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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹)	OEA Matter No. 1601-0034-22R23
)	
v.)	Date of Issuance: February 13, 2025
)	
D.C. DEPARTMENT OF CORRECTIONS,)	MONICA DOHNJI, ESQ.
Agency)	Senior Administrative Judge
)	

Employee, *Pro Se*
Connor Finch, Esq., Agency's Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On January 6, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Corrections' ("DOC" or "Agency") decision to terminate her from her position as an Operations Research Analyst, effective December 3, 2021. Employee was terminated for (1) "Failure to meet established performance standards"² and (2) "Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions and Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions."³ Employee was also charged with violating Agency's Policy and Procedures 3300.1E – Employee Code of Ethics and Conduct, Section 10 Personal Accountability – Employees shall obey all lawful orders from their superior. On January 6, 2022, OEA issued a Request for Agency's Answer to Employee's Petition for Appeal. Agency submitted its Answer to Employee's Petition for Appeal on February 22, 2022. Following a failed attempt at mediation, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on May 17, 2022. Thereafter, on May 17, 2023, the undersigned issued an Initial Decision ("ID") reversing Agency's decision to terminate Employee.

¹ Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

² 6B District of Columbia Municipal Regulations ("DCMR") §1607.2(m).

³ 6B DCMR §§1607.2(d)(1) and (2).

On June 21, 2023, Agency filed a Petition for Review with the OEA Board. Employee filed an Opposition to Agency's Petition for Review on June 22, 2023. The OEA Board issued an Opinion and Order on September 7, 2023, noting the following: "we believe that the parties' arguments related to service of the PIP notice present a contested issue of fact that cannot be deciphered based on the record in its current state." The OEA Board also highlighted that "Agency notes that it possesses a certificate of service indicating how the decision was delivered; however, it was not introduced as part of the record prior to the filing of the Petition for Review." Additionally, the OEA Board opined that "We believe that the AJ erred by relying *sua sponte* on a DCHR website without allowing the parties an opportunity to present briefs or oral testimony related to the FAQ section. This Board cannot decipher whether the FAQ page is current, accurate, or whether it provides any binding legal authority to support a finding that Agency violated DCMR § 1410.3." Regarding the PIP end date, the OEA Board stated that "there is no testimonial evidence in the record to support the AJ's conclusion that Employee was unapprised of the ending date of the PIP period. Agency's basis or methodology for unilaterally ending the PIP on August 22, 2021, is also unknown." Accordingly, the OEA Board remanded the matter to the undersigned for further proceedings.

Thereafter, the undersigned issued an Order on September 25, 2023, convening a Prehearing Conference for October 17, 2023, with Prehearing Statements due October 11, 2023. Both parties attended the scheduled conference and submitted their respective Prehearing Statements. Subsequently, on November 1, 2023, the undersigned issued an Order scheduling an Evidentiary Hearing for November 28, 2023. Agency filed a Consent Motion for Continuance on November 16, 2023, requesting that the Evidentiary Hearing be vacated as the parties were engaged in settlement negotiations.⁴ On November 21, 2023, the undersigned issued an Order Granting Agency's Consent Motion for Continuance. The November 28, 2023, Evidentiary Hearing was canceled, and the parties were required to submit a written status update on their settlement progress by December 1, 2023. Agency filed a written status update as requested, noting that the parties were still engaged in settlement discussions. Agency also requested an additional thirty (30) days to provide a more substantive update. This request was granted in an Order issued December 6, 2023. This Order further required the parties to submit another written status update by January 12, 2024.

Subsequently, on January 26, 2024, Employee submitted a written Status Update noting that the parties were still engaged in settlement negotiations. Accordingly, on January 31, 2024, the undersigned issued an Order requiring the parties to submit another written status update by February 21, 2024. Agency filed a written Status Update on February 21, 2024, wherein, it noted that settlement negotiations were ongoing. Thus, on February 26, 2024, I issued an Order requiring the parties to submit a written status update by April 19, 2024. Agency filed a written Status Update on April 19, 2024, noting that although the parties were still engaged in settlement

⁴ On November 17, 2023, OEA received Designation of Employee Representative noting that Employee had retained attorney Charles Tucker Jr. of The Cochran Firm to represent her in this matter.

discussion, Employee expressed that “she desired to schedule a hearing date.” Consequently, the undersigned issued an Order Convening an Evidentiary Hearing for October 16, 2024.⁵

On September 12, 2024, Agency filed an Opposed Motion for Continuance requesting that the scheduled Evidentiary Hearing be continued to October 17, or 18, 2024. The undersigned issued an Order on September 17, granting Agency’s Motion for Continuance and continued the Evidentiary Hearing to October 17, 2024. Both parties were present for the Evidentiary Hearing held on October 17, 2024. The undersigned emailed the Evidentiary Hearing Transcript to the parties and issued an Order on November 8, 2024, requiring the parties to submit written closing arguments by December 6, 2024. On December 4, 2024, Agency filed its Opposed Motion for Extension of Time, requesting that the deadline to submit written closing arguments be extended to December 20, 2024. Employee filed her written closing arguments on December 6, 2024. Agency’s Motion for Extension of Time was granted by AJ Harris on December 12, 2024.⁶ Agency filed its written closing argument on December 20, 2024. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Agency complied with DPM § 1410.5 notice requirement; and
- 2) Whether the ePerformance FAQ on the District of Columbia Human Resources website is accurate or provides any binding legal authority to support a finding that Agency violated DCMR § 1410.3; and
- 3) Whether Employee was apprised of the ending date of the Performance Improvement Plan (“PIP”) prior to the start of the PIP; and
- 4) Whether Agency had cause to discipline Employee; and
- 5) If so, whether the penalty of termination is appropriate under District law, rules, regulations or the Table of Illustrative Actions.

⁵ In an email dated August 2, 2024, Employee notified the undersigned of a change in her legal representation. Employee stated in this email that “As of this date, Charles Tucker and his team, formerly known as The Cochran Firm, will no longer be representing me in OEA Matter 1601-0034-22R23. I will now be representing myself *pro se*.” Mr. Tucker filed a Praecipe withdrawing his appearance as Employee’s representative on September 17, 2024.

⁶ Due to personal extenuating circumstances requiring the undersigned’s absence, on December 12, 2024, AJ Harris issued a Notice Regarding Temporary Abeyance of Proceedings to the parties until my return. AJ Harris granted Agency’s December 4, 2024, Motion in this Notice.

SUMMARY OF MATERIAL TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding.

Agency’s Case in Chief

Reena Chakraborty (“Dr. Chakraborty”) Tr. pgs. 15-210.

Dr. Chakraborty is employed by Agency as a Chief of Strategic Planning and Analysis and has been in this position since May of 2012. Tr. pg. 16. She is a team lead for three (3) operations research analysts and two (2) program analysts. Together, they are responsible for providing strategic planning, which includes performance reporting for Agency and developing Agency’s annual performance plan analysis for internal and external customers. This includes pulling data and providing analysis routine and on request as well as evaluation, which includes preparing independent government estimates for procurements. Tr. pgs. 16-18. Dr. Chakraborty has been a supervisor since 2011. She has completed all mandatory MSS employee coursework for supervisors during the past twelve (12) years. Dr. Chakraborty also completed an Executive Leadership Program in 2017. Tr. pgs. 18-19.

Dr. Chakraborty asserted that she hired Employee to work at Agency in 2014, and Employee was under her direct supervision until Employee’s termination. Dr. Chakraborty testified that Employee was hired as a DS-14, which is a senior operations research analyst, and, in this role, her duties included supporting strategic planning and analysis, but not evaluation. Tr. pgs. 20-21. Dr. Chakraborty identified Agency’s Exhibit 1 as the position description form for a DS-14 operations research analyst Tr. pg. 25. Dr. Chakraborty confirmed that Agency’s Exhibit 1 accurately describes the duties and responsibilities of an operations system analyst. She testified that based on the position description, a DS-14 operations research analyst is expected to be able to perform their duties with general direction and minimal supervisory intervention. She explained that at this level, the operations research analyst is expected to exhibit good analytical judgement. Tr. pg. 28. Dr. Chakraborty stated that projects assigned to DS-14 operations research analysts were often presented in relatively nonspecific language. She noted that the projects may involve multiple methods of analysis, which may include formal quantitative and qualitative methods; research; consulting others and going out and observing procedures and practice. Tr. pg. 29.

