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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
TERESA SMALLS,	)	
Employee	)	OEA Matter No. 1601-0273-10
	)	
v.	)	Date of Issuance: April 25, 2014
	)	
DISTRICT OF COLUMBIA	)	MONICA DOHNJI, Esq.
DEPARTMENT OF PUBLIC WORKS,	)	Administrative Judge
Agency	)	
_____	)	
Angela Pringle, Employee Representative	)	
Eric Huang, Esq., Agency Representative	)	

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 16, 2010, Teresa Smalls (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Public Works’ (“DPW” or “Agency”) decision to terminate her from her position as a Program Support Assistant, effective January 29, 2010. Employee was terminated based on the charge of any on Duty or Employment–Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations: Malfeasance. On March 24, 2010, Agency filed its Answer in response to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) in July of 2012. Thereafter, on July 3, 2012, I issued an Order Convening a Status Conference for July 31, 2012. Both parties were in attendance. During the Status Conference, the parties requested that the matter be referred to mediation. Following a failed mediation attempt, on April 10, 2013, the undersigned issued an Order Convening a Status Conference for May 1, 2013. Both parties were present for the Status Conference. On May 2, 2013, the undersigned issued an Order Convening a Prehearing Conference for June 5, 2013. The June 5, 2013, Prehearing Conference was rescheduled for July 24, 2013. Following the Prehearing Conference, the undersigned AJ issued an Order scheduling an Evidentiary Hearing for October 30, 2014. While both parties were present for the Evidentiary Hearing, the Court Reporter was not available, thus, the Evidentiary Hearing was rescheduled for December 10, 2013. However, due to inclement weather causing the closure of the District government, the Evidentiary Hearing scheduled for December 10, 2013 was rescheduled for February 12, 2014. Both parties were present for the Evidentiary Hearing. Thereafter, I issued an Order dated March 10, 2014, notifying the parties that the transcript from the Evidentiary Hearing was available for pickup at OEA. The Order also provided the parties with a schedule for submitting their written closing arguments. Both parties have 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 Employee's actions constituted cause for adverse action; and
- 2) If so, whether the penalty of termination is within the range allowed by law, rules, or regulations.

## BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

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

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

OEA Rule 628.2 *id.* states:

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.

## FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of terminating Employee was in accordance with applicable law, rules, or regulations. 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.

## SUMMARY OF MATERIAL TESTIMONY

### *Agency's Case in Chief*

#### **1. Deborah Greer (Transcript pgs. 15-42).**

Deborah Greer ("Greer") is employed by the Office of the Chief Financial Officer ("OCFO"). She has been working for OCFO for 20 years and she is the Customer Service Payroll Manager in the Office of Pay and Retirement Services. She has been in this position for five (5) years. As a Customer Service Payroll Manager, Greer handles restored leave for unpaid compensation, debt cases for unpaid compensation, and other problems. She is the Chief Correspondent for any customer service issues from the Mayor's Office and citywide.

Greer testified that PeopleSoft is a system of record for District government employees and she is familiar with the system. She stated that, when an employee receives his password and username for PeopleSoft, they will see a message from the system saying that they consent to what PeopleSoft is going to allow them to do and the responsibility associated with it. This includes consent to disciplinary actions taken if the employee does something that is against policy. The employee is also informed of their legal rights. Greer testified that PeopleSoft is the property of the District and the system is monitored, and can be seen by supervisors, directors, and managers. However, the only people that have authorization to look at one's PeopleSoft information are management and the employee.

Greer testified that she is familiar with the case with Employee and the Department of Public Works ("DPW or Agency"). She explained that the Director of DPW sent a letter to her Director on October 29, 2009, inquiring about some banking transactions that were called into question and her supervisor passed the information along to her. The name on the account was Vernon Matthews ("Matthews"). The letter requested verification of whether the accounts were valid and whether or not the direct deposit of disbursement of funds went into the accounts. DPW wanted to know if anything illegal had taken place. DPW also wanted to know if any unauthorized use or changes were made to the account. Greer confirmed that a change had been made to Matthews' account. According to Greer, she worked with another entity within the District government to investigate the issue. They verified the information to see what entries were put into PeopleSoft and what changes were made. Based on the information received and the parties that were contacted, OCFO learned that someone had accessed Matthews' account on PeopleSoft and that an unauthorized change had been made. The change occurred on August 31, 2009, and was traced back to Employee. Greer further testified that OCFO sent a report to DPW in response to their original request. OCFO informed Agency that a change had been made to Matthews' account and that the IP address that the change was made from had been traced back to the computer assigned to Employee. Greer noted that, you cannot make changes to another person's PeopleSoft information unless you have their password.

