THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARGARET FOWLER,	)	
Employee	)	OEA Matter No. 1601-0006-20
	)	
v.	)	Date of Issuance: March 11, 2021
	)	
D.C. ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION,	)	MONICA DOHNJI, Esq. Senior Administrative Judge
Agency	)	
	)	

Charles Tucker, Esq., Employee Representative
Ryan Martini, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

On November 14, 2019, Margaret Fowler ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Alcoholic Beverage Regulation Administration's ("ABRA" or "Agency") decision to terminate her from her position as a Licensing Specialist effective October 25, 2019. Employee was terminated for failure to meet established performance standards pursuant to District Personnel Manual ("DPM") § 1605.4(m). Agency filed its Answer to Employee's Petition for Appeal on December 13, 2019.

Following a failed mediation attempt, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on March 6, 2020. A Virtual Status Conference was held on May 4, 2020, with both parties present. Thereafter, I issued a Post Status/Prehearing Order requiring the parties to submit briefs addressing the issues raised during the conference. Both parties submitted their respective briefs as required. After considering the parties' arguments as presented in their submissions to this Office, I decided that an Evidentiary Hearing was required. Subsequently, the undersigned issued an Order Scheduling Telephonic Prehearing Conference for September 14, 2020. Both parties attended the scheduled conference. Thereafter, a Virtual Evidentiary Hearing was held via WebEx on November 16 & 17, 2020.[2] Both parties were

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[2] Throughout this decision, Vol. 1 denotes the transcript for Day 1 (November 16, 2020) and Vol. II denotes the transcript for Day 2 (November 17, 2020).

present for the Evidentiary Hearing. On January 5, 2021, the undersigned issued an Order requiring the parties to submit written closing arguments on or before February 5, 2021. Both parties have filed their respective closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Agency complied with DPM §1410 in implementing the Performance Improvement Plan ("PIP");

2) Whether Agency had cause to discipline Employee for failure to meet established performance standards pursuant to DPM § 1605.4(m);

3) Whether the PIP was in retaliation for Employee's federal complaint against Agency; and

4) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee has been employed with Agency since August of 1987. Employee worked as a Licensing Specialist at the time of her removal from Agency. During Fiscal Year(s) ("FY") 2017, and 2018, Employee was rated as a valued performer in her performance evaluation. Employee's immediate supervisor during that time period was Sean Gordy ("Gordy"). Gordy is a Licensing Program Manager at Agency. Following an altercation between Employee and Gordy wherein, Employee alleged that she was bumped and harassed by Gordy, she filed a report with Agency's Director Fred Moosally ("Moosally"). Gordy also filed a report with Moosally. The matter was referred to an Investigator at the District of Columbia Department of Human Resources ("DCHR"). Upon completion of the investigation, the Investigator found no fault from both parties but recommended that Employee be placed on a PIP. Employee was successful in the 2017 PIP. Thereafter, Employee filed a federal complaint against Agency, naming Gordy, in March of 2018. When Agency hired Karen Jackson ("Jackson"), as a Licensing Officer, she was made Employee's new direct supervisor in 2018, with Gordy as Jackson's supervisor.

Jackson was involved in the evaluation of licensing specialists at Agency. Following a mid-year review in May of 2019, Jackson and Gordy placed Employee on a thirty (30) day Performance Improvement Plan ("PIP") noting that Employee was a marginal performer. The PIP commenced on June 25, 2019.[3] Employee was provided with a performance goal for the

[3] Agency's Answer to Petition for Appeal at Tab 5 (December 13, 2019).

PIP.[4] Jackson had weekly meetings with Employee during the PIP period. She provided Employee with a weekly summary of Employee's progress on the PIP after each weekly meeting. On July 31, 2019, Gordy issued a Notice of Proposed Adverse Action: Removal to Employee, noting that the PIP was unsuccessful.[5] On August 13, 2019, Employee submitted a response to the Notice of Proposed Adverse Action: Removal dated July 31, 2019.[6] This matter was referred to a Hearing Officer who issued his Written Report and Recommendation on September 3, 2019. The Hearing Officer noted that Agency was able to support its decision to take adverse action against Employee. However, the Hearing Officer provided Agency with three (3) penalty recommendations: (1) reduction-in-grade; (2) retirement or (3) removal.[7] Subsequently, Agency Director, Moosally issued a Notice of Final Removal on October 15, 2019, removing Employee from her position as a Licensing Specialist with Agency, effective October 25, 2019.[8] Employee filed a Petition for Appeal with OEA on November 14, 2019.[9]

1) Whether Agency complied with DPM §1410 in implementing the PIP

Pursuant to DPM §1410.2, "a PIP is designed to facilitate constructive discussion between an employee and his or her immediate supervisor to clarify areas of work performance that must be improved. Once the areas for improvement have been identified, the PIP provides the employee the opportunity to demonstrate improvement in those areas and his or her ability to meet the specified performance expectations." Additionally, DPM §1410.3 provides that "a PIP issued to an employee shall last for a period of thirty (30) to ninety (90) days and must: (a) Identify the specific performance areas in which the employee is deficient; and (b) Provide concrete, measurable action steps the employee can take to improve in those areas." Furthermore, DPM § 1410.4 provides that "[a]n employee's immediate supervisor or, in the absence of the employee's immediate supervisor, the reviewer, as the term is defined in Section 1499, shall complete a PIP when the employee's performance has been observed by the immediate supervisor as requiring improvement."

