Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE,[1])	OEA Matter No. 1601-0043-22
)	
v.)	Date of Issuance: June 16, 2023
)	
UNIVERSITY OF THE DISTRICT OF COLUMBIA,)	MONICA DOHNJI, ESQ.
Agency)	Senior Administrative Judge
)	

Anita Mazumdar Chambers, Esq., Employee's Representative
Anessa Abrams, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 4, 2022, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the University of the District of Columbia's ("UDC" or "Agency") decision to terminate her from her position as a Student Activities Specialist, effective, February 3, 2023. Employee was terminated for unsatisfactory job performance and a failure to successfully complete a Performance Improvement Plan.[2] On March 4, 2022, OEA issued a Request for Agency's Answer to Employee's Petition for Appeal. After several requests for extensions, Agency submitted its Answer to Employee's Petition for Appeal, along with a Motion to Dismiss for lack of Jurisdiction on August 31, 2022. Employee filed a Motion for Leave to File Opposition to Agency's Motion to Dismiss for Good Cause Shown, along with Employee's Opposition to Agency's Motion to Dismiss on September 29, 2022. Subsequently, on October 4, 2022, Agency filed an Opposition to Employee's Motion for Leave to File Opposition to Agency's Motion to Dismiss for Good Cause Shown.

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on October 4, 2022. Thereafter, on October 13, 2022, the undersigned issued an Order scheduling a Status/Prehearing Conference for November 2, 2022. Thereafter, the parties filed a Joint Motion to Extend. In an Order dated December 13, 2022, the undersigned granted the parties' motion and continued the scheduled Status/Prehearing Conference for March 14, 2023. Both parties were present

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Agency's Answer at Exhibit 17 (August 31, 2022).

for the March 14, 2023, Status/Prehearing Conference. Subsequently, on March 17, 2023, Employee filed a Motion for Summary Disposition. Agency submitted its Opposition to Employee's Motion for Summary Disposition on March 30, 2023. Upon review of the record and considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

1) Whether Agency followed the appropriate Performance Improvement Plan ("PIP") procedures in terminating Employee.

2) Whether Agency had cause to institute adverse action against.

3) If so, whether the penalty of termination is appropriate under District law, regulations or the Table of Penalties.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[3]

OEA Rule § 631.2 *id.* states:

> For appeals filed under § 604.1, 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[4]

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA.

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[3] OEA Rule § 699.1.

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

Employee was a Student Activities Specialist with Agency. In July of 2019, Melinda Jennings ("Ms. Jennings") became the Director of Student Life at Agency and Employee's direct supervisor. On July 7, 2021, Employee was issued a Notice of Proposed Written Reprimand and placed on a Performance Improvement Plan ("PIP") for performance related deficiencies thereafter. Employee was placed on a 60-day PIP effective July 8, 2022.[5] Employee met with Ms. Jennings weekly to discuss her progress.[6] When the initial 60-day PIP expired on September 6, 2021, Agency decided to extend Employee's PIP for another 60-days.[7] When the extended PIP expired, Agency drafted several versions of Agency's Justification for Employee's termination and Notices of Proposed Adverse Action – Termination on November 4, 2021, November 19, 2021, and January 7, 2022.[8] Employee only received the January 7, 2022, notice. Thereafter, Employee filed a response to the Notice of Proposed Adverse Action – Termination on January 20, 2022[9]. On February 3, 2022, Agency issued its Final Administrative Decision upholding the proposed termination, with a termination effective date of February 3, 2022.[10]

<u>Employee's Position</u>[11]

In her Motion for Summary Disposition, Employee avers that on June 30, 2021, she was issued a Notice of Proposed Written Reprimand for insubordination and failure or delay to complete trainings. Within 15 days from receiving this notice and before Employee's response window for the proposed written reprimand had passed; Agency, placed her on a 60-day PIP citing a failure to complete the same trainings mandated which also served as the basis for the proposed written reprimand. According to Employee, she did not receive a copy of the PIP.[12]

Further, Employee asserts that Agency failed to comply with 8-B DCMR § 1910.3 which provides that a "PIP may be issued for a 30-, 60-, or 90-day period. A PIP may be extended in thirty (30)-day increments up to a maximum of ninety (90) days." Employee explains that on July 8, 2021, she was placed on a 60-day PIP. Thereafter, around September 2, 2021, Agency extended the PIP for another 60-day period for a total PIP duration of 120 days, 30 days longer than what is permitted by 8-B DCMR § 1910.3. Employee notes that Ms. Jennings, her supervisor, did not inform her that she was extending the PIP and did not provide her with notice indicating whether the PIP was successful or not.[13]

Additionally, Employee argues that Agency failed to notify Employee of her PIP result within l4 calendar days, pursuant to 8-B DCMR § 1910.4. She explains that she was not provided with any notice, written or oral, about the PIP outcome until she received the Notice of Proposed Termination on January 7, 2022. Employee also asserts that 8-B DCMR § 1910.4 provides that a copy of the supervisor's decision must be provided to the Human Resources ("HR") and to the

