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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
EMPLOYEE)	OEA Matter No. 1601-0001-22
Employee)	
v)	Date of Issuance: February 22, 2023
)	
DISTRICT OF COLUMBIA)	LOIS HOCHHAUSER, Esq.
DEPARTMENT OF TRANSPORTATION)	Administrative Judge
Agency)	
<hr/>)	
Employee, <i>Pro Se</i>)	
Shawn Brown, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee¹ filed a petition with the Office of Employee Appeals (“OEA”) on October 1, 2021, appealing the final decision of the District of Columbia Department of Transportation (“Agency”), to suspend her without pay for ten days, effective September 2, 2021. On October 19, 2021, OEA Executive Director Sheila Barfield, Esq., sent Agency Director Everett Lott a copy of the Petition for Appeal (“POA”), and notified him that, pursuant to OEA Rule 607.2, Agency’s response was due by November 18, 2021. Agency filed its Answer on December 10, 2021.² The matter was assigned to this Administrative Judge (“AJ”) on or about March 30, 2022.

The prehearing conference, originally scheduled for May 19, 2022, took place by teleconference on June 2, 2022. *See Orders* issued April 14, 2022, May 25, 2022 and June 7, 2022. The evidentiary hearing was held on August 2, 2022 at OEA, located at 955 L’Enfant Plaza S.W. in the District of Columbia. At the proceeding, the parties had the opportunity, and did, present evidence and argument.³ The August 9, 2022 deadline, agreed upon by the parties at the hearing,

¹ This Office does not identify employees in the Initial Decisions published on the Office of Employee Appeals website.

² It was not until the evidentiary hearing when Employee introduced her exhibits, which included a copy of Agency’s motion for an extension of time to files its answer, that the AJ became aware of the motion since it predated her appointment and was not in the file she received. Upon investigation, she found that it was in this Office’s database. Agency counsel stated at the hearing that the motion was granted, but was unsure if it was granted verbally or in writing. It was not found in the database. (Tr, 129-131)

³ Witnesses testified under oath and the proceeding was transcribed. The transcript is cited as “Tr” followed by the page number. Exhibits (“Ex”) are cited as “A” for Agency and “E” for Employee followed by the number of the exhibit. Throughout this document, when the year is omitted from a date, the year is “2021.” When documents are quoted, the emphases, , *e.g.*, boldface, italics, used in the originals, are used in this decision.

for filing closing statements was extended several times. Agency filed timely closing submissions, but Employee neither submitted any document no contacted the AJ. On August 30, the AJ issued an Order directing Employee to advise her by September 12, 2022, if she had filed a closing statement or sought an extension of time. The parties were advised that the record, which had closed on August 19, 2022, would remain closed if Employee did not respond to the Order. Employee did not respond or contact the AJ; and record remained closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3.

ISSUES

Did Agency meet its burden of proof regarding its decision to suspend Employee for ten days without pay? If so, is there any basis to disturb the penalty? If not, what relief should be ordered?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Findings of Fact

1. Agency is the District of Columbia Government entity that manages and maintains the District's transportation infrastructure. Among its responsibilities are the construction and maintenance of the District's streets, bridges, traffic signals, the management of traffic and the coordination of mass transit services. (Agency website).

2. Employee began working at Agency in 2012, and became a Program Support Assistant with Agency's Call Center and Clearing House Division ("Call Center") in approximately November 2019, and was in that position at the time of the adverse action.

3. Employee has two children, who were about six years old and 19 years old during the relevant time period. The father of the children died in about 2019. (Tr, 147).

4. Call Center employees respond to telephone calls and correspondence from the public about matters for which Agency is responsible. (Tr, 27; Ex A-2).

5. Michelle Simms, Customer Service Program Officer, became Employee's supervisor in about November 2019 and was her supervisor when the adverse action was taken. (Tr, 28, 126).

6. On March 12, 2020, Employee was placed on a 90-day Leave Restriction ("LR") due to attendance-related problems. (Ex A-2).

7. On June 30, 2020, Employee was placed on a Performance Improvement Plan ("PIP") for performance related problems including, missing calls, failing to report to work on time and not complying with "Call Center Principles." (Ex A-4). The PIP was not completed due to the Pandemic.

8. Employee was placed on approved leave under the Families First Coronavirus Response Act in September 30, 2020, and then on the Family and Medical Leave Act (FMLA). She returned to full-duty status on January 25, 2021.

9. Ms. Simms sent Employee an email on the morning of January 25, 2021, which informed her, among other things, that she would be given a refresher course and additional material to assist her in returning to her duties. The email stated, in pertinent part:

Welcome back!! I hope all is well with you, and I am looking forward to partnering with you to help you meet your goals. Ruth will reach out to you at 9:15 AM as a refresher to get you started on the phones... Attached is a copy of the Customer Service Clearinghouse and Call Center Champion Principals. Please take [the] time to review. Let me know if you have any questions or concerns. (Ex A-6)

10. On February 10, 2021, Employee was placed on a second 90-day LR. In the memorandum accompanying the notification, Ms. Simms wrote that the action was taken because of Employee's "failure to comply with established time and attendance policies," including repeated failure to "report to work on time." Ms. Simms stated that she had discussed the problems with Employee more than once and had "tried to be lenient and give [Employee] every opportunity to improve, to no avail." The LR stated that "*any future violations will result in corrective or adverse action.*" The LR requirements included:

Any absence due to illness will require a medical certificate from your doctor, regardless of the duration of the absence. Any absence due to illness that is not supported by a medical certificate attesting to your incapacity for duty will be charged to AWOL... (Ex A-5).

11. On February 17, 2021, Ms. Simms wrote Employee a letter entitled "Verbal Counselling-Call log compliance, use of your name in customer service greeting, and miss call activities" which identified problems with Employee's performance, such as:

Fail to introduce yourself to the caller... **Failure/Refusal to Follow Instructions...** Lack of awareness of phone activity results in missed calls-**Neglect of Duty...** Failing to complete your daily call log – **Failure/Refusal to Follow Instruction .**

Ms. Simms asserted that Employee had not logged in any calls between January 26 and February 5, 2021, and directed her to log in calls by 9:00 a.m. the next business day. She stated that during the same time, Employee missed 79% of her calls, and directed her to be aware of "phone status" and to enter "appropriate activity codes." Ms. Simms stated that the goal of the counseling was to help Employee meet her performance objectives and she invited Employee to provide a written response to "clarify...or take exception" to any statement or conclusion in the letter. (Ex A-14).

12. Employee responded on March 1, 2021, stating, in part, that she worked "diligently" to meet Agency standards, that she was "uncomfortable giving her name to callers "due to [her] lack of knowledge of the Call Center, but nevertheless does so when asked," and that at the start of Telework, she had no problem logging in her calls but stopped after she was "scored low/negatively." She ended the letter:

I have taken heed to the concerns...and am working diligently to improve my position with DDOT. I am extremely capable of doing this job with the proper training. My work has spoken for itself over the years. (Ex A-2).

13. On March 15, 2021, Agency issued a Notification of Charge to Absence Without Official Leave (“AWOL Notice”) informing Employee that she was being charged with AWOL and would not receive pay for: eight hours on March 1, eight hours on March 3, and four hours on March 10. (Ex A-13).

14. On April 7, 2021, Agency issued an AWOL Notice to Employee, stating that she was AWOL and would not be paid for two hours on March 15, eight hours on March 18, eight hours on March 19, and one hour on March 22. (*Id.*)

15. On April 9, 2021, Agency issued an AWOL Notice to Employee, notifying her that she was charged with AWOL and would not be paid for eight hours on March 29, eight hours on March 30, eight hours on March 31, and one hour on April 1. (*Id.*)

16. At 12:48 p.m. on April 12, 2021, Employee sent an email Ms. Simms stating she would be out for the rest of April 12 and for the next day “to handle personal business.” (Ex A-16).

17. On April 27, 2021, Agency issued an AWOL Notice informing Employee that she was charged with AWOL and would not be paid for 24 hours of “unapproved leave” on April 12, April 13 and April 15; and for 22 hours of “late arrivals” on April 14, April 19, April 20, April 21, April 22 and April 23. (Ex A-13).

18. On May 5, 2021, Agency issued an AWOL Notice, informing Employee that she was charged with AWOL and would not be paid for: one hour on April 26, two hours on April 27, two hours on April 29, two hours on April 30 and one hour on May 4. The AWOL Notice stated that “Per your [LR] ...[t]hese are considered unexcused tardiness and result in AWOLS.” (*Id.*)

19. On June 22, 2021 Agency issued an AWOL Notice, notifying Employee that she was charged with AWOL and would not be paid for: four hours on June 7, two hours on June 8; one hour on June 14, and two hours on June 16. (*Id.*)

20. The AWOL Notice issued on July 12, 2021, informed Employee that she was charged with AWOL and would not receive pay for: three hours on July 6, five hours on July 7, three hours on July 8, one hour on July 9, and one hour on July 12. In the Notice, Ms. Simms wrote to Employee:

Your tour of duty is from 8:15 AM until 4:45 PM. You did not call to report that you would be late for work on any of the dates listed above. Additionally, you did not report to work until 2:24 PM. You were supposed to meet IT at ...around 9:15 AM to pick up a new headset. IT stated that you showed up around 11 AM. I received a call from you at 11:59 AM. You informed me that you picked up

your headset and did not return to work until 1:24 PM. You are to report to work on time even when you have training. You were scheduled for training at 10:30 on July 8 and at 9:30 on July 9. On July 10, [you] did not provide any communications concerning your late login. (*Id*).

21. On July 23, 2021, Agency issued the Advance Written Notice of Proposed Adverse Action (“Advance Notice”), notifying Employee of its intention to suspend her for ten days without pay. (Ex A-2). Ms. Simms, the Proposing Official, stated in pertinent part

Cause 1: Attendance-related offense: Unauthorized absence of one (1) workday or more, but less than five (5) workdays, pursuant to DPM § 1605.4(f) and DPM § 1607.2(f)(3).

Specification 1:

General Call Center Duty Requirements

The [Call Center]...answers calls directly from the public or transferred from the ... 311 system and...manages all written correspondence...[Its] purpose...is to implement the Mayor's customer service standards so that customers can access and receive...services in a satisfactory, professional, responsible, and timely manner... [B]ecause of the critical and vital functions of the Call Center, it is imperative staff are dependable and punctual...Furthermore, proper attendance includes being ready to start work on time, remaining on the job during the workday to complete duties and appropriate use of leave. You have failed to foster and demonstrate these principles consistently. To supplement reasonable expectations of professional conduct...the Call Center has established procedures and an associated policy entitled "Call Center Champion Principals" (“Call Center Policy”)...[that] provides guidance on hours of work, breaks during tours of duty, logins and logouts from duty, ...conduct for responding to calls, required statements when engaged with...customers, and other instructions for effective performance and conduct... You received this Call Center policy on January 25, 2021....

Awareness of Policy Protocol and Practice for Requesting Leave

...Call Center policy [includes] instructions for requesting scheduled and unscheduled leave and numerous examples... of AWOL and attendance-related offenses. Attendance-related criteria for success [are included in] the Call Center policy because punctuality and reliable availability to work as scheduled are of paramount importance to your function for DDOT and to the efficiency and integrity of the Call Center in providing prompt customer service. The Call Center policy makes it clear that AWOL will result in pay denial for the entire period of absence and may lead to corrective or adverse disciplinary action for violation. The Call Center outlines AWOL examples of attendance-related failures, including tardiness, absence from duty, abuse of unscheduled leave, and failure to provide documentation justifying unscheduled leave...On January 25, 2021, I sent you a copy of the Call Center policy as part of my "Welcome Back" email...[and] advised you to take time to read the Call Center policy. Therefore, you have been oriented to duties, standards and requirements...

Persistent Tardiness, Absences and Abuse of Unscheduled Leave

Within a week of your return [on January 25, 2021] ...your...tardiness and unscheduled absence was evident. From January 26 through February 9...which is eleven... workdays, you were late on nine...days, absent on two...days, and failed to return to work on time after lunch on four...occasions. Your tardiness, absence and unscheduled leave abuse was a continuation of your attendance related misconduct that existed before your return to duty.... Last year, on March 12, 2020, you were placed on [LR] for similarly erratic timekeeping, abuse of unscheduled leave and unscheduled absences [and] were clearly informed of the basis for reliable attendance and for responsible use of unscheduled leave and you reasonably should be aware of the consequences for failure to comply with leave standards.

Due to your persistent tardiness and excessive use of unscheduled leave in the first ... two weeks back to work, you were placed on a second LR on February 10, 2021, which again set out the required conditions for timekeeping and attendance. These conditions included: requirement...to contact me or the Chief Performance Officer if you were going to arrive late; requirement for advance approval for annual leave; requirement to provide medical certification for use of unscheduled sick leave for any duration; requirement for advance approval for sick leave for medical appointments; notice that failure to comply would result in...being charged...AWOL.

While on LR, during February and March 2021...[y]ou were frequently tardy or absent and you used excessive unscheduled leave to account for your failure to report to work as scheduled. For example: in the five work weeks, from February 1 to March 5...you were late for work on ...12 out of...25 days, equivalent to being late for work approximately... 50% of the time... You provided a variety of excuses for your persistent tardiness and absences and you reported unscheduled leave to ensure that you were paid.

Your login history revealed a pattern of late logins on approximately...47% of days, including 31...of...65 workdays from February 1- April 29...Your unreliability imposed a burden on your co-workers to absorb your workload when you were late or absent. Your second placement on [LR] on February 12...did not bring about the required improvements in your attendance or punctuality... [From] March 1... through May 7...you were ...AWOL for...134 hours [and] you were AWOL for three...consecutive days on two separate occasions, and you were AWOL for the entire day on ten...occasions. On March 2...you requested approval for absence from duty...for an appointment scheduled that day...On March 2 and March 3 you did not log in [and] were absent from duty and unavailable for work. On March 3...at 9:09 AM, I approved your leave request from March 2... and...reminded you to provide your doctor's excuse upon return to work ...You did not submit a doctor's note as requested and as required by...[the LR]. On March 15... I emailed you and advised you that the sick leave, which you reported in your timesheet for March 2 and 3...required medical certification or AWOL would be charged...On March 15... you provided a medical note, which indicated you were seen on March 2...only. Your doctor's note did not excuse you from work on March 3... Consequently, you were charged AWOL for March 3, 2021...

On March 17, 18, and 19, 2021, you called out on unscheduled leave and you were

unavailable for duty. You claimed to have experienced a medical emergency...Consistent with [LR requirements], [on] March 30 [I emailed you and] specifically requested verification of treatment from you for each of the three.. days you claimed as unscheduled medical leave [and] reminded you to provide medical documentation to support your claimed basis for unscheduled leave and I advised you that without the required medical certification, days claimed as sick leave would be charged to AWOL... You did not provide the required medical certification. Your unauthorized absence was charged as AWOL...

On the three...consecutive workdays of March 29, 30 and 31, 2021, you failed to login for work and you were charged AWOL to your leave record. This was the second period of three... consecutive days of absence within the same month while [on LR]....[Y]ou claimed to have... internet issues on March 29 [and Agency's] IT department provided you a Hotspot Wi-Fi device to maintain connectivity [so] you could perform your duties while...teleworking... However, you claimed the Hotspot was weak and stated that you contacted the internet service provider Verizon to troubleshoot... You claimed Verizon visited your home at 11:00 AM to address the issue. You did not provide any documentation to support [your] claim that Verizon visited your home or attempted to troubleshoot your internet connectivity, despite my request for verification...You did not login the entire day. Therefore, AWOL was charged to your leave record. [On] March 30...you claimed again to have internet issues...However, as noted to you at the time, you were issued the Hotspot to maintain operational status for you to perform Call Center duties and your emails to me indicate some level of internet connectivity. On March 31...you did not login at all. You had not requested leave for that day, and you did not contact me, Chief Performance Officer Thomas or any other...management [official regarding your] need for unscheduled leave. Your unauthorized absence was charged as AWOL...Pursuant to the [February 10 LR]:

"Any absence due to illness will require a medical certificate from your doctor, regardless of the duration of the absence. Any absence due to illness that is not supported by a medical certificate attesting to your incapacity for duty will be charged to AWOL." ...

You violated the conditions of the [LR], failed to follow my instructions to return documented verifications of treatment and proof of internet support service from Verizon. AWOL was appropriately charged to your leave record on three ... occasions in March 2021, and on two...of those occasions, your unauthorized absence was for multiple consecutive days.

In April 2021, while under the conditions of [LR], you were late logging into work on...13 occasions... and you were AWOL for the whole day on three ... occasions...

In May 2021, while under the conditions of [LR] and immediately afterwards, you were late logging into work on...13 occasions...which is approximately 60% or two-thirds of the workdays in May.

In June 2021, you were late logging into work on ...11 occasions...which is approximately 50% of the workdays, and you were AWOL for more than two ...

hours on five... days...

The following list summarizes dates on which you were AWOL for part or all of the workday, from March 1, 2021, through July 19, 2021:

<i>Date</i>	<i>Hours</i>	<i>Leave Type</i>
March 1	1	AWOL
March 3	8	AWOL
March 10	1	AWOL
March 15	2	AWOL
March 17	8	AWOL
March 18	8	AWOL
March 19	8	AWOL
March 22	1	AWOL
March 29	8	AWOL
March 30	8	AWOL
March 31	8	AWOL
April 1	1	AWOL
April 2	2	AWOL
April 5	<u>6</u>	AWOL
April 7	2	AWOL
April 12	8	AWOL
April 13	8	AWOL
April 14	2	AWOL
April 15	8	AWOL
April 19	<u>4</u>	AWOL
April 21	3	AWOL
April 22	<u>6</u>	AWOL
April 23	3	AWOL
April 26	1	AWOL
April 27	2	AWOL
April 29	2	AWOL
April 30	2	AWOL
May 3	1	AWOL
May 4	1	AWOL
May 5	2	AWOL
June 7	1	AWOL
June 8	2	AWOL
June 9	2	AWOL
June 14	1	AWOL
June 16	2	AWOL
July 6	3	AWOL
July 7	2	AWOL
July 8	3	AWOL
July 9	1	AWOL
July 12	1	AWOL
July 15	2	AWOL
July 16	2	AWOL
July 19	1	AWOL

The list...reveals that during the...50 days from March 1 through May 7... you were AWOL for ten...complete days, which is 20% - equivalent to a day of AWOL each workweek- while on [LR]. You were also AWOL for all or part of the workday on ...30 of...50 days which is 60%, while on Leave Restriction.

Your unauthorized absences and excessive unscheduled leave persisted despite the compliance conditions clearly communicated to you by placement on [LR] on February 10, 2021. As noted above, that was your second placement on [LR] for abuse of unscheduled leave and other attendance-related offenses, making your persistent deviation are all the more aggravating to management.

Persistent Disregard of Communications Requirements

On May 23, 2021, I sent you an email notification that the time you reported for pay period 5/9/21-5/21/21 did not reflect the actual hours of telework recorded in the log data. You responded on May 24, as follows:

"8:30 am is breakfast time, which my daughter does not eat at school she eats at home. My daughter does not sleep at night so I take her to school when she is ready, sorry for being a parent. Pick up time if you read correctly is from 3 to 3:30 I go at my convenience and to give my daughter time away from home which she only attends two days a week. My time has been submitted and needs to be approved before it's too late!!"

You then sent another email response on ...May 28...at 10:32 AM, stating:

*"FYI
I have also been assisting another parent at my daughters school taking her children to and from on the days my daughter attends who is having financial difficulties as well I I Please see email below from principal.
Charge me as you may, I still have to be a parent!!"*

Your initial response on...May 24...described matters pertaining to your children, whereas your follow-up email [on] May 28...included additional information...claiming to assist another parent with transportation issue. You had not request approval for leave...to carry out non-work activities during your tour of duty. In each instance you failed to communicate prior to your exercise of leave. The letter you forwarded from the school requesting volunteers to assist other parents with transportation was dated May 12...You did not communicate to DDOT management you had volunteered to assist at your school and that your availability for work would be affected. You did not disclose that until your email ... on May 28... Having twice been placed on [LR] to curtail the use of unscheduled leave and unauthorized absence, you are clearly aware of management's concerns about your attendance and punctuality, yet you continued to disregard instructions...to request and secure approval [for] leave...

The timing and timbre of your responses indicates your disregard for management's concern about your unreliability and the adverse impact on the efficiency of Call Center operations from your erratic timekeeping. You continue to take unscheduled

leave without request or approval, despite repeated instruction and warning. Your resistance to cooperate creates scheduling difficulties, requires other employees to pick up your workload, and leaves callers waiting in the queue due to the staff shortage from your absence.

In June and July 2021, you [were] late...or AWOL on ...10 out of...33 workdays, equivalent to unreliability on one-third...of workdays. You persistently do not call to notify management of your late start and absences, including delayed return from breaks. For example on July 7...you were scheduled to collect a headset for Call Center duty at 9:15 AM from 250 M St SE. You collected the headset at approximately 11:00 AM, and you did not log in for work until 2:24 PM...Therefore ...you were AWOL for four...hours...You remained out of contact and did not communicate your status.

You have demonstrated unauthorized absence of one workday or more, but less than five consecutive...workdays on five...separate occasions since February 2021, during your second period of Leave Restriction. To aggravate matters, you have been late and unaccountably absent from duty on...31 additional occasions, many of which are for periods of a half workday or more. In the aggregate, you have demonstrated attendance-related violations on approximate 33% of workdays since February 2021. You have been repeatedly advised of the adverse effect of your absences and unscheduled leave taking on co-workers' workloads and on call handling efficiency, yet you persist in uncorrected deviations from your work schedule. Your persistent attendance-related misconduct constitutes an *Attendance-related offense: Unauthorized absence of one (1) workday or more, but less than five (5) workdays, pursuant to DPM § 1605.4(f)* which is cause for disciplinary action pursuant to DPM § 1605.4(f), for which the agency's Table of Illustrative Actions DPM § 1607.2(f)(3) provides a range of penalties from Suspension to Removal. In proposing the penalty for Cause 1, I have considered that your misconduct has persisted despite...management's effort to support and guide you, and despite twice having been placed on Leave Restriction. I have made every reasonable effort through provision of policy, repeated verbal and email communication of standards and requirements and warnings, to encourage you towards reliability. You understand that communicating your status in advance is critically important to the Call Center work...Your repeated failure to meet the most basic requirement of reliable attendance at work has severely undermined my confidence in your commitment to your job and the duties of your position. Therefore, I propose that you should be suspended without pay for ten...days...for persistent misconduct.

Cause 2: Failure or refusal to follow instructions: Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions, pursuant to DPM §1605.4(d) and DPM § 1607.2(d)(1).

Specification 2:

Background History of Negligence: Communications, Customer Service, Accountability, Timekeeping

During 2020, your customer service work in established goals of call management, quality assurance, and compliance with schedule adherence were below requirements based on established standards and as a result, you were served a Performance

Improvement Plan (PIP) on June 30, 2020...On September 30, 2020, you were approved for COVID Sick Leave under the Families First Coronavirus Response Act. Due to the Covid-19 pandemic and your approval for leave under the Family and Medical Leave Act (FMLA), you were unavailable for duty due to extended leave. The PIP in progress was therefore canceled. This leave expired on January 22, 2021. On Monday, January 25, 2021, you returned to work. I scheduled training for you the first week so that you can be refreshed on the policies and procedures within the division...As noted above under Cause 1, you failed to log in to work on time upon your return to work. This pattern continued in February 2021, as you failed to report to work on time, failed to return from lunch on time, and were AWOL for some or all of nine...11 days after return to work. I have repeatedly explained to you since your commencement within the...Call Center that positive schedule adherence is an essential measure of team and individual performance and directly impacts your accountability. It affects your overall work performance and imposes hardship upon your co-workers, who must absorb your duties when you are absent or late.

Negligence Since Return to Duty January 2021

On January 25, 2021, upon your return to duty following a period of authorized absence, I sent you the Call Center policy...[which] prescribes statements, actions and procedure for you to follow for effective performance of your duties as a Call Center Program Support Assistant. In addition, the Call Center policy sets out standards for customer service, and call handling protocol, including reliable logging of call activity. The Call Center policy warns that failure to follow these instructions may lead to corrective or adverse action. Despite these standards being provided to you in writing and repeatedly reminded verbally, you have consistently failed to adhere to established standards and procedures in the Call Center policy - particularly call logging - and you have persistently failed to follow instructions regarding timekeeping and attendance communications. I have communicated to you on multiple occasions how awareness of phone activity results in fewer missed calls and conversely how higher rates of missed calls indicates you are not cognizant of your phone activity. In an attempt to correct your negligence of Call Center standards and associated performance problems evident on your return to work in January 2021, I served you a Record of Verbal Counseling on February 17, 2021 for your failure to perform the functions of your position as instructed...The Record of Verbal Counsel (RVC) detailed how calls handling with minimal disconnects shows appropriate transfer use and engagement with customers. Also, the RVC described that completing the daily call log help drives business outcomes and manages customer contact conclusion tasks. However, despite the RVC, you failed to maintain proper procedures for call handling and failed to follow supervisory instructions regarding time and attendance.

Negligence in Specific Areas of your Duty as a Call Center Agent

I ran a report in our Amazon Web Services (AWS) system to review your productivity [from] February...through April 2021. This system is the call center tool used to manage and track all activity within the division including login and logout times, breaks, trainings, meetings, and the management of phone calls. This means all activity and inactivity are monitored in this system. The contact management data is generated via the AWS system and calculated via Tableau and an average score of 85% is required to meet proper standard call management protocols. The AWS report

shows that you have been extremely unproductive and inefficient in your position for the past 3 months. Below data delineates data according to the AWS system:

February 2021

- You handled 177 calls however you missed 35...approximately 20% of your calls for...February. The 20% indicates a lack of awareness of phone status and failure to enter an activity code when you step away from your workstation. 80% handled calls is 5% below standard.
- You handled 177 calls however you only logged 73...41% of your calls...The daily call log is a shared document and will auto-save once you have entered your data. Therefore, you failed to log approximately 59% of your calls.
- The schedule adherence data is based on number of days on time for work divided by average workdays per month. Your on-time workdays...for...February is 4 days. (Additionally, you worked 6 snow duty days during...February)...These dates are included in the equation; even though the scheduled adherence report via AWS does not capture login for snow days.

March 2021

- You handled 284 calls however you missed 55 [or]19% of your calls [which] indicates a lack of awareness of phone status and failure to enter an activity code when step away from your workstation..
- You handled 284 calls however you only logged 28 [or] 10% of your calls. Calls are to be logged Monday through Friday at the closed of the business day or before 9 AM on the next business day.
- The schedule adherence data is based on number of days on time for work divided by average workdays per month. Your on-time workdays [for] March is 2 days.

April 2021

- You handled 479 calls however you only logged 0. You logged 0% of your calls. .
- The schedule adherence data is based on number of days on time for work divided by average work days per month. Your on-time workdays for call center duty for... April is 0 days. Therefore, the month of April you were not on-time a single day.

This data shows that between February and April you are constantly late and when you are present your work product is markedly deficient. Your average score for the call management protocols [from] February through April 2021 is 39%... This marks the lowest average percentage of any employee [in] the...Call Center with like duties since I have been the supervisor for the division. Your low productivity [from] February to April 2021 can be compared to the Call Center agent team averages as follows:

Productivity: A. Johnson vs. Call Center Agent Team :

- Total Calls Handled average: 2094.
You have handled only 940 calls; about half...the team average.
- *Calls Logged* average is 88%.
You have logged only 17%; about one fifth ...the team average.
- *Calls Missed* average is 3.25%.

You have missed 20%; that is six...times the team average.

- *Schedule Adherence* average is 79.25%.

Yours is 20%; that is four...times more likely to be late or unavailable.

I have consistently instructed you to follow the Call Center policy regarding call handling procedures and requirements and call log follow-up, as well as timekeeping and attendance. You have failed to follow proper supervisory instructions, and in particular you have failed persistently to follow my instructions and standard operating procedures to log calls, despite issuance of the Record of Verbal Counseling in February 17, 2021, for negligence by your lack of awareness of phone activity which resulted in high missed call rates, and for failing to complete your daily call log. The analysis of data shows that you persist in these aspects of unacceptably negligent and careless work habit, despite your awareness of the requirements, standards and importance of compliance to overall Call Center team performance.

Your persistent failure to comply with standard operating procedures for handling calls and to follow instructions for communications standards timekeeping and attendance is misconduct, which constitutes *Failure/Refusal to Follow Instructions: Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions*. Under the DPM, failure to follow instructions constitutes cause for disciplinary action for which the Table of Illustrative Actions DPM § 1607.2 provides a range from Counseling to Removal. I have considered the scope of your negligence which includes failure to comply with written procedures, instructions and protocol for call handling, as well as your pervasive disregard of repeated instructions and conditions set out in the notice of Leave Restriction...to request and secure approval for leave in advance and to provide medical certifications when requested. These factors are aggravating and warrant the proposed suspension without pay of .ten workdays for Cause 2. I have also considered mitigating factors, in particular your parental commitments and the challenges that can bring.

Consideration of the Appropriate Penalty

In determining the appropriate penalty, I have considered the recommendations of the Table of Illustrative Actions DPM § 1607.2 and I have considered each factor provided in, as follows:

Aggravating (a) The nature and seriousness of the misconduct or performance deficit, and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional, technical or inadvertent; was committed maliciously or for gain; or was frequently repeated;

Given the frequency of your conduct and performance issues this factor is aggravating. You have disregarded basic time and attendance requirements, despite twice having been placed on Leave Restriction. The offense is particularly adversely impactful on the Customer Service function you perform for DDOT. In addition, when present your performance is below communicated and established standards.

Aggravating (b) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the

position; This factor is aggravating because this conduct is directly related to your job, which requires you to be present, attentive, and ready to engage in conversations with the public during the DDOT operating times of 8:15 AM through 4:45 PM, Monday through Friday. Your job requires punctuality and commitment to schedules. Your job requires that you comply with call handling protocol established for those calls, including follow-up for management by reliable call logging. Coming to work on time, following supervisory instructions, and completing assigned work such as logging your calls are basic expectations for your position and as a result, had an impact in the formulation of my decision to discipline. I have chosen a penalty which reflects the escalation of your behavior despite

Neutral (c) The employee's past disciplinary record; This factor is neutral because though you don't have an official discipline on your record for the specific type of conduct at issue in this action. You were issued a Record of Verbal Counseling on February 17, 2021 for failing to follow instructions and adhere to your duties. Furthermore, due to your performance and conduct being consistently poor for an extended period of time in areas of time and attendance, failure to follow supervisory instructions, and neglect of duty, a suspension without pay of ten (10) workdays is the appropriate discipline to propose for Cause 1, and for Cause 2.

Aggravating (d) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; Your performance in the Call Center is deficient and that is connected to your misconduct in your failure to follow instructions and standard procedures, and is linked to your unreliable attendance. Prior to you taking approved leave of absence in September 2020, you were on a PIP for similar lack of accountability, deficient customer service and deviation from established goals...Your performance evaluation for 2020 in your current position was a Marginal Performer with a low 2.08 Overall rating...You were recently issued a Record of Verbal Counseling for negligence of established Call Center procedure. Your prior discipline was for arguing and creating a disturbance at work with a team member; that was issued as a Reprimand in April 2020, and therefore within the period for consideration in assessing the appropriate penalty for subsequent disciplinary action...Your persistent disregard of communication protocol and excessive absence without leave indicates unacceptably low dependability levels, which this action is intended to correct.

Aggravating (e) 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; This factor is aggravating because you have disregarded constant reminders of instructions and procedures which are vital to the Call Center unit objectives and goals and the agency mission of public service excellence. Your persistent display of negligence and unmanageable absences undermines my confidence in your ability to do your job and to uphold our agency's mission.

Aggravating (f) Consistency of the penalty with those imposed upon other employees for the same or similar offenses; The proposed adverse action is consistent with actions taken by the agency against other employees for violations of neglect of duty and unauthorized absence.

Neutral (g) Consistency of the penalty with the Table of Illustrative Penalties (§ 1607); The proposed adverse action is within the range of penalties provided for both Cause 1 DPM § 1607.2(f)(3) and for Cause 2 DPM § 1607.2(d)(1).

Neutral (h) The notoriety of the offense or its impact upon the reputation of the agency or the District government; The notoriety of your absences is difficult to gauge, because customers are unable to give feedback when their calls are missed; those who have to wait longer due to short staffing in the Call Center would reasonably experience frustration at the agency's inability to respond to calls promptly, because you are late for work. It is reasonable to expect that customers whose calls are missed would be frustrated and that their perspective on DDOT would be accordingly affected: your absence increases the likelihood and frequency of customer frustration with DDOT.

Aggravating (i) 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; Our unit has clearly communicated and documented requirements for punctuality, completing assigned tasks, and following instructions. Furthermore, you were issued repeated reminders, assuredly provided the Call Center Champion Principals, and issued a Record of Verbal Counseling for similar negligence.

Mitigating (j) Potential for the employee's rehabilitation; There is limited potential for rehabilitation. Management has worked with you and been patient with you to elicit the required improvements in conduct, particularly with attendance and attentiveness to calls, and procedures instructed to you for processing calls to completion. You have been coached and encouraged toward improvements, as well as allowed a degree of latitude to accommodate life's challenges, which you have exceeded by your negligence in failing to communicate and request leave as instructed, as well as disregarding instructed procedures for regular duties tasks. This mitigation is reflected in the choice of adverse suspension as a penalty, which is intended to bring about immediate and lasting improvements in punctuality, attendance and in strict adherence to protocol and procedure for call handling.

Neutral (k) Mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; There are no known mitigating factors which directly affect [your] negligence and unauthorized absences...Management has assured that you have been afforded information for Employee Assistance Program...and that you were assured appropriate entitlement to protected leave under FMLA when the basis...was legitimately established.

Aggravating (l) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others; You have failed to act as instructed which is a critical failure in a hierarchy whereby supervisors establish protocol, procedure and rules for employee conduct and performance of duties. You have demonstrated persistent disregard for the norms of work rules, procedures and reasonable expectations for conduct and attention to duty following repeated advisory against continued failure through RVC and Leave Restriction notices. Additionally: I have communicated to you repeatedly that your conduct must

improve or...disciplinary action may follow. You persist in disregarding my instructions. Failure to follow instructions and unauthorized absences are untenable misconduct in the DC government employment relationship. Without compliance, management's objectives would not be attained, goals would not be met, and the agency mission would not prevail. No lesser penalty can be reasonably expected to deter future misconduct, due to this being the second occurrence of negligence, following a prior Record of Verbal Counseling, and due to your disregard of the procedures and instructions issued to you by two...[LRs] within a year.

The Notice included information with applicable references, regarding Employee's right to review the relevant material and submit a written response for the Deciding Official ("DO") to consider before making a final decision. She was told that her response should include "every defense, fact or matter in extenuation, exculpation, or mitigation that is relevant to the reasons for the proposed action, as well as "evidence" she thought "might affect the final decision," including affidavits. She was advised that she could use up to ten hours of official time to prepare the response and that John P. Thomas, Chief Performance Officer, would serve as DO in this matter. She was given Mr. Thomas's email and business addresses as well as his telephone number. The Notice stated that the filing deadline for submitting the response was ten days of service of the Notice. Employee acknowledged receipt of the Notice at 4:15 p.m. on July 23, 2021. (*Id.*)

22. On August 6, 2021, at 4:48 p.m., Employee sent Ms. Simms and Mr. Thomas an email entitled "Advance Written Notice of Proposed Adverse Action" which stated:

I am asking that my single parenting and financial constraints as well as false AWOLs already received be taken into consideration. I am also asking that it be seriously taken into consideration my request for Detail/Reassignment from the Call Center... (Ex A-7).

Mr. Thomas emailed Employee at 5:32 p.m. on August 6, that he had received the above email and asked her to confirm that it was in response to the adverse action. (*Id.*)⁴

23. The Final Agency Decision ("FAD") and supporting documentation was issued to Employee on September 1, 2021. (Ex A-3).⁵ In the FAD, Mr. Thomas stated that he had reviewed the Advance Notice and supporting documentation as well as Employee's written response. The FAD stated, in pertinent part::

CAUSE 1

I find that Attendance-related offense, pursuant to DPM § 1605.4(f): Unauthorized absence of one (1) workday or more, but less than five (5) workdays, pursuant to DPM § 1607.2(f)(3), is supported by a preponderance of the evidence.

The Proposing Official provided a compelling and detailed history of your erratic timekeeping and attendance after you returned to duty on January 25, 2021. Within two weeks, you were placed on Leave Restriction for unscheduled leave abuse ... having been

⁴ There is nothing in the record that Employee responded to the request.

⁵ Agency issued a corrected FAD on September 15, 2022. (Ex A-1). The only change was correcting Employee's return date from September 13 to September 16 to reflect the use of business days and not calendar days.

late for nine...of...11 days. During the...90 day period of Leave Restriction, your tardiness and unscheduled absences persisted with an unacceptable frequency. From February 1-April 29, 2021, our login history revealed a pattern of late logins on approximately...47% of days...

During the period of March 1... through May 7, 2021, you were AWOL for...134 hours: three... consecutive days on two separate occasions; and AWOL for the entire day on ten ... [days]... equivalent to a day of AWOL each workweek -while on [LR]. You were also AWOL for all or part of the workday on 60% of workdays, while on [LR]. Your unauthorized absences and excessive unscheduled leave persisted despite the compliance conditions clearly communicated to you by placement on [LR] on February 10, 2021. That was your second placement on [LR] for abuse of unscheduled leave and other attendance related offenses within a one-year period, making your persistent non-compliance are all the more aggravating to this cause for discipline. I note: the Proposing Official had to request medical certification from you, after you twice... indicated in March 2021 that you were taking multiple days of leave for medical reasons. You provided medical certification on one occasion only, and that did not excuse the entire time taken... As set forth [in] the ...[LR], [it] was your responsibility to provide medical certification for each instance of unscheduled or scheduled sick leave. Your failure to do so was neglect of duty to comply with written rules and policy, as well as a basis for AWOL...

In May 2021, while under [LR] and immediately afterwards, you were late logging in on approximately... two-thirds of the workdays... In June 2021, you were late logging into work on ...11 occasions... which is approximately 50% of the workdays, and you were AWOL for more than two... hours on five... days...

The written record shows that your misconduct has persisted despite...management's effort to support and guide you, and despite twice having been placed on [LR]. I find the Proposing Official made every reasonable effort to lead you to punctual and reliable attendance through provision of policy, repeated verbal and email communication of standards and requirements and warnings. You know that attendance and communicating your status in advance is critically important to...Call Center workload management. Your erratic absences create an [un]manageable burden for your coworkers, to absorb your workload because you're late or unavailable. Your uncorrected, frequently repeated failure to meet the most basic requirement for reliable attendance at work has severely undermined my confidence in your commitment to your job and the duties of your position. Therefore, I sustain the proposed penalty of ten... days suspension for Cause 1.

I advise you to make immediate lasting and consistent improvement in your punctuality and attendance, by reporting for work on time as scheduled, by logging in on time, and by remaining available and active in handling incoming calls during your regular tour of duty hours. ..I advise you to remain responsive to your supervisor during these hours. I advise you of these requirements so that you can avoid further disciplinary action, up to and including termination of your employment...

CAUSE 2

I find that Failure or refusal to follow instructions, pursuant to DPM § 1605.4(d): Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions, pursuant to DPM § 1607 .2(d)(I), is

supported by a preponderance of the evidence.

The Proposing Official provided compelling narrative and supporting documentation to establish your careless work habits as Program Support Assistant in the Customer Call Center. The written record shows that you have failed to follow instructions, disregarded policy, and failed to apply Call Center standard operating procedures when carrying out your duties. The written record establishes that your negligence persists despite repeated intervention, despite supervisory support, and despite prior warning by Record of Verbal Counseling issued to you... Your careless work habits are also linked to your unacceptably high rate of unscheduled absence from duty, as described above under Cause 1. In addition to the complete neglect of duty which your unacceptable rate of absence causes, you have failed to log calls, you have an unacceptably high missed-call rate, and you have only taken half the number of calls of your team average. The Proposing Official summarized from the documents:

Productivity: A. Johnson vs. Call Center Agent Team [Ex.A.13]:

- Total Calls Handled average: 2094.

You have handled only 940 calls; about half ...the team average.

- *Calls Logged* average is 88%.

You have logged only 17%; about one fifth ...the team average.

- *Calls Missed* average is 3.25%.

You have missed 20%; that is six...times the team average.

- *Schedule Adherence* average is 79.25%.

Yours is 20%; that is four...times more likely to be late or unavailable.

I find the Proposing Official has clearly instructed you to follow the Call Center policy regarding call handling procedures and requirements and call log follow-up...as well as timekeeping and attendance... instructions and policy. You continued to disregard proper supervisory instructions, despite your awareness of the requirements, standards and importance of compliance to overall Call Center team performance.

Your persistent negligence has required an untenable amount of supervisor time to manage and reschedule workloads due of your disregard of leave protocol and rule. Your negligence imposes a demoralizing burden of work on your co-workers. Your negligence has required excessive attention because your continued low productivity results from your persistent disregard of standard procedures for call response and logging. Management should not have to follow your activity constantly to ensure you're performing the essential functions of your position as instructed and at productivity levels comparable to the team. You have demonstrated full competence in your position on occasion, which indicates that you are aware of and capable of executing duties as instructed.

I find your negligence is avoidable and within the sphere of your control. Therefore, I sustain the proposed penalty of ten...days suspension for Cause 2.

I advise you to make immediate lasting and consistent improvement in your productivity levels, in particular to demonstrate awareness of call duration, calls waiting and call logging. I advise you to remain responsive to supervisory instruction and to follow standard operating procedures. I advise you to engage meaningfully with your supervisor to solicit clarity on requirements and expectation and to avoid assumptions about your duties and

responsibilities. I advise you of these requirements so that you can avoid further disciplinary action, up to and including termination of your employment...for further failure to follow instructions or negligence or careless work offenses.

In determining the appropriate penalty, I have considered the recommendations of the Table of Illustrative Actions DPM § 1607.2, I have considered and included the factors articulated by the Proposing Official. [Following a review of the factors and the Proposing Official's rationale, the DO concluded]:

Therefore, it is my decision to sustain the proposed Adverse Suspension. **Accordingly, you are hereby Suspended Without Pay for ten (10) days from your position of Program Support Assistant, effective Thursday September 2, 2021...**In making this decision, managerial discretion has been legitimately invoked and properly exercised.*(Id)*.

POSITIONS OF THE PARTIES AND SUMMARY OF EVIDENCE

Agency's position is that it had ample cause to impose the ten day suspension and that it acted appropriately and fairly. It maintained that Employee's AWOLs and tardiness constituted "attendance-related offenses;" and that her failure to follow instructions, including compliance with leave restrictions and Call Center policies constituted "failure or refuse to follow instructions." Agency asserted that it had placed Employee on LR twice in an effort to her correct attendance problems, but that her attendance did not improve and she failed to comply with the requirements. Agency maintained that Employee did not follow Call Center procedures and policies, although she was provided with training, the written policies and a refresher course when she returned from leave in January 2021. (Tr, 23-25).

Michelle Simms, Customer Service Program Officer for about ten years, testified on behalf of Agency. She stated that she supervised the 15 employees assigned to the Call Center, including Employee, to ensure, among other things, that they reported to work on time and answered calls in the "proper manner." (Tr, 29-30; Ex A-2).⁶ She testified that at the time of the suspension, Employee had been at the Call Center and under her supervision for about two years. (Tr, 101). Ms. Simms testified that she decided that the ten day suspension was necessary because Employee's "persistent" problems with attendance and following instructions did not improve despite being placed on LR twice in two years. She noted Employee's "[e]xcessive tardiness, no-phone no-show absences, and...refus[al] to follow instructions regarding her duties as a Call Center agent," and said that she hoped that the suspension would cause Employee to improve in these areas. (Tr, 31-33; Ex A-2).

Ms. Simms testified that on February 10, 2021, as a result of her attendance problems, Employee was placed on the second 90 day LR and was required, among other things, to submit medical notes when she took sick leave. She said Employee's tour-of-duty at that time was 8:15 a.m. to 4:45 p.m., with a one hour break from 12:15-1:15 p.m.. She noted that employees get a 15 minute "grace period." She testified that attendance records are "auto-generated" by Amazon With Connect Services ("AWS") based on when an employee logs in and out, and that the system does not allow her to change entries. She testified that between February 1 and July 23, 2021, Employee was late or absent the entire day about 85% of the time. (Tr, 35-40; Ex A-5).

⁶ The witness affirmed that each report she reviewed during her testimony appeared to be "true and accurate." (See, e.g., Tr, 34, 38, 41, 48, 60, 91, 100)

Ms. Simms reviewed Employee's timesheets covering the second LR, and testified that Employee was AWOL for one full day during the March 3 pay period, three days during the March 15 pay period, three days for the March 29 pay period, and three days for the April 12 pay period. (Tr, 41-46, Ex A-9). Ms. Simms stated that the data established that Employee was "consistently late," (Tr, 48-55, Ex A-12). The witness testified that between January 25 and July 23, Employee was AWOL for the entire eight hour tour-of-duty on ten days. (Tr, 57). She said that Employee was charged with AWOL on March 3, for failing to comply with LR requirements, explaining that Employee sought non-emergency medical leave for March 2 and March 3, and was required to submit a doctor's note for both days; but the note she submitted only stated that she was seen on March 2 and did not reference March 3. (Tr, 59-62, Ex 9). Ms. Simms testified that Employee was charged with five hours AWOL for March 16, and with eight hours AWOL on March 17, March 18, and March 19 for failing to submit the required doctor's note for unscheduled sick leave. She testified that Employee's request for sick leave for a medical emergency was initially approved but that Employee never submitted a doctor note, as required by the LR, so the absences to be charged to AWOL. (Tr, 64-68; Exs A-9- A-13).

Ms. Simms stated that Employee was charged with eight hours AWOL on March 29, March 30 and March 31. (Tr, 68-69; Ex A-9). With regard to March 29, the witness said Employee claimed that the hotspot at home was weak and Verizon came to fix it at about 11:00 a.m. but she did not submit documentation "to support her absenteeism," as directed. (Tr, 70, Ex A-11). She said that Employee was charged with AWOL on March 31 because she did not call or report to work on that day. (Tr, 72). Ms. Simms reported that Employee emailed her on April 12 that she would be out for the remainder of that day and on the following day "to handle personal business" and that the request was inappropriate" based on the terms of the LR and Agency policy, adding that Employee never provided an explanation of those absences or her subsequent absence on April 15 and so was charged with AWOL. (Tr, 72-75; Ex A-9).

Ms. Simms testified that Employee "always indicate[d] that she worked a full day" resulting in the need for correcting her time. (Tr, 76). She noted, for example, that on May 23, she emailed Employee that her timesheet for the pay period ending on May 21 did not reflect the actual hours she worked and needed to be corrected. In the email, she stated that Employee's daughter's school stated that children could be arrive at school at 8:30 a.m. and could be picked up at 3:00 p.m.. (Tr, 76-77; Ex A-11). She said that Employee responded on May 24:

8:30 a.m. is breakfast time, which my daughter does not eat at school, she eats at home. My daughter does not sleep at night so I take her to school when she is ready.... Sorry for being a parent. Pickup time, if you read correctly, is from 3:00 p.m. to 3:30 p.m. I go at my convenience and to give my daughter time away from home, which she only attends two days a week...My time has been submitted and needs to be approved before it's too late!! (Ex A-11).

She said that Employee emailed her again on May 28 regarding the pay period ending May 21, stating in part:

FYI, I have also been assisting another parent at my daughter's school, taking her children to and from [school] on the days that my daughter attends, who is having financial difficulties as well!!!

Please see email from principal. Charge me as you may, I still have to be a parent. !! (*Id*).

The witness testified that the reasons that Employee gave in these emails were not acceptable excuses. She noted that between January 25 and July 23, 2021, Employee was tardy for a total of 84 hours and 48 minutes. (Tr, 79-80).

Ms. Simms testified that she made the decision to charge Employee with refusing to follow instructions because Employee was received training, and had asked Employee if she needed additional training. She said she also communicated instructions to Employee regarding certain daily tasks, in the areas of “login and logoff times, logging calls and not being attentive to her call activity status,” and causing calls to be dropped. (Tr, 81-86). She testified that when Employee returned to work on January 25, 2021, a senior Call Center employee gave her a “refresher course” on Call Center policies and instructions, which included the proper use of the system, logging in and off, and logging calls. She said that in addition she gave Employee another copy of the written Call Center policies. (Tr, 82-85; Ex A-6). Ms. Simms stated that the written information and refresher course covered all of the information that Employee needed to perform her duties properly. (Tr, 86).

The witness testified that although Call Center employees are required to keep track of or “log” the type of call received, and that it takes only about five minutes daily to log the calls received that day, Employee did not comply. She said that she communicated with Employee about her failure to meet that and other requirements and also provided her with “verbal counseling” in February 2021. (Tr, 87-89; Ex 14). The witness testified, however, that Employee did not improve, but instead her performance “got worse,” noting that Employee went from logging in some calls to logging in “zero” calls. (Tr, 90). Ms. Simms testified that Employee failed to log about 59% of her calls in February 2021, 90% of her calls in March 2021, and 100% of her calls in in April 2021. (Tr, 95-96; Ex A-2). She stated that Employee was the “worst performer” of the Call Center employees that she supervised, and that Employee’s poor performance put a “strain” on co-workers since the system “tries to distribute calls evenly,” and the others had to “compensate for Employee’s failures” and poor attendance. (Tr, 98-99).

On cross examination, Ms. Simms denied that she proposed the suspension to retaliate against Employee. She also denied treating Employee more harshly than other employees who also took their children to and from school, explaining that most of them lived close to the schools their children attended and it only took them five to ten minutes to take them to and from school so they did not need leave. (Tr, 109-111). The witness said that since Employee needed more time to take her child to and from school, she approved an hour of leave in the morning and an hour in the afternoon. (Tr, 114). Responding again to Employee’s claim of being “singled out” because no other employee was required to take leave, Ms. Simms explained that no one else had missed work because of the time spent taking a child to or from school. Asked how she knew that information, the witness testified that the AWS system provided data that the other employees were “logging in on time [and] properly.” (Tr, 115). Asked by Employee how she knew the other employees were available to work when they were logged in but that Employee, also logged in, was not available to work; Ms. Simms testified that she knew “based on the metrics” that provided login and logoff times, missed calls, and availability to answer calls, that the other Call Center employees were performing their duties. (Tr, 119-120). Ms. Simms added that on May 6, 2021, Employee’s daughter returned to school two days a week, so the hour leave in the morning and afternoon applied on those two days. (Tr, 123).

Ms. Simms testified that she considered all of the *Douglas* factors in reaching a decision on the penalty. (Tr, 124). At the proceeding, she reviewed the factors and explained her rationale. The witness stated that she would have selected the same penalty if only one of the two charges is sustained. (Tr, 125).

Employee's position is that Agency had no basis for imposing a ten day suspension. She maintained that she was the victim of disparate treatment, *animus* and retaliation by Ms. Simms. She asserted that Ms. Simms did not like her and was retaliating against her for not being part of a "sexual harassment incident that took place at the Call Center" before February 2020. (Tr, 145). She claimed that Human Resources ("HR") "knew what was going on" and that she was "filing an [EEO] case accordingly" (Tr, 146).

Employee stated that she transferred to the Call Center "with guidance from Michelle Simms and HR in a way to justify my grade increase as a Grade 9" after the death of her children's father, and did not think that her duties would change. She contended that she did not receive adequate training, so that when she was required to start taking calls after about two months, she did not know how it operated. She testified, however, she "took on [her new] duties and responsibilities...to the best of [her] ability." (Tr, 143-144). Employee denied receiving a refresher course when she returned from leave on January 25, 2021, but agreed she did receive a copy of the Call Center's written policies at that time. (Tr, 153).

Employee testified that she was "constantly harassed" by Ms. Simms "as far as [her] responsibilities as a parent and having to ...assist [her] six-year-old daughter with online schooling as well as working at the same time" beginning in February 2020, when District of Columbia Government employees were "sent home during the Pandemic" (*Id*). She maintained that she was not AWOL on the days she was charged, alleging that Ms. Simms marked her AWOL on days that she was logged in but was not taking calls because she was helping her daughter with schoolwork, explaining that she could not take calls and help her child at the same time. (Tr, 129). Employee maintained that Ms. Simms was "constantly AWOLing [her]...as far as ...dealing with [her child], taking [her] child to and from school, taking [her] child to and from school, taking [her] children to or from doctor's appointments, saying that [she] had no control over...now being in a single-parent household." (Tr, 147).

On cross-examination, Employee responded in the following exchange, that she did not need to request leave when helping her child during her tour-of-duty:

Q. Is it your testimony that...DDOT, should pay you during your tour of duty to do things other than the work assigned.

A. That's correct. (Tr, 151).

Employee denied that she was placed on the most recent LR because of attendance problems, maintaining that she was placed on it because of a dispute with Ms. Simms. (Tr, 154). She agreed that the medical documentation submitted to support her request for leave on March 2 and March 3 did not include March 3, explaining that she did not report to work on March 3 because she was "was not feeling well... regardless of whether or not the doctor said it was okay for me to come back to telework or not." She added that although the doctor's note "did not specify [March 3]... [her] body did." (Tr, 156).

Employee testified that she was absent for her full eight hour tour-of-duty from March 17 through March 19, 2021 not because she was ill, but because she had to care for her mother who had experienced a “medical emergency:”

Q. You never provided DDOT with any evidence that you needed to assist your mother with a medical emergency on any of those days, did you?

A. Well, it was what’s called an emergency. (Tr, 163-164).

Employee testified that she did not submit documentation for her absence on those days because she did not think that she was required to do so. (Tr, 164-166). Asked if there was a reason for her position, she responded:

Yes. The leave restriction was never set forth by the Human Resources Office. And with that being stated, as far as a medical emergency happening with my mother, I care for my elderly mother. (Tr, 166).

Employee added that there was no reason for failing to submit the documentation, “ other than [that she] had to care for [her] my mother.” (Tr, 168). Shortly thereafter, the following exchange took place on cross examination:

Q. [W]e understand the ...need to care for someone, but is it your testimony...you [were] not required to explain why you missed work for 24 ...hours... on March 17th, 18th and 19th, 2021?

A. So I did give an explanation. So AWOL is someone does not know where I am. They have not spoken to me, and they do not know what’s going on. That’s what AWOL is in the District Government. ..So as far as these AWOLs are concerned, the relevancy in them is none, because [Ms. Simms] she knew where I was. Whether she was in agreement with it or not does not constitute for the fact that I did not explain to her what was happening. (Tr, 169).

ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Section 1605.1 of the District Personnel Manual (“DPM”) (May 19, 2017) states that an adverse action is “warranted” when an employee violates standards of conduct, fails to meet performance measures or disregards rules of the workplace in order to “encourage conformity to acceptable behavioral and performance standards or to protect operational integrity.” Pursuant to DPM §1605. 2, disciplinary action against an employee may only be taken for cause, *i.e.*, discipline can be imposed only when an employee fails to meet “identifiable conduct or performance standards, which adversely affects the efficiency or integrity of/government service.” Employee was charged with two causes listed in DPM §1603.5, *i.e.*, (d) failure or refusal to follow instructions” and (f) “attendance-related offenses” which includes (1) unexcused tardiness and (2) unauthorized absence. Pursuant to OEA Rule 628, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause

The AJ considered several factors when reaching a decision in this matter. The first factor was Employee’s *pro se* status. The AJ took “special care” based on her *pro se* status, without giving her “special treatment [or] substantial assistance” that would prejudice Agency. *Palou v. District of Columbia*, 998 A.2d 286, 292 (D.C. 2010). For example, the AJ admitted Employee’s exhibits into evidence although they were not disclosed until the morning of the hearing. She was

given leeway in her cross-examination of Ms. Simms and in her direct testimony, sometimes over Agency's objection. In addition, the AJ informed Employee of requirements, deadlines, relevant procedural rules as well as the consequences of noncompliance both verbally and in writing. When Employee failed to submit closing arguments, despite the extension of the deadlines, the AJ gave her another opportunity to do so. *Macleod v. Georgetown Univ. Med. Center*, 736 A.2d 977, 980 (D.C. 1999). See, e.g., Tr, 105-109, 111-115.

Second, the AJ carefully assessed the credibility and reliability of the two witnesses, who offered divergent views. *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand." *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d 440 (D.C. 1985). The AJ found Ms. Simms to be knowledgeable regarding facts and consistent in her testimony. She was calm, thoughtful and responsive. In addition and of considerable importance, her detailed testimony was supported by the exhibits introduced into the record. The AJ did not see any indication that Ms. Simms was biased or unsympathetic to Employee's situation as a single parent who had recently experienced the death of her children's father and was dealing with the difficulties of having a young school-age child during the Pandemic. Her testimony that she did not act out of retaliation or *animus* and that she did not treat Employee more harshly than other employees was credible and supported by a number of factors. As Employee pointed out, Ms. Simms was at least partially responsible for helping her get a promotion so she could get a higher salary after the death of her children's father. *Infra* at 22. In addition, the record supports her contention that she gave Employee several opportunities to submit required documentation, approved her requests for leave, and offered her assistance. The evidence supported Agency's position that she initiated the adverse action only after other efforts, such as the LR and counselling, had failed. In sum, the AJ found that Ms. Simms was a credible witness.

Employee presented was both articulate and intelligent. Although her responses were emotional at times, the AJ considered it understandable since she was the subject of the adverse action and had considerably more at stake. Employee was also still dealing with being a single parent and the ongoing stresses of the Pandemic. However, Employee sometimes offered different reasons for her actions, for example, in failing to submit documentation for her absences from March 17-19. *Infra* at 23. More troubling, she was dismissive about the need to provide required documentation in some instances, although she was aware of the requirements of the LR. *Infra* at 20-21. Employee also failed to offer any support for her assertions of retaliation, *animus*, disparate treatment, or even malfunctioning equipment. These unsupported allegations needed more to become credible particularly on affirmative defenses for which she had the burden of proof. See, e.g., *Pupis v. U.S. Postal Service*, 2007 M.S.P.B. 47 (2007). Employee did not offer any explanation or support for her contention that she was wrongfully charged with unapproved leave or AWOL. For these reasons, the AJ did not find Employee to be credible throughout her testimony.

The third and final factor that the AJ considered in her decision-making process was that all of these events took place during an exceedingly difficult and unprecedented period of time, particularly for Employee. She had experienced the death of her children's father, then moved into a new position, and then experienced the uncertainty and fearful time of the Pandemic. Employee was dealing with all this as a parent who had recently become single and had a young school-age child. However, the evidence established that throughout this time, Agency remained responsive to Employee, by granting her requests for leave; offering assistance; providing

reminders, and training; and giving her opportunities to submit required documentation. It did not improve this suspension until other measures such as counselling and LRs had failed. There was no argument made or evidence offered by either party that Employee was unable to meet the requirements of her position due to any disability when she returned to work on January 25, 2021. To the contrary, she was considered a capable and intelligent employee who had been able to meet requirements. The evidence further established that she was given a refresher course and written procedures to assist her re-entry into the workforce in January 2021, and was on notice of performance and attendance problems raised in the PIP, the LRs and the counselling.

Upon a thorough review of the evidence and arguments, the AJ concludes that Agency met its burden of proof on both charges. The charge of AWOL may be reversed if an employee presents sufficient evidence of illness or disability at the evidentiary hearing.” *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985). However, Employee did not offer any information or documentation to support her assertions of feeling ill on March 3 or of having to care for her mother for three days even at the hearing. *Murchison v. Department of Public Works*, OEA Matter No. 1601-0275-95, *Opinion and Order on Petition for Review* (July 15, 1998). Ms. Simms testified in great detail regarding each charge, and her testimony was supported by substantial amount of documentary evidence. Agency established that the documentary evidence was reliable and “neutral,” it was generated by programs that operated systemwide and not under the control of an individual. Although Employee challenged its accuracy at times, she did not provide any support for the allegation. In addition, Agency engaged in progressive discipline, trying to work with Employee to improve her attendance and performance issues through the PIP, of. Agency tried to work with Employee to correct the attendance and performance issues prior to initiating this action, and cautioned Employee of the consequences of failing to improve. Employee had previously been under a PIP, which although cancelled due to the Pandemic, had put her on notice of performance-related problems. She had also been under two Leave Restrictions, and therefore was on notice of her attendance-related problems and requirements related to attendance while on LR. Even during the second LR, Agency did not immediately penalize Employee for failing to provide documentation, it reminded her of the need to comply. It also counselled her, providing another opportunity for Employee to improve her attendance and performance, and to discuss any issues with Ms. Simms.

The Deciding Official stated in the FAD, that he had reviewed the Advance Notice and all of its supporting documentation as well as Employee’s written response before reaching a decision. He concluded that Ms. Simms provided “compelling narrative and supporting documentation” about Employee’s unexcused absences, “careless work habits,” and her failure to follow instructions and procedures. (Ex A-3, pp. 1-5).⁷ The supporting documentation established that Employee’s unexcused absences and performance deficiencies were significant and that, despite her obvious intelligence, her performance was well below the level of her peers. As noted by the DO, despite “every reasonable effort to lead [Employee] to punctual and reliable attendance through provision of policy, repeated verbal and email communications of standards and requirements and warnings,” neither Employee’s attendance nor her performance improved, and her attendance and performance problems created a “burden” for her co-workers who had to absorb her workload. (*Id.*).

Employee argued that she was the victim of disparate treatment and *animus*, and retaliation.

⁷ The AJ included most of the Advance Notice and much of the FAD because both are so thorough and detailed.

In evaluating claims of disparate treatment, the AJ must assess if Agency's discipline was "fair and equitable," by comparing the decision it made in this matter with decisions it made regarding other similarly-situated employees who engaged in the same or substantially the same conduct that resulted in this ten day suspension. *See, e.g., Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-00285-95, *Opinion and Order for Review* (September 29, 1995). Agency must be consistent in disciplining similar employees for similar actions. *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994). Employees have the burden of proof on affirmative defenses. *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017). They must offer evidence that the charges and circumstances were similar to those of another employee but the outcome was different. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 547 (2010). Employee alleged that Ms. Simms treated her more harshly than other Call Center employees who were not charged for the time they took taking their children to and from school or assisting their children during their work hours. However, Employee did not identify any co-worker or offer any supporting information regarding any co-worker who was treated differently under similar circumstances. On the other hand, Ms. Simms testified credibly and consistently that no other Call Center co-worker needed to take leave since they were able to drop off and pick up their children within ten minutes while Employee needed about an hour. She also testified credibly that unlike Employee who did not take calls during the times she said she was helping her young child, other employees remained logged in and taking calls while on duty. (Tr, 112-114). Employee also asserted that Ms. Simms was unsympathetic because she was not a single parent, and did not understand the hardships experienced by single parents, particularly of young children. However, the evidence did not support that contention, since Ms. Simms granted Employee's requests for leave and seemed flexible and responsive. In addition, although one may be sympathetic to a parent who stops work to assist her child or to assist someone else in need, the sympathy does not extend to excusing the requirement of working during duty hours, absent an emergency or a granting of leave. Employee was obligated to perform her duties during her work hours or establish good cause why she was unable to do so. There was no evidence that Employee requested additional leave or change in duty hours so that she could be available to work during her tour-of-duty. Ms. Simms testified credibly that she had no *animus* toward Employee because she was a parent, and that she did not retaliate against her or treat her more harshly. Employee did not present sufficient credible evidence to support her allegations of *animus*, disparate treatment or retaliation.

The AJ having determined that Agency met its burden of proof that the discipline was taken for cause, the remaining matter to be addressed is Agency's decision to impose a ten day suspension. The selection of the penalty is a management prerogative that will not be disturbed provided it is within the permitted range, based on the consideration of the relevant factors and is clearly not an error of judgment. *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). *See also, Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14 (July 11, 2017). The penalty will not be disturbed if Agency weighed "relevant factors" in a fair and unbiased manner. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). The documentary and testimonial evidence support the conclusion that Agency considered relevant sections of the DPM in determining the penalty. Pursuant to DPM §1605.1, in order to "encourage conformity to acceptable...performance standards or to protect operational integrity," an agency may impose an adverse action if an employee violates standards of conduct, fails to meet performance measures or disregards rules of the workplace. In this matter, Agency met its burden of proof by a preponderance of evidence that Employee continued to violate performance standards, meet performance measures and disregard rules and requirements, even after two LRs, a PIP and counseling attendance. (UFFs 6,7, 10 and 11). Agency established that Employee continued to

fail meeting “identifiable conduct or performance standards,” which “adversely affected the efficiency or integrity of Agency,” and caused her co-workers to assume extra tasks. *See* DPM § 1605. 2, Employee was charged with two causes listed in DPM §1603.5: (d) failure or refusal to follow instructions” (f) “attendance-related offenses, including (1) unexcused tardiness and (2) unauthorized absence. The penalty for the first offense of failing or refusing to follow instructions ranges from counseling to removal. The penalty for a first charge of unauthorized absence of one workday or more, but less than five workdays, the specific attendance-related offense charged by Agency was suspension to removal ranges from suspension to removal. Therefore, the penalty comes within the permissible range.

The evidence also supports the conclusions that Agency considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981) in determining the penalty. Ms. Simms provided a full analysis of her reasoning in her testimony and in the Advance Notice. Mr. Thomas, the Deciding Official, stated in the FAD that he had reviewed the Advance Notice, supporting documentation, DPM provisions, and Employee’s written response in reaching a decision. Both the Advance Notice and FAD include thorough and thoughtful analyses of these factors. Mr. Thomas relied in large part on the analysis in the Advance Notice, finding the information and documentation in that document was “compelling and detailed” in support of both charges. The AJ finds that his reliance was reasonable and does not mean that he did not conduct an independent review. Mr. Thomas, for example, noted that he had “considered [Employee’s] request for leniency due to parental responsibility, [and noting that] the proposed action was issued as a mitigated action of ten... days, having considered [her] personal circumstances.” (Ex A-3). The AJ therefore concludes that Agency met its burden of establishing that it properly exercised its managerial discretion in determining the penalty, which was within the permitted range, based on the consideration of the relevant factors, and was not arbitrary, unreasonable or based on improper factors.

In sum, based on a thorough review of the documentary and testimonial evidence, as well as the arguments presented by the parties; and for the reasons stated above, the AJ concludes that Agency met its burden of proof regarding the charges and the penalty, and that this appeal therefore should be dismissed.

ORDER

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

FOR THE OFFICE:


LOIS HOCHHAUSER.