Employee argues that Agency added to her workload during the PIP, in violation of PIP regulations. Employee acknowledged that specific cases were assigned to her at the time of the PIP; however, more cases were added to the cases assigned at the commencement of the PIP. Tr. Vol. II. pg. 45. She acknowledged that the additional cases included America Eats Tavern, Swingers, Chicago Uno Grill and the Golo Bar Lounge. Tr. Vol. II. pg.45. She noted that Agency did not offer to amend the time period of her PIP nor was she advised that her PIP would be amended to include the additional cases. Tr. Vol. II. pg. 46. Employee reiterated that she was not informed that she could be given additional work during the PIP period. Tr. Vol. II. pg. 47. Employee also explained that, she kept up with her work although she was placed on the PIP and had extra work added during the PIP.

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[4] This was Employee's second PIP. Employee had been placed on a PIP in 2017, after the incident with Gordy. Employee successfully completed the 2017 PIP.
[5] Agency's Answer to Petition for Appeal at Tab 4 (December 13, 2019).
[6] *Id*. at Tab 3.
[7] *Id*. at Tab 2.
[8] *Id*. at Tab 1.
[9] Petition for Appeal (November 14, 2019).

During the Evidentiary Hearing, Jackson was asked if it would be a problem if additional cases were given to Employee after the PIP had already begun, and Jackson said yes. Tr. Vol. I. pgs. 106-108. Jackson also acknowledged that the above cases were added to Employee's docket while she was already on the PIP. Tr. Vol. I. pgs. 108-109. Jackson acknowledged that additional work was added to Employee after she was already on the PIP. Tr. Vol. I. pg. 109. Jackson also acknowledged that the PIP was not amended to include these cases. However, she claimed that Employee was evaluated on the cases that were on the PIP. Tr. Vol. I. pg. 109. Gordy also explained that while a PIP may reference a specific area, which was the performance evaluation and Standard Operating Procedures ("SOP") in Employee's case, because work does not stop at Agency, Employee would continue to receive assignments, but these assignments are not included in the PIP or held against Employee. Tr. Vol. I. pg. 196. Gordy stated that there were no amendments made to Employee's PIP document. Tr. Vol. I. pg. 197.

Here, while the performance goals as listed in the Notice and Imposition of PIP II, were not changed, Jackson acknowledged that Employee was assigned additional cases during the PIP period. Contrary to Jackson's and Gordy's assertions that Employee was not evaluated on the new cases, the record shows otherwise. The July 23, 2019, email from Jackson which formed part of the basis of the current adverse action listed these additional cases: America Eats Tavern, Swingers, Chicago Uno Grill and the Golo Bar Lounge to proof that Employee did not meet Performance Goals #1, #3 and #4. By adding these cases on Employee's docket, and evaluating her performance based on the newly added cases, I find that Agency violated DPM §§1410.2 and 3, as stated above.

Employee also asserts that there is no evidence in the record of a mid-year review being conducted. During the Evidentiary Hearing, Employee explained that she had never been provided with any performance evaluation where she was not rated as a valued employee and has never received a marginal rating. Tr. Vol. II. pg.12. Employee also stated that she found out about the marginal performance evaluation rating for the first time during the current Evidentiary Hearing from Agency's witnesses. Employee averred that the last performance evaluation she received was dated April 29, 2018, covering the period of October 1, 2017, to September 30, 2018, and she was rated a valued employee. Tr. Vol. II. pg. 13. Employee testified that her supervisor during this period was Jackson and Gordy, and her performance rating for that period was valued performer. Tr. Vol. II. pg. 54. Employee questioned how she could go from being rated as a valued employee in 2018 to being "no-good" in 2019.[10] Jackson on the other hand testified that she was involved in Employee's performance evaluation in 2019. Tr. Vol. I pg. 17. She explained that Employee was a marginal performer in 2019 and this assessment was documented. Gordy also testified that he was involved in completing a performance evaluation for Employee in 2019. Tr. Vol I. pg. 147. He stated that he worked closely with Jackson who was Employee's direct supervisor to monitor Employee's declining performance. Tr. Vol. I. pg. 153. Gordy also noted that Employee's performance was marginal during that period. Tr. Vol. I

[10] In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that "school principals have total discretion to rank their teachers" and noted that performance evaluations are "subjective and individualized in nature." See also *See also American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

pgs. 147-148. Gordy acknowledged that Agency took action by placing Employee on a PIP as a result of Employee's marginal 2019 performance evaluation. Tr. Vol. I. pg. 151. Gordy stated that Employee was placed on the PIP to improve her declining performance. Tr. Vol. I. pg. 151. Gordy explained that he and Jackson did a review of Employee's cases in March of 2019 and they found out that some areas they looked at were simply egregious, so they decided to take action. Tr. Tr. Vol. I. pg. 153.

