THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARTIN D. HARRIS,	)	
Employee	)	OEA Matter No. 1601-0060-16
	)	
v.	)	
	)	
D.C. DEPARTMENT OF GENERAL SERVICES,	)	Date of Issuance: April 5, 2017
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
	)	

Martin D. Harris, Employee *Pro Se*
C. Vaughn Adams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 6, 2016, Martin D. Harris ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of General Services' ("Agency" or "DGS") decision to suspend him from service for ten (10) days from his position as a Supervisory Special Police Officer, CS-083-9, based on the following causes of action: "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carryout assigned tasks and careless and negligent work habits"[1]; and "[a]ny other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious: sleeping on the job."[2] Agency's Answer was due on or before August 5, 2016. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on October 4, 2016. On October 18, 2016, I issued an Order convening a Prehearing Conference in this matter.[3] Prehearing statements were due on or before November 23, 2016.

On November 30, 2016, a Prehearing Conference was held in this matter. A Post Prehearing Conference Order was issued the same day and the parties were ordered to submit briefs in

[1] DPM § 1603.3 (f)(3) (2012)
[2] DPM § 1603.3 (g) (2012)
[3] The Prehearing Conference was held in conjunction with Employee's other appeal, OEA Matter No. 1601-0059-16, which was filed simultaneously with the instant appeal.

accordance with the briefing schedule agreed upon during the conference. Agency's brief was due on or before December 30, 2016. Employee's brief was due on or before January 30, 2017. Based on the briefs submitted by the parties, I determined that an Evidentiary Hearing was not warranted. 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; and
2. If so, whether the ten (10) day suspension was appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

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 PARTIES' POSITION

Agency's Position

Agency asserts that there was just cause for the adverse action levied against Employee, and that the penalty of a ten (10) day suspension was appropriate. Agency asserts that on August 21, 2015, at approximately 3:08am, that two Protective Services Division (PSD) Captains observed Employee sleeping while on duty in his PSD Patrol Vehicle.[4] During their observation, it was noted that Employee did not open his eyes.[5] Agency contends that Employee was parked in a parking lot and those who observed him sleeping were able to capture photographs of the incident.[6] Agency argues that while Employee was sleeping that he was not carrying out his duties. As a result, in an Advance Written Notice of Proposed Suspension dated January 29, 2016, and delivered to Employee

[4] Agency's Answer at Page 2. (August 5, 2016)
[5] *Id.*at Attachment.
[6] *Id.* at Tab 2.

on February 2, 2016,[7] Agency gave Employee a fifteen (15) day advance notice of a proposal to suspend him without pay for ten (10) days.[8] On February 9, 2016, Agency contends that Employee responded to the proposed suspension, but never denied the allegation. Agency asserts that in his response, Employee blamed the "Captains who discovered him for endangering his life because they did not wake him up or check on his welfare."[9] Agency avers that the photographic evidence clearly shows that Employee as sleeping and as a result, on June 6, 2016, Employee was provided final notice that he would be suspended for ten (10) days. Agency argues that in making the decision to administer this adverse action that it weighed the Douglas factors, and noted that Employee's "sleeping while on duty interfered with his ability to service the community and with his ability to effectively supervise his team."[10] Consequently, Agency argues that the ten (10) day suspension was appropriate under the circumstances.

Employee's Position

Employee contends that it was never proven "beyond a shadow of any reasonable suspicion" that he was sleeping while on the job.[11] Further, Employee argues that the act did not interfere with government operations. Employee asserts that he did not get a call for service, did not miss a radio run and that the "wheels of the government did not fail to turn or miss a beat."[12] Additionally, Employee argues that the two captains who observed him could not say that he failed to respond. Employee argues that Agency should have determined whether he was sleeping on the job or was unconscious.[13] Employee argues that there was not just cause for the adverse action and that the ten (10) day suspension was not an appropriate penalty.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee is employed by Agency as Supervisory Special Police Officer, CS-083-9, with the Protective Services Division (PSD) with the Department of General Services.[14] In a Final Written Notice dated June 6, 2016 , Employee received final notice of Agency's decision to suspend him without pay for ten (10) days from his position for violation of DPM §1603.3(f)(3)—"Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carry out assigned tasks; and DPM § 1603.3(g) Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: sleeping on the job."[15] The effective dates of the suspension were June 7, 2016, through June 18, 2016.

