

Both parties appeared for the Status Conference as scheduled. Following the conference, I issued an Order the same day establishing a briefing schedule in this matter. Agency's brief was due on or before July 22, 2022. Employee's brief was due on or before August 19, 2022, and Agency had the option to submit a sur-reply brief by August 29, 2022. On July 21, 2022, Agency filed a Motion to Extend the time to file briefs by two (2) weeks citing that more time was needed due to numerous deadlines and scheduled leave. Agency noted that Employee did not consent to this request. Upon consideration of Agency's request and Employee's opposition, I issued an Order on July 22, 2022, granting Agency's Motion. Agency's brief was now due by August 5, 2022. Employee's brief was due by September 2, 2022, and Agency had the option to submit a sur-reply brief by September 12, 2022. Both parties submitted their briefs as required. Upon consideration of the parties' arguments as presented in their submissions to this Office, I have determined that an Evidentiary Hearing is not required. 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 had cause to take adverse action against Employee; and
2. If so, whether termination was the appropriate penalty under the circumstances.

BURDEN OF PROOF

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

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

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

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF THE PARTIES' POSITIONS

Employee worked for Agency as a Support Specialist for two (2) years and for the District Government for 13 years. In a Final Written Notice dated November 16, 2021, Agency terminated Employee from service pursuant to **DPM § 1605.4(a)**³ - "**Conduct Prejudicial to the District: unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or confidential information**"; and **DPM § 1605.4 (b)** - **False Statements-**

³ As previously referenced, the undersigned noted that Agency's Final Notice included the specific charge under this section but did not denote the number for which this description of the action is aligned. The Table of Illustrative Actions specifies this cause of action under **DPM § 1607.2(a)(10)**.

Misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; Knowingly and willfully making an incorrect entry on an official record or approving an incorrect official record; and Knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any supervisor. ; and DPM §1605.4(l) – Prohibited Personnel Practices. The termination was effective November 18, 2021.

Agency's Position

Agency asserts that it had cause to terminate Employee from service and that it did so in accordance with all applicable laws, rules and regulations. Agency avers that in 2021, it was “alerted to Employee’s potential non-resident tuition fraud and began an investigation.”⁴ Agency asserts that “from 2014-2021, Employee’s daughter attended two D.C. Public Charter Schools.”⁵ Agency cites that “[t]o attend a D.C. public charter school tuition-free, a child’s parent, guardian, custodian, other primary caregiver must annually certify that they physically reside in D.C. See 5-A District of Columbia Municipal Regulations (“DCMR”) 5000, et seq. Otherwise, a non-resident tuition is owed.”⁶ Residency is verified through “D.C. Residency Verification Forms (“Form”).” Agency asserts that this form requires the child’s parent, guardian, etc., to “identify their relationship to the student, confirm their address (and whether they are a D.C. resident), and submit supporting documentation.” “One permissible form of supporting documentation is a paystub.”⁷ Agency avers that “from 2014 through 2021, Employee, on behalf of her daughter, submitted, to KIPP D.C., the Form indicating that she was her daughter’s legal guardian and that she was domiciled in the District. As proof of domicile, Employee submitted OAG paystubs.”⁸

Agency asserts that its Public Advocacy Division (“PAD”) “investigates and litigates civil cases aimed at protecting the public interest, including diversion of funding from public charter schools and non-resident tuition fraud.”⁹ Agency avers that in “March 2021, PAD completed its investigation [of Employee], which revealed that from 2014-2021, although she resided in Maryland, Employee used her OAG- issued computer and District network to alter her official government paystubs to reflect a District address.”¹⁰ Further, Agency asserts that Employee “sent those altered paystubs to KIPP, DC on an annual basis as attachments to the Form to falsely represent that she was a District resident.” Agency argues that Employee did this in order to avoid paying non-resident tuition at the District charter schools. Agency maintains that Employee has not resided in the District since 2014. Agency avers that Employee’s unaltered paystubs from 2014-2018 reflect an address for Greenbelt, Maryland. Agency also proffers that the unaltered stubs from 2020 reflect a Silver Spring, Maryland address.¹¹

