THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0051-22
EMPLOYEE[1]	
Employee	Date of Issuance: November 30, 2023
v	
DISTRICT OF COLUMBIA	LOIS HOCHHAUSER, Esq.
DEPARTMENT OF FORENSIC SCIENCES	Administrative Judge
Agency	

Carisa Carmack, Esq., Employee Representative
Rachel Coll, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a petition with the Office of Employee Appeals ("OEA") on April 27, 2022 appealing the final decision of the District of Columbia Department of Forensic Sciences ("Agency"), to terminate her employment, effective July 12, 2021. Sheila Barfield, Esq., OEA Executive Director, notified Agency Interim Director Anthony Crispino of the Petition for Appeal ("POA") on April 27, 2022, and informed him that the filing deadline for Agency response was May 27, 2022. Agency filed its Answer on May 26, 2022. The matter was subsequently referred to mediation at the request of the parties. On July 13,2022, mediation was cancelled and the matter was assigned to this Administrative Judge ("AJ") on or about August 2, 2022.

The AJ issued an Order on August 19, 2022 scheduling the prehearing conference (PHC) for September 22, 2022. Upon the unopposed request of Employee for a continuance, the PHC was rescheduled for October 17, 2022.[2] At the PHC, the parties initially agreed that an evidentiary hearing was unnecessary, but at the end of the PHC, Employee asked for additional time to make a decision on that matter. The AJ directed that by November 11, 2022, Employee state if she wanted a hearing and that they submit statements of undisputed facts, disputed facts, and their positions on issues discussed at the PHC.[3] The "Parties' Joint Statement," filed on November 29, 2022, included a joint request for an evidentiary hearing. By Order dated January 30, 2023, the AJ confirmed the hearing date of February 22, 2023,[4] and set filing deadlines and other requirements. The parties

[1] This Office does not identify employees by name in Initial Decisions published on its website.
[2] *See,* Order issued September 13, 2022
[3] *See*, Order issued November 8, 2022
[4] A significant amount of time was spent identifying a hearing date. On January 6, 2023, the AJ notified the parties that the hearing would take place on February 22, 2023, the earliest date available to the parties..

timely filed their lists of exhibits and witnesses. The "Parties' *Praecipe* Regarding Joint Statements/Stipulations" was filed on February 17, 2023.

The evidentiary hearing was held on February 22, 2023 at this Office. Present at the proceedings were: Carisa Carmack, Esq., Employee Representative; Rachel Coll, Esq., Agency Representative; Employee; and Quiyana Hall, Agency Human Resources and Labor Relations ("HR") Director. At the hearing, the parties were given full opportunity to, and did, present testimonial and documentary evidence as well as argument in support of their positions.[5] At the close of the hearing, the parties agreed to file closing arguments and redacted documents by May 1, 2023. The parties timely filed their closing briefs and the "*Praecipe* Regarding Joint Exhibits," and the record closed on May 1, 2023.[6]

JURISDICTION

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

ISSUES

Did Agency meet its burden of proof regarding its decision to remove Employee? If so, is there any basis to disturb the penalty?

SUMMARY OF EVIDENCE

1. Summary of Documentary Evidence

   A. D.C. Board of Ethics and Government Accountability Negotiated Disposition (12/20/21) ("ND") (Ex J-6)

   Pursuant to section 221 (a)(4)(E) of the Board of Ethics and Government Accountability Act of 2011…, the Office of Government Ethics (OGE) …hereby enters into this public negotiated settlement agreement with the Respondent [Employee]. Respondent agrees that the resulting disposition is a settlement of the above-action, detailed as follows:

   Findings of Fact (first paragraph omitted)

   Respondent owns and operates an outside business through which she sells beauty and cosmetic items. Respondent creates press on nails and makes them available for sale at $40-$60 each. Respondent also provides cosmetic services such as make-up application through her outside business. During an interview with BEGA staff, Respondent admitted that she creates products to sell through her outside business during her District government tour of duty. Specifically, Respondent stated that she paints press-on nails during her "down time" at work and that those press-on nails are then made available for sale through her outside business. Respondent stated that she, and her colleagues, are allotted two to three hours per tour of duty to complete reports and process evidence. Respondent considers this time "down time." Respondent approximated that about a third

[5] Witnesses testified under oath and the proceeding was transcribed. The transcript is cited as "Tr" followed by the page number. Exhibits ("Ex") are cited as "J" for Joint and "E" for Employee, followed by the number of the exhibit. Agency did not introduce any exhibits into evidence. .

[6] The representatives are commended for their professionalism, cooperation and advocacy throughout this proceeding.

of her…tour of duty is "down time." Respondent explained that if she does not have to respond to a crime scene and she has completed all of her in-office work, she engages in the nail painting activity.

While Respondent has "down time" every day that she reports for work, OGE was not able to ascertain the exact amount of time that she used to paint nails. Respondent stated in the interview that some of her [Agency] colleagues are also clients of her outside business but that she does not service those colleagues during her …tour of duty.

Nature of Misconduct

Respondent violated the following provision of the District Personnel Manual ("DPM")

Count One: Using government time or resources for other than official business, or government approved or sponsored activities in violation of DPM §1807.1(b)

- Respondent violated this rule when she created products for her outside business during her District government tour of duty.

Terms of the Negotiated Settlement (first paragraph only)

Respondent acknowledges that her conduct was a violation of the Code of Conduct. Respondent agrees to pay a fine in the amount of $2,500.00 to resolve this violation.