Dr. Chakraborty affirmed that she had concerns about Employee’s performance in fiscal year (“FY”) 2020, which she documented. Dr. Chakraborty identified Agency’s Exhibit 2 as Employee’s annual performance evaluation for FY 2020, which Dr. Chakraborty completed. Tr. pg. 30. Dr. Chakraborty asserted that every supervisor is required to consider prior year performance in setting the performance goals for the following fiscal year. She confirmed that Employee’s FY 2020 performance was considered in setting her FY 2021 performance goals. She explained that she suggested in Employee’s FY 2021 performance plan that Employee work on customer service and communication. Tr. pg. 33.

Dr. Chakraborty testified that Agency had not returned to in-person work when she set Employee's FY 2021 performance goals. She cited that Employee was on Family Medical Leave ("FMLA") during FY 2021 starting in December 2020 and ending March 2021. Dr Chakraborty identified Agency's Exhibit 3 as the notification of the approval of Employee's FMLA leave which she received when Employee was on FMLA leave. Tr. pgs. 33-34. When asked if Employee was on FMLA leave at the time she completed Employee's performance plan for fiscal year 2021, Dr. Chakraborty answered 'no'. Tr. pg. 35.

Dr. Chakraborty identified Agency's Exhibit 4 as Employee's FY 2021 performance document. She affirmed that she authored the document and entered all the SMART goals. Tr. pgs. 35-36. Referencing Agency's Exhibit 4, Dr. Chakraborty testified that "Core competencies are common for all District employees, and we don't edit those. Those are as they are. The SMART goals are established by the employee's supervisor in consultation with the employee hopefully where possible." She noted that Employee's first SMART goal was to perform a comprehensive analysis of overtime utilization which was a critical agency need and that was the type of analysis expected from a Grade 14 operations research analysts. Tr. pgs. 37-38.

Regarding the timeline for completing the project, Dr. Chakraborty testified that different people have different working styles and can take different amounts of time to complete the project. Dr. Chakraborty asserted that because there was another Agency hearing coming up in June, if they had the overtime utilization analysis prior to that hearing or sometime in May of 2021, then they would have served the Agency, and this goal would have been met. Tr. pg. 39.

For the second SMART Goal - demonstrated advanced Excel skills, Dr. Chakraborty explained that this goal was very important for analysts to have. She explained that because she felt that the first goal was very politically heavy, the second SMART goal would support it and would be a somewhat lighter goal to accomplish. Dr. Chakraborty confirmed that both SMART goals essentially work together to reach the same goal. Tr. pg. 40.

Dr. Chakraborty testified that she set the third SMART Goal because "I felt that this was an obstacle to [Employee] being effective and that we discussed it, and I continued to see evidence that there was deficiency in her performance in this area. For example, you know, grammar and spelling and I felt that with some attention to this area, she could be more effective in her work." Tr. pg. 41. Dr. Chakraborty reiterated that "SMART goal No. 1 was really the most important for everyone. ... We really needed a solid product for SMART Goal No. 1. SMART Goal 2 and 3 were developed to support success in SMART Goal No. 1." Tr. pg. 41.

Dr. Chakraborty stated that Employee's SMART goals were modified in March 2021. She identified Agency's Exhibit 5 as an email she sent to Employee stating that Employee's FY'21 performance plan was attached and informing Employee that she had to change some of the goals that were discussed on November 5th because Employee was going to be out on FMLA. Dr. Chakraborty affirmed that Employee's FY'21 Performance Plan was transmitted to her via email. Tr. pgs. 42-44. Dr. Chakraborty confirmed that she used DCHR's template in creating the performance plan document. She stated that Employee was on FMLA when she emailed the FY'21 Performance Plan to Employee. Dr. Chakraborty does not recall discussing Employee's performance plan with Employee when she returned from FMLA. Tr. pg. 45.

Dr. Chakraborty confirmed that Agency's Exhibit 7 is an email thread which reflects her transmission of Employee's performance plan on December 15, 2020, and that Employee responded to the email on March 29, 2021, when she returned from FMLA. Tr. pg. 48. She stated that her correspondence with Employee was mainly through email. Tr. pg. 49. Dr. Chakraborty asserted that there was a performance hearing in June, so she really needed the SMART Goal 1 analysis done prior to the performance hearing. Dr. Chakraborty averred that the overtime analysis was the only project Employee had at the time. Tr. pgs. 50-51.

Dr. Chakraborty stated that she provided Employee with general directions as was appropriate for a DS-14 analyst on how to complete the overtime analysis. Dr. Chakraborty averred that her communication with Employee about the project was primarily in writing since they had not returned to the office. She noted that she was available to answer questions but does not recall getting any questions from Employee. Tr. pgs. 58-60. Dr. Chakraborty asserted that Employee also had other resources such as access to past analyses that were performed by the team and made available in a shared network folder to assist Employee complete the project. She clarified that while Agency had models for written reports, there are no written reports on overtime. Tr. pg. 60. Dr. Chakraborty explained that the pieces of analyses that would be contained in an overtime report were available to Employee for the most part. Tr. pg. 61.

Upon review of Agency's Exhibit 33, Dr. Chakraborty testified that Employee submitted the analysis of overtime transportation unit prior to the issuance of the current PIP. Tr. pg. 74. Dr. Chakraborty recalled reviewing the transportation unit analysis overtime document that Employee completed. Tr. pg. 76. Dr. Chakraborty identified Agency's Exhibit 10 as the initial analysis of overtime for the transportation unit that Employee completed for her review. Tr. pgs. 76 - 77.

Dr. Chakraborty affirmed that it was typical to have some assignments not specifically stated on a performance plan. Tr. pg. 51. She explained that when Employee asked that the first SMART goal be extended to June 30th, she provided Employee an extension through May 31. Tr. pg. 52. Dr. Chakraborty cited that one of Employee's assignments was to update the website. She explained that "there are three reports that have to be pulled. One is a population snapshot for either the last day of the quarter or the first day of the following quarter. There's an intakes report that has to be pulled and a releases report that has to be pulled. These three reports have to be analyzed using pivot tables to produce a series of charts and graphs with then pasted into a document for example in PowerPoint ... which is then converted to a PDF document and posted to the website." Tr. pg. 54.

Dr. Chakraborty acknowledged that the transportation unit analysis is part of the broader overtime utilization project that is part of Employee's SMART Goal number one, and it was a piece of the overall overtime analysis project with a later date. She asserted that she provided Employee feedback on this portion of SMART Goal number one. Tr. pg. 78. Dr. Chakraborty explained that "... the transportation unit is a small portion of the agency's overtime, so it's about 4 percent. And ... based on the outline I saw, I saw that many pieces of what I was expecting was there content-wise, but there were again business communication-related matters that needed to be addressed." Tr. pg. 79. Dr. Chakraborty asserted that this piece of the project did not fully meet her expectations, but it was getting there. Tr. pg. 80. Dr. Chakraborty testified that as a

supervisor, she is required to ensure that all communications made by her and the staff members were compliant with Agency's workplace policy, the mayor's standards for business communications and District-wide standards. Tr. pg. 82.

Dr. Chakraborty testified "I felt that the performance deficiencies that were identified in FY 2020 continued to be present in FY 2021. And after consultation with the Human Resources Department, I felt that the best option to help [Employee] come back into compliance with the standards of performance for a DS-14 operations analyst was to issue a PIP and to monitor her performance on that PIP." Tr. pg. 86. She asserted that Employee was the first employee she placed on a Performance Improvement Plan ("PIP"). Dr. Chakraborty stated that she transmitted the performance plan to Employee via email, during a virtual meeting she had with Employee. Tr. pg. 87. Dr. Chakraborty identified Agency's Exhibit 12 as her email to Employee, informing her that a copy of her PIP was attached. Tr. pg. 88.

