THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,[1]	)	OEA Matter No. 1601-0026-23
	)	
v.	)	Date of Issuance: June 11, 2024
	)	
OFFICE OF THE ATTORNEY GENERAL,	)	MONICA DOHNJI, Esq.
Agency	)	Senior Administrative Judge
	)	

Employee, *Pro Se*[2]
Bradford Seamon Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 30, 2023, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the Attorney General's ("OAG" or "Agency") decision to terminate her from her position as a Paralegal Specialist, effective December 30, 2022. OEA issued a Request for Agency's Answer to Employee's Petition for Appeal on January 31, 2023. After a request for extension was granted by OEA's Executive Director, Agency submitted its Answer to Employee's Petition for Appeal, on March 9, 2023. This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on March 9, 2023. Thereafter, the undersigned issued an Order on March 22, 2023, scheduling a virtual Status/Prehearing Conference for April 18, 2023. Subsequently, Employee filed a Consent Motion to reschedule the scheduled Status/Prehearing Conference, and a Request for Mediation.

Following an unsuccessful attempt at mediation, on June 28, 2023, I issued an Order Scheduling a Status/Prehearing Conference for July 12, 2023. The undersigned was notified by the assigned Mediator on July 10, 2023, that the parties had reached a settlement agreement. Accordingly, the July 12, 2023, Status/Prehearing Conference was canceled. In an email dated July 28, 2023, Employee's former representative informed the undersigned that it was "unclear whether a settlement will be reached at this stage." Consequently, on August 29, 2023, the

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee was initially represented by the Law Office of Peter C. Hansen, LLC, however, Employee's counsel filed a Motion to withdraw as Employee's counsel on December 13, 2023.

undersigned issued an Order requiring the parties to submit written briefs. On September 14, 2023, Agency filed a Consent Motion to Extend Deadline for Briefs. Agency's Motion was granted in an Order dated October 4, 2023, and the briefing schedule was adjusted accordingly.

Subsequently, on October 10, 2023, Agency filed a Motion to Enforce the Parties' Settlement Agreement. Employee filed an Opposition to Agency's Motion on October 23, 2023. Agency filed a Reply to Employee's Opposition to its Motion on November 1, 2023. Thereafter, on November 15, 2023, the undersigned issued an Order denying Agency's Motion to Enforce the Parties' Settlement Agreement. This Order also set the discovery deadline and modified the briefing schedule. On December 13, 2023, Employee's representative filed a Motion for Withdrawal of Counsel wherein, Employee also requested a one (1) month extension of the discovery deadline. This Motion was granted in an Order dated December 21, 2023.

On January 24, 2024, Agency filed a Motion to Compel Discovery Responses and Extend Briefing Deadline. The undersigned granted Agency's Motion in an Order dated January 30, 2024, and the briefing schedule was adjusted accordingly. Agency submitted its brief on March 15, 2024, and Employee submitted her brief on April 8, 2024. Thereafter, Agency submitted a Motion to Extend Deadline for Submission of Reply Brief on April 17, 2024, citing that Employee's April 8, 2024, brief was incomplete, and that it received the missing attachments on April 15, 2024. The undersigned issued an Order on April 19, 2024, granting Agency's Motion. Agency has now submitted its reply brief. Upon review of the record and considering the parties' arguments as presented in their submissions, I have determined that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Agency followed the appropriate Performance Improvement Plan ("PIP") procedures in terminating Employee.

2) Whether Agency had cause to discipline Employee for failure to meet established performance standards pursuant to DPM 1605.4(m).

3) Whether Agency retaliated against Employee.

4) If so, whether the penalty of termination is appropriate under District law, regulations, or the Table of Penalties.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[3]

OEA Rule § 631.2 *id.* states:

> For appeals filed under § 604.1, 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 FACT, ANALYSIS AND CONCLUSIONS OF LAW[4]

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during Employee's appeal process with OEA. Employee was hired as a Paralegal Specialist in Agency's Civil Litigation Division in 1996. Prior to her termination from Agency, Employee was reassigned, as a Paralegal Specialist in the Commercial Division's Tax and Finance Section ("TFS") under the supervision of David Bradley ("Mr. Bradley"), in October of 2019.[5] Thereafter, Agency transitioned to full-time telework due to the onset of the COVID-19 pandemic. In an email dated October 9, 2020, Mr. Bradley informed Employee and other TFS employees of available trainings for several programs frequently utilized by TFS such as OneDrive, Microsoft Teams and Microsoft Office.[6] Employee was evaluated by Mr. Bradley in November 2020, and she received an overall performance rating of three (3) for her Fiscal Year 21 ("FY'21") Performance Review. Mr. Bradley noted in Employee's FY21 Performance Review under Section I, Competencies - Competency 5: Core Competency – Job Knowledge that "[i]t's vital that [Employee] become familiar with the technology to allow her to work more effectively. She needs to understand how to use OneDrive. MS Word. Excel. and Teams. She also needs to learn how to access ProLaw[7] and other databases to work more effectively. Because of [Employee's] limitations in understanding the technology and how the section operates she can only be given limited scope of assignments which she is able to complete in an adequate manner.[8]

Renae Stong ("Ms. Stong") replaced Mr. Bradley as Employee's supervisor in January 2022. Ms. Stong conducted a Mid-Year Evaluation of Employee in May 2022[9], wherein, she

---

[3] OEA Rule § 699.1.
[4] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[5] Agency's Answer to Petition for Appeal (March 9, 2023).
[6] *Id*. at Tab 2.
[7] ProLaw is one of the databases Agency uses to track a case's overall status, to include filings and scheduling.
[8] Agency's Answer to Petition for Appeal, *supra*, at Tab 3.
[9] *Id*. at Tab 4.