B. Notice of Proposed Separation (February 8, 2022) (Ex J-2, p.1) (in part only)

Disciplinary Cause. This action is being proposed for the following reasons:

You engaged in actions that violate the ethical standards of conduct for D.C. Government employees. Based on the [NA] you entered into with the Board of Ethics and Government Accountability (BEGA), signed and dated January 6, 2022, you violated the following sections of the [DPM]…

*Using government time or resources for other than official business or government approved or sponsored activities in violation of [DPM] §1807.1(b). [Employee] violated the ethics rule when she created products for her outside business during her District government tour of duty.

1**. Conduct Prejudicial to the District Government, specifically: On-duty conduct that an employee should reasonably know is a violation of law or regulation**: D.C. Code §1-618.01(a); 6B DCMR §1607.2(a)(4).

Proposed Action: Removal

2. **Conduct Prejudicial to the District Government, specifically: Use of District owned or leased property for non-official purposes**: D.C. Code §1-618.01(a); 6B DCMR §1607.2(a)(12).

Proposed Action: Removal

C. Administrative Review/Written Report and Report and Recommendation (March 22, 2022 (Ex J-4, p. 10) (in part only)

The…Hearing Officer finds that the proposal to remove [Employee] …for on-duty conduct that an employee should reasonably know is a violation of law or regulation; and use of District owned and leased property for non-official purposes, are supported by a preponderance of the evidence…Accordingly I find that the proposed removal of [Employee] is reasonable.

D. Final Agency Decision – Separation (March 30, 2022) (Ex J-3, p.1) (in part only)

As a government employee, you hold a position of public trust. As explained in the Proposing Official Rationale Worksheet, based on the conduct outlined…and

consideration of the relevant *Douglas Factor*s, [Agency] is compelled to terminate your employment because your intentional actions undermine the agency's integrity.
I adopt the evidence, recommendations, rationale and conclusions of the proposing official and administrative review officer. The proposed notice and administrative review report along with attachments are incorporated into this final action.

E. Parties Joint Statement: Stipulated Facts (Ex J-1, p. 1) .
1. [Agency] has never met with Employee to discuss this matter until such time when she was presented with the proposal to terminate her employment
2. [Agency] never conducted its own investigation on the matter, but rather relied solely on the negotiated disposition.
3. [Employee] took full responsibility during the BEGA investigation
4. The Deciding Official for the termination, Anthony Crispino, accepted the hearing officer's recommendation without further investigation.

F. Photographs of items on Employee's desk – (taken by Employee 4/11/21)(Ex E-1) (Attachment 1) and (taken by Employee 9/21/21) (Ex E-2)

2. Positions of the Parties and Summary of Testimonial Evidence

Agency's position is that Employee engaged in the charged misconduct and that removal was the appropriate penalty since Employee admitted to BEGA that she conducted income-generating "outside business" while at work, and kept equipment used for that business on her work desk. It asserts that Employee knew or should have known that her activities were prohibited. It maintains it removed Employee because this was an ethical violation caused Agency to lose its confidence in her.

Quiyana Hall, Agency's first witness, stated that she has 13 years of experience working in HR positions for various District of Columbia Government agencies, and has been Agency HR Director for the last two years. She said that one of her duties is to monitor the BEGA website weekly to find out if any Agency employee has been found to have any ethical violations.. She said it was during one of her weekly reviews of the website that she learned that Employee had entered into an agreement with BEGA. (Tr, 36-37, Ex J-2, *infra* at 2-3). Ms. Hall testified that Agency takes disciplinary action whenever there is an ethical violation. The witness stated that she did not know the amount of money that Employee earned from selling items made during duty hours, but that according to the ND, she charged between $40.00 and $60.00 per item. (Tr, 45).

The witness stated that Employee's primary duties as a forensic scientist ("FS") are to collect and log in evidence; and to testify in court for the government. She testified that these duties require that the FS to be credible and trustworthy; and that an ethical violation could cause Employee's credibility and trustworthiness to be challenged and also bar her from testifying in court. She stated that the penalty for the charges range from reprimand to removal; and Agency determined that removal was appropriate under these circumstances.. (Tr, 42-45).

Ms. Hall stated that she serves as proposing official in all adverse actions involving ethics issues, and was proposing official in this matter. She testified that Agency complied with all procedures. She testified that Agency did not have to conduct its own investigation, asserting that Agency properly relied on the BEGA investigation and the ND, since BEGA is the "highest agency in the

District that investigates ethical violations." (Tr, 35, 50, 74-76, Ex J-2, *infra* at 3).

The witness reviewed of the *Douglas Factors,*[7] noting that Employee's "job level and employment type" was considered an aggravating factor because Employee held "a position of trust" and could be disqualified as a witness, an essential function of her job, due to loss the credibility. (Tr, 48-53; Ex J-2). She stated that progressive discipline was not considered since removal is allowed for a first offense. (Tr, 54). Ms. Hall testified that Employee's work record was given a "neutral" rating, since she received a score of "three," a good rating, for the last three annual performance ratings. She added that even if Employee had received the highest ratings, Agency would still have removed her. (Tr, 57-58, 72).