Dr. Chakraborty identified Agency's Exhibit 13 as the PIP document she issued to Employee. Tr. pg. 89. She confirmed that the PIP was based off Employee's performance plan for FY 2021 and on areas of the performance plan that were deficient. Dr. Chakraborty stated that under the first core competency as stated in the PIP document, she observed that Employee did not meet business standards as required of a person working as an operations research analyst. Tr. pg. 90. She averred that there were many errors in Employee's emails and written material and the standard of performance for Employee's position required substantially error-free work. Tr. pg. 91. Dr. Chakraborty explained that she observed the written and oral communication between she and Employee, and Employee and other customers both internal and external. She also highlighted that she expected Employee to use spell checks on all written communication. Tr. pgs. 92-93.

Regarding the next core competency - customer service, Dr. Chakraborty testified that in their role as analysts, everyone in the Agency is their customer. She explained that the customer service core competency was part of Employee's PIP because she observed that Employee had a different definition of who constituted a customer. Dr. Chakraborty noted that if Employee was directly assigned to support a person, they were a customer, and she treated them accordingly. However, other people, such as her supervisor or others who were not directly her customers, did not receive the same level of attention and service as those she believed to be her customers did. Tr. pgs. 93 -94. For the accountability core competency, Dr. Chakraborty testified that "accountability is taking personal responsibility for making sure that assignments are completed on time and up to the standards." Tr. pg. 94. She confirmed that Employee was deficient in this area in FY 2021 that is why it was part of her PIP. Dr. Chakraborty could not recall specific instances of this deficiency in FY 2021. Tr. pgs. 94-95.

When asked about goal attainment, Dr. Chakraborty asserted that "if an assignment is given, it should be completed on time and up to performance standards." She explained that "for work that's been done before, there shouldn't need to be several levels of revision, or for work that's newly assigned, you know, if there's questions to be asked, to make sure that the goal is achieved in a timely way." Dr. Chakraborty affirmed that she expected Employee to turn in her work on time and communicate the progress she was making. Tr. pgs. 95-96. For job knowledge, Dr. Chakraborty stated that analysts must consistently work to improve their knowledge of what

it takes to be an analyst. She noted that there were different ways for analysts to improve their job knowledge which included taking courses appropriate for them and using web-based resources which were freely available and provided by the district government. Tr. pgs. 96-97.

Dr. Chakraborty testified that SMART goal number one was part of Employee's PIP because that was the most important work product that was required of Employee by Agency. She cited that she "had every expectation that [Employee] would complete this work and successfully complete the PIP." Dr. Chakraborty explained that prior to placing Employee on the PIP, she observed that Employee's work on the transportation overtime analysis project had not fully met her standards. She stated that SMART goal number one mirrored what was in Employee's performance plan. Dr. Chakraborty also stated that the due date for this SMART goal in Employee's performance plan was different from the due date provided in the PIP. She explained that with the performance plan, the due date for this SMART goal was May 1, 2021, which was extended to May 31, 2021, based on Employee's request. Dr. Chakraborty averred that for the PIP, the due date for this SMART goal was June 8, 2021, because Agency needed the information to prepare for the performance hearing. Tr. pgs. 97-101. Dr. Chakraborty testified that SMART goal number three was part of Employee's PIP. Tr. pg. 102.

Dr. Chakraborty identified Agency's Exhibit 14 as the video of the Microsoft Teams meeting she had with Employee regarding her PIP. Tr. pg. 104. Upon review of Agency's Exhibit 14, Dr. Chakraborty confirmed that the Correctional Training Facility ("CTF") analysis was part of the overtime analysis and was similar to the transportation analysis. She cited that Employee had made some progress towards the completion of SMART goal number one prior to being placed on the PIP. Tr. pgs. 114 -115.

Dr. Chakraborty identified Agency's Exhibit 16 as an email chain between she and Employee where she reminded Employee that "the SMART goal and the PIP both clearly specify a written report, not say a PowerPoint document." Tr. pg. 118. Dr. Chakraborty stated that she had some concerns with the CTF overtime report that Employee submitted, and she provided Employee with feedback. Tr. pg. 119. Dr. Chakraborty testified that "As in terms of how the posts contributed to overtime and analysis of overtime by activity, which I did not see in the version that I received. And that's what I say in that email. And I also mentioned that I would like a written report for CTF." Tr. pg. 120. She explained that she wanted something other than a PowerPoint slide because PowerPoint slides don't contain "the linkage of the graphs and charts that an analyst produced through the insights that they derived, the insights and recommendation." She stated that this part was essential because it "represents the thought process, the true analysis that's done in arriving at the insights." Tr. pgs. 120-121.

Regarding the email Employee sent to Dr. Chakraborty on May 26, 2021, at 3:47 p.m., Dr. Chakraborty testified that analysts use analytical methods to process large numbers of records. She explained that a typical Excel book can hold up to 700,000 records. Dr. Chakraborty stated that while analysts don't usually handle large numbers of records, it's not unusual for them to work with large data sets. But if they must work with large records, they have prepackaged tools or methods that allow them to break up the records into smaller subsets that can be easily processed. Tr. pgs. 122-123. Dr. Chakraborty identified Agency's Exhibit 17, as an email exchange between she and Employee. Tr. pg. 127. Dr. Chakraborty testified that she asked all

her staff to submit weekly plans. She also noted that to monitor Employee's PIP, she asked Employee to submit weekly plans. Tr. pg. 128. Dr. Chakraborty stated that Employee was informed while on the PIP that Dr. Chakraborty would monitor her performance using the weekly plan. Tr. pg. 129.

Referencing Agency's Exhibit 18, Dr. Chakraborty testified that Employee submitted an overtime analysis for SMART goal number 1 on June 4, 2021, which did not meet her set expectations for SMART goal number one. Dr. Chakraborty testified that the report "... was not comprehensive, and it had errors in communication. And finally, and probably most importantly, it was missing that connection between the graphs and charts and the inferences and insights and recommendations." Tr. pgs. 129-130, 132-133. Dr. Chakraborty asserted that there were some insights that appeared to be actionable in Employee's report, but that connection piece was missing. She stated that Agency could not rely on Employee's report for the performance hearing because the piece on the analysis of mandatory and drafted overtime was missing, which had an adverse effect on Agency as they were delayed in their response to the council. Dr. Chakraborty stated that she did the analysis because it was required, and she could not rely on Employee's report since it was incomplete, and had several grammatical errors, as well as style and usage. She affirmed that she provided Employee with feedback on these issues. Tr. pgs. 135-137.

Dr. Chakraborty identified the last email in Agency's Exhibit 22 as the feedback she provided to Employee after she completed the overtime analysis. Tr. pgs. 141-142. Dr. Chakraborty identified Agency's Exhibit 24 as "the revised analysis with the analysis of the security posts." Tr. pgs. 143-144. She affirmed that Employee transmitted the revised version of the overtime report to her in an email in July as documented in Agency's Exhibit 24. Tr. pg. 145. Dr. Chakraborty identified Agency's Exhibit 25 as the final overtime analysis report submitted by Employee. She explained that Agency's Exhibit 25 was an attachment to Employee's email to her in Agency's Exhibit 24. Tr. pgs. 145-146.

Dr. Chakraborty noted that Employee's submission in Agency's Exhibit 25, did not meet the expectations of the report set in the performance improvement plan. She explained that "the critical piece that I'm looking for, which was the outlining of thought process that the analyst goes through to arrive at the insights and recommendations was missing. It was missing for the two largest sections... two facilities that used the most overtime.... For the CDF and CTF, that line of thought that the analyst went through to generate recommendations and insights, and follow-up actions was missing." Tr. pgs. 148-149. Dr. Chakraborty also testified that the report did not meet the standard for such reports because "Grammatical error continued to be present." Tr. pg. 149.

According to Dr. Chakraborty, the overtime analysis report Employee submitted "... was still missing the analysis of mandatory and drafted overtime, so it was incomplete... So that was an issue... I would have expected analysts to generate several next level questions, at least one key next level question if not more. That was missing. And the organization of the various sections was not consistent. I mean some sections offered a lot more and some sections offered probably less." Tr. pgs. 149-150. Dr. Chakraborty identified Agency's Exhibit 26 as the letter she wrote and signed, informing Employee that the conditions of the PIP had not been met. Tr. pg. 151.