noted that Employee would be placed on a Performance Improvement Plan ("PIP").[10] On July 29, 2022, Employee was placed on a 60-day PIP effective August 1, 2022, to September 30, 2022. Employee was notified by Ms. Stong on October 14, 2022, that she had failed her PIP. On the same day, Agency also provided Employee with an Advance Notice of Proposed Removal ("NOP").[11] Employee filed a response to the NOP. On November 17, 2022, the assigned Hearing Officer issued a Report and Recommendation finding that the proposed removal was appropriate.[12] On December 28, 2022, Agency issued a Final Decision on Advance Written Notice of Proposed Removal ("Final Decision") terminating Employee for her failure to meet the requirements of a PIP under 68 DCMR § 1605.4(m), with a termination effective date of December 30, 2022.[13]

Employee's Position

Employee asserts in her Petition for Appeal that prior to the current alleged performance deficiency, she was never subjected to any corrective or adverse actions or accused of any performance deficiency during her lengthy tenure with Agency. Employee avers that although she did not receive proper training for ProLaw, OneDrive, Excel or Teams, and she was left to figure them out by herself, she was highly proficient in Microsoft Word, despite Mr. Bradley's claims in her FY'21 Performance Review.[14] While Employee admitted to struggling with the ProLaw program, she contends that Agency had repeatedly failed to provide her with adequate training on the software program she was belatedly told she needed to master. She also contends that the 'meager' training she received was mere cover for Ms. Stong's plan to terminate her. [15]

Employee also argues that there was not sufficient basis for her termination and that a full and fair analysis of the *Douglas* factors indicates that a lighter sanction was warranted. She states that her termination was an abuse of power because there were far more appropriate sanctions available than termination. Employee avers that Agency has not met its burden to prove by a preponderance of evidence that there was a sufficient basis for the PIP or termination, as there's insufficient evidence to support the allegations against her, and an insufficient nexus between her performance issue, her position and Agency's mission. Employee asserts that Agency wrongfully ignored numerous mitigating factors in her favor. Employee cites that Agency ignored progressive discipline and other available disciplines such as reprimand, reassignment, reduction in grade, or suspension for less than ten (10) days and elected to remove her.[16]

Employee avers that she was transferred to a new department in October 2019, and she was confronted with wholly unfamiliar practices and technology, and her managers never provided her with proper training or information needed to adapt and thrive. Employee cites that Agency abused its "discretion by knowingly ignoring her blind spots, failing to train her

[10] *Id*. at Tab 5.
[11] *Id*. at Tab 7.
[12] *Id*. at Tab 9.
[13] *Id*. at Tab 11.
[14] Employee's Petition for Appeal (January 30, 2023).
[15] *Id*.
[16] *Id*.

adequately, and brutally mismanaging and ending her career… when she was at the threshold of retirement age."[17]

Employee states that compounding her challenges, the COVID-19 pandemic began less that six (6) months after she was transferred to a new section, prompting a sudden spike in the use of many computer programs such as Microsoft Teams that had been much less popular prior to the pandemic. Employee avers that she was now expected to have far more knowledge about Microsoft Excel, Teams, OneDrive and ProLaw than she had ever needed in the performance of her previous positions with Agency. She notes that her former duties had primarily involved compiling trial binders and other duties that did not require such programs. Employee contends that Agency knew or should have known that she was "patently and undeniably unprepared to jump into the work of Tax and Finance and further that she was clearly not an IT expert, being a near-retirement worker who had for years performed tasks for Agency that required minimal technological skills …."[18] Employee maintains that regardless of Agency's claims, she was not provided with the basic support nor did she receive sufficient guidance or training in ProLaw, OneDrive, Excel, or Teams. Employee reiterates that she was never trained in Microsoft Office, and that apart from Microsoft Word, she never had to use any other Microsoft Office programs in her role as a Paralegal in the Civil Division. Thus, Agency's decision to terminate her on such grounds without sufficient basis is a gross abuse of discretion.[19]

Employee asserts that the PIP was conducted in bad faith as termination was sought immediately after its completion, instead of more reasonable alternatives. Employee notes that she was "gravely harmed by Ms. Stong's improper impatience, ageism and vindictive bad faith, which led Ms. Stong to undertake the PIP in order to check a box before terminating [Employee], even while far less damaging approaches were available – e.g., a lesser sanction or a negotiated retirement."[20]

Employee avers that she did not receive performance reviews at the Tax and Finance section from her arrival on FY'19 until FY'21, and none for two (2) years before that at her former unit. However, by the time of her termination, she had received only one and a half (1.5) performance reviews from FY'17 to FY'22. She concluded that the sudden undertaking of performance reviews – Annual Performance review in FY'21 and the Mid-Year Evaluation in FY'22 "was clearly aimed at justifying the 60-day PIP, rather than triggering a reset that would give [Employee] proper training and breathing room to adapt, or an arranged transfer to a more suitable section within the Agency."[21] Employee reiterates that despite the claims made in the PIP and subsequent reports by her supervisors, she "was never provided with any training in Microsoft Office programs, and any claimed ProLaw trainings were far from sufficient and tainted with bad faith …." Employee avers that Agency provided a division-wide training ProLaw session when it began using ProLaw around 2003, but despite many updates and changes to the program, there have been no further division-wide trainings. Employee explains that aside from Agency providing her with a 165-page ProLaw manual, Agency did not attempt

[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.

to help her develop the technology skills she was lacking. She notes that she was only provided with a ProLaw refresher guide document after the PIP began in August 2022.[22]

Employee argues in her brief that the current position description for Paralegal Specialist position is not applicable to her because when she began her tenure with Agency in the 90s, she was never provided with a position description. Employee avers that she does not remember applying to a Paralegal Specialist position and that Microsoft did not exist in the early years of her employment at Agency. Employee states that she agreed to her transfer to the TFS.[23]

Employee contends that while at the Civil Division, it was the responsibility of the staff assistant to enter information into ProLaw. She states that she did not have difficulties emailing discovery requests as she routinely emailed such requests during her 25 years tenure at Agency. Employee affirms that she "had no experience or knowledge pertaining to the editing of "PDF" documents" because her functions at the Civil Division did not include editing "PDF" and she did not receive any training for such. Employee also provides that she had not used ProLaw for a while, thus, she needed a "refreshing of the use of ProLaw."[24]