DPM §1410.4 requires that the immediate supervisor, in this case Jackson, complete a PIP based on her observation of employee's performance. Jackson testified that Employee's declining performance was the reason why she was placed on the PIP. Gordy, though not Employee's immediate supervisor, signed the PIP memo. Gordy, who qualifies as a reviewer under DPM §1499[11], testified that he was involved in completing Employee's performance evaluation and that her performance was marginal. Thus, Employee was placed on the PIP to improve her declining performance. The June 25, 2019, PIP memorandum issued by Gordy specifically state as follows "[t]his memorandum is to advise you that effective June 25, 2019; the agency will be placing you on a Performance Improvement Plan (PIP) for no more than thirty (30) days. Below, you will find the results of a recent mid-year review of your performance since December 2018 to May 2019. *In that time, Management conducted a review of your day-to-day work performance, including case assignments and has found that you continue to display a blatant disregard for ABRA policies and standard operating procedures, specifically with regards to your individual performance and relevant S.M.A.R.T goals*."[12] (Emphasis added). The memorandum goes on to discuss Employee's deficient work performance observed by Agency management during that time period.[13] Based on the above statement as found in the PIP Memorandum, as well as Jackson and Gordy's testimony, I conclude that Employee's performance was observed by her supervisors as requiring improvement, in compliance with DPM §1410.4.

Employee also argues that the PIP did not last the required thirty (30) days. Specifically, Employee notes that her Alternate Work Schedule ("AWS") and the Fourth of July holiday was not factored into the calculation of the PIP thirty (30) days.[14] Employee explained that she informed Jackson, Moosally, Gordy and Robinson during the PIP that she felt the time period of the PIP was not calculated correctly, but they did not appear concerned. Tr. Vol. II. pg. 46. Per Employee, no one explained to her that her AWS or holidays would not be considered. Section 1410.3 provides in pertinent part that "a PIP issued to an employee shall last for a period of thirty (30) to ninety (90) *days*…." (Emphasis added). DPM 1499 defines days to mean "*calendar days* for all periods of more than ten (10) days; otherwise, business days for periods of ten (10) days

[11] DPM 1499 defines a Reviewer as "a supervisor, agency head, or agency head designee responsible for reviewing and approving the annual performance evaluation completed by a rating official." There is evidence in the record proving that Gordy was a supervisor at Agency within Employee's direct chain of command, and he was responsible for reviewing and approving performance evaluation completed by a rating official. He was also Jackson's immediate supervisor; therefore, I conclude that he qualifies as a reviewer.
[12] Agency's Answer to Petition for Appeal at Tab 5, *supra*.
[13] *Id*.
[14] Employee worked four (4)-ten (10) hour days, and was off every other Monday, or as needed to accommodate her doctor's appointments.

or less (unless explicitly stated as calendar days)."[15] Contrary to Employee's assertion, since the PIP period is for more than ten (10) days, it is counted based on calendar days, which include holidays, weekends, days off, and not only work days. As such, I find that June 25, 2019, to July 25, 2019, is equivalent to thirty (30) calendar days. Although it is unfortunate that Agency chose not to extend the PIP at the end of the thirty (30) calendar days, it is within its discretion not to do so. Consequently, I further find that the PIP was in compliance with the requirements of DPM §1410.3 as it did, in fact, last for thirty (30) calendar days as defined in DPM §1499.

2) Whether Agency had cause to discipline Employee for failure to meet established performance standards pursuant to DPM § 1605.4(m)

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency terminated Employee for violating DPM §1605.4(m) – failure to meet established performance standards. Specifically, Agency asserts that Employee was placed on a thirty (30) days PIP effective June 25, 2019, and at the end of the thirty (30) days period, Employee's performance did not improve. Agency avers that Employee did not meet the performance goals as outlined in the PIP. Employee was provided with performance deficiencies that management expected her to correct during the PIP. The table below outlines the 2019 PIP Goals that were present to Employee at the start of the PIP period:

2019 PIP Goals:

What	**How**	**When**		
Deficient S.M.A.R.T Goals	**Desired Outcome**	**Action Plan to Improve Performance**	**Results to measure**	**Frequency of Monitoring**
Performance Goal # 1 (ABC Board Agenda items) – Ensure that 90% of all ABC Board docket and other matters for consideration on the ABC Board Agenda are given to the Program Manager for submission on the Agenda within 36 hours of being assigned the case. Subsequently ensure that the respective applicant, licensee or designated agent is contacted no later than 36 hours after notification of the ABC Board's decision.	• Prepare in advance all agenda and docket items for management review by ensuring files are organized properly and the Accela record is completed. • Contact all assigned applicants to notify of Board's	• Submit all agenda or docket files/applications to supervisor for review in preparation for Board review by 4pm each Tuesday. • Email Licensees/applicants and copy immediate supervisor (Licensing Officer) and (Licensing Division Manager). • Attend in-house	• All Board items must be submitted to ABRA's Licensing Officer each Tuesday before Board [meeting] Wednesday by 4pm • Management must be copied on all correspondence to licensees/applicants or their	Daily, weekly, monthly

[15] DPM 1699 also defines days as "calendar days for all periods of more than ten (10) days; otherwise, days are workdays."

