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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: EMPLOYEE ¹ Employee v DISTRICT OF COLUMBIA OFFICE OF UNIFIED COMMUNICATIONS Agency	}	OEA Matter No. 1601-0034-23 Date of Issuance: July 5, 2024 LOIS HOCHHAUSER, Esq. Administrative Judge
Daniel Thaler, Esq., Agency Representative Lateefah Williams, Esq., Employee Representative ² Carisa Carmack, Esq., Employee Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a petition with the Office of Employee Appeals (“OEA”) on March 17, 2023, appealing the final decision of the District of Columbia Office of Unified Communications (“Agency”) to terminate his employment as a Telecommunications Equipment Officer. Sheila Barfield, Esq., OEA Executive Director, notified Agency Director Heather McGaffin of the appeal on March 17, 2023, attaching a copy with the letter. She informed Director McGaffin that, pursuant to OEA Rule 612.1, the filing deadline for Agency response was April 16, 2023. Agency filed its Answer on April 20, 2023, and the matter was then assigned to this Administrative Judge (“AJ”).

The AJ determined that the Petition for Appeal (“PFA”) was incomplete and issued an Order on April 21, 2023, directing that Employee amend the PFA by May 8, 2023 and that Agency amend its Answer by May 22, 2023. The parties complied with these directives. The Order scheduling the prehearing conference (“PHC”) was issued on June 2, 2023. The PHC was held on June 28, 2023. The AJ issued an Order on July 20, 2023, scheduling the evidentiary hearing for October 5 and October 25, 2023. The parties filed a “Joint Request for an Extension of Time” on September 18, 2023, asking for a one week extension of the deadline for filing prehearing submissions. The request was granted by Order dated September 19, 2023.

The parties filed the “Joint Prehearing Statement,” on September 27, 2023.³ In addition, Employee filed his “Hearing Exhibits” and a request for the issuance of a *subpoena* to compel Agency Director to appear at the October 5 proceeding. Agency filed its opposition on October 3,

¹ This Office does not identify employees by name in Initial Decisions published on its website.
² Ms. Williams represented Employee from the inception of the proceedings until January 24, 2024 when Ms. Carmack entered her appearance on Employee’s behalf.
³ This document was admitted as a joint exhibit at the October 5 proceeding.

2023. Employee filed his response to Agency’s opposition on the same day. At the December 5 proceeding, the AJ determined that although Employee had not established good cause for the late filing; he would be permitted to call the witness since Agency would not be prejudiced.⁴ The AJ issued an Order on October 11, 2023, confirming that the third hearing day was October 27, 2023, and that the deadline for the filing of *subpoena* requests was October 13, 2023.

The evidentiary hearing took place on October 5, October 25 and October 27, 2023 at the Offices of OEA. Throughout the proceedings, the parties were given full opportunity to, and did, present testimonial and documentary evidence as well as argument in support of their positions. Witnesses testified under oath and the proceeding was transcribed.⁵

The parties filed closing arguments, and the record closed on March 18, 2024.⁶

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 on its decision to remove Employee? If so, is there any basis to disturb the penalty?

SUMMARY OF EVIDENCE

Summary of Undisputed Findings of Fact⁷ and Documentary Evidence

1. Agency is the District of Columbia Government entity responsible for ensuring professional and expedited service to [individuals in] the District of Columbia” who initiate emergency and non-emergency telephone calls from 911 and 311. Agency also coordinates and manages “public safety voice radio technology and...communication systems and resources to District government agencies and several local, state, and federal partners.⁸

⁴ On October 10, 2023, Agency advised the AJ that the witness could appear was October 27 and that date was confirmed with the parties. Employee requested issuance of the *subpoena* on October 12, and the *subpoena* was issued on October 13. *See, e.g.*, Tr1, 20-28, 163-166 On October 23, Agency filed a motion to quash the *subpoena*. The matter was argued by the parties at the October 25 proceeding. The issue of the *subpoena* remained an issue in dispute throughout the proceedings, but is not discussed further since it is not relevant.

⁵ The transcript is cited as “Tr” followed by “1” (October 5), “2” (October 25), or “3” (October 27), followed by the page number. Exhibits (“Ex”) are cited as “J” for Joint, “A” for Agency and “E” for Employee, followed by the exhibit number and where necessary, the page number. The following exhibits were not admitted into evidence: Ex A-1, Ex A-8. Ex E-4 was admitted although it carried little or no probative value because it was referenced by a witness.

⁶ The parties agreed that closing briefs would be filed 45 calendar days after receipt of the third transcript. That deadline was stayed until certain evidentiary issues were resolved. By Order issued on December 21, 2023 the deadline was extended until February 2, 2024. On January 24, 2024, Employee filed an unopposed motion to extend the deadline until March 18, 2024. The request was granted by Order dated February 2, 2024.

⁷ These findings of fact were not disputed during the course of these proceedings. The primary sources for this section are the documentary and testimonial evidence and Employee’s Post-Hearing Brief.

⁸ Agency website.

2. Telecommunications Equipment Officers (“TEOs”)⁹ are responsible for “answering, screening and processing via telecommunications systems emergency and non-emergency calls from the general public and other public safety services:

for the protection of life and property; during a life-threatening emergency, establishes communications with the caller and maintains control of the conversation by providing the caller with life-saving instructions until assistance arrives on the scene; gathers, classifies, and supplements pertinent information obtained from the caller and enters it in the Computer-Aided Dispatch System using appropriate screens.” (Ex A-6 at 82-84).

TEOs communicate with police, fire and emergency medical services agencies; and must follow the policies and procedures of those departments governing the dissemination of information. According to the Position Description:

The heavy communications traffic creates pronounced demands on the incumbent’s coordination and alertness and ability to make rapid decisions and take several simultaneous actions in the accomplishment of a number of control procedures. (*Id.*)

The TEO’s work requires “some physical exertion such as prolonged periods of sitting under conditions that are often stressful. The use of equipment may be “at a high level of noise.” It is an “essential position,” worked in 12 hour rotating shifts. (*Id.*)

3. Employee was a TEO from 2005 until February 24, 2023, the effective date of his removal. Prior to this position, Employee was a correctional officer for several years with the District of Columbia Department of Corrections and a public safety officer in Maryland. Employee earned an associate’s degree in law enforcement, a bachelor of science degree in criminal justice and a master’s degree in digital forensics and cyber investigations. (Tr2, 199-204).
4. Alton Gadsden, Watch Commander, was Employee’s direct supervisor during the relevant time period and was responsible for completing Employee’s evaluations during that time. Mr. Gadsden worked at Agency for 36 years, and was Watch Commander from 2016 until his retirement in June 2023. During the relevant time, he supervised about 15 employees.
5. On December 18, 2021,¹⁰ while on duty, Employee answered a 911 call reporting an incident at the Potomac Avenue Metro Station. (“Metro call”).