Agency also avers that PAD’s investigation revealed that Employee requested another employee, Ms. Hogan, a Program Support Assistant, “to falsely represent that she was an OAG human resource official and to send Employee’s altered paystubs to KIPP DC using OAG’s email.”¹² Agency asserts that Ms. Hogan “did so by indicating her job title in her email signature block as “Human Resources Assistant for the District of Columbia” instead of her accurate title, Program Support Assistant.”¹³

⁴ Agency’s Answer at Pages 1-2 (February 4, 2022).

⁵ Agency’s Brief at Page 2 (August 5, 2022).

⁶ *Id.*

⁷ *Id.* at Page 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at Page 3-4.

Agency cites that following the completion of its investigation, on March 3, 2021, they referred the non-resident tuition fraud matter to the D.C. Board of Ethics and Government Accountability (“BEGA”). On March 11, 2021, “OAG issued a letter to Employee that she had a non-resident tuition obligation of \$8,516.32.”¹⁴ Agency also notes that during its investigation, “it became aware that Employee’s daughter’s father, (“Mr. Walker”) was a resident of the District until September 10, 2020, when he was released from jail and relocated to Maryland.” Agency asserts that “although Employee’s 21-22 Form- and all of the other preceding related Forms – were false, OAG determined that she did not have any obligation to pay tuition to the District prior to September 10, 2020, because of the father’s residency.”¹⁵ Thus the \$8,516.32 reflected tuition costs from September 10, 2020, to March 5, 2021, when the father became a Maryland resident. OAG asserts that on March 17, 2021, it referred this matter to the D.C. Office of the Inspector General (“OIG”).

Agency avers that even after notice regarding the tuition fraud investigations, that “Employee committed non-resident tuition fraud again for the 2021-2022 school year.” Agency asserts that “per the 21-22 Form, Employee selected that she was the “students legal parent/guardian/custodian,”[sic] she also stated that the “address of the enrolling person” was 3416 B Street SE, Apt 303, Washington DC 20019,” she indicated “Yes” for “D.C. Resident,” and submitted, as proof of D.C. residence, an altered OAG paystub.”¹⁶ Agency further avers that as a “part of the 21-22 Form, just like every other Form, the D.C. resident requirements were detailed for Employee and Employee was required to confirm, by her signature, her compliance with those D.C. residency requirements.” Agency asserts that “Employee’s unaltered June 1, 2021, OAG paystub indicated that Employee resided at 2300 McMahon Road, Apt., 2321, Silver Spring, MD 20902 on June 9, 2021, the date which Employee executed the 21-22 form.”¹⁷

As a result, Agency avers that it issued an Advance Notice of Proposed Removal on August 23, 2021. Agency notes that Employee submitted a statement dated that same day and avers that Employee admitted therein that she lived in Greenbelt, Maryland at times from 2014 through 2016 due to alleged domestic abuse.¹⁸ Further, Agency asserts that in that statement, Employee “acknowledged that she “used [her daughter’s] grandmother’s address to ensure [her daughter] was properly enrolled in school, and [Ms. Hogan]...offered to help [her] with [her] paperwork.”¹⁹ Agency cites that the matter was assigned to a Hearing Officer on September 23, 2021. On September 28, 2021, PAD filed a tuition fraud complaint in D.C. Superior Court.²⁰ Agency states that on October 1, 2021, Employee “answered the complaint and denied all allegation of tuition fraud.” Agency notes that the matter is still pending in D.C. Superior Court.

On November 1, 2021, the Hearing Officer issued her Conclusion and Recommendation and found that Agency had cause to discipline Employee for violation of 6-B DCMR 1605.4(a), 1605.4(b) and 1605.4(1). The Hearing Officer also found that termination was appropriate in the circumstances. On November 16, 2021, Agency issued its Final Notice. Agency asserts that it noted the weight and consideration given to mitigating factors in this matter but found that Employee’s actions of altering her paystubs and using government equipment to do so were “inexcusable, especially considering her position with OAG.”²¹

¹⁴ *Id.* at Page 4.

