THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0010-21
EMPLOYEE[1],	
Employee	
	Date of Issuance: April 20, 2022
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF FOR HIRE VEHICLES,	
Agency.	MICHELLE R. HARRIS, ESQ.
	Administrative Judge

Gina Walton, Employee Representative
Connor Finch, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 4, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of For Hire Vehicles' ("DFHV" or "Agency") decision to terminate her from service effective December 4, 2020.[2] OEA issued a letter dated March 9, 2021, requesting an Agency Answer by April 8, 2021. Agency filed its Answer to Employee's Petition for Appeal on April 8, 2021.

I was assigned this matter on July 1, 2021. On July 8, 2021, I issued an Order Scheduling a Prehearing Conference for July 29, 2021. During the Prehearing Conference, I determined that an Evidentiary Hearing was warranted. As a result, I issued an Order Convening an Evidentiary Hearing for November 4, 2021. Following email correspondence and a Status Conference with the parties on October 28, 2021, it was determined that the Evidentiary Hearing would need to be rescheduled due to witness availability. As a result, on November 2, 2021, I issued an Order rescheduling the Evidentiary Hearing for December 2, 2021.[3] On November 19, 2021, Agency notified the undersigned of its position to seek mediation of this matter. Accordingly, on November 22, 2021, I issued an Order Postponing the Evidentiary Hearing pending the results of mediation. On December 14, 2021, the undersigned was

[1]Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee was charged with two causes of action: 1) Failure/Refusal to Follow Instructions under DPM §1607.2 (d)(2); and 2) False Statements/Records under DPM §1607.2 (b)(4).
[3] Agency subsequently filed a Motion to Continue the Evidentiary Hearing. An Order was issued November 3, 2021, granting that Motion and noting the December 2, 2021 date for the Evidentiary Hearing.

notified that mediation was not successful in this matter. Accordingly, on December 15, 2021, I issued an Order Rescheduling the Evidentiary Hearing for January 25, 2022.

The Evidentiary Hearing proceeded on January 25, 2022. During the Evidentiary Hearing, both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on February 10, 2022, requiring both parties to submit their written closing arguments on or before March 14, 2022. Both parties submitted their written closing arguments by the prescribed deadline. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee for: 1) Failure/Refusal to Follow Instructions under DPM §1607.2 (d)(2); and 2) False Statements/Records under DPM §1607.2 (b)(4).; and
2. If so, whether termination was the appropriate penalty under the circumstances.

BURDEN OF PROOF

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

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

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

SUMMARY OF TESTIMONY

On January 25, 2022, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions.

Agency's Case-In-Chief

Mia M. Bowden - "Bowden" – Pages 25 – 93

Bowden is the Assistant Chief Supervisory Vehicle Inspection Officer and has been in that position since October 2014. Bowden's responsibilities include the supervision of all Vehicle Inspection Officers (VIOs) and the administrative duties associated with the management of those employees. Bowden explained that VIOs are responsible for policing for-hire vehicles in the District and enforcing DCMR Title 31. VIOs may write citations, and counsel drivers on rules and regulations and ensure compliance. Vehicles include taxi cabs, limousines and other for hire vehicles. VIOs have enforcement authority and can assess fines and have vehicles impounded. VIOs may also testify in hearings at the Office of Administrative Hearings (OAH) as it relates to violations they enforce.

Bowden testified that she believed Employee commenced employment at Agency in 2006 when it was still called the DC Taxicab Commission (DCTC). Bowden did not know Employee prior to her work at Agency. Bowden explained that she supervised Employee as a watch commander, but Employee was not her direct report until she was assigned to supervise Employee in or around February 2020. Bowden explained that watch commanders are assistant chiefs during shifts. Thus, if an employee who she does not directly supervise was on a shift, then she would be their watch commander. Bowden testified that she was Employee's supervisor until the time of her removal.

Bowden explained that in March 2020, the ordinary duties of the VIOs changed due to the Covid-19 public health emergency. Because VIO responsibilities could not be completed via telework, the Agency assigned alternative duties to VIOs. VIOs were to do Skillport training each day they were on duty, Monday through Friday. Bowden testified that she also did not have her ordinary duties and was detailed to the Department of Employment Services (DOES) around the first week of April 2020. During this time, she was still Employee's supervisor of record, but did not oversee her daily activities because of the detail assignment. Bowden noted that she had to physically report to duty at DOES from 8:00am to 5:30pm.[4] Bowden explained that she would still approve Employee's time every two (2) weeks and address leave requests, but iterated that she did not provide Employee with the daily assignments.[5]

Bowden testified that in May 2020, she received a phone call from HR Specialist, Shalonda Frazier ("Frazier"), who informed her that Employee had expressed that she had time conflicts for trainings due to her child's remote learning schedule which was from 9am to 3pm. Bowden explained that she and Frazier had a conversation and decided they would allow Employee an additional two (2) hours to turn in her trainings by 7pm each day instead of 5pm.[6] Bowden could not recall the date of that conversation. Bowden also noted that Employee did not email her requesting an accommodation, but that it was forwarded to her by Frazier.[7] Bowden cited that she did receive an email from Employee as presented in Agency's exhibit A-14. Bowden testified that she and Frazier came up with this resolution regarding Employee's child's distance learning schedule and time needed to complete work assignments. Bowden said this accommodation was communicated to Employee via email. Bowden explained that the assigned trainings probably lasted for about two and a half hours each day.[8] Bowden also noted that the accommodation was set to allow Employee time to submit after the end of the school day.

Bowden testified that at some point in May 2020, Employee expressed that she had not completed trainings as referenced in an email exchange as presented in Agency's Exhibit A-2. Bowden said that she responded to Employee's email and told her that she had requested an accommodation for her child's remote learning and that she was provided extra time to turn in assignments each day. This email exchange occurred on May 12, 2020. Bowden asserted that after that exchange on May 12th, she contacted Amber Sigler and Chief Martin by phone, and they said the trainings had not been turned in. Bowden

[4] Tr. at Page 35.
[5] Tr. at Page 36.
[6] *Id.*
[7] Tr. at Page 38.
[8] Tr. at Page 42.

believed she then sent an email to Employee requesting she complete and turn in the trainings. Bowden explained that there was a lot of back and forth and she could not recall whether she requested Employee turn it in on May 12th or May 13th. Bowden later identified through Agency's exhibit A-2 that the correspondence was on May 12th.[9] Bowden stated that according to this email, she instructed Employee to get the trainings done and submit them with the next day's trainings which would have been May 13th. Bowden testified that she believed that Employee had submitted those trainings on May 13th as instructed. Bowden later recalled that she was informed Employee did not complete her trainings as referenced in Agency's Exhibit A-4.[10] Bowden explained that Amber Sigler communicated that Employee did not submit trainings on May 13th. Bowden said after hearing this, she thinks she called Chief Martin and may have called Sigler to double check. Bowden noted that Chief Martin is an Assistant Chief at Agency. She was communicating with Martin because he was one of the people the trainings needed to be submitted to. Because Bowden was detailed at DOES, she was not directly assigning trainings and they were being turned into Martin and Sigler. Bowden testified that Employee later indicated she no longer needed the accommodation. Bowden believed this was communicated via email.

