

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Widmon Butler)	OEA Matter No. 1601-0049-15
Employee)	
)	Date of Issuance: November 30, 2016
v.)	
)	Joseph E. Lim, Esq.
Metropolitan Police Department)	Senior Administrative Judge
Agency)	
_____)	
David Branch, Esq., Employee Representative		
Frank McDougald, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 6, 2015, Widmon Butler (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Metropolitan Police Department’s (“MPD” or “Agency”) decision to terminate him from his position as a Civilian Claims Specialist,¹ effective February 6, 2015. Following an Agency investigation, Employee was charged with [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance, and outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.

After the parties declined mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on May 27, 2015. After several continuances requested by the parties for medical reasons, I held a Prehearing Conference in this matter on October 2, 2015, and an Evidentiary Hearing on September 2, 2016. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency violated D.C. Official Code § 5-1031 (a) (2004), otherwise known as

¹ In his appeal form, Employee describes his position as Human Resource Specialist/Claims Examiner.

the "90-day rule" in terminating Employee.

2. Whether Agency's action of terminating Employee from service was done in accordance with applicable law, rule, or regulation.

BACKGROUND

Undisputed facts

Agency has two main classes of employees: uniformed personnel, such as police officers and non-uniformed personnel, often called civilian employees. Employee works as a Civilian Claims Specialist in the Agency's Medical Services Branch ("MSB"). As such, he assessed the worker's compensation claims or performance of duty claims made by uniformed officers.

PFC Associates, LLC ("PFC") was contracted by Agency to manage its electronic medical records system. To comply with Agency's policy and HIPAA Federal Law, PFC requires everyone who uses the system to read and sign the Acceptable Use Agreement. This agreement governs the rules for employees' use. Employee was authorized to use Agency's electronic medical records system to access medical records of uniformed personnel (police officers) but had no authority to access medical information of non-uniformed personnel.

Ms. Josephine Jackson was not a uniformed officer, but a Civilian Cell Block Technician working at the Agency who had filed a worker's compensation claim that was being contested by her employer. Employee, a lawyer, had agreed to represent Jackson in his private law practice.

Parties' Allegations

Agency accuses Employee, a DS-12 Civilian Claims Specialist, of abusing his position to access his private client's medical records through MSB's electronic medical records system without proper authorization for other than official business. Agency also alleges that Employee's actions constituted outside employment that interfered with his officially assigned duties and responsibilities.

Employee denies the charges and asserts that the penalty was unwarranted. He also accuses Agency of violating the 90-day rule.

Evidentiary Hearing on Disputed Issues

Paulette Woodson ("Woodson") testified (Tr. p. 8 - 37) as follows.

Lieutenant Woodson was a Sergeant in the Internal Affairs Division ("IAD") during the relevant period who investigated the charges against Employee. She described Employee's actions as time and attendance fraud as well as a HIPAA² violation. Her investigation indicated

² HIPAA is the Health Insurance Portability and Accountability Act of 1996. The main purpose of this federal statute was to help consumers maintain their insurance coverage, but it also

that Employee was working on Josephine Jackson's worker's compensation claim during his official tour of duty.

Because she felt it was criminal in nature, Woodson referred the matter to the United States Attorney's Office for prosecution but the U.S. Attorney declined to prosecute in June 2014. This cleared the way for Agency to proceed further as an administrative matter. After Woodson left the division, Agent Tracye Malcolm took over the investigation.

The investigation revealed that the Director of MPD Human Resources, Diana Haines-Walton, received an MPD email from Employee stating that he represented Ms. Jackson in her worker compensation claim. Because Haines believed Employee's representation represented a conflict of interest, she notified the IAD and upper management.

Marian Booker ("Booker") testified (Tr. p. 37 - 64) as follows.

During the relevant time period, Booker was the Clinical and Information Technology Supervisor for Police and Fire Clinic ("PFC") wherein she monitored the clinic staff and the electronic medical records system ("EMR"). PFC manages and maintains all EMRs of the Agency. Because all medical records are regulated by HIPAA, patient information is protected by statutory limitations on patient information access.