¹⁵ *Id.*

¹⁶ *Id.* at Pages 4-5.

¹⁷ *Id.* at Page 5, citing to Exhibits 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at Page 6.

²¹ *Id.* at Page 8.

Agency argues that it has shown cause for disciplinary action against Employee. Agency avers that the email correspondence between Employee and Ms. Hogan evince that Employee sent the 2014-2015 Form and fraudulent paystub to Ms. Hogan. Further, Agency asserts that Employee continued to submit fraudulent and altered paystubs from that point until OAG discovered this in 2021. Agency notes that the addresses in the paystubs submitted with the Forms submitted in those school years, do not align with the addresses in Peoplesoft/unaltered paystubs. Agency avers that the Forms are clear and that “a reasonable person would have understood this language to mean that the Form required the enrolling person’s address and not the student’s address to be indicated.”²² Agency avers that the Forms for the 2016-2017 school year and those, thereafter, explicitly note the requirement for the enrolling person’s address. Agency asserts that Employee “attempts to excuse her non-resident tuition fraud” by alleging that her daughter lived with family members in D.C. from 2015-2016 and with her daughter’s sister from 2016 to the time of the appeal in this matter. Agency avers that “even if this is true, it does not excuse Employee’s false statement regarding the domicile on the Forms. Nor does it excuse Employee’s decision to alter OAG paystubs and submit them to KIPP DC to gain tuition-free enrollment for her daughter.”²³

Agency also asserts that the status of Employee’s daughter’s father (Mr. Walker), does not support the action of altering the paystubs. Agency asserts that in her May 31, 2022, deposition, “Employee remained steadfast in her belief that she did not alter her OAG paystubs.” Agency asserts that “[e]ven when Employee finally admitted that she did, in fact, alter the dates on her paystubs to reflect the proper pay period before sending those paystubs to KIPP DC, Employee still did not believe that she altered her paystubs.” Agency avers that Employee “asserted that Ms. Hogan altered the address on her initial paystub and Employee then changed the dates on that initial paystub to reflect the proper Form submission year. According to Employee, she only changed the dates on the paystubs for every year in question.”²⁴

Agency avers that its penalty of termination was appropriate under the circumstances. Agency argues that Employee’s actions of non-resident tuition fraud were actionable under the DPM. Further, Agency argues that Employee’s position as a Support Services Specialist (“SSS”) required her to operate with integrity and honesty. Agency also maintains that the actions reflected negatively on OAG, which is why its charge of conduct prejudicial to the District of Columbia government should be sustained.²⁵ Additionally, Agency argues that its charges of False Statement and Prohibited Personnel Practices reflect directly on Employee’s actions. Agency asserts that Employee has not been a resident of the District since at least 2014 but reported to KIPP DC that she maintained a District domicile. Agency asserts that despite this being noted in the March 11, 2021 Letter, “Employee still proceeded to represent that she resided in the District on the 21-22 Form.”²⁶ Agency also argues that Employee has “essentially conceded that she committed the charged offenses and otherwise presents insufficient argument or evidence to rescind her termination.”²⁷ Agency asserts that Employee offers no explanation “as to how the address on the initial altered paystub was changed from 2209 Franklin Street, N.E., Washington, DC 20019, to 3416 B Street, S.E., Apt 303, Washington, DC 20019 when she submitted the D.C. Residency Verification Form (“Form”) for the 2021-2022 school year.”²⁸ As a result, Agency asserts that its action was warranted and that its penalty of termination should be upheld.

²² *Id.* at Page 12.

²³ *Id.* at Page 13.

²⁴ *Id.* at Pages 16-17.

²⁵ Agency’s Brief at Page 18 (August 5, 2022).

²⁶ *Id.* citing to Exhibit 2.