	decision within 24 hours or next business day after Licensing Assistant notifies you of Board's result.	licensing division quality assurance group and individual training.	attorney agents	
Performance Goal #2 (File Contact and File Organization) Ensure that within 24 hours, or the next business day after receiving a case assignment, the applicant, licensee or designated agent who filed the application has been contacted. Information on the date, name of individual contacted and method of contact should be documented in Comment section of Accela or an email should be sent by the Licensing Specialist to the applicant, licensee or designated agent. Create and format the appropriate license application file within 24 hours or the next business day after receiving the case assignment.	• Contact within 24 hours or the next business day after receiving assignment, the actual applicant, licensee or designated agent who filed the application. All initial and ongoing contact must be documented and contact must be made via email. Subsequent phone calls must be memorialized in email. • Assemble and create the appropriate file with all documents and corresponding Accela record for each case. File folders must be consistent with protocol, processing all	• Management (immediate supervisor/licensing officer and division manager) must be copied at each level of correspondence with applicant. • Management (Licensing Officer, and/or division manager or designee) reviews with Ms. Fowler assigned application each Friday or during the week to ensure document file folders are created, organized and labeled as required. • Establish specific days and times designated for cleanup of workspace and inspection by Management. • Collaborate with Records Division to properly store reviewed files. Management will work with Ms. Fowler from spreadsheet of all files to ensure Accela statuses are reconciled and files put away; This measure includes all files pulled by Supervisor for 2019 workload	• Review of licensing assignment spreadsheet and timeline of application submission. • All files to be reviewed and inspected for proper filing of assignments. • Management will permit for specific times/schedule to be allotted each day for cleanup. • Licensing Officer, divisional manager or designee will review and monitor spreadsheet daily for progress and completion of assignment.	Daily and Weekly

	documents received throughout the application process and created within 24 hours or the next business day of receipt of case assignment. Documents must be added to Accela accordingly. • Workspace must be clean and organized at all times. Files must be created and handled pursuant to file creation and maintenance standard operation procedures. • Submit monthly issuance report with supporting license files and documentation to management on-time and by prescribed deadline	review; corrections must be made; files organized/reorganized and reconciled with the Accela system and permanently filed in conjunction with record management protocol within 30 calendar days of PIP implementation.		
Performance Goal # 3 (Case Processing) Ensure that 90% of all assigned cases that are uncontested are processed through to the point of license issuance within 90 days after being assigned the case. Ensure that all completed cases are processed through the Accela workflow, and that all relevant documents are attached in Accela (e.g. Notice of Public Hearing, Notice of Issuance, Approval Letters, Denial Letters etc.) within 24 hours of	• Ensure that all data from at least 90% of licensing application assignments is entered into Accela 1) accurately and 2)	• Licensing Officer and/or divisional Manager will monitor Employee's Accela entries throughout performance period until employee's monthly reports are submitted to	• Review of licensing assignment spreadsheet and timeline of application submissions and auditing of case assignments. • Attend all in-house quality	Daily and Weekly

receiving the placard notice confirmation, or issuing a license and/or substantial change approval letter, or issuing a denial letter. Finally, file all relevant documentation into ABRA Licensing File and return File to Record Division.	statuses updated in Accela within 24 hours or the next business day of issuance of license and/or Board approval license and/or license substantial changes. • Complete all workflow in Accela as each application progresses through the application process. • Update all license statuses and attach relevant documentation such as Notice of Issuance, PDF copies of licenses, and/or Approval letters in the document section of Accela.	manager. • Attend all in-house quality assurance group and individual training. • Ensure that all results are documented and applicants are issued the appropriate correspondence including deficiencies, approval (contingency) and Issuance letters.	assurance group and individual training. •	
Performance Goal #4 (Case Entries in Accela) Ensure that within 3 business days of assignment all pertinent case information, including but not limited to, Applicant contact information, premise address, occupancy information, corporation/entity name, share/stock interest, hours of operation/sales/entertainment/sidewalk/summer garden and endorsement information is entered accurately into Accela.	• All application information is accurately entered into Accela including workflows, applicant contact information, comments and case notes, application status,	• Management will regularly monitor Accela Entries. Reports will be made using the licensing assignment sheet to monitor case progress and Accela. • Attend in-house quality assurance group and individual training	• Review and audit assignments as found on the licensing division assignment spreadsheet and in Accela, Monitor application submissions and auditing of case assignments.	

	premise address, fees, establishment occupancy information, corporate/entity name, share/stock interest, hours of operation and endorsement information • Properly transfer and notate transfer of licenses, particularly transfers with and/or without sale are accurately entered into Accela with updated statuses for the transferor and transferee including appropriate fee assessment.			