Employee asserts that while "Agency started using "Box" the usage of this program did not apply to Employee, as one of the attorneys had an intern skilled in the use of "Box" …"[25] Employee provides that Microsoft Teams was "simply a redundant method of communication which was; for all intents and purposes, appeared to be no different than the use of email."[26] Employee asserts that the courses offered by Agency in Percipio were irrelevant and had no bearing on her Paralegal Specialist job. Employee states that around May 10, 2022, she participated in a 15-20 minutes ProLaw training session where she was instructed on the basic functions and use of ProLaw. She notes that following this training, her issues with making case entries into ProLaw were resolved.[27]

Employee also avers that she was placed on a PIP shortly after she filed a complaint against Ms. Stong for making inappropriate and offensive comments at Employee. She explains that she agreed to be placed on the PIP to prevent Ms. Stong "from devising a more insidious revenge against the Employee in retaliation for her filing a complaint with Human Resources pertaining to her remark that she knew David Bradley was at my house." Employee notes that she was not having any difficulties with her assigned work when the decision was made to place her on the PIP. Employee highlights that her brief conversations with Ms. Stong to ensure she was on the right track does not qualify as training. Employee asserts that her duties involved "entering data in Microsoft Excel for spreadsheets set up by either Pearl Keng or Paula Peters, responding to; drafting and filing, discovery requests and forwarding them to Petitioner" and neither Pearl Keng ("Ms. Keng") nor Paula Peters ("Ms. Peters") had any issues with her performance. Employee asserts that Agency's claim that the PIP was conducted to provide her with an opportunity to improve her job performance is untrue. Employee maintains that "the

[22] *Id*.
[23] Employee's Brief (April 8, 2024).
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.

additional work requirements of the PIP appeared to add additional work for Employee in order to set her up for failure in the timely completion of her assignments." She avers that the scope of the PIP assignment was meant to interfere with the timely completion of her assignments.[28]

Employee explains that for the Communication goal under the PIP, she was required to draft at least three (3) legal filings and email/mail to Ms. Stong and Ms. Keng, however, Ms. Stong never articulated what these filings were to be based on. For the Customer Service goal, Employee notes that she was ordered to draft at least two (2) Amended Stipulations and forward to Stephen Henry, which she did. For Accountability goal, Employee cites that she was instructed to draft five (5) Answers and save to a folder on OneDrive. She provides that despite inquiring whether the Answers were like the ones used in the Civil Division, she was not provided with a template. She explains that if a template was provided to her, she would have known the Answer was different from that used in the Civil Division. For the Job Knowledge goal, Employee highlights that she was instructed to review ProLaw guidance from past trainings and write a one-page summary on how to find case number, open the case, and make notes within the case. Employee asserts that she only had one (1) 15-20 minutes ProLaw training session. Regarding the Leadership goal, Employee provides that "what "leadership" had to do with creating a chart is unknown." For Operational and Strategic Planning goal, Employee asserts that she was instructed to become familiar with the relevant filings on OneDrive concerning the case of *D.C. V. 1620 S. Capitols. & Jemal BP* and perform legal assignments provided by AAG Liu. Employee states that AAG Liu had obtained the assistance of an intern on this case, which Ms. Stong should have been aware of.[29]

Employee states that she informed Ms. Stong during the August 30, 2022, PIP meeting that she was still having issues with ProLaw. Employee also contends that she informed Ms. Stong she was focusing on her non-PIP assignments. She asserts that her assignments from the attorneys were a priority and Ms. Stong's "focus on the PIP assignments negated the fact that all my assignments from and [sic] Pearl Keng and Paula Peters were timely completed." Employee also notes that "failure to respond to the work and deadline issued by Pearl Keng and Paula Peters had the potential of causing them more work as PIP assignments were supposedly to be a priority."[30]

Agency's Position

Agency avers that as a Paralegal Specialist, Employee was required to possess "knowledge and proficiency in utilizing various Microsoft applications and database management and tracking systems, as well as having a willingness to learn new technology associated with assigned work tasks."[31] Agency argues that Employee's assertion that Agency erred by transferring her to TFS is largely negated by the fact that she voluntarily agreed to the transfer. Agency explains that "Employee's reassignment was not a unilateral decision that was made without her knowledge or input. Rather, the reassignment was discussed with her

[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] Agency's Answer to Petition for Appeal at Tab 1 (March 9, 2023) and Agency's Brief (March 15, 2024).

beforehand, and she not only expressed a desire to leave GCS, but welcomed the opportunity to join TFS."[32]

Additionally, Agency explains that although Employee now claims that she was "patently and undeniably unprepared to jump into the work of Tax and Finance" at the time of the transfer, she had nearly three (3) years to learn her new role and additional job demands. Agency avers that "TFS was extremely patient with Employee despite her ineffectiveness, even limiting her assignments for her benefit but to the detriment of the section." Agency further notes that "all of the tasks assigned to Employee by TFS were included in the agency-wide [Paralegal Specialist] job description irrespective of the particular section. Therefore, Employee's assertion that OAG should have known that she was not equipped to join TFS as a [Paralegal Specialist] is without merit. Employee was only required to perform the same tasks that other OAG paralegal specialists routinely perform."[33]

Agency asserts that Employee was transferred to the TFS effective October 13, 2019, under the supervision of Mr. Bradley. Shortly after Employee's transfer to the TFS, Agency transitioned to full time telework due to the COVID-19 pandemic, and Mr. Bradley encouraged Employee and other TFS employees to participate in scheduled trainings for applications such as Microsoft Teams and Box that were heavily relied upon because of the pandemic. Agency asserts that when Mr. Bradley realized that Employee was experiencing some difficulties with her assignments, he began working directly with Employee and provided her with specific instructions when assigning her tasks, to alleviate Employee's struggles. Agency cites that Mr. Bradley created a Microsoft Excel spreadsheet to assist Employee keep track of her cases for which she had completed discovery, and he also "advised the other TFS employees not to overwhelm Employee with assignments while she continued to get acclimated to the section."[34]