²⁷ Agency’s Sur Reply (September 8, 2022).

²⁸ *Id.* at Page 2.

Employee's Position

Employee avers that Agency's action of terminating her from service was without cause and that the penalty of termination was inappropriate. Employee asserts that she began her service with OAG in 2008 and work in Program Support in the Support Services Division ("SSD"). She notes that she was married at that time to another employee ("Mr. Thompson"). Employee avers that in 2014, Mr. Thompson "became violent and abusive toward me at work, leading OAG to terminate Mr. Thompson."²⁹ Employee asserts that following the termination, Mr. Thompson "beat [her] so badly that [she] left the home we shared at 9130 Springhill Land, Greenbelt MD 20770, and went to go stay with [her] grandmother at 2209 Franklin Street, NE WDC 20018." Employee asserts that the change was sudden, and she didn't have permanent housing, so she did not submit a change of address.

Employee notes that she kept her daughter with her during this time because she was younger. Employee maintains that "at the same time, my co-worker Ms. Marjorie Hogan ("Ms. Hogan"), and I had been having conversations about [daughter] and KIPP DC." Employee avers that "Ms. Hogan stated that she didn't mind helping me get [daughter] into KIPP DC because she knew how the process went and she helped her sister with the same process."³⁰ Further, Employee cites that Ms. Hogan asked her to "email my paystub into a word document where she altered my paystub by changing the address to my grandmother's address, she then emailed me and KIPP administrator Ms. Getzed[sic] the altered paystub." Employee avers that she did not pay attention to the signature Ms. Hogan used in this email.³¹

In 2015, Employee cites that her cousin's daughter who also attended KIPP DC was staying at her grandmother's house. Employee cites that because her cousin was better able to care for her daughter and because she was also staying with the grandmother, that she asked her to care for her daughter. Employee cites that she moved to an apartment in Greenbelt, MD and stayed there for approximately a year.³² Employee avers that from 2014-2016, she was "basically homeless, spending some nights at my grandma's house and other nights with friends who lived all over the city."³³ Employee also cites that during this time she also suffered from depression and anxiety and had to use FMLA. In 2016, Employee notes that her oldest child moved in to shelter housing located on New York Avenue, in NE Washington. Employee asserts that she asked her eldest daughter for her youngest daughter to live with her and that ultimately her youngest stayed with her eldest daughter at that location for about a year. Later that same year, Employee notes that she applied for housing assistance and in October 2016, she received a "Housing Choice Voucher from Prince George's County Maryland." Employee notes that she then moved into an apartment located at 2300 McMahon Road in Silver Spring, Maryland. Employee avers that she remained in this apartment until August of 2021, when she was no longer able to pay rent, and subsequently moved in with her eldest daughter, youngest daughter and grandson.³⁴

In 2017, Employee asserts that she wrote a "notarized letter that was provided to [eldest daughter's] housing counselor, Ms. Foster, so that her [youngest daughter] could continue to live with her. Employee avers that the counselor approved, and her oldest daughters moved to the address located on B Street in Southeast Washington DC. Employee avers that her youngest daughter has not lived with her full time or been in her care since she began living with her eldest daughter.

²⁹ Employee's Brief at Page 2 (September 1, 2022).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at Pages 2-3.

³³ *Id.* at Page 3.

³⁴ *Id.* at Page 3-4.

