

address Employee's motion. Upon consideration of this motion, the Prehearing Conference was rescheduled for March 3, 2017. Subsequent to the Prehearing Conference, a Post Prehearing Conference Order was issued which required the parties to submit legal briefs addressing the issues in this matter. Both parties filed their briefs accordingly. Upon consideration of the briefs submitted by the parties, it was determined that an Evidentiary Hearing was warranted. After a number of continuance requests were granted, an Evidentiary Hearing was held on February 7, 2018. Both parties were afforded the opportunity to present testimonial and documentary evidence. The record is now closed.

JURISDICTION

This 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 for “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty.”
2. If so, whether removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.² “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.

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.³

Agency's position

Employee was hired as a Contracts Management Specialist on September 27, 2010 and was responsible for oversight of Agency's performance-based contracts with private agency congregate care providers. On April 2, 2015, Employee's title in the Foster Care Resources Administration changed to Program Monitor due to a reorganization of the Contracts Monitoring Division. Despite this title change, Employee's duties essentially remained the same.

Agency asserts that Employee began to exhibit work-related difficulties beginning in 2013, and culminated with difficulties in 2015, which led to her ultimate removal, effective, March 4, 2016. Specifically, Agency maintains that the cause of Employee's removal was an

² 59 DCR 2129 (March 16, 2012).

³ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

incomplete audit of a private provider and failure to use the required Staff Clearance Tracker Form, in addition to submission of a quarterly report to her supervisor that contained incomplete and inaccurate information each time it was submitted.

Employee's removal from her position as a Program Monitor for neglect of duty was based on two specifications: (1) an incomplete 100% desk audit of a private provider, Umbrella, to be completed prior to transfer to another Program Monitor; and (2) Employee's submission of a quarterly report for Umbrella, which contained numerous errors each time it was submitted to her supervisor for review. Employee revised the draft of the quarterly report four times prior to its final submission.

Employee's position

Employee asserts many issues regarding her removal, including Agency's violation of District and Federal Family Medical Leave ("FMLA"), her civil rights, a contractual obligations, torts, and other statutory violations.⁴ While a number of issues raised by Employee are outside the purview and jurisdiction of this Office, the undersigned will address whether Agency had cause to take adverse action, and if so, whether removal was appropriate under the circumstances.

Employee's main contention is that Agency retaliated against her for taking FMLA leave. Employee also contends that Agency violated whistleblower protection laws. Further, Employee raises a disparate treatment argument which stems from her 2013 notice to her supervisors of the need for "medical/leave accommodation[s]."

In 2012/2013, Employee lost her mother and sibling and requested FMLA leave to attend to her family's estate in Connecticut. Employee was also referred to the Employee Assistance Program (EAP) for grief counseling.

In response to Agency's claim that Employee failed to complete an oversight visit with Umbrella, Inc., and failed to use the required Staff Clearance Tracker form, Employee highlights that shortly after her position was converted to a Program Manager, her new supervisor, Mr. Ransom Washington, advised the unit that he was making changes to how quarterly reports were written. Employee indicated that traditionally the practice and protocol for conducting a quarterly oversight is to be completed by both the primary and secondary Program Monitors. However, in the instant matter, Employee asserts that she was instructed to complete the Q4 oversight report without her secondary Program Monitor (Cedet Francois). Employee was also instructed to complete another oversight report of Umbrella in October, without explanation. Employee additionally asserts that traditionally, it was left up to Program Monitors on how to track staff clearances.

In response to Agency's claim that Employee submitted an inaccurate and incomplete fourth quarter report for Umbrella, Employee highlights that during the period in which that quarterly report was submitted, she was out on FMLA leave and also served a suspension during this time. While Employee was out on FMLA and during her suspension, she maintains that two

⁴ See [Employee's] Brief, at 1 (May 12, 2017).

other Program Monitors, Mr. Billie Baker and Cedet Francois, were responsible for overseeing Umbrella (and Echelon, Inc.) compliance. Baker and Francois were listed as primary Program Monitors in the previous three quarters.

Employee was approved for FMLA from March 2, 2015, through April 15, 2015, which was taken in a continuous block. Employee was also approved to take leave intermittently between April 16, 2015, and July 16, 2015 (up to three times per week).

SUMMARY OF TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding. During the Evidentiary Hearing, I was able to observe the poise, demeanor, and determine the credibility of the witnesses.

Agency’s Case-in-Chief

Ransom Washington (“Washington”) Tr. 10-183

Washington worked as a Performance Improvement Program Manager for three years with Child Family Services Agency (“Agency” or “CFSA”). Program Monitor were responsible for working with group homes, ensuring regulation for the contracts, and making sure that the provider received staff clearances for their employees. He explained that there was a contract between Agency and the group home providers, and stated that the main responsibility for the Program Monitor was to ensure that the services that Agency contracted for with particular providers were met.

