THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
CLARENCE SYKES, Employee	OEA Matter No. 1601-0044-22
v.	Date of Issuance: June 16, 2023
D.C. DEPARTMENT OF TRANSPORTATION, Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Donald Temple, Esq., Employee Representative
Shawn Brown, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 7, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District Department of Transportation's ("DDOT" or "Agency") decision to terminate him from his position as a Motor Vehicle Operator effective February 18, 2022. Following an administrative review, Employee was charged with 1) Unauthorized Absence of five workdays or more, 2) Neglect of duty, and 3) Inability to carry out assigned responsibilities or duties. On March 7, 2022, OEA requested Agency's response to the appeal. On April 6, 2022, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on June 2, 2022. Thereafter, on June 15, 2022, I issued an Order scheduling a Prehearing Conference in this matter for August 3, 2022. After a postponement request, I held the Prehearing Conference on October 11, 2022. Thereafter, I issued a Post Conference Order requiring the parties to submit written briefs addressing the issues raised at the Prehearing Conference. After an Order was issued granting a Consent Motion for an extension of time to file briefs, both parties have now submitted their written briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material issues of fact in dispute, and as such, an Evidentiary Hearing is not required. The record is closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The following facts were obtained from the record and the parties' undisputed submissions and representations. Employee was hired as a Motor Vehicle Operator on April 19, 2004.[1] His job was to drive vehicles, including six- and ten-wheel trucks with a gross weight of 26,000 pounds. As a union member, the terms of Employee's employment were covered by the Collective Bargaining Agreement ("CBA") between Employee's union and Agency. On June 17, 2017, Employee was involved in a minor vehicular accident for which his supervisor placed him on paid suspension pending investigation. Employee does not believe an investigation was warranted as he was not at fault in the accident. However, neither of the parties submitted the investigative accident report. From June 1, 2017, to September 20, 2017, Employee was on Family and Medical Leave Act ("FMLA") leave for the maximum yearly amount of 640 hours. Upon completion of the investigation in early September 2017, Employee returned to work after his FMLA leave. Employee alleged that his coworkers stole his personal items such as cash, jewelry, laptop, a watch, and family photos from his work locker. The parties did not submit an investigative report, if any, on Employee's theft allegations.

Following a medical need, Employee came under the care of Clinical Psychologist Sandra Hoffman ("Hoffman"). In a series of letters dated November 17, 2017, December 4, 2017, February 1, 2018; March 6, 2018; April 1, 2018; May 1, 2018; June 1, 2018, July 1, 2018, August 1, 2018, and September 1, 2018, Hoffman wrote letters to DDOT's Maintenance Division informing them that Employee had been under her care since October 8, 2017, for a generalized anxiety disorder and a major depressive disorder due to a hostile work environment.[2] On October 1, 2018, Hoffman again wrote that this condition caused Employee to be incapacitated and requested an extension of his leave from October 8, 2017, to October 31, 2018.[3] Hoffman also recommended that Employee be transferred to another office within his division.

On February 13, 2018, Agency sent Employee an FMLA form, but it was returned undelivered.[4] On April 18, 2018, Agency emailed Employee the FMLA form.[5] However, there is

[1] Employee's Prehearing Statement dated October 18, 2022.
[2] Employee Brief, Exhibit 1. (March 30, 2023)
[3] *Id.*
[4] Agency Brief, Agency Exhibit 12.
[5] *Id*.

no evidence that Employee ever submitted this FMLA form for approval. Thus, Employee was not on FMLA leave in 2018 and subsequent years.

On January 9, 2019, Employee submitted a Request for Reasonable Accommodation to DDOT. That request was supported by a letter from Employee's Clinical Psychologist Hoffman.[6] Hoffman wrote that Employee had been under her care since September 18, 2017, and that he is ready to return to work. However, the reasonable accommodation that Hoffman and Employee were asking was not for arrangements or accommodations that would allow Employee to continue his job at DDOT. Rather, the accommodation they sought was for Employee to be reassigned to another agency in the District Government. Employee was not charged Absent Without Leave ("AWOL") for 2018 or 2019 even though he did not return to work.

On March 3, 2020, Employee was placed on AWOL status. Although Employee has been absent from work since February 21, 2019, Agency charged him AWOL only from March 23, 2020, to November 30, 2021. By Agency's own calculation, Employee had been AWOL for 620 days or 20 months and 10 days.[7]

In a March 20, 2020, letter, Hoffman submitted on Employee's behalf to his supervisor, Brian Lawrence, she requested a leave extension for Employee.[8] The letter reiterates that Employee suffers from a generalized anxiety disorder and a major depressive disorder, rendering Employee unable to function at the workplace. Hoffman also repeated that Employee had been under her care since October 8, 2017. Although her March 20, 2020, letter contradicted her earlier January 9, 2019, letter, which stated that Employee was fit to work, Hoffman did not address this contradiction. This request was transferred to the Administrative Services Division for assessment.

