THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
STEPHANIE LINNEN,	)	
Employee	)	OEA Matter No. 1601-0039-18
	)	
v.	)	Date of Issuance: February 13, 2019
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	Monica Dohnji, Esq.
Agency	)	Senior Administrative Judge
	)	

Stephanie Linnen, Employee *Pro Se*
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 9, 2018, Stephanie Linnen ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("OSSE" or "Agency") decision to suspend her for ten (10) days from her position as a Staff Assistant, effective March 1, 2018 through March 14, 2018. Following an Agency investigation, Employee was charged with (1) Neglect of Duty – failure to carry out assigned tasks and (2) Insubordination.[1] On April 12, 2018, Agency filed its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on June 4, 2018. After several failed attempts to convene a Status/Prehearing Conference, on July 30, 2018, a Status/Prehearing conference was held, with both parties present. Thereafter, a Prehearing Conference was held on September 18, 2018. Subsequently, an Evidentiary Hearing was held on November 20, 2018. Both parties were present for the Evidentiary Hearing. On December 11, 2018, the undersigned issued an Order requiring the parties to submit written closing arguments on or before January 25, 2019. Both parties have complied. The record is now closed.

[1] Agency's Answer at Exhibits A and B (April 12, 2018).

JURISDICTION

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

ISSUES

1) Whether Agency in suspending Employee utilize the appropriate District Personnel Manual; and

2) Whether Agency's action of suspending Employee for ten (10) days was done for cause; and

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

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of suspending Employee for ten (10) was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

SUMMARY OF RELEVANT TESTIMONY

Agency's Case in Chief

1. Vivian Joseph ("Joseph") Tr. 11-49.

Joseph worked for the D.C. Office of the State Superintendent of Education ("Agency") as a Human Resources Specialist. Joseph was responsible for employee relations issues pertaining to the Family Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA") of 1990, discipline, investigations, and complaints. Joseph stated that she worked with Stephanie Linnen ("Employee") on her FMLA and ADA.

Joseph testified that Employee requested a headset, a ten-minute break to walk every hour, and to take lunch at 2:00 p.m. daily. On May 24, 2016, Employee provided a letter of medical necessity from her doctor. The note stated that Employee needed an ergonomic work station. However, Joseph explained that the medical note did not specify what type of equipment was needed and Agency requested that Employee's doctor submit that information. Subsequently, Employee's doctor provided a note and requested that she receive a chair designed to allow for comfortable and flexible seating, a keyboard with foam rubber strip, a wireless

mouse, and a footrest. Joseph stated that Agency provided Employee with a list of ergonomic chairs to select from.

Joseph testified that Employee requested to work three days a week for four hours a day. She explained that Employee was scheduled to work from 10:00 a.m. to 2:00 p.m. However, Employee informed Joseph that she was unable to work those hours because she depended on other people for transportation to work and did not have the financial means to transport herself.

On cross-examination, Joseph stated that she did not recall Employee requesting any other special accommodations after her letter dated May 24, 2016.

On redirect, Joseph stated that in order for an employee to request an accommodation, the employee would have to initiate the request with their supervisor or Human Resources ("HR"). HR would follow-up with the employee and if a medical note was not initially provided, HR would ask employee to submit a medical note to them. If a medical note was provided, HR would review it to see what the accommodation was for and if they were able to accommodate the employee. Joseph testified that Employee did not ask for a wireless headset or an earpiece.

2. Gregory Ellis ("Ellis") Tr. 50-93.

Ellis worked with Agency as the Director of Operations. He was responsible for upkeep, maintenance of the building, and badge access for employees. Additionally, he oversaw and managed the P-Card system which was Agency's purchasing cards. In May 2017, Ellis stated that Employee was reassigned to his department as a customer service representative. He explained that customer service representatives received incoming calls and directed the calls to the appropriate department.

Ellis testified that each employee within the District of Columbia, and specifically Agency, were provided with a performance plan. The performance plan was a listing of criteria, job duties, and timelines in which they are to be completed. He created the Fiscal Year 2017 performance plan and provided a copy to Employee. Ellis stated that there were three goals, which was a requirement under the District when developing a performance plan. Employee was expected to provide administrative support, customer service, and travel and future tracking. Additionally, Employee was responsible for the entire processing of Agency employees' travel as well as Fleet Share tracking, a program that allowed an employee to lease or rent a vehicle for transportation to a meeting if they were unable to take public transportation.