Agency asserts that on October 9, 2020, Mr. Bradley emailed Employee a list of available trainings for applications such as Microsoft Office, Teams, and OneDrive. Agency states that on January 8, 2021, Mr. Bradley also sent Employee a link to access various training modules and encouraged her to focus on Microsoft Access and Excel.[35] Agency notes that Employee participated in TFS trainings on how to respond to discovery requests in TFS matters. Agency explains that Employee was still struggling to complete her assigned tasks, and she had difficulties with certain technological functions required by her role such as her demonstrated lack of proficiency in using OneDrive, ProLaw and various Microsoft programs.[36] Agency cites that Mr. Bradley noted in Employee's FY'21 Annual Performance review that Employee needed to "become familiar with the technology to allow her to work more effectively" and that Employee lacked adequate knowledge of programs such as OneDrive, Microsoft Word, Microsoft Excel and Microsoft Teams. Agency avers that Mr. Bradley also stated in the FY'21

[32] *Id.*
[33] *Id*.
[34] *Id*.
[35] *Id*. at Tab 2.
[36] *Id*.

Performance Review that "TFS could only rely on Employee for a limited scope of assignments due to her technological deficiencies."[37]

Agency contends that Employee's claim that she did not receive adequate training is disingenuous. It notes that Employee received adequate training as it provided Employee with several opportunities to receive training on various programs and software required by her job. Agency avers that it made efforts to help Employee improve her performance by (1) contacting Human Resources ("HR") in October 2021, about offering technological support to Employee and assisting her with using Microsoft programs; (2) Joy Dorsey ("Ms. Dorsey") from HR provided Employee a link through which Employee could find daily courses offered by DCHR to assist her in operating Microsoft applications; (3) Ms. Dorsey provided Employee with information and log-in instructions about Percipio, a training vendor that offers courses tailored to employee's specific needs; (4) Employee received a ProLaw manual and a one-on-one ProLaw training from Agency's Senior Technology Specialist, Shoreh Khodabakhsh ("Ms. Khodabakhsh") on May 10, 2022; and (5) Employee's TFS colleagues assisted her with entering cases in ProLaw on multiple occasions, but Employee continued to have difficulties using Prolaw and other applications. Agency maintains that Employee refused "to accept that as an employee, she was accountable for taking the necessary steps to improve her performance after being on clear notice that she was not meeting expectations."[38]

Agency asserts that when Ms. Stong became Employee's supervisor, she conducted a Mid-Year Evaluation of Employee on May 31, 2022, and concluded that despite "multiple one-on-one training sessions and guidance, Employee's assignments were extremely limited because she is not familiar with the software and programs."[39] Therefore, Ms. Stong informed Employee she would be placed on a PIP, to which Employee agreed that the PIP would be beneficial due to her technological limitations and lack of understanding of the TFS subject matter.[40]

Agency asserts that Ms. Stong had a meeting with Employee and her union representative on July 29, 2022, wherein, the 60-day PIP which spanned from August 1, 2022, to September 20, 2022, was issued. Agency explains that the PIP informed Employee in writing that her current performance failed to meet the minimum requirements of the position and that the PIP explicitly advised that if Employee failed to improve her job performance, she could be subject to removal. Employee notes that Ms. Stong reviewed each PIP assignment with Employee in detail and provided specific instructions for each assignment. Agency further notes that the PIP identified the seven (7) core competencies with corresponding tasks that would be used to measure Employee's progress.[41] Agency avers that it conducted five (5) PIP meetings with Employee throughout the 60-day PIP period on August 15, 2022, August 30, 2022, September 6, 2022, September 13, 2022, and September 20, 2022.[42]

---

[37] *Id*. at Tab 3.
[38] *Id*.
[39] *Id*. *See* Tab 4.
[40] *Id*.
[41] *Id*. *See* Tab 5.
[42] *Id*. *See* Tab 6.

Agency states that at the end of the 60-day PIP period, Ms. Stong issued a PIP result to Employee on October 14, 2022, informing her that she failed to meet the PIP requirements. It further explained to Employee that her average completion percentage for the PIP core competencies was 29.6%, with only one of the seven (7) categories fully completed and three (3) totally incomplete. Therefore, Ms. Stong recommended that Employee be terminated.[43] Agency issued an Advanced Notice of Proposed Removal on the same day terminating Employee for her failure to meet the requirements of a PIP pursuant to 6B DCMR § 1605.4(m) and to 6B DCMR §1410.6, which allows for removal of an employee who fails to meet the requirements of a PIP.[44]

In addition, Agency argues that it had cause to discipline Employee pursuant to 6B DCMR §1605.4(m). It highlights that Employee does not assert that she successfully completed the PIP or that Agency did not properly credit her work on the PIP assignments, rather she merely argues that she did not receive adequate training leading up to the PIP and that she should have never been transferred to TFS in the first place.[45] Agency notes that "Employee's performance fell short of expectations for nearly three years as a paralegal in TFS, and thus she was rightfully placed on a PIP to improve her performance. Notably, Employee agreed at the time that a PIP was appropriate."[46] Agency states that it complied with all requirements of 6B DCMR § 1410 in administering the PIP, and Employee does not contend otherwise.

