work. Ms. Garner Barry will help a coworker when she or he needs help. Ms. Garner Barry takes pride in giving great customer service to all who comes across her path during the workday." Employee testified that she agrees with the assessment of her performance. Tr. at pgs. 122-123.

Employee testified that she reported to work on time on April 1, 2014, and performed her duties. She explained that her goal on April 1, 2014, as a passenger was to take down the vehicles while her partner, Ms. King read out the tag numbers. Employee explained her ROSA work production on April 1, 2014 and how the information is gathered. She stated that the numbers imputed by the officers are gathered into the MEZ system, calculated on a computer

and printed out. Tr. at pgs. 127-128. On the date of the alleged incident, Ms. King had to call the numbers for it to get on her production list.

Employee testified that she and Ms. King returned to 1725, the main building, because Ms. King called Mr. Means stating that she had to go to the restroom. Mr. Means asked Ms. King if she wanted to come down to the main building to use the restroom, although there were several rest stops prior to coming to the main building, and Ms. King said yes. Employee and Ms. King returned to the main building. When they arrived at the building, Ms. King went into the building to go use the restroom. Employee stated that she told Ms. King "Okay, I'm going to meditate while you're in the building," which she did. Employee testified that Ms. King, as well as Mr. Means were aware that she was fasting and praying at her church. Tr. at pg. 129. Employee stated that Ms. King was in the building for about fifteen (15) minutes. Ms. King was not in the car when Mr. Means approached the car.

Employee testified that when Mr. Means came out, he tapped on the window three (3) times. She alerted Mr. Means the first time he tapped on the window that Ms. King was in the bathroom on her break, "...so I'm on my break, I'm meditating." Mr. Means heard the gospel music playing. He left it alone, and then notified Ms. Harrison-Crews. Employee stated that she was right there when Mr. Means notified Ms. Harrison-Crews. When Ms. Harrison-Crews came outside, Employee testified that she laid back again, closed her eyes, and was meditating. Mr. Means was fully aware of what she was doing, but he chose to bring Ms. Harrison-Crews outside. Then Mr. Means and Ms. Harrison-Crews paraded, danced outside saying, "we have her now" and began taking pictures. Tr. at pgs. 130-131. Both Mr. Means and Ms. Harrison-Crews took pictures. Ms. Harrison-Crews took pictures on her cell phone. Thereafter, Mr. Means asked her to come out of the vehicle and he asked her if she was asleep, and she said "no, I was meditating, and you were fully aware I was meditating based on a conversation you and I had when you came outside." Tr. at pg. 132. Mr. Means asked her to go to the conference room, and she did. Mr. Means asked her if she needed to drink something, and she said she was fine. He then asked Employee if she could go back to assume her duties outside, and Employee stated that yes, with no problem. Employee stated that she completed the rest of her duties that night. Employee testified that she was not sleeping on the job on April 1, 2014.

Employee testified that she doesn't have a relationship with Ms. King because since she has been on ROSA, she has always had different partners, so she does not only work with Ms. King. Employee testified that Ms. King barely came to work, so she really didn't have a relationship with Ms. King. Mr. Means had her paired up with three (3) or four (4) people at one time. Employee started working at ROSA in January, and she had to learn every duty on her own, as no one explained the ROSA protocol to her.

According to Employee, Mr. Means did not talk about Employee's work performance on the night of the incident. No one at the agency talked to her about her lack of efficiency or her failure to carry out her assigned tasks. Agency wrote her up for AWOL when she first started at ROSA because she was placed on ROSA against her will and was given a shift change which affected her personal life. She received a reprimand.

Employee testified that she told Mr. Means that she was fasting at the tour of her duty. She explained that she told Mr. Means that she will be praying and meditating during her break, and he acted as if he was okay with it. She stated that she would always approach her supervisor prior to her tour of duty about how she was feeling that day and let them know the protocol. Employee testified that she gave a copy of her paper from church to Mr. Means letting him know that the fast was going on. Tr. at pgs. 136-137.

Employee explained that fasting is not only going without food, it involves praying and meditating, and seeking God and going before God. She further explained that during times when you would be normally talking on the phone or idle times, you're seeking favor from God and you are totally focused on the task at hand. Tr. at pg. 137.