Ellis stated that Employee was tasked with developing a list of job responsibilities that she would be responsible for. Ellis explained that the nature of the work Employee did for him was completely different than her previous job responsibilities. Initially, Employee was able to complete her tasks at Agency, however, due to the medical documentation that Agency received from her doctor, Employee's hours were modified. She was only able to sit for an hour before she needed to take a break. Additionally, Agency had to adjust her schedule time-wise due to the medication that she took. Ellis further explained that Employee was sent to PASS training, a training that allowed an individual to have access to different invoices and bills to process for the District, but Employee did not attend the training. Ellis testified that on numerous occasions

Employee was asked to sign up and attend trainings, but she provided various reasons why she did not attend.

Ellis explained that Employee's schedule was modified, and she worked for four hours. During her shift, she was able to complete the Fleet Share and travel tracking and on occasion customer service coverage. Additionally, Employee would provide lunch coverage, but the invoice processing was never completed because she had not taken the PASS training. Ellis stated that he had another employee process the invoices. He asserted that he made numerous attempts to have Employee complete the PASS training, but Employee would not show up for the training. Due to the lack of compliance, Ellis requested that Employee be suspended and issued her an Advanced Written Notice of Proposed Suspension.

On August 16, 17, and 31, 2017, Employee failed to provide customer service coverage. Subsequently, Ellis submitted a letter of admonition to HR based on the lack of performance that he received from Employee. He addressed the letter and his concerns with Employee. Additionally, Ellis explained that he met with Employee prior to drafting the letter and conducted an audit to show the dates that she was absent from work and the lunch coverage that she did not provide. Ellis stated that Employee refused to sign the admonition letter. Ultimately, Employee was issued a final decision for a ten-day suspension.

On cross-examination, Ellis stated that he did not recall if Employee requested a wireless earpiece to sit at the front desk. He also did not receive documents from her doctor. Ellis admitted that Employee already received prior PASS training and he had to reclassify her title so that she could perform the work requested.

Ellis reiterated that Employee completed duties pertaining to the Fleet Share and travel tracking, but did not complete the invoice processing, which required Employee to complete the PASS training. Additionally, he testified that Employee did not provide customer service coverage that was required in her job description. Ellis explained that he received a request for a headpiece to answer the phones at the front desk. He did not receive the letter of medical necessity dated August 30, 2017 which provided that Employee use a wireless earpiece.

On redirect examination, Ellis testified that the front desk has a speaker and a headset. He explained that employees did not have to pick up the receiver to answer the phone.

3. **Alecia Denmark ("Denmark") Tr. 94-113.**

Denmark worked for Agency as the Administrative Management Officer. She was responsible for overseeing the customer representatives. Denmark testified that Employee provided lunch coverage on Mondays, Tuesdays, and Fridays. Denmark believed that Employee frequently called out of work on Tuesdays.

There were days when Employee notified Denmark that she was unable to cover for lunch and she would ask other people on the team to cover for her without first seeking permission from her or Ellis. Most of the conversations between Employee and Denmark

occurred because Employee could not provide coverage because she was not at work and Agency would have to find coverage for the desk.

Denmark testified that Employee worked from 8:00 a.m. to 12:00 p.m. three days a week. She stated that Employee was out on a Monday, and another employee provided coverage for her lunch. When Denmark sent an email and asked Employee to step in and cover for the employee who previously covered for her, Employee stated that she doesn't cover on Mondays. Denmark forwarded Employee's response to her supervisor, Ellis. She stated that she consistently informed Ellis of Employee's lack of coverage. Tr. 109.

On cross-examination, Denmark testified that there were occasions when Employee asked someone to cover for lunch. She then stated that she could only recall one occasion that Employee needed coverage. She stated that she was not aware that on August 31, 2017, Employee requested accommodation.