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[5] Agency's Opposition to Employee's Motion for Summary Disposition at Exhibit R (March 30, 2023).
[6] *Id*. at Exhibits S - W.
[7] *Id*. at Exhibit Y.
[8] *Id*. at Exhibits Z, AA, BB, DD.
[9] *Id*. at Exhibit EE.
[10] *Id*. at Exhibit FF. While the Final Administrative Decision noted that the effective date of the termination was February 3, 2022, Agency provided Employee's Notification of Personnel Action Standard Form 50 ("SF-50") in Exhibit GG in support of its assertion that the effective date of Employee's termination was August 31, 2022, and not February 3, 2022, as stated in the Final Administrative Decision.
[11] Employee's Motion for Summary Disposition, *supra*.
[12] *Id*.
[13] *Id*.

employee. She highlights that although Agency created an internal form to assist in providing feedback to employees, Ms. Jennings did not refer to, or use the form.[14]

Employee notes that the extended PIP deadline was November 1, 202l. However, Ms. Jennings did not provide her with notice of any performance deficiencies, or any other issues asserted in the PIP, in violation of the 14-day notice requirement of 8-B DCMR S 1910.4. Employee argues that absent notice of success or failure within l4 calendar days of the PIP conclusion date, and absent written documentation of success or failure, any employee would believe their performance was satisfactory or otherwise meeting expectations, as stated in 6-B DCMR §1410. Employee highlights that pursuant to 6-B DCMR 1410, "… the failure of the supervisor or reviewer to issue a written decision within the specified time period *will result in the employee's performance having met the PIP requirements*." She also cites that Agency did not provide her with any follow-up or information about perceived performance deficiencies for the entirety of November and December 2021.[15]

In addition, Employee contends that her termination should not be upheld because the Notice of Proposed Adverse Action - Termination was mailed to an incorrect address. Employee explains that Agency does not have evidence that it physically mailed the notice to Employee, and it does not have a registered mail return receipt. Employee reiterates that the Notice informed her for the first time that she had failed to fulfill the requirements of the PIP and proposed to remove her, ending her 50+ year career. Employee further avers that the Notice added new causes of action that had not been included in the Memorandum of Counseling ("MOC"), Notice of Proposed Written Reprimand, PIP, or PIP extension. Specifically, Employee alleges that Agency cited for the first time four new causes of actions to include (1) Failure or refusal to follow instructions, 8-B DCMR 1503.1(d); (2) Failure to meet performance standards, 8-B DCMR 1503.1(m); (3) Inability to carry out assigned responsibilities or duties, 8-B DCMR 1503.4(n); and (4) Neglect of Duty,8-B DCMR 1503.1(3).

Citing to *Employee v. DFHV*, OEA Matter No. 160l -0010-21, Employee highlights that the charge of failure or refusal to follow instructions includes a deliberate or malicious refusal to comply with rules, regulations, written procedure, or proper supervisory instructions. She explains that her refusal to use the incorrect username out of concern that the username was not connected to her name or employee record is inherently reasonable. Moreover, she involved her union for assistance after Ms. Jennings and Agency refused to help her correct the issue with her username. Employee states that her continuous attempts to solve the problem, despite her supervisor's refusal to assist, does not demonstrate a "deliberate or malicious refusal to comply." In fact, it demonstrates a conscious effort to comply. Employee asserts that Agency regularly sought to minimize her worries while simultaneously refusing to correct the username. She avers that her refusal to use the incorrect username, over which she had no control and could not independently alter, was not borne out of malice nor any deliberate desire not to comply with Ms. Jennings's requests. She avers that she simply acted reasonably given the ongoing issues of the username, which was not corrected until October 2021.[16]

Employee also argues that Agency gave little to no consideration to her reply to the proposed termination. She concludes that Agency failed to properly weigh the *Douglas* factors[17] and her termination was an abuse of discretion. According to Employee, Agency had alternative options to

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[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

correct her performance other than termination such as temporary suspension or voluntary retirement. Employee notes that Agency pursued the harshest path to end her 50+ year career despite never having put her on notice of any performance issues prior to May 2021.[18]

Agency's Position[19]

Agency avers that Employee's 120-days PIP was in compliance with 8-B DCMR §1910.3. Citing to OEA Rule §§ 634.6 and 699.1, Agency notes that to the extent that it was not, any procedural violation was harmless error. Agency states that there is no evidence Employee was prejudiced by the fact that her PIP lasted 120 days. It contends that the 120-day PIP did not significantly affect the Agency's final decision to take action. Agency explains that Employee's performance failed to improve over time and Employee admitted that she did not complete the expectations set for her by Ms. Jennings. Therefore, the longer PIP did not affect Agency's decision; rather, it simply prolonged the period within which Employee remained an Agency employee. Agency contends that while a PIP is typically 30, 60, or 90 days, Agency managers have discretion regarding the length of a PIP. Thus, Ms. Jennings, in consultation with Agency's Director of Employee and Labor Relations, decided to extend Employee's PIP for 60-days based on her longevity with Agency and to allow Ms. Jennings time to observe Employee's interaction with student organizations upon the Agency's return to campus in a hybrid model from the COVID-19 pandemic.[20]