[7] Agency's Answer (August 5, 2016).
[8] *Id.*
[9] *Id.* at Page 2.
[10] Agency's Brief at Page 3 (December 28, 2016).
[11] Employee's Brief (February 1, 2017).
[12] *Id.*
[13] *Id.*
[14] Employee Petition for Appeal (July 6, 2016).
[15] Agency's Brief Pages 1-2 (December 28, 2016).

ANALYSIS

Appropriate Version of DPM

In the Post Prehearing Conference Order dated November 30, 2016, the undersigned required the parties to address whether Agency, in administering the adverse action against Employee utilized the appropriate version of the District Personnel Manual ("DPM"). Employee proffered that this issue should be determined by the court.[16] Agency asserted that its adverse action was properly guided by and assessed under the August 27, 2012 version of DPM Chapter 16. Agency contends that Employee's conduct that resulted in the instant adverse action took place on August 21, 2015.[17] As a result, Agency proffers that Employee's actions that resulted in the adverse action occurred while the 2012 version of the DPM was still effective.

Agency contends that the current DPM Chapter 16 version which was effective as of February 26, 2016, would be inappropriate to apply in this instant matter as that would result in retroactive application of a new statute.[18] The undersigned agrees. The actions for which Employee was subject to an adverse action occurred during the time in which the 2012 version of the DPM was effective. Consistent with the findings of the U.S. Supreme Court, 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."[19] Because the current DPM Chapter 16 did not become effective until February 26, 2016, I find that it would be improper for it to have been applied retroactively in the instant matter. As a result, I find that Agency did utilize the appropriate 2012 version of the DPM in administering adverse action against Employee.

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.

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[16] *See* Employee's Brief (February 1, 2017).
[17] Agency's Brief (December 28, 2016)
[18] *Id.* at Page 4.
[19] *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 10, 2010).

Employee's suspension was levied pursuant to DPM § 1603.3, wherein the definition of cause includes the following: §1603.3(f)(3)—"Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carry out assigned tasks; and DPM § 1603.3(g) Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: sleeping on the job."

District of Columbia personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.[20] In the instant matter, on August 21, 2015, Employee was observed in his patrol car by two captains with his eyes closed and head tilted back.[21] Photographic evidence provided by Agency shows Employee was in a PSD patrol car, sitting with his eyes closed and his head tilted back.[22] There is no dispute that Employee was on duty at the time of the incident. Employee argues that the pictures and the observations of the captains do not prove that he was actually sleeping. However, the undersigned finds that the photographic evidence submitted by Agency overwhelmingly invalidates Employee's claim. The pictures captured by the captain exhibit Employee sitting in the patrol car with his eyes closed in a manner that the undersigned believes a reasonable person would find consistent with sleeping.

As a result, the undersigned finds that Employee was sleeping while on the job and therefore was not engaged in behavior conducive to carrying out his duties. Employee's arguments that his actions did not interfere with government operations or cause an interruption in service are unpersuasive. Upon consideration of the aforementioned findings, I find that Agency has met its burden of proof in this matter, and it has adequately proven that there was proper cause for adverse action against Employee.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[23] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in DPM 1619.1; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this

[20] *Karen Falls v. Department of General Services*, OEA Matter No. 1601-0044-12R14 (August 12, 2014). *See also* 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).
[21] Agency Answer (August 5, 2016).
[22] *Id.* at Tab 4.
[23] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

Office."[24] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[25]

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to suspend Employee from service.[26] Further, Chapter 16 § 1619.1 of the District Personnel Manual Table of Appropriate Penalties ("TAP") provides that the appropriate penalty for a first offense for neglect of duty ranges from reprimand to removal.[27] Additionally, the TAP provides that the appropriate penalty for a first offense for any on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious, specifically, sleeping on the job; ranges from reprimand to suspension for up to fifteen (15) days.[28]

Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of a ten (10) day suspension is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to suspend Employee from service. As a result, I conclude that Agency's action should be upheld.

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[24] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[25] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[26] *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.

[27] 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

[28] 6-B DCMR §1619.1(7), Table of Appropriate Penalties (2015).

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee from service for ten (10) days from service is **UPHELD.**

FOR THE OFFICE:

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Michelle R. Harris, Esq.
Administrative Judge