THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
[redacted]	OEA Matter No. 1601-0055-19R21
Employee	
	Date of Issuance: January 14, 2022
v.	
	JOSEPH E. LIM, ESQ.
D.C. OFFICE OF POLICE COMPLAINTS,	Senior Administrative Judge
Agency	

Laura Nagel, Esq., Employee Representative
Bradford Seamon, Jr., Esq., Agency Representative

INITIAL DECISION ON REMAND

PROCEDURAL HISTORY

Employee, an Investigator with the D.C. Office of Police Complaints ("OPC" or "Agency"), filed a Petition for Appeal on June 13, 2019, with the Office of Employee Appeals ("OEA") challenging Agency's final decision to terminate his employment for Failure to Follow Instructions and Conduct Prejudicial to the District Government. OEA requested Agency's response on June 17, 2019, and Agency submitted its Answer on July 9, 2019. This matter was assigned to the undersigned Administrative Judge on or around September 17, 2019. After postponements requested by the parties, I held a Prehearing Conference on December 2, 2019, and Evidentiary Hearings on February 18, 2020, and February 24, 2020. On August 6, 2020, I issued an Initial Decision ("ID") reversing Agency's action on the ground that it failed to prove Employee violated its policies.

On October 9, 2020, Agency appealed the ID to the Superior Court of the District of Columbia ("Sup. Ct.") Case No. 2020 CA 004294 P(MPA). The Sup. Ct. issued its Order granting in part the Petition for Review on June 24, 2021. The Sup. Ct. upheld OEA's findings on charge 3 but remanded the matter back to the undersigned with instructions to determine whether Employee violated the relevant District of Columbia Municipal Regulations ("DCMR") provisions with regards to charges 1, 2, and 4.

JURISDICTION

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

ISSUES[1]

1. Whether Agency met its burden of proof against Employee for Charge 1.
2. Whether Agency met its burden of proof against Employee for Charge 2.
3. Whether Agency met its burden of proof against Employee for Charge 4.
4. Whether Agency's action to summarily remove Employee should be upheld.

FINDINGS OF FACT[2]

1. Agency is an independent agency and has statutory jurisdiction to investigate community complaints against any officer of the Metropolitan Police Department ("MPD"), the Office of Unified Communications, and the D.C. Housing Authority Police Department. With that authority, Agency investigates several allegations such as harassment, failure of an officer to self-identify, retaliation, and excessive force. To perform its mission, Agency hired staff members and trained them as administrative investigators to conduct work within its authority.

2. Agency is part of the National Association for Civilian Oversight of Law Enforcement and is often referred to as a model agency on how to conduct civilian oversight within that organization. Agency is regularly consulted by other cities and other civilian oversite entities on how they operate. Each year Agency participates in the annual conference that the National Association hosts and regularly serves as panelists in the conferences. Employee was a panelist and presenter at one of the conferences.

3. Agency's investigation of complaints from the public regarding alleged police misconduct ties to MPD since Agency worked directly with MPD Internal Affairs on cases. By law, a community member can file a complaint with Agency or MPD. No matter where the complaint is filed, the complaint is directed to Agency. Agency typically conducts the investigations, with some limited exceptions. The primary job of MPD's Internal Affairs is to conduct their own internally generated investigations outside of the complaint process.

4. If Agency finds an officer to be guilty of the complaint made by the public, the recommendation goes to an independent hearing examiner. If the hearing examiner concurred with Agency's recommendation, it would be submitted to the Chief of Police, and in turn the Chief of Police would issue the discipline.

5. Agency uses body-worn camera footage as one of the tools used to investigate officer-public interactions. MPD was the first large urban metropolitan police department to receive the body-worn cameras. Agency's agreement with MPD regarding body-worn camera footage is

---

1 The August 6, 2020, ID's holding on Charge 3 was upheld by the Sup. Ct. and thus is not included among the issues.

2 This ID incorporates the Summary of Evidence depicted in the August 6, 2020, ID and thus, will not be repeated here. Instead, the undersigned lists here the parties' joint stipulations of facts, uncontested documents and exhibits of record, and my own findings of fact.

only for usage for accessing and viewing them. By December 2016, the body-worn cameras were fully implemented in the District. Prior to this implementation, there was a three-year backlog in Agency's cases. Once the body-worn camera policy was fully implemented, the backlog was eliminated. Currently, investigators complete cases on an average of one hundred twelve days.