In the instant matter, Agency argues that Employee did not meet any of the above-mentioned performance goals. Jackson testified that with regards to Performance goal #1 (ABC Board Agenda Items), Employee's performance was marginal/inadequate. Tr. Vol. I. pg. 24. She explained that licensing specialists are required to submit their cases before the Board by 4:00 p.m. every Tuesday, per Agency's procedures and policies which were emailed to the licensing specialists every week. Tr. Vol. I. pg. 24. When asked if Employee was meeting this deadline, Jackson responded in the negative. Tr. Vol. I. pgs. 24-25. Jackson also asserted that licensing specialists are required to notify their clients of the ABRA Board's approval of their case within 24 hours of the decision. Tr. Vol. I. pg. 25. Licensing specialists were aware of this timeline via the Standard Operating Procedure for handling case assignments. Tr. Vol. I. pg. 25. Jackson identified Agency's Exhibit 2 as the SOP she referenced in her testimony and which was in effect in May – July 2019. Tr. Vol. I. pg. 26. When asked if Employee was complying with the SOP at the time of the July check-in, Jackson said no. Tr. Vol. I. pg. 27. She stated that

Employee was the only employee who had the tendency of submitting licensing applications late. Tr. Vol. I. pg. 84. Jackson reiterated that the deadline for Agency Board agenda items was Tuesday at 4:00 p.m. The Board met on Wednesdays and Employee sometimes would submit her cases while the Board was in session. Tr. Vol. I. pg.132. Employee also acknowledged that she submitted cases after the deadline. However, she explained that those cases could have waited to the next Wednesday. But because she worked from 9:00 a.m. to 7:30 pm, she put the cases out to go before the Board after the deadline so they can go before the Board the next day. According to Employee, the Board meets on Wednesday, so she worked until 7:30 pm on Tuesday to get the cases to the Board on Wednesday. Tr. Vol. I. pg. 121. She admitted that some of her cases went out before the 4:00 p.m. deadline and others did not. Tr. Vol. I. pg.121. Based on Employee's own admission that some of her cases did go out after the 4:00 p.m. Tuesday deadline, I find that Employee did not meet Performance Goal # 1. Because Employee did not meet Performance Goal #1, I find that Agency had cause to discipline Employee for failure to meet established performance standards. Performance Goal #1 was one of the established performance standards listed in the June 2019 performance plan, and by failing to comply with this standard, I further conclude that Employee's performance did not improve.

Performance Goal #2 (File Contact and File Organization - Files and Record Management) required that Employee contact within 24 hours or the next business day after receiving assignment, the actual applicant, licensee or designated agent who filed the application. It emphasized that Employee document all initial and ongoing contact via email. Employee was further required to memorialize any subsequent phone calls in emails. This performance goal required Employee to copy her supervisor at each level of correspondence with applicants. According to Jackson, by the third meeting, there were no emails to show that Employee had contacted the licensees as required. Jackson stated that Employee never copied her on any emails, and she got constant calls from licensees. The licensees were instead contacting Gordy or the Director for updates on where they were in the process. Tr. Vol. I. pgs. 61 - 64.

Jackson asserts that Employee's performance throughout the PIP was marginal. Jackson stated that her conclusion that Employee did not meet the performance goal of the PIP was based on several factors to include the fact that: Employee never brought in proof of any of the documentation; Employee never responded to any of the emails, all she did was argue the whole time she was in the office; she never provided documentation showing that she was trying to improve; and she did not show the willingness to do the work. Tr. Vol. I. pgs. 66-67. Gordy acknowledged that Agency took steps to ensure that Employee's PIP was a success, however, Employee's performance had not improved at the end of the PIP. He noted that initially, Employee would not participate in the meetings. Tr. Vol. I. pg.155. He stated that Employee ultimately became contentious, obstinate and combative whenever they met to discuss the PIP. Tr. Vol. I. pgs. 155-156. Gordy further explained that Employee rebuffed and pushed against the fact that she was placed on a PIP. Tr. Vol. I. pg.156. Gordy asserted that he made a decision that Employee should be disciplined because there was no improvement in Employee's performance. Tr. Vol. I. pg. 158. Gordy further noted that with the push back from Employee, Agency was forced to discipline Employee. He concluded that disciplinary action had to be taken to get Employee's attention. Tr. Vol. I. pg. 158.

Employee acknowledged that pursuant to the SOP, upon receiving an assignment, the licensing specialist shall contact the licensee or designated agent within 24 hours or the next day to notify them if they have been assigned the application process. Tr. Vol. II. pg. 93. She acknowledged attending weekly meetings with Jackson that lasted about three (3) hours. Employee stated that she informed Jackson that the meetings were taking up her time. Tr. Vol. II. pg.124. According to Employee, she discussed her progress with Jackson during the meetings, and she had no control over what Jackson decided to put in the emails. Tr. Vol. II. pgs.124-125. Employee reiterated that her performance was great, and she was totally shocked when she received the advanced written notice of removal. Tr. Vol. II. pg.125. Additionally, Employee asserted that her files were removed which caused her extra time trying to find them. Tr. Vol. II. pg. 25. She also testified that she had cases on the PIP that involved continuous work as they were dealing with customers that were buildings like hotels. Tr. Vol. II. pgs. 38-40. She further explained that as the most tenured licensing specialist, she was assigned more cases and most of her assigned cases had problems. Tr. Vol. II. pg. 39.

Employee did not provide this Office with any evidence to contradict Agency's assertion that she did not contact the applicants/licensees or their designated agents via email within 24 hours or the next business day after receiving the assignment, as outlined in Performance Goal #2. There is also no evidence in the record to show that Employee copied her immediate supervisor or management on any of the email correspondence with the applicants/licensees or their designated agents. As such, I conclude that Employee did not meet this performance requirement as established in the 2019 PIP. Because Employee did not meet Performance Goal #2, I find that Agency had cause to discipline Employee for failure to meet established performance standards.