Booker testified that Agency allows its employees to access a patient's medical records only under strict authorization and only in relation to their official duties. Access to EMR is controlled by the use of user IDs and passwords. Her audit revealed that on July 22, 2013, Employee accessed Ms. Jackson's medical records, specifically her chart and chart tab summary, without authorization for more than 51 minutes.

Booker explained that even if the patient gives Employee permission to search her EMR, Employee must still seek authorization from his supervisor to use Agency's EMR system for this purpose. All such authorization has to be written and on an official form. Booker also pointed out that although Employee got a signed authorization from Ms. Jackson to search her medical records on July 26, 2013, her audit revealed that Employee accessed Jackson's records on July 22, 2013, therefore, Employee had no authorization from anyone to access Jackson's EMR during the time he did.

William Sarvis ("Sarvis") testified (Tr. p. 66 - 88) as follows.

Sarvis, the Director of Agency's Medical Services Division, supervised Employee through Lieutenant Stroud for about 10 years. He emphasized that Employee was a Claims Specialist for worker's compensation claims only from Agency's uniformed personnel.

Sarvis testified that he heard from the Director of Human Resource Management Diana Haynes Walton and that the City's Chief Risk Management Officer Amy Mauro emailed him regarding an unauthorized intrusion into the EMR of Ms. Jackson. Based on those reports, he

includes privacy and security standards to protect the confidentiality and integrity of individually identifiable health information. Source: Whatishippaa.org.

ordered an audit of the EMR. The audit revealed that Ms. Jackson's medical chart had been opened by Employee and one of the tabs had been changed.

Sarvis stated that Employee's action of sending communications regarding Jackson's case on Agency's time and facilities violated Agency policy because Employee had no official business with Jackson. He also stated that he never authorized Employee to use Agency resources for his private law practice or use Agency's address as the address of Employee's law office. Sarvis stated that Employee's violation of HIPAA exposed Agency to both civil and criminal liabilities.

Widmon Butler ("Employee") testified (Tr. p. 89 - 166) as follows.

Employee testified that he worked for Agency from 2000 until February 6, 2015. As a Claims Examiner, his job was to review the medical files and to certify official investigation on a police officer or other uniformed personnel seeking worker's compensation on a job related injury and make a ruling as to whether the claim was a performance of duty ("POD") injury or not. His ruling would then be passed on to his supervisor, Lieutenant Stroud for signature. Employee stated that although his work centered on Agency's uniformed personnel, he did on occasion receive claims from civilians that he would then refer to the Office of Risk Management. The Office of Risk Management handles worker's compensation claims from Agency's non-uniformed or civilian employees. Employee stated that he had authorization to see everyone's EMR files, including non-uniformed personnel.

Employee revealed that in July 2013, he met Josephine Jackson at the behest of the National Association of Government Employees' union president for assistance on Jackson's worker's compensation claim. He agreed to represent Ms. Jackson on a pro bono basis and immediately sought to obtain her medical records.

Employee admitted that he accessed Jackson's EMR on Agency's database but denied clicking on any of the tabs. He admitted that he left Jackson's record open while he worked on a cop's claim. He insisted that he had Jackson's permission. In his opinion, Employee stated that he believe he did not violate HIPAA since he did not click on the tabs or start reading, copying, or communicating any of the medical information contained within. Employee opined that "I really didn't think it was anything serious..."³

Employee admitted that on August 26, 2013, he filed a worker's compensation appeal on Jackson's behalf to the Office of Risk Management using his Agency assigned email address and the D.C. government's email system.⁴ However, he insisted that he did it on his own time since he sent the email at 4:01 p.m. after his shift ended at 4:00 p.m. Later, on cross-examination, Employee admitted that he scanned his client's documents before 4:00 p.m. but said that he often worked overtime regularly and feels insulted about Agency's allegation.