6. Every investigator hired by Agency goes through the District new employee orientation and a performance of duty training. On the first day of employment with Agency, investigators are trained for two (2) months on the body-worn camera footage usage policy and sign their promise to comply. The agreement provides that the employee understands what the policy states and how it is used before they are given an individual account on the evidence.com website to access the body-worn camera footage. Agency retains a log of employees that have been trained. As custodian of the video footage, Agency is restricted to solely viewing the actions of an officer. Agency negotiated viewing access to view the video footage so that Agency would not interfere with the chain of custody.

7. Employee has been an Investigator, Grade 9, with Agency since October 31, 2016. That same day, Employee attended the New Employee Orientation and signed the Appointment Affidavit promising to faithfully execute the laws of the District of Columbia.

8. Employee received training on OPC Body-Worn Camera ("BWC") Video Usage Policy and signed the BWC Video Usage Agreement and Training Log on October 31, 2016.

9. A former police officer with degrees in Criminal Justice and Sociology, Employee's duties included investigating complaints from the public regarding police conduct or events, writing reports on his investigation, and making recommendations for resolution.

10. When his mother's health started to deteriorate, Employee took time off to care for her. Employee used Paid Family Leave ("PFL") and intermittent leave under the Family and Medical Leave Act ("FMLA").

11. On or about March 8, 2018, Employee complied with OPC's request to change his work schedule in order to be approved for intermittent leave on an as-needed basis. Eventually, Employee took continuous FMLA leave from January 2, 2019 to February 4, 2019.

12. On February 19, 2019, Employee was served with a notice of violation of District Personnel Manual § 1607.2(d)(2): Failure/Refusal to Follow Instructions—Proposed Suspension ("Notice of Proposed Suspension") by his supervisor.[3] The nature of Employee's alleged failure to follow instructions involved his repeated failure to complete tasks pursuant to his duties as an Investigator. Employee was given until February 25, 2019, to submit his response to his supervisor's proposed corrective action.

13. When Employee received the three-day Notice of Proposed Suspension, he was provided an opportunity to submit a response. The notice of the proposed suspension memorandum provides that an employee has a right to challenge the proposed action and may secure an

3 Agency Exhibit Tab 2, Violation of DPM 1607.2(d)(2): Failure/Refusal to Follow Instructions-Proposed Suspension.

attorney or representative at their own expense. Furthermore, the notice encouraged him to fully review any company material supporting the proposed action. The documents that were attached to the proposed suspension were not redacted. Employee gave these unredacted documents that he received from Agency including other documents that he obtained from the evidence.com website to his attorney, Reshad Favors ("Attorney" or "Favors") for assistance in forming a response to the proposed suspension. Employee believed that submitting the documents to Favors would show that there was significant communication between him and the chief investigator about his timeliness issues of working the case.

14. Employee wanted to show that he was communicating with Agency regarding his work, and to demonstrate that he had worked continuously on the case. He intended the body-worn camera audit trail to show the dates when he accessed the particular body-worn cameras for the different officers in question. To support his arguments, he submitted exhibits that included: 1) emails regarding the open investigation that served as the basis for the proposed suspension, 2) reports generated from the Body Worn Camera video footage archive showing his login and viewing history, and 3) a transcript of a January 18, 2018, agency meeting. His emails regarding the investigation and his login and viewing information of body worn camera footage would show that he worked appropriately on the investigation when he was in duty status and not on FMLA leave.

15. On February 21, 2019, Employee submitted a written request for an extension of the time allowed to submit his response to the Notice of Proposed Suspension. OPC granted the extension, allowing Employee until February 27, 2019 to submit his response. Also, OPC advised that per DPM § 1621.2, Employee was authorized four (4) hours of administrative leave to draft his response.

16. On or about February 27, 2019, OPC received Employee's response to his proposed suspension via email from Employee's attorney. The written response to the Notice of Summary Removal argued that the proposed suspension should be rescinded, or that the penalty should be mitigated. Employee's arguments against termination included: (1) the information Employee shared with prior counsel was necessary to exercise his right to respond to the proposed suspension, and (2) the Proposing Official improperly charged Employee with violations of 6B DCMR § 1607.2(a)(3)(10), 6B DCMR § 1607.2(d)(1), and 6B DCMR § 1607.2(d)(12).