Operator: MPD Police non-emergency line
Employee: What’s the address
Participant: I need a trans police up at Potomac Avenue Station. There’s a person up here harassing folks at metro transport. Metro, uh

⁹ TEOs are also identified as “call takers” and “universal call takers” in the transcript and documentary evidence. For the sake of clarity, only the term “TEO” is used in this decision.

¹⁰ Although the call took place on December 18, 2021, Agency did not become aware of it until July 2022. (*Infra* at 8).

Employee: Okay. I don't get your request. Repeat that.
Participant: I need police—
Employee: Hello?
Participant: I need trans—I need transit police at Potomac Avenue Station.
Employee: Okay. How—
(Simultaneously speaking)
Participant: What?
Employee: You said you have someone harassing metro officers? Are there officers?
Participant: Sir, I need transit police at the Potomac Avenue Metro Station—
Employee: Okay, standby.
(Simultaneously speaking)
Participant: Let's be cool, let's be cool, let's be cool man.
(Fight in background. Indiscernible)
Transit Police: Okay. Where is he located?
Employee: Um—
Transit Police: Where is he located, sir, do you know?
Employee: I think he had mentioned some metro station.
Transit Police: Okay. That's what we need to know.
Employee: Yes, I think that's---
(Indiscernible. Fight in background)
Participant: (Indiscernible)
Transit Police: Okay. Where are you located? Where are you located?
Employee: He hung up.
Transit Police: Okay. All right.
Employee: All right
Transit Police: Take care, okay?
Employee: Bye.
(Tr1, 113-116, Ex A-13).

6. On May 30, 2022, while on duty, Employee answered a 911 call from an individual at Howard University Hospital (“HUH call”).

Operator: D.C. emergency administrator line
Participant: (Inaudible) Hello?
Employee: Okay, ma'am, what is the address we are responding to?
Participant: Howard University Hospital).
(long pause)
Employee: All right. Is (Inaudible).
Participant: (Inaudible)
Employee: I'm sorry, I can't hear you, ma'am.
Participant: (Inaudible)
Employee: Repeat what you just said, ma'am.
Participant: I'm sorry?
Employee: I cannot hear you. Can you speak up?
Participant: I said (Inaudible).
Employee: (Inaudible)
Participant: Yes. And (Inaudible) and I tried to explain it to the lady but she hung up on me.
I don't feel like she sent somebody out.
Employee: Yes, the officers will be the one to do that. To—
Participant: (Inaudible)
Employee: Please listen to me.

(Simultaneously speaking)

Participant: ---police.

Employee: Yes, the officers have their own police. That's what I'm trying to let you know.

Participant: No. No.

Employee: Are you going to argue with me or are you going to listen to me?

Participant: (Inaudible) police—

Employee: Correct.

Participant: (Inaudible)

Employee: Okay.

Participant: (Inaudible)

Employee: Okay.

Participant: Can you help me?

Employee: Ma'am, you have to let the hospital know what is going on there. I don't—

(Simultaneously speaking)

Participant: (Inaudible) No one is doing anything.

Employee: The time is 3:29, I'm disconnecting the call at this time.

Participant: I'm sorry?

(Tr1, 125-127, Ex A-14).

7. On July 26, 2022, 911 Operations Manager Karl Millard, on behalf of Agency, issued Employee a memorandum entitled Notification of Mandatory Remediation Training ("Remedial Training Notice"). (Ex A-6 at 62-64). The Remedial Training Notice stated, in part:

Based on quality assurance evaluations and review of same, this memorandum is to inform you that you have failed to meet the performance expectations of that of a [TEO]. The following deficiencies were noted during the review of the quality assurance ("QA") evaluations:

- Attention to detail
- Collection of information
- Retention of information
- Completing all cycles of communication
- Unprofessional to callers and becoming argumentative
- Failure to enter calls, accurately and efficiently, for service
- Premature disconnecting callers prior to ensuring help was being sent

Employee was required to attend remediation training that included 80 hours of classroom training, 60 hours of on-the-job training with a Communications Training Officer ("CTO") and 24 hours of independent call-taking with documented observations by a CTO. It also discussed "core competencies" that were expected of Employee, including:

Customer Service: You will provide quality customer service, demonstrate consistent and continual adherence to all prescribed District Government and [Agency] customer service goals and standards, and treat all customers in a professional courteous manner.

Accuracy: You will be expected to create an event record by providing the correct location given by the citizen. The location shall be verified twice before rerouting it to the radio zones. You will also utilize resources available to you to assist when citizens have difficulty giving you an accurate location... (emphasis in original). (Ex A-6 at 62-64)

8. Employee attended classroom training from July 25 through August 5, 2022. CTO Marisha Jennings conducted individual on-the-job one-on-one training on August 10 and August 11, 2022 and independent call taking with observations on August 30, September 2, September 3 and September 4, 2022.
9. On November 23, 2022, Agency issued the advance notice proposing Employee's termination. ("Advance Notice"). (Ex A-6). Calvin Williams was the Proposing Official. The Advance Notice stated in pertinent part that discipline was based on:
 1. **Failure/Refusal to Follow Instructions:** Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. (See DPM §1607.2(d)(1) ...) Proposed Action: **Removal**
 2. **Neglect of Duty:** Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties, failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits.... (See DPM §1607.2(e) Proposed Action: **Removal**
 3. **Inability to carry out assigned duties:** Any circumstance that prevents an employee from performing the essential functions of his...position, and for which no reasonable accommodation has been requested or can be made, unless eligible for protected leave.... (See DPM §1607.2(n) Proposed Action: **Removal**