Employee also insisted that he verbally informed and asked Sarvis for a medical records authorization form for his client, Ms. Jackson. Employee admitted that he used Agency's medical

³ Transcript at page 105, line 5.

⁴ Agency Exhibit 1, attachment 2.

records database system to check Jackson's file but hedged on whether he actually "accessed" the file despite not having authorization to do so.⁵ He said that although he did use his Agency issued log in name and password to open Jackson's file, he did not look at it nor did he make a copy of it. Employee conceded that checking Jackson's file is unrelated to his job.

Employee denied running his private law practice from Agency's premises or listing Agency's address as the address of his law office on a website. He conceded that to a layperson, the website listing Agency's address, phone and fax number with his photo and advertisement of his law office seemed to indicate that he was soliciting business from Agency's premises; but he asserted that the listing was done without his knowledge or consent. To support his contention, Employee submitted emails and a letter he sent to those websites, asking them to delist his name.⁶

Employee denied practicing law by representing Jackson before this Office but admitted that he filed motions on Jackson's behalf to OEA. He admitted practicing law by representing Jackson before the Office of Risk Management.

Employee testified that he received his notice of charges on October 6, 2014, more than 90 days after the September 19, 2013, letter notifying him that he was being placed on administrative leave with pay for accessing the medical records of an Agency employee without authorization.⁷

The documentary evidence of interview reports admitted at the hearing shows the following:

Director Haines-Walton of Agency's Human Resources Management Division determined that Jackson's worker's compensation claim had no impact on a pending RIF of Jackson's position. She received an email from Ms. Mauro that Employee had sent an email regarding his legal representation of Jackson using Agency resources. She then notified Director Sarvis.

Lieutenant Gregory Stroud learned that Employee performed legal services for Jackson during Agency's working hours and said he never authorized Employee to access Jackson's medical records on Agency's database system.

General Counsel Mauro of the D.C. Office of Risk Management stated that she responded to Employee's email request regarding Jackson's worker's compensation claim by asking Employee to clarify if he was acting in his official capacity as an Agency employee or on his own private law practice when she noticed Employee's use of Agency's email account.

Director Phillip Lattimore of the D.C. Office of Risk Management stated that when he received Employee's email which was signed "Esquire" and realized Employee was advocating for Jackson at the same time he was working as a claims specialist, he thought it was a conflict of interest and referred the matter to Mauro.

Josephine Jackson stated that Employee did not charge her for his representation in her worker's compensation appeal and that she gave Employee a signed medical release form.

⁵ Transcript page 116, line 19 to page 117, line 10. See also transcript page 128, lines 5 to 22.

⁶ Employee Exhibit 1.

⁷ Agency Exhibit 1, tab 6.

Union President Reed confirmed that he asked Employee to speak to Jackson due to his expertise in worker's compensation claims.

Agency Medical Services Branch Director William Sarvis ordered an audit of Agency's electronic management system after learning about Employee's legal representation of Jackson while using Agency time and resources. He indicated that Employee had no authorization to use Agency resources to access Jackson's records and said it was a conflict of interest.

Chief Operating Officer Marian Booker of Agency's Medical Services Branch did the audit of Agency's electronic management system and found that Employee accessed Jackson's files for about an hour.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

Whether Agency violated D.C. Official Code § 5-1031 (a) (2004), otherwise known as the "90-day rule" in suspending Employee.

Findings of Fact, Analysis and Conclusion on Issue 1.

Undisputed Findings of Fact⁸

1. As a Claims Examiner, part of Employee's job duties was to review medical files using Agency's electronic medical records system.
2. On July 22, 2013, Employee used his Agency log-in and password to check the existence of his client Ms. Jackson's medical records without authorization from his superiors.
3. On September 12, 2013, the D.C. Office of Risk Management brought Employee's actions to the attention of Agency.
4. On or after October 1, 2013, Agency referred the matter to the United States Attorney's Office for criminal investigation.⁹
5. On December 3, 2013, Agency initiated its own investigation with an interview of Lieutenant Gregory Stroud by the Internal Affairs Division (IAD).¹⁰
6. On June 2, 2014, the United States Attorney's Office sent a Letter of Declination to Agency, indicating that they had declined to pursue criminal charges and signaled Agency that it may proceed with its administrative action.¹¹

⁸ Agency's charging documents has been admitted as part of the record per judicial notice.