17. The email from Favors included a response to the Notice of Proposed Suspension issued to Employee, unredacted documents that referenced body-worn camera footage, and other exhibits in support of Employee. Employee had also downloaded audit trails that did not pertain to his investigative duties on February 21, 2019. Employee's user ID and IP address were logged on the audit trail that he printed.

18. Upon receiving the email from Favors, OPC Deputy Director Rochelle Howard ("Howard") became concerned that Favors had obtained access to the confidential information since Favors never signed a confidentiality agreement with the District or Agency. Agency considered Favors as a member of the public as he was not an Agency employee. Howard believed that if MPD were alerted of this violation, they could rescind Agency's access to body-worn camera footage, since Agency did not uphold their trust. Ultimately, the violation

could affect Agency's entire operations if access was restricted as Agency would no longer be able to investigate cases expeditiously. Subsequently, Howard conducted an investigation.

19. The email from Favors contained two attachments—a letter entitled "Aguilar Response to Proposed Suspension" and 65 pages of unredacted exhibits. These exhibits contained audit reports relating to an open OPC case, confidential information pertaining to MPD officers who were involved in open OPC cases, confidential information pertaining to potential civilian suspects, and BWC video reports containing confidential information.

20. On February 28, 2019, OPC reviewed the response submitted by the Attorney and conducted an inquiry into the exhibit's origin and extent of use. Following the inquiry, OPC determined that the Employee committed four violations of the District Municipal Regulations ("DCMR"), specifically provisions of 6B DCMR § 1601 and § 1607.

21. On March 4, 2019, Howard issued a Final agency decision imposing a three-day (3) suspension, as proposed.

22. On March 5, 2019, Howard issued a Notice of Summary Removal, effective immediately. The Notice of Summary Removal charged Employee with one count of Failure to Follow Instructions in violation of 6B DCMR § 1607(d) and three counts of Conduct Prejudicial to the District Government in violation of 6B DCMR § 1607(a). Specifically, Agency alleged that Employee (1) on or about February 21-27, 2019, violated OPC's Body Worn Camera Use Policy, an alleged violation of 6B DCMR § 1607.2(d)(1), (2) on or about February 21-27, 2019, shared confidential open case information with a member of the public, an alleged violation of § 6B DCMR § 1607.2(a)(3) and (10), (3) on or about February 21, 2019, used government time and resources outside of the four hours of administrative time allotted for him to respond to the proposed suspension in alleged violation of 6B DCMR § 1607.2(a)(12); and 4) on or about February 21-27, 2019, shared confidential open case information with a member of the public, an alleged violation of 6B DCMR §§ 1607.2(a)(3) and (10).

23. Howard stated that Employee could have consulted with his supervisors and discussed how he could access the information without violating the rules. For example, Employee could have accessed the documents in redacted form or Agency could have asked MPD if they could download the information.

24. Howard stressed that while the downloading and sharing of documents from evidence.com were violations of Agency's policy, Agency only charged Employee with sharing confidential documents with a member of the public. She reiterated that the agreement that Agency has with MPD only allows for accessing and viewing of documents. Moreover, Agency is not the custodian of that evidence; thus, they only have authorization to view it.

25. Although Agency was concerned about the possibility that Favors could divulge the information that he obtained through Employee and take it to the media or exploit the information that they had access to, there is no allegation nor was there any evidence that Favors divulged any confidential information to anyone other than Employee's superiors.

26. The Notice of Summary Removal advised Employee that he was being removed from his position pending the decision of the Agency's Administrative Hearing Officer, who was investigating Employee's four alleged violations of the DCMR. The notice also informed Employee that OPC was proposing the disciplinary action of removal for each of the violations. This notice advised Employee that he had the right to challenge the action, to secure an attorney to do so, and that any written response should be submitted to Hearing Officer Shawn Brown ("Brown") for review.

27. OPC provided Brown with redacted versions of the relevant documents in support of its position.

28. Brown reviewed the documents in the matter and issued a Memorandum of his review. In Brown's May 1, 2019, "Memorandum of Administrative Review of Proposed Notice of Summary Removal," he found that OPC met its burden in showing that Employee was guilty of the four violations and that removal was within the range of possible disciplinary actions for each violation. However, he opined that, although the charges in the Notice of Summary Removal were sustained by a preponderance of the evidence, the proposed termination action was too severe and not a reasonable penalty and, therefore, recommended penalties for each charge ranging from counseling to five-day suspensions.

29. On May 14, 2019, OPC Director Michael Tobin issued a final agency decision removing Employee from his position and District service. The decision enumerated Agency's reasons for choosing termination as its penalty and notified Employee of his appeal rights.

30. On June 13, 2019, Employee filed the instant Petition for Appeal with OEA.

31. On July 8, 2019, Agency filed an Answer to Employee's Petition for Appeal, requesting that the matter be scheduled for an evidentiary hearing.

32. Robert Rowe ("Rowe") worked as a Supervisory Investigator with Agency for six years where he was one of the two supervisors of Employee. He took part in drafting the policy for the body-worn camera. The principal objective of the policy was to make sure that video footage did not get out to the public. He claimed that the primary fear was video footage of a matter appearing on a website like YouTube. Therefore, the policy ensured that the videos did not end up with unauthorized viewers. Rowe did not agree that sharing data from evidence.com with a member of the public should be considered a violation.

33. Employee was aware of the body-worn camera video usage policy and recalled signing the acknowledgement form. He did not believe that he violated the policy because the policy states that employees were not to distribute any of the videos. Employee did not believe that he was violating the video policy or any other confidentiality policy because it was his understanding that the information that he disclosed with an attorney was considered privileged and confidential. Additionally, he stated that there were no other written policies in effect.

34. Employee testified that he was not aware that he had to redact the documents since it was submitted to him unredacted in the notice of proposed suspension. He admitted that those

documents contained confidential information and that he could have redacted the documents and still be able to defend himself. He admitted that he did not ask permission from Agency to download and share documents with his attorney, but based on his past interactions with his superiors, he also did not feel comfortable asking permission from them.

35. Employee noted that Agency's suspension notice provided that he may use any documents and the DCHR manual provides that if he did not submit or present any evidence in his response, he would not be able to include other information. He claimed that he was within the guidelines provided by DCHR and Agency.

ANALYSIS AND CONCLUSIONS OF LAW

1. Whether Agency met its burden of proof against Employee for Charge 1.

In its Notice of Summary Removal, Agency alleged that Employee failed to comply with 6B DCMR §1607.2(d)(1). 6B DCMR §1607.2(d)(1) states: *Failure/Refusal to Follow Instructions: Negligence, including the careless failure to comply with the rules, regulations, written procedures, or proper supervisory instructions.* Specifically, Agency charged that on or about February 21-27, 2019, Employee violated OPC's Body Worn Camera Video Usage Policy.

This Office's Rules of Procedure provide that an agency's action must be supported by a preponderance of the evidence, which is defined as "that degree of relevant evidence which a reasonable mind, considering the matter as a whole, would accept as sufficient to find a contested fact more probably true than untrue."[4]

Based on the uncontroverted testimonies and documents submitted in evidence, I make the following findings of fact with regards to the following charges:

For the first cause of action against Employee, Agency states that he was insubordinate, citing 6B DCMR § 1607.2(d)(1) "[n]egligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions. Agency alleges that on or about February 21-27, 2019, Employee shared confidential open case information with a member of the public, specifically, Employee's then lawyer Mr. Favors, in violation of Agency's strict policy on confidentiality, particularly as it pertained to the Agreement between the Agency and MPD regarding Evidence.com, as well as his signed oath to adhere to the Agreement. Agency states that the Agreement clearly delineates that "[s]taff members shall only access Evidence.com . . . as necessary in the course of handling an OPC complaint. Access under any other circumstances must be approved in writing by a supervisor." [5]

Employee accessed Evidence.com on February 21, 2019, in order to retrieve the audit trails that he provided to his attorney in support of his defense to a corrective action. Agency states that this access was not in the course of handling an OPC complaint assigned to Employee as an official duty. Rather, it was for personal use, which is specifically prohibited by the

---

4 OEA Rule 628.1, 59 DCR 2129 (2012).
5 Agency Exhibit Tab 2, Violation of DPM 1607.2(d)(2): Failure/Refusal to Follow Instructions-Proposed Suspension.

Agreement and therefore constitutes a failure or refusal to comply with Agency rules, regulations, written procedures or proper supervisory instructions. Agency asserts that Employee also shared unredacted documents with his attorney that contained the names of accused police officers as well as other confidential information. Agency adds that even if Employee was merely negligent, the violation of the Agreement is still actionable under this section of the municipal regulations/DPM.

Employee does not deny the allegations surrounding his accessing information on Evidence.com.[6] However, he does not believe he breached the Agreement as he understood it according to his training since he shared the documents only with his attorney for the express purpose of defending himself from what he felt were unfair charges connected to his three-day suspension. He assumed that the attorney-client privilege is an assurance that his attorney would not divulge any confidential information received from him to anyone outside of Agency. He also argues that Agency failed to prove negligence on his part, especially under the reasonable person standard.

While Agency couches its argument that Employee's failure to follow instructions stems from the undisputed fact that Employee accessed Agency's website "Evidence.com," a reading of Agency's "Office of Police Complaints Body-Worn Camera Video Usage Policy" indicates that any viewing of a video accessed from the website Evidence.com must only be "in the course of handling an OPC complaint."[7] However, there is no allegation, nor was there any evidence produced, that Employee provided any video to his lawyer. I therefore find that Employee did not violate this part of the policy. Rather, Employee is accused of providing confidential documents such as his work product, emails, video reports, and other unredacted documents to his lawyer to assist in his defense against a proposed three-day suspension. The policy is silent on documents such as audit trails, video reports, emails from Evidence.com. Employee cannot reasonably be expected to obey unwritten rules. I therefore find that Employee did not violate the policy as written. Therefore, I conclude that Agency failed to meet its burden of proof that Employee was guilty of insubordination on this particular specification.

However, the policy also states that accessing the website "under any other circumstance must be approved in writing by a supervisor."[8] Employee concedes that he did not ask written permission from his supervisor to access the website for his defense. He argues that he did not feel comfortable with asking any of his superiors for permission as he felt it was a hostile work environment.[9] Employee added that it was his experience whenever he asked for guidance, he was referred to an outside agency and did not get any response from his director. Thus, he felt they would not be able to give him guidance.[10]

Nonetheless, the policy is clear that an employee wishing to access the Evidence.com website for anything other than in the course of handling an OPC complaint requires a supervisor's written permission. The evidence shows that Employee failed to do so. Employee's belief that it would have been futile to ask for his supervisor's written permission does not

---

6 February 24, 2020, Transcript p. 226-229.
7 Agency Exhibit tab 1 titled "Office of Police Complaints Body-Worn Camera Video Usage Policy."
8 *Id.*
9 February 24, 2020, Transcript p. 231 lines 2-8.
10 *Id.*, 231 lines 13-20.

excuse his failure to follow a written policy or procedure. In addition, Employee's claim that he was not trained on the applicable portion of the policy does not meet the test of credulity when the applicable language of the policy is plain and straightforward. Employee himself testified that he understood that the policy required him to seek his supervisor's written permission, but he chose not to do so. Based on the above, I therefore find that Employee was insubordinate for this particular specification.

2. Whether Agency met its burden of proof against Employee for Charge 2.

In its Notice of Summary Removal, Agency's Charge 2 alleged that Employee failed to comply with 6B DCMR §1607.2(a)(3) and (10). Specifically, Agency charged that on or about February 21-27, 2019, Employee shared confidential open case information with a member of the public that includes subject and witness MPD officer names and badge numbers, MPD arrest and incident information including potential civilian suspect charges and other information from MPD and/or OPC open cases. [11]

6B DCMR §1607.2(a)(3) states: Conduct Prejudicial to the District Government: Indictment or charge of any felony or a criminal offense that is related to the employee's duties or his or her agency's mission. There is no allegation, much less any evidence, that Employee was indicted or charged with a crime. I find that Agency failed to prove this violation.

Nonetheless, in their May 1, 2019, Memorandum of Administrative Review of Proposed Notice of Summary Removal and in their testimonies, Agency's witnesses tried to correct their drafting mistake by stating that they meant to charge Employee with violating 6B DCMR §1607.2(a)(4) instead of 6B DCMR §1607.2(a)(3). Agency cannot be allowed to amend its charge verbally months later at the hearing when they could have amended their written Notice of Summary Removal at the onset. Thus, I find that Agency failed to prove this violation.

6B DCMR §1607.2(a)(4) states: Conduct Prejudicial to the District Government: *On-duty conduct* that an employee should reasonably know is a violation of law or regulation. (Emphasis supplied). At the hearing, Agency failed to prove that Employee's conduct occurred during his tour of duty. While Agency concedes that it could not prove that Employee's conduct occurred while he was on-duty, Agency argues that because of Employee's job, he was duty-bound to protect the confidentiality of Agency's documents at all times. This interpretation, however, overstretches the plain language of 6B DCMR §1607.2(a)(4) and renders the phrase "on-duty conduct" in the said regulation useless. Therefore, I find that Agency failed to prove this violation.

Agency asserted that Employee's action in sharing audit trail data and emails with his attorney in order to defend against the Proposed Suspension violated 6B DCMR § 1607.2(a)(10). 6B DCMR §1607.2(a)(10) provides: "Conduct Prejudicial to the District Government: Unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or confidential information."

Based on the evidence presented and Employee's own admission, I find that on February

11 Agency Exhibit Tab 12, March 5, 2019 Notice of Summary Removal.

21-27, 2019, Employee shared confidential open case information with his lawyer (which Agency contends is a member of the public) that includes subject and witness MPD officer names and numbers, MPD arrest and incident information including potential civilian suspect charges and other information from MPD and/or OPC open cases. The question is whether this disclosure to his attorney violated 6B DCMR §1607.2(a)(10).

With regards to sharing unredacted documents with his attorney, Employee argues that Charge 2 should not be sustained under 6B DCMR § 1607.2(a)(10) because Employee had a constitutional right to communicate with his attorney regarding the proposed suspension and that Agency has not shown that Employee's communications were unauthorized and not protected under these circumstances. Employee points out that in the Notice of Proposed Suspension, Agency advised that he (1) had the right to challenge the proposal, (2) had the right to be represented by an attorney or other representative, (3) was encouraged to review the accompanying supporting materials, and (4) was encouraged to include affidavits or other documents he would like considered with his written response. It did not warn Employee that he could not provide the evidence file provided to him (unredacted) to his attorney or of any other limitations on his communications with his attorney. Employee argues that his communications with his attorney were not a *de facto* public disclosure under the law and, under these circumstances, were authorized under subsection 10.12.

Agency states that it does not take issue with Employee using documents that he deemed supportive of his defense, but rather, that he provided the documents in an unredacted format to someone outside of the agency and thereby exposed confidential information. In other words, Agency states that Employee's disclosure of the confidential Agency information was not relevant to his legal defense of the proposed suspension. Agency states that to zealously advocate for Employee, Employee's attorney did not need access to the open case information, potential charges against civilians and MPD officers, the officers' names and IDs, the IP addresses, etc. All of this confidential information was irrelevant to the alleged conduct that drew the proposed suspension. Agency argues that Employee's right and privilege to effective counsel did not hinder his duty to safeguard confidential information, and thus, Employee's argument that he was simply engaging in confidential communications with his attorney lacks validity.

In their testimonies, I note that Agency's witnesses Howard and Tobin testified in general terms that its employees knew that the information in the Evidence.com website are confidential and are not to be shared with anyone, even their own lawyers. However, they did not specify any specific training, and the only written document pertaining to such training that Agency introduced was the Body Worn Camera Use Policy. An examination of this policy shows that it mostly talks about BWC videos. Nowhere in the policy is there any mention of audit trails, work product, unredacted documents, etc. On the other hand, Employee and his former supervisor, Rowe, testified credibly that the confidentiality training provided pertained

12 D.C. Rules of Professional Conduct Rule 1.6(a) advises that a lawyer shall not *knowingly* use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

only to the videos. I therefore find that Agency did not instruct Employee that he may not provide unredacted documents to his lawyer.[13]

The other problem with Agency's charge that Employee violated 6B DCMR §1607.2(a)(10) "Conduct Prejudicial to the District Government: Unauthorized disclosure or use of (or failure to safeguard) information protected by *statute or regulation* (emphasis added) or other official, sensitive or confidential information," is the fact that nowhere in its March 5, 2019, Notice of Summary Removal or its May 14, 2019, Final Agency Decision-Separation, is there any mention of any law or regulation that Employee is accused of violating. Only at the hearing did Agency state that Employee violated 6B DCMR § 1808.

6B DCMR § 1808 states: "An employee has a duty to protect and conserve government property and shall not use such property, or allow its use, for other than authorized purposes." Employee has a right to be notified by Agency, and Agency has an obligation to inform him, of the specific statute or regulation that he is alleged to have violated. Agency cannot be permitted to fix its charging deficiency at the hearing.

As for the Employee's sharing of "official, sensitive or confidential information," Agency does not dispute Employee's testimony that the charging documents it provided him contained unredacted information. Agency also does not contend that it stamped them as "confidential." I have also found that Agency did not provide credible evidence that it explicitly trained Employee that he is not to share any work documents, apart from BWC videos, to his attorney. For Agency to threaten Employee with a three-day suspension, and then remove him from his position for providing his attorney with documents while attempting to defend himself is to unreasonably put all the burden on Employee, a layperson, while absolving Agency for its own omissions.

I therefore find that these charges cannot be sustained under 6B DCMR §1607.2(a)(10) because the communication with an attorney is protected by the First Amendment of the U.S. Constitution and the Agency did not show that the Employee's conduct was unauthorized under Agency policy, that the Employee knew or should have known that it was unauthorized under the circumstances, or thatEmployee violated confidentiality by sharing the information with his attorney, who had a duty of confidentiality.

3. Whether Agency met its burden of proof against Employee for Charge 4.

For Charge 4 in its Notice of Summary Removal, Agency again charged that Employee failed to comply with 6B DCMR §1607.2(a)(3) and (10). The specification for Charge 4 is identical to that of Charge 2 except this one pertains to email. Specifically, Agency alleged again that on or about February 21-27, 2019, Employee shared confidential email communications

13 Generally, "impairment of communications between attorneys and their clients may be unconstitutional as a denial of the right of access to the courts" (*Martin v. Lauer*, 686 F.2d 24, 32fn.36 (D.C. Cir. 1982)) and "the First Amendment protects the right of an individual or group to consult with an attorney on any legal matter." *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000).

with a member of the public that included the following information regarding open investigations: subject and witness MPD officer names and badge numbers, MPD arrest and incident information including potential civilian suspect charges and other information from MPD and/or OPC open cases.

The arguments that the parties presented with regards to Charge 4 are similar to those presented for Charge 2. Because of this, my analysis with regards to this specification is the same as that for Charge 2. Accordingly, I again find that Agency failed to meet its burden of proof on this charge of prejudicial conduct as well.

In conclusion, while I find that Agency failed to meet its burden of proof on all its charges of prejudicial conduct, it met its burden of proof on the charge of Failure to Follow Instructions against Employee.

5. Whether Agency's action to summarily remove Employee should be upheld.

Employee states that his penalty was not progressive and should be reduced to a reprimand or fewer days of suspension. As discussed above, one of the charges was upheld. In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency.

Chapter 16 of the DPM and the D.C. Municipal Regulations("DCMR") outlines the Table of Illustrative Actions ("TIA") for various causes of adverse actions taken against District government employees. The penalty for the first offense for DCMR § 6-B1607.2(d)(1) Failure/Refusal to Follow Instructions: Negligence, including the careless failure to comply with the rules, regulations, written procedures, or proper supervisory instructions ranges from counseling to removal. In short, even if Employee was guilty of only one of the charges or specifications, the allowable penalty for a first offense includes removal.

On March 5, 2019, Agency also performed an extensive analysis of the *Douglas* factors[14] in Employee's adverse action.[15] Agency considered all relevant factors when imposing its

---

14 In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
>
> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> 3) the employee's past disciplinary record;
>
> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

penalty against Employee. Agency determined that removal was appropriate because there was only one mitigating factor to offset eleven aggravating circumstances to support Employee's removal. It considered Employee's seriousness of his conduct, employment type, past disciplinary record, confidence in Employee, consistency in other disciplinary actions, impact on Agency's reputation, clarity of notice to Employee of unacceptable conduct, rehabilitation potential, adequacy of alternative actions, balanced against Employee's past work record. In the end, Agency felt that there were no alternative sanctions that could be imposed to deter similar conduct from Employee in the future. Therefore, he was removed.

Based on the aforementioned, there is no clear error in judgment by Agency. Termination was within the range of penalties for the sustained charge of failure/refusal to follow instructions as evidenced in Chapter 16 of the DPM. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Accordingly, in light of the Court's holding in *Stokes*, I find that Agency's penalty of removal has to be upheld.

ORDER

It is hereby ORDERED that the agency's action of summarily terminating Employee is UPHELD.

FOR THE OFFICE:

s/s Joseph Lim
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

---

5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7) consistency of the penalty with any applicable agency table of penalties;

8) the notoriety of the offense or its impact upon the reputation of the agency;

9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;

10) potential for the employee's rehabilitation;

11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

15 Agency Exhibit 7. Proposing Official's Rationale Worksheet.