Specifications:
On July 13, 2022, [Agency] received an email from [MPD] Internal Affairs Division to review a phone call, particularly the Telecommunications Equipment Operator's response. After review of the phone call, it was found that the caller gave the reason for the call and location three...times, but [you] did not retain the information provided. On September 29, 2022, Tipi Brookins, Chief of Professional Standards provided the OUC Human Resources (HR) Division with a report accounting you retraining as a TEO conducted from July 25, 2022 to September 2, 2022. After completing the training you were observed taking calls on August 30, 2022, September 2, 2022, September 3, 2022 and September 4, 2022. It was observed that you were not able to correctly identify call types for service for police, fire, or medical calls. Computer Aided Dispatch (CAD) incidents did not contain complete notes to ensure that all necessary information was obtained to ensure safety. You needed assistance from the CTO for additional information multiple incidents. Also, you did not inquire or question the caller to obtain the needed information to assist with help and inconsistently retained the information that was provided ...
Your conduct violates [Agency's] mission which is to provide a fast, professional, and cost effective response to emergency and non-emergency calls in the District of Columbia. Your performance undermines the confidence of you to perform the essential functions of your job answering, screening and processing calls. Moreover, you failed to adhere to District government regulations which is vital to the trust of your duties in judgment to interpret and adapt guidelines such as agency policies, procedures, regulations, precedents, and work directions. (emphasis in original)
10. Anndreeze Williams, Assistant General Counsel of D.C. Department of Behavioral Health served as Hearing Officer ("HO") in this matter and issued the Administrative Review/Written Report and Report and Recommendation ("HO Report") on February 2, 2023. (Ex A-7). The HO Report states that each party initially submitted 13 documents to the HO. It further states that Employee asked Agency for 14 additional items; and that Agency subsequently provided 13 documents. The HO Report states that Employee submitted a nine page rebuttal and seven additional documents. HO Williams concluded that "the proposal to remove [Employee] is supported by a preponderance of the evidence

and is reasonable. (*Id.*).

11. The Notice of Final Decision-Removal (“Final Decision”) was issued on February 15, 2023. (Ex A-8). Heather McGaffin, Acting Director, was the Deciding Official. The Final Decision stated, in pertinent part, that Employee would be terminated, effective February 24, 2023, based on the following cause(s):
 1. **Failure/Refusal to Follow Instructions:** Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. (See DPM §1607.2(d)(1) ...) **Proposed Action: Removal**
 2. **Neglect of Duty:** Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties, failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits.... (See DPM §1607.2(e) **Proposed Action: Removal**
 3. **Inability to carry out assigned duties:** Any circumstance that prevents an employee from performing the essential functions of his...position, and for which no reasonable accommodation has been requested or can be made, unless eligible for protected leave.... (See DPM §1607.2(n) **Proposed Action: Removal**

Final Decision

After careful review of the advance written notice and the Hearing Officer’s *Written Report and Recommendation*, I agree with the Hearing Officer and find the cause(s) for the removal action are supported by the evidence, and it is my final decision to **sustain** the proposed removal action. In making my decision to remove you, I considered several factors, including the following:

1. **The nature and seriousness of the offense and its relation to employee’s duties, position and responsibilities, including whether the offense was intention or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.**

On September 29, 2022, Tipi Brookins, Chief of Professional Standards in the Office of Professional Standards and Development (OPSD) provided the OUC Human Resources (HR) Division with a report accounting your retraining as a TEO conducted from July 25, 2022, to September 2, 2022. After completing the training you were observed taking calls on August 30,...September 2,...September 3,...and September 4, 2022...that you were not able to correctly identify call types for service for police, fire or medical calls. Computer Aided Dispatch (CAD) incidents did not contain complete notes to ensure that all necessary information was obtained to ensure safety. You needed assistance from the Certified Training Officer (CTO)...Also, you did not inquire or question the caller to obtain the needed information to assist with help and inconsistently retained the information that was provided.
2. **Employee’s job level and type of employment, including supervisory or fiduciary role, contact with the public and prominence of position**

As a TEO...your position plays a vital role in ensuring that timely emergency services are properly and appropriately delivered to emergency personnel and the citizens and visitors... On multiple occasions your lack of attention to detail created and caused distrust from the general public and other public safety service agencies to answer, screen and process emergency and non-emergency calls. Your conduct undermines the OUC’s integrity and mission, is unacceptable and goes against the extensive training you have received, including subsequent remedial training, in an attempt to remediate your failures...

The Employee’s past disciplinary record

You have not had any official actions taken in the past three...years. However, the egregiousness of your actions warrants this level of discipline.
3. **The Employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, dependability**

You have been employed since October 4, 2001. You were rated a 3 in FY 2019, FY 2020, FY 2021, making your performance satisfactory. However, your conduct on multiple

occasions failed to correctly identify call types for service for police, fire or medical calls after retraining, and your CAD notes were incomplete...Additionally, you required more assistance from the CTO...Your conduct is not within the standard of satisfactory performance and is totally unacceptable.

4. **The effect of the offense upon the Employee's ability to perform at a satisfactory level and its effect upon supervisors confidence in the employee's ability to perform assigned duties**

Agency employees are required to provide the highest quality of services and to be courteous and professional at all times. [You] have been found to have violated the OUC's mission, which is to provide a fast, professional and cost-effective response to emergency and non-emergency calls in the District...[Agency] no longer has confidence in your ability to perform your duties.

5. **Consistency of the penalty with those imposed upon other employees for the same or similar offenses**

Agency's decision to remove you is consistent with disciplinary action taken against similarly situated employees.

Positions of the Parties and Summary of Testimonial Evidence

Agency maintains that Employee failed to "adhere to the basic fundamentals of call taking" even after receiving remediation training and coaching. It contends that removal was appropriate since his performance did not sufficiently improve the training and coaching. Agency asserts that it must maintain high standards since "one mistake" by a TEO can result in the death of a citizen. (Tr1, 30; 161).

Calvin Williams, Agency's first witness, stated that he worked at Agency for 29 years and has been Operations Manager for two years. He said that his duties include supervising watch commanders, assistant wage commanders, dispatchers and telephone equipment operations; working collaboratively with the Office of Professional Standards ("OPS"), Agency's training division; and with Office of Human Resources ("OHR"). (Tr1, 49). The witness said that as Proposing Official ("PO") he reviewed all documentation provided by OPS before signing off on the Advance Notice. (Tr1, 51-52; Ex A-6).