⁹ Undated letter from Agency's Internal Affairs Division to Public Corruption Section, U.S. Attorney's Office.

¹⁰ Final Investigative Report Concerning an Allegation Misconduct by Civilian Widmon Butler, Corporate Support Bureau, Medical Services Branch, IS# 13-002588, IAD# 13-260, dated September 25, 2014.

¹¹ Metropolitan Police Department's Answer to the Petition. Agency Tab 6.

7. On September 25, 2014, Agency's Internal Affairs Division ("IAD") submitted its final investigative report on Employee to its Assistant Chief of Police.¹²
8. On October 6, 2014, Agency sent to Employee his advance notice of adverse action charging him with "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance: dishonesty, unauthorized use of government resources; using or authorizing the use of government resources for other than official business" and "...outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities."¹³
9. On December 5, 2014, Agency issued Employee a Notice of Adverse Action Hearing Officer's Decision.¹⁴
10. On February 5, 2015, Agency issued its Notice of Final Decision, sustaining the charges and terminated Employee effective the next day.¹⁵
11. Employee was terminated effective February 6, 2015.
12. On March 9, 2015, Employee sent a request for reconsideration to the Chief of Police, who denied the appeal on March 20, 2015.¹⁶

Analysis

The first challenge raised by Employee is that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because MPD failed to propose his termination in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. MPD contends that it did act within the 90 day period.

§ 5-1031. Commencement of corrective or adverse action states as follows:

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be

¹² Metropolitan Police Department's Answer to the Petition. Agency Tab 1.

¹³ Metropolitan Police Department's Answer to the Petition. Agency Tab 2.

¹⁴ Metropolitan Police Department's Answer to the Petition. Agency Tab 3.

¹⁵ Metropolitan Police Department's Answer to the Petition. Agency Tab 4.

¹⁶ Metropolitan Police Department's Answer to the Petition. Agency Tab 5 and 6.

commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

In *D.C. Fire and Medical Services Department vs. D.C. Office of Employee Appeals*, No. 08-CV-1557, 986 A.2d 419 (January 7, 2010), the D.C. Court of Appeals held that the 90-day period for Agency to propose removal of a technician began to run on the date that a panel of Agency leaders interviewed the technician in an investigation of the incident.

However, in this case, Agency referred the matter to the Office of the United States Attorney for the District of Columbia for criminal investigation. It was only on June 2, 2014, that the United States Attorney's Office sent a Letter of Declination to Agency.

Although Employee alleges that based on D.C. Code Section 5-1031(b), the ninety day clock began to tick again after the criminal investigation was completed by the United States Attorney's Office, I note that Agency's IAD's own investigation was still ongoing and did not conclude until September 25, 2014, the date IAD issued its investigative report.

There are 12 working days from September 12, 2013, the date Agency was alerted by the Office of Risk Management about the suspicious activities of Employee, to October 1, 2013, which is the date that Agency referred the matter to the United States Attorney's Office for criminal investigation. There are six working days from September 25, 2014, to October 6, 2014, the date that Agency gave Employee his advance notice of adverse action. Adding the 12 working days before the 90-day period was tolled to the six working days after the 90-day clock began ticking again adds up to 18 days, which is short of the 90-day period.

As set forth above, Agency commenced adverse action against Employee by serving him with a fifteen (15) day advance written notice of proposed removal on October 6, 2014, well within the ninety day period mandated by the 90-day rule.

After carefully reviewing the record and the arguments of the parties, the Administrative Judge concludes that the Agency initiated the adverse action in a timely manner.