Dr. Chakraborty asserted that she is trained in performance management approximately every two (2) years. She stated that a normal PIP runs for 90 days. Dr. Chakraborty stated that she completed Employee's PIP form "with guidance of DOC HR because I had never completed a PIP form before." Tr. pgs. 153- 154. She testified that "I read the instructions on the PIP form. And I sought advice from DOC HR to be sure that that PIP form met their standards before the PIP was issued to [Employee]." Tr. pg. 155. Referencing Agency's Exhibit 4, Dr. Chakraborty affirmed that Employee was on FMLA when her FY21 performance plan was emailed to her on December 15, 2020. Tr. pgs. 155-156. Dr. Chakraborty also confirmed that she received Employee's acknowledgment of receipt of her PIP on March 29, 2021. Tr. pg. 156. She also affirmed that the SMART goals that were issued via email in December 2020, and received by Employee on March 29, 2021, were not the initial goals that she discussed with Employee. Tr. pgs. 158, 160.

Dr. Chakraborty testified that based on advice from DOC HR, she was not specific about the length of Employee's PIP. She explained that the policy at Agency was that unless otherwise specified, a PIP was for 90 days. She averred that based on her training she did not know if a PIP had to be entered into the PeopleSoft system. Dr. Chakraborty confirmed that Employee's PIP mirrored her performance plan for the entire fiscal year. Tr. pgs. 166-167, 207-208. Dr. Chakraborty testified that "A PIP does not cover the previous year's performance. I was placing you on a PIP because the deficiencies I noted in the previous year, I continued to observe in FY21." Dr. Chakraborty affirmed having a performance discussion on November 5, 2020, with Employee. Tr. pg. 167.

Dr. Chakraborty testified that performance plans are "supposed to be issued in the month of October, if possible. However, because of everything that was going on, I was unable to have that performance discussion before November 5th. So it was late. I admit to that." She noted that she was unable to finalize Employee's performance plan before December 15th. Dr. Chakraborty affirmed that they were working remotely when she issued the PIP to Employee. Tr. pg. 168.

Dr. Chakraborty testified that she observed Employee's deficiencies in "...the communication that we had between October 1st and the time that you departed on FMLA, and also after you returned to duty and before the PIP was issued. So there was time to observe your performance during that period." Tr. pg. 169. Dr. Chakraborty stated that "I communicated to you that the performance for FY2020 was unsatisfactory during our performance review. I believe it was on November 5th of 2020 for FY21. In FY21, when we had the FY20 performance review and discussion on November 5th, that is when I communicated that the FY20 performance was unsatisfactory. Regarding the FY21 performance, I observed performance between October 1st and the time that you left, and also between the time that you returned and when the PIP was issued." Dr. Chakraborty stated that she unfortunately did not have documentation to support her observations. Tr. pgs. 171 -172. She asserted that she did not communicate these deficiencies to Employee in writing because they had already had a discussion on November 5th where she communicated these to Employee. She also noted that she believed Employee was sufficiently aware and understood what the deficiencies were. Tr. pgs. 174, 176.

According to Dr. Chakraborty, because they were still in remote work status in FY'21, she observed that most of Employee's work product that was submitted was deficient. She also testified that she observed deficiencies with Employee's email communication such as numerous grammatical errors and usage errors. Dr. Chakraborty asserted that these errors made it sometimes difficult to understand what Employee was typing. She stated that "those caused me concern because those go to businesses communication, that is a competency that was deficient in FY20. And I was seeing a similar pattern in FY21. ...that subsequently led me to consult DOC HR and subsequently issued the PIP." Tr. pgs. 173 – 174. Dr. Chakraborty testified that she asked Employee if she would like coaching, and she either did not receive a response or the response was no. However, Dr. Chakraborty does not recall which date or month she offered coaching to Employee. Tr. pg. 179.

Dr. Chakraborty stated that SMART Goal number 3 was part of the PIP. She explained that SMART Goal number 3 had no specific due date because SMART Goal number 3 was a companion goal to SMART Goal number 1. Tr. pg. 185. Dr. Chakraborty asserted that she provided feedback for SMART Goal number 1 in the PIP letter issued to Employee informing her that she did not meet the conditions of the PIP. Tr. pgs. 185-186.

Dr. Chakraborty cited that she did not update the FY21 plan with the revised due date for SMART Goal number 1 because she was not advised it was required. Tr. pg. 187. She could not recall the exact date the PIP ended. Tr. pg. 188. Dr. Chakraborty confirmed that she entered Employee's performance plan into PeopleSoft for FY21. She stated that she does not know how a Standard Form 50 ("SF-50") is generated. Tr. pg. 191.

Dr. Chakraborty does not recall when Employee received the PIP letter advising Employee that she did not meet the PIP standards. Tr. pgs. 196-197. When asked if Employee was doing additional work during the PIP period, Dr. Chakraborty said "no". Tr. pg. 199. Dr. Chakraborty cited that during the PIP period, Employee was required to complete facts and figures report, and the population report within thirty (30) days of the end of the quarter. Dr. Chakraborty testified that Employee was also expected to work on her SMART Goals within thirty (30) and this was not unusual. Tr. pg. 200.

Dr. Chakraborty explained that after receiving Employee's final draft of SMART Goal number 1, she concluded that Employee had not met the requirements. However, she waited for 90 days to ensure the other requirements, especially the business communication had not been met. Tr. pg. 201. Dr. Chakraborty testified that SMART Goal number 3 was customer service. She explained that "Competency on communication was part of the PIP as well, and that was the part that had to do more specifically with business communication. That was the part that I provided additional time to monitor." Tr. pg. 202.

Philip Mancini ("Mr. Mancini") Tr. pgs. 214-267.

Mr. Mancini has been employed by D.C. Department of Human Resource ("DCHR") since 2014 as a Human Resource ("HR") Specialist, Performance Management. He explained that his duties included assisting agency managers manage the performance plan process for their individual employees during the fiscal year. He also provided consultation and training related to

performance management. Mr. Mancini affirmed that he worked with both managers and employees. Tr. pgs. 214-216, 224-225.

Mr. Mancini confirmed that he was familiar with the performance management process. He explained that employees' performance expectations are set by their managers for each fiscal year through a performance plan. Tr. pg. 216. Mr. Mancini asserted that if a manager had concerns about an employee's performance after the performance plan was set, the manager "should talk to the employee, see what's going on with the employee, and coach them." He stated that if the concerns continue, the manager can implement a performance improvement plan ("PIP"). Mr. Mancini asserted that a PIP can last for no more than 90 days or fewer than 30 days. Tr. pgs. 217, 249-250.

Mr. Mancini explained that the employee should be informed that they are on a PIP. Tr. pgs. 217-218. When asked if there are any requirements that the duration of the PIP be communicated to the employee, Mr. Mancini said "none". He affirmed that it was within the manager's discretion to decide the duration of the PIP. Tr. pg. 218.

Mr. Mancini does not recall communication with Employee about a PIP. He identified Agency's Exhibit 30 as an email he sent. Tr. pg. 219. Mr. Mancini confirmed that Agency's Exhibit 30 was an email chain between him and Employee. Tr. pg. 220. When asked if there was any reason to place an improvement plan into PeopleSoft, he answered "no". He explained that that was not how PIPs work. He testified that PIPs are conducted outside PeopleSoft because "if an employee succeeds on a PIP, then it doesn't become part of their PeopleSoft record." He noted that "if the employee is not successful, then it will become a part of their record for whatever action is taken." Tr. pgs. 221, 233.

Mr. Mancini identified Agency's Exhibit 31 as a PIP guidance document. Tr. pgs. 221-222. He explained that the purpose of the PIP guidance document is to guide managers through the process of taking an employee through a performance improvement plan. Tr. pg. 222. Mr. Mancini stated that although managers are trained on performance modules, they don't necessarily have to know how to complete PIP forms because "it's something that they don't do all the time, so they may have a question about it when it comes up." He asserted that managers "would be guided how to implement the performance improvement plan." Tr. pg. 225.