Agency contends that, Employee's claim that she did not receive a copy of the PIP and was not aware that she was formally on a PIP, are belied by the underlying facts and evidence. Agency notes that it emailed a copy of the PIP to Employee, and it also discussed the PIP with Employee during a meeting with Agency's Human Resources and Employee's Union representative. Agency explains that Ms. Jennings met regularly with Employee concerning Employee's performance, and she referred to the PIP during their discussions.[21]

Additionally, Agency asserts that it did not violate 8-B DCMR § 1910.4 which states that employees will be provided with a written decision of the PIP outcome within 14 days of the conclusion of the 120-day PIP period. Agency explains that it is an independent agency of the District of Columbia and is governed by Chapter 8-B of the DCMR. It maintains that its regulations do not contain a provision similar to 6B DCMR § 1410.11 regarding the consequences of a supervisor's failure to issue a written decision on a PIP. Agency avers that Employee's reliance on DCMR § 1410 for the proposition that failure of a supervisor to issue a written decision on a PIP within the specified period "will result in the employee's performance having met the PIP requirements" is misguided. Citing to case law[22], Agency further explains that because its regulations do not provide a consequence for failure to comply with section 1910.4, this section is discretionary – not mandatory. It maintains that at the conclusion of the initial 60-day PIP, Ms. Jennings issued a written extension of the PIP, which ended in November 2021, therefore, Agency made a written determination regarding whether Employee satisfied the initial 60-day PIP within 14 days of its

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[18] Employee's Motion for Summary Disposition, *supra*.
[19] *See* Agency's Opposition to Employee's Motion for Summary Disposition, *supra*.
[20] *Id*.
[21] *Id*.
[22] *District of Columbia Department of Health v. District. of Columbia Office of Employee Appeals*, 273 A.3d 871, 876 (D.C. 2022) (citing JBG Props., Inc. v. Dist. of Columbia Office of Human Rights, 364 A.2d 1183, 1185 (D.C. 1976)); *Rodriguez v. District of Columbia Office of Employee Appeals*, 145 A.3d 1005, 1012 n.10 (D.C. 2016).

expiration. Agency asserts that the initial PIP ran until September 6, 2021, the PIP extension expired – at the earliest – November 5, 2021. Fourteen (14) days from November 5, 2021, was November 19, 2021. Agency provides that it began preparing for Employee's termination during this time period, but because Employee was ill and out of work (hospitalized) in mid to late November through December 2021, Agency did not believe it was appropriate to terminate Employee at that time given her personal circumstances.[23]

Agency states that even assuming that it did not comply with the discretionary provisions of 8-B DCMR § 1910.4, there is no evidence that Employee was prejudiced by any alleged violation. It maintains that at no time after the proposed termination did Employee assert that Agency failed to comply with its regulations or that she was prejudiced due to Agency's alleged non-compliance with its regulations.[24]

Furthermore, Agency highlights that pursuant to 8-B DCMR § 1910.7, if an employee fails to improve their performance during the PIP, the supervisor must propose either a demotion or separation from the University. It explains that the adverse action to separate an employee who has failed to perform satisfactorily is to be accomplished via Chapter 15 of 8-B DCMR. Accordingly, although § 1910 of 8-B DCMR does not provide the time period within which a notice of proposed termination must be issued, 8-B DCMR § 1502.3 provides that disciplinary action must be commenced within 90 days after the agency knew or should have known of the performance supporting the action. It asserts that the Notice of Proposed Adverse Action was issued to Employee on or about January 7, 2022, and this is within 90 days of the expiration of the PIP extension. Thus, Agency asserts that it complied with its regulations.

Agency also contends that its termination of Employee was proper because there were numerous deficiencies in Employee's performance such as poor email communication, use of incorrect email addresses, grammatical errors, failure to respond in a timely manner, timely completion of assigned tasks, and inability to utilize the Agency's various technologies. Agency also notes that it is undisputed that Employee was specifically directed to engage in Microsoft Office training, yet she admits that she blatantly refused to participate in the training using the incorrect username as instructed by her supervisor Ms. Jennings. Agency asserts that Employee admitted to not providing Ms. Jennings with any documentation demonstrating that she completed the assigned trainings. Agency states that while Employee took issue with the spelling of her username, it is undisputed that the "incorrect" username was a workable username and Employee was advised that she would still receive credit for the trainings if she logged in with the "incorrect" username. Agency maintains that Employee's argument that it was "inherently reasonable" for her to be concerned that her "incorrect" username was not tied to her employee record, is belied by the factual record. Agency notes that Employee was explicitly informed – even before the MOC was issued – that all the data was tied to employee identification numbers and that she would receive credit for the training even if she participated in the training using the "incorrect" username.[25] Agency concludes that Employee's conduct and admissions satisfies each of the causes of actions in the current adverse action.[26]

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[23] Agency's Opposition to Employee's Motion for Summary Disposition, *supra.*
[24] *Id*.
[25] *Id*.
[26] Employee was terminated for (1) failure or refusal to follow instructions, (2) neglect of duty, (3) failure to meet performance standards, (4) inability to carry out assigned responsibilities or duties, (5) insubordination and (6) failure or delay in carrying out orders, directions or assignments.