Agency also argues that contrary to Employee's claim that Agency should have selected a lighter penalty to address her failed PIP, termination was the appropriate penalty, and it properly reviewed and analyzed the twelve *Douglas* factors, when assessing the appropriateness of the penalty. Agency asserts that the only mitigating factor in this matter was Employee's past disciplinary history. Agency also asserts that Employee's termination was allowed by law after she failed the PIP. Agency posits that "although Employee points to other available remedies, such as reduction in grade or reassignment, OAG used its discretion to determine that no other forms of discipline would have been sufficient."[47]

In its brief, Agency states that in two (2) separate September 7, 2022, emails, Ms. Stong explicitly advised Employee to contact ProLaw support if the guidance provided by Ms. Stong was unclear.[48] Agency further asserts that although "Employee may attempt to attribute her failed PIP assignments to her preoccupancy with non-PIP work, she stated in an August 5, 2022 email to Ms. Stong that aside from "[AAG] Paula Peters and occasionally [AAG] Richard Wilson [who request assistance] regarding closed cases and send[ing] out discovery requests as assigned, [n]o one else has approached me with additional tasks.""[49]

Agency maintains that it appropriately followed the PIP procedures without error. Agency reiterates that prior to the PIP going into effect, Ms. Stong had a two (2) hour long meeting with Employee and her union representative, wherein Ms. Stong thoroughly outlined the process. Employee was given the opportunity to seek clarification or express concern with any of

---

[43] *Id*. *See* Tab 6.
[44] *Id*. See Tab 7.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] Agency's Brief, *supra*.
[49] *Id*.

the PIP assignments. Agency notes that it made a good faith effort to facilitate constructive discussion during the PIP and it ensured Employee had the right tools and access to complete her assignments.[50] Agency avers that pursuant to 6B DCMR §1410.3, Employee was on notice from the onset that the PIP would last for 60 days, the performance areas requiring improvement and she was provided with concrete, measurable action steps to improve in those areas.[51]

Agency asserts that in compliance with 6B DCMR §1410.4, Employee's immediate supervisor, Ms. Stong devised the PIP after noting Employee's need for improvement in her FY22 Mid-Year review a few months prior.[52] Agency also avers that it satisfied 6B DCMR §1410.5 when it issued the PIP decision on October 14, 2022, within ten (10) business days from the PIP September 30, 2022, end date. Agency states that the PIP decision provided Employee with a thorough explanation of the PIP outcome for each designated area of improvement. According to Agency, because Employee was unsuccessful in all but one (1) PIP competency and thus failed to improve her performance during the PIP, Ms. Stong recommended termination in compliance with 6B DCMR §1410.6, 6B DCMR §1410.12 and applicable provisions of Chapter 16 of the District Personnel Manual ("DPM").[53]

Agency argues in its Reply Brief that "[a]lthough Employee seemingly implies that the position description contained in Tab 1 of OAG's Answer was inapplicable to her, she is mistaken." Agency notes that Employee apparently believes that because she was hired decades ago when "Microsoft did not exist," the current position description for a Paralegal Specialist ("PS") does not apply to her. Agency contends that position descriptions are periodically updated, and employees are expected to engage in skills training when necessary to comport with evolving job duties and/or technology. Agency further points out that Employee refers to herself as a "Paralegal" throughout her brief, and the position description it submitted with its Answer is the standard description applicable to all Agency paralegals during the relevant period. Thus, Employee's paralegal position with TFS required her "to be proficient in operating a computer, utilizing various Microsoft programs and case tracking systems such as ProLaw, and to possess a willingness to learn new technology associated with assigned work tasks."[54]

Agency notes that contrary to Employee's statement that "it is patently untrue that Employee had difficulties emailing discovery requests … Employee's assertion is undermined by the documentation contained in … OAG's Answer as well as TFS attorney Pearl Keng's Affidavit …. Moreover, Employee acknowledges that she struggled with tasks such as editing .pdf documents but disclaims that she had no prior experience with this task. However, this ignores her obligation to stay familiarized with basic computer programs such as Adobe Acrobat and the fact that her need for instruction on such basic tasks presented challenges for TFS."[55]

Agency asserts that contrary to Employee's argument that the training courses offered by OAG's Talent Acquisition and Professional Development Officer, Ms. Dorsey, did not pertain to

---

[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] Agency's Reply Brief (May 3, 2024).
[55] *Id*. *See also* Attachment 1.

Employee's role as Paralegal, nor did they assist in improving her skills in the role of Paralegal, is absurd, especially considering that Employee did not take any of the courses. She admits that her only participation on Percipio (the training platform offered by Ms. Dorsey) was a Sexual Harassment training. Agency notes that as Ms. Dorsey explained, Percipio offers courses on Microsoft Office programs and enables employees to select their desired learning path from start to finish. Agency highlights that "the overarching theme is that Employee did not take the time or effort to seek opportunities to improve her skills as a paralegal; rather, she was apparently waiting for solutions to find her."[56] Agency also notes that while Employee states that she did not need improvement in operating Microsoft, both of her supervisors, Mr. Bradley and Ms. Stong, told her the contrary on multiple occasions. Thus, "Employee cannot now shift the blame given that she was repeatedly warned about her deficiencies but rejected the criticism, and those same deficiencies eventually led to her removal."[57]

Regarding Employee's claims that her placement on a PIP was in retaliation for filing an action against Ms. Stong with HR, Agency argues that this claim is false and unsupported by any evidence. Agency asserts that Employee fails to articulate when Ms. Stong made the alleged comment and when she reported it to HR. Agency explains that these are critical omissions as this tribunal cannot evaluate the temporal proximity between the claimed protected activity and the PIP. Further, Agency avers that Ms. Stong refutes any suggestion that Employee was placed on the PIP for any reason other than her lackluster job performance.[58]

Additionally, Agency asserts that OEA lacks the jurisdiction to adjudicate claims of retaliation. It notes that "although this tribunal may "consider evidence that Agency's termination action may have been motivated by retaliation," this exception does not apply here." Agency contends that Employee is not claiming that her termination was a pretext for retaliation but rather that she was placed on a PIP for retaliatory reasons. Agency also argues that because Employee's placement on a PIP and her removal for failing a PIP are separate actions, Employee's retaliation claim is not properly before this tribunal even under OEA guidance and the fact that Employee failed to successfully complete the PIP is undisputed.[59]