Employee testified that her supervisors in 2018 were Jackson and Gordy, and her performance rating for that period was valued performer. Tr. Vol. II. pg. 54. Employee questioned how she could go from being rated as a valued employee in 2018 to being "no-good" in 2019. Employee maintained that she knew she was doing good work and she did not know why she was placed on a PIP in 2019. Tr. Vol. II. pg. 124. The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*[16] explained that, "[d]ifferent supervisors may disagree about an employee's performance and each of their opinions may be supported by substantial evidence." Similar to the facts in *Shaibu*, I find that it is within the supervisor's discretion to reach a different conclusion about Employee's performance, as long as the supervisor's opinion is supported by substantial evidence. There is evidence in the record to support Agency's assertion that Employee was not successful in the PIP. Jackson provided Employee via email, with a thorough recap of the weekly meetings held with Employee during the PIP. These emails highlighted Employee's performance progress as discussed during the meeting. Employee testified during the Evidentiary Hearing that she discussed her progress with Jackson during the meetings, and she had no control over what Jackson decided to put in the emails. Tr. Vol. II. pgs.124-125. However, she did not provide any specific facts or evidence to contradict what Jackson wrote in the emails. Further, substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. The court in *Shaibu* noted that, "it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [supervisor's] evaluation but that would support a better overall

[16] Case No. 2012 CA 003606 P (January 29, 2013).

evaluation."[17] The court in *Shaibu*, further opined that if the factual basis of the "[supervisor's] evaluation were true, the evaluation was supported by substantial evidence." Additionally, it highlighted that "[supervisors] enjoy near total discretion in ranking their teachers"[18] when implementing performance evaluations. The court concluded that since the "factual statements were far more specific than [the employee's] characterization suggests, and none of the evidence proffered to OEA by [the employee] directly controverted [the supervisor's] specific factual bases for his evaluation of [the employee] …" the employee's petition was denied. As performance evaluations are "subjective and individualized in nature,"[19] this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[20] Moreover, Employee in the current matter admitted to not meeting the document submission deadline which was part of Performance Goal # 1. Furthermore, there is no evidence in the record to contradict Agency's assertion that Employee did not copy her supervisor or contact the applicants via email as required in Performance Goal # 2. Therefore, I conclude that Agency has met its burden of proof for this cause of action. Because Agency has met the burden of proof with regards to performance goals #1 and #2, I will not address the remaining performance goals, and the above violation of performance goals #1 and #2 provides Agency with sufficient cause to discipline Employee for failure to meet established performance standards.

3) Whether the PIP was in retaliation for Employee's federal complaint against Agency

Employee states that her performance was great, and she was placed on a PIP because she filed a federal lawsuit against Agency and named Gordy in the lawsuit. She explained that she was targeted by Gordy with regards to the PIP, and Agency should have removed Gordy from supervising her after she filed a federal complaint against him. Tr. Vol. II. pgs. 90-91. Referencing Employee's Exhibit 5, the FY2018 performance document, Employee identified her name on the document and the rating period on the documents as October 1, 2017 to September 30, 2018. Tr. Vol. II. pgs. 49-50. Employee testified that her supervisor during this period was Jackson, and Gordy was the manager. She also noted that her performance rating for that period was valued performer. Tr. Vol. II. pg. 54. She acknowledged that during this period, Gordy found her to be highly effective. Tr. Vol. II. pg. 54. Employee notes that her federal complaint against Agency and Gordy was filed on March 20, 2018. Tr. Vol. II. pgs. 69-70. Employee stated that apart from assigning Jackson to be her supervisor, Moosally did not take any action after finding out that Employee had filed a federal complaint against Gordy. Tr. Vol. II. pg. 66. Employee testified that she received a high-performance rate that Gordy modified. She questioned how she could go from being rated as a valued employee in 2018 to being a marginal performer in 2019.

Gordy stated that he does not recall being made aware of an EEOC/Federal complaint by Employee naming him as the subject of the complaint. Tr. Vol. I. pgs. 185-186. When asked if

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[17] *Id.* at 6.
[18] *Id*. *Citing Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).
[19] *See also American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).
[20] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

he had any concerns regarding retaliation especially with Gordy listed on Employee's PIP, Moosally responded in the negative. Moosally agreed that during the 2017 PIP, there were no federal lawsuits filed by Employee against Gordy. Tr. Vol. II. pgs.153-155. He also agreed that a federal lawsuit was filed by Employee against Gordy in March of 2018 and the current PIP was initiated after the March 2018, date. Tr. Vol. II. pg. 155. Jackson acknowledged that she was made aware by the General Counsel after Employee's termination that Employee had filed a federal lawsuit against Agency. Tr. Vol. I. pg. 78.

To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his employer took an adverse action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.[21] A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.[22] There is no dispute that Employee filed a federal complaint in March of 2018, against Agency, naming Gordy. There is also no dispute that Agency took adverse action of termination against Employee.