The witness stated that on July 13, 2022, Agency was notified by the Internal Affairs Division ("IAD") of the Metropolitan Police Department ("MPD") of a call involving Employee, and after the call was reviewed by Agency's Quality Assurance Division ("QAD"), Agency determined that Employee needed remedial training. Mr. Williams testified that the training described in the Advance Notice was "an accurate summary" of the training Employee received, which included 80 hours of classroom training, then 24 hours of "on-the-job" training and finally 36 hours of independent call taking. Mr. Williams testified that after Employee completed training, Agency determined that he still did not meet required standards, and terminated his employment. (Tr1, 55).

Mr. Williams testified that removal was warranted because Employee failed or refused to follow instructions provided at training about appropriate procedures and regulations; and failed to fulfil his responsibilities in a manner "expected [of] a reasonable individual in the same position." The witness stated that Employee's actions of "hanging up on an individual...in need of police assistance" and failing to obtain and document pertinent information was "unacceptable." The witness testified that

the *Douglas Factors*¹¹ were considered. He said that the first factor, *i.e.*, the nature and seriousness of conduct, was considered significant because even after completing remedial training, Employee still failed to “identify call types for several police and fire medical calls.” He noted that the range of penalties for each offense was counseling to removal. (Tr1, 57-60, Ex A-6).

The witness stated that as Operations Manager, Employee was under his direct or indirect supervision. He noted that he was Employee’s direct supervisor for several years in about 2007. (Tr1, 80-81). The witness said that although he did not have “problems” with Employee when he supervised him, he did have to talk with Employee about “being consistent with processing calls.” (Tr1, 63).

Gregory Hill, Agency’s next witness, is employed by MPD. He testified that as part of his investigation of threatened armed violence against a Metro employee at the Potomac Avenue Metro Station, he reviewed a 911 call that Employee handled in July 2022. (Tr1, 93). He said that after listening to the call, he contacted Agency on July 13, 2022, and suggested that it might want to review the call “[in] particular, the call-taker’s responses” because of his concern that the response time was delayed due to Employee’s conduct. (Tr1, 86-90; Exs A-4, A-13).

[T]he citizen had explained twice where they were, had requested the police, and specifically at one point said that a police officer was either being harassed or assaulted...So, there were three things being relayed twice that were overlooked, not addressed, and then the transfer to Transit Police further delayed this process...I don’t know if that’s typical how things go, that’s not what I’ve experienced in listening to other call audio. (Tr1, 90-91).

Latrice Covington, Agency’s third witness, stated that she has worked at Agency for 32 years, initially as a 911 dispatcher and assistant watch commander, and for the last 3 ½ years as Quality Assurance Specialist (“QAS”). (Tr1, 134). She stated that the Quality Assurance Office is responsible for ensuring that TEOs and dispatchers meet Agency standards, and that the QAS evaluates randomly selected calls to determine if TEOs are meeting those standards. (Tr1, 110). The witness testified that she reviewed the Metro call and found deficiencies in Employee’s performance, including his failure to verify the location to be “professional.” She stated that Employee did not retain information regarding the location of the incident, although the caller gave the information to him three separate times. (Tr1, 123, 158). Ms. Covington noted that TEOs are “trained to also listen to background,” and that an “altercation” could be heard in the background which made the call a priority. (Tr1, 136-137). Ms. Covington testified that she also reviewed the HUH call, and found deficiencies in Employee’s performance such as disconnecting the caller and failing to enter the call into the system. She stated that Employee was “unprofessional” with the caller. (Tr1, 131.)

Ms. Covington testified that after completing her report about Employee’s handling of the Metro and HUH calls, she was directed by management to “listen to random calls” between January and July 2022 to fully assess Employee’s deficiencies and determine if he needed remedial training. (Tr1, 152). She said upon review of these calls, she recommended training for Employee based on “all of the deficiencies” that she found in such areas as attention to detail, his collection and retention of information, his lack of professionalism and argumentativeness, his failure to enter calls accurately

¹¹ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

and efficiently and his premature disconnection of calls. She said that these deficiencies are part of the Remedial Training Notice. (Tr1, 133, 157; Ex A-6 at 62-64).

Trayshelle Jackson, Agency's next witness, said that she has worked at Agency for more than 18 years; first as a TEO and MPD dispatcher, and for the last five years as a QAS. (Tr1; 187, 212). She testified that she evaluated random calls handled by Employee between January and March 2022 and June through August 2022. She testified that she found Employee deficient in such areas as "attention to detail, collection of information, retention of information...and enter[ing] calls accurately and efficiently." (Tr1, 179, 181). With regard to the HUH call, the witness testified that Employee should have obtained the caller's location within the hospital and a description of the alleged assailant. She also stated that Employee was "argumentative" at times. (Tr1, 185; Ex A-14). She surmised that if Employee had "asked for further clarity and got a little bit more detail," he might have "connected with campus police," and had them go into caller's room, which is something Agency TEOs do with hospitals "each and every day." (Tr1, 191-192). She agreed that TEOs have "to be firm at times," but explained that "there's a big difference" between being firm and getting the necessary information and being argumentative with the caller. (Tr1, 199). The witness said that TEOs are trained to "take control of the calls," which she described as using "calming techniques [and not] being argumentative with a caller" which can often "further escalate the situation." (*Id.*)

Tipi Brookins, stated that she has held the position of Agency Chief of the Office of Professional Standards and Development ("OPSD") for over a year; and that in that position she is responsible for training, and the development and implementation of curriculum. She testified that she developed Employee's remediation plan based on the Quality Assurance Review. The witness stated that the plan began with 80 hours of classroom instruction in areas such as "attention to detail...geography...computer-aided dispatch and the 911 location determining technology instruction." (Tr1, 207-208; Ex A-6). She identified two answers on a test Employee completed which, she stated, demonstrated that he had "no understanding" of those key performance indicators. She also pointed out other incorrect responses. (Tr1, 209-211; Ex A-6 at 67-78).

Ms. Brookins stated that after Employee completed 80 hours of classroom remediation training, CTO Jennings provided Employee with "immediate chairside instruction" to "answer clarifying questions, explain misunderstandings [and] coach him and mentor throughout the calling-taking process." (Tr1, 212). She noted that Employee was not receptive to CTO Jennings' feedback and that Melissa Grooms, a training specialist, and Calvin Williams, were brought in to find out the reason. After Employee told them that he was embarrassed about the location of the remediation training, they changed the training site. She stated that Employee did not complain about the quality of the training. (Tr1, 214).