ANALYSIS

1) Whether Agency complied with DPM §1410 in implementing the PIP

Pursuant to DPM §1410.2, a PIP is designed to facilitate constructive discussion between an employee and his or her immediate supervisor to clarify areas of work performance that must be improved. Once the areas for improvement have been identified, the PIP provides the employee with the opportunity to demonstrate improvement in those areas and his or her ability to meet the specified performance expectations. Here, Employee asserted that she was not having any difficulties with her assigned work when the decision was made to place her on the PIP. She argued that the sudden undertaking of performance reviews – Annual Performance review in FY'21 and the Mid-Year Evaluation in FY'22 were aimed at justifying the 60-day PIP, rather

[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*.

than providing her with proper training, or transferring her to a more suitable section within the Agency. Employee also averred that Agency's claim that the PIP was conducted to provide her with an opportunity to improve her job performance is untrue.[60]

Pursuant to the record, I find that Employee's performance was deficient while she was under the supervision of Mr. Bradley and Ms. Stong. Further, I find that Agency informed Employee of the deficiencies that needed improvement. There's evidence in the record to demonstrate that after Agency shifted to full-time telework due to the COVID-19 pandemic, Employee experienced difficulties using technology in completing her assigned work. The record consists of emails from Mr. Bradley to Employee and/or the other team members advising them of Employee's challenges with using technology such as Microsoft Teams, ProLaw etc.

Employee also stated that neither Ms. Keng nor Ms. Peters had any issues with her performance. However, Ms. Keng noted in her signed Affidavit submitted with Agency's Reply Brief that:

> …
>
> "During my time at TFS as a Case Manager and Trial Attorney, I worked with Paralegal Specialist [Employee]. Although I never supervised Employee, as a Case Manager I was responsible for overseeing her work when I requested her assistance."
>
> "… after March 2020, … Employee worked from home remotely, and I gave her instructions for assignments over email or over the telephone."
>
> "*… her inability to proficiently operate basic software such as Microsoft Word, Excel, and ProLaw, limited her work assignments and hindered her work performance. I spent many hours on the phone with Employee providing additional training to her on these software(s)… Employee was also provided training opportunities related to these software(s)*." (Emphasis added).
>
> ….
>
> "Because Employee required multiple explanations to accomplish a task, she received less assignments than other TFS paralegals and administrative staff."[61]

Additionally, Ms. Stong, Employee's immediate supervisor at the time of the PIP identified areas of deficiencies that needed improvement in Employee's FY22 Mid-Year review. Ms. Stong also submitted an Affidavit wherein she stated as follows:

> "…

[60] Employee's Brief*, supra.*
[61] Agency's Reply Brief, *supra*, at Attachment 1.

> …. I later became TFS' Acting Section Chief around February 2021 until being officially appointed as Section Chief in August of 2021. In this capacity, I directly supervised … [Employee].
>
> At the time I began supervising Employee, she had been at Paralegal Specialist in TFS for almost two years. *I immediately noticed deficiencies in Employee's work performance, to include an inability to follow instructions, unwillingness to learn, lack of productivity, and overall poor work product*. (Emphasis added).
>
> …
>
> *Due to Employee's ongoing deficiencies, she was given special assignments that did not require her to perform the full scope of duties expected of a Paralegal Specialist in TFS*. (Emphasis added).
>
> On Employee's May 31, 2022, Mid-Year Evaluation, *I noted her limitations and advised that she would be placed on a Performance Improvement Plan ("PIP") to help improve her performance. Employee agreed that a PIP would be beneficial to her*. (Emphasis added).
>
> …"[62]

Based on the forgoing and Employee's own admission that she agreed to be placed on the PIP, I conclude that Agency complied with DPM §1410.2.

Additionally, DPM §1410.3 provides that a PIP issued to an employee shall last for a period of thirty (30) to ninety (90) days and must: (a) Identify the specific performance areas in which the employee is deficient; and (b) Provide concrete, measurable action steps the employee can take to improve in those areas.

In the instant matter, Employee does not dispute that she was placed on a sixty (60) day PIP effective August 1, 2022, to September 30, 2022, following an FY'22 Mid-Year performance review in May of 2022, wherein, Ms. Stong found her work performance to be deficient in some areas.[63] Further, Employee does not assert that the PIP did not identify specific performance areas in which she was deficient or that the PIP did not include concrete, measurable action steps for Employee to use to improve in the identified deficient areas.[64] Based on the PIP document as submitted to this Office, the PIP identified the specific performance goals and concrete, measurable action step for Employee to undertake to improve on the identified performance deficiencies. Thus, I conclude that Agency complied with DPM §1410.3.

Next, DPM § 1410.4 provides that, "[a]n employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, as the term is defined in Section 1499, shall complete a PIP when the employee's performance has been observed by the

---

[62] *Id*. at Attachment 2.
[63] Agency's Answer to Petition for Appeal at Tab 4, *supra*.
[64] *Id*. at Tab 5.

immediate supervisor as requiring improvement." Here, Ms. Stong was Employee's immediate supervisor during the PIP period, and she observed Employee's performance and noted after the FY'22 Mid-Year performance review that Employee's work performance needed improvement. Both Employee and Ms. Stong acknowledge that Employee agreed to be placed on the PIP after the FY'22 Mid-Year performance review. Accordingly, I conclude that Agency complied with DPM § 1410.4.

According to DPM § 1410.5 "[w]ithin ten (10) business days after the end of the PIP period, the employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, shall issue a written decision to the employee as to whether the employee has met or failed to meet the requirements of the PIP." In this matter, Agency was required to issue a written decision within *ten (10) business days* of the end of the PIP period, or no later than October 14, 2022. (Emphasis added). On October 14, 2022, Employee's supervisor, Ms. Stong provided Employee with a written decision of the sixty (60) days of the PIP, noting that Employee failed to meet the PIP requirements and based on the DPM, termination was recommended. Employee does not assert that Agency did not issue a written PIP decision within ten (10) business days. Consequently, I find that Agency complied with the above PIP regulations as it applies to the timeline.