Employee's Case in Chief

1. **Stephanie Linnen ("Employee") Tr. 116-160.**

Employee testified that she was injured at work on January 14, 2017. She filed a workers' compensation claim which required her to get special accommodations due to her sustained injury. Employee stated that in February 2017, she filed a grievance against her former supervisor Rochelle Wilson ("Wilson"). One of the accommodations to help her not file a grievance was if she wanted to work with Operations. Employee explained that she turned the opportunity down four times because she did not want to sit at the front desk due to her neck injury. Three weeks later, Employee claimed that an executive decision was made to move her to Operations. Employee subsequently told Ellis that she did not have a problem sitting at the front desk but would need accommodation. Ellis informed Employee that she would have to submit a letter from her doctor with this request. Employee provided Agency with a letter, but she never received any accommodation for her neck.

On July 14, 2017, Employee's neck became worse. She filed a workers' compensation claim and was able to work three days per week, four hours per day. Additionally, Employee was not in the office on Thursdays and Fridays. Employee stated that she was able to perform her duties but needed a wireless earpiece to work the front desk. She testified that she sent emails to Ellis, Hall, and Joseph, but never received the wireless earpiece. Due to her condensed work schedule, Employee was unable to cover the front desk at 12:00 p.m. because that was when she was scheduled to leave work.

Employee testified that Agency informed her that they did not have to accommodate her ADA, only her FMLA. Employee stated that she sent an email to Mr. Demas asking if she had any rights as a thirteen-year career employee to be considered under ADA if she was injured. She stated that she provided Agency with doctor's notes and Agency still did not accommodate her. Once Employee condensed her work schedule, Agency issued disciplinary action letters and continued to disregard her doctor's letters of medical necessity.

On cross-examination, Employee stated that as of October 19, 2017, she had not received her request for accommodation as listed in the August 30, 2017 medical note. She also stated that on October 19, 2017, she did not cover the front desk unless Agency had her cover until 11:00 a.m. because she was not at work past 12:00 p.m. She further explained that she discussed her ADA and requirements to cover the front desk with Ellis. Employee claimed that Ellis stated that he could not speak with her regarding ADA or FMLA, but he could discuss death with her. Additionally, Employee stated that she was asked to sign a document stating that she received everything that she needed for her accommodations because she was informed that what she previously signed was a prior accommodation for an ergonomic work station. However, that accommodation did not indicate that she needed a headset. Additionally, Employee explained that she was unable to put the calls on speakerphone because callers would provide their personal information and she could not have them on speaker.

Employee testified that she had numerous emails that stated she needed a wireless ear set. She also explained that when she wrote the email stating that she did not need a headset, she maintained that she could not use a headset and needed a wireless earpiece. Employee stated that Agency never responded to her emails. The only response she received from Agency was that she did not have FMLA. She informed Agency that FMLA and ADA were not the same. She explained that her disability for her neck was covered under ADA and she used FMLA because her mother was ill. Employee further explained that on one of the incidents that Agency claimed she was to cover the front desk, she could not have covered the front desk because she was out on leave to care for her mother in Georgia, so it was not possible that Ellis met with her.

Employee asserted that she was retaliated against and reassigned to work under Ellis. She explained that after she filed an Equal Employment Opportunity Commission ("EEOC") grievance, Agency made an executive decision to move her to a different position and lower her pay. During her mediation for the EEOC complaint, she received a performance plan and her job responsibilities from Ellis, but she turned it down. Additionally, she stated that she was only given Tuesdays and Thursdays to cover lunch.

Analysis

Agency's Use of District Personnel Manual

The District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. The 2012 DPM version was effective as of July 13, 2012,[2] and was effective until the 2016 DPM version was made effective on February 5, 2016.[3] The 2016 DPM version was effective until May 2017 when the current DPM was made effective.[4] In the instant matter, Agency levied an adverse action against Employee utilizing the 2012 DPM version. To support its use, Agency argues that it was still in bargaining (impacts and effects) with some of the unions with regards to the DPM and had not yet come to an agreement with the unions. Agency further noted that using the old DPM was a decision made by Agency as a whole that until impacts and effects bargaining was finished, it

[2] Transmittal Date reflects as of August 27, 2012 for the 2012 DPM Version.
[3] Transmittal Date is as of February 26, 2016.
[4] Transmittal Date reflects May 19, 2017.

was not going to move everyone over to the new DPM. In addition, Agency asserted that they had an agreement with DCHR to continue using the old DPM, however, Agency failed to provide this Office with any such agreement. Agency also maintained that, section 1605.4 of the applicable DPM encompasses section 1603 of the 2012 DPM and Neglect of Duty is still a cause of action under section 1605.4 of the applicable DPM.[5] Employee testified during the Evidentiary Hearing that she was not a member of any union.