The witness stated that after the classroom training and individual sessions with CTO Jennings, Employee was evaluated on "independent call-taking" and had an "unacceptable rating." (Tr1, 215; Ex A-6). Ms. Brookins testified that although he processed some calls correctly, there were "multiple incidents where [Employee] did not properly identify...complaints," explaining the importance of doing so in order to prioritize calls. (Tr1, 218). She stated that Employee required assistance from CTO Jennings to get necessary information, adding that at time he required assistance in properly entering information. She gave an example of an incident where Employee failed to use his location-determining technology to locate a caller who reported a seizure, requiring CTO Jennings "to step in to assist" in order to "get a good address" so that help could be sent. Ms. Brookins explained the

importance of identifying the type of call in order to prioritize assistance, and gave another example where Employee erroneously entered the type of call as a carjacking, which has “ a high priority” when it was actually a domestic violence call which has a lower priority. (Tr1, 221-222; Ex A-6).

Ms. Brookins stated that a TEO must “control” the call, and does so by asking the caller direct questions, getting the caller’s attention, and documenting information. She testified that there were instances when Employee was unable to control a call, citing a “seizure call” which Employee “took entirely too long” to answer. She stated that although a second patient was involved, Employee “did not-could not understand.” The witness testified that Employee also failed to utilize “pre-arrival instructions that the TEO should provide in accordance with the emergency dispatch protocol system. She stated that due to Employee’s performance, CTO Jennings had to intervene and provide assistance. She noted that there were also “multiple examples” where Employee failed to retain information. (Tr1, 222-226).

The witness stated that Employee received copies of the basic call-taking program manual (“Manual”) and the ECBD medical protocol dispatch directions (“ECBD”). She noted that the Manual contains information about the duties and responsibilities of the call taker, and that the ECBD is the “protocol based system” that Agency currently uses. Ms. Brookins testified that given Employee’s years of experience, the remediation training should have achieved better performance, and added that to the best of her knowledge, Employee did not ask for additional training. The witness testified that she reached her conclusions that Employee failed to control calls and “inconsistently retained information” based on the Daily Observation Report documentation. The witness stated that based on these problems, she recommended Employee’s termination, adding that his actions could have exposed Agency to lawsuits. (Tr1, 222-231, Exs A-6, A-11, A-12). She noted an incident that Employee erroneously designated the issue as a car-jacking when it should have been designated as domestic violence. (Tr1, 240).

Ms. Brookins testified that she did not listen to Employee’s calls, but instead based her opinion of Employee’s deficiencies on “the quality assurance review evaluations.” (Tr1, 250; Ex A-6). She stated that although some of the calls were made before Employee finished remediation training, he had completed enough training to show more improvement, especially because of his years on the job. (Tr1, 264). Ms. Brookins testified that there were several reasons that a previously satisfactory employee could no longer perform satisfactorily. She stated that she became “burned out” after 15 years as a TEO; and surmised that Employee was “probably a high performer” at the start of his career, but after 20 years, he was now making errors that a “reasonable” TEO would not make. She said that Employee’s remediation training was sufficient to improve his performance. (Tr1, 267-269).

Alden Gadsden, Agency’s final witness on the first day of the proceeding, testified that for fiscal year (“FY”) 2020, the first performance evaluation he completed for Employee, he gave Employee an overall rating of “3.”¹² (Tr1, 277; Ex A-3). He stated that Employee’s overall rating for the FY 2021 evaluation was “2.9.” He noted that he stated in the evaluation, that Employee “should continue to improve in the area of active listening to ensure that he inputs the correct location into the system as required,” because Employee had “challenges” in that area that resulted in late responses. He stated that Employee was told of this deficiency “many times,” and received remedial training. Mr. Gadsden testified that Employee’s overall rating for FY 2022 was “2.65.” (Tr1, 278-280; Ex A-3).

¹² The lowest rating is a “1,” and the highest is a “5.”

He stated that he also included positive comments about Employee's performances, such as noting in the FY 2020 evaluation that Employee showed "personal responsibility" for completing assignments. (Tr1, 287). The witness testified however, that he gave Employee a "marginal" rating for the core competency of "accountability" with a notation that Employee was cited twice during the rating period for failing to enter the correct address; but showed improvement after completing a 60 day Performance Improvement Plan. (Tr1, 289-290; Ex A-3). Asked if anything contributed to Employee's declining scores, Mr. Gadsden stated that he disagreed with the premise, since there was "really... not that much difference." He noted that Employee continued to have problem with "blown addresses," even after receiving additional training. (Tr1, 292-293, Ex A-3). The witness testified that after several dispatchers complained to him about the incorrect addresses, Agency investigated the matter and determined that Employee entered addresses into the system that differed from the addresses he received. He said that Employee was then given one-on-one remedial training with a CTO, and that when the CTO "was there ...to make sure that [Employee] verified the address...classified the call correctly, [and] prioritized it correctly," Employee showed improvement. (Tr1, 292-299, 302; Ex A-3).

Mr. Gadsden said that he supervised about 15 employees. He agreed that some employees experience burn-out after a number of years on the job. He said that when he notices "some change" in performance of an employee he supervises, he talks with that employee to "find out what was going on." He said that he had several such conversations with Employee, because they had "a good rapport." Asked what precipitated him to have these conversation with Employee, he testified that Employee had "a couple of challenges with the classification of calls but it was mainly the blown addresses that was a red flag," (Tr1, 307-308.) The witness stated that Employee was "on notice" about his deficiencies." He said that he thought he contacted the training unit twice about Employee's challenges. He testified that as a result Employee "was assigned to get the help." (Tr1, 319-321). He also noted that Employee was aware through their talks that on-line classes in areas such as call-taking, were available and that Employee would need approval for other classes. (Tr1, 312). Asked about Employee's assertion that his request was not approved, the witness said that there is no guarantee of approval since it depended on a range of factors including staff coverage. He recalled that Employee was approved for some courses. (Tr1, 314).