Referring to Agency's Exhibit 13, Mr. Mancini testified that the rating period for a PIP is the fiscal year in which the PIP is administered. He highlighted that a PIP cannot be based on a previous fiscal year's performance. He explained that the PIP applies to the current fiscal year. Tr. pgs. 228-229, 258. Mr. Mancini testified that it's up to the manager to decide how long the PIP will run, between 30 and 90 days. Tr. pgs. 228-229, 231, 249. Mr. Mancini explained that "when a manager sits down with an employee or informs an employee that they're on a PIP, they know that it has to be at least 30 days and they know it can be no more than 90 days, but they may not know how much within that it's going to be depending on how the employee performs in that period." He cited that it was not the manager's responsibility to inform the employee of the duration of the PIP. He confirmed that a PIP is based on calendar days. Tr. pgs. 231-233.

Mr. Mancini testified that "... if an employee is employed with the District government and eligible for a performance plan and has a performance plan in place, yes, they should be evaluated for that fiscal year." Tr. pgs. 235-236. Mr. Mancini asserted that "under certain circumstances, you can get an increase for exceptional performance. One of the criterion -- one of the criteria for that is a completed performance evaluation for the prior fiscal year rated at least a 3.5 or higher, cumulatively. How that is actually promulgated in the PeopleSoft system, I don't know how that is done." Tr. pgs. 238-240. Mr. Mancini asserted that the "PIP is supposed to be based on a performance plan." He explained that "it's up to the manager to decide what part of the PIP -- what part of the plan the PIP will be based on. So if the manager decides that, yes, then that would be the case." He also confirmed that the PIP is supposed to address observed deficiencies. Tr. pg. 257.

Mr. Mancini confirmed that he was familiar with PIP corrective or adverse actions. He noted that the PIP notification period is ten (10) days. He explained that he has never been involved in communicating the outcome of the PIP to the employee. However, he stated that the outcome must be communicated to the employee either via "Teams message the employee, email the employee, call the employee, whatever it needs to be, to let them know within ten days whether they have succeeded or not on the PIP." Tr. pgs. 243-244. Mr. Mancini also affirmed that mailing a notice to the employee's address was an acceptable form of notification. Tr. pgs. 244-245. He testified that If the PIP runs its course and the employee is not successful on the PIP, the agency will take adverse action. Tr. pg. 248.

When questioned on how the PIP duration is communicated to affected employees, Mr. Mancini testified that "So there's a fiscal year. And within the fiscal year, you're allowed to put an employee on a performance improvement plan. When you put the employee on the performance improvement plan, you'll say, you're on a performance improvement plan. And ... the manager will monitor that. If the manager decides, ... after however many days, between 30 and 90, they'll say, you know what? I've monitored. I see that you've improved, so we're going to end this. And then the PIP is over." Mr. Mancini confirmed that a manager does not have to tell the employee the duration of the PIP. Tr. pgs. 265-266.

G. Stewart-Ponder ("Ms. Stewart-Ponder") Tr. pgs. 270 -295.

Ms. Stewart-Ponder is currently employed by Prince George's County Office of Human Resources and Management as a Deputy Director for Employee and Labor Relations. Tr. pg. 270. Prior to her current role, Ms. Stewart-Ponder worked for Agency from January of 2016 to December of 2021, first as an EEO and Diversity Major from January to November of 2016, and later as Deputy Director of Administration from November of 2016 to December of 8 2021. Tr. pgs. 270-271. Ms. Stewart-Ponder testified that as a Deputy Director of Administration, she had oversight over numerous units and divisions within the department to include human resources and strategic planning. She confirmed knowing Dr. Chakraborty. Tr. pg. 270. Ms. Stewart-Ponder stated that Dr. Chakraborty was the Chief of Strategic Planning, and she reported directly to Ms. Stewart-Ponder. Tr. pg. 271.

Ms. Stewart-Ponder affirmed that in her role as Deputy Director of Human Resources Management, she was responsible for performance management. She stated that she had

oversight over the Department of Human Resources that handled performance management issues. She asserted that she ensured that this department was compliant with county, city standards and requirements, to include performance management. Tr. pgs. 272.

Ms. Stewart-Ponder testified that from 2016 when she assumed the position of Deputy Director of Administration, Dr. Chakraborty had several concerns about Employee and by 2020, 2021, these concerns were becoming more numerous and frequent. He explained that Dr. Chakraborty's concerns were almost every other week and related to Employee's performance, and she decided that the next step was to place Employee on a PIP. Tr. pg. 273.

Ms. Stewart-Ponder asserted that Employee's PIP was for a 90-day period which was within the city regulations prescribing the PIP duration to be for 30, 60 and/ or 90 days. She explained that Agency did PIPs for 90 days "because that was the maximum opportunity of an employee to improve their performance." Ms. Stewart-Ponder cited that Dr. Chakraborty found that Employee was not successful in the PIP at the end of the 90-day period, and based on personnel rules, Employee was terminated. Tr. pg. 274. Ms. Stewart-Ponder stated that she followed personnel rules and proceeded with termination for failure of the PIP. Tr. pg. 275.

Ms. Stewart-Ponder identified Agency's Exhibit 27 as the Advance Notice she signed, but did not draft. She stated that the document was drafted by Human Resources, which she reviewed and signed. Tr. pgs. 275-276. Ms. Stewart-Ponder confirmed that she was familiar with the *Douglas* factors. She affirmed that she reviewed the application of the *Douglas* factors as found in Agency's Exhibit 27 that she signed. Tr. pgs. 277 - 278.

Ms. Stewart-Ponder noted that she was not Employee's direct supervisor. Tr. pg. 280. She stated that "it is my responsibility to advise my direct reports on next actions and give guidance after a PIP is not successfully completed and/or if it was successfully completed." Tr. pgs. 281-283. When questioned why she chose removal instead of reassignment or demotion, Ms. Stewart-Ponder stated that "I think the demotion is an option for failure on a PIP when a person exhibits that they don't have the skill set to complete what the department is asking for. In this case, that wasn't the situation. You are highly skilled at what you do. You are very good at what you do. It's only when you choose to do so. ... so I didn't see an alternative outside of termination given your high skill set and knowledge and capabilities." Tr. pg. 290.

Ms. Stewart-Ponder acknowledged that SMART Goal number 3 was part of Employee's PIP. She stated that if SMART Goal number 3 was part of the PIP, then "it would be due at the conclusion of the PIP." Tr. pg. 292. She also stated that SMART Goal number 3 was part of Agency's Exhibit 27, because Employee did not complete this goal within the time period of the PIP, and beyond the time period of the PIP. Tr. pgs. 293-294.

Employee's Case in Chief

Employee – Tr. pgs. 298-344

Employee worked for Agency from August 24, 2015, to December 3, 2021, as an operations research analyst. Employee stated that Agency went into remote work from March

15th, 2020, and did not return to the office until July 12, 2021. She asserted that her FY20 performance goals were modified on May 8, 2020. Tr. pg. 298.

Employee testified that because they were still in remote posture, her team met via Teams on November 4, 2020, and individually on November 5, 2020, to talk about the upcoming FY21 Goals. Employee explained that she was out on FMLA from December 7, 2020, to March 29, 2021. Tr. pg. 299. Employee explained that when she returned to work on March 29, 2021, she received an email from Dr. Chakraborty informing Employee that “because I received the unsatisfactory performance for FY20, [Dr. Chakraborty] was going to put me on a PIP.” Employee cited that she was not observed or informed of any deficiencies in her work from October 1, 2020, to December 7, 2020. She highlighted that March 29, 2021, was the first time she was notified that she would be placed on a PIP based on the previous fiscal year performance. Employee stated that “I submitted my work, but as you can, ... it was pretextual and I was placed on a PIP.” Employee reiterated that she was “never informed there was any deficiencies in my work product in FY21.” Tr. pg. 302. She restated that “... I believe that the, well, I know that the, it was pretextual because it was written before I received my SMART Goals to even begin working on...” Tr. pgs. 303-304.