I however find that there is no causal connection between the federal lawsuit and the adverse action. The adverse action of termination resulted from Employee being unsuccessful in the 2019 PIP. Employee explained that she was targeted by Gordy with regards to the PIP, and Agency should have removed Gordy from supervising her after she filed a federal complaint against him. Tr. Vol. II. pgs. 90-91. Moosally averred that he was not troubled with Gordy being named as one of Employee's supervisor in the PIP even though he was aware of the federal lawsuit filed by Employee against Agency and Gordy, because the allegations had been investigated. Tr. Vol. II. pg.152. The record however suggests that Jackson, and not Gordy was Employee's direct supervisor. Employee also acknowledged that Gordy was removed from directly supervising her prior to the 2019 PIP.

Moreover, Jackson testified that she only became aware of the lawsuit after Employee's termination. She also testified that she was involved in Employee's performance evaluation in 2019 and Employee was a marginal performer in 2019. Tr. Vol. I. pg. 17. Jackson further affirmed that she was involved in the drafting of the PIP. Tr. Vol. I. pg. 18. During the PIP, Jackson stated that she offered weekly meetings with Employee to review her progress. Following each weekly 2019 PIP meeting, Jackson emailed a detailed Memorandum summary of the PIP meetings to Employee and Agency management. The content of the Memorandum formed the basis for the current adverse action. She noted the deficiencies in Employee's performance in the weekly memos. As noted above, Employee herself acknowledged not meeting the performance standard that required her to submit case files by 4:00 p.m. on Tuesdays and she did not provide any evidence to contradict Agency's assertion that she did not email the applicants or copy Agency management on the emails as requested. As set forth above, while Gordy signed the PIP and was present for the weekly meetings held with Employee during the 2019 PIP timeline, the specifications Agency used to support the outcome of the PIP was

[21] *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).
[22] *Id.*

provided by Jackson. Moreover, Employee did not provide any evidence to support her assertion that she received a high-performance rating, which Gordy changed. Consequently, I find that there is no causal connection between Employee filing a federal lawsuit and her termination for failure to meet established performance standards. I therefore conclude that, Agency's termination of Employee was not in retaliation of Employee's federal lawsuit.

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

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).[23] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of failure to meet established performance standards. Consequently, I conclude that Agency can rely on this charge to discipline Employee.

Employee asserts that by terminating her, Agency did not engage in progressive discipline. She notes that she submitted her intent to retire letter to Agency on July 24, 2019, days before Agency's issuance of the Advance Written Notice of Propose Removal. Employee testified during the Evidentiary Hearing that she intended to retire on her birthday, February 6, 2020, because of her failing health. Employee also noted that there were mitigating circumstances that Agency knew or should have known of, prior to Agency's issuance of Notice of Final Removal dated October 15, 2019. These mitigating circumstances include (1) her failing health; (2) her submission of a Family Medical Leave Act ("FMLA") form to Agency's Administrative Officer, Camille Johnson; and (3) the additional cases Agency added to the original PIP without amending the PIP. Gordy testified during the Evidentiary Hearing that he was not aware that Employee was contemplating retirement. He stated that he did not have the information in front of him at the time. Tr. Vol. I. pgs. 200 -201.

In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Illustrative Penalties ("TIA"). Chapter 16 of the DPM outlines the TIA for various causes of adverse actions taken against District government employees. The penalty for "failure to meet established performance standards" is found in § 1607.2(m) of the DPM. The penalty for a first offense under this provision ranges from reassignment, reduced grade to removal. The record shows that this was the first time Employee was charged for violating this cause of action.

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[23] *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).

Employee acknowledged that she contacted DCHR to find out what her retirement classification would be prior to the adverse action. Tr. Vol. II. pg. 61. Employee then submitted her intent to retire on July 24, 2019 via email to Moosally, Jackson, Gordy, and Robinson. Gordy issued Agency's Notice of Proposed Removal on July 31, 2019. Thus, I find that contrary to Gordy's testimony that he was not aware of Employee's intent to retire, the record proves otherwise. Gordy also stated that he consulted with the Administrative Officer, Johnson, prior to issuing the adverse action. He noted that if he was aware of Employee's health issues and her requesting FMLA, he probably would not have proceeded with the adverse action as these all tie into the *Douglas* factors consideration. Tr. Vol. I. pg. 197. The record also shows that Johnson received Employee's request for FMLA, along with Employee's medical record in August of 2019, months before the issuance of the Notice of Final Removal dated October 15, 2019.

Additionally, the Hearing Officer recommended in his report that Employee be reassigned or be allowed to retire since she had showed interest in retiring. He recommended removal only as a last resort if the first two options were not feasible. Moosally stated in the Notice of Final Removal that he did not find the Hearing Officer's recommendation of a reduction-in-grade or reassignment feasible because many of the tasks not performed by Employee as outlined in the PIP were same or similar tasks that would have been required of Employee at a lower grade. With regards to retirement, Moosally stated that in light of Employee's years of service, he found that retirement was a reasonable recommendation. However, he noted that Employee's intent to retire letter was not specific enough, as it did not have an exact retirement date. Consequently, he chose the penalty of removal. When questioned about the same issue by the undersigned during the Evidentiary Hearing, Moosally reiterated that retirement would have been an option if there was a specific date. Tr. Vol. II. pg. 186. He explained that all he had was the intent to retire letter and management does not have the ability to tell an employee you must retire on this date. Tr. Vol. II. pg.187. When questioned why Agency did not reach out to Employee to ascertain the exact retirement date, Moosally explained that the concern was management telling Employee she had to retire sometime in February of 2020. Tr. Vol. II. pg. 187.