Marsha Jennings, Agency's final witness, stated that she was a TEO for two years, and has been a CTO for the last five years. (Tr2, 96). She said that she received required training and certification starting as a CTO.¹³ She said that she did not know Employee before she was assigned as his CTO in August 2022. (Tr2, 12-15). The witness said that she developed his individualized program after her discussion with Mr. Gadsden about the reasons that Employee was referred for training. She noted that she has trained other TEOs who had been with Agency for about the same amount of time as Employee and had similar deficiencies. (Tr2, 100). She stated that during training, as CTO, she sits "chairside" and monitors calls that the TEO takes and then provides the TEO with coaching, feedback, and guidance as needed. (Tr2, 16; Ex A-6). The witness stated that Employee was not receptive to her feedback, giving an example when Employee became "agitated" when she gave him "guidance [and] redirection" in order to "ensure that he dispatched appropriate emergency help to the location" on a robbery call. She testified that after Employee told her that he did not feel respected, she and another CTO who was present at the time, spoke with him about his feelings. She said that she and Employee also spoke with Mr. Williams about the incident. (Tr2, 17-18). She said

¹³ She identified the organization by the acronym "ABCO" but did not know the name.

that Employee did not always follow her instructions and that he never indicated that the training was not appropriate. (Tr2, 41).

Ms. Jennings agreed that TEOs have complained of equipment malfunction, but said those problems are with screens and not the headsets. She did not believe the problems created a “burden” for the TEO or add to the time needed to process calls. (Tr2, 68-69, 73). She testified that she never had a problem with “headset malfunctioning” or with “hearing” a caller, but noted that she did replace her phone when the mouthpiece broke. (Tr2, 76). . The witness testified that Employee’s equipment was working throughout the training.

Ms. Jennings stated that she discussed the deficiencies that she observed with Employee during the one-on-one training. (Tr2, 83). She testified that she considered Employee’s deficiencies to be “significant,” because that they continued even after the remedial training that focused on those deficiencies was completed. (Tr2, 103). She stated that during the final component of training, *i.e.*, after Employee completed classroom and on-the-job training, Employee handled the calls independently, while she monitored them and took contemporaneous notes. She testified that she found Employee was still deficient in attention to detail, collecting information, and retaining information She stated that she also found that he was unprofessional to callers at times, becoming argumentative and prematurely disconnecting callers without ensuring that help was being sent (Tr2, 21, 102; Ex A-6). The witness stated that Employee failed to take complete notes needed to ensure officer and scene safety, giving an example when he omitted information from the caller that the subject “was known to carry a gun.” (Tr2, 27-30; Ex A-6). Ms. Jennings testified that at times, it became necessary for her to intervene and assist Employee. She described one such incident when Employee failed to upgrade a call, although required to do so by Agency protocol:

[Employee] should have upgraded [the matter] to cardiac arrest. He did not [and so] I had to, from my...computer...send the call to the radios and say, “I’m sorry, for service, for police and EMS to respond out for this patient in cardiac arrest. (Tr2, 31).

The witness testified that Employee did not always retain information and therefore failed to “document it...on a consistent basis.” She gave one instance when Employee entered the wrong location and did not include that the caller reported the subject was throwing rocks. She described another call when Employee continued to ask for the subject’s description of the subject, after the caller had provided it several times. (Tr2, 39-40). Ms. Jennings testified that the training that Employee received was sufficient to improve the performance of “a reasonable person in [Employee’s] position.” (Tr2, 90). She added that Employee could have received additional training if he had requested it.

Employee’s position is that he has had a “storied” career, first at the D.C. Department of Corrections and then, beginning in 2003, at Agency. He maintains that he never “underperformed,” and was always “perfectly professional.” He contends that the remedial training was inadequate because it failed to address the “particular deficiencies” identified by Agency. Tr1, 38-44).

Sabrina Richardson, Employee’s first witness, said that she has worked at Agency for 25 years, working as a TEO and for the past five years, as a CTO. She said she is a member of the Union and serves as a shop steward. (Tr2, 124). She stated that she was not present during any of Employee’s remedial training. (Tr2, 182).

The witness testified that she has had equipment problems which make it “very hard to hear” callers. (Tr2, 125). She stated that she has reported the problems to management, but noted that employees have complained about headsets “for years,” and “nothing has been done.” (Tr2, 129). She said that recently it took two weeks for her to get her headset replaced, so that some calls sounded “very distorted.. (Tr2, 129). The witness testified that she thought these problems will continue because Agency is not doing an “adequate” job in “fixing or supplying new headsets or equipment.” (Tr2, 135-136). She asserted that someone monitoring a call uses a different system that is “way clearer,” and does not hear what the TEO hears. (Tr2, 137-138). The witness testified that she has learned new techniques from new hires since employees who have been there many years are not “retrained,” and thought it would be beneficial for senior employees to take classes with new employees. (Tr2, 142-144, 165). The witness said that that she was required to take training, but was not disciplined, when she entered an address incorrectly. (Tr2, 190, 194-195).

Ms. Richardson testified that she did not know the identity of the employee who, according to a newspaper article, erroneously entered an incorrect address into the system, resulting in a delay in reaching an infant who subsequently died. She stated that she had no first-hand knowledge about the incident. (Tr2, 184-189; Ex A-4).

Employee, the final witness of this proceeding, testified that he was very “stressed” after his return from Nigeria and the birth of triplets on March 31, 2022. He said that he applied for FMLA leave which was approved. He said that that he decided to return to work for the remedial training while he was on leave, since Mr. Williams told him that Agency wanted him to take training “just to improve.” (Tr2, 204-206). He said no one told him of any problem areas, and that he was not given a training plan. He agreed that he received the Remedial Training Notice that identified deficiencies. (Tr2, 214-219; Ex A-6 at 62-64).

Employee testified that he took the training “seriously.” He said that he tried his best, attended all sessions and was cooperative. He said that new employees asked him why he was in the class with them when he had been there for 20 years. Employee stated that the training was “not specific... cultivated, cultured, or trained towards any specific goal.” (Tr2, 217-222). He said that CTO Jennings did not have “any specific plan” and “just [went] with the flow.” Employee stated that he was “not even sure if she understood what training is.” He said that after he complained to Mr. Williams because CTO Jennings yelled at him and the three of them met, CTO Jennings stopped giving him feedback and “pretty much withdrew into herself.” (Tr2, 222-224). He stated that her statement that he did not accept constructive feedback was “false.” (Tr2, 228-229, 245).

