

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of: )  
)  
Michael Jackson ) OEA Matter No. 1601-0034-11  
Employee )  
)  
v. ) Date of Issuance: July 18, 2014  
)  
Department of Real Estate Services ) Joseph E. Lim, Esq.  
Agency ) Senior Administrative Judge  
\_\_\_\_\_)  
Donald Temple, Esq., Employee Representative  
Frank McDougald, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND BACKGROUND

On January 15, 2004, Michael Jackson (“Employee”), a Project Manager, CS-0801-14/10, filed a Petition for Appeal (“PFA”) of Department of Real Estate Services’ (“Agency” or “DRES”) action to remove him from service effective November 5, 2010 based on any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations to include: inexcusable neglect of duty, (i.e., poor performance and failure to complete assigned duties), insubordination, incompetence and misfeasance. This matter was assigned to me on July 26, 2012. After several postponements due to the parties’ requests, a personal injury of Employee’s counsel, and budget issues due to the Federal Government shutdown, I held a Prehearing Conference on December 20, 2012, and an evidentiary hearing on April 25, 2014. The record is closed.

JURISDICTION

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

ISSUES

- 1) Whether Agency’s action to remove Employee was taken for cause; and
- 2) If so, whether the penalty was appropriate under the circumstances;

STATEMENT OF CHARGES AND PARTY POSITIONS

*Statement of Charges.*

In a letter dated March 8, 2010, Agency notified Employee of a 30-day advance notice of proposed removal from his position based on the charge of “Any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations to include: the neglect of duty, insubordination, incompetence and misfeasance as defined in District Personnel Manual (DPM) §1603.<sup>1</sup> The particulars are as follows:

Specification 1: On April 21, 2010, you were suspended for 4 days due to your failure to adhere to the Construction Division's procedures regarding the entering of projects in the PMIS<sup>2</sup> system along with the submission of invoices in the required timeframe.

Specification #2: On 4/26/10, in your mid-year review with your Cluster Leader (Donald Eischens), you were informed that your mid-year performance in several areas was at the Marginal Performer level, due to your continued failure to adhere to the requirements identified in Specification #1.

Specification #3: On May 24, 2010, you were placed on a sixty (60) day Performance Improvement Plan (PIP) due to your unsatisfactory performance as a Project Manager. The purpose of this plan was to assist you in improving your performance in order to meet the minimum requirements of your position. At the end of the sixty (60) day period, it was clear that you still had not improved your performance. On July 24, 2010 you were given a thirty (30) day extension on the Performance Improvement Plan (PIP). The extension expired on August 23, 2010. At the end of the extension, it was determined that you have not improved your performance on a consistent basis enabling you to meet the minimum requirements of your position.

The attached Performance Improvement Plan (PIP) identified specific areas of your position, which required timely and accurate data input from you, in order for contractors to be paid in a timely manner. The attached documentation indicates the dates of which you failed to accurately complete and manage this process. The dates reflected on the documentation are dates prior to and post the issuance of the Performance Improvement Plan (PIP). Your failure to process numerous contractors' invoices in a timely manner reflects poorly on the Capital Construction Division, and ultimately the Agency. You have also put the District in the position of being in violation of its contractual requirements with numerous contractors.

On November 1, 2010, a Notice of Final Decision was issued affirming Employee's removal effective November 5, 2010.

*Agency's Position.*

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<sup>1</sup> Employee Exhibit 5.

<sup>2</sup> Project Management Information System or PMIS is a computerized database Agency used to manage its projects.

Agency contends that it met its burden of proof in establishing, by a preponderance of evidence, that Employee was properly removed for cause. Agency also contends that Employee's removal was the appropriate penalty under the circumstances. As a Project Manager within the Construction Division of the Agency from April 14, 2008, to November 5, 2010, Employee's duties included planning, directing, and managing the construction of D.C. projects and assuring the documentation of data into the project management and data system to ensure that schedules and budgets are under control. His repeated failure to enter project information into the Construction Division's Project Management Information System ("PMIS") and to submit invoices for payment within a reasonable timeframe was gross negligence and caused Employee to be suspended from work for four days. Despite Agency's considerable efforts to assist Employee successive Performance Improvement Plans ("PIP"), he failed to improve his work performance.<sup>3</sup>