Washington explained the process of receiving a staff clearance; He stated that there are regulations that are outlined in the D.C. Municipal Regulations (“DCMR”) on how an individual becomes licensed in a group home and/or independent living facility. The individual would obtain clearances that stated they do not have any drug, felony, or child abuse and neglect charges. Individuals cannot have contact with a child until the clearance is complete. Washington further explained that Child Protective Registry (“CPR”) clearances expired every year; while state, local, and the Federal Bureau of Investigation (“FBI”) clearances expired every two years.

Every quarter, Program Monitors are required to perform a desk audit regarding the expiration of the clearances. It is their responsibility to ensure that the clearances remain valid throughout the contract cycle as long as the individual is employed by Agency. Additionally, Program Monitors are responsible for checking to determine if an individual was arrested for something that was against regulations. Monitoring the individual served as an opportunity to track the individual, especially if they did not disclose the information.

Washington explained that if an individual had an expired clearance, the Program Monitor would send an email to the provider indicating that the individual had an expired clearance. The Program Monitor also noted what the expired clearance was, and indicated when

it expired. Next, the Program Monitor would have the individual removed from the staff roster and work with the provider to obtain the new clearance. If there was an extensive delay, the Program Monitor was notified of the delay and was responsible for ensuring that the individual refrained from working. Regardless of the delay, the individual was not able to work unless they received the proper clearance. If the provider was informed that the individual was to be removed and the provider did not comply with the request, the Program Monitor had to document the provider's failure to comply and contact their supervisor to inform them of the issue.

If there was ever a time where the provider added the individual to the roster without permission, the Program Monitor would document the incident and inform their supervisor. If a provider failed to submit the clearance in a timely manner that was agreed upon, the issue would be escalated because it would impact on the individual's contract, and Agency could terminate the contract. Washington expressed that it was essential to follow-up if an individual had expired clearance because ultimately, it was essential to the youth's care. He explained that Agency provided care for persons who were already in a vulnerable state.

Occasionally, Program Monitors received assistance from other Program Monitors on certain assignments. Washington explained that there was a pairing system. One Program Monitor was a lead monitor and assigned to the program, while the other Program Monitor served in secondary capacity. The secondary was there to ensure that the lead completed everything correctly.

Washington testified that a lot of pairings were in place to assist Employee with some of the difficulties that she had with completing her assignments. From April 2015 to November 2015, Employee was paired with Billy Baker ("Baker") and Angela Seegars ("Seegars"). Seegars became Employee's secondary monitor in September of 2015. She expressed concern about Employee via email to Human Resources ("HR") regarding Employee's work performance. Seegars stated in the email that she did not want to be responsible for completing Employee's work and did not want to be held accountable for any of Employee's deficiencies. Washington told Seegars to keep him abreast if she experienced any further difficulties with Employee and he would address the issues as they arose. After Employee was removed from Agency, there were no issues with any of the other Program Monitors so Washington discontinued the pairing system.

According to Washington, Employee completed the desk audit and Seegars, one of the other Program Monitors, verified the documents and noticed a lot of discrepancies in Employee's audit. One of the main issues was that one of the staff members on a provider's roster had an expired clearance. Washington stated that he informed Employee on how to properly complete the task.

Initially, Washington did not notice any issues with Employee. However, one of the first indicators that presented an issue was when he asked Employee to provide a summary of all the programs. Washington asked the Program Monitors to provide him with a synopsis of the programs that they were monitoring. He particularly remembered Employee stating that one of the providers, Umbrella, was a challenge because it did not comply with her requests. He

explained to Employee that she was the contract owner, and Umbrella was contractually obligated to respond to her requests.

Washington found that Employee neglected her duties; therefore, he proposed her termination in the Advance Written Notice. He explained that the charge was for neglect of duty and the submission of a report with multiple errors. Washington further explained that he provided Employee with specific directives in order to obtain the staff clearances. Further, Employee was provided a clear directive on her task in addressing the provider, Umbrella. He had Employee complete a 100% percent desk audit for all of the staff at Umbrella, and provided her with a deadline for which the assignment was to be completed, but she was unable to complete the reports in a timely manner.

Washington testified that Employee should have informed the provider when the clearances were needed and followed-up with the provider within twenty-four hours to make sure that she received the clearances. He further explained that Employee failed to complete a 100% desk audit because the clearance for T. Sullivan (“Sullivan”) expired on April 17, 2015. Washington stated that Employee was well aware of the expired clearance in August 2015. Employee was physically onsite to rectify the clearance issue and contact the provider to inform them that the clearance was needed the following day. However, no follow-up was completed until October 2017. Washington stated that it was unlikely that there would have been an issue obtaining the clearance and if there was, or the provider was non-compliant, Employee should have notified her supervisor of the issue. Washington considered the matter regarding Sullivan a fortunate situation for Agency because Sullivan was not criminally charged. However, had Sullivan been convicted for possession of a gun and marijuana, Agency would have been liable.

Washington was aware that Employee was out on Family Medical Leave Act (“FMLA”) on an intermittent basis during 2015. Employee received FMLA leave from July 13, 2015, to September 14, 2015. Employee was on continuous leave from July 13, 2015, until July 31, 2015, and then on an intermittent basis from August 3, 2015, to September 14, 2015. After September 14, 2015, Employee returned to work full time. In Employee’s absence, the secondary Program Monitor’s responsibilities varied. They could have specifically provided coverage in case a problem occurred with the program; however, the secondary would not have been responsible for maintaining Employee’s daily tasks.

There were four inaccurate Quarterly Reports submitted by Employee during Q4 during Fiscal Year (“FY”) 2015. Washington stated that he was the one who made the edits on the reports. Washington explained that the quarterly report was the provider’s evaluation of their performance for that specific quarter. Based upon the reports that Employee presented, the numbers on the Q4 report were different than what was indicated on data sheets. It was unacceptable to Washington that he had to revise Employee’s report four times because it indicated that she did not give attention to details. Washington did not understand the disconnect with Employee despite outlining and making comments on what was specifically wrong with her report. Washington further explained that Employee’s inaccuracies occurred because her numbers were consistently incorrect. He was not concerned about the verbiage in the report, but rather that the numbers provided accurately reflected the data. Washington explained that the

quarterly reports needed to be sent out in a timely manner so that the provider would know what their performance rating was and where they stood.

Washington stated that if Employee's files were not up to date on the shared drive, it would not be the secondary's role to correct any mistakes that Employee may have made because they would not know what mistakes to look for. Further, he stated that Employee was the leader of her program. When Employee returned to work, she was instructed, via email, to review and get up to date with her work. Moreover, Employee had three opportunities to correct any mistakes by herself or others. She had the opportunity to make corrections when she returned to work, when she sent the email in August and September of 2015, and when Washington sent her out in October to check for expired clearances.

Washington stated that the policy established in 2009 regarding a secondary Program Monitor remained the same until Employee's removal. Agency wanted to change the policy, but there was concern that changing the policy would cause issues with Employee.

Washington testified that Employee questioned if he had put her on a Performance Improvement Plan ("PIP"), and he told her that she was not. Washington reiterated that Employee had four opportunities to correct the clearance tracker issue. Washington further explained that every year, D.C. Government employees received a performance plan which included the standard metrics that employees were required to meet based on communication, accountability, job performance, and job knowledge. There were specific smart goals, separate from a PIP that had to be met. One of the goals for the Program Monitors was timeliness of the reports.

Washington stated that compared to other monitors, Employee was the Program Monitor with the most back logs and her reports required the most corrections.

Cedet Francios ("Francois") Tr. 185-215

Francois currently works as a Contract Specialist with the D.C. Office of Contracting and Procurement. Prior to that, he worked at Agency as a Program Monitor from July 2007 until June 2016. He explained that as a Program Monitor, he was responsible for ensuring that the providers met all of the contract requirements, and held the providers accountable for all of the Section C requirements in the contract.

Program Monitors collected data from the various outside providers contracted with Agency, evaluated the data based on the requirements, stored the programs, and wrote a monthly and quarterly comprehensive report highlighting any challenges or recommendations.

Francois served as Billie Baker's secondary, who was serving as the primary Program Monitor on Employee's contracts while Employee was out on FMLA leave for a period of time in 2015. In this capacity, Francios's role was to support Baker. He also assisted Baker with the Umbrella contract. Francois was familiar with the clearance issue surrounding T. Sullivan, but

testified that it was not his responsibility as the secondary Program Monitor to follow-up on this issue.⁵

According to Francois, the role of a secondary Program Monitor was to do whatever the primary Program Monitor needed. The primary monitor was responsible for planning the site visit, the oversight inspection, and assigned certain tasks to the secondary. The primary was responsible for scheduling the oversight visits. Two visits were conducted during the quarter, one announced, and the other unannounced. During the announced visit, the provider knew that the Program Monitors reviewed files, conducted audits, and retrieved data. The secondary served as a support role, and the primary was the lead. Francois stated that it was the provider's responsibility to make sure that their staff was cleared. With regard to Sullivan receiving the staff clearance, Francois stated that it was the responsibility of the provider to follow-up and make sure that their staff were cleared.

To conduct a proper 100% desk audit, the Program Monitors have to make sure that they reviewed all of the clearance documents to see if there were any criminal charges for employees listed on the provider's roster. If criminal charges were found, the provider was immediately notified that the staff person could not work until the Program Monitors reviewed the court documents. The court documents determined whether or not the staff person could continue to work on the contract. Once the clearance documents were received, they were reviewed and the final determination was made by the program manager on whether or not they could return back to work. Francois further explained that if the Program Monitor notified the provider about the expired clearances and nothing was done, the Program Monitor should elevate it and inform their program manager to get involved. If T. Sullivan was not removed from the staff schedule roster, it was the Program Monitors' responsibility to take the issue directly to their superior for immediate action to be taken.

On cross-examination, Francois testified that there were usually challenges with obtaining the staff clearances for Umbrella. When Francois initially took over Umbrella, he did a 100% staff clearance review and found several expired clearances. He immediately notified his manager of the issue so that it could be rectified.

Christine Phillips ("Phillips") Tr. 217-270

Phillips worked as a Supervisor for Contracts and Monitoring at Agency from 2012 through 2015. Phillips was a Contract Monitor, which was a different position from a Program Monitor; however, they were under the same division. Phillips supervised Employee and stated that Employee was often behind on her quarterly reports and did not communicate with Phillips. She further explained that Employee was neglectful because she did not complete reports.

According to Phillips, Employee failed to complete the 4th Quarter annual evaluation. She explained that Employee failed to complete the evaluation accurately after five edits from the program manager. Phillips stated that the numbers on Employee's reports were constantly inaccurate and there were times when it took as many as eight revisions for the report to be

⁵ Tr. 197-200

satisfactorily corrected. Additionally, Employee had a lot of grammatical errors on her reports. Employee's inconsistencies affected the efficiency of Agency because they were often quarters behind. While Agency would be on the fourth quarter of the FY, Employee was still on her third quarter reports.

In the beginning, Phillips reviewed the reports with Employee making any comments or edits needed to help her get up to speed. Phillips found that during her three-year tenure with Agency, Employee would use different versions of a report, which led to Employee's confusion of which report she should work on.

After Phillips conducted staff meetings, Employee would speak with her and state that she was not clear on what was expected of her. Phillips decided to create meeting minutes solely for Employee so that she would have her expectations in writing. The assignment given to the Program Monitors remained in effect for a two-year period.

When Phillips left Agency, Employee was still having performance issues. She believed that Employee's work performance would not have improved based on her experience with working with her. Phillips did not think that Employee was efficient, detail oriented, or possessed traits that were needed in her profession to successfully complete her job.

Phillips explained that Program Monitors were scored on their staff clearances. If the provider failed to provide the requested information, the Program Monitor would contact their superior because the lack of response was considered a violation of contract. The provider would be issued a notice of infraction, and the monitor would continue to follow-up with the clearance until the matter was resolved.

Phillips testified that she was aware that Employee was out on FMLA from 2013-2015. Phillips could not recall the contingency plan with the other Program Monitors during Employee's absence.

Phillips explained that the Excel spreadsheet developed for Program Monitors was weighted. She stated that every section was weighted and the Monitors who plugged in their numbers used the formulas that were in the spreadsheet. Once the numbers were plugged in, a populated score was provided. Phillips did not believe that Employee possessed the skill set of inputting numbers because her numbers never came back accurate. She determined that Employee did not know how to work an Excel spreadsheet, or that she was not collecting the data accurately for it to be reflected in the spreadsheet. Phillips also noted that there was no flaw with the algorithm, and employees were able to take advantage of Excel training provided by the government.

Phillips recalled Employee's training transcript, which indicated that Excel training was listed. She further stated that Program Monitors were expected to use the staff clearance tracker form to update the clearance of a provider.

Billie Baker (“Baker”) Tr. 270-312

Baker worked as a supervising Program Monitor with Agency for two years. Prior to that, he was a Program Monitor for nine years. He worked with Employee as her secondary monitor from October 2013 until October 2015.

Baker was familiar with a 100% desk audit and explained that it occurred whenever Agency received a new contract. The Program Monitors would review the providers’ staff members’ credentials to determine whether they could work under contract. All Program Monitors were aware that they were required to track the clearances for all employees of the providers that the Program Monitors were assigned. If the staff member’s clearance was expired, the Program Monitor was responsible for following-up by sending an email to the provider that the staff member could not provide services, and requested that an updated schedule indicate that the person was no longer on the roster.

During the third quarter of the 2015 reporting year, Baker and Cedet covered Employee’s programs while she was out on FMLA. When Employee returned to work in August of 2015, Baker accompanied Employee for an onsite visit to Umbrella. There was a clearance issue for staff member, T. Sullivan. As Employee’s secondary monitor, Baker reviewed staff records and found that Sullivan had expired clearances, and a possible charge on her criminal background. Once a Program Monitor identified an issue with a staff member on a provider’s roster, the Program Monitor was required to take the information collected during oversight, and send the provider a preliminary email within twenty-four (24) hours stating that the individuals were ineligible to work underneath the contract because of their expired clearances.

To obtain clearance documents from the provider, the Program Monitor would review each staff member’s personnel file and see what clearance the member was missing. If the documents were not provided immediately, a Program Monitor would follow up via email and request the documents.

Baker stated that he never had an issue receiving staff rosters from Umbrella. He testified that he always received the information he requested. However, Baker admitted that he did experience a time when he did not receive all of the information on a staff roster for a contract that he monitored. He stated that although there were times when he did not initially receive what he requested, he made sure to follow-up.

Baker explained that the actions he took to follow-up on a clearance request involved emailing the provider so that a paper trail was left, and gave the provider another chance to produce the documentation needed. Because the clearances were health and safety issues, Agency did not want the youth around staff members who had clearance issues. Baker stated that it was the responsibility of the Program Monitor to follow-up until the matter was resolved.

If there was an old Program Monitor who transferred the case and requested any information, the provider would send the information to the old Monitor via email, rather than send it to the new monitor, because the provider might not have been aware of the transfer.

Baker testified that he did not complete the reports in the third quarter from April of 2015 to July of 2015. Baker opined that it was possible that the Program Monitor assigned to the program would not have written a report because if Agency anticipated Employee returning to work in July or August, and the reports were not due, it would be Employee's responsibility to complete the report. Baker was unsure of who wrote Employee's reports for the first and second quarters, but stated that they were completed.

There was no mechanism for tracking whether a staff member's clearance was set to expire. Baker stated that the Monitor had the clearance tracker, which had every employee's name, hire date, and expiration of when the clearance expired. Thus, if there were five names that were about to expire, or had already expired based on the monitor's chart, the Program Monitor was responsible for reporting these findings. When the Monitor went onsite, it was expected that the clearances were current and in the employee's personnel record.

Baker asserted that terminating a contract with a provider because of clearance issues with one of its employees was a drastic measure that should never be reached. He explained that the provider would terminate an employee if there were clearance issues prior to the contract being in breach because it was more important for the provider to be in compliance with Agency.

Angela Seegars ("Seegars") Tr. 312-340 (telephonic testimony)

Seegars worked for Agency as a Program Monitor for seven years. She was Employee's secondary monitor in October 2015. Seegars explained that when a program under contract is transferred from one Program Monitor to another, the current Program Monitor would provide a transfer summary in writing. If there were any issues related to a particular program, it would be reflected in the program summary and discussed between the outgoing Program Monitor, incoming Program Monitor, and a supervisor.

Seegars further explained that on October 28, 2015, Washington instructed Employee to conduct a 100% desk audit at Umbrella. A 100% desk audit meant that Employee was to review all the records, the current staff roster, and make sure that the staff had updated clearances. Once Employee completed her task, Seegars reviewed her work. The importance of this was to make sure that they did not have staff working with pending charges that would prevent a staff member from continuing to work under the contract.

Seegars stated that initially the staff clearance tracker and format was correctly completed by Employee. However, when Seegars monitored Employee's work, she noticed that when Employee validated what was sent to the clearance tracker there were multiple inaccuracies that erroneously indicated that staff had clearances. Specifically, T. Sullivan raised a red flag to Seegars because of the criminal charges that Sullivan sustained. Seegars found that there was an issue with Sullivan's clearance when she validated the roster from the provider and she compared it to the tracker that Employee completed once she noticed that Sullivan's clearance was expired.

Employee never informed Seegars that there was an issue with obtaining clearance for one of Umbrella's staff members. Seegars stated that she should have been made aware of what happened in the program so that it would have been monitored effectively.

Christal Williams Tr. 341-366

Williams is a manager for employee and labor relations within Agency's Office of Human Resources. In this capacity, Williams served as the custodian of personnel records for Agency employees. Williams confirmed the documents for Employee's FMLA leave in 2015. Williams testified regarding the documents that were sent to Employee advising Employee of her FMLA status and the dates in which she was approved for FMLA in 2015.

Williams stated that she was familiar with the 2012 District Personnel Manual ("DPM") and it was her understanding that pursuant to the DPM, an employee could be terminated for the first offense of neglect of duty. Further, she attested that Agency had imposed neglect of duty charges against Employee on more than one occasion and Employee was provided several opportunities to improve her work performance.

Employee's Case-in-Chief

Cheryl Span ("Employee") Tr. 366-380

Employee testified that Agency had an extensive history of ignoring Umbrella's patterns of noncompliance in accordance with their Human Care Agreement. Employee did not understand how Agency rationalized that she neglected her job when she was absent from work on approved leave. Further, Employee claimed that she was not insubordinate, nor did she have professional issues with the providers and how she delivered her services. Employee claimed that ethically, HR did not base its decision properly because of her FMLA status. Moreover, Employee felt that she did not receive support from management and was falsely accused of not accurately completing her job.

Employee testified that it was not true that she did not follow-up to obtain the clearance documents. Employee further explained that when she returned to work, Washington told her to prioritize getting the reports out. However, it was difficult because although Employee returned to work, she was still out one day per week on FMLA for post-surgery rehab.

Employee was at work when Washington asked her to complete a 100% desk audit on October 27, 2015. Employee did not indicate that there was an issue with the staff clearance before the program was transferred to Seegars. Employee stated that Seegars did not realize until November 2015 that the clearance was not completed, because it took sixty to ninety days to obtain a staff clearance. Furthermore, Employee stated that she did not indicate in her transfer memorandum to Seegars that there was a clearance issue with Sullivan.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The undersigned was able to examine both the testimonial and documentary evidence presented by the parties throughout the evidentiary hearing and the documents of record. Employee was removed from her position based on the following charge: Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty.⁶

Agency is required to prove the facts with respect to each of the alleged acts of misconduct by a preponderance of the evidence.⁷ Pursuant to OEA Rule 628.1, “preponderance of the evidence” is defined as “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.”

Whether Agency’s adverse action was taken for cause

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 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.

Whether Agency had cause to take adverse action against Employee for: Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty.

The 100% Desk Audit

Employee was directed by her supervisor, Mr. Washington, to complete a 100% desk audit for the entire staff at Umbrella by October 30, 2015. Employee was asked to complete this task via e-mail on October 27, 2015. Employee was required to use the requisite staff clearance tracker form and was also directed to prepare a written transfer summary to Angela Seegars, another Program Monitor who was slated to take over the Umbrella contract. However,

⁶ See Section 1603.3(f)(3) of Chapter 16 of the D.C. Personnel Regulations. The Personnel Regulations were updated effective, February 25, 2016. The previous version of the D.C. Personnel Regulations, which were effective on August 27, 2012, has been cited since it was the version applied at the time of Employee’s misconduct.

⁷ OEA Rule 628.1, 59 DCR 2129 (March 16, 2012)

Employee failed to complete the directive as ordered, and thus neglected her duties as a Program Monitor.

Employee was aware since at least August 31, 2015, that the FBI and local clearances of T. Sullivan, a staff member at Umbrella, had expired. However, T. Sullivan still remained on the staff roster at the time the Umbrella contract was transferred to Angela Seegars in November 2015. Further, Employee did not obtain the required clearance documentation from Umbrella during her site visit on October 28, 2015. There is no indication in the record that Employee ever followed up to retrieve the documents pertaining to T. Sullivan, yet Angela Seegars, upon request to Umbrella, was able to retrieve the documents on the same date she requested them. Although Employee stated in her Summary Transfer memorandum to Angela Seegars that she completed the 100% audit and that the staff clearance information was current, management found that her statements were incorrect. Ms. Seegars, upon request for the clearances from Umbrella, found that T. Sullivan's local and FBI clearances had expired. Agency learned that the FBI clearance showed that T. Sullivan was arrested on December 23, 2014, with multiple charges, including possession of marijuana with intent to distribute, possession of an unregistered firearm, and possession of unregistered ammunition. If T. Sullivan was convicted of this charge, Umbrella would have been effectively prohibited from rendering services to CFSA, pursuant to 29 DCMR § 6228.2, displacing those receiving care.⁸

The crux of the charge in the instant matter is that Employee neglected her duties by not following up with Umbrella regarding T. Sullivan's clearance status. Employee knew prior to October 28, 2015, that T. Sullivan's clearance had expired as of April 17, 2015. Employee sent an email to Mr. Russell, a Program Director with Umbrella, on August 31, 2015, informing him that 14 staff members at Umbrella had expired clearances and therefore should immediately be removed from the roster.⁹ T. Sullivan was one of the staff members listed in this email. Additionally, on September 16, 2015, Employee conducted an announced oversight visit to Umbrella's C Street, SE location. The results of her visit are documented in an email dated September 17, 2015 to Mr. Russell, and it was noted specifically that staff member T. Sullivan's "clearances for the D.C. MD local expired on 4/17/205 [sic]."¹⁰ Furthermore, Employee did not direct Umbrella that they were required to remove T. Sullivan from the roster nor did she inform her supervisor of the issue.

As Mr. Washington testified at the evidentiary hearing, it was Employee's responsibility to follow up with the provider, to be proactive, and ensure that if the clearance documents were not obtained, then that staff member (T. Sullivan in this case) was removed from the staff roster.¹¹ While it is acknowledged that Employee followed up with Umbrella on August 31,

⁸ 29 DCMR § 6228.2 provides that: All prospective and existing staff shall undergo a criminal records check prior to commencing work at any facility. The facility shall obtain the written approval of the licensing agency and the contracting entity prior to employing any person who has been convicted of the following offenses or their equivalents:

(a) Fraud; or

(b) A drug-related offense.

⁹ See Agency's Answer, Tab 20, attached email from Employee to Mr. Russell on August 31, 2015.

¹⁰ See Tab 20, attached email from Employee to Mr. Russell, dated September 17, 2015. The date referred to is 4/17/2015; the email contained a typographical error as to the date listed in the email.

¹¹ Tr. at 72-77.

2015, Employee did not provide Umbrella with a deadline within which to provide the clearance documents.¹² This was Employee's responsibility as Program Monitor, since T. Sullivan's clearance had expired long before that date, on April 17, 2015. Thus, in her August 31, 2015 email, Employee should have required Umbrella to submit the documentation within 24 hours or have T. Sullivan removed from the roster.¹³ Umbrella would be expected to comply as it is contractually obligated to provide Employee with the documents; otherwise, the contract could be terminated.

As of November 2015, when the Umbrella contract was transfer to another Program Monitor, Seegars, T. Sullivan remained on Umbrella's staff member roster. There is no evidence in the record that suggests Employee took any proactive action to compel Umbrella to provide documents pertaining to T. Sullivan's clearance or having T. Sullivan removed from their roster. Thus, I find that Employee neglected her duties with regard to Specification No. 1 by failing to complete an accurate 100% desk auditor after being given ample opportunity to correct all issues with the provider Umbrella.

Despite being given several opportunities to correct the issues with Umbrella, Employee failed to do so. Employee contends that she could not have rectified the situation as described by Agency because she was on FMLA leave. Employee further blames her co-workers, specifically Cedet Francois, for not updating the clearance information with regard to T. Sullivan. However, as testified by Mr. Washington, he provided Employee with the opportunity to resolve any clearance issues upon her return from a continuous block of FMLA leave.¹⁴ After September 14, 2015, Employee was no longer on FMLA leave. While it is noted that Employee was out on FMLA for a continuous period of time at various points in 2015, she also seems to suggest that while out on intermittent FMLA in 2015, that she was not responsible or capable of properly overseeing the Umbrella contract. It is understandable that while out during a continuous block of FMLA leave that she was not be in a position to oversee the Umbrella contract as expected by Agency. However, being out on intermittent leave, up to one time per week during the relevant time period, did not absolve Employee from carry out her duties for the days when she was present at work.

As such, after conducting the 100% desk audit in October 2015, Employee should have obtained the clearance documents or otherwise made sure that T. Sullivan was removed from the staff roster. The undersigned finds that Employee's failure to do so was a neglect her duties.

Quarterly Reports

With regard to Employee's preparation of her Fourth Quarter Report for Fiscal Year 2015, Employee neglected her duties in this instance because the Report was edited by her

¹² Tr. at 72-77.

¹³ *Id.*

¹⁴ Employee was on a continuous block of FMLA leave from March 2, 2015, through April 16, 2015. This was followed by a period of intermittent FMLA leave (up to three times per week) between April 16, 2015, and July 16, 2015. Employee was again out on a continuous block of FMLA leave from July 13, 2015, through July 31, 2015, followed by another period of intermittent FMLA leave (up to once per week) between August 3, 2015, and September 14, 2015. See Agency's Exhibit 5.

supervisor and sent back to Employee for revisions on at least four separate occasions due to the lack of detail and number of errors.¹⁵ Employee's supervisor, Mr. Washington, sought more detail from Employee in the Report as there were multiple errors of omission and lack of details. The report also contained many inaccuracies with regard to the data included.¹⁶ Because Employee's 4th Quarter report had to be sent back to Employee four times for multiple errors, including numerical errors in the data input, it is evident that Employee neglected her duty to provide accurate reports. The numerous errors and lack of detail contained throughout the four versions submitted by Employee was unacceptable given Employee's position and her experience with Agency. I found Mr. Washington's testimony to be very credible with respect to Employee's work performance. Mr. Washington's testimony regarding Employee's work performance is further supported by the four editions of the Fourth quarter submitted by Employee.¹⁷

As Employee's supervisor, Mr. Washington reviewed and edited all four draft reports of Employee's 4th Quarter report for Fiscal Year 2015.¹⁸ Mr. Washington testified to the inaccuracies in the reports at the evidentiary hearing; specifically he noted that the numbers did not add up based on what he saw in the data sheet.¹⁹ Mr. Washington testified credibly that he did not have to edit similar quarterly reports drafted by other Program Monitors as many times as he did with Employee.²⁰ Furthermore, the number of edits on such documents was part of what was considered in a Program Monitor's performance review – the requirement was no more than four edits.²¹

Phillips', who also served as Employee's supervisor for a period of time, also provided testimony that Employee exhibited difficulties in her work performance dating back to January 2013.²² On numerous occasions, Employee was verbally counseled, sent countless reminder emails, and had numerous meetings with her supervisors where they provided clarity on her assignments and duties. She was counseled on several occasions regarding the expectation to meet deadlines and to provide required and accurate documentation and data. Employee had been reprimanded on several occasions regarding her poor work performance and failure to meet deadlines. As reflected in the record and at the Evidentiary Hearing, Employee was given numerous chances to improve her performance, yet failed to do so. Much of Phillips' testimony corroborated the testimony of Washington, both of who served as Employee's supervisor at varying times. I found Phillips' testimony to be very credible and forthright. Additionally, Phillips is no longer with Agency, thus I further find that she had no motive or incentive to give anything other than her honest and objective testimony regarding Employee's work performance. Accordingly, I find that Employee neglected her duty by failing to ensure accuracy and the pertinent details within her 4th Quarter Report for FY 15.

¹⁵ See Agency's Answer, Tab 20; See also Agency Evidentiary Hearing Exhibit 3, Bate Stamps 48-92.

¹⁶ See Agency's Answer, Tab 20.

¹⁷ See Agency Evidentiary Hearing Exhibit 3, Bate Stamps 48-92.

¹⁸ Tr. at 98.

¹⁹ Tr. at 101-103.

²⁰ Tr. at 181.

²¹ Tr. at 105.

²² Tr. at 218-240.

Appropriateness of the Penalty

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). 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.

Furthermore, Chapter 16 of the District Personnel Manual (DPM) establishes a Table of Appropriate Penalties by which Agencies are guided as to the permissible level of penalty that may be imposed against an employee for a specific cause. It instructs that a first offense for "Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations," specifically, "neglect of duty" carries a potential penalty ranging from "Reprimand to Removal."²³ As demonstrated by the record in this case, Employee has been previously disciplined based on charges of Neglect of Duty. Employee was suspended for 15 days²⁴ based on the charge of Neglect of Duty and Incompetence as of June 2, 2015 – within the same year that Employee continued to neglect her duties with regard to the 100% audit of Umbrella and the quality of completing the quarterly Report for Umbrella.²⁵ Prior to that, Employee was disciplined on April 19, 2013, February 3, 2014, and July 7, 2014,—all on Neglect of Duty charges.²⁶ Thus, the Charge of Neglect of Duty cited in the Advanced Notice dated January 20, 2016, constitutes the fifth time Employee has been charged with Neglect of Duty and disciplined based on this charge.

It is apparent that Agency has attempted to work with Employee and assist her with her deficiencies on several occasions. The Table of Appropriate Penalties provides that an appropriate penalty for a first time offense under a "Neglect of Duty" charges is a reprimand to a removal. Here, Agency elected to remove Employee after she incurred her fifth "Neglect of Duty" charge within a three year time span. I find that removal in this case is within the appropriate penalty as provide under 6-B DCMR § 1619.1(6)(c) and that Agency appropriately exercised its managerial discretion in opting to remove Employee from her position.

Furthermore, the Hearing Officer reviewed both aggravating and mitigating factors under *Douglas* in her report and recommendation regarding Employee's removal.²⁷ She noted that Employee was disciplined on four previous occasions between January 2013, and the date of the issuance of the Advanced Notice on January 20, 2016, in the instant matter. After the consideration of relevant aggravating and mitigating factors²⁸, the Hearing Officer found that termination was the appropriate penalty. Thus, I find that Agency appropriately considered all relevant *Douglas* factors.

²³ 6-B DCMR § 1619.1(6)(c) (August 27, 2012).

²⁴ The penalty was originally 30 days but was reduced to 15 days after Employee filed a grievance.

²⁵ See Agency's Answer, Tabs 15-19 (May 6, 2016).

²⁶ See Agency's Answer, Tabs 5, 8, 9, and 11.

²⁷ See Agency's Answer, Tab 21.

²⁸ The *Douglas* factors are:

(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;

Employee's written closing arguments

In Employee's written closing arguments, she addresses two arguments that are outside the scope of the undersigned's review. The arguments raised by Employee in her written closing argument take issue with the way the negotiation/mediation process unraveled in this matter. However, the decision to take adverse action against Employee was ostensibly made prior to any settlement negotiations engagement. Thus, this decision is based solely on the issues identified above and the undersigned takes no position regarding the unraveling of the negotiations process.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's removal of Employee from her position as a Program Monitor is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

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- (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;
 - (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.