Employee testified that an employee who allegedly gave first responders an incorrect address causing a delayed response which resulted in the death of an infant, was not terminated. He said the initials of the employee were “BW,” and asserted that he was aware of the identity of the employee based on conversations with other employees. He identified BW as a dispatcher, not a TEO. (Tr2, 236-242; Ex E-4).

Employee denied each of Agency’s charges. (Tr2, 258-265). Asked about the allegations that he did not correctly identify call types for police, fire and medical calls between the final part of remedial training on September 2 through September 4, he responded that “this was [when he] just [returned] from Nigeria...[and was] very emotionally comatose,” because it was “a very stressful” time for him.

(Tr2, 272). After listening to the audio of the Metro call, Employee agreed the caller had identified the location as the Potomac Avenue Metro Station three times. He explained that the sound was clearer at the hearing, and “when you are on the line, it’s a totally different ballgame.” He said that he failed to identify the station to the dispatcher because he had “trouble hearing...the person very well.” He added that “if I heard this person correctly, I wouldn’t ask again.” (Tr2, 267-270).

With regard to the HUH call, Employee testified that, “to the best of his knowledge,” the caller was a mental health person who was already in the hospital:

So a hospital is not a place...where they would normally...put them. It’s not a place that regular people have access to. My wife work[s] in a hospital so I know exactly what I’m talking about. (Tr2, 281).

Employee testified that he knew that the caller was on a mental health unit because she had called before, and wanted to be sure he didn’t “send a frivolous call...[b]ecause when you [do] it also [has] repercussions because either the supervisor will write you up so you [are] damned if you do, you [are] damned if you don’t.” (Tr2, 275-278). He said that Agency did not train TEOs on how to handle calls from a “mental health person.” He stated that he was advised to treat “mental health calls” differently since it was a “waste of resources” to send police or fire units since these were “false” calls. Employee testified that he “answered the call...based on how the situation appear[ed]” to him, and that it “appear[ed]” to him that the “person was a mental health person who’s already in the hospital.” (Tr2, 279). He added:

To the best of my knowledge, I did what I’m supposed to do...If I knew that we were going to be sitting here talking about this, I [would have sent] Police, Fire...everybody. (Tr2, 281).

Employee agreed that he had not realized at the time that the caller reported that her abuser was in the hospital. He later stated that he had heard what she said but did not find it credible, explaining that she had “called a couple of times earlier on the same day so [he believed] it was a mental health person.” (Tr2, 349-350). Asked how he knew that the caller was a mental health patient, he responded that he did “not know,” but that “[t]o the best of [his] knowledge, it sounded [like] a mental health person. (Tr2, 351).

Employee stated that he did not identify the caller by name, but said that he determined she called before since there were other calls from that phone number. (Tr2, 352). Asked if he had taken those earlier calls, he responded:

I can’t remember exactly who was sitting next to me on that shift on that day, but to the best of my knowledge, this person had called earlier...And I heard the person sitting next to me say oh, it’s mental health from Howard. (Tr2, 353).

Employee testified that he did not think the caller was in distress. He stated that he was not “berating” her when he told her to “listen to [him] when [he speaks],” but that it was “a way of getting [her] attention and [saying] I want you to listen to me now.” (Tr2, 354-355). Employee testified that asking the caller if she was “going to argue...or...listen to [him]” was a way of “trying to calm her down because with mental health persons, you can go on and on...and on.” (Tr2, 357).

Employee stated that he felt deceived by Mr. Williams' explanation of the training, because he thought he only needed to complete the training but instead was terminated when training concluded. He said that he relied on Mr. Williams because they had a good relationship and Mr. Williams had "never told [him] a lie before." (Tr3, 123-125, 131). He agreed that the Remedial Training Notice stated that he was subject to removal if he failed to successfully complete the training, but maintained that this was not what he was told initially. (Tr3, 47; Ex A-6).

Employee said that he did not dispute that he could benefit from training, but disagreed that he needed training in the areas identified by Agency. When asked to identify areas where he would benefit from training, he said that he had never visited a fire house and never had a training manual. Asked again to provide specific area, Employee identified geography was "one little area" where he could improve with more training. (Tr3, 52-54). He testified that although he did not agree with all of Agency's descriptions of his deficiencies, he knew that he had "room to improve." (Tr3, 56-59). Reviewing Agency's list of his deficiencies, Employee disagreed that he had problems collecting and retaining information, being unprofessional with callers, entering calls accurately and efficiently, and disconnecting callers prematurely. (Tr3, 75-76; Ex A-6, 63). He stated that the deficiencies were based only on the Metro and HUH calls. He did not dispute that Ms. Covington identified problems with "numerous" other calls, but maintained that it was "not presented" to him so he could not "just take her word...for it." (Tr3, 77).

FINDINGS OF FACT, ANALYSIS, 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 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."

In evaluating the evidence, the AJ was required to make credibility assessments. *Haebe v. Department of Justice*, 288 F3d 1288 (Fed. Cir. 2002). In doing so, she considered the demeanor and character of the witness, the inherent improbability of the witness's version, inconsistent statements and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). The AJ determined that witnesses were generally credible, and were knowledgeable in their areas of expertise. Agency witnesses appeared to be knowledgeable and experienced and did not exhibit any animus toward Employee. However, even recognizing that Employee was in a very stressful situation which could adversely affect his testimony, the AJ found that some of his testimony was unreliable. For example, he offered multiple explanations for his reason for believing that the HUH caller was a "mental health person." He did not provide support for most of his explanations. The AJ did not find his testimony on this issue credible. However, that even if some of his testimony could not be credited, other parts were credible and accepted as true. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir.1985).