According to Employee, she was “responsible for quarterly reports, facts and figures, and those things that go on the website.” She asserted that she completed all her required work. Tr. pg. 301. Employee testified that the overtime analysis for an oversight hearing was not requested until February 2021, after she was given her performance, and she included this in her report. Employee stated that “this category was not captured in the database until March 1st, 2021.” Tr. pg. 301. Employee stated that “If you have thousands and thousands of records, you cannot give a written report. The report I provided has recommendations. It has graphs.” Tr. pgs. 301-302.

Employee stated that she “worked on a SMART Goal No. 2. There's emails and feedback that [Dr. Chakraborty] provided letting you know where I stood.” Employee highlighted that she had to work on “SMART Goal No. 3, September the 1st, but I'll say that I'm during that time, [Dr. Chakraborty] was aware that I had three deaths in the family...” thus, she had to take bereavement leave during the PIP period. Tr. pg. 302.

Employee also noted that “I was not told the duration of the PIP...” Tr. pgs. 300. She maintained that she was not informed she was on a 90-day PIP. Tr. pg. 304. Employee testified that she was out on annual and sick leave, and she was not aware of the proposed adverse action. Tr. pg. 303. She explained that “I was not giving any progressive performance, coaching, feedback, or anything about any particular one SMART Goal.” Tr. pg. 304.

When asked if she did any work towards SMART Goal No. 3 at any point either prior or during the PIP, Employee responded ‘No.’ She explained that according to her performance plan, SMART Goal number 3 was not due until September 30th. She also noted that according to her March 29, 2021, emails with Dr. Chakraborty, Dr. Chakraborty had to approve the courses required to complete SMART goal number 3. Employee stated that Agency omitted several emails from Dr. Chakraborty directing her to stop working on different things. Tr. pgs. 304-306.

Referencing Agency's Exhibit 4, page 3, Employee confirmed that she received the document on March 29, 2021, upon her return from FMLA. When asked during cross-examination if she did work towards SMART Goal No. 3, Employee stated that she did. She explained that she "... took a course in Microsoft Publisher and I used Publisher for facts and figures. ...I'm testifying that I took a course required business communication, oral and written, and I applied that to the facts and figures as required by Reena in April. Tr. pgs. 307-308. Employee stated that she only took one course and she had an error free communication the rest of the year. Tr. pgs. 308, 312. Employee also noted that the overtime report she submitted in June 2021, should have been error free because she used 'Grammarly'. Tr. pg. 308.

Employee asserted that she was the sole author of Agency's Exhibit 18. When asked if there were any errors in that document, Employee responded that "Not that I know of. It said the question was email communications. SMART Goal No. 3 said email communication." She cited that her reports were not part of SMART goal number 3 because the reports were not email communication. Tr. pg. 309. Employee reiterated that the overtime analysis is a report, but SMART Goal number 3 referred to 30 days of emails. She noted that the overtime reports she submitted did not need to evince improved communication skills. Employee testified that "The report was a report. You cannot ascertain an improvement from a report. The email was complete coursework in business communications, oral and written. I took a course in Publisher. I used that course to do the facts and figures, which is not on the SMART Goal, and I never received feedback from the facts and figures concerning errors." Tr. pgs. 309- 311.

Employee further testified that she could not give a written report with thousands of records because was a dataset. Employee noted that "you cannot write about a dataset that has various data of thousands and thousands of records. ... It has to have, if you are using Excel, which is data driven, then you have to write a narrative of what the data represents, cannot write a paper." When asked if it was her job to take large pieces of datasets and large amounts of data and turn into comprehensive reports for senior management, Employee answered 'No, it's not.' Tr. pg. 312. She explained that "As a senior analyst, our job is to usually have reports that are done with no more than a 12-month span. It doesn't expand two and a half years." Tr. pg. 313. Employee asserted that she submitted a written report for the overtime analysis and Agency's Exhibit 18 was "a written report in form." Tr. pg. 313.

Employee identified Agency's Exhibit 8 as an email from her to Dr. Chakraborty. Tr. pg. 319. When asked if there were any errors in the email dated April 20, 2021, Employee responded that "There are not. I used Microsoft Word that highlights the errors." She asserted that "I was never given a discussion on this email as an error." Tr. pg. 320. Employee cited that "Grammarly was used for the SMART Goal report, not emails. I was never informed that this was an email that contained an error by my supervisor." Tr. pg. 321. Employee was also asked if she ran spell check or grammar check on all emails, and she responded that "that was not a part of the SMART Goal." Tr. pg. 321. She noted that she sometimes spell checked, and grammar checked emails to her supervisor. Tr. pgs. 321-322.

Employee averred that SMART Goal No. 3 was not due until September 2021 and she did not work on it all year because she decided to work on time sensitive projects such as SMART Goal No. 1, quarterly reports, and SMART Goal No. 2. She reiterated that she was

“never given discussion or feedback that any of the emails I sent was related to SMART Goal No. 3.” Tr. pg. 322. Employee noted that she did not communicate with anyone about the expectations set in her PIP and that it was not her responsibility to ask her supervisor about the duration of her PIP. Tr. pgs. 328-329. Employee testified that a PIP is supposed to be for the current fiscal year and her PIP email stated that she “would be put on a PIP for the prior fiscal year performance. So, therefore, I was not even given a fair opportunity to complete my SMART Goals before Reena and Gitana decided that they were going to place me on a PIP.” Tr. pg. 329.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW⁷

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. On September 7, 2023, the OEA Board issued an Opinion and Order (“O&O”) remanding this matter to the undersigned. In doing so, the OEA Board noted that: “we believe that the parties’ arguments related to service of the PIP notice present a contested issue of fact that cannot be deciphered based on the record in its current state.... Agency notes that it possesses a certificate of service indicating how the decision was delivered; however, it was not introduced as part of the record prior to the filing of the Petition for Review.” Additionally, the OEA Board opined that “We believe that the AJ erred by relying *sua sponte* on a DCHR website without allowing the parties an opportunity to present briefs or oral testimony related to the FAQ section. This Board cannot decipher whether the FAQ page is current, accurate, or whether it provides any binding legal authority to support a finding that Agency violated DCMR § 1410.3.” Regarding the PIP end date, the OEA Board stated that “there is no testimonial evidence in the record to support the AJ’s conclusion that Employee was unapprised of the ending date of the PIP period. Agency’s basis or methodology for unilaterally ending the PIP on August 22, 2021, is also unknown.”

1) Whether Agency complied with DCMR §§ 1410.5 notice requirement

In its September 7, 2023, O&O, the OEA Board stated that “we believe that the parties’ arguments related to service of the PIP notice present a contested issue of fact that cannot be deciphered based on the record in its current state.... *Agency notes that it possesses a certificate of service indicating how the decision was delivered*; however, it was not introduced as part of the record prior to the filing of the Petition for Review.” (Emphasis added). DCMR §§ 1410.5-6 & 11 highlight that: **1410.5:** “[w]ithin ten (10) business days after the end of the PIP period, the employee’s immediate supervisor or, in the absence of the employee’s immediate supervisor, the reviewer, *shall issue a written decision to the employee* as to whether the employee has met or failed to meet the requirements of the PIP.” **1410.6:** “If the employee fails to meet the requirements of the PIP, the written decision shall state the reason(s) the employee was unsuccessful in meeting those requirements and: a. Extend the PIP for an additional period, in accordance with Subsection 1410.8; or b. Reassign, reduce in grade, or remove the employee.” **1410.11:** “[w]henver an immediate supervisor or, in the absence of the immediate supervisor, a reviewer, *fails to issue a written decision* within the specified time period as

⁷ Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) (“The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence”).

provided in Subsections 1410.5 or 1410.9, *the employee shall be deemed to have met the requirements of the PIP.*” (Emphasis added).