DPM § 1410.6 states that "[i]f the employee fails to meet the requirements of the PIP, the written decision shall state the reason(s) the employee was unsuccessful in meeting those requirements and: (a) Extend the PIP for an additional period, in accordance with Subsection 1410.8; or (b) Reassign, reduce in grade, *or remove the employee*." (Emphasis added). Additionally, DPM § 1410.7 provides that "[t]he written decision may serve as a notice of proposed reassignment, reduction in grade, or removal and be provided to the employee when the decision complies with the provisions of Chapter 16. Alternatively, the agency may issue a written decision and subsequently issue a separate notice of proposed reassignment, reduction in grade or removal." Here, Agency issued a written PIP Summary and an Advance Notice of Proposed Removal detailing how Employee failed to meet the specific PIP requirements. Pursuant to DPM § 1410.6, Agency had the option to extend the PIP period, or reassign, reduce in grade or remove Employee for her failure to meet the sixty (60) day PIP requirement, and it chose removal. Employee was informed of this decision in the October 14, 2022, PIP summary and the NOP issued on the same date, proposing Employee's removal from her position pursuant to DPM § 1605.4(m) - Employee's inability to meet performance standard.[65] Therefore, I find that Agency complied with the above PIP regulations. Based on the above, I further conclude that Agency complied with the applicable DPM § 1410 provision in performing the instant PIP.

2) Whether Agency had cause to discipline Employee for failure to meet established performance standards pursuant to DPM 1605.4(m)

Pursuant to OEA Rule § 631.1, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the DPM regulates the way agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for

[65] *Id*. at Tab 7.

cause. Agency terminated Employee for violating (1) DPM §1605.4(m) – failure to meet established performance standards after the 2022 PIP.

Agency charged Employee with failure to meet established performance standards, in violation of DPM §1605.4(m). Here, Agency asserted that after Employee was transferred to TFS in 2019, and Agency moved to full-time telework in March of 2020 due to the COVID-19 pandemic, Employee's then supervisor, Mr. Bradley realized that Employee was experiencing difficulties with her assignments. Mr. Bradley began working directly with Employee and provided her with specific instructions when assigning her tasks, to alleviate Employee's struggles. Agency also noted that Mr. Bradley identified Employee's technological issues in his FY'21 Annual Performance review of Employee, wherein, he stated that Employee needed to "become familiar with the technology to allow her to work more effectively" and that Employee lacked adequate knowledge of programs such as OneDrive, Microsoft Word, Microsoft Excel and Microsoft Teams. Agency averred that Mr. Bradley stated in the FY'21 Performance Review that "TFS could only rely on Employee for a limited scope of assignments due to her technological deficiencies."[66]

Additionally, Agency provided that when Ms. Stong became Employee's supervisor, she conducted a Mid-Year Evaluation of Employee on May 31, 2022, and concluded that despite multiple one-on-one training sessions and guidance, Employee's assignments were extremely limited because she was unfamiliar with the software and programs. Employee on the other hand contended that she was not having any difficulties with her assigned work when the decision was made to place her on the PIP. She argued that the sudden undertaking of performance reviews – Annual Performance review in FY'21 and the Mid-Year Evaluation in FY'22 were aimed at justifying the 60-day PIP. I disagree with Employee's contention, and I find that there is sufficient evidence in the record to the contrary.

Employee also argued that the current position description for Paralegal Specialist position is not applicable to her because when she began her tenure with Agency in the 1990s, she was never provided with a position description. She explained that she does not remember applying for a Paralegal Specialist position and that Microsoft did not exist in the early years of her employment at Agency. Upon review of the record, the undersigned notes that Employee stated in her Petition for Appeal that she was a Paralegal Specialist. Specifically, when asked on the Petition for Appeal form - "what is your position title?" Employee responded, "Paralegal Specialist." Furthermore, Employee also asserted throughout her submissions to this Office that she was a Paralegal/Paralegal Specialist with Agency. Moreover, Employee has not provided this Office with what she considers to be the applicable position description. Accordingly, the undersigned will rely on the position description provided by Agency.

In her submissions to this Office, Employee admitted struggling with some of the software programs (e.g. ProLaw) used by Agency to effectively execute her work assignments prior to and while she was on the PIP. However, she contended that Agency had repeatedly failed to provide her with adequate training on the software program. Employee further provided that while she was proficient in Microsoft Word, she did not receive proper training for ProLaw,

[66] *Id*. at Tab 3.

OneDrive, Excel or Teams. Employee stated that she "had no experience or knowledge pertaining to the editing of "PDF" documents."

The record contains evidence of Agency's efforts to provide Employee with trainings in the areas she was deficient in prior to and during the PIP. For instance, Employee affirmed that around May 10, 2022, she participated in a 15-20 minutes ProLaw training session where she was instructed on the basic functions and use of ProLaw. Ms. Keng submitted that Employee's "inability to proficiently operate basic software such as Microsoft Word, Excel, and ProLaw, limited her work assignments and hindered her work performance. *I spent many hours on the phone with Employee providing additional training to her on these software(s)… Employee was also provided training opportunities related to these software(s)*." (Emphasis added).

Employee further provided several explanations for her inability to properly use the applicable technology to complete her job assignments to include: (1) "Agency started using "Box" the usage of this program did not apply to Employee, as one of the Attorneys had an intern skilled in the use of "Box" …"; (2) Microsoft Teams was "simply a redundant method of communication which was for all intents and purposes, appeared to be no different than the use of email."; and (3) the courses offered by Agency in Percipio were irrelevant and had no bearing on her Paralegal Specialist job. I find that these are all excuses that do not exempt Employee from meeting the established performance standards.