On March 23, 2020, Steve Messam ("Messam"), Operations Manager for the Employee Relations Unit, responded to Hoffman's letter via email.[9] He stated that Employee was considered AWOL, and that Ms. Hoffman may not request leave for Employee unless he is incapacitated. The email further said that Employee must comply with Article 21 of the CBA between DDOT and AFGE 1975 if he wanted to request leave. Messam noted that Article 21 of the Collective Bargaining Agreement ("CBA") between Employee's union and Agency governs leave requests.[10] Article 21, Section C states that leave requests must be submitted in writing on Form SF-71 in advance of the leave requested. Messam also stated that Employee was not on FMLA leave at the time.[11]

On July 23, 2020, Employee arrived at a DDOT worksite driving a motor vehicle bearing the markings of a different employer.[12] The next day on July 24, 2020, Employee's supervisor, Anthony Wooten ("Wooten") wrote Employee reminding him that he had not requested FMLA

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[6] DDOT Legal Brief Supporting Adverse Action, Agency Exhibit 1.
[7] DDOT Legal Brief Supporting Adverse Action and Agency Exhibit 6
[8] *Id.*, Agency Exhibit 2.
[9] *Id.* Agency Exhibit 2, 3.
[10] *Id.* Agency Exhibit 7.
[11] *Supra*, Agency Exhibit 3.
[12] *Id.* Agency Exhibit 8, pg. 3.

and that if he wanted leave, he must comply with the CBA and submit Form SF-71.[13] Wooten attached D.C. Form 1199-A informing Employee that he was AWOL from March 20, 2020, to July 24, 2020. He warned Employee that unless he responded to the AWOL by July 31, 2020, DDOT would terminate his employment.[14]

On or about July 15, 2021, Employee left a voice message on the office telephone of Steve Messam asking, "does [he] still have a job at DDOT?"[15] Subsequently, on November 30, 2021, DDOT mailed its Advance Written Notice of Proposed Removal.[16] This matter was referred to a Hearing Officer, and following an Administrative review, the Hearing Officer in her January 31, 2022, report, upheld DDOT's decision to terminate Employee for unauthorized absence for five days or more and Inability to carry out assigned responsibilities and duties. She also noted that Employee failed to cooperate with his union in providing a response.[17] On February 16, 2022, DDOT issued its Notice of Final Decision for Proposed Removal with an effective removal date of February 18, 2022.[18]

Agency's Position

Agency asserts that the evidence in this matter reasonably supports its decision to remove Employee for cause from his position of Motor Vehicle Operator. Agency explains that Employee was guilty of 1) Attendance-related offense: Unauthorized Absence of five workdays or more, pursuant to District Personnel Manual ("DPM") §1605.4(f) and §1607.2(f)(4); 2) Neglect of duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties, pursuant to DPM §1605.4(e) and §1607.2(e) and 3) Inability to carry out assigned responsibilities or duties: Any circumstance that prevents an employee from performing the essential functions of his or her position, for which no reasonable accommodation has been requested or can be made, unless eligible for leave protected under the Family Medical Leave Act, pursuant to DPM §1605.4(n) and §1607.2(n). Agency further notes that Employee willfully refused to return to work, despite inadvertently showing that he was able to work, both based on his doctor's note and the fact that he was seen driving another employer's vehicle.

Agency highlights that Employee did not ask for leave in accordance with the CBA, nor did he properly ask for FMLA or ask for a reasonable accommodation that would allow him to continue to work for Agency. Agency also highlights that the letters from Hoffman did not cover the period for which Employee was charged for AWOL (March 23, 2020, to November 30, 2021).[19] Agency explains that its penalty against Employee was within the range of the DPM and it correctly applied the appropriate penalty. Therefore, this Office should sustain Agency's termination of Employee.[20]

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[13] *Id.* Agency Exhibit 4.
[14] *Id.* Agency Exhibit 11 Wooten affidavit.
[15] *Id.* Agency Exhibit 10 Messam affidavit.
[16] *Id.* Agency Exhibit 8.
[17] *Id.* Agency Exhibit 14.
[18] *Id.* Agency Exhibit 9.
[19] Agency's Legal Brief (March 16, 2023) and Agency's Response to Employee's Legal Brief (April 14, 2023).
[20] *Id*.