Whether Agency's action of terminating the Employee from service was done in accordance with applicable law, rule, or regulation.

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for

cause. Further, District Personnel Manual (“DPM”) § 1603.2 provides that disciplinary action against an employee may only be taken for cause.

Under DPM §1603.(f)(6),¹⁷ the definition of “cause” includes any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance, and outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities. According to the record, Agency’s decision to terminate Employee was based on these charges.

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

Misfeasance is defined in part as unauthorized use of government resources; using or authorizing the use of government resources for other than official business.¹⁸ According to Agency, outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities would also fall under misfeasance.

Here, Agency asserts that Employee accessed his private client’s medical records using Agency resources without authorization. Based on Employee’s own testimony, he admitted as much. His defense lay in his own definition of “accessed.” Without presenting any support to his assertion, Employee insists that using his Agency issued log in name and password to open his client’s medical record was not really “accessing” the records because he did not delve deeper into the details.

Based on his demeanor and lack of consistency, I do not find Employee’s explanation credible on this issue. Therefore, I find that Employee used Agency resources for his personal law practice, and his action constitutes Misfeasance. I also find that Employee’s actions constituted outside employment or private business activity or any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities. Employee’s use of Agency resources during his work period conflicted and interfered with his official duties and appeared to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.

Agency also charged Employee with dishonesty, specifically, lying about his accessing of Ms. Jackson’s medical records. Based on the above, I also find this specification credible. Consequently, I find that Agency had sufficient cause to charge Employee with misfeasance on these specifications.

Agency also based its charge of misfeasance on its allegation that Employee used Agency resources such as Agency’s place of business, telephone and fax number to advertise his private law practice on two websites. Agency alleges that Employee’s use of Agency resources during

¹⁷ See also D.C. Mun. Reg. tit. 16 § 1603(f)(6).

¹⁸ DPM § 1619 (c)-(f).

his work period conflicted and interfered with his official duties and appeared to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.

Employee denies this allegation and submitted his communications to these websites to cease using Agency's contact information on the websites.¹⁹ In this instance, I find Employee's defense credible as Agency presented no evidence that would controvert his assertion. Accordingly, I find that on this specification, Agency had no cause to charge Employee with misfeasance.

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

Employee admits to accessing Agency's electronic records system without approval for his law practice. Employee's conduct constitutes an on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations and it is consistent with the languages of § 1619.1(6)(f) of the DPM.

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).²⁰ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations to include: Misfeasance", and as such, Agency can rely on these charges in disciplining Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "[a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Misfeasance" is found in § 1619.1(6)(f) of the DPM. On September 28, 2015, OEA upheld Employee's suspension for misfeasance and insubordination in an unrelated matter.²¹ Thus, this is Employee's second offense for misfeasance. The penalty for a second

¹⁹ Employee exhibit 1.

²⁰ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

²¹ See *Widmon Butler v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0236-12 and 1601-0069-14 (September 28, 2015).

offense of Misfeasance is a twenty (20) to thirty (30) day suspension. The penalty for a third offense of Misfeasance is termination. Agency has not presented any evidence to show that this was the third time Employee violated §1619.1(6)(f).

Here, Agency has not presented any evidence to justify imposing a penalty that is beyond the legislated table of penalties. This Office has held that compliance with the Table of Penalties is mandatory.²² Therefore, on October 18, 2016, I remanded this matter back to Agency with instructions to reconsider its penalty of termination in that although I found cause for adverse action, Agency had not presented evidence that would justify imposing a penalty that is beyond the mandated table of penalties.