Agency stated that it met with Employee weekly during the PIP period to discuss her progress. At the end of the sixty (60) day period, Agency noted that Employee's percentage of completion was as follows:

Core Competencies

1. Communication – 16%
2. Customer Service – 25%
3. Accountability – 0%
4. Goal Attainment – 0%
5. Job Knowledge – 100%
6. Leadership – 0%
7. Operational and Strategic Planning – 66%

Employee also argued that the work requirements of the PIP added additional work for her. She noted that the scope of the PIP assignment was meant to interfere with the timely completion of her assignments. However, Ms. Stong stated in her Affidavit that "[t]he PIP assignments that Employee was tasked with completing on a weekly basis did not amount to a full caseload for a Paralegal Specialist at TFS." Moreover, Ms. Keng stated that "[b]ecause Employee required multiple explanations to accomplish a task, she received less assignments than other TFS paralegals and administrative staff."

Contrary to Employee's assertion that Ms. Keng and Ms. Peters had no issues with her performance, Ms. Keng provided in her Affidavit that Employee's "*inability to proficiently operate basic software such as Microsoft Word, Excel, and ProLaw, limited her work*

assignments and hindered her work performance. I spent many hours on the phone with Employee providing additional training to her on these software(s)… Employee was also provided training opportunities related to these software(s)." (Emphasis added).

Employee also noted that prior to the current alleged performance deficiency, she was never subjected to a corrective or adverse action or accused of any performance deficiency during her lengthy tenure with Agency. I find that it is within the Administrator's discretion to reach a different conclusion about an employee's performance, as long as the Administrator's opinion is supported by substantial evidence. The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*[67] explained that "it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [supervisor's] evaluation but that would support a better overall evaluation."[68] The Court further opined that if the factual basis of the "[supervisor's] evaluation were true, the evaluation was supported by substantial evidence." Additionally, it highlighted that "[supervisors] enjoy near total discretion in ranking their [employees]" when implementing performance evaluations.[69] This Office has consistently held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[70] As performance evaluations are "subjective and individualized in nature,"[71] this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[72] Therefore, based on the foregoing, I find that Agency has established cause for failure to meet established performance standards and neglect of duty.

3) Whether Agency retaliated against Employee

Employee argued that her placement on the current PIP was retaliatory, vindictive and a consequence of her filing an action through Human Resources against Ms. Stong for her comment regarding Mr. Bradley. Agency averred that this claim is false and unsupported by any evidence. Agency asserted that Employee failed to articulate when the alleged comment was made and when she reported it to HR. Agency explained that these are critical omissions as this tribunal cannot evaluate the temporal proximity between the claimed protected activity and the PIP. Agency also stated that Ms. Stong refutes any suggestion that Employee was placed on the PIP for any reason other than her lackluster job performance. Agency argued that because Employee's placement on a PIP and her removal for failing a PIP are separate actions, Employee's retaliation claim is not properly before this tribunal. Agency argued that Employee's

---

[67] Case No. 2012 CA 003606 P (January 29, 2013).
[68] *Id.* at 6.
[69] *Id*. *Citing Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).
[70] *See Mavins v. District Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013); *Mills v. District Department of Public Works*, OEA Matter No. 1601-0009-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997); *see also Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[71] *See also American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).
[72] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

failure to successfully complete the PIP is undisputed and that she was placed on the PIP for her lackluster job performance.

To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) s/he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his employer took an adverse action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[73] A *prima facie* showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.[74]

Here, Employee made a blanket allegation that she was placed on the PIP in retaliation for reporting a comment made by Ms. Stong about Mr. Bradley being at Employee's house to help her with her computer. Specifically, Employee noted that Ms. Stong remarked that "she knew David Bradley was at my house." Employee did not provide this Office with any further information about the nature of the claim, whether the alleged comment was protected or unlawful, and when the alleged protected or unlawful activity occurred. Also, I find that being placed on a PIP is not an adverse action, therefore, Employee has not satisfied the second element. Furthermore, Employee has not provided any causal connection between the alleged protected activity and the current adverse action of removal. I therefore conclude that Employee's termination was not in retaliation for her action of filing a complaint against Ms. Stong, but rather based on Employee's poor performance before and during the current PIP.

Pursuant to the record, Employee had a mid-year review in 2022, and it was determined that Employee's performance was deficient in several performance criteria. Employee was placed on a sixty (60) days PIP and her overall performance only improved by 29%. Accordingly, Agency terminated Employee for failure to meet established performance standards and neglect of duty. Therefore, I conclude that Agency had a legitimate reason to take this adverse action and its termination of Employee was not in retaliation for Employee filing a complaint against Ms. Stong.

4) Whether the penalty of termination is appropriate under District law, regulations, or the Table of Illustrative Actions.

Employee argued that there was not sufficient basis for her termination and that a full and fair analysis of the *Douglas* factors[75] indicates that a lighter sanction was warranted. She

---

[73] *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).
[74] *Id.*
[75] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). 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;

maintained that her termination was an abuse of power, as there were far more appropriate sanctions available to Agency than termination. Employee also asserted that that Agency wrongfully ignored progressive discipline and numerous mitigating factors in her favor. 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).[76] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency. As it relates to penalties, DPM § 1410.6 provides in pertinent part that "If the employee fails to meet the requirements of the PIP, the written decision shall state the reason(s) the employee was unsuccessful in meeting those requirements and: (b) Reassign, reduce in grade, or remove the employee. In accordance with section 1410.6, Agency had the choice to reassign, demote or terminate Employee. In addition, the penalty for a first offense for neglect of duty under DPM § 1607.4(e) ranges from Counseling to Removal. Consequently, Agency also had the choice to counsel, suspend or terminate Employee. Thus, pursuant to these sections, Agency could impose termination as a penalty.

The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[77] Specifically, OEA held

---

4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[76] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01*, Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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).

[77] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[78] Here, I find that removal was within the range of penalty DPM § § 1410.6 and 1607.4 (e). Thus, Agency's penalty determination was appropriate. Furthermore, there is evidence in the record that Agency adequately weighed the factors before imposing its penalty of removal.

Based on the foregoing, I find that Agency had cause to terminate Employee. As a result, I further find that the penalty was appropriate, and Agency adequately considered the *Douglas* factors. Consequently, I conclude that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable. Therefore, I further conclude that Agency's action should be UPHELD.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

[78] *Love* also provided the following:

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