*Employee's Position.*

Employee contends that Agency's action was arbitrary, capricious and wrongful; it misapplied the Douglas factors in choosing its penalty; it failed to consider mitigating factors; it fabricated its specifications; and that Agency failed to prove its case by a preponderance of evidence.<sup>4</sup> Employee also contends that there was procedural error in Agency's PIP; that there was a lack of progressive discipline; that the PMIS process constituted only 15% of his job, and that his termination was the result of Deputy Director for Construction Gerick Smith's personal quest to get him fired.<sup>5</sup>

SUMMARY OF MATERIAL TESTIMONY

*Donald Eischens, Executive Program Manager, Agency, transcript pp. 7-169*

Mr. Donald Eichens ("Eichens") testified that he was the Agency's Executive Program Manager from 2008 to 2012 before moving to the International Monetary Fund. He was responsible for either building or renovating real estate projects for the D.C. Government under the auspices of DRES. He supervised project managers such as Employee, whose job was to manage the completion of a project, making sure that the project stays within its objectives of cost, schedule, and quality.<sup>6</sup> During the relevant time period, Employee was the project manager for the Waterfront Project comprising the buildings on 4<sup>th</sup> Street, S.W., Washington, D.C.

Part of the project manager's cost management duties was to make sure vendors of building materials and labor got paid. Eichens described the payment process. As a project manager, Employee would receive and review a vendor's invoice for accuracy and enter the data into PMIS before electronically sending it to Eichens for approval. If approved, Eichens forwards it to the financial person and then to the deputy director for construction. Once approved, the invoice goes back to Project Manager Employee to complete inputting into PMIS so that the information transfers to the Procurement Automated Support System ("PASS"), the

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<sup>3</sup> Agency's Prehearing Statement at pp. 2.

<sup>4</sup> Employee's Prehearing Statement at pp. 2-3.

<sup>5</sup> Employee's Closing Argument, Tr. P. 330-341.

<sup>6</sup> Agency Exhibit 1.

District Government's accounting system for payment. These specific job-related tasks had to be completed within seven (7) days, since by statute, vendors had to be paid within 30 days.

Apart from Employee's tardiness and occasional errors in inputting data into PMIS, Eichens stated that he had no problems with Employee. However, this was not the first time Agency had problems with Employee's tardiness. Based on Employee's untimely compliance completing assignments, Eichens had several discussions with Employee. When no improvement occurred, Agency suspended Employee for four days in May of 2010 because of a Waterfront invoice being processed five weeks late.<sup>7</sup> Eichens also stated that Employee was the only project manager who had problems with the timely processing of invoices into the PMIS.

Following the suspension, Eichens developed a 60-day performance improvement plan for Employee to afford him an opportunity to improve his performance between May 14 and July 14, 2010.<sup>8</sup> Emails documented the continuing problems that Employee had.<sup>9</sup> However, Eichens felt that Employee failed to show improvement. So he extended the improvement plan by another 30 days to August 23, 2010.<sup>10</sup>

Despite this, Employee still failed to meet the requirements of the improvement plan.<sup>11</sup> On cross-examination, Eichens admitted that the PMIS was not very user-friendly, explaining that the user had to follow step by step instructions to input data. He stated that both he and Deputy Director for Construction Gerick Smith were Employee's direct supervisors on the Waterfront project.

Eichens testified that at times, funding would temporarily not be available or inadequate for a particular project because there was a change order that occurred when an Agency tenant requested a change in the design, and this necessitated the temporary switching of available funds to finish a project. In addition, changes that involved a large amount of money had to be approved by the D.C. government. Eichens clarified that Employee was held responsible for processing the invoices within seven days, not specifically for ensuring that the vendors got paid in a timely manner as payment was made by a different department. He could not recall the specific invoices Employee had trouble with.