Agency submitted its response on November 4, 2016. It stood by its penalty of termination after submitting a November 8, 2013, Notice of Final Decision that suspended Employee for thirty work days for a June 13, 2013, act of misfeasance.²³ Agency stressed that the instant matter is actually Employee's third act of misfeasance. Apart from the June 13, 2013 misfeasance, Employee has also committed another act of misfeasance on March 6, 2012.²⁴

Employee submitted his response to Agency's response on November 21, 2016. In it, Employee objects to Agency's submission by citing OEA Rule 629.1 which states, "When an evidentiary hearing has been provided, the record shall be closed at the conclusion of the hearing, unless the Administrative Judge directs otherwise."²⁵ Employee also cites OEA Rule 629.2 which states, "Once the record is closed, no additional evidence or argument shall be accepted into the record unless the Administrative Judge reopens the record pursuant to § 630.1."²⁶

What Employee failed to note is that nowhere in the orders I have issued nor in the hearing transcript is there any indication that I have closed the record. Nonetheless, OEA Rule 630.1 states, "The Administrative Judge may reopen the record to receive further evidence or argument at any time prior to the issuance of the initial decision."²⁷ Therefore, Employee has no valid basis for objecting to Agency's submission in response to my Order.

Employee also argues that if Agency wants to rely on a third offense of misfeasance which was not presented to Employee at the time of the termination decision, it must return Employee to employment and reissue the notice of termination with that additional evidence and permit Employee to respond. Employee argues that Agency should not be permitted to reopen the record. Again, Employee is mistaken in assuming that Agency was permitted to reopen the record. The record was not closed at the conclusion of the hearing, thus Agency could not have reopened it.

²² *Michael Dunn v. D.C. DYRS*, OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for Review*, (April 15, 2014).

²³ Agency Response to Remand Order to Agency, Attachment 1. (Nov. 21, 2016).

²⁴ *See Widmon Butler v. D.C. Metropolitan Police Department*, OEA Matter Nos. 1601-0236-12 and 1601-0069-14 (September 28, 2015).

²⁵ 59 D.C. Register 2129 (March 16, 2012).

²⁶ *Id.*

²⁷ *Id.*

Next, Employee argues that Agency should not be permitted to argue about the appropriateness of its penalty for the first time on appeal at the OEA. Employee avers that Agency is limited in its response to the information it provided in the administrative record submitted to OEA which formed the basis for the discipline it meted out. I note that Employee had not provided any basis such as a statute, rule, or regulation, other than mere argument for his assertions.

Next, Employee argues that Agency failed to consider the *Douglas* factors in determining the appropriate penalty.²⁸ In my review of the charging documents in this matter, specifically the November 26, 2014, Memorandum titled Notice of Final Decision Regarding Mr. Widmon

²⁸ In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

- 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the 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;

Butler, Medical Services Division, IS #13-002588 and DRB # 661-14, Agency considered Employee's behavior in relation to his job position and duties, veracity, timeliness, and signed agreement with Agency's "Acceptable Use Agreement" which explicitly spells out the acceptable use of Agency's medical services database.

I have reviewed Agency's charging documents, and have found that Agency carefully laid out their consideration of the *Douglas* factors, although it did not name it as such. Although Agency may not have weighed these factors in the exact same manner as Employee would have preferred, this is not grounds for overruling Agency's determination.

In addition, this Office has held that failure to discuss Douglas factors does not amount to reversible error.²⁹ Even without such a discussion, Agency's decision to remove Employee is valid so long as it was not an abuse of discretion or arbitrary.

Lastly, Employee argues that one or more of his priors should not be considered as they have either been appealed or settled. Again, Employee did not provide any evidence to support his contentions. In addition, the above cited Table of Penalties merely requires prior instances of the offense.³⁰

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's disciplinary action of terminating Employee as a Claims Specialist is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

²⁹ See *Christopher Lee v. D.C. Dept. of Transportation*, OEA Matter No. 1601-0076-09, *Opinion and Order on Petition for Review* (January 26, 2011).

³⁰ Also see *D.C. Public Schools Dept. of Transportation v. D.C. O.E.A.*, Case No. 12-CA-8132 (D.C. Super. Ct. Jan. 3, 2014) which required mere instances of prior misconduct, regardless of its final resolution.