Bowden proposed Employee's removal and was the proposing official and completed the official rationale worksheet. However, Bowden's worksheet did not address both charges for which Employee's removal was proposed. Bowden prepared the first charge for failure to follow instructions and Shalonda Frazier prepared the second charge for false statements. Bowden explained that she considered the allegations serious and that she relies on VIOs to follow instructions. Bowden also noted that VIOs hold a position of trust. Bowden also considered past discipline in the Douglas Factors.[11]

On cross-examination, Bowden explained that Skillport Trainings are in PeopleSoft and are just technical trainings. She reiterated that she neither assigned nor issued these trainings to Employee. Bowden believed that all VIOs received the same training but was unsure because she was not involved in that process. Bowden testified that her detail at DOES ended sometime in October 2020. Bowden further testified that she did not recall having previously completed disciplinary action/ proposal for a suspension or removal. Bowden could not recall whether she had received any training as it relates to the considerations of Douglas Factors for disciplinary actions. Bowden noted that during the time of her detail at DOES, her tour of duty was 8am to 5:30pm.

Employee sent an email on May 12th about not completing the assignment. It was highlighted that Employee sent the email to Bowden at 3:16pm. When asked why Bowden consulted with Sigler or Martin, when the assignments were not due until 7pm, Bowden explained that if Employee sent it at 3:16 pm, then she would not have seen that email until after 5pm.[12] Bowden testified that she probably didn't see the email until close to 6:30pm. Bowden explained that she lives a good distance from DC and had to leave DOES and drive home. Thus, she would have looked at the email once she was home, which would've been closer to 6:30pm. Bowden iterated that she didn't see the email, which is why she didn't respond until 9:56pm that evening. Bowden thought she told Employee to submit that day's training along with the next day's training on that next day. Bowden further explained that she told Employee to submit trainings for May 12th and May 13th on May 13th. Bowden testified that Employee completed the trainings for May 12th. Bowden believed it was submitted on May 13th or May 14th. Bowden was not aware of what "proof" of completed trainings were sent. She thought they were instructed to send a screenshot of the certificate of completion or a transcript, but indicated she was unsure because she did not assign the trainings and did not get the direct instructions, thus she was unsure of what they were

[9] Tr. at Page 51.
[10] Tr. at Page 55.
[11] It should be noted that Employee objected to Bowden's testimony regarding past discipline, indicating that the past disciplinary charges were not included in the notices for removal. Tr. Page 70. That will be addressed in the analysis of this decision.
[12] Tr. at Page 77.

supposed to send in. Bowden recalled that the certificate of completions for Employee's training denoted May 12th, but said it was not received until May 13th or May 14th.

On redirect, Bowden testified that she instructed Employee to complete and submit proof of trainings by 7pm each day. To comply with this directive, Employee was supposed to send these certificates to Amber Sigler and Carl Martin each day.

Amber Sigler – "Sigler" – Pages 94 -113

Sigler is a Program Analyst in the Enforcement Department at Agency and has been there for three (3) years. Her responsibilities include collecting data for the entire department, mostly from the VIOs data input into the system. During District Covid-19 Public Health Emergency in 2020, Sigler explained that beginning in March 2020, VIOs were required to complete trainings in Skillport Monday through Friday. Sigler did not select the trainings but sent them out via email every day. She tried to have them out by 8am most mornings. Sigler sent these emails to the entire Enforcement Department, including VIOs, and assistant chiefs. Sigler was familiar with the trainings because she completed them as well and that it usually took her about an hour or two to complete them. Sigler could not recall any trainings that were significantly longer than two hours, except some of the live DCHR classes.

Sigler testified that after she sent out the trainings, employees would send their certificates back to her and she would keep track on a spreadsheet to see who completed them and who did not. Sigler was familiar with Employee. Sigler previously worked at OAH where she recalled VIOs names and scheduled hearings, but otherwise did not know Employee outside of Agency. Sigler recalled that at a certain point she had to send Employee different trainings because she could not attend the live trainings, so she was still sent the SkillPort trainings. Sigler did not know the specific reason why she sent Employee different trainings. Sigler said the selection of trainings would have come from someone else. Sigler recalled an email indicating Employee had until 7pm to turn in her trainings. Sigler testified that there came a time when Employee did not submit her training by 7pm and could not recall the specific date. Following a review of Agency's Exhibit A-4, Sigler recalled that it was May 13, 2020. Sigler cited that she could not remember if she sent it that day, but that her name was on it, so she was sure she did. Sigler testified that she did not believe Employee submitted her trainings by 7pm that day.

Sigler said that she would have sent an email to Bowden and Martin regarding Employee's trainings. Sigler explained that Martin was the only chief detailed to the Agency at this time and that VIOs were to email certificates to both her and Martin. Sigler said that she also emailed Shalonda Frazier about Employee's trainings because she was told to "keep her in the loop."[13]. Sigler could not recall who told her to do that, but it would have come from a supervisor. Sigler testified that Employee emailed the completed trainings to her the next day, which was May 14th. Sigler did not have any role in the disciplinary action against Employee. On cross-examination, Sigler testified that the selection for trainings initially came from Chief Bowden and then Chief Fludd took over the selection for trainings.[14] Sigler did not recall providing any information regarding Employee's completion of trainings on May 12th.

When asked by the Administrative Judge what mechanisms were used to track trainings, Sigler explained that at the end of each class, employees received certificates and they were instructed to send a screenshot or the actual certificate to her. Once she received that, she would then add it to a spreadsheet and check off that it was complete. Sigler testified that the only monitoring for training completions was

[13] Tr. at Page 103.
[14] Tr. at Page 106.

captured when employee sent the certificates to her. Sigler further testified that the date on the certificate is what was reflected the training had been completed.[15]

Carl Martin – "Martin" – Pages 114 – 127

Martin is an Assistant Chief Vehicle Enforcement Officer and has been employed at Agency since November 2007. Martin has been an assistant chief for approximately eight (8) years. Martin testified that he has worked with Employee in a supervisory capacity. Martin explained that during a short time during the public health pandemic in 2020, he was Employee's supervisor. However, he was not Employee's supervisor in May 2020. Martin testified that during the public health emergency, VIOs were required to complete online courses that were sent to them. Martin said Amber Sigler sent the courses to employees. Martin explained that during this time, his roles was monitoring to ensure courses were coming in and that once they completed the course, that they were mailing in the certificates. Martin relied on Sigler to determine whether the certificates had been mailed or not. Martin explained that he was the only full time chief at this time, and other chiefs were temporarily at DOES. Martin could not recall if Employee was sent different courses than other VIOs. Martin did not have any involvement in the accommodation request from Employee. Martin recalled that he was copied on certificates that were sent to Sigler. Martin did not recall receiving a complaint from Employee in May 2020. Following a review of Agency's Exhibit A-4 (email), Martin noted that on May 13th he indicated that he had not received anything from Employee and that it says he received a verbal complaint of why Employee's course was different from VIOs Morgan and Glover. Martin testified that he did not select the courses and that he would send those complaints to the originator, which was VIO Chief Fludd. Martin explained that Chief Fludd sent the main courses out and they were going through Sigler to be sent to VIOs.[16] Martin noted that his responsibility included monitoring course completions.

On cross-examination, Martin reiterated that he was the only chief assigned at Agency in May 2020 and that he was not responsible for the selection of courses. Martin explained that Chief Fludd did assignments for trainings. Martin also noted that Chief Fludd was detailed to another Agency at the time. Martin said he received notifications for trainings and forwarded them to Sigler. Martin had no knowledge regarding whether Employee completed trainings on May 12th and explained he was only aware of an issue on May 13th.

Shalonda Frazier – "Frazier" – Pages 129 – 178

Frazier works at Agency as a Human Resources (HR) Supervisor and has been with Agency a little over two (2) years. Her responsibilities include recruitment, performance management, benefits, time and labor, and Employee Labor Relations. Frazier testified that Employee was a VIO at Agency and she does not know her outside of a professional capacity. Frazier testified that she did not have any role in identifying training for VIOs during the 2020 public health emergency.

Frazier explained that she is involved when an employee requests an accommodation and that those requests are brought to HR. This includes accommodation requests for issues in completing work assignments, like in this case which was based around the Covid pandemic. Frazier testified that she reviews accommodations on a case-by-case basis. Once received, she discusses the request with the employee and then will discuss it with their supervisor to inform them of the accommodation and what flexibility may be available. Once its deemed feasible, the manager would then coordinate with their employee to move forward with any sort of flexible schedule or accommodation.

[15] Tr. at Page 110.
[16] Tr. at Page 122.

Frazier testified that Employee requested an accommodation via a phone call for which Frazier could not recall the exact date. An email was also sent to Frazier from Employee regarding the accommodation. Following a review of Agency's Exhibit A-14, Frazier explained that Employee stated that she was not able to make the trainings due to her son's remote learning virtual schedule from 9am to 3:30pm. Frazier noted that the phone call she previously attested to was after the receipt of the email as noted in Agency's Exhibit A-14.[17] Further, Frazier cited that the phone call was related to Employee's concerns that "her peers were completing different assignments – different trainings than what she was in." Frazier maintained that the accommodation Employee requested was approved. Frazier explained that she recommended that Agency accommodate Employee based on the request and the timeframe of her son's distance learning schedule that she provided. Frazier did not request any proof from Employee before granting the accommodation. Frazier stated that Employee's supervisor would have communicated the approval of the request and provide next steps. Frazier noted that Agency's Exhibit A-1 was the document for which the accommodation was approved.

Frazier learned that there was a time that Employee had not completed trainings following the accommodation. It was via an email communication within the Enforcement Department wherein Employee indicated the trainings were being assigned during the time of her son's distance learning. Frazier testified that there also came a time when Employee expressed to her that she no longer wanted the accommodation. This was first communicated via a phone call. Employee expressed concerns about her peers receiving different trainings than what she was assigned and that the trainings she had been assigned required her to complete assessments which Employee deemed to be unfair. Employee told Frazier she wanted to take the same trainings as her peers. Frazier stated that she told Employee she would reach out to the Enforcement Team to see what the difference was and get back to her by the next day.[18] Frazier explained that the next morning, Employee had received trainings and communicated via email saying she did not have to do these trainings. Frazier stated that she told Employee that she had to speak with the Enforcement Team before a decision like that is made. Frazier testified that after speaking with the Enforcement Team, they decided to continue Employee's current accommodation until at least the end of the school year based off Employee's initial request. Frazier maintained that she had one phone call with Employee and the other communications were via email.

Upon review of Agency's Exhibit A-5 (email dated May 14, 2020), Frazier then testified that the phone call she had with Employee occurred prior to that email and that there were no other phone calls. Frazier iterated that she did not request proof from Employee for the initial request, but for the second request to end the accommodation, she told Employee to provide information to show that the school schedule had been discontinued from what was initially relayed. Frazier said she told Employee she would review it. Frazier testified that Employee cited that she had not asked for any proof initially. Frazier said she told Employee that based on the public health emergency that agencies are being as flexible as possible, and that virtual learning was new and that they were accommodating schedules.[19] Following Frazier's request for proof, Employee sent over a screen shot of her son's distance learning schedule. Following a review of Agency's Exhibit A-5 (Employee objected to this exhibit), Frazier noted that she did not seek any other documentation regarding Employee's child's distance learning schedule. Frazier did not recall reviewing a letter from KIPP DC.[20] Frazier testified that she did not review anything on the KIPP DC website regarding the learning schedules of students within the program.[21]

[17] Tr. at Page 135.
[18] Tr. at Page 139-140.
[19] Tr. at Page 145.
[20] Tr. at Page 147.
[21] Tr. at Page 148.

Frazier testified that she prepared the Proposing Official's Rational Worksheet for Employee's termination, as highlighted in Agency's Exhibit A-11 (as related to the False Statement charge).[22] Frazier testified that she prepared the worksheet because "once [Employee] submitted proof of her son's school learning, [she] noticed that it was different from what her initial request was."[23] Frazier maintained that as an employee of the District, she's required to report any sort of fraud, waste and abuse. So when documents were being prepared for Employee's removal, she wanted to "show another example of a violation for providing a false statement." When asked by the AJ whether she had requested proof with the initial request, Frazier explained that in the first request made by Employee, she said she needed an accommodation due to her son's schedule. Then when Employee wanted to "revise the accommodation, that's when [she] asked [Employee] to show [her] proof that her son's distance learning had deviated away from her initial request."[24]

Frazier testified that she concluded Employee was being untruthful because her initial request indicated that her son's schedule was from 9:00am to 3:30pm, but when she submitted the proof in the second request, the schedule was one day a week for an hour. Frazier stated that Employee held a position of trust, and this made her question Employee's trust. When asked whether Employee ever represented that there was any change to her son's learning schedule between the time of the request of the accommodation and the time, she said she no longer needed it, Frazier stated "no". When asked whether she had looked at any documents from KIPP DC regarding the schedule, Frazier testified that she "saw some documents."[25] Frazier indicated that they were collective files sent over to the Hearing Officer. Frazier said she was involved with preparing the false statement portion of that package. When asked by the Administrative Judge regarding her previous testimony that she had not reviewed KIPP DC documents, it was noted that this testimony was related to the Hearing Officer's report.

The Administrative Judge asked Frazier what HR policies, practices or procedures she relied upon in the review of the accommodation request, specifically as it related to the submission of supplemental documentation for employee to submit. Frazier testified that when she received the first request, she relied on guidance by DCHR "who at the time when the Government went into telework posture in March 2020, which was to be "as flexible as possible".[26] Frazier explained that they were still in the process of developing guidance and policies, so that when they, (DCHR), provided guidance to "HRAs" it was to be as flexible as possible, considering every aspect.[27] Frazier testified that it was her practice when Employee came to her with concerns about her son's distance learning schedule and how it crossed over with her trainings/telework tasks. Frazier noted that once Employee explained it to her and in consideration of DCHR guidance to be flexible and understanding during that time. This is what she relied upon in recommending that Employee be accommodated and noted how stressful it can be to be a mom. Frazier testified that the DCHR guidance did not ask for or did not require proof be shown, but iterated they were just advised to be as flexible as possible due to the current state they were in at that time.[28]

On cross-examination, Frazier testified that the DCHR guidance she recalled that a return to work or something in the DPM indicated that no proof would be necessary, and this was because they all knew

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[22] Employee objected to this Exhibit, citing that Frazier was not the proposing official and is not in a supervisory or managerial position over Employee and should not have completed the worksheet, and that it should have been done by the Proposing Official, Mia Bowden. Employee agreed to the admission of the exhibit to show that Frazier completed it but did not agree to offering it for the truth of the matter of the contents. The exhibit was entered, having noted that Frazier prepared the worksheet but was not the proposing official. The Administrative Judge required Frazier to explain why she prepared the worksheet.
[23] Tr. at Page 151.
[24] Tr. at Page 152.
[25] Tr. at Page 154.
[26] Tr. at Page 158-159.
[27] Tr. at Page 159.
[28] Tr. at Page 160.

that DC Public Schools had gone to virtual learning postures. When asked why she requested documentation when all Employee wanted to do was end the accommodation, Frazier testified that she did so because the request to end the accommodation came within "a matter of days" of receiving the first request – one school week to the next. Further, Frazier testified that Employee's reasoning to request the stop of the accommodation on that she was having different trainings and had to complete assessments and that she wanted to do the same as her peers that did not have to complete assessments. Frazier said she told Employee that the trainings her peers were assigned were during the time that Employee said she had her son's distance learning. Frazier stated that Employee replied that she did not need the accommodation, so that's why she asked Employee to provide her proof that her son's school schedule had deviated from the initial request. Frazier explained that she would review what was provided. Frazier testified that it was determined that the accommodation would continue through the end of the school year and at that time there were approximately three (3) weeks left.

Frazier testified that her understanding of Employee's request to end the accommodation was that initially Employee requested an accommodation because assignments were given to her during her son's school schedule. Once Employee realized that she was doing different assignments from her peers and she had to do assessments and they did not, Employee said she no longer needed the accommodation and she would work it out on her end.[29] Based on this, Frazier said she requested proof from Employee because she "didn't want to start a trend of all the employees requesting accommodation and then ending accommodations."[30]

Frazier stated she came to the conclusion that Employee had willfully and knowingly reported false information because based on her initial request she said her son's schedule was from 9am to 3:30pm and that once she requested to end that accommodation, that the proof Employee submitted did not reflect the same school schedule. Frazier said that she made these determinations to ask for proof because of the timeframe Employee requested and that Employee was basing her request off the different assignments her peers had versus what she was assigned. Frazier also explained that during a phone call, Employee expressed that she didn't need to do the assessments and that she wanted to do what her peers were doing and said it didn't make sense and that "you all are so stupid" and "stop sending her stuff."

Frazier did not have any role in the trainings that were assigned to VIOs in May 2020. Frazier did recall being included on emails regarding Employee's trainings but did not recall whether she was included on emails regarding other employees. Frazier noted that Employee was copying Frazier on emails when she requested to stop her accommodation requests. Frazier did not recall any other agency employee included on her emails regarding trainings. Frazier testified that it was not a common practice for her to participate in disciplinary actions issued to employees.

The Administrative Judge inquired further regarding the policies the witness referenced. When asked by the AJ what she relied upon when considering an employee's request to revoke an accommodation or indicate they no longer need an accommodation, Frazier testified that beginning back in March 2020, there was no clear guidance.[31] Frazier explained that the guidance was to be as flexible and open as possible and grant telework if possible. Frazier cited that the guidance did not speak to revoking or cancelling an accommodation request. Outside of this matter, Frazier explained that in her position she has relied on the DPM, ADA and FMLA regulations regarding accommodations. Frazier explained that if an accommodation is to be cancelled or an employee wants to withdraw, that those

[29] Tr. at Pages 163-164.
[30] Tr. at Page 164.
[31] Tr. at Page 172.

regulations require documentation to release an employee from a special accommodation. Frazier iterate that for this case there was no guidance on how to handle it and it was new to everyone.[32]

On redirect, Frazier testified that it was her understanding that the trainings for VIOs without an accommodation were happening between 9:00am-3:30pm. Frazier cited that some VIOs were done by 9am and that the duration of trainings were no longer than two hours a day and that they were compensated for eight (8) hours as long as they completed trainings. Frazier cited that if someone was unable to work from 9am -3:30pm, then they would need an accommodation. On additional cross-examination, Frazier testified that she reached out to DCHR via the HRA meetings that were held weekly during that time. They had several "Q&A" sessions and other agencies noted conflicts with school and work schedules. Frazier noted that they were advised to be as flexible as possible and that those were the key words shared in the weekly HRA meetings. Frazier testified that she never asked about the evidence needed if an employee asked for an accommodation. She cited that she reviewed Employee's request, shared it with her manager and gave her recommendation. Frazier noted it was very tough times with school and work schedules during the public health emergency.[33]

David Do – "Do" – Pages 179 – 204

Do is the Director of Agency and has been in that capacity since November 2018. He is responsible for the direction of all operations within the Agency. Do explained that he signs off on some of the disciplinary actions that come to his office. Do explained that he was familiar with the matter involving Employee and had not directly worked with Employee. Do could not recall the exact date that he first learned of the issue involving Employee, but noted it was in 2020 during the Covid-19 pandemic. Do testified that the notice of separation was a written document. He was the Deciding Official and signed the final notice regarding the removal action. He authored the notice in conjunction with the Agency general counsel as noted in Agency's Exhibit A-13.

Do testified that in preparation of the removal action that he relied on the Hearing Examiner and reports from Agency manager, including the first notice of separation, evidence and Douglas Factors. Do stated that he reviewed all the evidence submitted to the Hearing Officer and evidence submitted from Employee's representative. Do noted that he agreed with the *Douglas* Factor analysis completed in the rationale worksheets by Frazier and Bowden. Do testified that he concluded that Employee had failed to follow instructions because she had not submitted trainings in a timely manner. Do explained that the VIOs represent the agency publicly and hold a position of trust. VIOs are also deputized and can pull over vehicles under the applicable code provisions pertaining to Agency and can assess tickets or otherwise to those drivers. Do stated all employees should follow their supervisor's direction. Do explained that VIO roles include performance metrics and other systems to ensure success and that the truthfulness of everyone involved is relied upon. Do stated it was "key" for the VIOs. Do maintained that he believed Employee could not continue at Agency based on the instant charges and prior reprimand and suspension for failure to follow directions. Do testified that progressive discipline is very important to him and that he works with the Union to ascertain before ever going directly to termination.[34]

On cross-examination, Do testified that he did recall that Employee training certificates were submitted. But that Employee was charged for not submitting them to Agency until May 14th. Do stated that he reviewed what was submitted by Frazier and Bowden and the Hearing Examiner's report when he made his decision for termination.

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[32] Tr. at Page173-174.
[33] Tr. at Page 176-177.
[34] Tr. at Page 193.

When asked by the AJ what he considered as the "completion date" for trainings, Do explained that he looked at Employee's emails between her supervisor regarding the trainings and that Employee said she would not do them, but later submitted the trainings to Amber Sigler.[35] Do testified that he based the termination on the date of the submission of the trainings to Amber Sigler, and not the date the trainings were completed. When asked what instructions were provided to employees regarding the certificate completion date or submission date, Do stated that from his review, Employee had until 7pm to submit trainings and that Employee did not submit those by that time.[36] Do explained that he noted the 7pm deadline based on the Hearing Officer's report and that it was his understanding that Employee needed to complete her training and submit by that due date. Do testified that he reviewed what was submitted by Bowden and Frazier, as it was part of the package.[37]

Employee's Case-in-Chief

Employee – Tr. Pages 205 – 239

Employee testified that in May of 2020 she was employed at Agency but was later terminated. Employee testified that she completed the trainings on May 12, 2020 and submitted those trainings by the end of the day. Employee cited that it was before 7:00pm. Employee also noted she sent an email to her supervisor at 2:09 pm on May 13, 2020, regarding the trainings that she was assigned that day. (Agency's A-4). Employee indicated that those were not the same trainings the other VIOs in her grade were taking. Employee stated that Bowden replied to her email later that evening at approximately 9:50 pm. Employee noted that Bowden's response was that she had to complete the training and turn them in. Employee testified that she completed those trainings for May 13th and turned them in on May 14th. She also completed the May 14th training and turned those in at the same time and by the 7pm deadline.

Employee testified that on May 6, 2020, she requested an accommodation because she had been scheduled to attend webinars but that she was unable to due to her son's class zoom calls. Employee said that the accommodation was granted, and she was told that she had to complete them by 7pm. However, Frazier told her that webinars could not be recorded and that she would speak with Employee's supervisor on how to proceed. Employee further testified that she was not required to provide any proof to support her request for an accommodation.[38].

Employee noted that there came a time where she no longer wanted to have the accommodation. Employee testified that she spoke with her son's teachers and that they all agreed that whenever she needed the time, that she could work with her son at another time when she was available to work with him. Employee explained that her son had an Individualized Educational Plan (IEP) and that he works with several teachers at his school, and that the IEP has different schedules and meets with teachers at different times. Employee attested that her son's IEP documentation (Employee Exhibit 2) outlined his curriculum etc. (Agency noted this document was included in the proposing official rational worksheet. Further, Agency noted this document was dated September 8, 2020, after the timeframe). Employee further noted that her son's IEP indicated that he has additional training and teaching outside of normal class hours.[39] (Employee Exhibit 3)

Employee reiterated that she wanted to end the accommodation after speaking with her son's teachers and learning about the different trainings other VIOs were completing. She stated that the school indicated they would work around her schedule. Employee did not know whether Agency contacted her

[35] Tr. at Page 197-198.
[36] Tr. at Page 199.
[37] Tr. at Page 200.
[38] Tr. at Page 210.
[39] Tr at Page 214.

son's teacher during this time frame. Employee testified that her son's schedule never changed from Monday through Friday from 9am-3:30pm.

On cross-examination, Employee explained that her child had been attending school in person prior to March 2020 and began virtual learning when the DC Public Schools closed during the 2020 pandemic. When virtual first began, Employee testified that the school was trying to come up with a schedule for her son since he had an IEP and was trying to work with all his teachers and his homeroom. In the beginning, the school would contact her as needed to set up to meet with her son on Zoom. Employee testified that the distance learning started when schools closed and that he immediately had a 9am to 3:30pm schedule, but her son was working with different teachers, so they met with him at different times during that day.

Employee attended trainings between March and May of 2020. Employee testified that she would do her SkillPort trainings in between the breaks of her son's teachers and the classes he attended. The school directed Employee that she had to be with him for the entirety of his Zoom calls. Employee cited that they were scheduled at different hours because he worked with different teachers. Employee testified that her child started the school day Zoom with all his classmates. Then throughout the day, he would be with his IEP teachers and herself. Employee reiterated that these sessions were scheduled throughout the day and that she had to be there for all of them.

Employee testified that she sent Agency an email (Agency Exhibit A-6) because she was told to provide proof that she didn't need the accommodation any longer. Employee explained that her son was still attending the same number of classes. She said that the email reflects his homeroom teacher, to which he reported each morning. Employee testified that her son (and she) were attending more classes than what was referenced in the screenshot. Employee explained that she did not provide any other schedule because she had advised Agency that they could call his teacher directly and she could elaborate on what was needed for her and her son. Employee reiterated that she requested to end the accommodation because she spoke with her son's school and they were willing to work with her schedule.

Regarding the May 13th training, Employee testified that she completed it and turned it in on May 14th. She turned it in after receiving the response from Bowden. She did not turn it in sooner because she was questioning back and forth regarding the assignments.[40] She didn't receive a response from Bowden about it until nearly 10pm at night. Employee noted that she was no longer on the clock and not required to answer emails, so she didn't see the email until the next day on May14th. Employee cited that she was instructed to submit trainings by 7pm and that she did not do that on May 13th. Employee stated she did not do them because it could have been in an issue as she had been speaking with Agency HR representatives and her Union, and she might not have had to do those assignments since they were different from other VIOs. Employee believed that since she and the other VIOs were all in the same grade and job description that their training should be identical. Employee noted that she did not decide to do the assignment and grieve it later. She waited to have an answer to her question before completing the training. Employee recalled talking to Frazier about an accommodation, initially on May 6, 2020, and then again around May 15th. In the May 15th call, Employee testified that she told Frazier that she did not need the accommodation. Employee iterated that she did not refer to Frazier as stupid during this call.

On redirect, Employee testified that in May 2020, her child was three (3) years old. Employee explained that on any given day, he would need to report for classes from 7:45am though 4pm (this was physical reporting to school). When asked by the Administrative Judge what information was provided to her about the completion of trainings, Employee testified that she didn't initially do a Skillport training in March 2020. On re-cross examination, Employee noted that initially, she was detailed inside the Agency

[40] Tr. at Page 228.

that started in January *2020 (Employee later explained she was detailed because she was pregnant. Tr. at 239)*. Once Agency started to assigned trainings, they removed her from that detail and then placed back under the Enforcement Team. Employee cited that at the beginning of March 2020, she was under another supervisor. Employee also cited that at the beginning of the March 2020, her son's schedule started at 8:30am. She explained that she requested the 9am-3:30pm time frame because initially his one-on-one with teachers didn't start until 9am, or sometimes maybe at 8:45am. Employee explained that her son had a regular schedule and had an IEP schedule during the school day. His initial teachers were Ms. Ashley Hughes and Ms. Hodges. Ms. Hughes was her son's regular/report to everyday teacher.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Brief Summary of Agency's Position

Agency asserts that it had cause to terminate Employee from service and did so in accordance with all applicable regulations. Agency maintains that Employee failed to follow instructions regarding the requirement to complete daily trainings and that Employee made false statements as related to her child's remote learning schedule and work schedule conflicts. Specifically, Agency avers that Employee failed to submit training certificates following email correspondence on May 12, 2020. Further, Agency argues that Employee provided false statements that it relied upon in granting her a work schedule accommodation. Specifically, Agency avers that Employee conveyed that she was unable to complete assignments due to her son's remote learning schedule. This was during the 2020 District of Columbia's Covid-19 State of Emergency. Agency asserted that Employee told them her son's schedule was from 9am to 3:30pm. As a result, Agency allowed Employee two (2) additional hours to submit her work, which was due daily by 7pm. During this time, Agency required employees to complete online trainings and submit them each day in lieu of normal duties given the pandemic status. Agency avers that soon after requesting this accommodation, Employee notified them that she no longer needed the accommodation and would complete her work in the same time frame as the other VIOs. Agency was skeptical of this request and inquired as to the change and what had changed. Agency contacted the school and inquired generally about the schedule. Agency also received an email from Employee that included a screenshot with a schedule from her child's teacher. Employee also advised that Agency could contact the teacher directly and noted the specific school campus where her child attended.

Agency asserts that on May 12, 2020, Employee did not complete her trainings, following an email Employee sent to her supervisor, Mia Bowden. Agency further asserts that Employee failed to complete her assignments as directed on May 13, 2020. Agency notes that Employee turned in her training for both May 13th and May 14th on May 14th by the 7pm deadline.[41] Agency also avers that even if Employee had issues with her assignments, (Employee emailed her supervisors after learning she was given different assignments from her peers in the same pay grade), that Employee was bound to complete the assignments pursuant to the "obey-now-grieve later" principle.[42] Wherefore, Agency maintains that Employee's actions constituted cause for which termination was appropriate.

Brief Summary of Employee's Position

Employee asserts that Agency did not have cause for disciplinary action. Employee asserts that she completed and turned in her training assignments on May 12, 2020. Further, Employee avers that she did not make false statements regarding her son's remote learning schedule. Employee maintains that her child's regular schedule along with the schedule for an Individualized Education Plan (IEP) required her

[41] The undersigned will address the May 12, 2020 assignment in the analysis section.
[42] Agency's Closing Remarks at Page 9-10 citing to *Pedeleose v. Dept. of Defense*, 110 M.S.P.R. 508 §16-18 (2009), aff'd, No. 2009-3135, 2009 WL 2400321 (Fed. Cir. June 6, 2009) (NP). (March 14, 2022).

presence at the times she first conveyed. Employee also avers that she provided Agency the contact information for her child's teacher and advised they could contact them for information about the schedule. Employee asserts that after learning that she was given more assessments in her training assignments than her peers, that she contacted her supervisor to find out why. Employee argues that her supervisor replied to her email after the tour of duty, so that she completed her assignments after hearing from her supervisor during her tour of duty time frame. Employee avers that she turned in assignments for May 13th and May 14th, 2020 by the 7pm deadline as directed on May 14th. Further, Employee asserts that based on the notice regarding the adverse action, that the dates in issue are May 6, 2020, and May 12, 2020. Employee avers that while the notice of proposed action issued references emails on May 12, 2020, that Agency did not provide any emails dated May 12, 2020 as evidence to support the charge listed in the proposed action.[43] Employee maintains that she completed and emailed training certificates on May 12, 2020, and that the certificates indicated that the trainings were completed on May 12, 2020.

Employee also argues that Mia Bowden, her supervisor, was the Proposing Official and completed the Proposing Official's Rationale Worksheet for the charge of Failure to Follow Instructions; but asserts that Shalonda Frazier, completed the Rationale Worksheet as related to the other charge of False Statements. Employee notes that Frazier is a part of the Human Resources personnel team and is not in the supervisory chain for employee, and that Frazier should not have been involved in that manner. Further, Employee asserts that both worksheets contain information that are not listed in the proposal and analysis for separation.[44]

Employee also contests that Agency did not provide support regarding the charge of false statements. Employee argues that Agency relied upon emails between Agency Assistant General Counsel John Marsh and Erin Pitts, Sr. Director of Employee Policy at KIPP DC (child's school) to assess that Employee made false statements about her son's schedule. Accordingly, Employee avers that Agency has not shown cause for action nor did it provide any justification for deviating from progressive discipline in this matter. As such, Employee argues that the termination should be reversed.

ANALYSIS

Whether Agency had Cause for Adverse Action

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

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Additionally, DPM § 1601.7 provides that "[e]ach agency head and personnel authority has the obligation to and shall ensure that corrective and adverse actions are only taken when an employee does

[43] Employee's Closing Argument at Page 7. (March 14, 2022).
[44] Employee's Closing Argument at Page 6. (March 14, 2022).

not meet or violates established performance or conduct standards, consistent with this chapter." Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee was terminated from services pursuant to two (2) charges: **(1) DPM § 1607.2(d)(2) – "Failure/Refusal to Follow Instructions:** *Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions;* and **(2) DPM § 1607.2(b)(4) – "False Statements/Records:** *Knowingly and willfully reporting false or misleading material information or purposely omitting material facts, to any superior.*

False Statements/Records

Agency charged Employee with False statements/Records, asserting that Employee made false statements regarding her son's school schedule which led to an accommodation in her work schedule. Employee avers that she did not make false statements. DPM § 1607.2 (b)(4) notes that the cause of action for False Statements/Records is knowingly and willfully reporting false or misleading material information or purposely omitting material facts, to any superior. OEA has held that to sustain a falsification charge, that "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency."[45]

In the instant matter, on May 6, 2020, during correspondence between Employee and Agency, Employee conveyed that her son's remote learning schedule required her presence with him from 9:00am to 3:30pm, particularly because her son had an IEP curriculum. Thus, Employee had challenges in completing the trainings assigned during the Covid-19 state of emergency.[46] After conferring with Human Resources personnel, Shalonda Frazier, Mia Bowden, Employee's supervisor, noted that Employee would be provided an additional two (2) hours to turn in her trainings each day, thus meaning Employee had to turn in assignments daily by 7pm. Thereafter, Employee emailed Bowden and inquired about the differences in the trainings she was required to complete versus those completed by VIOs in her same grade etc. Employee also contacted Frazier regarding the matter. During these exchanges, Employee relayed to Agency that she thought the requirement of additional assessments for her assignments versus those of her similarly situated coworkers was unfair. Ultimately, Employee notified Agency on May 14, 2020, that she no longer needed the accommodation and would complete her assignments like everyone else.

As a result, Shalonda Frazier testified that she became skeptical of Employee's request in that it came only a week after the initial notification of the schedule. Thus, she asked Employee for proof of her child's school schedule. It should be noted that Agency did not require Employee to provide any proof for the initial request. Employee sent an email on May 15, 2020, and included a screenshot of a text from her son's teacher regarding the schedule for that day, and noted that this was what she received each week.[47] She also advised Agency that they could contact her son's teacher directly and provided the name of the teacher, the campus location and the name of the school for Agency to inquire further about the

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

[46] VIOs were unable to complete normal duties during the Covid-19 State of Emergency. Thus, Agency had them complete daily SkillPort trainings. Testimony from the Evidentiary Hearing noted that assignments were generally disseminated by or before 8am each morning by Amber Sigler and employees were responsible to send her a screenshot or forward the certificates of completion by the end of the day. Agency did not have any other manner for which it recorded employees' completion of these assigned trainings.

[47] The screenshot indicated that there would be a Zoom call at 1pm or 2pm on Wednesday and another on Friday at 1:30pm. Further, it noted that the focus that week would be on math and that links would be provided on the mornings of for the child. See. Evidentiary Hearing Transcript at Agency's Exhibit A-6.

schedule. During the Evidentiary Hearing, Shalonda Frazier testified that she requested Employee submit proof because she did not want to set a precedent of employees being provided an accommodation and then having them quickly revoked. Frazier could not attest to what policy she relied upon in making that assessment. Frazier further noted that she did not require proof of Employee's initial request because during the Covid-19 State of Emergency, the guidance from DCHR was to be "as flexible as possible" during those times.

However, Frazier ultimately concluded from Employee's email that Employee had provided false statements when requesting the accommodation and that her son's schedule did not require the 9:00am to 3:30pm parental supervision as previously indicated. Frazier testified that she did not contact Employee's son's teacher nor did she review any information from KIPP DC.[48] Frazier later testified that she reviewed information from KIPP DC that was included in the packet for the hearing officer.[49] Frazier also testified that she relied on guidance from DCHR and also referred to her knowledge of ADA, FMLA and other regulations in her assessment of the accommodation for Employee. Frazier noted that there was no specific DCHR guidance, and ultimately, they were advised to be as flexible as possible given the Covid-19 State of Emergency. Again, Frazier could not attest to any written policies or otherwise for which she decided to not require proof of the request for an accommodation, or for why she required proof when Employee indicated she no longer needed/wanted the accommodation.

Further, in preparing the adverse action against Employee, Agency did not contact the child's teacher, but contacted Erin Pitts ("Pitts"), Sr. Director of Employee Policy for KIPP DC. On July 15, 2020, Agency Assistant General Counsel, John Marsh, sent an email to Pitts and indicated that Agency was trying to reconcile the schedules for Pre-K students.[50] Pitts noted in her initial email response that she would be surprised to hear that any school would be in instruction from 9:00am to 3:30pm, but also noted that "there was no one schedule for all pre-k classrooms, so we would likely need specifics regarding the student, school and classroom at issue."[51] Following another email from Marsh regarding what Agency was asking, Pitts responded with the following: "[a]lthough I believe different schools/classrooms could have offered different levels of support to families, I would be surprised to hear that any school offered zoom programming from 9 am – 3 pm. That said, we fully understand that having a prek-3 student at home all day (particularly when we have not been able to offer a full day of activity for our students) means many parents are precluded from being able to work as they normally would/would like to…" Marsh forwarded this correspondence to Agency General Counsel and this information was included with the notices for Employee's removal. Ultimately, Agency found Employee should be charged with false statements based on this information.

The undersigned finds that Agency has failed to show that Employee knowingly and willfully provided false statement/records. Here, Employee was not asked for any proof regarding her child's schedule with the initiation of the accommodation request. Following her request to revoke the accommodation, Agency then asked for proof of the schedule. Employee provided a screenshot from her son's teacher and noted that this was the communication she received each week. While the screenshot Employee sent reflects a specific schedule for that day, the undersigned finds that Employee also gave Agency permission to contact her son's teacher directly to make further inquiries about what she provided. Agency did not do so, but instead, later relied on a general email correspondence from a KIPP DC school administrator, Erin Pitts. However, it is of note that Pitts cited in her email response that there was "***no one schedule"*** **and** also indicated that that "…having a prek-3 student at home all day (particularly when we have not been able to offer a full day of activity for our students) means ***many***

[48] Tr. Pages 147-148.
[49] Tr. Pages 154-156.
[50] Tr. at Agency Exhibit A-7.
[51] *Id.*

parents are precluded from being able to work as they normally would/would like to…" (Emphasis added). Wherefore it appears incongruous that Agency would conclude that Employee willfully made false statements considering the totality of the evidence presented and the ongoing challenges of remote learning and work during the Covid-19 State of Emergency in 2020. Further, it does not align with the testimony provided by Shalonda Frazier who iterated several times during her testimony that they were told to be as flexible as possible during these unprecedented times.

During the Evidentiary Hearing, I had the opportunity to listen and evaluate the testimony provided. I found that Employee credibly testified that since her son had an IEP, that he had varying schedules based upon the "regular" school curriculum and his IEP needs. As such, the undersigned finds that absent more specific confirmation regarding Employee's son schedule, Agency has not proven that Employee knowingly and willfully provided false statements. I find that Employee's testimony corroborates with what was provided by Pitts that there was no one schedule and that due to the situation at that time and that pre-k 3 parents were challenged to be able to work as they normally would. Further, I find that Agency did not contact the child's teacher or the school campus to ascertain the most accurate and direct information regarding Employee's child's specific schedule, but instead supported its assertions for adverse action by relying on a general schedule provided by the administration of the KIPP DC school system. This is of particular note given the fact that Employee indicated they could contact the child's teacher and she noted therein the campus location where her child was a student. I find that correspondence with the child's teacher would have provided specific evidence regarding Agency's question regarding the veracity of what Employee initially conveyed regarding the accommodation request. Accordingly, I find that Agency has not met its burden with this cause of action and this charge of false statements/records cannot be sustained.

Notice of Proposed Action – Proposing Official Did Not Prepare Rationale Sheet

DPM §1618.4 requires that Notices of Proposed Action "shall be approved and signed by a proposing official, who must be a manager within the employee's chain of command or management official designated by the personnel authority." Here, Employee avers that it was improper that Shalonda Frazier prepared the Proposing Official's Rationale Worksheet for the False Statements/Records charge. Frazier was not in any management capacity to Employee nor was it asserted that she was designated by the personnel authority. Mia Bowden, Employee's supervisor, acted as the Proposal Official and signed the Proposed Notice itself, but testified that she did not complete the rationale sheet for this charge, but only for the charge of failure/refusal to follow instructions. Additionally, Mia Bowden testified during the Evidentiary Hearing that she could not recall if she had previously completed a disciplinary action, but if she had, it may have been on one (1) prior occasion.[52] While the DPM provides who the proposing official should be, it does not denote whether another person can prepare the rationale sheet. As such, the undersigned is unable to conclude whether Frazier's completion of the rationale sheet was improper but will note that this practice raises questions about the efficiency and accuracy of Agency's process of the administration of the instant adverse action.

Failure to Follow Instructions

Employee was also charged with the Failure/Refusal to Follow Instructions. Specifically, Agency averred that Employee failed to complete assignments as required. This assertion followed email correspondence between Employee and Agency over the course of several days in May 2020. Employee has asserted throughout this matter that Agency's charging documents specify May 12, 2020, as the date for which she was charged for the Failure/Refusal to Follow Instructions. Agency asserts in its notice

[52] Tr. Page 74.

specification that on May 12, 2020, Employee sent an email correspondence to her supervisor, Mia Bowden. Specifically, its Final Notice dated December 3, 2020 Agency noted the following:

> **"**On Tuesday May 12, 2020, at 3:16pm [Bowden] received an email from [Employee] stating that you did not complete your online training for that day because of your son's all day remote learning schedule. [Bowden] replied back to you in an email sent on May 12, 2020 at 9:56pm, reminding you of the special accommodation that was afforded to you on May 7, 2020, and the instruction for you to complete and submit May 12th's trainings on May 13th along with that days completed trainings…"[53]

Employee testified that she sent her May 12, 2020 trainings on May 12th and that the certificates reflect that date. Agency provided no emails indicating that Employee did not turn in May 12th certificates on that date. Further, in her response to the hearing officer, Employee forwarded emails from the May 12th trainings. The hearing officer noted the receipt of those emails and that they reflect training certificates for May 12th; but questioned why Employee completed those May 12th trainings, but said in an email to her supervisor that she had not.[54] That said, Agency has provided no evidence to support its assertions that Employee failed to turn in the May 12th trainings by the time required. In fact, the evidence supports the contrary. Amber Sigler ("Sigler"), the Agency representative responsible for disseminating training assignments and also for collecting the complete training certificates, testified that the date reflected on the certificates are the dates that the trainings were completed.[55] Sigler also testified that while she did not believe that Employee completed the May 12th trainings in a "timely manner," that she did not have/provide any emails regarding any non-completion of trainings for May 12th for Employee.[56] Based on the email records and the certificates produced in the record, the undersigned finds that Agency has failed to prove that Employee failed to complete and submit the May 12th assignments as required.[57] Upon consideration of the testimony during the Evidentiary Hearing, I find that Employee testified credibly that she had turned in the May 12th trainings on May 12th. Agency has not otherwise provided any documents to evince otherwise. Agency provided email threads about missing certificates regarding subsequent dates on May 13th but did not produce any emails wherein anyone identified that May 12th trainings were not completed and received from Employee. Wherefore, I find that this charge can not be sustained based on this May 12, 2020 date.

May 13, 2020 – May 14, 2020

Agency further asserts that Employee failed to turn in assignments for May 13th and 14th. Again, Employee avers that the inclusion and reliance upon these dates for levying the adverse action is improper because those time frames were not specified in the Final Notice and specifications. The undersigned notes that while May 13th is mentioned as a date to turn in both the May 12th and May 13th assignments, that the notice does not cite that as the misconduct. That said, the undersigned would highlight that Employee and Agency had correspondence on May 13th through May 14th wherein, Employee inquired about the difference in her assignments versus those of her peers. It is of note that Employee sent correspondence during the normal tour of duty hours, but her supervisor often replied after those times. Specifically, on May 13th at 2:09pm, Employee sent an email to her supervisor regarding the different training assignments. At 8:31pm, Bowden replied and noted that Employee's trainings were different due

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[53] Agency Answer at Final Notice.
[54] Agency Answer at Hearing Officer Report.
[55] Tr. at Page 110.
[56] Tr. at Page 109.
[57] Employee's supervisor testified that she believed Employee had turned in the May 12th assignments on May 13th. See Tr. at Page 51. Later, the supervisor noted that she got an email indicating that Employee had not sent in the May 13th assignments, however that email did not mention the 12th. See Tr. at Page 55 and Agency Exhibit 1-4.

to the accommodation and asked Employee to confirm completion. On May 14th at 8:42am, Employee replied indicating she had not completed the trainings on May 13th because she was waiting for an answer. Bowden replied at 6:08pm and advised Employee that she was required to complete all assignments and that if Employee wanted to involve the Union that she should coordinate a meeting.

Then, on May 14th at 6:59pm, Amber Sigler sent an email to Bowden and others, citing that "I just wanted to let you know that [Employee] made up her work from yesterday and sent her training certificates for today."[58] Regarding the May 13th assignments, while Employee avers that it was not in the charges, the undersigned notes that the specification did indicate that Employee was to turn in both the May 12th and May 13th assignments on May 13th. Employee did not turn in May 13th assignment until May 14th. Employee avers that she did not complete the assignment because she was waiting for an answer regarding her inquiry as to why her assignments were different. Agency has asserted that Employee was bound to "obey now and grieve later." It has been established that Employee's supervisor was detailed to another Agency during this time. Bowden testified that she was Employee's supervisor of record but did not oversee her daily activities.[59] Additionally, during this time, the record reflects that Bowden often replied to Employee's inquiries regarding her work after the tour of duty. Bowden testified that she replied to the Agency emails following her departure from her detail.[60]

OEA has held that a Failure/Refusal to Follow Instructions includes a deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions. In the instant matter, the undersigned does not find it unreasonable for Employee to have waited for an answer from her supervisor regarding the issue of the assignments, particularly since Employee noted that she would contact her union regarding the issue. Thus, I also find that Employee's inquiry regarding her assigned work serves as a valid mitigating factor regarding her ultimately turning in the assignment late. Additionally, I find that Agency failed to give due weight and consideration to *Douglas* factors, namely the mitigating factors of unusual job tensions. This is of note given the challenges that the Covid-19 State of Emergency caused during this time in 2020. Further, Employee's direct supervisor did not oversee her daily activities and was detailed to another agency. Thus, her supervisor responded to Employee's emails after the official tour of duty hours. However, in its rationale sheet, Agency did not list any mitigating factors and noted this as "neutral." As such, I find that Employee's actions do not exhibit a deliberate or malicious refusal to follow instructions, but rather reflects an untimely submission of one (1) assignment pending further supervisory instruction. This is of note given that Employee submitted the assignments as required, along with the next day's assignment, and did so by the deadline required on May 14th. Accordingly, I find that Agency has not met its burden of proof regarding the May 13th date that Employee deliberately or maliciously failed/refused to follow instructions.

Additionally, I find that in the assessment of assignments and their completion, that based on the evidence presented in the record, Employee only failed to turn in the May 13th assignment by 7pm on that date. The May 14th assignments were turned in by 7pm as required. The messages forwarded by Amber Sigler show the time stamps of completion and those are all before 7pm. Further, Sigler forwarded the message regarding the completion at 6:59pm on May 14th which further evinces that Employee completed and submitted the May 14th assignments as required. Thus, assuming *arguendo* that May 14th was included in the specification for the charges against Employee, the undersigned finds that Agency has no cause of action for this date.

Whether the Penalty was Appropriate

[58] Transcript at Agency's Exhibit A-4.
[59] Tr. Page 35-36.
[60] Tr. Pages 77-79.

Based on the aforementioned findings, I find that Agency does not have cause for adverse action against Employee. As a result, I also find that the penalty of termination was inappropriate under the circumstances. The undersigned would note that, while it has been determined that Agency has not shown cause for the adverse action and that the instant charges cannot be sustained, assuming *arguendo* that cause was determined for the charge of Failure/Refusal to Follow Instructions for the May 13th assignment, the undersigned would find that Agency's penalty of termination exceeded reasonableness. OEA has held that an Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[61] Here, I find that Agency failed to consider relevant *Douglas*[62] factors in its assessment of this action. Namely, Agency noted the mitigating factors as "neutral" and indicated that there were no mitigating factors. This is of note considering that at the time of this matter, the District of Columbia Covid-19 State of Emergency was in effect and everything was in flux which created *unusual job tensions*.[63] In this same vein, I find that Agency failed to give due consideration that Employee's direct supervisor was detailed to another Agency and did not supervise her daily activities and often replied to Employee after official tour of duty hours. This is of significance to the undersigned given the testimony of Agency's witness, Shalonda Frazier, wherein she iterated several times that the pandemic was challenging, and they were advised to be as flexible as possible. In consideration of these factors, I would find that Agency's termination of Employee for submitting one (1) assignment a day late to be an excessive penalty. Agency did cite to Employee's previous disciplinary actions.[64] That, considered with the assessment of progressive discipline, the undersigned finds that in the DPM Table of Illustrative Actions, the range for a subsequent offense for Failure/Refusal to Follow instructions is a 14-Day Suspension to Removal.[65] Thus, assuming *arguendo* that cause was found (which

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[61] *Employee v. Dept. of Human Services*, OEA Matter Nos. 1601-0048-18 and 1601-0015-18R19, Initial Decision, (June 17, 2021) *citing : 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).

[62] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's 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. **(emphasis added**).

[63] *Id*. at 12. "…mitigating circumstances surrounding the offense such as **unusual job tensions."**

[64] Employee had been previously charged with Failure to Follow Instructions and received a three (3) day suspension.

[65] DPM 1607.2(d)(20 June 12, 2019.

it has not), the undersigned would have reversed Agency's penalty of termination and invoked the 14-Day Suspension pursuant to the DPM. That said, the undersigned finds that Agency has failed to meet its burden of proof for cause in this matter and the charges and action against Employee cannot be sustained.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**.
2. Agency shall reimburse Employee all back pay, and benefits lost as a result of the termination.
3. 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/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Administrative Judge