*David Prestidge, Senior Program Manager. transcript pp. 170-221.*

Mr. Prestidge was the senior project manager for the Waterfront Project where he supervised Employee. He testified that Employee was the Contracting Officer Technical Representative ("COTR") responsible for all the paperwork that went to the D.C. Government. Prestidge evaluated Employee's work performance as good during two evaluation periods. He described PMIS as a project management database tool that oversaw the day to day functions of the project managers. He described PMIS as an awesome product but that Agency did not pay for its proper implementation, thereby making it useless as it was not integrated into any other

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<sup>7</sup> Agency Exhibit 2, pp. 3-6.

<sup>8</sup> Agency Exhibit 18.

<sup>9</sup> Agency Exhibits 3 to 10.

<sup>10</sup> Agency Exhibit 19.

<sup>11</sup> Agency Exhibit 20.

database. All it did was generate a report.

Prestidge said Gerick Smith spoke to him regarding Employee's performance relative to invoicing, saying that Employee should be fired if he did not improve despite a work performance plan. Prestidge disagreed with Smith and would not fire Employee. Shortly thereafter, he was no longer Employee's supervisor.

Prestidge explained that it was Employee's responsibility to input the vendor's invoices into the PMIS. However, the District Government would often remove funding from a Waterfront Project to pay for something else, and then return the funding later. This would sometimes result in the PMIS rejecting the invoice and redoing the processing, thereby entailing another three to four weeks. Prestidge was aware that upper management had placed Employee in a PIP and so he advised Employee to "play the game."<sup>12</sup> However, no one, not even Employee, talked to him further regarding the PIP or its extension.

Prestidge testified that Deputy Director Smith disliked Employee because he made excuses for his non-performance. Prestidge had no respect for Smith because he believed Smith was not good at his job.

*Employee, transcript pp. 222-329*

Employee was one of the project managers in charge of construction and move-in of tenants at the Waterfront Project. The other project manager was David Prestidge, and they worked under Don Eischens. He explained that Waterfront Associates, the leaseholder and landlord of the Waterfront Buildings, had a lease agreement build-out with Agency.

Employee said that PMIS used a different Agency format which required him to transcribe 25% of the contractor invoices that he receives, thereby turning what should be a five step process into a ten or eleven step one. All this added days to the normal typical seven day process.

In using PMIS, Employee testified that he would review a contractor's invoice for accuracy and work verification, sign it, reformat it into the proper format if necessary, send it back to the vendor for signature, enter it into PMIS, and send it over for signatures by Don Eischens, Ajay Kapoor, and Gerick Smith. PMIS Administrator Ajay Kapoor would then enter it into the PASS system. It is then returned to Employee who completes his processing into PMIS with a receipt number. Finally, the invoice is routed to Cassandra White of Agency's financial arm for payment. *See* Employee Exhibit 11 for a flowchart of the process. Employee estimates that about 10% to 15% of his time is spent dealing with PMIS.

Kapoor fixed whatever technical problems arose with the system. Employee stated that delays occurred because he would input all his invoices into PMIS at the end of his workday at 7 or 8 p.m., while Agency's financial administrator, Cassandra White, ended her workday at 3 or 4 p.m. Thus, unbeknownst to him, the invoice would get cut off and not be processed at all. About 30 days later, a contractor would complain to him about the non-payment. Employee

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<sup>12</sup> Tr. pp. 202.

would then contact White, who would then track it down. Employee testified that this would happen frequently and this involved \$400,000 to \$500,000 invoices.

After construction of the Waterfront Project was completed on March 2010, Employee and the team oversaw the relocation of 6 Agencies and its roughly 1600 D.C. Government employees into the buildings over the course of three months.

Employee explained that his four-day suspension involved a late payment for vendor McKissack and McKissack due to a funding problem. The original funding was exhausted after additional work was done. Employee believed that this was beyond his control and responsibility; but his supervisor Eischens advised him to accept the suspension.

Although he was aware of the PIP, Employee testified that he was not made aware of any specific problems at the time. Employee did not recall receiving his annual performance document for the period of October 1, 2009 through September 30, 2010. He denied having any problems processing invoices during the PIP period. He also testified that neither Eichens nor Smith talked to him about any work performance problems. Employee admitted signing a receipt for his performance review on April 30, 2010. Employee attributed the problems to inadequate funding caused by management transferring the funds out to pay other bills due and then belatedly refunding or re-obligating the funds back at some point after the vendor had complained about non-payment.