## **2. Thomas Duckett (Transcript pgs. 43-59).**

Thomas Duckett ("Duckett") has been employed with Agency for thirty years. He is the Chief of the Street and Alley Division. Duckett testified that Employee also worked in this division. Duckett explained that, during 2009, he knew Employee as an Administrative Clerk (staff person) to Matthews, and Matthews was Duckett's General Foreman.

According to Duckett, in the summer of 2009, Matthews suffered a stroke and was unable to work. Thereafter, Duckett was contacted by Matthews' mother regarding his health. Duckett referred her to Human Capital, the Human Resources department with Agency. During this time, the head of Human Capital was Ingrid Jackson. Duckett also testified that in late September 2009, he was contacted by Matthews' brother, Anthony Williams, regarding a request for funds to be moved from one account to another account. Duckett noted that he advised Matthews' brother to speak with Ingrid Jackson and gave him the number to contact her. Duckett stated that he did not provide any authorization to make this change and he did not receive any Power of Attorney to make these changes. Duckett noted that he did not hear back from Human Capital regarding whether the change had been authorized.

Duckett testified that Employee's performance was good and he would hire her back. He explained that he has never had any difficulties with Employee's use of PeopleSoft or Trakster, a system that administrative personnel used to input daily time for employees. Duckett noted that he has had problems in the past with employees using someone else's password for PeopleSoft. Specifically, some employees would

ask administrative people to use their passwords to assist with evaluations or if something was wrong on their pay stub.

According to Duckett, in December 2009, an audit was conducted by OCFO to look into the accuracy of some of the pays and the filings within Agency. They discovered some misuse of pass codes. Duckett testified that it was at this time that he learned that it was against policy to divulge passcode/password information. Prior to this time, he did not know that this was a problem because a lot of employees did not know how to use PeopleSoft and did not want to learn, so the administrative staff had to assist with this process.

### **3. Kevin Bryant (Transcript pgs. 65-76).**

Kevin Bryant (“Bryant”) has been employed by Agency for twenty-seven years. He is currently an Associate Administrator for Agency. Bryant testified that Matthews was the General Foremen of the Special Operations Division within Agency.

Bryant stated that he had a conversation with Matthews’ brother regarding the incident concerning Employee, Matthews’ sister and her phone call to the division that Employee worked for. According to Bryant, Matthews’ sister reported that Employee had gone into Matthews’ personal bank account and changed the direct deposit information. According to the conversation Bryant had with Matthews’ brother, Matthews’ sister did not have legal authority regarding the business aspects of Matthews. The brother indicated that part of the problem was created by the sister and that the sister was inappropriately taking money from an account that Matthews’ check was going to. Matthews’ mother requested that Employee help her redirect the money.

At the request of Employee, Bryant wrote a letter which captured the conversation with Matthews’ brother. The intent of the letter was to lend support to Employee’s character. Bryant believes he was brought into the incident because at one time, Matthews and Employee both worked for him and he developed good personal and professional relationships with them. Bryant stated that he has never known Employee to commit any of the acts that she has been accused of, and he does not believe that the acts were malicious. He wanted to do something that would dispel any flaws that may have been perceived about Employee’s character. Bryant also noted that Employee was very close to Matthews, and overtime Matthews became a ‘big brother’ to Employee.

Bryant testified that after his conversation with Matthews’ brother, he spoke to Employee and he informed her that under the circumstances, she should have forwarded the request to the Human Capital Administration. Bryant noted that Human Capital would have been the department to expedite a request from Matthews’ mother who indicated that she had a Power of Attorney. However, Bryant never saw any evidence of a Power of Attorney.

### **4. Earl Simpson III (Transcript pgs. 78-93)**

Earl Simpson, III (“Simpson”) has been working for Agency for nine years. He currently holds a Sanitation Foreman position. Simpson testified that, in 2009, Employee was within his chain of command and she was an administrative assistant for Matthews. Simpson worked under Matthews for three years. Simpson noted that Employee input all of the employees’ time into the system and took care of Matthews’ personal matters.