Here, the current PIP ran from May 24, 2021, to August 22, 2021. Pursuant to DCMR § 1410.5, Agency was required to issue a written decision of the outcome of the PIP to Employee “[w]ithin ten (10) business days after the end of the PIP period.” Ten (10) business days from August 22, 2021, is September 3, 2021. Agency argued in its December 20, 2024, Closing Argument that “[i]n this context, the word “issue” means “[t]o be put forth officially” or “to send out or distribute officially.”⁸ Agency maintained that “[b]ecause 6-B DCMR § 1410.5 only requires when a written decision must be issued without reference to when it must be received, an agency need only show that it issued a decision within the ordinary meaning of the word within 10 business days of the end of a PIP.” Mr. Mancini confirmed that he was familiar with PIP corrective or adverse actions. He explained that the PIP outcome *must* be communicated to the employee either via “Teams message the employee, email the employee, call the employee, whatever it needs to be, to *let them know within ten days* whether they have succeeded or not on the PIP.” (Emphasis added). Tr. pgs. 243-244. Mr. Mancini also affirmed that mailing a notice to the employee's address was an acceptable form of notification. Tr. pgs. 244-245.

The current regulation is silent on what steps Agency must undertake to ‘issue’ or ‘to put forth officially’, the written decision of the outcome of the PIP ‘*to the employee*’. (emphasis added). Contrary to Agency’s assertion that 6-B DCMR § 1410.5 only requires that the written decision be issued, 6-B DCMR § 1410.5 goes further to state that the written decision *must be issued to the employee*. (emphasis added). Therefore, I find that it would be unreasonable for a document or decision to be considered ‘issued’ if the affected employee or intended party does not have official notice of the document. I further find that to have official notice or ‘to be put forth officially’, as Agency noted, the document must be served on the intended or affected employee.

Additionally, the OEA Board noted in the September O&O that “we believe that the parties’ arguments related to service of the PIP notice present a contested issue of fact that cannot be deciphered based on the record in its current state.... *Agency notes that it possesses a certificate of service indicating how the decision was delivered; however, it was not introduced as part of the record prior to the filing of the Petition for Review.*” (Emphasis added). Agency submitted a United States Postal Service (“USPS”) mail envelope dated September 02, 2021, along with the written PIP decision.⁹ Agency selected the “Signature Required” box on the USPS mailing coversheet, but it did not include a ‘signature receipt’ or a certificate of service indicating how the written decision was delivered to Employee with its submission.¹⁰ Although the mailing envelope submitted by Agency indicates that Agency selected the “signature required” box, Employee provided that she found all three (3) Express Mail envelopes with no signature or receipt at her mailing address on September 10, 2021.¹¹ Moreover, Agency has still not provided this Office with a certificate of service or return receipt for the PIP written decision

⁸ Agency’s Closing Argument (December 20, 2024), citing to Black’s Law Dictionary (12th ed. 2024).

⁹ Agency’s Exhibit 27. This appears to be the same document Employee submitted with her Petition for Appeal.

¹⁰ *Id.*

¹¹ See Petition for Appeal, *supra*.

it mailed to Employee. Agency has the burden of proof in this matter.¹² Because Agency failed to provide a certificate of service for the PIP written decision it mailed to Employee and given Employee's assertion that she received the notice on September 10, 2021, I find that Agency failed to timely notify Employee of the PIP outcome as mandated by DCMR §1410.5.¹³

DCMR § 1410.11 provides that whenever an immediate supervisor or a reviewer *fails to issue a written decision within the specified time period as provided in Subsections 1410.5 or 1410.9, the employee shall be deemed to have met the requirements of the PIP.* (Emphasis added). Since Agency failed to submit a return receipt or a certificate of service evincing service of the PIP written decision to Employee by September 3, 2021, I find that Employee is deemed to have met the requirements of the PIP, and any adverse action stemming from the PIP is null and void.

2) Whether the ePerformance FAQ on the District of Columbia Human Resources website is accurate or provides any binding legal authority to support a finding that Agency violated DCMR § 1410.2

The undersigned relied on the "ePerformance Frequently Asked Questions (FAQs) Performance Improvement Plan (PIP)" found on the DCHR website in the ID. This document addressed whether an employee's performance evaluation can be extended into a new performance management period and whether a PIP based on past performance can be considered when issuing a new PIP to an employee. Agency argued that the ePerformance FAQ is not a binding legal authority and that it did not violate the DCHR's ePerformance FAQ. Mr. Mancini identified Agency's Exhibit 31 as a PIP guidance document. Tr. pgs. 221-222. He explained that the purpose of the PIP guidance document is to guide managers through the process of taking an employee through a performance improvement plan. Tr. pg. 222. Referencing Agency's Exhibit 13, Mr. Mancini testified that the rating period for a PIP *is the fiscal year in which the PIP is administered.* He highlighted that *a PIP cannot be based on a previous fiscal year's performance.* He explained that *the PIP applies to the current fiscal year.* (Emphasis added). Tr. pgs. 228-229, 258.

Employee testified that "So again, I want to state that I was never informed there was any deficiencies in my work product in FY'21." Tr. pg. 302. Employee cited that a PIP is supposed

¹² As previously notes, DCMR § 1410 is silent on how the written decision of the PIP outcome should be 'issued' to the employee. However, because DCMR § 1410.7 provides that: "The *written decision may serve as a notice of proposed* reassignment, reduction in grade, or removal and be provided to the employee when the decision complies with the provisions of Chapter 16. Alternatively, *the agency may issue a written decision and subsequently issue a separate notice of proposed reassignment, reduction in grade or removal*", I find that the notice requirement in DCMR §§1618.6-8, are applicable here. Specifically, DCMR § 1618.8 provides that, "For purposes of §§ 1618.6 and 1618.7, *service shall be deemed effective when the employee has actual notice of the proposed actions.*" (Emphasis added). Here, Agency issued both a written decision and a separate notice of proposed removal on the same day, September 2, 2021. Applying DCMR § 1618.8 to the current matter, I conclude that Employee only had actual notice of the written decision and the notice of proposed removal when she received the written decision and the notice of proposed removal on September 10, 2022.

¹³ Employee also noted on the last page of her Petition for Appeal that "this is not my address. I updated my address in the PeopleSoft system in April 2021 and as early as August 10, 2021, when I needed a new badge." Agency did not address this assertion. A review of the record highlights that Employee's address on file for the pay period beginning September 12, 2021, is different from the address Agency mailed out the written decision to.¹³

to be for the current fiscal year and her PIP email stated that she “would be put on a PIP for the prior fiscal year performance.” Tr. pg. 329. Dr. Chakraborty on the other hand testified that “I felt that the performance deficiencies that were identified in FY’2020 continued to be present in FY’2021. And after consultation with the Human Resources Department, I felt that the best option to help [Employee] come back into compliance with the standards of performance for a DS-14 operations analyst was to issue a PIP and to monitor her performance on that PIP.” Tr. pg. 86. Dr. Chakraborty explained that prior to placing Employee on the PIP, she observed that Employee’s work on the transportation overtime analysis project had not fully met her standards. She stated that SMART Goal Number One mirrored what was in Employee’s performance plan.

Dr. Chakraborty also testified that “A PIP does not cover the previous year's performance. I was placing you on a PIP because the deficiencies I noted in the previous year, I continued to observe in FY’21.” Dr. Chakraborty also testified that she observed Employee’s deficiencies in “...the communication that we had between October 1st and the time that you departed on FMLA, and also after you returned to duty and before the PIP was issued. So there was time to observe your performance during that period.” Tr. pgs. 169, 171 – 176. Dr. Chakraborty, while going through the PIP standards with Employee during the May 24, 2021, meeting noted that “... where there is an area where in FY’20... *the performance wasn’t ... a three or higher, ... what I’ve filled out is what the desired outcome will be. ... what the action plan is to improve performance...*”¹⁴ (Emphasis added). Furthermore, Dr. Chakraborty also stated during the PIP meeting that “So, what I will say is that, based on how things have been going, *I have observed an improvement* and this is really designed to help you be effective as a DS 14 performance analyst... so really to get you up to the standard of... performance that is expected... *I think that I am encouraged*, if you continue to be on the path that you are on, we would hopefully be able to ... show that the performance goals have been met and this will be pass us at the end of FY’21...”¹⁵ (Emphasis added). I find Dr. Chakraborty’s May 24, 2021, statement on this issue more credible than her testimony during the Evidentiary Hearing because her statement on May 24, 2021, was captured in ‘real time’, whereas her testimony at the Evidentiary Hearing occurred over three (3) years after the PIP. Additionally, based on the statements made during the PIP meeting, she seemed pleased with Employee’s performance in FY’21. Consequently, relying on Mr. Mancini’s testimony, I find that Agency erred in placing Employee on a PIP based on Employee’s previous fiscal year (FY’20) performance and not the current fiscal year (FY’21) performance, in violation of DCMR § 1410.2.