Employee cites that on July 30, 2021, she was “contacted by Mr. Eric Block, Investigator, CFE from the DC Office of the State Superintendent (OSSE), he explained to [Employee] that he was contacted by OAG, and he would be conducting an investigation to determine if [Employee] committed tuition fraud regarding [her youngest daughter], and if found guilty they will be pursuing legal actions against [Employee].”³⁵ Employee asserts that the investigator told her to go to the school to fill out a “Other Primary Caregiver (OPC)” form and that once completed, to send it to him directly. Employee avers that she submitted the OPC Form to KIPP DC on August 23, 2021, and then followed up on August 25, 2021, to ascertain the status. Employee avers that she told the investigator that the “reason I filled out [youngest daughter’s] enrollment form with [Employee’s name] and address, as well as her [eldest daughter’s] address was because [Employee] is [youngest daughter’s] mother and she would put [Employee’s] address on the form [sic] it asks for parent address, and the reason my [eldest daughter] address is on the form is because that is where her [youngest daughter] resides.” Employee asserts that following the investigation, that “OSSE did not file fraud against me and, it was determined that all I needed to do was fill out a primary caregiver form.” Employee also asserts that her youngest daughter’s father, Mr. Walker is a DC resident, which also made her youngest daughter eligible to attend the KIPP DC school. Employee maintains that her daughter never lived with her in Maryland and has always resided in DC.³⁶

Employee asserts that she never told OAG that she was confused about the address, but that she told them that she filled in the address where her youngest daughter resided. Further, Employee asserts that she never emailed Ms. Hogan “a fraudulent OAG paystub.” Employee avers that she and Ms. Hogan “had been having conversations about [youngest daughter] attending KIPP DC and she offered to get [youngest daughter] into KIPP DC because she knew how the process went...” Employee cites that “Ms. Hogan asked me to email her a copy of my paystub, which I did, sending her a PDF copy. Ms. Hogan then altered the paystub and sent it to Ms. Getzed³⁷[sic], the KIPP administration, changing her title in the process and on her own.”³⁸ Employee avers that “[a]fter Ms. Hogan sent the email to Ms. Getzel, she forwarded it to me using my work email address and I emailed it to my personal email address.”³⁹ Employee argues that in June 2021, that she “completed the enrollment forms for the 2021-2022 school year using my then current address at 2300 McMahan Road apt 2321, Silver Spring, MD 20902, after speaking with a KIPP DC administrator.” Employee cites that she was “advised it was ok because they are aware of our circumstances.”⁴⁰

Employee cites that on August 23, 2021, she received an Advanced Written Notice of Proposed Removal. Employee avers that she was “instructed that if she wanted to respond, to do so to Hearing Officer Terry Michael Banks.”⁴¹ Employee asserts that she sent her response and requested a hearing on September 3, 2021. Employee avers that she later received an email on September 7, 2021, asking if she had sent her response to the hearing officer. Employee states that as of October 1, 2021, she had not heard from Mr. Banks.⁴² Employee also notes that around November 18, 2021, she was notified that there was a substitution for the hearing officer, a Ms. Calmeise. Employee asserts she was never notified, thus she never submitted anything to Ms. Calmeise nor did Calmeise reach out to her. Employee argues that Ms. Calmeise’s report is based solely on what was provided by OAG, and thus is unfair because she was not

³⁵ *Id.* at Page 4.

³⁶ *Id.* at Pages 5-6.

³⁷ It should be noted that upon the undersigned’s review of the record, the last name of the person referenced is “Getzel.” *See*. Residency forms at Agency’s Brief at Exhibit 2 (August 5, 2022).

³⁸ *Id.* at Page 6.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at Page 6 -7.

⁴² *Id.* at Page 7.

permitted to present her side of the issue.⁴³ Employee also avers that in the Final Notice, OAG noted it weighed mitigating factors regarding abuse with Mr. Walker. Employee asserts that she never told OAG she was in an abusive relationship with Mr. Walker, and thus, “this untruth shows how OAG, or the hearing officer failed to thoroughly read, and consider the information” she provided.⁴⁴