According to Simpson, while Matthews was incapacitated, Simpson and Employee visited him in the hospital. Simpson stated that he visited Matthews at least four times a week while he was in the hospital. Simpson noted that prior to being incapacitated; Matthews worked from the hospital and provided directives to Simpson. Simpson also testified that, he was aware that Matthews could not operate the time keeping systems and that Employee performed Matthews' PeopleSoft functions.

Simpson testified that, on the weekend of September 26, 2009, there was an exercise event for Homeland Security where employees were hauling debris from the First District Police Station, and he was the lead person for the day. According to Simpson, Wanda Ellis was the Special Events Coordinator for Agency. Simpson was at the event all day and he spoke with Employee on the phone several times that day. Simpson stated that Employee's duty for this event was to input employees' time into the Trakster. Simpson explained that Trakster is what employees used and PeopleSoft is what the administrators used.

#### **5. Wanda Ellis (Transcript pgs. 95-102)**

Wanda Ellis ("Ellis") has been working for Agency since 2003. She is currently an Emergency Management Officer with Agency. In 2009, Ellis was an Emergency Preparedness Officer. Ellis sits on the Mayor's task force for special events, and she assigns the Special Operations employees to events and tracks their time. Ellis testified that in 2009, employees were not teleworking.

According to Ellis, on September 26, 2009, Ellis participated in the special event and worked alongside the firefighters, police officers, and the Department of Homeland Security. Ellis was the exercise manager for the event. Ellis noted that Employee did not work on September 26, 2009. However, Ellis explained that she received a phone call from Employee and she recalled Employee stating that something was wrong with her children, and Ellis advised Employee to contact Duckett.

#### **6. Eddie Sanders III (Transcript pgs. 103-109)**

Eddie Sanders, III ("Sanders") is currently employed with Agency as a Sanitation Supervisor. He has been with Agency for 14 years. Sanders testified that he worked the special event that was held on September 26, 2009. His role in the event was helping to clean up debris. Sanders stated that Employee's role during that day would have been to input time for the employees who worked the event. Sanders stated that Employee was also one of the "call-back" people, which meant that if there was an issue in the field, she would be called to discuss the issue. Sanders testified that he does not remember whether Employee worked on this day and he did not speak to Employee that day.

Sanders testified that Employee worked for Matthews as his clerical assistant and did most of his computer work because he was not up to speed with the computer or PeopleSoft. According to Sanders, Employee also helped some employees get into the system to see their information. He noted that assisting the employees with this required that they disclose their passwords to Employee.

#### **7. Michael A. Carter (Transcript pgs. 110-127)**

Michael Carter ("Carter") is the Deputy Director of Agency and has been working with Agency since 2006. His primary responsibility is to sign leave slips and approve time in PeopleSoft. He also supervises the Safety and Risk Management group, Customer Service Clearinghouse, and Community Relations.

Carter testified that he issued the advanced written notice of proposal to remove Employee for malfeasance. Carter explained that he was aware of the penalty range for malfeasance, and that the penalty for malfeasance ranges from nine (9) days suspension to removal. Carter further explained that he felt that removal was appropriate in this case because Employee went into PeopleSoft and changed a designation for an employee's checking account without HR approval, and input time for a date that she had not worked. Carter believed these actions were serious because authorizations for designations should be run through HR, and if there is something that an employee cannot do, she should consult the administrator. According to Carter, no evidence was presented to him indicating that Matthews had given Employee authorization to make these changes or that Matthews' mother had Power of Attorney to make the changes. Carter testified that he is not aware of situations where administrative assistants have helped other employees input time into PeopleSoft. With regard to Employee inputting time for which she did not work, Carter did not receive any information regarding Employee attempting to mitigate the situation.

Carter stated that he was aware of Matthews' condition in July 2009, from Duckett, Bryant and other employees. Carter recalled a time when Matthews' brother called him regarding a Power of Attorney and he directed him to HR. Carter noted that he was aware of the audit that OCFO conducted on Agency, however, he does not know of any other employees who were terminated for unauthorized changes to another employee's PeopleSoft information.

According to Carter, he suspended Niky West, and Employee in the Street and Alley Cleaning Division. Carter explained that Ms. West was suspended for signing in an employee that was late or not at work. Carter charged Ms. West with malfeasance for time and attendance fraud. The suspension was between 30 and 60 days. Carter recalled that Ms. West was a Lead Supervisor Foreman. Carter further explained that Ms. West did not commit the same behavior as Employee. Carter noted that, he believes that inputting time and attendance is different than an employee changing PeopleSoft information without authorization. Carter testified that Employee had the same supervisors as Ms. West.

#### **8. Sybil Hammond (Transcript pgs. 127-146)**

Sybil Hammond ("Hammond") is the Administrator for Solid Waste Administration and has worked for Agency fourteen (14) years. Hammond has approval rights for the time that is entered into PeopleSoft. She is the last person to receive the time information before it is processed. Hammond stated that Timekeepers can go back in pay periods to make adjustments and corrections to time. There have been situations where employees have been overpaid and they have had to refund the money.

Hammond testified that she knows Employee and the fact that she was terminated for malfeasance. She noted that she is familiar with the facts of the case involving Employee. Hammond further testified that, she knows that the penalty for malfeasance ranges from 30 days suspension to removal. Hammond believed that removal was appropriate in the case because of the seriousness of the acts that led to the termination. She noted that this type of offense is more serious than inputting someone's time.

According to Hammond, she did not give Employee authorization to make the changes to Matthews' account. Hammond did not receive any Power of Attorney from Matthews' mother to give Employee authorization to make any changes to Matthews' account. Further, she did not receive any response from Human Capital indicating that Employee had authorization to make the changes. Hammond testified that she did not have any contact with Matthews' brother, sister, or mother regarding the situation. Hammond is aware that administrative assistants use other employees' passwords to input their time. According to

Hammond, it's not an unusual practice for timekeepers and staff assistants to utilize other employees' passwords.

Hammond also testified that she knows Joann Johnson, a clerk working on the Street Cleaning Division. However she is not aware of a proposal to suspend her for time and attendance fraud. Hammond knows Ms. West and knows that Ms. West was suspended for time and attendance fraud.

### **Employee's Case in Chief**

#### **1. Dana Darden (Transcript pgs. 150-157)**

Dana Darden ("Darden") is a Sanitation Worker within the Street and Alley Cleaning Division of Agency. In 2009, Darden was, and is still a Sanitation worker. However, Darden has also conducted clerical work and input time and attendance into Trakster for employees. She had to utilize PeopleSoft passwords when using Trakster. Darden performed the clerical work from 2010 to 2011.

Darden testified that because she did not have her own PeopleSoft password, she utilized Earl Simpson's pass code. Darden stated that Simpson was aware that Darden was entering time and attendance into Trakster. Matthews was Darden and Simpson's Direct Supervisor. Darden testified that she was informed that it was illegal to utilize other employees' PeopleSoft pass codes. Darden also explained that she has never entered someone's direct deposit information without their authorization. Further, she has never done anything unauthorized.

#### **2. Annice Rush (Transcript pgs. 158-179)**

Annice Rush ("Rush") is a Motor Vehicle Operator with Agency. Rush is also a Shop Steward for Agency and handles disciplinary cases. In 2001, Rush was a time and attendance Clerical Worker. Rush testified that during her time as a Clerical Worker, she utilized other clerks' access codes to enter time and attendance into PeopleSoft. She also assisted employees with viewing their pay stubs while utilizing the employees' passwords. Rush explained that when an Employee forgets their password, the Help Desk is contacted and they request the employee's name, social security number, and location of their work, and the Help Desk provides the employee a new password. This password will allow the employee access to their personal information, banking information, direct deposit information, and W-2 information. According to Rush, this is a common practice within Agency, and if she assisted with this process, she would be given access to this information. Rush also testified that she assisted an employee to figure out their password. She explained that she did not access anyone's information without their permission. Rush was not informed of a policy preventing her from using someone else's password.

Rush noted that there were employees who were disciplined for time and attendance fraud. One of the employees who committed time and attendance fraud was the Head Administrator. Another employee was a timekeeper and she changed someone's bank stub information, and these employees are still employed by Agency.

Rush testified that Joann Johnson was Rush's replacement clerk after she went back to work in the field. Rush trained Johnson on keeping time and attendance for the employees. Johnson was aware that she could not put her own time in. The head administrator put all the clerks' time in.

### **3. Daniale Lawrence (Transcript pgs. 179-192)**

Daniale Lawrence (“Lawrence”) is currently a Staff Assistant with Agency. Lawrence oversees payroll and personnel functions. Lawrence worked with Employee in Special Operations. Lawrence works under Duckett. Lawrence testified that when Duckett was absent or when there was an emergency, Lawrence utilized Duckett’s password for PeopleSoft. Lawrence stated that she currently has her own password. Lawrence also stated that at one time she was an assistant for Matthews. Because Matthews was not computer literate, Lawrence performed some of his duties for him; however, these duties did not involve PeopleSoft.

Lawrence further testified that she knows about the incident that occurred with Employee and Employee being compensated for a weekend special event that she did not work. Lawrence noted that an adjustment could have been made to Employee’s time in order to recoup the funds. She also is aware of the investigation OCFO conducted on Agency and that it discovered that it was common practice that PeopleSoft passwords were being used by other employees. Lawrence testified that this is no longer a common practice. However, Lawrence stated that she assists employees who do not know their PeopleSoft password or cannot access the system if the employee is physically present when she assists them. Lawrence noted that because she has timekeeper privileges, she has the option to go into the system and make adjustments to employees’ time.

### **4. Teresa Smalls (Transcript pgs. 195-238)**

Teresa Smalls (“Employee”) was a Program Support Assistant for Agency from October 2000 until January, 2010. In this position, Employee conducted administrative tasks and did the time and attendance for about 30 to 40 employees. Employee also conducted tasks for some of the special events such as setting up the location an employee would be working at, on the day of the event, how long they would work, and what supervisor they would be working under.

With regard to the special event held on September 26, 2009, Employee testified that she was not physically present at the event. However, someone else entered her time into PeopleSoft for this day. Employee explained that the person who entered the time knew that she did not work. Employee further explained that she removed her time from the Trakster system for that day and she did not put the time in PeopleSoft. Employee testified that she later informed Carla Eason, Earl Simpson, and Delona Blue that she removed her time in Trakster. Employee tried to repay the monies for the day she did not work. She went to 441 4<sup>th</sup> Street and spoke to Debbie Greer about the issue, but was told that there was nothing that could be done because there was no paper trail.

Employee noted that it was common practice for employees to work from home via their Nextel phone. Employee stated that she was trained by Daniale Lawrence and this practice was in place when she came to Agency. Employee believed that the other employees who testified about working from home did not want to expose Agency. She noted that when she had her hearing with Teresa Cusick, she discussed repayment with her. Employee felt like she was mistreated because a Program Support Assistant and a supervisor were charged with the same conduct, but were not terminated. Employee testified that one employee gained financial funds from their conduct. Employee believed that Agency’s actions were a pretext to terminate her.

According to Employee, she worked under Matthews and was his “right hand man.” Matthews was not computer savvy. Employee also helped other supervisors because they were not computer savvy either.



Employee taught Matthews how to pay his bills online. She noted that this was not one of her tasks with Agency; but because she was good friends with Matthews, she did this out of her friendship with him.

Employee testified that it was not uncommon for the staff assistants to utilize their supervisors' passwords. Employee testified that she changed Matthews' password information because she did not feel comfortable about giving that information to Lawrence. Matthews was not aware that Lawrence needed his password and was incapacitated during this time. Employee explained that she felt uncomfortable because Matthews asked her to place him on annual leave in PeopleSoft, and she did not want anyone choosing whether he should have been on disability or making choices regarding leave for him.

According to Employee, while Matthews was in the hospital, Employee visited him almost every day. Prior to Matthews becoming incapacitated, Matthews told Employee to make sure everything was right at Agency. Matthews asked Employee to make sure he was paid correctly and to take care of his mother. Employee assisted Matthews' mother with AFLAC. Employee did not know that she did not have authorization to change Matthews' direct deposit information. She noted that she was trained to conduct this kind procedure.

Employee also testified that at the request of Matthews' mother and his brother, she changed Matthews' direct deposit information. Employee felt that Matthews' mother did not lie when she said she had Power of Attorney. Employee attempted to notify Duckett on numerous occasions regarding the change. Further, Employee noted that Williams wrote a letter on behalf of Employee, stating that he tried to contact Duckett. Employee provided that she thought this kind of change was OK. She explained that she made this kind of change all the time because Lawrence did not want the Reeves building to be bombarded with employee information. No one informed Employee that her action was against policy. In addition, Matthews was not getting the help he needed from his direct supervisor.

Employee stated that she only had access to Matthews' PeopleSoft information. While he was in the hospital, she assisted him with paying his bills. Bill collectors were calling because bills were not getting paid. Employee would call Matthews' brother to let him know what bill collector called. She also sent emails to his brother letting him know which bill needed to be paid. Employee did not receive any monetary donations for assisting Matthews.

Employee noted that an employee who worked out in the field requested computer-related tasks of the administrative staff. If Employee did not do what was requested by the field staff, the employees would contact the appropriate personnel and Employee risked being written up. Prior to the incident that involved Matthews, Employee only changed direct deposit information if an employee requested it. To this day, Employee believes that she had authorization to change Matthews' direct deposit information.

### **Analysis**

Employee was a Program Support Assistant for Agency from October 2000 until January, 2010. In 2009, Employee's supervisor was Matthews. Employee performed administrative functions for Matthews that ranged from business to personal duties such as helping Matthews pay his bills online. It was not uncommon for the staff assistants to utilize their supervisors' passwords. Employee had access to Matthews' PeopleSoft information, and she helped Matthews and other supervisors who were not computer savvy. Matthews became ill and was hospitalized in 2009. At some point, Matthews was incapacitated, and Employee was contacted by Matthews' brother and mother, requesting that Employee change Matthews' direct deposit information in PeopleSoft. Employee accessed Matthews' PeopleSoft account, and made the

change without receiving authorization from management and without any written documentation to show that Matthews' mother had power of attorney to make the requested change. An investigation into the matter linked Employee's computer address ("IP address") to the same address used to change Matthews banking information in PeopleSoft. Employee acknowledged that she made the change to Matthews' banking information on PeopleSoft. She explained that while in the hospital, Matthews asked her to take care of his mother. Employee did not receive any benefit, financial or otherwise, from making the change to Matthews' banking information.

Additionally, on September 26, 2009, Agency had an emergency preparedness exercise, and Employee was scheduled to work on that day. Although Employee was not physically present at work, she indicated in Trakster that she worked ten (10) hours. Employee later removed the ten (10) hours from Trakster, however, it had already been entered into PeopleSoft by another person and Employee was paid for the ten (10) hours.

On December 2, 2009, Employee was served with a thirty (30) day Advance Written Notice of Proposal to Remove. The proposed action was based on the charge of: any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Malfeasance.<sup>1</sup> Specifically, Employee was accused of falsely recording ten (10) hours of overtime on her time and attendance report for September 26, 2009; and for violating District personnel policy by utilizing the PeopleSoft "sign-in" account information for Vernon Matthews to gain access to his personnel information and make changes to his account, including on August 31, 2009, a change to his direct deposit payroll disbursement, without legal authorization.<sup>2</sup> Following an administrative review, the Hearing Examiner recommended that the penalty of removal be sustained.<sup>3</sup> On January 26, 2010, Agency issued a Notice of Final Decision to Employee notifying her that she would be terminated effective January 29, 2010.<sup>4</sup>

### ***1) Whether Employee's action constituted cause for termination***

According to the record, Agency's decision to terminate Employee was based on the charge of: any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Malfeasance. Although there is evidence in the record to show that it was common practice where Employee worked to share passwords, the witnesses testified that they only accessed another employee's PeopleSoft account to input time, retrieve password, or view banking information, if the employee was present and gave them permission to do so. The record shows that the PeopleSoft Computer Security and Confidentiality Agreement that appears on the PeopleSoft access website prohibit the sharing and/or the unauthorized use of passcodes. Because Employee admitted to accessing Matthews' PeopleSoft account and changing his banking information without direct authorization from Matthews who was incapacitated at the time, or from Agency's management (Human Capital Administration) to do so, I find that Agency had cause to institute this action against Employee. I further find that, Agency has met its burden of proof with regards to this specification.

Additionally, Employee admits that she entered the ten (10) hours in Trakster on September 26, 2009.<sup>5</sup> Employee explains that she worked from home; however, she did not provide any credible evidence to prove that she worked from home or that she was authorized to work from home on September 26, 2010.

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<sup>1</sup> Agency's Answer at Tab 13 (March 24, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at Tab 15.

<sup>4</sup> *Id.* at Tab 16.

<sup>5</sup> Employee's Prehearing Statement (May 28, 2013).

Employee further explained that she later removed the time from Trakster, and she contacted her time keeper to request that the time in PeopleSoft be corrected the day before payroll processed, but the time keeper failed to make the correction. Employee also notes that she attempted to pay back the compensation she received for the ten (10) hours after she was paid in error. Again, through Employee's own admission that she was not physically present for the September 26, 2009, exercise and her admission that she input the ten (10) hours into Trakster, I further find that there is sufficient evidence in the record to support this specification. Moreover, although Employee testified that other employees worked from home, Employee has not provided this office with any credible and/or specific evidence to show that she was authorized to work from home. Accordingly, I further find that Agency has met its burden of proof with regards to this specification and therefore, Agency can utilize this charge to institute adverse action against Employee.

**2) *If so, whether the penalty of termination 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).<sup>6</sup> 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 ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.<sup>7</sup> 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 remove Employee.<sup>8</sup>

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<sup>6</sup> 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).

<sup>7</sup> *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).

<sup>8</sup> 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 its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

## Disparate Treatment

Employee argues that she was not disciplined in the same way as her colleagues. Employee contends that Agency engaged in disparate treatment. She explained that Daniale Lawrence, a supervisor, was not disciplined for her role in time and attendance fraud; Joann Johnson, a Clerical Staff member who committed the same offense as Employee by placing her own time in PeopleSoft and gained financially, only received a fifteen (15) day suspension. Employee also states in her Prehearing Statement that a Staff Assistant who committed the same offense as Employee was not disciplined at all. Employee further maintains that DPW managers also failed to comply with the payroll and PeopleSoft policy by allowing Staff Assistants access to PeopleSoft codes to make changes to accounts. Further, Carter testified that Niky West, a Lead Supervisor Foreman was charged with malfeasance for altering the time and attendance of another employee, and she was only suspended. Carter further testified that Niky West and Employee had the same supervisor.

OEA has held that, to establish disparate treatment, an employee *must* show that she worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (emphasis added).<sup>9</sup> Additionally, “in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty.”<sup>10</sup> (Emphasis added).

After a careful review of the record, it appears that Niky West (Lead Supervisor Foreman), Joann Johnson (Clerical Staff) and Employee (Program Support Assistant) all had different official position titles. While Carter testified that Niky West and Employee had the same supervisor, Employee has not provided any evidence to show that Niky West, Joann Johnson and Employee worked in the same organization unit. Although there is evidence in the record to show that Niky West and Employee were disciplined by the same person - Carter, Employee has failed to provide any evidence to show that they were disciplined within the same general time period. Furthermore, Employee has not provided any evidence to show that Employee, Joann Johnson and the other DPW employees were disciplined within the same general time period, by the same supervisor, and for the same cause of action. Consequently, I conclude that Employee has not provided sufficient evidence to establish a claim of disparate treatment, and therefore, she has not met her burden of proof.

The penalty for violating [a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Malfeasance is found in § 1619.1(6)(g). In 2010, when Employee was terminated, the TAP recommended penalty for a first time offense under this section was suspension to removal. Because removal is within the range allowed under DPM 1619.1(6)(g), an agency is justified in terminating an employee for this cause of action, as long as it does not abuse its discretion.

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- 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.

<sup>9</sup> *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

<sup>10</sup> *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).

In this case, I find that Agency has met its burden of proof for the above-referenced cause of action, and it can utilize this cause of action to institute an adverse action against Employee. 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.<sup>11</sup> According to the record, the penalty for a first time offense for this cause of action ranges from a thirty (30) day suspension to removal. The record shows that this is the first time Employee is being charged with this cause of action. In reaching the decision to remove Employee, Agency gave credence to the nature and seriousness of the offense; Employee's type of employment; the erosion of supervisory confidence; notoriety of the offense on the reputation of the Agency; Employee's past disciplinary record and her past work record; and mitigating and aggravating circumstances.<sup>12</sup> In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is clearly not 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 terminating Employee is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Administrative Judge

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<sup>11</sup> *Id.*; See also *Hutchinson, supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995).

<sup>12</sup> Agency's Answer at Tab 13, *supra*.