3) Whether Employee was apprised of the ending date of the Performance Improvement Plan (“PIP”) prior to the start of the PIP.

Employee argued that Agency placed her on a PIP for one (1) year.¹⁶ Employee testified that “I was not told the duration of the PIP...” Tr. pg. 300. She maintained that she was not informed she was on a 90-day PIP. Tr. pg. 304. Dr. Chakraborty testified that based on advice from DOC HR, she was not specific about the length of Employee’s PIP. She explained that the policy at Agency was that unless otherwise specified, a PIP was for 90 days. Tr. pgs. 166-167. Mr. Mancini testified that it is up to the manager to decide how long the PIP will run for between

¹⁴ Agency’s Exhibit 14 at 0.30seconds to 1minute.

¹⁵ *Id.* at 2minutes, 10 seconds to 3minutes, 03 seconds.

¹⁶ Employee’s Brief, *supra*.

30 and 90 days. He confirmed that the manager does not have to tell the employee the duration of the PIP. Tr. pgs. 265-266. He noted that there are no requirements that the duration of the PIP be communicated to the employee and that it was within the manager's discretion to decide the duration of the PIP. Tr. pg. 218. Ms. Stewart-Ponder asserted that Employee's PIP was for a 90-day period which was within the city regulations prescribing the PIP duration. She explained that Agency did PIPs for 90 days to maximum the opportunity of an employee to improve their performance. Tr. pg. 274. DCMR §1410.3, provides in part that "a PIP issued to an employee *shall* last for a period of *thirty (30) to ninety (90) days*." (Emphasis added). Based on Mr. Mancini's testimony that the managers are not required to tell the employee the duration of the PIP, I conclude that Agency was not required to apprise Employee of the PIP end date, and it was within its discretion to end the PIP on the 90th day in compliance with DCMR §1410.3.

4) Whether Agency had cause to discipline Employee

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Here, following a PIP, Employee was terminated for (1) "Failure to meet established performance standards;" (2) "Negligence, and (3) violating Agency's Policy and Procedures 3300.1E – Employee Code of Ethics and Conduct, Section 10 Personal Accountability – Employees shall obey all lawful orders from their superior.

Agency asserted that as a Grade 14, Employee was required to have a mastery and expert knowledge in mathematics, statistics, writing, and Microsoft Office, but her performance failed to rise to what was required of her position.¹⁷ Agency asserted that Employee was placed on a PIP in 2021, due to her declining performance. Agency averred that Employee's performance did not improve at the end of the PIP period, as she failed to meet the requirements of the PIP.¹⁸ Agency stated in the PIP outcome letter that the Overtime ("OT") utilization report was due on June 8, 2021, however, Employee submitted the final report on July 27, 2021, almost a month beyond the due date of June 8, 2021. Therefore, Employee did not meet the Communication competency requirements of being (1) clear and concise, and (2) timely. Agency also stated that Competency of communication also required that Employee used MS Office tools to spell, and grammar check writings and proofread critical messages before sending, but Employee did not meet this requirement. Additionally, Agency asserted that Employee did not meet the Accountability competency. Agency explained that Employee's performance in the first SMART Goal was untimely and not of the highest standard. It averred that Employee's performance was an example of poor customer service. Agency also asserted in the advance notice of removal that Employee's failure to meet the PIP requirements was a failure to follow instructions and neglect of duty.¹⁹ Agency concluded that Employee's performance was unacceptable and her failure to meet performance standards and her refusal to follow supervisory instructions was cause for removal.²⁰

Employee testified that she completed the overtime utilization report ("OT Report") and

¹⁷ Agency Closing Argument, *supra*.

¹⁸ *Id.*

¹⁹ Agency's Exhibit 27.

²⁰ *Id.*

submitted it to Dr. Chakraborty on June 11, 2021. She stated that the report and her emails were error free because she used ‘Grammarly’ and ‘spell check’. Tr. pg. 308. Employee reiterated that the overtime analysis is a report, but SMART Goal Number 3 referred to 30 days of emails. She noted that the overtime reports she submitted did not need to evince improved communication skills. Tr. pgs. 309- 311. Employee testified that she could not give a written report with thousands of records “Because it's a dataset. So, you cannot write about a dataset that has various data of thousands and thousands of records. ... It has to have, if you are using Excel, which is data driven, then you have to write a narrative of what the data represents, cannot write a paper.” Tr. pg. 312. She explained that “As a senior analyst, our job is to usually have reports that are done with no more than a 12-month span. It doesn't expand two and a half years.” Tr. pg. 313.

Dr. Chakraborty testified that Employee’s submission in Agency’s Exhibit 25 did not meet the expectations of the report set in the performance improvement plan. She explained that “the critical piece that I'm looking for, which was the outlining of thought process that the analyst goes through to arrive at the insights and recommendations was missing. It was missing for the two largest sections -- or two largest facilities that -- two facilities that used the most overtime... For the CDF and CTF, that line of thought that the analyst went through to generate recommendations and insights, and follow-up actions was missing.” Tr. pgs. 148-149. Dr. Chakraborty also testified that “Grammatical errors continued to be present. And the standard is for a report of this nature, I have to be able to take and give it to the stakeholder that requested it with minimal amount of edits, and this report simply wasn't there.” Tr. pg. 149. Dr. Chakraborty reiterated that the overtime analysis report Employee submitted was incomplete as it was still missing the analysis of mandatory and drafted overtime. She stated that the report had grammatical errors, the discussion section that laid out the analytical thought pattern was missing, and she expected an analyst like Employee to generate at least one (1) next level question. Dr. Chakraborty also stated that Employee’s organization of the various sections was not consistent. She testified that “... some sections offered a lot more and some sections offered probably less.” Tr. pgs. 149-150.

I find that it is within the Administrator’s discretion to reach a different conclusion about an employee’s performance as long as the Administrator’s opinion is supported by substantial evidence. The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*²¹ highlighted that “[supervisors] enjoy near total discretion in ranking their [employees]” when implementing performance evaluations.²² This Office has consistently held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.²³ As performance evaluations are “subjective and individualized in

²¹ Case No. 2012 CA 003606 P (January 29, 2013).

²² *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

²³ See *Mavins v. District Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013); *Mills v. District Department of Public Works*, OEA Matter No. 1601-0009-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997); see also *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

nature,”²⁴ this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if “managerial discretion has been legitimately invoked and properly exercised.”²⁵ Therefore, based on Dr. Chakraborty’s testimony that Employee did not meet the performance requirements of the PIP, I conclude that Agency was within its rights to reassign, reduce in grade, or remove employee in compliance with DCMR §1410.12.

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

In the instant matter, although Agency has met its burden to establish cause for the adverse action in this matter, I conclude that because Agency did not comply with all the PIP requirements, Agency cannot discipline Employee pursuant to 6B DCMR §1607.2(d)(1) and (2); and Agency’s Policy and Procedures 3300.1E. Agency’s has the burden of proof in this matter, and it failed to provide a certificate of service proving that Employee was notified of the outcome of the PIP within ten (10) business days. Additionally, I find that the current PIP was based on Employee’s previous fiscal year (FY’20) performance and not the current fiscal year (FY’21) performance, in violation of the PIP procedures. Therefore, I conclude that in accordance with DCMR § 1410.11, Employee was successful in the PIP and Agency cannot rely on the current PIP to terminate Employee.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency’s action of terminating Employee is **REVERSED**; and
2. Agency shall reimburse Employee all back-pay, and benefits lost as a result of her termination; and
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/ Monica N. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge

²⁴See also *American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

²⁵ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).