The witness testified that Agency would still have removed Employee, even if she thought doing this outside work was allowed and immediately stopped when notified by BEGA, maintaining that "[u]nder no circumstance is it ever acceptable to work on your personal business to be able to collect an additional income. (Tr, 59). She stated that none of Agency's 300 other employees engaged in similar conduct, *i.e*., "conducted personal business for income gain while on…government time," adding that an employee who was paid twice for the same time period was removed. (Tr, 60-61). Ms. Hall testified that all Agency employees, including Employee, are "bound" by the District Personnel Manual ("DPM") which is available on-line. She stated that if Employee had questions about doing this outside work during duty hours, she could have spoken with an Agency manager, HR, and/or Union staff. She stated that Employee took ethics training and if the issue was not raised during training, Employee could have spoken with the trainer about the matter. Ms. Hall stated that if Employee was "experiencing unusual job stress or personal problems," Agency had resources, such as counseling, available to help her, but that Employee would "absolutely not" have been permitted to engage in personal business activities during her duty hours. (Tr, 70-71).

On cross examination, Ms. Hall stated that she was not aware of any Agency employee charged with an ethical violation who is still employed by Agency. (Tr, 81-82). Asked if there is a policy about activities that employees can engage in during duty hours after completing their work, the witness responded that employees should contact their supervisors if they have "nothing to do." She did not know if Employee contacted her supervisor. (Tr, 88). She testified that even if managers saw Employee doing this outside activity at work and did not say anything to her, Employee still had the obligation of determining the appropriateness of doing this outside work during duty hours. (Tr, 99).

Ms. Hall testified on re-direct that Employee's statement in the ND that she charged between $40.00 and $60.00 per item established that she was engaged in an income-generating activity, which constitutes an ethical violation. (Tr, 104). She said that she did not know if the U.S. Attorney's Office ("USAO") was told of the matter or if Employee continued to serve as a witness. She testified that Agency would have removed Employee even if the USAO allowed her to continue to serve as a witness because Agency had lost confidence in her. (Tr, 114-115). She noted that Agency has a procedure that requires employees who want to perform work other than their official duties during work hours to obtain clearance from Agency's ethics officer in conjunction with BEGA, and that Agency employees go through that process "all the time." (Tr, 117).

The witness stated that an employee who works an eight hour shift generally has 30 minutes for

[7] *Douglas v. Veterans Administration*, 5 MSPR 313 (1981).

lunch and two 15 minute breaks during the shift and at those times the employee is not considered to be on duty. She testified that Employee's assertion of "two to three hours of down time," exceeded the permitted time. (Tr, 120). The witness stated that during non-duty time, *i.e.,* lunch and breaks, an employee can do outside activities in a break room or out of the building, but Agency's "expectation" is an employee is performing government work while in the assigned government facility. (Tr, 118-119). Ms. Hall testified that the fact that Employee's supervisor or manager may have seen the Employee's products and not said anything to her did not provide a basis for Employee to believe that she was allowed to perform these activities. (Tr, 121).

Erin Price, Agency's second witness, stated that she was Employee's supervisor for the two years preceding her removal. She said that the FS is responsible for collecting evidence at crime scenes, from vehicles; and at autopsies; entering the evidence into the appropriate systems, packaging] the items for final storage, and "keep[ing] track of the chain-of-custody." She estimated that the FS spends half of the time in the field and the rest at the office. She stated that an FS responds to between 10-12 crime scenes each week. (Tr, 131-134). She noted that the unit was understaffed in 2021 and 2022. (Tr, 140).

Ms. Price testified that FSs may have two to three hours of "down time" each shift, and are expected to use that time to perform tasks "related to [their] actual work" such as reviewing case jackets, taking training, using the office library, and working on "in-house" projects. (Tr, 136-139)." The witness testified that employees are not permitted to work on outside projects or businesses during work hours. She stated that she did not know of any other employee doing outside work during duty hours. (Tr, 143-145). Ms. Price said that it was her responsibility to report employees engaged in outside business during work hours. She said that she did not report Employee because she never saw her conducting outside business during her tour-of-duty. She said that she did not report seeing a pair of nails on Employee's desk because the items could have been "just [Employee's] personal belongings." (Tr, 147).

On cross-examination, Ms. Price stated that she worked on the second floor, but went to the third floor, where Employee and other FSs had their cubicles, every day. After reviewing the April 11, 2021 photograph of Employee's equipment on her desk, she stated that she did not recall seeing all of those items on the desk, but added that there was never a time when she did not see any of the items on her desk. (Tr, 152). She testified that she never saw Employee painting or otherwise working on the nails. (Tr, 150; Exs E-1- E-2).

Ms. Price discussed Employee's evaluations, stating that Employee had good communication skills and was given "3" rating in that area which meant that she was a "valued performer." She said that Employee was also given a "3" in customer services, since she "completed her goals, and…[showed] dedication in work." (Tr, 158). Ms. Price said that she rated Employee a "4" in job knowledge, noting that Employee participated in committees, and assisted with lesson plans" which exceeded "what some of the other scientists did." (Tr, 160). She said that Employee met the requirement of completing reports within 14 calendar days about 95% of the time. She added that she supervises employees who finished their reports in four or five days, and those employees received higher ratings. (Tr, 164-165). The witness testified that Employee was selected as a trainer based on her knowledge and expertise, noting that Employee had created lesson plans and PowerPoints. (Tr, 175). The witness said that Employee assisted with training within Agency's academy and was also part of the field training work. (Tr, 176). The witness confirmed the accuracy

of her statement in Employee's 2019-2020 assessment:

> [Employee] continues to provide high-quality services to the Agency, her crime scene skills are excellent, and her attention to detail and commitment to performing these duties to the best of her abilities is evident in reviewing her work. (Tr, 170).

Ms. Price stated that as supervisor, she monitors the "day-to-day duties" of those employees that she supervises. She said that she was never concerned about Employee's work product or her ability to meet deadlines. She testified that if Employee was painting nails during work hours, it did not "affect any of her turnaround times or quality of work product," but added that Employee "shouldn't have been working on it." (Tr, 178). She testified that when an FS is not assigned to a crime scene, the FS is expected to work on reports; participate in training or use the library. She said that she was not aware of any time that Employee's credibility was called into question. (Tr, 173-174).

On redirect, Ms. Price testified that Employee told her that she was investigated by BEGA and then that the matter was settled "through funds being taken out of her check," but did not provide detailed information, and she did not asked Employee any questions. (Tr, 184). She said that Employee is required to take ethics training annually, and she thought the training included information about conducting outside business during duty hours. She testified that an employee cannot conduct any outside business during duty hours, even during down times. (Tr, 187-188).

Nagesh Tammara, Agency's final witness, stated that he is the Senior Assistant General Counsel of the Office of the State Superintendent of Education, and has served as a hearing officer in disciplinary actions "dozens of times" in the seven years that he has held the position. (Tr, 194-196). He stated that he reviewed documents provided by the parties in this matter, in including Agency's *Douglas* Factor*s* work sheets to determine if the proposed penalty was reasonable. (Tr, 198-199). The witness stated that he considered Employee's arguments in reaching his decision, and characterized her submission as "thorough." (Tr, 201). He testified that he found "merit" in the arguments raised by both parties, and thought Employee's response raised "questions about whether a lesser penalty might be appropriate, particularly in light of an apparent pattern of practice by other DFS personnel using their government tour-of-duty for non-government work." The witness testified that he "ultimately" concluded that removal was permitted " under the DPM," stating that he would not have reached a different conclusion even if he had more information about other employees who engaged in non-government activities during duty hours. (Tr, 201-204). He stated that his "ultimate conclusion" was that Agency's decision to remove Employee was a reasonable exercise of its discretionary authority. (Tr, 202).

On cross-examination, Mr. Tammara stated he has reviewed more than 40 proposed adverse actions in the seven years serving as a hearing officer. (Tr, 211-216). The witness stated that the issue in this matter was the penalty, since " there didn't seem to be a lot of dispute" about the charged conduct. (Tr, 213). He testified that Employee said that other employees engaged in similar conduct, but did not provide specific information. (Tr, 223-226). The witness stated that he did not think that Agency was required to conduct its own investigation since Employee's response and the ND were "pretty thorough." He added that some agencies rely on the BEGA findings while others find it necessary to conduct their own investigations. (Tr, 212).

Employee's position is that she painted synthetic nails during down time at work, *i.e.*, when all

of her other work was completed, an activity that she finds relaxing, noting that all employees engage in activities that help alleviate the stress of their jobs. Employee contended that she did not paint nails as part of an income-generating business until about 2021, when she incorporated the synthetic painted nails as part of her on-line business. She maintained that she never transacted business at work. Employee stated that she did not know the activity was prohibited, and immediately stopped when notified by BEGA that it was prohibited. Employee asserted that her supervisors and other managers saw nail equipment on her desk since they regularly walked by her cubicle or came into it to speak with her, but no one ever talked with her about it. She also contended that other employees engaged in income-generating activities during down town.

Employee said that she was employed with Agency for five years and was a Forensic Scientist II at the time of her termination. (Tr, 228). She said that she rotated monthly between the day and afternoon shifts. (Tr, 232). She described her primary responsibilities as documenting "anything that could be of potential evidentiary value" at the crime scene," and then serving as a witness for the government. (Tr, 229). Employee stated that she was not assigned to a crime scene every day, but that when assigned, it could take between 30 minutes and 15 hours to complete her work. (Tr, 230).

Employee testified that there "really wasn't any particular guidance as to what you should be doing" when all assigned work was completed. She stated that when she first started at Agency in 2017, she found "people doing their hobbies" such as knitting and making bracelets, and which "prompted [her] to believe that it was an okay thing to do." She asserted that one employee made paperweights that she "used to sell." (Tr, 230-231). She stated that there was "a lot of that going on because there's a lot of inherent down time on top of the built-in down time that [is] already… built into the schedule, but was unsure of the exact amount. Employee identified herself as "the person [who] volunteered for a lot of things," for which she was not "really getting compensated," explaining that she volunteered for additional duties such as training, and did these volunteer activities when her work was completed. (Tr, 232-234, 238). She testified that after completing all of her required and volunteer duties, there was very limited time available to work on nail painting. (Tr, 240).

Employee testified that in September 2021, BEGA notified her by email of a possible violation. She said that she did not know who had reported her, and BEGA declined to tell her. She stated that BEGA informed her that the violation was that she was "painting press-on nails at [her] desk during [her] tour of duty." She said that at that time, she had been doing that for about four years, and that that no one had ever "discussed or brought" this activity to her attention. (Tr, 237-238). Employee stated that the ND did not include all of the information she gave BEGA investigators, including her statement that she did not think that she was wrong to engage in the activities, because she "had seen "other people conducting their hobbies;" and that when she was "approached" while "in the middle" of doing the activity" by Ms. Price and other supervisors, no one said anything to her. She. noted that she worked in an "open" cubicle and "wasn't hiding anything" since she did not think she was doing anything wrong. (Tr, 242). She said at times, Ms. Price and other supervisors came into her cubicle to talk with her, and the items were in clear view. (Tr, 245, Ex E-1). Employee noted that her co-workers were also aware that she was painting nails during duty hours, but she did not know if they knew that it was part of her "outside business." She testified that nail painting "[n]ever" interfered with her official duties. (Tr, 248). Employee said that coworkers asked her during work hours if her items were for sale., but she "never" sold anything during work hours or on-site, selling mostly through her website. (Tr, 250-251).