Regarding Employee's assertion that it did not receive the Notice of Proposed Adverse Action, Agency avers that the fact that it cannot locate documentation regarding mail or email notice does not automatically equate to a failure to provide notice. Agency provides that to the contrary, it is undisputed that Employee received notice of her proposed termination, as her attorney submitted a 13-page response. Moreover, Employee produced a copy of the Notice of Proposed Adverse Action for her termination during discovery. Therefore, Employee did not suffer any prejudice as it relates to delivery of the Notice of Proposed Adverse Action for her termination as she was able to timely respond to the bases for the proposed termination. In addition, Agency avers that Employee does not argue that she failed to receive Agency's final decision on her termination or that she was unable to file a timely Petition for Appeal with OEA.[27]

According to Agency, Employee's argument that that her termination was improper because the Notice of Proposed Adverse Action added new causes that were not present in the MOC, Notice of Proposed Written Reprimand, PIP or PIP extension is without merit. Agency states Employee's PIP was a performance management tool and not an adverse action. Agency highlights that Employee has not pointed to any legal authority or regulation mandating that the causes set forth in the Notice of Proposed Adverse Action for her termination must be identical to those set forth in prior corrective actions or performance management tools.[28]

Agency also avers that its termination of Employee was not an abuse of discretion, and it properly weighed the *Douglas* factors. Agency explains that Employee's conduct supports the six (6) enumerated reasons for which she was terminated. Agency notes that the 'Table of Penalties for Corrective and Adverse Actions' indicates an employee can be terminated for a first offense of insubordination. Thus, Employee's termination was reasonable and not an abuse of discretion. Agency states that while Employee asserts that Agency could have issued a suspension or discussed with her the option of voluntary retirement, it is management's prerogative to determine the penalty imposed. Agency avers that suspension is not required under its progressive discipline policy. Agency further stated that it was willing to allow Employee to resign or retire. It explains that after receipt of the Notice of Proposed Adverse Action for Employee's termination, Employee's Union President, Lavern Gooding-Jones ("Ms. Gooding-Jones"), contacted Katharine Bruce ("Ms. Bruce"), Agency's Manager of Employee and Labor Relations to discuss the proposed termination. Ms. Gooding-Jones inquired whether Agency would accept Employee's resignation or retirement in lieu of termination, to which Ms. Bruce responded Agency was willing to do so. Ms. Gooding-Jones indicated she would discuss those options with Employee; however, Employee never tendered her voluntary resignation or retire.[29]

Agency contends that Employee's argument that it improperly weighed the *Douglas* factors and chose to impose the harshest penalty lacks merit. Agency notes that it properly considered the *Douglas* factors as Ms. Jennings appropriately considered and analyzed all *Douglas* factors in the context of the questions and issues posed. Agency maintains that the record is clear that despite repeated opportunities for improvement via the issuance of lesser or alternative sanctions, Employee failed to improve. Agency also concluded that it properly exercised its managerial discretion to

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[27] Agency's Opposition to Employee's Motion for Summary Disposition, *supra.*
[28] *Id.*
[29] *Id.*

terminate Employee, consistent with 8B DCMR § 1910.7, and it properly applied the *Douglas* factors.[30]

ANALYSIS[31]

1) *Whether Agency followed the appropriate PIP procedures in terminating Employee*

Pursuant to 8-B DCMR §1910.1, "[t]he purpose of a Performance Improvement Plan (PIP) is to establish clarity, for both the employee and supervisor, about areas of performance that are deficit and in need of improvement. *The PIP is a management tool for correcting such performance deficiencies and is not a form of discipline*. It is used to monitor and measure deficient work product, processes and/or behaviors as efforts are undertaken to improve performance or modify behavior. *The PIP also serves as the basis for further action if deficient performance continues*." (Emphasis added). Here Agency initially placed Employee on a PIP around July 7, 2021, in an attempt to correct/improve Employee's alleged performance deficits. The outcome of this PIP served as a basis for the instant adverse action.

Employee contends that Agency violated 8-B DCMR §1910.3 of the PIP regulations as it placed her on a 120-day PIP. Agency on the other hand argues that it complied with 8-B DCMR §1910.3. It also avers that placing Employee on a 120-day PIP was within its managerial discretion. Agency further asserts that to the extent that it violated 8-B DCMR §1910.3, any procedural violation was harmless error. 8-B DCMR §1910.3 provides that *"[a]t the sole discretion of the supervisor*, the PIP may be issued for a 30-, 60-, or 90-day period. A PIP may be extended in thirty (30)-day increments up to *a maximum of ninety (90) days*." (Emphasis added). Here, I agree with Agency's assertion that 8-B DCMR §1910.3 gives Agency's management the sole discretion to select the length of the PIP. I find that Agency utilized this managerial discretion when it issued Employee a 60-day PIP effective July 7, 2021. Additionally, I further find that Agency complied with the second part of 8-B DCMR §1910.3, which provides that a PIP *may* be extended in thirty (30)-day increments *up to a maximum of ninety (90) days* (emphasis added). In this instance, although Agency extended Employee's PIP by a sixty (60) day increment, instead of the thirty (30)-day increment provided for in 8-B DCMR §1910.3, the word ***may*** in this section makes this provision discretionary. Additionally, Agency extended the PIP by sixty (60) day, less than the ninety (90) days maximum provided for in 8-B DCMR §1910.3.[32] Accordingly, I conclude that Agency did not violate 8-B DCMR §1910.3 in the instant matter.

Employee also argues that her supervisor, Ms. Jennings, did not inform her that she was extending the PIP. However, she states in her Motion for Summary disposition that Agency extended

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[30] *Id.*
[31] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[31] 801 A.2d 86 (D.C. 2002).
[32] Referencing 6-B DCMR Section 1410.3 which, similar to 8-B DCMR §1910.3, highlights the length of the PIP, the D.C. Court of Appeals in *District of Columbia Department of Health v. District. of Columbia Office of Employee Appeals*, *supra*, noted that "[Section 1410.3] does not set any timetable for government action or specify any time by which public officers must carry out their duties, but instead outlines the fundamental parameters of a PIP. Substantively, a PIP must identify "specific performance areas" and "[p]rovide concrete, measurable action steps"; duration-wise, it "shall last for a period of thirty (30) to ninety (90) days."

her PIP for another 60-day period for a total PIP duration of 120 days, 30 days longer than what is permitted by 8-B DCMR § 1910.3. Agency notes that it emailed a copy of the PIP to Employee, and it also discussed the PIP with Employee during a meeting with Agency's Human Resources and Employee's Union representative.[33] Agency also explains that Ms. Jennings met regularly with Employee concerning Employee's performance, and she referred to the PIP during their discussions. Employee does not dispute this. Moreover, there is evidence in the record of the weekly PIP follow-up meetings between Employee and Ms. Jennings spanning from July 19, 2021, to September 2, 2021.[34]

Referencing 6B DCMR § 1410, Employee argues that Agency failed to notify her of her PIP result within l4 calendar days, pursuant to 8-B DCMR § 1910.4. Employee explains that she was not provided with any notice, written or oral, about the PIP outcome until she received the Notice of Proposed Adverse Action for her termination on January 7, 2022. Agency argues that its regulations do not contain a provision similar to 6B DCMR § 1410.11 regarding the consequences of a supervisor's failure to issue a written decision on a PIP. Agency avers that Employee's reliance on DCMR § 1410 is misguided. Agency notes that pursuant to 8-B DCMR § 100.3, UDC is an independent agency of the government of the District of Columbia, regulated by the provisions of Chapter 8 of the DCMR. Thus, the PIP regulations under 6B DCMR § 1410 are inapplicable here.

8-B DCMR §1910.4 highlights that "[w]ithin *fourteen (14) days of the conclusion of the PIP period*, and in consultation with the University's Office of Human Resources, *the supervisor will make a written determination as to whether the employee has met the requirements of the PIP*. A copy of the supervisor's decision will be provided to the employee." (Emphasis added). Employee's PIP was for a period of 60-days effective July 7, 2021, and ended on September 6, 2021. Agency decided to extend the PIP for another 60 days spanning from September 7, 2021, to November 5, 2021. Pursuant to 8-B DCMR §1910.4, Agency had to provide Employee with a written determination of whether she met the PIP requirements no later that November 19, 2021. However, Agency failed to do so. Agency issued a Notice of Proposed Adverse Action to Employee in January 2022, notifying her of the outcome of the PIP.[35] Agency argues that because, 8-B DCMR §1910.4 does not contain a provision regarding the consequences of a supervisor's failure to issue a written decision on a PIP within the prescribed deadline, this is harmless procedural error. I agree.

The OEA Board in *Kyle Quamina v. Department of Youth Rehabilitation Services,*[36] cited to *Teamsters Local Union 1714 v. Pub. Employee Relations Bd*., 579 A.2d 706, 710 (D.C. 1990), wherein, the D.C. Court of Appeals held that "[t]he general rule is that [a] statutory time period is not mandatory *unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision*. (Emphasis added). In *Watkins v. Department of Youth Rehabilitation Services*[37], this Board adopted the reasoning provided in *Teamsters* when examining a forty-five-day regulation which also addressed the time limit in which an agency was required to issue a final decision in cases of summary removal. The Board in *Watkins* noted that the personnel regulation regarding the forty-five-day rule did not specify

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[33] Agency's Opposition to Employee's Motion for Summary Disposition, *supra,* at Exhibit R.
[34] *Id*. at Exhibits S – W, Y. It should be noted that the record is void of any PIP follow-up weekly meeting/discussion documentation after September 2, 2021.
[35] *Id*. at Exhibit Z. Agency also submitted a Notice of Proposed Adverse Action and a Justification for Termination dated November 4, 2021. Agency asserted that it did not provide Employee with these Notices in November 2021, as dated. Separate copies of these Notices were dated for November 19, 2021, *See* Exhibits AA & BB.
[36] OEA Matter No. 1601-0055-17, Opinion and Order on Petition for Review (April 19, 2019).
[37] OEA Matter No. 1601-0093-10, Opinion and Order on Petition for Review (January 25, 2010).

a consequence for the agency's failure to comply; therefore, the regulation was construed to be directory in nature.[38] Unlike a mandatory provision, a directory provision requires a balancing test to determine whether any prejudice to a party caused by agency delay is outweighed by the interest of another party or the public in allowing the agency to act after the statutory time period has elapsed."[39]

Here, although 8-B DCMR §1910.4 provides a clear time limit for when Agency has to make a determination and inform Employee of the outcome of the PIP, it, however, does not provide a consequence for failing to strictly adhere to this provision. Consequently, I find that Agency correctly asserted that the language of 8-B DCMR §1910.4 should be considered directory, rather than mandatory in nature.

When weighed against the prejudice to Employee, it is clear that the public interest in adjudicating this matter on its merits outweighs Agency's procedural delays.[40] Although Employee was informed several times that her trainings were tied to her employee ID and that she would still be credited for completing the required training using the "incorrect" username, Employee refused to follow her supervisor's instructions to complete the assigned tasks.[41] Even after Employee received a reprimand and was eventually placed on a PIP for failing to complete the training using the "incorrect" username as instructed by her supervisor, Employee did not complete the training throughout the 120 days duration of the PIP. Employee admitted to not completing the trainings despite being instructed to do so. Accordingly, the undersigned agrees with Agency's assertion that Agency's failure to comply with 8-B DCMR §1910.4 is considered harmless error.

OEA Rule 631.3 provides that, "[n]otwithstanding any other provision 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: 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 the action."

Moreover, the OEA Board in *Quamina* addressed this issue of harmless error. It noted that "… an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency's adverse action. Thus, the facts in this matter warrant the invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, this Board will apply a two-prong analysis: whether Agency's error caused substantial harm or prejudice to Employee's rights *and* whether such error significantly affected Agency's final decision to suspend Employee."[42] In applying this two-prong analysis to the current matter, the undersigned finds that Agency's failure to notify Employee of the outcome of the PIP within the required 14 days period did not cause substantial harm or prejudice to Employee. Agency asserted that it began preparing for Employee's termination prior to the expiration of the fourteen (14) days, but because Employee was ill/hospitalized and out of work from mid to late

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[38] In distinguishing mandatory statutory language from directory language, the Board in *Watkins* highlighted the *holding in Metropolitan Police Department v. Public Employee Relations Board,* 1993 WL 761156 (D.C. Super. Ct. August 9, 1993), wherein the Court found statutory language mandatory, not directory, where it provided that no adverse action shall be commenced 45 days after an agency knew or should have known of the act constituting the charge.

[39] *See JGB Property v. D.C. Office of Human Rights,* 364 A.2d 1183 (D.C. 1976); and *Brown v. D.C. Public Relations Board,* 19 A.3d 351 (D.C. 2011). See also *Quamina*, *supra*.

[40] *Watkins at 5.*

[41] Agency's Opposition to Employee's Motion for Summary Disposition, *supra,* at Exhibits L, N, P.

[42] *Quamina*, *supra*.

November through December 2021, Agency did not believe it was appropriate to terminate Employee at that time given her personal circumstances. Moreover, there's no evidence in the record to show that Employee was prejudiced by this violation. Agency also noted that the error did not affect its final decision to terminate Employee because there's evidence proving that Employee did not satisfy the PIP requirements. Therefore, I find that Agency's failure to comply with the 14 days requirement did not significantly affect Agency's decision to terminate Employee. While it is unfortunate that Agency did not provide Employee with a written decision of the PIP outcome within 14 days pursuant to 8-B DCMR § 1910.4, as referenced above, I find that this amount to harmless error.

Employee contends that her termination should not be upheld because the Notice of Proposed Adverse Action - Termination was mailed to an incorrect address. Agency provides that it is undisputed that Employee received notice of her proposed termination, as her attorney submitted a 13-page response. It highlights that Employee produced a copy of the Notice of Proposed Adverse Action for her termination during discovery. Therefore, Employee did not suffer any prejudice as it relates to delivery of the Notice of Proposed Adverse Action for her termination as she was able to timely respond to the bases for the proposed termination. I agree with Agency's assertion. Despite the mistake in her mailing address, Employee timely received the Notice of Proposed Adverse Action for her termination and her representative responded to the Notice. Moreover, Employee admitted that she learned of the outcome of her PIP from the Notice of Proposed Adverse Action. Consequently, I conclude that the wrong mailing address on the Notice of Proposed Adverse Action is harmless error as Employee was not prejudiced by this mistake.

Employee also argues that the Notice of Proposed Adverse Action added new causes of action that had not been included in the MOC, Notice of Proposed Written Reprimand, PIP, or PIP extension. As Agency rightly stated, a PIP is a performance management tool and not an adverse action. Agency highlights that Employee has not pointed to any legal authority or regulation mandating that the causes set forth in the Notice of Proposed Adverse Action for her termination must be identical to those set forth in prior corrective actions or performance management tools.

8-B DCMR § 1910.1 provides in pertinent parts that a PIP "… *is a management tool for correcting such performance deficiencies and is not a form of discipline… The PIP also serves as the basis for further action if deficient performance continues.*" (Emphasis added). Here, I find that the MOC, the PIP and the current adverse actions are separate tools used by Agency to manage its workforce. As provided in 8-B DCMR § 1910.1, Agency can use the outcome of the PIP for further actions such as the basis for an adverse action if the PIP is unsuccessful, as it did in the current matter. Moreover, 8-B DCMR § 1910.8 provides in part that "[a]dverse actions to demote or *separate* an employee *who has failed to perform satisfactorily will be accomplished pursuant to the provisions of Chapter 15* (Progressive Discipline), except for at-will employees." (Emphasis added). In this instance, because Agency found that Employee did not perform satisfactorily while on the PIP, it initiated the current adverse action pursuant to the provisions of 8-B DCMR Chapter 15. Additionally, MOC is not considered an adverse action under 8-B DCMR § 1508. 8-B DCMR § 1508.2 defines an adverse action as "a suspension of ten (10) days or more, a demotion, or a termination."[43]

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[43] 8-B DCMR § 1505 highlights in parts that when an Employee fails to meet performance standards steps will be taken to gather the relevant facts, correctly identify the problem(s), and then determine whether further action is warranted. As a

2) ***Whether Agency had cause to discipline***

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. 8-B DCMR § 1503.4 provides a list of conduct and performance deficiencies which constitute cause and warrant disciplinary action. These include: (1) Failure to meet performance standards (§ 1503.4(m)); (2) Inability to carry out assigned responsibilities or duties (§ 1503.4(n)); (3) Failure or refusal to follow instructions (§1503.4(d)); (4) Neglect of duty (§1503.4(e)); (5) insubordination; and (6) failure or delay in carrying out orders, directions or assignments.

Employee notes that preceding May of 2021, UDC provided no notice of performance deficiencies to Employee including any given in performance appraisals or evaluations. She argues that the purported performance issues leading to the May 21, 2022 MOC stemmed from two UDC electronic systems: (l) Percipio Skillport; and (2) the timekeeping and payroll system.

Employee highlights that the charge of failure or refusal to follow instructions includes a deliberate or malicious refusal to comply with rules, regulations, written procedure or proper supervisory instructions. She explains that her refusal to use the incorrect username out of concern that the "incorrect" username was not connected to her name or employee record was inherently reasonable. She asserts that she sought the assistance of Jennings and her union to resolve this issue, but Agency refused to correct her username. Employee further avers that her refusal to use the "incorrect" username, over which she had no control and could not independently alter, was not borne out of malice nor any deliberate desire not to comply with Ms. Jennings's requests. She simply acted reasonably given the ongoing issues of the username, which was not corrected until October 2021.

Agency on the other hand provides that Employee was specifically directed to engage in Microsoft Office training, yet she blatantly refused to participate in the training using the incorrect username as instructed by her supervisor Ms. Jennings. Agency asserts that Employee admitted to not providing Ms. Jennings with any documentation demonstrating that she completed the assigned training. Agency explains that while Employee took issue with the spelling of her username, it is undisputed that the "incorrect" username was a workable username and Employee was advised that she would still receive credit for the trainings if she logged in with the "incorrect" username. Agency maintains that Employee's argument that it was "inherently reasonable" for her to be concerned that her "incorrect" username was not tied to her employee record, is belied by the factual record. Agency notes that Employee was explicitly informed – even before the MOC was issued – that all the data was tied to the employee identification numbers and that she would receive credit for the training even if she participated in the training using the "incorrect" username.

A review of the record highlights that Employee was mistakenly assigned a username that did not conform with Agency's username practices. Employee brought up this issue to her direct supervisor, Agency's HR, and her union prior to being placed on the PIP in July 2021. Employee was informed that while Agency worked on resolving this issue, Employee could continue using the "incorrect" username for training and she would receive credit for these trainings since the incorrect username was tied to her employee ID.[44] Employee refused to follow her supervisor's instructions to

first step, performance matters will initially be addressed as set forth in 8-DCMR Chapter 19. When counseling is appropriate, supervisor will follow-up the verbal counseling with a Memorandum of Counseling to the employee.

[44] Agency's Opposition to Employee's Motion for Summary Disposition, *supra,* at Exhibits L, N, P.

complete the assigned tasks. She claimed that Agency's request for her to take the training courses to improve computer literacy were not framed as performance failures or mandatory trainings for her to retain her position with UDC. I disagree. These training courses were included in the PIP notice issued on July7, 2021. Employee did not complete the trainings throughout the 120-day PIP period. Based on the aforementioned guarantees from Agency and Employee's continuous refusal to complete the requested training using the "incorrect" username as instructed, I find that Employee's actions were deliberate and not inherently reasonable given the circumstance.[45] I also find that by refusing to complete her assigned tasks as instructed, Employee neglected her duties. Accordingly, I conclude that Agency, in its discretion, can discipline an employee for failure to complete tasks as required, neglect of duty and failure to meet performance standards. For these reasons, I find that Agency has met its burden of proof and has shown that it had cause for these adverse actions.

3) *Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions*

Based on the above-mentioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[46] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM § 1607; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Here, Employee argues that her termination was an abuse of discretion. According to Employee, Agency had alternative options to correct her performance other than termination such as temporary suspension or voluntary retirement giving her years of service with no performance issues. Agency noted that it was willing to allow Employee to resign or retire. It explains that after receipt of the Notice of Proposed Adverse Action for Employee's termination, Employee's Ms. Gooding-Jones contacted Ms. Bruce to discuss the proposed termination. Ms. Gooding-Jones inquired whether Agency would accept Employee's resignation or retirement in lieu of termination, to which Ms. Bruce responded Agency was willing to do so. Ms. Gooding-Jones indicated she would discuss those options with Employee; however, according to Agency, Employee never tendered her voluntary resignation or retire.[47] Employee did not deny this assertion, moreover, there's nothing in the record to suggest that Employee requested to voluntarily retire or resign prior to the effective date of her termination, or even after the effective date of her termination.

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[45] Assuming *arguendo* that Employee's refusal was not deliberate, I still find that Agency had cause for this adverse action as Employee acted negligently/carelessly when she refused to comply with her supervisor's instructions despite being assured numerous times that the "incorrect" username was linked to her employee ID and that she would receive credit for the trainings.

[46] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[47] *Id.*

The District of Columbia Court of Appeals in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172, 1175-1176 (D.C. 2008) held that as a general principle, an employee's decision to [retire] is considered voluntary "if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. With meaningful freedom of choice as the touchstone, courts have recognized that an employee's [retirement] may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information." An attempt by an agency to request that an employee retire would render the retirement involuntary and a constructive removal. In the instant matter, I find that Employee did not initiate a retirement or inform Agency she was willing to retire. Based on the forgoing, Employee had to inform Agency of her willingness to retire and apply for retirement in order for Agency to consider retirement as an alternate option to the corrective action.

Moreover, 8-B DCMR § 1910.7 provides that, "[i]f the employee fails to improve the performance deficiencies during the PIP and their performance remains "Unsatisfactory", the supervisor, in consultation with the Vice President of Human Resources, *must* propose one of the following actions: (a) *Demotion to a lower graded position with the appropriate reduction in salary if such a position is available; or (b) Separation from the University*." (Emphasis added). Thus, I conclude that Agency was faced with two (2) options following Employee's failure to improve her performance during the PIP – demotion or separation. Agency chose separation. I find that Agency's choice to separate Employee is within its managerial discretion. While 8-B DCMR § 1910.7 provides in part that "[a]dverse actions to demote or *separate* an employee *who has failed to perform satisfactorily will be accomplished pursuant to the provisions of Chapter 15* (Progressive Discipline), except for at-will employees," pursuant to 8-B DCMR § 1501.6, "[s]trict application of the progressive steps in § 1501.5 *may not be appropriate in every situation*. Therefore, *the University retains the right to evaluate each situation on its own merits and may skip any or all of the progressive steps*."[48] (Emphasis added). Further, this Office has consistently held that "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[49] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[50]

Here, Employee also argues that Agency failed to properly weigh the *Douglas* factors. Agency notes that it properly considered and applied the *Douglas* factors. I find that Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, in reaching its decision to terminate Employee from service.[51] Employee argues that Agency did not include the

[48] 8-B DCMR § 1501.6 further highlights that any deviation from the progressive disciplinary system is only appropriate when consistent with § 1504. 8-B DCMR § 1504 provides a list of twelve (12) factors that management has to consider when commencing an adverse action. 8-B DCMR § 1504.3 provides that these factors should be considered and balanced to arrive at the appropriate remedy. While not all of these factors may be relevant, consideration should be given to each factor based upon the circumstances. It should be noted that these factors mirror the *Douglas* factors.

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

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

[51] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

Douglas factors with the final agency decision. I conclude that this is harmless error as Agency provided Employee with a detailed *Douglas* factor analysis, along with the Notice of Proposed Adverse Action for Termination issued to Employee.

Further, Chapter 16 §1607 of the District Personnel Manual Table of Illustrative Actions ("TIA") provides that the appropriate penalty for a first occurrence of Neglect of Duty ranges from Counseling to Removal.[52] Additionally, the TIA provides that the appropriate penalty for first occurrence of failure to follow instructions ranges from a Counseling to Removal.[53] As a result, I find that removal is an appropriate penalty under the circumstances. Accordingly, I further find that Agency properly exercised its discretion, and its chosen penalty of termination is reasonable under the circumstances, and not a clear error of judgment. I conclude that Agency had appropriate and sufficient cause to terminate Employee from service. As a result, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Employee's Motion for Summary Disposition is **DENIED**.

It is further **ORDERED** that Agency's action of terminating Employee from service is **UPHELD.**

FOR THE OFFICE:

/s/ *Monica N. Dohnji*________
MONICA DOHNJI, Esq.
Senior Administrative Judge

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2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[52] DPM §1607 et.seq. Table of Illustrative Actions. (2019).
[53] *Id.*