Employee avers that OAG’s claims that her actions were not a one-time occurrence, and completely ignored OSSE’s determination that there was no tuition fraud because her daughter has always been a DC resident and eligible to attend KIPP DC. Employee also argues that she did not allow her OAG colleague “to misrepresent OAG in support of the KIPP application. Enrolling my daughter in KIPP was Ms. Hogan’s suggestion, and because she had to submit and change things for her sibling to help her niece get in to KIPP, she offered to help me do the same.”⁴⁵ Employee argues that OAG citing to the “hundreds of emails sent out to and from me using my DC government email account, which led them to the conclusion that I appeared to have used my OAG-issued computer to alter my paystubs, but not once has OAG shown any emails that I myself, altered any paystub because I didn’t.” Employee avers that “I never knew Ms. Hogan had altered her signature block until it was asked by Mr. Stephen Milak during the deposition. OAG has only shown copies of the paystubs that were altered by Ms. Hogan and given to OAG from KIPP DC because those were the only ones altered.”⁴⁶

Employee asserts that “OEA should find that while OAG may have had cause to take adverse action against me, termination was not appropriate.” Employee argues that Agency ignored the findings of the OSSE investigation. Further, Employee asserts that OAG’s reliance that she “did important work and that they relied upon me to complete my work with honesty and integrity”, does not make termination appropriate for a first occurrence of these causes of action.⁴⁷ Additionally, Employee avers that “Ms. Hogan’s work was just as important or more so based on her grade and the tasks she performed, and it was shown that she was the one that falsified the paystubs, yet she was only suspended.” Wherefore, Employee requests that this Office find that the termination was inappropriate, that it be rescinded and that she be allowed to resign and have the matter removed from her personnel file.⁴⁸

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

ANALYSIS

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or

⁴³ *Id.*

⁴⁴ *Id.* It should be noted that Employee referred to a previous relationship with a “Mr. Thompson” when referencing an abusive relationship. *See also.* Employee’s Brief at Page 2 (September 1, 2022).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at Page 8.

⁴⁸ *Id.*

suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. (*Emphasis added*).

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee's termination was levied pursuant **DPM § 1605.4(a)**⁴⁹ - "**Conduct Prejudicial to the District: unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or confidential information**"; and **DPM § 1605.4 (b) – False Statements-** *Misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; Knowingly and willfully making an incorrect entry on an official record or approving an incorrect official record; and Knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any supervisor; and DPM §1605.4(l) – Prohibited Personnel Practices.*

In the instant matter, Employee was an employee in the Support Services Division ("SSD") at OAG. Employee's responsibilities included handling budgets, managing records and accessing the District's financial database for procurement and purchase orders.⁵⁰ Agency asserts that in 2021, it was "alerted to Employee's potential non-resident tuition fraud and began an investigation."⁵¹ Agency cited that following the completion of its investigation, and investigations conducted by BEGA and OIG, that it was determined that Employee had submitted paystubs with altered addresses as a part of an application for her daughter to attend KIPP DC schools. Agency avers that because KIPP DC requires DC residency in order for a child to attend tuition free, that Employee submitted altered paystubs to reflect a District address. Agency relied upon email exchanges between Employee and another OAG employee from 2014, which reflected the first instance of these actions. Agency also noted that in subsequent years, essentially from 2014-2021, Employee continued to submit paystubs with different addresses than were reflected in her official payroll and personnel records.

Agency further cited that even after notification in March of 2021 of its initial findings, that Employee still completed the 2021-2022 school year form with the submission of an altered paystub. Agency avers that during the times in which it investigated Employee, she retained a Maryland address in the payroll and personnel records but continued to submit a paystub which reflected a District address. Agency asserts that Employee's position at OAG required her to work with procurement and finances, which required honesty and integrity in functions. As a result, Agency avers that it showed cause for adverse action and that termination was appropriate under the circumstances given the egregious and ongoing nature of the misconduct.

Employee avers that OAG wrongfully terminated her. Employee asserts that another employee, Ms. Hogan, altered the paystubs and sent those to KIPP DC in 2014. Employee asserts that she never altered the paystubs. Further, Employee maintains that her daughter was always a District resident during the times for which she enrolled her at KIPP DC. Additionally, Employee argues that OSSE's investigation did not find she was guilty of tuition fraud, and also that her daughter's father was a District resident. Employee asserts that she never maintained that she was a District resident, and that she had housing struggles during the times in question and also lived in Greenbelt, and Silver Spring Maryland at the times. Employee cites that OAG did not give her the opportunity to present her side of the issue to the hearing officer. That notwithstanding, Employee iterates that she was terminated, wherein, Ms. Hogan, the employee who altered the paystubs was only suspended.

⁴⁹ DPM § 1607.2(a)(10).

⁵⁰ Agency's Answer at Page 1-2 (February 4, 2022).

⁵¹ *Id.* at Page 2.

In the instant matter, I find that Agency has met its burden of proof in showing it had cause to take adverse action against Employee. The record is clear that in 2014, Employee utilized an altered paystub, which reflected a Washington, DC address, as a part of the application for her daughter to attend KIPP DC schools.⁵² The record also clearly evinces that in subsequent years, Employee continued to submit paystubs along with the application which also reflected a Washington, DC address. These altered paystubs also reflected Washington DC tax withholdings. Employee has admitted that she did not reside in the District during these relevant time frames. Further, Employee admits that she sent a PDF paystub to Ms. Hogan, that Ms. Hogan altered. The undersigned finds that based upon the charges, Employee's contention that she did not alter the paystub, does not lessen her involvement in the utilization of those forms. Employee's own admissions evince that she was wholly aware that her paystub, which is a government form, was altered and submitted on another government form to verify residency in the District. Employee cited that she sent a PDF version of her paystub to Ms. Hogan, that Ms. Hogan converted it to a word document, altered the address and sent it KIPP officials. Further, the undersigned would note that even after notice of the investigation regarding possible fraud in March 2021, that Employee submitted another application on June 9, 2021, for the 2021-2022 school year, utilizing yet another altered paystub.⁵³ Agency's records, and Employee's admissions, are consistent in that the addresses in the official personnel/payroll files for Employee during the relevant application submission time frames were not the District of Columbia addresses she submitted in the application for residency verifications to KIPP DC. In comparing the paystubs, the official paystubs from DCHR reflect addresses in Greenbelt and Silver Spring Maryland, respectively, and include Maryland tax withholding.⁵⁴

The undersigned would also note that on each submission of the residency verification form for KIPP DC, particularly the most recent form submitted on June 9, 2021, Employee entered a Washington, DC address, after admitting that she did not live in the District.⁵⁵ Further, this Washington DC address is different than the one submitted with the "original" altered stub. The stub that Ms. Hogan altered in 2014 had an address of Franklin Street NE, however, the address submitted with the most recent verification form reflected an address on B Street, SE.⁵⁶ Additionally, neither of these addresses reflect the Maryland addresses in the official DCHR paystubs. This, coupled with Employee's admission that she resided in Silver Spring Maryland until August 2021, effectually show that the submissions were falsified. The undersigned finds Employee's claims regarding her daughter's residency during the times, to be irrelevant to her submission of the altered paystubs with the residency forms. These forms also required an indication of what verification source was submitted, and Employee indicated a paystub would accompany the form for verification.⁵⁷ The paystubs and the residency verification forms are both representative of official government forms which should not have been altered or falsified.

OEA has consistently held, that to sustain a falsification charge, that "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency."⁵⁸ While the undersigned is sympathetic to the challenges Employee faced over the course of the years for which she submitted the KIPP DC

⁵² Agency's Brief at Exhibit 2 (Ms. Hogan's Email and altered paystub) (August 5, 2022).

⁵³ *Id.* at Exhibit 2 (KIPP DC verification form signed by Employee June 9, 2021).

⁵⁴ *Id.* at Exhibit 2 (Original DCHR Paystubs).

⁵⁵ *See* Employee's Brief at Page 3 – Employee notes that she applied for and received a Housing Voucher from Prince George's County Maryland on October 12, 2016. Employee then cites that "I moved into my apartment located at 2300 McMahon Road apt. 2321, Silver Spring, Maryland 20902." Employee notes that her daughter did not live with her. Then, Employee cites "I lived in my apartment until August 2021, after I was no longer able to pay rent or bills...."

⁵⁶ Agency's Brief at Exhibit 2. (August 5, 2022); *See also*. Agency's Sur Reply Brief (September 8, 2022).

⁵⁷ *Id.* The forms have boxes to check/indicated what verification source would be included with the form. Employee elected "paystub."

⁵⁸ *John J. Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); *See also Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

applications, I find that those circumstances would not excuse her continued use and submission of the altered paystubs. Even though the investigations determined that her daughter's father's residency allayed some of the tuition responsibilities, I find that Employee knowingly submitted altered paystubs as a part of the residency verification forms. To that same end, I find that Employee was appropriately charged with Conduct Prejudicial to the District Government and Prohibited Personnel Actions for this same conduct. Employee's position, particularly given her access to financial records, evince the importance of operating in honesty and integrity. The undersigned agrees that Employee's actions were prejudicial to District Government and were prohibited by personnel regulations. Accordingly, I find that Agency has met its burden for the charges levied against Employee in this instant action.

Disparate Treatment Claims

Employee raises a disparate treatment argument in her assertion that Agency's discipline against her was harsher than the employee she alleges altered the paystub.⁵⁹ In *Jordan v. Metropolitan Police Department*, OEA's board set forth the considerations regarding a claim of disparate treatment.⁶⁰ The Board held that:

[An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to [their] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

Accordingly, an employee who makes a claim of disparate treatment has the burden to make a prima facie case showing that they were treated differently from other similarly situated employees.⁶¹ To support this contention, Employee reiterates that she did not actually change the pay stubs and that another employee did, and that employee was suspended while she was terminated. Employee proffered that OAG noted that it relied upon her to complete her work with honesty and integrity, which is why termination for a first occurrence was appropriate. Employee averred that Ms. Hogan's "work was just as important or more so based on her grade and the tasks she performed."⁶² Beyond this, Employee does not offer any substantive proof regarding the disparate penalty in this matter. As a result, I find that Employee's disparate treatment argument fails to meet the burden of proof for this claim. Upon consideration of the aforementioned findings, I find that Agency has met its burden of proof in this matter, and it has adequately proven that there was proper cause for adverse action against Employee.

⁵⁹ Employee's Brief at Pages 8-9. Employee avers that Ms. Hogan, the employee who altered her paystubs, was only suspended for her actions. (September 1, 2022). Employee's brief also contained attachments of what appears to be other co-workers sleeping while on duty. The undersigned finds those attachments to be irrelevant to this instant matter.

⁶⁰ *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-95, *Opinion and Order on Petition for Review* (September 29, 1995).

⁶¹ See *John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), citing to *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994).

⁶² Employee's Brief at Page 8 (September 1, 2022).

Whether the Penalty was Appropriate

Based on the above-mentioned findings, I find that Agency's action was taken for cause, and as such, Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).⁶³ According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM § 1607; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."⁶⁴ Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."⁶⁵

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to terminate Employee from service.⁶⁶ Chapter 16 §1607 of the District Personnel Manual Table of Illustrative Actions ("TIA") provides that the appropriate penalty for a first occurrence for Conduct Prejudicial to District Government ranges from Counseling to Removal.⁶⁷ For a first occurrence of False Statements, the penalty range is from

⁶³ *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). 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).

⁶⁴ See *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*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

⁶⁵ *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁶⁶ *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;
- 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.

⁶⁷ DPM § 1607.2 (a)(10)

Counseling to Removal.⁶⁸ Additionally, the TIA provides that the appropriate penalty for a first occurrence of Prohibited Personnel Actions ranges from Suspension to Removal.⁶⁹ As a result, I find that removal is an appropriate penalty under the circumstances. Accordingly, I further find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and not a clear error of judgment. I conclude that Agency had appropriate and sufficient cause to terminate Employee from service. As a result, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee from service is **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Administrative Judge

⁶⁸ DPM § 1607.2 (b)(3) (2019).

⁶⁹ DPM § 1607.2(1) (2019).