Employee also testified that he never asked Smith why he was being fired. Employee reiterated that even with the PIP and its subsequent extension, he never knew why he was fired as he felt he was addressing the problem. Employee claimed that Eichens told him the PIP and then its extension was simply on the orders of Smith.

*Documentary Evidence admitted at the hearing:*

Agency Exhibit 1 and Employee Exhibit 1: Project Manager job description  
Agency Exhibits 2 through 10, 13 through 16, Employee Exhibit 8 and 10: emails documenting management's frustrations with Employee's processing of invoices of various vendors.  
Agency Exhibit 17: Memo regarding Employee's Performance Improvement Plan  
Agency Exhibit 18: Employee's Performance Improvement Plan  
Agency Exhibit 19 and Employee Exhibit 4: Memo extending Employee's Performance Improvement Plan  
Agency Exhibit 20 and 21: Memo on results of Employee's Performance Improvement Plan  
Agency Exhibit 22: signed receipts of PIPs  
Employee Exhibit 2: Employee's Annual Performance Document 2009-2010  
Employee Exhibit 3: Employee's Annual Performance Document 2008-2009  
Employee Exhibit 5: Documents regarding Employee's 4 day suspension and subsequent removal  
Employee Exhibit 6: Employee's affidavit  
Employee Exhibit 7: Table of Employee's performance evaluations  
Employee Exhibit 9: calendar of May through August 2010  
Employee Exhibit 11: Employee's flow chart of invoice processing

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issues identified in this Matter. 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.

### *Whether Agency's Action Was Taken For Cause.*

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq.* (September 1, 2000).<sup>13</sup>

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 628.1, 59 D.C. Reg. 2129, 2145 (2012). OEA Rule 629.2, *id.*, reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues."

An evaluation of the record reflects the following significant evidence:

*Specification No. 1:* Employee testified about his 4-day suspension where he blamed the late payment for a vendor on a funding problem. Employee's testimony that he believed the delay was not his fault but that he accepted the brief suspension because he was persuaded to do so, was unconvincing. Nonetheless, specification 1 is not a valid specification as it merely recited the prior disciplinary action taken against Employee. Thus, it will not be considered.

*Specification No. 2:* Eichens testified credibly about Employee's tardiness in inputting project data in the PMIS system along with the submission of invoices in the required time frame. Eichens also testified credibly that he had several discussions with Employee regarding his requirement to complete the processing of invoices within the required period. Based on his courtroom demeanor and inconsistencies, I do not find credible Employee's claim that Eichens never discussed his performance with him. Relative to the requirement to process invoices within the seven-day timeframe, Employee claimed that the financial administrator's different work schedule and funding problems prevented the timely payment of some invoices within the mandated 30-day deadline. However, apart from his own testimony, Employee failed to present

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<sup>13</sup> Section 1603.3, *id.* at 7096, sets forth the definition of cause for which a disciplinary action may be taken. Here, Employee was removed from service for "negligence" which is one of the causes set forth therein.

evidence to support his contention that his allegedly timely processing of invoices at the end of his workday prevented the financial administrator from working on the payments. Employee failed to produce Cassandra White's testimony to back up his contention that her work schedule delayed or prevented the processing of the invoices. In addition, Eichens credibly testified that management did not hold Employee accountable for the actual payment of the invoices, just the timely inputting into the PMIS system. I also find that the processing of invoices into the PMIS system was an essential part of his job duties. Based on all the evidence, Employee failed to make the required entries in PMIS in a timely manner.

*Specification No. 3:* Here, Employee did not dispute the late processing of invoices. Employee's claim that the one added step of formatting 25% of the invoices he received turned a five-step process into a ten or eleven process is illogical and incredible. I also find that Employee's claim that no one made him aware that his untimely processing of invoices were never discussed with him before, during, or after the institution of his PIP and even after its extension to be incredible. I find Eichens to be more credible than Employee. I also note that Employee's sole witness, Mr. Prestidge, did not claim that Employee was timely in the processing of invoices in PMIS. Although one email revealed that Deputy Director Smith wanted Employee fired early on, the emails also showed that the motivation was not personal, but based on management frustration with Employee's late processing. Yet, despite this frustration, it is undisputed that management instituted a PIP for a total of 90 days to afford Employee a chance to improve his work. In addition, I also find that Employee failed to improve this aspect of his work duties despite the PIP.

Substantial evidence is "relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Mills v. Dep't of Employment Services*, 838 A.2d 325, 328 (D.C. 2003) (quoting *Black v. D.C. Dep't of Employment Services*, 801 A.2d 983, 985 (D.C. 2002)). Here, the evidence of record substantially supports Agency's charges. In contrast, Employee's claims that the fault for his tardy processing of invoices into the PMIS system lay elsewhere and not on him, were unsupported and therefore, not credible reasons for his poor work performance. As Eichens credibly stressed, management faulted Employee's work performance on his tardy processing of invoices, something that was within his control, and not on the untimely payment of invoices, something that was not totally within his control. While this Judge takes notice that Employee's job was quite challenging, his repeated unsupported assertions that there was no problems with his work on invoices does not weigh in his favor. Employee's argument that the timely processing of invoices constituted only 15% of his work duties does not alter the fact that this was considered to be an essential part of his duties. I also find that there was no credible evidence of a procedural error in the implementation of the PIP.

After careful consideration of all the evidence, this Judge concludes that Agency met its burden of proof on its charge of inexcusable neglect of duty, incompetence, and misfeasance, i.e., Employee's poor performance and failure to complete his assigned duties in a timely manner, and had cause to take adverse action against Employee. However, I do not find that Employee was guilty of insubordination as there was no credible evidence that Employee willfully refused to perform his duties.

*Whether the Penalty Was Appropriate Under the Circumstances.*

Employee argued that his penalty was not tempered by a consideration of the Douglas Factors.<sup>14</sup> However, Employee failed to produce or elicit any evidence regarding the Douglas Factors during the hearing. In addition, a *Douglas* analysis by management is not required by statute. This Office does not apply a litmus test that agencies analyze a penalty in strict accordance with *Douglas*. The Office has not required an agency to apply the factors in a mechanical fashion at a certain time in the proceedings or in a certain way. The first time the Office considered the factors in assessing the appropriateness of a penalty was in the case of *Employee v. Agency*, OEA Matter No. 1601-0016-81, 29 D.C. Reg. 4565 (1982). In that case the Administrative Judge stated that the “[r]eview of an Agency-imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably . . . [and that] [t]his Office is *guided* in this matter by the principles set forth in *Douglas*.” *Id.* at 4570. (emphasis added). Failure to discuss Douglas factors does not amount to reversible error. Even without such a discussion, Agency’s decision to remove Employee is valid so long as it was not an abuse of discretion or arbitrary. *Christopher Lee v. D.C. Dept. of Transportation*, OEA Matter No. 1601-0076-09, *Opinion and Order on Petition for Review* (January 26, 2011).

Despite Agency’s attempts to warn Employee through progressive discipline, afford him additional opportunities to improve his job performance, and assist him in other ways, he did not improve after a reasonable time to do so. Chapter 16 of the District Personnel Manual (“DPM”) outlines the Table of Penalties for various causes of adverse actions taken against District government employees. Section 1619 of the DPM clearly lists that the penalties for an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations (neglect of duty) charge ranges from a reprimand to removal even for the first offense, while that for a second offense is a fifteen-day suspension to a removal. As noted above, Specification One establishes that this was Employee’s second offense. Hence, removal was an appropriate penalty for Employee. The penalty for a first offense of incompetence is suspension for 5 to 15 days while the penalty for a first offense of misfeasance is suspension for 15 days. Accordingly, removal was also an appropriate penalty for the neglect of duty charge against Employee.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.” Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency’s penalty “undisturbed” when “the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment.” *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the evidence of record and consideration of the totality of circumstances, this Judge concludes that removal was the appropriate penalty

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<sup>14</sup> For a discussion of the Douglas Factors, see *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981).

within the parameters of reasonableness, and the penalty should be upheld.

ORDER

It is hereby Ordered that Agency's action in removing Employee from service is UPHELD.

FOR THE OFFICE:

Joseph Lim, Esq.  
Senior Administrative Judge