After carefully considering the evidence and arguments presented by the parties, the AJ concludes that Agency met its burden of proof in establishing cause. The District Personnel Manual (“DPM”) states, in relevant part, that an adverse action is “warranted” when an employee violates standards of conduct. The documentary and testimonial evidence presented by Agency was consistent and cumulative. Although some of Agency’s evidence was duplicative, the AJ understood the need for Agency to ensure that it did not act precipitously in removing an employee of 20 years who during most of his tenure had met standards. Agency presented considerable documentary and testimonial evidence to support its allegations that Employee failed to adhere to standards of conduct by not following instructions and procedures; neglecting his duty by not performing tasks consistent with a reasonable individual in the same position and being unable to carry out his assigned duties. For example, Ms. Covington offered credible evidence regarding deficiencies that Employee exhibited during the Metro and HUH calls; including, but not limited to, failure to verify location, lack of professionalism, and premature disconnection of a caller. Ms. Covington also reviewed several of Employee’s “random calls” between January and June 2022, and identified deficiencies consistent with those stated in the Remediation Notice, *i.e.*, attention to detail, collection and retention of information, lack of professionalism, argumentativeness, failure to enter calls accurately and efficiently and prematurely disconnecting callers before any assurance that help was being sent. (*Infra*, 11-14). Ms. Jackson, another experienced QAS, reviewed random calls that Employee handled between January and August 2022, and identified problems with attention to detail, collection and retention of information, and accurately entering calls. She discussed these problems with Employee. After listening to the recording of the Metro and HUH calls at the hearing, she identified deficiencies consistent with those identified by Ms. Covington and other witnesses and as charged by Agency. (*Infra* at 14-15).¹⁴

The evidence also supported Agency’s contention that Employee failed to perform his required duties consistent with that expected of a reasonable individual in the same position. Despite his longevity with Agency, and his ability to perform these tasks in the past, and despite the remedial training he received and other remediation in the past, Employee was unable to fulfil his essential duties in a satisfactory manner. Although the classroom training, was not individualized, it still provided relevant and updated training materials, which the Employee found valuable. The rest of the training was provided one-on-one with CTO Jennings. Agency witnesses consistently testified that the remedial training should have sufficiently improved Employee’s performance, but failed to do so. CTO Jennings testified that Employee still exhibited problems with attention to detail, collection of information, and retention of information during the final portion of the remedial training which involved monitoring his calls in “real time.” In addition, she found that Employee continued to act unprofessionally at times, was still argumentative with callers at times and still disconnected calls prematurely. CTO Jennings provided credible evidence that she had to intervene because of deficiencies in Employee’s handling of several calls.

Employee offered several arguments to support his positions regarding cause and penalty. With regard to his embarrassment of being in a class with new hires and his view that CTO Jennings spoke to him disrespectfully, the AJ finds that even if these assertions were true, they would not excuse or mitigate the established cause. Employee also asserted that he had been suffering from “severe stress”

¹⁴ The AJ was particularly troubled by Employee’s testimony regarding his handling of the HUH call. Employee never explained to the AJ’s satisfaction why he considered the called to be a “mental health” caller; or why he thought a “mental health” caller was not worthy of the same treatment as other callers.

since about March 2022, and he returned to work from leave to complete the remedial training. The AJ recognizes and sympathizes with the Employee's stress, but did not find that it excused or mitigated the conduct. Although Employee denied that he had the deficiencies itemized by Agency, the evidence established that these deficiencies were identified, Employee was cautioned about them and had received remedial training for them before March 2022. Agency presented sufficient evidence that Employee's performance continued to decline before March 2022.

Employee argued that staff shortage was a "potential mitigating factor." Assuming that there was a staff shortage, Employee failed to establish a nexus between the shortage and his performance deficits. Finally, he asserted that "Agency [was] unable to provide or ascertain if or how much of Employee's charged conduct was due to equipment issues. (*Employee's Post-hearing Brief*). Even if there were equipment problems, the record did not support the conclusion that those problems caused or significantly contributed to any of the multiple errors made by Employee that resulted in Agency's decision to terminate his employment.

Agency has the primary responsibility for managing its employees, including determining penalties once cause is established. The AJ's review is limited to ascertaining if "managerial discretion [was] legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The AJ concludes that Agency established that it "reasonably considered" all relevant factors in reaching its decision; and finds no basis to disturb the penalty. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272 (2001).

The applicable Table of Illustrative Actions provides that the penalty for a first occurrence for each charge in this matter ranges from reprimand to removal. *See*, 6-B DCMR 1607.2 (2017). Thus, the penalty imposed is within the permitted range. The evidence established that Employee's deficits were longstanding and previous efforts had been made to remediate the problems. The AJ also recognized that given the specific requirements of Employee's position, removal was a reasonable penalty. Agency established that the penalty 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).

Employee offered two arguments specifically addressing the penalty. First, he contended that Agency did not fairly assess the *Douglas Factors*, listing eight factors as aggravating and four as neutral but none as mitigating. He maintained that factors such as lack of recent adverse actions, and work record have been considered mitigating. (*Employee's Post-hearing Brief*, pp. 12-14). However, the seriousness of the conduct can outweigh good performance, length of service and lack of prior discipline. *Von Muller v. Department of Energy*, 101 M.S.P.R. 91 (M.S.P.B. 2006). In this matter, Employee was unable to process emergency calls with the accuracy, speed, and professionalism that is reasonably required of those in his position with his experience and expertise even after receiving remedial training. In addition, 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." *Bryant v. Office of Employee Appeals*, Case No. 2009 CA 006180 P(MPA) (DC Super Ct., August 2, 2012). The AJ did not find any "significant mitigating factors," including those Employee would change, 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) Agency established that it considered relevant factors in determining the penalty.

Finally, Employee charged that he was the victim of disparate treatment, alleging that a co-worker whose failure to provide accurate information caused a delay that resulted in a death was not terminated. Employee has the burden of proof in establishing disparate treatment which is an affirmative defense. *Jordan v. Metropolitan Police. Department*, OEA Matter No. 1601-00285-95 (September 29, 1995). Agency presented evidence that Employee's allegation was factually inaccurate if not incorrect. Employee failed to meet his burden of proof of this affirmative defense, presenting little if any factual evidence.

In sum the AJ concludes, based on a thorough review of the documentary and testimonial evidence and arguments,¹⁵ and for the reasons discussed herein, that Agency met its burden of proof in this matter, and that there is no basis for disturbing its decision.

ORDER

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


LOIS HOCHHAUSER.

FOR THE OFFICE:

¹⁵ In reaching her decision, the AJ thoroughly reviewed and considered all of Employee's evidence and arguments. *Antelope Coal Company/Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014). Her decision not to discuss each argument and piece of evidence, does not mean that each was not carefully considered. *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647 (2016).