Employee testified that the photograph she took in April 2021, represented "what her desk looked like on a daily basis" for about four years. She stated that the photograph showed that the nail equipment took about "half" of the desk space, with the computer taking up the rest of the desk. Employee said she could not remember why she took the first picture, but that she took the second photograph of the "same corner of [her] desk" on September 21, 2021, when she "pack[ed] up all the stuff [to] take.. home" after learning of the BEGA investigation. (Tr, 250-251, Exs E-1, E-2).

Employee testified that in December 2021, the BEGA investigator told her the investigation was finished, and asked her if she wanted to add anything. She said that she did not, because she did not know that the ND would be the only document that Agency would rely on this this matter, and that if she had known, she "would have clearly put all of the information [she] could have provided them in that document." Employee stated that she told BEGA investigators that she considered down time to be the two to three hours daily "allotted" to complete reports and process evidence, and that about one-third of her tour-of-duty consisted of down time. She testified that she told investigators that if she had finished all of her work, she did the nail painting, which she found relaxing and artistic. (Tr, 254-255). Employee said that she had paid the $2,500 fine imposed by BEGA. (Tr, 256).

Employee testified that no one at Agency discussed the BEGA investigation with her or told her that she was required to notify HR of the ND. She said that she continued to work "as usual" until she received the proposed notice of removal. (Tr, 257; Ex J-2). Employee said that although the hearing officer's report "captured a lot" of her response, it omitted her discussion of "other people's wrongdoings." She noted that others were "watching TV, doing hobbies, all the things that people were doing and nobody was ever saying that's not appropriate." (Tr, 260-261, Ex J-4). Employee reaffirmed that she did not know that she was "actually doing something wrong" until informed by BEGA, and she then "corrected it immediately." (Tr, 259)

Employee testified that although Agency pointed out in its assessment of *Douglas* Factors that the charges impacted on Employee's credibility as a witness, she did not think that she was ever determined to be "uncredible" and continued to be called as a witness. She stated that she was supposed to testify several times after her removal, but only one matter proceeded to trial. She said that the issue was not raised during her testimony. (Tr, 263-264).

On cross examination, Employee stated that she was not aware if any employee "engaging in hobbies," such as knitting, watching TVs, or running errands was disciplined for engaging in that conduct. Employee testified that Laura Harris, a co-worker, who sold items that she worked on during duty hours sat "close to" her and Employee has seen her "doing it all the time, and that's what kind of prompted me to doing something in the office. (Tr, 266). Employee said that Ms. Harris was terminated for unrelated reasons, and did not know if she was ever disciplined for selling items during work hours. " (*Id*). Employee also asserted that Careena, another co-worker, sold items at work that she brought from home, stating that Careena " had a curling iron still in the box that she didn't want, she would sell it to someone. She said that Careena was also terminated "for something else." (Tr, 267-269). Employee stated that although she could not identify anyone else, she knew "people that had businesses that were doing their planning like putting together websites." She stated that one supervisor and his team "put together Super Bowl parties and also watched a football game in the conference room," but she did not believe that they were selling anything.

Employee said that there was a "culture at DFS that it was okay to do something to pass the time

as long as all of your work was complete. (Tr, 268). She explained that doing so reduced the high stress levels caused by witnessing brutal crime scenes and having to stay at crimes scenes for long periods, and then work overtime to complete assignments. (Tr, 274). Asked if she was "aware of accommodations that were available for stress and mental health issues," she said that the only resource that she was aware of was the EAP.[8] Employee testified that she did not seek assistance about her stress and mental health concerns." (Tr, 276-277).

Employee stated that she did not discuss her nail painting with Ms. Price, but knew Ms. Price had to see her painting nails and the equipment since she walked by Employee's cubicle multiple times each day, sometimes stopping to speak with her. She maintained that the same was also true for the other supervisors. She stated that she and Ms. Price also didn't discuss if the nail painting was part of a new outside business, that Employee was establishing, "because it was a hobby," and had been for "many, many, many years before it ever became something that somebody asked me to purchase." Employee stated that she "didn't market it that way." She testified that it was "all an innocent hobby" that she thought "was okay" because she saw co-workers also "engaged in some sort of down time activity." (Tr, 277- 278). Employee testified that that she was never told during training that engaging in "side business or side hobbies" during downtime " wasn't… or… was okay," and relied on her observations of co-workers engaged in these activities to reach the conclusion that it was permitted. (Tr, 281).

Employee testified that at the time of the BEGA investigation she owned and operated a private business, explaining that nail painting only became part of her larger business because co-workers saw her painting nails at work as a hobby, and told her they wanted to purchase her products. She said that although it was not in the ND, she told BEGA investigators that the nail painting was a "hobby." Employee testified that she had a "a makeup business" for about nine years, then started "an eyelash extension business" as a result of recommendations from her client base. Employee testified that she incorporated "as an LLC" in 2020, adding nail painting to her business in 2020 or the beginning of 2021. She stated that that making and painting nails was a hobby that was fun and released stress, and for many years, she made the items for herself and to give as gifts. She said that she had to establish prices for these items because people wanted to purchase them. (Tr, 283-288).

Asked if she understood that the charges related to conducting a business while on duty and not the act of painting nails, Employee responded:

> So that's the issue.. So if that's what you're asking me, have I sold a pair that I might have made at work, I don't know if it's one I made at work or not. But have I sold nails? Yes….And so that's what they had me admit to, which I didn't have a problem admitting to because I definitely was making them, I was using them personally. I just wasn't making them for other people like, order from me, I'm going to sit at work and make it, and then I'm going to send it to you. (Tr, 288-289).

Employee testified that although she did not remember why she took photograph of the items on her desk on April 11, 2021, she thought it was useful to show that she "wasn't trying to hide" anything and did not think she was doing anything wrong. She said the nail items took up about half of her desk, and included nail polishes, a UV light and nail brushes. She added that her computer

[8] Employee Assistance Program

took up the other half of her desk. Employee stated that she took the second photograph on September 21, 2021, to show that she immediately removed the items once she was contacted by BEGA. (Tr, 289-290; Exs E-1, E-2). She stated that she could not estimate on how much time she spent on the nail activities, since "it depended on what was going on." She testified that "at the time of the BEGA situation" she had two surgeries on both wrists and was not physically able to work on the items.. (Tr, 291).

Employee stated that she could not recall if any ethics training she took included information on when an activity could be considered an outside business, and that she "didn't think" that she was doing such an activity:

> If I'm not actively trying to sell you something or I'm not taking your sale or anything of that nature, I'm making something for myself or for a family member or a friend. I didn't think that I was conducting business on the clock, if that makes sense. (Tr, 297).

Employee testified that she "definitely" sold one or two pairs of the items that she worked on during duty hours. She explained that they were probably items that somebody wanted to buy from her. Employee testified that she could not remember the items, since "[e]verything was kind of like a hobby," and a way to both express creativity and alleviate stress. (Tr, 298). Employee stated that the trial in which she was a witness took place "long" after her termination. She testified that both the U.S. Attorney's Office and defense counsel were aware that she was terminated. She noted that she was paid for her appearance. (Tr, 302-304).

On redirect, Employee testified that at times, someone may have ordered nails that she created at work for a colleague and then placed on social media. She reaffirmed that she never engaged in a business transaction at work. (Tr, 305).

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

1. Findings of Undisputed Facts[9]

Employee received a Master of Science degree in Forensic Science from Towson University in 2012. She worked as a Forensic Specialist for Montgomery County Police Department from 2012-2017; an Evidence Technician I and II with Prince George's County Police Department from 2008-2012; and a Crime Laboratory Technician with Baltimore City Police Department from 2006-2008. Employee was hired by Agency as a Forensic Scientist/Crime Scene Analyst ("FS/CSA") on March 20, 2017. At the time of her removal, she was a DS-12, Step 6, and held permanent and career status, earning an annual salary of $98,439.00. According to the Position Description ("PD"), the FS/CSA is responsible for "recognizing and recovering evidence in criminal investigations" at crime scenes by "analyzing, photographing, collecting, preserving and presenting physical evidence; and testifying as an expert witness regarding the processing and preservation of evidence." The FS/CSA works under the general supervision of a supervisor or senior level analyst, but primarily:

[9] These facts are not in dispute, and are based on testimonial evidence and primarily, Exs J-1, and J-8, entered into evidence jointly by the parties.

> independently plans and carries out routine assignments, interprets policies and procedures within the governing policies and guidelines and determines the approaches to be taken according to established policies, practices and protocols. The incumbent consults with the immediate supervisor, other unit managers and/or laboratory directors on unusual and complex problems.
>
> The incumbent is responsible for following guidelines, which "consist of policies and procedures of [Agency], governing laws and regulations of the District and Federal Government, methods, processes…

During her eight hour tour-of-duty, when not at a crime scene, Employee worked at her duty-station, a cubicle on the third floor. During down time, *i.e.*, when all mandatory and volunteer duties were completed, employees engaged in independent activities, such as knitting, watching television and making paperweights, in order to alleviate job-related stress. Employee saw others engaged in those activities from the time she started at Agency. Employee used her down time to paint nails in her cubicle, using the equipment that she kept on her desk. (Ex E-1). The equipment took up about half of her desk and was in full view of anyone passing by or entering her cubicle. Employee's supervisor and others saw the equipment regularly and did not question her about the it. Employee considered the nail painting to be a relaxing and artistic hobby.

Employee owned and operated a private "make-up" business since about 2013. She incorporated the business in 2020, and added nail painting to the business in 2020 or early 2021. She conducted the business primarily on-line, and there is no evidence that she engaged in any financial transactions at work or during work hours.

Employee was notified by BEGA in September 2021, that it had received a report of a possible violation related to the nail painting. She immediately removed the nail equipment home and stopped nail painting at work. On December 21, 2021, she signed the ND stating that she violated DPM 1807.1(b) "when she created products for her outside business during her District government tour of duty. She sold the nails for between $40.00 and $60.00." (Ex J-6).

Agency did not conduct its own investigation, relying solely on the ND. The proposed notice of separation was issued on February 8, 2022. (Ex J-2). Employee submitted a response to the hearing officer who issued his report and recommendation on March 23, 2022. (Ex J-4). The Deciding Official issued the final notice removing Employee from her position on March 30, 2022. (J-3).

During her tenure with Agency, Employee received positive evaluations. She met requirements, including deadlines for completing reports. She was commended for volunteering her time, notably training new hires and developing training materials. Employee also continued to take voluntary and mandatory training, including courses in ethics. (Ex J-8). Following her removal, Employee was called as a witness by the government several times, and testified at one trial.

2. Analysis, Additional Findings of Facts[10] and Conclusions of Law

The jurisdiction of this Office is established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA) (2001) as amended by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124. D.C. Official Code §1-606.03(a) provides that an employee can appeal "an adverse action for cause that results in removal." Pursuant to OEA Rule 631, Agency has the burden of proving the charges that resulted in removal. It must meet this burden by a

[10] These are facts that were not "undisputed." *(Infra* at 12).

preponderance of evidence, *i.e*., "the 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."

Agency charged Employee with engaging conduct prejudicial to the District Government by violating 6B DCMR §1607.2(a)(4). This provision prohibits employees from engaging in "on-duty conduct" that they should "reasonably" know violates law or regulation; and 6B DCMR §1607.2(a)(12) which prohibits employees from using property owned or leased by the District for "inappropriate" or non-official purposes." The charges are a result of Agency's determination that Employee violated DPM §1807.1 which bars employees from engaging in an outside business and using government property during duty hours:

> A District government employee shall not engage in any outside employment or other activity incompatible with the full and proper discharge of his or her duties and responsibilities. *Activities or actions that are not compatible with government employment include but are not limited to…using government time or resources for other than official business, or government approved or sponsored activities.* (emphasis added).

The AJ concludes that Agency met its burden of proof by a preponderance of evidence that Employee engaged in the charged conduct based on the following facts: First, Employee painted nails at her desk with equipment and products at work and took up about half of her government-issued desk, during down time, *i.e*., time during her work day after she had completed her required and volunteer duties. (*Infra* at 10-12, Ex E-1). It is irrelevant if she did this regularly or infrequently, Second, Employee did nail painting as a way to relax from her stressful duties until about 2020 or early 2021. At that time, Employee added nail painting to the private business she had incorporated and operated primarily on-line. Employee charged between $40.00 to $60.00 for the nails. *(Infra* at 2, 11; Ex J-6). Finally, although she continued the activity primarily as a hobby, Employee did sell nails that she worked on during duty hours. For the purpose of determining misconduct, it is unnecessary to ascertain the percentage of time Employee engaged in the activity as a hobby versus as a profit-making business or the number of nails that she worked on while on-duty which she sold away from the work site. She was not charged with selling products at the worksite. Employee's conduct violated 6B DCMR §1607.2(a)(4), 6B DCMR §1607.2(a)(12) and DPM §1807.1.

The primary issue in dispute is the penalty. Employee argues that the penalty is unduly harsh and should be reduced. Agency asserts that the penalty is appropriate since it lost confidence in Employee. The AJ agrees with Employee that the penalty is severe, and it is unlikely that she would have chosen such a severe penalty if she was authorized to make the decision. However, the AJ is not permitted to change the penalty unless she determines that in reaching its decision, Agency failed to consider all relevant factors or failed to exercise management discretion within "tolerable limits of reasonableness." *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272 (2001). As stated in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011):

> [OEA's] role in this process is not to insist that the balance be struck precisely where [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first interest, such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. That 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.

Employee raised several arguments in support of her position that the penalty should be reduced. She contended that the penalty should be reduced because Agency did not conduct an independent investigation which would have provided Agency with "a more accurate picture of the facts to properly determine" if removal was appropriate. (Employee Brief, pp 1-15, 36). She stated that although she agreed to the terms of the ND, it did not include all relevant facts, and if she had known that the ND was the only information that Agency was going to use, she might added more information. Agency maintains that it was reasonable to rely on the BEGA investigation, since BEGA is the leading authority in the District Government on ethical violations. The hearing officer testified that other agencies have also relied solely on BEGA investigations. The hearing officer also testified that he considered Employee's "thorough" arguments in reaching his decision. (*Id* at 8). The Deciding Official was provided with Employee's submissions as well as the hearing officer's report. (Ex J-3). Finally Employee provided the AJ with testimonial and documentary evidence which the AJ considered in reaching her decision. Employee did not establish that Agency was required to conduct its own investigation, or that its failure to do so was prejudicial since she was able to present her arguments to the hearing officer and Deciding Official; and presented both arguments and evidence to the AJ . Therefore, these arguments are not bases to disturb the penalty.

Employee also argued that other employees engaged in for-profit private businesses during duty hours but were not terminated; and that neither BEGA nor the hearing officer considered that argument in reaching their decisions. However, Employee made this argument in testimony and written argument before the AJ, and the AJ considered this argument in reaching her decision. Employee identified at least two individuals by name but claimed there were others who engaged in for-profit business activities. (*Infra*, pp. 10-11). Agency maintained that it would have removed any employee who engaged in the charged conduct. Employee has the burden of proof on affirmative defenses, including disparate treatment. In order to establish a *prima facie* case of disparate treatment, Employee had to establish that these individuals were similarly-situated, *e.g*., held positions similar to hers, shared the same supervisor, worked similar shifts. Employee did not present any evidence or argument that would establish that Careena, Ms. Harris or the employee who made paperweights, even if they sold them, were similarly-situated. She also did not establish that Agency knew of employees engaged in for-profit businesses during working hours and failed to take similar action. Employee did not establish that Agency engaged in disparate treatment. *See, e.g., Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0287-94, *Opinion and Order on Petition for Review* (September 29, 1996). Therefore these arguments offer no bases to challenge the penalty.

Employee argued that her supervisor and others saw her painting nails and saw the equipment, but never questioned her about it. However, she did not establish that any supervisor or manager saw her painting nails, and more important, that any supervisor or manager was aware that nail painting was part of Employee's for-profit business. Employee's contentions that she did not sell or deliver products at work; and that if someone ordered a specific design, she did not work on it during business hours does not detract from the charge that she engaged in for-profit business at work.

Employee also contended that the nail painting work she did during down time did not negatively impact on her job performance. It is undisputed that she received positive evaluations, met production goals and volunteered for additional responsibilities, such as training new

employees. Employee also represented that the nail work she did during her down time was always done primarily as a hobby and de-stressor, and not for profit. However, Agency did not dispute these facts, contending that they did not change its decision on the penalty. Employee also maintained that the USAO called her as a witness in a trial after she was terminated, and government and defense counsel were advised of her removal. Although Ms. Hall testified that the possibility that Employee would no longer be able to serve as a witness was a consideration in Agency's decision to remove Employee, she maintained that even if the government allowed Employee to continue to serve as a witness, Agency would still remove Employee because it had lost confidence in Employee. (*Id* at 4-6). These arguments are not bases for changing the penalty.

Employee asserted that she was unaware that engaging in a profit-making business at work was prohibited. (*Infra* at 8-11). She stated that no one at work or at training told her that engaging in for-profit activities during work was prohibited. She testified that "double dipping" may have been discussed at training, but assumed that the prohibition against "double dipping" did not apply to her since she was not "actively trying to sell anything" during work hours. (*Infra* at 10-12). The AJ finds these arguments insufficient to alter the penalty. If "double-dipping" was discussed, Employee was put on notice about engaging in outside work, and had the skills and access to material to find out if it included making products that would be sold away from the workplace. Even if outside work was not discussed at work or training, Employee had been employed in increasingly responsible positions as a FS for more than 10 years. She worked in a field and among professionals concerned with ethics and law. She is highly educated and experienced. According to her PD, as a FS she was "responsible for following… policies and procedures of [Agency as well as] governing laws and regulations of the District and Federal Government." It is undisputed that she performed her duties well, and met requirements. It is reasonable that an individual with Employee's experience, responsibility and intelligence is held to a higher standard than an employee without fewer qualifications and less experience. *See, e.g., Williams v. Walker-Thomas*, 350 F.2d 445 (CADC 1965). It is reasonable to assume that she would be aware of basic ethical requirements and not rely on watching others engage in activities which she thought could be for-profit to decide that it was acceptable for her to engage in such conduct, even for a minimal amount of time. More than most employees, she had access to and was familiar with D.C. Government laws, policies and regulations. Her PD in fact stated that she was "responsible for following guidelines" which "consist of policies and procedures of [Agency], governing laws and regulations of the District and Federal Government, methods, processes." (*Infra* at 11-12). The provisions which were the bases for her termination were in fact easily accessible to her, including DPM §1807.1, which states that employees are prohibited from engaging in an outside business and using government property during duty hours.

With regard to Employee's contention that Agency failed to consider mitigating circumstances, the Superior Court for the District of Columbia held in *Bryant v. Office of Employee Appeals*, Case No. 2009 CA 006180 P(MPA) (DC Super Ct., August 2, 2012) that even "significant mitigating factors…do not offset the seriousness of the sustained misconduct and make the penalty of removal outside the bounds of reasonableness and impermissible." Employee's arguments are insufficient to overturn Agency's decision. The AJ did not find any "significant mitigating factors" that offset the "seriousness of the sustained misconduct" thereby rendering the penalty of removal to be "outside the bounds of reasonableness." *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, (2006).

The District Personnel Manual ("DPM") states that an adverse action is "warranted" when an employee violates standards of conduct, fails to meet performance measures or disregards rules of the workplace. The Table of Illustrative Actions, applicable in this matter, states that the penalty for a first occurrence of each violation ranges from reprimand to removal. The AJ finds that that Agency's loss of confidence and trust in Employee was not unreasonable in these circumstances. She further finds that it was a sufficient basis for the decision to terminate Employee given the requirement that the FS largely work independently to identify, assess and maintain evidence. Agency cannot utilize the services of an FS, regardless of her skills and experience, if it no longer has confidence in or trusts her. The AJ therefore concludes, based on a thorough review of the documentary and testimonial evidence and arguments,[11] and for the reasons discussed in this decision; that Agency met its burden of establishing that the penalty of removal was not "[a]rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Smallwood v. D.C. Metropolitan Police Department*, 956 A.2d 705, 707 (D.C. 2008).

ORDER

Agency's decision is sustained. The appeal is hereby dismissed.

Lois Hochhauser

FOR THE OFFICE: LOIS HOCHHAUSER.

[11] In reaching her decision, the AJ thorough reviewed and considered Employee's evidence and arguments. She did not include an analysis of each argument in this decision, since to do so would significantly increase the length of the document but would not have impacted on the outcome. *Antelope Coal Company/Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014).