Employee testified that they pulled up to the building on April 1, 2014, at around 1:15 a.m. She was aware when Ms. King got out of the car and said she was going to the restroom. When Ms. King went to the restroom, Employee stated that she laid her head back and Mr. Means came out and knocked on the window and said "what's going on?" and she responded that she was meditating. Her eyes were fully open when Mr. Means initially came out. He stated that "Okay, well, you're meditating now?" and Employee responded that "yes, I am." Mr. Means then asked her if she could get out of the vehicle and she said "No. Why do I need to get out of the vehicle?" She closed her eyes and laid her head back, and she said, "Mr. Means, I'm on my break, Toya King is on her break, therefore, I'm on my break, because she's the driver." She closed her eyes and meditated. Mr. Means banged on the door a couple more times; she did not open her eyes because he knew she was meditating. Tr. at pgs. 138-139. Employee testified that the next thing she knew was she lifted her head and she noticed Ms. King was not back from the restroom. That's when Ms. Crews and Mr. Means were outside in front of her. Because her window was cracked open, she could hear everything and they were dancing and saying that "we have her". Tr. at pg. 139. She knew they were taking pictures of her with their cell phones because they took the pictures when her eyes were open as well as closed. Tr. at pg. 140. Ms. King never came back outside until Mr. Means asked her to go to the conference room.

Employee testified that the reason she felt comfortable with her pictures being taken by the supervisors while her eyes were closed was because she had no idea at the time that it would be taken out of context. Moreover, Mr. Means knew that she was not the type of employee who would sit back and allow them to manipulate the situation either. She gave him a pamphlet of the program at her church – Greater Mount Calvary Church and what they were doing. Employee stated that she did not have a specific time when she was going to pray, but when her roll call started, she approached Mr. Means, gave him a copy of the church pamphlet and informed him of what she would be doing during her break.

According to Employee, she personally handed documents, including, but not limited to, the pamphlet from her church, to Ms. Jordan in response to the proposal in a brown envelop. She also stated that, she specifically told Agency about her conversation with Mr. Means regarding her meditation. Employee stated that, she submitted additional information along with the paperwork submitted by her union, after she received the proposal. She explained that she gave Ms. Jordan a brown packet, with all her information included. The union did a written statement and she submitted her own response in addition to the union's statement. However, after she

received a response from Agency, she went to Ms. Jordan because the information she submitted, along with the copy of her church's program were not included. She testified that she does not have the additional letter and the church program in court because she gave the originals to Ms. Jordan. Tr. at pgs. 144-146.

According to Employee, Mr. Means knocked on her window three (3) times. After the first time, she said "Mr. Means, you are fully aware that I am meditation. I am on my break just like Toya King is on her break. If she is on her break in the bathroom, I'm on my break meditating." She went back and laid her head, and didn't respond to the subsequent knocks as she had already explained what she was doing.

Employee testified that she and Mr. Means have never had a good relationship since she has been on ROSA, and it's not out of the ordinary that they don't see eye-to-eye. He was aware that she was meditation, but he chose to knock on the window again, and she chose to ignore him because she had already informed him she was meditating and that her break will be over when Ms. King returned to the vehicle. Employee testified that Mr. Means was not truthful when he testified earlier in the day. Tr. at pg. 148. Employee stated that she has had other partners, and has never had any issues of dozing off or lacking alertness on the job. According to Employee, prior to Mr. Means' testimony, she was not aware of any reports that any of her other partners made of her.

Employee testified that while Ms. King was in the restroom, instead of meditation, she could listen to music, but she could not place numbers in a computer because her partner was in the building, and there was really nothing she could do since they were in a parking lot which was closed to the public at that hour. Security guards were in their booths and they were sitting in pitch black darkness, with nothing else to do. Tr. at pg. 150.

According to Employee, when Mr. Means called her in the office, they did not have a conversation about the performance of her duty on the day in question. Mr. Means did not mention to her that Ms. King had alleged that she was sleeping throughout her tour of duty. He asked her if she was asleep and she said no, and that she was meditating. He then asked her if she needed coffee or anything to drink, and if she could go back on the street and perform her duties, to which she stated that she had no problem and that she was performing her duties prior to coming back to the building. Tr. at pg. 151.

Employee stated that she complied with Mr. Means' directive to follow him into the office even though she was not sleeping because Mr. Means had a witness, Ms. Harrison-Crews present and Mr. Means was the supervisor and Employee did not want them to say she was insubordinate. Ms. Harrison-Crews also asked her to go into the conference room, but she was not there during her conversation with Mr. Means. Employee testified that she did not respond to the second and third knock on the window by Mr. Means, but she complied with his instructions to go into the building with him. Tr. at pgs. 155-156.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issues of whether Agency had cause to suspend Employee for fifteen (15) days for violating District Personnel Manual (“DPM”) Chapter 16, Section 103.3. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee’s appeal process with this Office.

Employee is a Parking Enforcement Officer (“PEO”) with Agency. Employee was scheduled to work on March 31, 2014 to April 1, 2014. Her tour of duty was from 10:00 p.m. to 6:30 a.m. Employee was partnered on the night in question with Ms. King. Ms. King was the driver of their government assigned vehicle for that shift, while Employee was responsible for inputting vehicle information into the system as they were called out by Ms. King. During their tour on April 1, 2014, Ms. King texted Mr. Mean stating that she was not feeling well, and that it was taking them twenty (20) minutes to complete a block because Employee was falling asleep. Ms. King later requested to return to the main building located at 1725 15th Street N.E. for a bathroom break, and this request was granted by Mr. Means. While Ms. King went into the building to use the bathroom, Employee remained in the vehicle.

At about 1:28 a.m. Mr. Means approached the parked vehicle where Employee was seated on the passenger side, with her eyes closed. The passenger side window was cracked open. Mr. Means took pictures of Employee in that position and then called his supervisor, Ms. Harrison-Crew to come witness the incident. When Ms. Harrison-Crews arrived at the scene, Mr. Means knocked on Employee’s window three (3) times. Employee woke up after the third (3rd) knock on her window stating that she was praying. Mr. Means asked Employee to step out of the vehicle and come to his office. Mr. Means counseled Employee about her sleeping and asked her if she needed a drink to assist her, to which Employee stated that she was okay, and that she was just praying. Employee was allowed to go back to work after the incident.

On April 28, 2014, Agency issued its Advance Written Notice of Proposed Suspension of Fifteen Days to Employee. This Notice charged Employee with the following causes of action:⁴

Cause No. 1: any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious – Sleeping on the Job.

Cause No. 2: any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations – Neglect of Duty, failure to care out assigned tasks and careless or negligent work habits.

On May 6, 2014, Employee’s union filed a response to the Advance Written Notice of Proposed Suspension of Fifteen Days on Employee’s behalf.⁵ On May 23,

⁴ Agency Answer at Tab 20 (July 9, 2014).

⁵ *Id.* at Tab 21.

2014, Agency issued its Final Decision on Proposed Fifteen Days Suspension, which included an analysis of the *Douglas* factors.⁶

Analysis

1) *Whether Employee's actions constituted cause for discipline*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3, the definition of “cause” includes (1) any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious – Sleeping on the Job; and (2) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations – Neglect of Duty, failure to care out assigned tasks and careless or negligent work habits.

A) Any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious – Sleeping on the Job

There is sufficient evidence in the record to support Agency’s assertion that Employee was sleeping on the job on April 1, 2014. Based on my review of Agency’s Exhibit 2, I find that Employee was sleeping when the picture was taken. Employee is seen in the picture with her head resting on the headrest, and her eyes closed. Any reasonable person upon reviewing the picture will conclude that Employee was sleeping when the picture was taken. Moreover, Employee does not dispute that the picture was taken on the night in question nor does she dispute that she is the one in the picture. Furthermore, both Mr. Means and Ms. Harrison-Crews testified that Mr. Means knocked on Employee’s window three (3) times before she woke up. They both stated that she woke up by the third (3) knock which was louder than the previous knocks.

Employee asserts that she was awake but decided to ignore Mr. Means and Ms. Harrison-Crews as they paraded, danced outside saying “we have her now” while taking pictures because she had already informed Mr. Means that she was meditating. Tr. at pgs. 130-131. It can be reasonably assumed that no reasonable person, would ignore such comments made by their superiors, especially after hearing the superiors stating that “we have her now.” Therefore, I find Employee’s assertion that she was meditating unpersuasive.

Also, pursuant to Agency’s Standard Operating Procedures section 18.56, of the Code of Conduct, no PEOs shall “*sleep, idle, or lay around while in uniform* or when assigned for official activities, or fail to perform work assignments that directly impact the public perception of District government employees (emphasis added).”⁷ Agency asserts that this document is provided to all PEOs such as Employee, when they get hired into training, and it is also a topic of their daily roll call. Employee does not deny having access to this document; therefore, I conclude that she was aware of this policy. Employee was sleeping in a government vehicle in

⁶ *Id.* at Tab 22.

⁷ Agency’s Exhibit 5.

her uniform on the night in question. Consequently, I further find that Agency had cause to discipline Employee for sleeping on the job.

B) Any on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty

Neglect of duty is defined, in part, as a failure to follow instructions or observe precautions regarding safety; and failure to carry out assigned tasks.⁸

Here, Agency asserts that on the night in question, Mr. Means received a text message from Employee's partner, Ms. King stating that it was taking them twenty (20) minutes to complete a block because she keeps falling asleep. Mr. Means testified that it should not take twenty (20) minutes to complete a block. Also, Mr. Means asserted that inputting vehicle tag information in the system was part of Employee's duties on the date of the incident. Mr. Means stated that Employee performed her assigned tasks on the night of the incident, but because she kept falling asleep, she was not able to perform all her tasks as she was missing vehicles. When asked if he confronted Employee about the non-performance of her duty after he received the text, Mr. Means responded in the negative. He explained that if the driver calls a vehicle tag out to their partner, the partner can still be asleep, but wakes up upon hearing the driver call out the vehicle tag information. Therefore, it is possible to have consistent vehicle tag numbers even with a sleeping on the job complaint. He testified that Employee was consistently entering tag numbers as she was assigned. He did not counsel Employee about her work production on the night of the alleged incident. Tr. at pgs. 34 - 39. Agency further argues that it is possible that the entries made while Employee was falling asleep were inaccurate. Employee testified that she reported to work on time on April 1, 2014, and performed her duties.

Agency has the burden of proof in this matter and I conclude that Agency did not meet this burden for this cause of action. The only person who could set the record straight was Ms. King, and Agency failed to make her available to testify and be cross examined. Moreover, Ms. King also stated in her incident report that "...she was not feeling well, and that it was taking them twenty (20) minutes to complete a block because Employee was falling asleep." Therefore, it can also be reasonably deduced that Ms. King's ill health was also a contributing factor to the delay in completing a block. With regards to the accuracy of the entries Employee made on the date in question, as previously noted, Agency has the burden to prove that they were inaccurate and it has failed to do so. Also, Mr. Means did not specify which tasks Employee did not complete. Moreover, Ms. King's statement does not indicate that they missed any vehicles on the night of the incident. Additionally, Agency's own witness, Mr. Means testified that Employee consistently entered the tag numbers as she was assigned, and that she performed her assigned duties on the night of the incident. Accordingly, I find that Agency has not met its burden with regards to this cause and as such, it did not have cause to charge Employee with Neglect of duty.

⁸ DPM § 1619 (c).

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

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).⁹ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious – Sleeping on the Job" and as such, Agency can rely on this charge in disciplining Employee.

Employee states that Agency's decision should be reversed or in the alternative, the penalty be reduced to an oral or written reprimand. In reviewing Agency's decision to suspend Employee for fifteen (15) days, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious – Sleeping on the Job" is found in § 1619.1(7) of the DPM. The penalty for a first offense for Neglect of duty is reprimand to suspension for up to fifteen (15) days. The record shows that this was the first time Employee violated §1619.1(7). Therefore I find that, by suspending Employee for fifteen (15) days, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.¹⁰ When an Agency's charge is upheld, this Office has held that it will leave the 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 judgment. I find that the penalty of fifteen (15) days suspension was within the range allowed by law. Accordingly, Agency was within its authority to suspend Employee for fifteen (15) days given the Table of Penalties.

⁹ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

¹⁰ *Love* also provided that "[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, is it 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 (1981).

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.¹¹ The evidence does not establish that the penalty of fifteen (15) days suspension constituted an abuse of discretion. 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 suspend Employee for fifteen (15) days.¹² In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to suspend Employee for fifteen (15) days. Agency has properly exercised its managerial discretion and its chosen penalty of fifteen (15) days suspension is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for fifteen (15) days is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

¹¹ *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).

¹² The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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