While it was within Agency's discretion to allow Employee to retire in lieu of termination, I disagree with Moosally's reasoning with regards to not probing more into Employee's intent to retire. Moosally and Agency failed to cite to any statute, case law, or regulation stating that an employee is required to provide agency with an exact retirement date or one that forbids agency from asking clarifying questions when an employee submits an intent to retire. The District of Columbia Court of Appeals in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (D.C. 2008) held that as a general principle, an employee's decision to [retire] is considered voluntary "if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. With meaningful freedom of choice as the touchstone, courts have recognized that an employee's [retirement] may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information." In the instant matter, I find that Employee initiated the retirement process when she emailed Agency's management, including Moosally on July 24, 2019, informing them of her intent to retire in February of 2020.

Agency has not provided the undersigned with any regulation stating that once an employee makes an employer aware of their intent to retire, the employer cannot contact the employee or ask them clarifying questions about their pending retirement. Employee made the choice to retire and she set an effective date of February of 2020. While Employee did not specify the exact date in February that she wanted to retire, I find that the request was specific enough for Agency to reach out to Employee without any time pressure, to ascertain an exact date in February of 2020, that Employee was planning to retire. I find that Moosally's assertion that he did not contact Employee to get an exact date because he did not want it to appear as if Employee was being pushed out is not persuasive. As previously stated, Employee already submitted her intent to retire to Agency. Requesting a specific date in February is equivalent to Agency reaching out to an employee for additional information to process her request. I further find that communicating with Employee for this specific reason does not amount to misrepresentation, duress or coercion, or time pressure. Employee had already set the ball rolling when she emailed Agency about her intent to retire, as well as providing them with a retirement month and year. Nonetheless, I conclude that, since the effective date of Employee's proposed retirement was several months after the effective date of the termination, it was within Agency's discretion to allow Employee to retire in lieu of termination.

Based on the record, I find that Agency did not consider relevant mitigating circumstances or progressive discipline in its decision to terminate Employee. I further conclude that the penalty of termination was excessive given Employee's years of service with Agency. 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.[24] When an Agency's charge is upheld, this Office has 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. Given the totality of the circumstance, I find that while Agency's charge of failure to meet established performance standards against Employee was upheld, the penalty of termination was excessive for that specification. Consequently, I further find that the penalty of termination should be reversed.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[25] Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313

[24] *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 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 (1981).

[25] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

(1981), in reaching the decision to terminate Employee.[26] However, I find that Agency imposed penalty constitutes an abuse of discretion. The proposing official, Gordy, testified that he considered the *Douglas* factors in imposing the penalty in this matter. He however, stated that based on the *Douglas* factors, Employee's health issues would have been considered if he was made aware of them. He explained that if he was made aware of the FMLA and her health issues, he would not have moved forward with the termination. Gordy testified that he consulted the Administrative Officer, Johnson, before proposing Employee's removal, and he was not made aware of Employee's health issues or FMLA request. Gordy was copied on the July 24, 2019, email from Employee expressing her intent to retire, yet he claimed that Employee did not make her intent to retire known to him. Additionally, this same intent to retire letter informed Gordy and Mossally that Employee was retiring due to various health conditions, medical limitations, and conditions. Thus, I find that if Gordy or Moosally were truly unaware of Employee's health issues and her request for FMLA prior to the effective date of the adverse action, then someone within Agency's management staff failed to act appropriately and Employee should not have to suffer for Agency's mistakes. Accordingly, for the reasons stated above, I further find that Agency's penalty of termination must be reversed as it did not consider all relevant 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.

Additionally, as set forth above, I find that Agency violated DPM §§1410.2 and 1410.3 when it added cases to the already established PIP without amending the PIP period or goals to accommodate the additional cases. 6-B DCMR § 631.3 provide that "… [OEA] shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the

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[26] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." Additionally, 8-A DCMR § 1803 highlights that "harmful error shall mean an error of such magnitude that in its absence the employee would not have been released..." In the instant matter, Agency provided Employee with specific PIP goals to be completed within a thirty (30) days period. Sometime during the thirty (30) days period, Agency assigned additional cases to Employee. These additional cases were part of the basis of Employee's failed PIP as seen in the July 23, 2019, Memorandum of the July 18, 2019 meeting, drafted by Jackson. Agency included these cases in support of its assertion that Employee did not meet the established performance goals. It is highly probative that Employee relied and focused on the cases that she received at the beginning of the PIP in meeting her performance goals. Furthermore, it can be reasonably assumed that upon receiving the PIP standards, Employee allocated time and resources according to her initial docket. I agree with Employee's assertion that these extra cases undermined the very purpose of the PIP and could not be used to accurately gauge her improvement in the PIP. Consequently, I find that by adding the new cases to Employee's PIP evaluation, Employee was prejudiced because the time and resources she devoted to the other cases may have negatively impacted her rating. Therefore, I conclude that Agency's adverse action of termination must be reversed.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of terminating Employee for failure to meet established performance standards is **REVERSED**;
2. Agency shall allow Employee to retire effective February 6, 2020;
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the adverse action for the period of October 15, 2019, to February 6, 2020; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge