THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHIREEA DAVIS,	)	
Employee	)	OEA Matter No. 1601-0054-19
	)	
v.	)	
	)	
D.C. DEPARTMENT OF TRANSPORTATION,	)	Date of Issuance: January 14, 2021
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Administrative Judge
	)	

Peter S. Fayne, Esq., Employee Representative
Cheri Hance-Staples, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

On June 10, 2019, Shireea Davis ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Transportation's ("Agency" or "DDOT") decision to terminate her from her position as a Construction Control Representative, effective May 24, 2019. Agency filed its Answer to Employee's Petition for Appeal on July 12, 2019. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on September 17, 2019.

On September 20, 2019, I issued an Order convening a Prehearing Conference in this matter for October 23, 2019. Both parties appeared for the scheduled Prehearing Conference. During the Prehearing Conference, Employee requested an extension of time to retain representation. Accordingly, I rescheduled the Prehearing Conference to November 19, 2019. On November 7, 20219, Employee, by and through her counsel, filed a Consent Motion to Reschedule the Prehearing Conference. On November 12, 2019, I issued an Order granting Employee's Motion and scheduled the matter for December 16, 2019. During the Prehearing Conference, I determined that an Evidentiary Hearing was warranted. As a result, I issued an Order Convening an Evidentiary Hearing in this matter

[1] This Initial Decision was issued during the District of Columbia's COVID-19 State of Emergency.

for March 17, 2020. Additionally, the parties were directed to submit briefs in the matter ahead of the Evidentiary Hearing. Briefs were submitted in accordance with the applicable deadlines. Due to the District of Columbia Covid-19 State of Emergency, the Evidentiary Hearing was not held in March 2020. The Evidentiary Hearing was eventually rescheduled and held virtually via WebEx on July 28, 2020, where both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on August 13, 2020, requiring both parties to submit their written closing arguments on or before September 18, 2020. 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 should have used the 2015 or 2018 District Personnel Manual (DPM) version of Section §435-Suitability in its administration of adverse action against Employee.
2. Whether Agency had cause to take adverse action against Employee.
3. If Agency had cause to take adverse action, 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 CHARGES

In a Final Agency Notice dated May 17, 2019, Agency terminated Employee from service effective May 24, 2019, for the following causes of action:

1. "On September 24, 2007, October 15, 2012, and September 9, 2018, you operated or had physical control over a vehicle in the District of Columbia while under the influence of alcohol. Based on this pattern of conduct, you have been deemed unsuitable for your current position as a Construction Control Representative with

the District Department of Transportation (Unsuitable for job, 6B DCMR §435.9; Violation of Law, 6B DCMR §1605.4 and D.C. Official Code §50-2206.11)."

2. "On October 4, 2018, October 9, 2018 and /or October 11, 2018, while on-duty, you operated a District government vehicle in violation of the pre-trial release conditions ordered by the D.C. Superior Court. (Violation of Court Order 6B DCMR § 1605.4(a))."

SUMMARY OF TESTIMONY

On July 28, 2020, an Evidentiary Hearing was held before this Office. This Evidentiary Hearing was limited in nature regarding the causes of action against Employee as outlined in Cause 2 of the May 17, 2019 Final Notice. The parties submitted briefs regarding the legal issue pertaining to Cause 1 and the use of the DPM version (2015 or 2018) Section 435: Suitability. The parties also submitted a Joint Stipulation of Facts and Exhibits prior to the Evidentiary Hearing. 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 course of this matter to support their positions.

Agency's Case in Chief

Bernadette Edwards ("Edwards") Tr. Pages 9 – 33

Edwards is a Supervisory Construction Representative in the Public Space Regulations Division at Agency. Edwards testified that she had been employed with that unit for two years and that Employee worked on her team as a construction maintenance representative. Edwards explained that construction maintenance representatives were responsible for inspecting and enforcing public spaces in the District of Columbia, including public roadways, sidewalks and any construction-related work that occurs in a public space. Inspections are conducted out in the field and the position requires the use of vehicles.

Edwards testified that DDOT disseminates a Vehicle Operator's Acknowledgement Form to each employee. The form details the responsibilities as it relates to the vehicle when it is in the possession of an employee. Employees are required to sign the form on an annual basis. Edwards indicated that she supervised a team of ten (10) construction representatives and at the time she supervised Employee, she had a team of nine (9). At the time, two employees worked the night shift, Employee and Mr. Jamal Heath-Bey. The night shift is different because it is typically responsible for inspection of entertainment life that operates during the evening in the valet staging areas. Edwards explained that the night shift employees performed their inspections separately during their shift. Representatives are required to perform 60 inspections per week, which averages about 12 per day. Edwards testified that Employee did not make a request to ride with another employee to perform her inspections. Edwards further noted that she was not aware of any issue Employee had with her driver's license.

Edwards explained that the employees are assigned vehicles that they check out through a "Traka" box which contains keys to the vehicles. The Traka system is accessed through the use of the government issued identification. There are times when a vehicle may be out of service, and at that time a supervisor will check out the vehicle, but the employee driving the vehicle/in possession has to sign it out. There is a manual sign-out log employees use to sign out a vehicle. Edwards indicated that other employees are not permitted to sign out a vehicle for another employee. Edwards recalled inspection reports from Employee for October 3, 2018, and October 4, 2018 but did not have any knowledge of reports submitted on October 11, 2018. Edwards also noted that Employee submitted inspection reports on October 3rd and October 4th

2018. Edwards indicated that Mr. Heath-Bey was out on leave for three (3) months and did not return to work until October 17, 2018. Edwards testified that when employees use the handwritten log, they can return the key to the Traka box. Employees also have access to vehicles and buildings when they are off-duty by using their government issued-ID. Employees also work in inclement weather since they occupy field positions. They are provided gear to work in inclement weather by Agency. Edwards explained that she was on extended sick leave when Employee was removed from her position. Edwards was on sick leave from January 2019 through July 2019.

On cross-examination, Edwards recalled Employee's signature on the sign out book. Edwards could only attest to the signature on the book. Edwards had no direct knowledge of whether Employee drove vehicles on October 4, 2018 or October 11, 2018. Edwards explained that there is a vehicle log that the fleet coordinator is responsible for monitoring vehicle use. This log tracks the starting and ending mileage, and gas levels when vehicles have been used and then returned. This log also documents damage to the vehicle. Edwards testified that the use of this vehicle log with this information is a requirement but is not always followed. Edwards could not recall whether Employee filled out this documentation on October 4, 2018 or October 11, 2018.

Jamal Heath-Bey ("Bey") Tr. Pages 34 – 51

Bey works in the Public Space Regulation division at Agency and had been there since February 2016. Bey explained that his job duties include investigation and inspection of public space, including construction sites, valets, sidewalk cafes and other public space. A typical (pre-Covid) workday started at 11:00 a.m. where he would go to the office and print off the assignments for the day and speak with a manager to see if there was anything needed for the day. Bey would then go to the Traka to retrieve vehicle keys and proceed to do the assignments. Government vehicles were always used, and he signed the vehicle acknowledgement form. Bey testified that Bernadette Edwards was his supervisor and that he had been under her supervision for about two (2) years. Bey explained that he and Employee were coworkers in the same department and were hired at the same time and have the same position. Bey indicated that he and Employee were first assigned to work at night in order to get valet services under control and to get a better handle on sidewalk cafes. There were no other employees that worked that shift during that time. Bey further explained that he and Employee had not done partnered work since their training period. Bey cited that during their 90-day training period, they would go out together and work with others and this was during 2016.

Bey explained that vehicles were not always available so sometimes they have to call for service and wait for a vehicle to become available. Bey testified that he did have to manually sign out vehicles instead of using the Traka. Bey explained that that is the only time that a manager may have to get the key for them. Once that occurs, they go to their analyst's desk and sign in and out of the logbook. Bey said that he does not have to sign anything out if the Traka system is used because it is automated. But if a manager gets the key out, the Traka would reflect the person who got the key out, which would then require him to go and manually sign out and sign it back in upon return. Bey said that he had never signed out a key for another employee and that it is against the rules. Bey also indicated that he had not given a key to another employee when a manager retrieves the key.

Bey testified that Employee did not ask him to drive her to do inspections. Bey explained that he drove during the training period, and that he recalled that in February 2018, the Chief of Inspections, Stacey Collins, directed him and Employee to drive together. He noted that this was the only time after training that they rode together. Bey noted that Collins directed him and Employee to ride together during a time when Bernadette Edwards was out on leave. Bey iterated that Collins directed him that he and Employee were to ride together on that day. Bey testified that there may have been times when he saw Employee and

they may have assisted with something, but that he did not observe her at work every day or otherwise track her.

Bey explained that he was out on leave from the middle of August 2018 through the middle of October 2018. Bey returned to his duties upon his return. Bey explained that during times of inclement weather they were still required to do their job, but if the weather was particularly bad then they would have to pull over or pause work. Bey said that Agency provided inclement weather gear.

Employee's Case-in-Chief

Shireea Davis ("Employee") Tr. Pages 52 – 82

Employee testified that she began working at Agency in February 2016. She completed a background questionnaire as a part of her hiring process and because she had a CDL, there were questions about prior traffic and criminal matters. Employee explained that she advised Agency that she had lost her CDL due to a second DUI. Employee maintained that Agency was aware of her DUIs from 2007 and 2012, but she was still hired. Employee was charged with a DUI in 2018 and was ordered not to drive a vehicle as of October 4, 2018. Employee noted that the sign-in sheet was used if a manager or supervisor had to sign out keys for a vehicle. Employee admitted that she was at work on October 4, 2018 and that she signed the sign in sheet, but that sheet did not reflect if she drove a vehicle. Employee explained that a vehicle log sheet is what is required to be signed if a vehicle is driven during work duty. It shows the beginning and ending mileage, gas and any damage to the vehicle before and after it is driven. There is no vehicle log for Employee for October 4, 2018. On October 4, 2018, the Traka log indicated that Employee logged in at 11:37:09 pm and the box was closed at 11:37:36 pm. Employee maintained that this does not show that she drove a car and that she never drove a vehicle on October 4, 2018.

Employee testified that her timesheet reflects that she was not at work on October 9, 2018, despite Agency having charged her with driving a vehicle on that day. There is no sign-in for October 9, 2018 and Employee noted that she did not know where Agency got that date from. Employee acknowledged that she worked on October 11, 2018 and that she signed in for work, but that she did not sign into the vehicle log because she did not drive on that date. The log in sheet for the box showed that Employee logged in at 10:08:22 pm and closed the box/logged out at 10:08:48 pm. Employee cited that this did not show her driving a vehicle or taking a vehicle on that date. Employee reiterated that she never drove a vehicle on October 4th, 9th or 11th. Employee testified that she and her coworker, Mr. Bey had previously driven together, but that he did not drive her on October 4th, 9th or 11th dates.

On cross-examination, Employee reiterated that she divulged her previous DUI charges to Agency when she was hired. Employee testified that she signed a Pretrial Release Conditions and Order Form on October 4, 2018 which directed her not to drive a vehicle. Employee reported to work on October 4, 2018 but did not inform her supervisor about the change to her license. Employee said that she did not always need to use a vehicle to perform her job duties. Employee explained that for many of her assignments she would walk. Employee indicated that there were many times that she could not walk to complete her assignments because she did not deal with construction sites. Employee maintained that after the October 4, 2018 Order, she did not drive any vehicle, government or otherwise, but that she did continue to report to work. Employee also indicated that she continued to sign out vehicles and acknowledged her signature on October 3rd, October 4th and October 11, 2018.

Employee had union representation who presented documents on her behalf during the agency investigation and review of her matter. Employee testified that her union representative filed the documents and statements and then emailed her to ask her what she thought about those documents. The documentation sent by the union representative indicated that another employee drove Employee on October 4, 2018.

Employee did not know where the union representative received that information. She explained that the representative asked her some questions about what she could recall for the dates in the charges, and Employee maintains that she told her representative that she knows she did not drive a vehicle because she was ordered by the court not to do so. Employee also explained that on days where there is inclement weather, they mainly do administrative work which includes entering inspections. Employee said that she works ten-hour days, so she typically logs more than twelve (12) inspections while on duty. Employee indicated that there were hundreds of inspections she could work on without ever having the need to go in the field. Employee testified that she never said another employee drove her on October 9th or October 11th and did not recall doing so for October 4th, despite what the statement said. Employee maintained that she did not write this statement. Employee did not know who 'Jim Alvey' was and that in her interview with DCHR, she did not say Jamal Heath. Employee noted that there would not be any other employee that she would refer to as her partner.

On redirect examination, Employee testified that the Pretrial Order instructed her not to drive, but did not revoke her license, and there was no change in her license status at that time. Employee also indicated that the Vehicle Operator Statement was dated January 10, 2019, which was four (4) months after the incident. Employee maintained that the Vehicle Acknowledgement form requires that a supervisor be notified if there is a change in the status of her license but does not require any notification of legal matters. Employee reiterated that her union representative, Gina Walton, only reviewed the statement that was submitted after it was filed. Employee said that the statement was something the representative had made up and that it was based on her representation of other people. Employee maintained that she did not write the first paragraph of the statement that was submitted by the union (See exhibit 4). Employee stated that Gina Walton did not submit a draft to her before it was submitted to Agency. Employee testified that Ms. Walton asked her questions about her workdays and hours. Employee said she trusted her judgment since she was her representative. On re-cross examination, Employee testified that the union representative submitted the statement without sending it to her to review. Employee did not tell the union representative about the inaccuracies in the statement.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Joint Stipulation of Facts

The following represents the parties' joint stipulation of facts in this matter as filed on July 22, 2020:

1. Shireea Davis (Employee) was employed with the DC Department of Transportation (DDOT or Agency) as a Construction Control Representative since 2016 through the date of her termination.
2. The position of Construction Control Representative requires Employee to conduct on-site inspections of construction and maintenance work and to enforce public spaces permit conditions.
3. On September 9, 2018, Employee was involved in a traffic accident during non-work hours in her personal vehicle. Employee was arrested and charged with driving under the influence.
4. On October 4, 2018, Employee signed a Pretrial Release Conditions and Order which prohibited Employee from driving "until further Order from the Court."
5. On November 9, 2018, Employee pled guilty to driving under the influence stemming from the September 9, 2018 arrest.

6. By letter dated March 19, 2019, DCHR on behalf of Agency, provided Employee with advance written notice of its proposal to remove Employee from the position of Construction Control Representative for two (2) causes of action stated therein.
7. Through the advance written notice, Employee was advised and provided the opportunity to submit a response to the hearing officer reviewing the action.
8. Employee, through her union representative, submitted a written response dated April 15, 2019.
9. On May 7, 2019, the hearing officer issued the Hearing Officer Report & Recommendation recommending the Employee's separation from employment.
10. DCHR, on behalf of Agency, issued its Notice of Final Decision dated May 17, 2019, sustaining its proposal to remove Employee from her position based on the causes of action as stated therein, effective May 24, 2019.
11. Employee filed a timely appeal with the Office of Employee Appeals on June 10, 2019.
12. Counsel for the parties have agreed to submit post-prehearing briefs with respect to Cause 1 and to have a hearing with witnesses with respect to Cause 2.

Brief Summary of Parties' Positions

Agency's Position

Agency argues that it had cause to separate Employee from service and did so in accordance with all applicable laws, rules and regulations. Agency asserts that upon learning that Employee had a criminal conviction for driving under the influence following a September 9, 2018 accident, that it conducted a suitability assessment in accordance with the "2018 version of the DPM §435.9 and Employee was found unsuitable for her position."[2] Subsequently on May 24, 2019, Agency cites that Employee was removed pursuant to this suitability provision listed as Cause 1 in its notice and which indicated the following:

> "On September 24, 2007, October 15, 2012, and September 9, 2018, you operated or had physical control over a vehicle in the District of Columbia while under the influence of alcohol. Based on this pattern of conduct, you have been deemed unsuitable for your current position as a Construction Control Representative with the District Department of Transportation (Unsuitable for job, 6B DCMR §435.9; Violation of Law, 6B DCMR §1605.4 and D.C. Official Code § 50-2206.11)."

Agency maintains that its administration of the instant adverse action with the 2018 DPM Suitability provisions was appropriate. Agency disputes Employee's argument that the 2015 DPM version should apply because her Union was challenging the finalization of Chapter 4 pursuant to the Collective Bargaining Unit (CBA) between Agency and the American Federation of Government Employees, AFL-CIO ("Union") Local 1975, Article 2, Section D which states "when the change directly impacts on the conditions of employment of bargaining unit members, such impact shall be a proper subject of negotiation." Agency argues that even the "2015 version of Chapter 4 that Employee is urging this Court to apply does not preclude a termination pursuant to Chapter 16 of the DPM."[3] Further, Agency asserts that the 2015 version of Chapter 4 states that "notwithstanding any other

[2] Agency's Post Hearing Brief at Page 2 (January 17, 2020).
[3] *Id.*

provision of this subtitle, whenever an employee is deemed unsuitable under this chapter, the facts supporting that determination shall be cause for adverse action under Chapter 16 of these regulations."[4] Accordingly, Agency asserts that it correctly applied the 2018 DPM Suitability version to justify Employee's termination and that there is no case law to support a "status quo ante" version of the 2015 DPM, even when a union makes a request to negotiate impacts and effects."

Agency contends that even if the 2015 version were applicable, Employee's removal was justified by the DPM Chapter 16. In support of its removal under Chapter 16, Agency alleged that Employee drove government vehicles on October 4, 2018, October 9, 2018 and/or October 11, 2018, without a valid license. Employee disputed Agency's allegations.[5] Agency "acknowledges that it presented no direct evidence in the form of eyewitness testimony that Employee drove a vehicle on any of the dates in question."[6] "Agency further acknowledges that it offered no evidence that Employee drove a vehicle on October 9, 2018." However, Agency asserts that it offered "credible circumstantial evidence that it's more probably true than untrue that Employee did drive in violation of the Court Order on October 4, 2018 and/or October 11, 2018."[7] Agency argues that Employee exhibited a lack of credibility in that she has offered conflicting accounts regarding the use of a vehicle. Agency cites that Employee had three (3) opportunities to present her defense, including the DCHR investigation in February 2019, the statement filed by Employee's union representative in April 2019 and testimony provided during the July 2020 Evidentiary Hearing held before OEA.

Employee's Position

Employee argues that Agency should have used the 2015 DPM Suitability provisions in its administration of disciplinary action. Employee asserts that on September 9, 2018, she was in a traffic accident and was charged with a DUI. On November 9, 2018, Employee pled guilty to the DUI under DC Code § 50-2206.11.[8] Employee asserts that Agency improperly conducted a suitability assessment under the 2018 version of DPM § 435.9. Employee avers that prior to the 2018 DPM, the 2015 DPM version governed. Employee cites that the 2018 DPM version "materially altered the condition of the collective bargaining agreement that was adopted on December 10, 2018." Employee cites that §435.9 of the 2015 DPM states that "[i]f an employee is deemed unsuitable, the employing agency shall move the employee to a non-covered position…[i]n contrast §435.9 of the 2018 DPM states that 'if an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified…"[9] Employee cites that Agency relied on DPM 1607.2 (a)(2)-(5) to administer the termination.

Employee asserts that §1607 (a)(2) indicates that "termination is appropriate when there is a criminal offense."[10] Further, Employee contends that §1607 (a)(3) indicates termination is appropriate "when the employee commits a felony or a criminal offense that is related to the employee's duties or the agencies mission."[11] Additionally, Employee cites that §1607 (a)(4) requires that an employee's "negative conduct to occur on the job for a termination to be appropriate." Lastly, Employee notes that §1607(a)(5) "applies to off-duty conduct that adversely affects the employee's job performance,

[4] *Id.*
[5] Agency's Closing Argument (September 18, 2020).
[6] *Id.* at Page 7.
[7] *Id.* at Page 8.
[8] Employee's Post Prehearing Brief (February 18, 2020).
[9] *Id.*at Page 2.
[10] *Id.* at Page 5.
[11] *Id.*

trustworthiness, adversely affects his or her agency's mission, or as a nexus to the employee's position." Employee asserts that she was convicted under D.C. Official Code §50.2206.11, but argues that it was a traffic offense and not a criminal or felonious offense. As a result, Employee asserts that § 1607 (a)(2) does not apply. Further, Employee argues that § 1607 (a)(4) requires an employee's actions to have occurred while on duty and that these actions for which she was convicted occurred off duty. As a result, according to Employee, this DPM provision does not apply either.[12]

Employee also avers that Agency failed to show by a preponderance of evidence that it had cause to terminate her under DPM Chapter 16.[13] Employee asserts that Agency provided no evidence that she drove a vehicle or that anyone physically saw her sign out a vehicle in violation of the October 4, 2018 Court Order. Employee maintains that her supervisor, Bernadette Edwards ("Edwards"), testified at the Evidentiary Hearing that she had no specific recollection of seeing Employee sign out nor did she give her keys for a vehicle. Edwards testified that she had no direct knowledge of whether Employee drove a vehicle and did not witness her driving on any of the days for which she was accused of doing so. Further, Employee asserts that Edwards testified that there is a separate "vehicle log" that employees are responsible for completing when they drive a vehicle, and includes starting and ending mileage, gas levels and condition of the vehicle. Employee avers that Agency failed to produce a vehicle log indicating that she had signed out and driven on those days and Edwards testified that she did not see a log.[14]

ANALYSIS

Use of Chapter 4 Suitability -DPM 2015 or 2018 Version

In its administration of the instant adverse action, Agency relied upon the "Suitability" provisions as noted in the 2018 version of the DPM. Specifically, Agency relied on section 435.9 which indicates that "[i]f an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement. Instead of terminating the employee, the personnel authority may reassign the employee to a position for which he or she is qualified and suitable…" Employee avers that Agency incorrectly applied the 2018 version and should have used the 2015[15] version because her union had issued a demand letter to bargain regarding the 2018 version, and requested a '*status quo ante'* until bargaining was complete in accordance with Article 2 of the Collective Bargaining Agreement (CBA).

Neither party provided any accompanying information regarding the status of the negotiations or whether they were in impacts and effects bargaining at the time of the administration of the instant adverse action or regarding any actions following the Union's issuance of the demand letter. The Union demand letter was dated December 4, 2018.[16] Agency avers that its use of the 2018 DPM version was correct, and *assuming arguendo* that it were not, it would be an issue regarding labor

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[12] *Id.*

[13] Employee's Closing Argument (September 18, 2020).

[14] *Id.* at Page 3.

[15] Section 435.9 of the 2015 DPM cites that " If an employee is deemed unsuitable, the employing agency shall move the employee to a non-covered position, or if none are available terminate his or her employment by immediately initiating the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement. Notwithstanding any other provision of this subtitle, whenever an employee is deemed unsuitable under this chapter, the facts supporting that determination shall be cause for adverse action under Chapter 16 of these regulations."

[16] Agency's Answer at Attachment 4 (July 12, 2019).

practices that are not in OEA's jurisdiction and that its adverse action would still be for cause in accordance with the charges enumerated in DPM Chapter 16. The 2015 and 2018 versions differ in how a suitability assessment for an employee and the subsequent steps if an employee is deemed unsuitable. Specifically, under the 2015 DPM, if an employee is deemed unsuitable, the Agency is directed to move the employee to a non-covered position if available. The 2018 version notes that an Agency may choose to terminate an employee or find another position, but it is not specifically required.

As it relates to the CBA argument presented by the parties, typically, OEA does not review matters that are under the guidance of a Collective Bargaining Agreement. However, the District of Columbia Court of Appeals held in *Brown v. Watts*, 933 A.2d 529 (April 15, 2010*)*, that this Office is not "jurisdictionally barred from considering claims that at termination violated the express terms of an applicable collective bargaining agreement."[17] The Court went on to explain that the "Comprehensive Merit Personnel Act ("CMPA') gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including matters covered under subchapter [D.C. Code § 1-616] that also fall within the coverage of a negotiated grievance procedure."[18] In the instant matter, Employee was a member of the AFGE Local 1975 Union ("Union") at the time of her discharge from service. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between Agency and the Union, related to the adverse action at issue in this matter.[19]

That said, the undersigned finds that Agency's use of the DPM versions requires review under the presumption against statutory retroactivity. In the instant matter, Employee's actions which led to her being charged occurred on September 9, 2018 (DUI) and on October 4, 9, and 11, 2018 (violation of law charges). The District Personnel Manual (DPM) regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. The 2015 DPM (Chapter 4 Suitability) version was effective as of December 14, 2015,[20] and was effective until the 2018 DPM version went into effect on December 10, 2018.[21] Consistent with the findings of the U.S. Supreme Court in

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[17] *Shands v. District of Columbia Public Schools*, OEA Matter No. 1601-0239-12 (May 7, 2014); See also *Robbins v District of Columbia Public Schools*, OEA Matter No. 1601-0213-11 (June 6, 2014).

[18] *Id.*

[19] The undersigned notes that while it is not in OEA's jurisdiction to assess whether a provision of bargaining has equated to an unfair labor practice, the District of Columbia Public Employee Relations Board("PERB") (the district agency that retains jurisdiction related to the adjudication for labor matters) has previously held that the status that the application of *status quo ante* is not a typical remedy regarding bargaining. Of note, PERB held the following in FOP/MPDLC v. MPD, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44:

> "[A]n employer does not violate its duty to bargain when it merely unilaterally implements a management right decision. *American Federation of Government Employees, Local 383 v. D.C. Dept of Human Services, Slip Op. No. 418, PERB Case No. 94-U-09 (1992).* The violation of the duty to bargain arises from the employer's failure to provide an opportunity to bargain over the impact and effects once a request to bargain is made, not from the unilateral exercise of its sole management right…" "…[H]owever, ***we note that FOP'S request for status quo ante relief is generally inappropriate to redress an alleged violation of the duty to bargain over the impact and effects of implementing a management right decision.*** We have determined that where the duty to bargain applied only to the impact and effects of a management decision, status quo ante relief is not appropriate when: (1) rescission of the management decision would disrupt or impair the agency's operation and (2) there is no evidence that the results of such bargaining would negate the management rights decision. *American Federation of Government Employees, Local 872. et al. v. D.C. Department of Public Works,Slip Op. No. 439, PERB Case No. 94-U-02 and 94-U-04 (1995)"* (Emphasis added)."

PERB reiterated the same regarding a remedy of status quo ante in *Fraternal Order Police/DOC Labor Committee v. Department of Corrections*, 49 DCR 8937, Slip. Op.No.679, PERB Case No. 00-U-36 and 40 (2002).

[20] Transmittal Date reflects as of August 27, 2012 for the 2012 DPM Version, and the 2016 Transmittal Date is as of February 26, 2016.

[21] *Id.*

Landgraf v. USI Film Productions[22], OEA has held that there is a presumption in which the "legal effect of one's conduct should be assessed under the law that existed when the conduct took place."[23] Further, OEA has noted that "the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact."[24]

Pursuant to these findings, it is presumed that an employee facing disciplinary action should be assessed under the regulatory and statutory regulations that were active at the time of the actions for which the employee would be disciplined. As previously stated, the 2018 DPM Chapter 4 Suitability version was not effective until December 10, 2018. As a result, I find that the 2015 DPM version, which became effective on December 14, 2015, was still in effect at the time of the actions for which Employee was ultimately disciplined. The 2018 version became effective several months after the actions and after the time in which Agency knew of the actions as well. Accordingly, I find that under the presumption against statutory retroactivity, that Agency improperly used the 2018 DPM in its administration of the instant adverse action against Employee and that the 2015 DPM version should have been applied given the timing of the causes of action for which Employee was charged. The 2018 and 2015 DPM versions differ in the directives for how an employee who has been deemed unsuitable should be disciplined. The 2015 version of the DPM, which became effective on December 14, 2015, Chapter 4 § 435.9 states:

> "If an employee is deemed unsuitable, the ***employee's agency shall move the employee to a non-covered position, or if none are available, terminate his or her employment by initiating the appropriate adverse action procedure as specified in this subtitle or any applicable bargaining agreement.*** Notwithstanding any other provision of this subtitle, whenever an employee is deemed unsuitable under this chapter, the facts supporting that determination shall be cause for adverse action under Chapter 16 of these regulations." (Emphasis added)

The 2018 version of the DPM §435.9, which became effective on December 10, 2018 states:

> "If an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement. Instead of terminating the employee, the personnel may reassign the employee to a position for which he or she is qualified and suitable."

As highlighted above, the 2015 DPM version requires Agency to first move an employee to a non-covered position. If none are available, then Agency may terminate an employee as further specified in the DPM. The 2018 DPM version does not have this provision and provides a discretionary measure by which an Agency could either terminate an employee or find another position for which they may be suitable. In the instant matter, there is no evidence in the record that Agency made any

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[22] 511 U.S. 244, 114 S.Ct. 1482 (1994)

[23] *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 1, 2010 at Page 7). The OE A Board cited that the Supreme Court "reasoned that considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. The Court noted that for that reason, there is a timeless and universal appeal that the legal effect of one's conduct should be assessed under the law that existed when the conduct took place. Therefore, the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact."

[24] *Id.*

considerations to move Employee to a non-covered position as required by the 2015 DPM version. Accordingly, I find that Agency did not follow appropriate laws, rules and regulations in its administration of the instant matter because it utilized the incorrect version of the DPM, and as a result, Employee was not afforded the specifications as required under section 435.9 of the 2015 DPM.

Further, because the two versions of the DPM have substantive differences, I find that Agency's use of the incorrect DPM would not be harmless procedural error under OEA Rule 631.3.[25] Because of the substantive differences regarding an employee being moved to a non-covered position, I find that Agency's error in not applying the 2015 version caused "substantial harm or prejudice" to Employee, and ultimately affected its final decision to take action in the instant matter. As a result, of these findings, the undersigned will not further address the issues raised regarding Employee's Union/CBA and the use of the DPM version. The undersigned noted that Agency argued that even *assuming arguendo* that it had used the incorrect Suitability version, that its action under Chapter 16 would still result in Employee's separation. As will be explained below, the undersigned finds that Agency did not meet its burden to establish cause under Chapter 16.

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).*

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. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee's termination was levied pursuant to 6B DCMR § 435.9; 6BDCMR § 1605.4 and D.C. Official Code § 50-2206.11and 6BDCMR § 1605.4(a) .[26]

[25] OEA Rule 631.3 provides that "[n]otwithstanding any other provision of these rules, the Office 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 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."

[26] Employee Petition for Appeal at Final Agency Notice (June 10, 2019)

Chapter 16

In the Final Agency Notice dated May 17, 2019, Agency also charged Employee under Chapter 16 of the DPM. Specifically, the final (and the advanced written notice dated March 19, 2019) indicated that:

> "Cause 1. On September 24, 2007, October 15, 2012 and September 9, 2018, you operated or had physical control over a vehicle in the District of Columbia while under the influence of alcohol. Based on this pattern of conduct, you have been deemed unsuitable for your current position as a Construction Control Representative with the District Department of Transportation. (Unsuitable for job, 6B DCMR §435.9; **Violation of Law 6B DCMR §1605.4** and D.C. Official code §50-2206.11) (Emphasis added).
>
> Cause 2. On October 4, 2018, October 9, 2018, and/or October 11, 2018, while on-duty, you operated a District government vehicle in violation of the pre-trial release conditions ordered by the D.C. Superior Court. **(Violation of Court Order, 6B DCMR § 1605.4(a).** (Emphasis added.)

To support those charges, Agency asserted that Employee drove District vehicles after being ordered by a D.C. Superior Court Pre-Trial order that she was not to drive any vehicles. Employee avers that she did not qualify for termination under Chapter 16 of the DPM and that the Agency's arguments were without merit. Further, Employee asserts that a DUI is not a criminal offense, but a traffic violation and, maintains Chapter 16 does not apply.[27] Further, Employee avers that under DPM§ 1607.2(a)(4) that a removal for violation of law must be related to an on-duty violation.[28] In its submissions to this Office, specifically its Reply Brief dated March 2, 2020, Agency avers that it "correctly asserted facts in this instant matter to support termination under 6B DCMR §1605.4(a)(2), 6B DCMR 1605.4(a)(3) or 6B DCMR § 1605(a)(4) and that Employee's argument that no section of Chapter 16 applies is incorrect. Agency asserts that under the aforementioned sections, it had cause that a conviction of a DUI in the District of Columbia under §50-2206.11 is a criminal offense and would be subject to discipline under 1605.4(a)(2). Agency acknowledges Employee's argument regarding the on-duty nexus for violation of law under §1 607.2.(a)(4), however Agency asserts that it "further relied upon 6B DCMR 1605.4(a)(4) not 1607(a)(4) which addresses off-duty and mirrors the language of 6B DCMR 1607.29(a)(5)."[29] Agency further asserts that "[b]oth §1605.4(a)(4) and §1607.2(a)(5) provide for corrective or adverse action if the off-duty conduct 1) affects the employees job performance or trustworthiness; 2) adversely affects the agency's mission; or 3) has an otherwise identifiable nexus to the employee's position."[30]

As previously stated, Agency charged Employee with violations of Chapter 16 of the DPM pursuant to:"1605.4 (Cause 1 - violation of a court order) and section 1605.4(a) (Cause 2- violation of law)." However, for the following reasons, the undersigned finds that Agency failed to specifically

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[27] The undersigned disagrees with Employee's contention that a DUI is a traffic violation and not a criminal offense. A DUI in the District of Columbia carries penalties of fines and/or jail time. Jail time may even be mandated based upon the alcohol level detected at the time pursuant to D.C. Official Code §50-2206.13. Further, DC Official Code 22-3571.01, characterizes a DUI as an "ineligible misdemeanor." Accordingly, I find that it was appropriate for Agency to assess a DUI as a criminal offense in the District of Columbia.

[28] Employee Post Prehearing Statement (February 18, 2020).

[29] Agency's Reply Brief at Page 3 (March 2, 2020)

[30] *Id.* at Page 3-4.

enumerate its actions as required by the DPM.[31] DPM Section 1605.4 includes charges that are considered to be "Conduct Prejudicial to the District government." In that section there are several actions for which an employee may be disciplined. In fact, DPM §1605.4 includes fourteen (14) potential actions enumerated with letters "a" to "n" and several of those have numbered subsections further specifying adverse actions under this provision. In assessing Agency's use of "1605.4" and its notation of "Violation of Court Order," the undersigned finds there is no such specification included in this section of the code. Furthermore, as it relates to Agency's citation and use of § 1605.4 (a), the undersigned finds that there are four (4) notations for which a charge could be assessed. In its notice Agency, cited to "Violation of Law". The undersigned finds that the provision that appears to fit this would be 1605.4(a)(3), where the language cites to "conduct that an employee should reasonably know is a violation of law or regulation."[32] The other actions listed include (a)(1) conviction of any felony; (a)(2) conviction of any criminal offense that is related to employee's duties or his or her agency's mission; and (a)(4) off-duty conduct that adversely affects the employee's job performance of trustworthiness, or adversely affects the employing agency's mission or has an otherwise identifiable next to employee's position.

OEA has held and D.C. Superior Court has affirmed, that an agency's failure to specify/identify the charges underlying a proposed termination, deprives employees of the notice to which they are entitled and the opportunity to appropriately defend themselves.[33] D.C. Superior Court has held in accordance with *Office of the D.C. Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994), "an employer is required to provide an employee, against whom an adverse action is recommended, with advance written notice stating any and all causes for which the employee is charged and the reasons, specifically and in detail, for the proposed action."[34] The Court also noted that the *Frost* holding found that "the purpose of requiring a specification of the details is to apprise the employee of the allegations he or she will be required to refute or the acts he or she will have to justify, thereby affording the employee a fair opportunity to oppose the proposed removal." *Frost*, 638 A.2d at 662. Further, the OEA Board has held that when there are different charges that carry different penalties, an employee must be given appropriate notice of those underlying charges in order to be able to adequately be able to refute them. The Board found that a failure to specify these charges deprives employees of the opportunity to oppose the proposed disciplinary action (in that matter the action was termination)."[35]

In the instant matter, not only does § 1605.4 include 14 sections and associated subsections, the penalty range for each of the charges is different. The same is also true related to causes found under § 1605.4(a), which contains four (4) different actions for which discipline could be assessed. Specifically, the penalty for a first offense under 1605.4(a)(1) -conviction of a felony would be removal in accordance with the Table of Illustrative Actions in 1607.2(a)(4).[36] However, the Table of

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[31] The undersigned notes that Agency's administration of this action under DPM Chapter 16 was likely administered under the 2018 DPM version. However, consistent with my previous findings made regarding the 2015 DPM version; the undersigned finds that Agency should have administered this action in accordance with the DPM version made effective as of May 19, 2017. The 2018 version was effective on December 10, 2018, after the actions for which Employee was charged. Consistent with the presumption against statutory retroactivity, I find that the 2018 version was not the appropriate version to administer this adverse action. However, the undersigned finds that there were no substantive changes made between the 2017 and 2018 Chapter 16 versions, and the penalty range for the actions were the same. As a result, I find that Agency's use the 2018 DPM version of Chapter 16 to be harmless procedural area as noted in OEA Rule 631.3.

[32] DPM 1605.4 (a)(3) 2018.

[33] *Office of the Attorney General v. Office of Employee Appeals*, D.C. Superior Court 2019 CA 5286 P(MPA) Pages 5-6. (July 16, 2020).

[34] *Id*.

[35] *Rachel George v. Office of the Attorney General*, OEA Matter No. 1601-0050-16 *Opinion and Order on Petition for Review* (July 16, 2019).

[36] DPM Table of Illustrative Actions 16017.2(a)(4).

Illustrative actions shows that the penalty range for a charge for "violation of law under 1605.4(3) is reprimand to removal."[37] As a result, the undersigned finds that Agency's use of 1605.4 without specific enumeration does not meet the appropriate standard of notice for charges being assessed. DPM section 1605.4 is a broad provision that covers many different causes of actions. Additionally, I find that Agency's specified references to charges in its submissions to this Office are not sufficient or appropriate to cure the lack of specificity in its Advanced and Final notices of removal. Accordingly, the undersigned finds that based upon the charges assessed pursuant to Chapter 16, this matter can only be assessed by and through the charge specifically noted in the Advanced and Final Written Notices which were included **for 1605.4 "violation of law or regulation"**, and which the undersigned notes is enumerated by 1605.4(a)(3).[38] The undersigned finds that while the "violation of Court order" is not listed, it can be reasonably attributed to the violation of law or regulation and the undersigned will provide the analysis.

In assessing the charges, Agency notes that Employee violated this DPM provision when she allegedly drove a government vehicle on October 4,2018, October 9, 2018 and October 11,2018, which was violative of a pre-trial court order Employee was subject to pursuant to her being charged with Driving Under the Influence following an incident that occurred on September 9, 2018. As previously noted, Agency relied on Employee's entries in the Traka system and the sign in sheet to support its contentions. Employee avers that she did not drive a vehicle and that the time stamps shown for the Traka System would not indicate enough time to operate a vehicle. Further, Employee avers that she was not even at work/on-duty on the October 9, 2018 date for which she was charged.

For the following reasons, the undersigned finds that Agency has not shown by a preponderance of evidence that Employee drove a car on the dates for which she was charged. First, regarding October 9, 2018, Employee avers that she was not on duty. The record and evidence support Employee's contention. The Peoplesoft time entry for October 9, 2018, clearly reflects that Employee was out on leave on October 9, 2018.[39] Regarding the remaining dates of October 4, 2018 and October 11, 2018, Agency maintains that the Traka System wherein Employee logged in on those days provide evidence that she drove vehicles in violation of this court order. Further, Agency asserts that Employee provided inconsistent statements regarding whether she drove a vehicle and/or if another employee drove her around on the days for which she was charged. Accordingly, Agency avers that while it could produce no eyewitness testimony, it has provided enough circumstantial evidence for which it could reasonably rely upon in its assessment of the instant adverse action against Employee. Employee asserts that she did not drive the vehicles on those days and that the entries in the Traka system reflect a time period that was too short for her to drive. On October 4, 2018, the Traka System log notes an initial sign in for key retrieval at 11:37:09 PM, a time stamp that an item was returned (16) seconds later at 11:37:15, the vehicle door was closed at 11:37:34 PM. Following that, the system shows that Employee logged out of the system completely at 11:37:36 PM. For October 11, 2018, the Traka system reflects a log into the system at 10:08:22 PM, that the door to a key lift was opened at 10:08:30 PM, and then it was returned at 10:08:43 PM.

The undersigned finds that the Traka system time frames for these dates are not sufficient evidence to show that Employee drove a vehicle on those days. At best, this log evinces that there were entries made, doors were closed and opened, but it does not provide enough information to support the operation of a vehicle. Agency did not provide the Vehicle Log managed by the fleet coordinator that

[37] *See*. Table of Illustrative Actions DPM §1607.2 (a)(4) and (a)(1) – conviction of a felony.
[38] "Conduct that an employee should reasonably know is a violation of law"- DPM Chapter 16.
[39] Joint Stipulation of Facts and Exhibits at Exhibit 20 (July 21, 2020)

employees are supposed to use when driving vehicles on duty. This Vehicle Log maintains records for the gas levels, starting/ending mileage and any damage or issues related to the vehicle being used. Additionally, during the Evidentiary Hearing on this matter, Employee's former supervisor, Bernadette Edwards, provided testimony related to this issue.[40] Edwards noted that this Vehicle Log is supposed to be completed to track employees' use of vehicle and the issuance of keys. Edwards confirmed that this log tracks the starting and ending mileage, gas levels and gas, and denotes damage and times of use. Edwards also testified this Vehicle Log is a "requirement but is not always followed."[41] As previously stated, Agency did not produce this Vehicle Log for any of the days for which Employee was accused of driving. Further, Edwards also testified that she did not see Employee driving/operating a vehicle on the days in question.[42] The undersigned finds that the Traka system report alone, without the vehicle log sheet or an eyewitness is not enough to show by a preponderance of evidence that Employee drove a vehicle on the days for which she was charged.

Consequently, the undersigned finds that Agency has not met its burden to show that Employee violated a law or regulation as it relates to Cause 2 of the adverse action. Specifically, Agency has not provided substantial evidence to prove employee drove a District vehicle while on duty such that she would be in violation of the D.C. Superior Court Order that prohibited Employee from driving any vehicles. As a result, I find that Agency did not have cause under DPM Chapter 16 §1605.4(a)(3) to take adverse action against Employee.

Whether the Penalty was Appropriate

Based on the aforementioned findings, including Agency's failure to utilize the appropriate version of the District Personnel Manual in its administration of this action, I find that Agency did not have cause for adverse action against Employee. As a result, I find that the penalty of termination was inappropriate under the circumstances.

ORDER

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

1. Agency's action of terminating Employee from service is hereby **REVERSED.**
2. Agency shall reinstate Employee to her last position of record, and Agency shall reimburse employee all backpay and benefits lost as a result of her removal.
3. Agency shall file within thirty (30) days from the date 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

[40] Evidentiary Hearing Transcript Pages 31-32 (July 28, 2020).
[41] *Id*.
[42] Evidentiary Hearing Transcript Pages 31-32 (July 28, 2020).