Employee's Position

Employee does not deny that he had been absent from work since the autumn of 2017. For this matter, Employee does not deny that he was absent from work from March 23, 2020, to November 30, 2021, the period for which he was charged AWOL.[21] However, Employee asserts that his absence was caused by the traumatic mental stress he suffered due to his supervisor and co-workers.[22]

Employee contends that he should have been allowed to use his unused sick leave to cover his absences. However, Employee did not submit any document such as a pay stub to show that he had any unused leave. Nor did Employee submit any documents to show that he requested leave in accordance with his union's CBA. Employee states that his January 9, 2019, Request for Reasonable Accommodation should have been granted. Employee also contends that his FMLA application submitted in May or June of 2018 should have been granted. However, he did not submit any document to substantiate his claim.

Employee admits that between October 2017 and December 2019, he worked part-time for other companies, including UPS. He also admits that from December 2019 to the present, worked as a Transportation Driver for Potomac Job Corp Center for $17/hour.[23]

Employee states that he had ample sick leave, annual leave and/or personal leave to cover the dates of his absences. Employee states that he repeatedly requested that Agency allow him to utilize his earned leave. Additionally, Employee takes issue with Agency's *Douglas* Factor analysis.[24]

Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rules 631.1 and 631.2, 6-B DCMR Ch. 600, et seq. (2021), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the DPM § 1605.1 provides that corrective or adverse action is warranted against a District employee when established standards of conduct are violated or performance measures are not met, or the rules of the workplace are disregarded. Under DPM §1605.4(f)(2), the definition of "cause" includes Attendance-related offenses, including unauthorized absence. And under DPM §1605.4(e), the definition of "cause" includes Neglect of duty. 1) Attendance-related offense: Unauthorized Absence of five workdays or more, pursuant to District Personnel Manual ("DPM") §1605.4(f) and §1607.2(f)(4); 2) Neglect of duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties, pursuant to DPM §1605.4(e) and §1607.2(e) and 3) Inability to carry out assigned responsibilities or duties: Any circumstance that prevents an employee from performing the essential functions of his or her position, for which no

[21] In his brief, Employee states that he was charged AWOL from February 21, 2019, to November 19, 2021, for this matter. However, the charging documents show that he was removed for being AWOL during the period of March 23, 2020, to November 30, 2021.
[22] Employee's Brief in Support of Petition for Appeal (December 17, 2012).
[23] *Id*., page 10.
[24] *Id*.

reasonable accommodation has been requested or can be made, unless eligible for leave protected under the Family Medical Leave Act, pursuant to DPM §1605.4(n) and §1607.2(n).

a) Unauthorized Absence of five workdays or more

In the instant case, the undersigned must determine if the evidence that Employee was absent from work for five (5) or more consecutive day is adequate to support Agency's decision to terminate Employee. In AWOL cases such as this one, "[t]his Office has consistently held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable."[25] Additionally, if the employee's absence is excusable, it "cannot serve as a basis for adverse action."[26] The relevant time period in this matter in which Employee was absent from work is March 23, 2020, to November 30, 2021.

DPM § 1242.1 read in pertinent parts as follows: "[a]n agency head *shall* grant sick leave to an employee under any of the following circumstances: (a) When the employee requires personal medical, dental, or optical examination or treatment; (b) When the employee is incapacitated for the performance of his or her duties by physical or *mental illness*, injury, pregnancy, or childbirth…" (Emphasis added). However, DPM § 1242.7 further provides that "[f]or an absence in excess of three (3) workdays, the agency *may* require a medical certificate, or other administratively acceptable evidence as to the reason for the absence" (emphasis added).

While Employee had submitted his doctor's notes for his prior absences from June 2017 to October 31, 2018, he did not submit any doctor's note that would cover the period for which he was charged AWOL. Indeed, Dr. Hoffman's note of January 9, 2019, indicates that Employee was ready to return to work, albeit it was coupled with a request for Employee to work in a different position other than his previous job assignment.

Because the doctor's notes are outside the relevant dates in this matter, I find that these notes from Employee's doctor are not sufficient to justify Employee's AWOL during the relevant period in this matter. Since DPM § 1242.7 gives Agency the discretion to request evidence of an absence of more than three (3) workdays such as a doctor's note, Agency was justified in charging Employee AWOL for the periods he failed to provide a doctor's note.