Based on Agency's own admission, it did not use the new (May 19, 2017) version of the DPM.[6] However, Agency levied the instant adverse action under the 2012 version. Further, the applicable DPM is substantively different from the 2012 DPM utilized by Agency in the current matter with regard to the charges and penalties such that the undersigned would be unable to ascertain which charges should have been levied against Employee had Agency utilized the appropriate version. Agency argues that the charge of Neglect of Duty is still in the new DPM. While this cause of action is present in both the 2012 and 2017 DPMs, their corresponding sections are different in both DPMs, making it difficult for a reasonable person to properly defend themselves. In the 2012 DPM, Neglect of Duty can be found under section 1603.3(f)(3). However, in the 2017 DPM, section 1603.3(f)(3) is omitted and Neglect of Duty is only found in section 1604.5. Additionally, the charge of Insubordination which was also levied against Employee in the instant matter does not have a corresponding provision in the 2017 DPM version. Agency did not provide a breakdown of the penalty with respect to each cause of action. Accordingly, it would be improper for the undersigned to essentially 'guess' or 'estimate' what the appropriate charge and/or penalty would have been had Agency used the appropriate DPM version.

Moreover, while Agency noted during the Evidentiary Hearing that it had an agreement with DCHR to continue using the old DPM for all its employees, including those that were not under impacts and effect bargaining, Agency was instructed to provide the said agreement when submitting its closing argument.[7] However, Agency failed to comply. Furthermore, Agency's argument that section 1605.4 of the 2017 DPM encompasses section 1603 of the 2012 DPM is misguided as several causes of actions which were enumerated under section 1603 of the 2012 DPM were removed from the current DPM such as Insubordination.

Because of the substantive differences with respect to the 2012 and 2017 DPMs as they correlate to the charges and penalties for the adverse actions levied against Employee, the undersigned is unable to determine what the corresponding charges in the 2017 DPM would have been to those cited by Agency from the 2012 DPM version. OEA has held that it is required to adjudicate an appeal on the "grounds invoked by agency and may not substitute what it considers

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[5] Tr. pages 161 -164.

[6] 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." Further, OEA has noted that "the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact." *See* also. *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 1, 2010), citing *Landgraf v. USI Film Productions*, 511 U.S. 244, 115 S.Ct. 1482 (1994). The 2017 DPM version is the appropriate version for the alleged incidents that commenced in May of 2017.

[7] Tr. pages 164-165.

to be a more appropriate charge."[8] Agency failed to levy the charges under the appropriate DPM, and as a result, I conclude that this was harmful procedural error. Pursuant to OEA Rule 631.3[9], I find that Agency has not demonstrated that its use of the wrong DPM version was harmless error. Because I find that Agency utilized the wrong DPM version, I will not address the other issues in this matter.

Based on Agency's failure to utilize the appropriate version of the District Personnel Manual in its administration of this action, as well as its failure to submit any written directive from DCHR authorizing Agency to continue using the 2012 DPM, while the 2017 DPM was in effect, as it implied during the Evidentiary Hearing, I find that Agency did not have cause for adverse action against Employee. Consequently, I further find that the penalty of ten (10) days suspension was inappropriate under the circumstances.

ORDER

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

1. Agency's action of suspending Employee for ten (10) days is hereby **REVERSED.**
2. Agency shall reimburse Employee all pay and benefits lost as a result of the ten (10) days suspension.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Monica D. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge

[8] *Kenya Fulford-Cutberson v. Department of Corrections*, OEA Matter No. 1601-0010-13 (December 19, 2014). Citing to *Gottlieb v. Veterans Administration*, 39 M.S.P.R 606, 609 (1989) and *Johnston v Government Printing Office*, 5 M.S.P.R 354, 357 (1981).

[9] OEA Rule 631.3 provides that: "Notwithstanding any other provisions of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take action."

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail on this day to:

Stephanie Linnen
12205 Windbrook Drive
Clinton, MD 20735

Hillary Hoffman-Peak, Esq.
Assistant Attorney General
Office of the Superintendent of Education
1050 First St, NE
3th Floor
Washington, DC 20002

Katrina Hill
Clerk

February 13, 2019
Date