Moreover, although Employee alleges that he was mentally incapacitated during the relevant timeframe, it is worth noting that Employee did not deny that he was seen driving a different employer's vehicle on July 23, 2020. Employee also readily admits in his brief that he works as a Transportation Driver for other companies from October 2017 to the present.[27] Employee alleges that going to work with his supervisor and fellow employees is untenable as he does not trust them. However, he has failed to submit any credible evidence that the entire workforce at his jobsite is so toxic that while he could drive for a different employer, he could not

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[25] *Murchinson v. Department of Public Works*, OEA Matter No. 1601-0257-95R03 (October 4, 2005); *citing Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995).
[26] Murchison*, ibid*, *citing Richard v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997); *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001).
[27] *See* Employee's brief, page 10.

do his job for Agency. Consequently, given the totality of the circumstances, I find that Agency had the right to request acceptable evidence such as a doctor's note as to the reason for the continued absence during the period Employee was charged AWOL.

Employee further argues that he had ample sick leave and annual leave to cover his absence for the relevant period. However, Employee failed to submit any evidence that he had ample sick or annual leave. DPM § 1268.1 provides that, "[a]n absence from duty that was not authorized or approved, or for which a leave request has been denied, shall be charged on the leave record as absence without leave (AWOL). The AWOL action may be taken whether or not the employee has leave to his or her credit." Here, due to the CBA between Agency and Employee's union, Employee was obligated to submit Form SF-71 to request leave. If he was requesting sick leave, he was also obligated to provide a doctor's note. There is no evidence to show that Employee ever asked for leave in accordance with the CBA and the leave regulations. Accordingly, I find that Employee's absences were unauthorized, and Agency was justified to charge him for being AWOL. DPM § 1268.2 further provides that "[a]n agency head is authorized to determine whether an employee should be carried as AWOL." Additionally, DPM § 1268.4 highlights that, "[i]f it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate." Here, Agency determined that Employee was AWOL for the period of March 23, 2020, to November 30, 2021. Moreover, given the record, I also find that because Employee's leave was unauthorized, and his doctor's notes does not cover the relevant timeframe in this matter, Employee's absence is not excusable and as such, the charge for AWOL during that timeframe cannot now be charged against Employee's sick or annual leave as provided in DPM § 1268.4.

b) Neglect of duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties.

Employee was also charged with violating DPM §1605.4(e) and §1607.2(e): Neglect of duty: Failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties. Specifically, Agency alleges that despite Messam's March 23, 2020, email message and July 24, 2020, certified letter to Employee to submit a CBA mandated written leave request, Employee failed to do so.

In his brief, Employee does not offer any reason as to why he never complied with the CBA regarding leave requests. I therefore find that Agency met its burden of proof that Employee neglected his duty to comply with the CBA in requesting leave. I also find that he failed to perform his assigned task by Messam to submit a leave request in conformance with the CBA.

c) Inability to carry out assigned responsibilities or duties: Any circumstance that prevents an employee from performing the essential functions of his or her position, for which no reasonable accommodation has been requested or can be made, unless eligible for leave protected under the Family Medical Leave Act, pursuant to DPM §1605.4(n) and §1607.2(n).

For this cause, Agency contends that Employee failed to report for work without authorized leave for more than a year, specifically, from March 23, 2020, to November 30, 2021. Agency further specifies that despite being instructed by management on March 23, 2020, and again on July 24, 2020, that Employee was AWOL and to contact management by July 31, 2020, Employee failed to do so.

Employee does not dispute this allegation; however, he maintains that Agency should have granted him another FMLA. However, as Agency had informed him, Employee was not eligible for FMLA because he had not performed the minimum requirement of one thousand (1000) hours of work for DDOT during the previous twelve (12) months period.[28] Thus, I find that Employee was not entitled to another FMLA during the relevant period.

Next, Employee argues that Agency should have granted his request for another position or reassignment to another agency under the Americans with Disability Act ("ADA") in his January 9, 2019, Request for Reasonable Accommodation. The relevant regulation on reasonable accommodation requests due to a medical condition, 6-B DCMR § 2006.2, states that:

> *2006.2 Whenever a medical evaluation establishes that an employee is permanently incapable of performing one (1) or more of his or her essential job functions…*

There are several problems with Employee's requested accommodation. First, Employee's requested accommodation is to seek reassignment to another unit or D.C. agency, not for a change in working conditions or other arrangements for him to continue in his current position with Agency. Lastly, Employee has not shown that he has a *permanent medical condition* that would prevent his performing his job as a Vehicle Operator. In fact, Employee himself admits that he could perform his job. He just did not want to do it either in his current unit or as an employee of DDOT. Interaction with his superiors and fellow employees was an essential component of his position. Employee's requested accommodation poses an unreasonable burden on Agency.[29] It is the employee's burden to identify a vacant position that will accommodate his disability and to show he is qualified for the position.[30] Employee has failed to do so. Finally, Employee's outside employment proves that he is not a disabled employee and I find that his request not to work for Agency but continue to be paid by Agency or the D.C. Government is not a reasonable accommodation request.

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

The D.C. Court of Appeals has made clear that a D.C. agency must take into consideration the "*Douglas* Factors" when making a disciplinary determination.[31] In *Douglas v. Veterans*

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[28] The Employee's Guide to the Family and Medical Leave Act, Department of Labor.
[29] *See Diane Copeland v. D.C. Public Library,* Case No. 2021 CA 000253 P(MPA) (D.C. Super. Ct. June 10, 2021) where the Court found an employee's accommodation request unreasonable and two years absence from work imposed an undue burden on Agency.
[30] *See Hunt v. D.C.*, 66 A.3d 987, 992 ("The widely prevailing view is that '[a]n ADA plaintiff. . . must demonstrate the existence, at or around the time when accommodation was sought, of an existing vacant position to which she could have been reassigned [and]. . . for which she was qualified.'" (quoting *McBride v. BIC Consumer Products Mfg. Co.*, 593 F.3d 92, 97-98 (2d. Cir. 2009).
[31] *D.C. Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005).

Administration, the Merit Systems Protection Board ("MSPB"), in the context of federal employment, ruled that an agency must consider specific mitigating and aggravating factors in determining an appropriate penalty. The D.C. Court of Appeals in *Colbert* emphasizes the importance of responsibly balancing the relevant factors in each individual case. In its evaluation of the dismissal of a D.C. Department of Public Works employee and subsequent proceedings, the Appellate Court further explained that an agency must consider the *Douglas* Factors at the onset of termination and in consideration of pretermination protections.[32] The agency must provide evidence of the *Douglas* Factors in advance of termination to preserve the procedural protections of due process.

In this matter, Agency addressed the *Douglas* Factors in its Advance Written Notice of Proposed Removal on November 30, 2021.[33] It discussed *Douglas* Factors 1, 2, 4, 5, 6, 7, 9, 10, and 12 as aggravating factors and only found *Douglas* Factors 3, 8, and 11 as neutral. Agency states that Employee's continued unauthorized absence from work for years and unsubstantiated accusations against his fellow employees had made his continued employment untenable.

Employee's arguments regarding Agency's *Douglas* Factor[34] analysis is essentially a disagreement with the way Agency performed its analysis and the weight it placed on each factor.

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[32] *Colbert* at 359.
[33] DDOT Legal Brief Supporting Adverse Action, Agency Exhibit 8.
[34] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
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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;
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> 3) the employee's past disciplinary record;
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> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
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> 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;
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> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
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> 7) consistency of the penalty with any applicable agency table of penalties;
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> 8) the notoriety of the offense or its impact upon the reputation of the agency;
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> 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;
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> 10) potential for the employee's rehabilitation;

However, while there is a requirement that Agency perform a *Douglas* Factor analysis in deciding Employee's penalty, I find that there is no requirement that Agency perform such an analysis to Employee's satisfaction.[35]

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).[36] 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 Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, I find that Agency has met its burden of proof for all its charges and specifications against Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the TIA. Chapter 16 of the DPM outlines the TIA for various causes of adverse actions taken against District government employees. The penalty for a first offense for Unauthorized Absence of five (5) workdays or more is removal.[37] The penalty for a first offense of Neglect of duty ranges from counseling to removal.[38] The penalty for a first offense of Inability to carry out assigned responsibilities or duties is removal.[39] Agency's choice of termination as the penalty is consistent with the language of the DPM. Therefore, I find that, by terminating Employee, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[40] When an Agency's charge is upheld, this Office has

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> 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
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> 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[35] *District of Columbia Metropolitan Police Dept. v. District of Columbia Office of Employee Appeals*, 88 A.3d 724 (April 10, 2014) the D.C. Court of Appeals has held that an agency is not required to articulate its Douglas analysis regarding factors that assist it in determining appropriateness of sanction, before terminating employee.

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

[37] DPM §1607.2(f)(4).

[38] DPM §1607.2(e).

[39] DPM §1607.2(n).

[40] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would

held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE: *s/Joseph Lim*
JOSEPH E. LIM, Esq.
Senior Administrative Judge

fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).