THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0001-20
EMPLOYEE[1],	
Employee	
	Date of Issuance: January 3, 2023
v.	
D.C. DEPARTMENT OF EMPLOYMENT SERVICES,	MICHELLE R. HARRIS, ESQ.
Agency	Senior Administrative Judge

Tamara Slater, Esq., Employee Representative
Timothy M. Belknap, Esq., Employee Representative
Tonya A. Robinson, Esq., Agency Representative[2]

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 10, 2019, ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Employment Services' ("DOES" or "Agency") decision to terminate him from service effective September 18, 2019. OEA issued a letter dated October 16, 2019, requesting an Agency Answer. Agency filed its Answer to Employee's Petition for Appeal on November 15, 2019. Following an unsuccessful attempt at mediation, this matter was assigned to Administrative Judge ("AJ") Arien Cannon. This matter was reassigned to the undersigned on September 8, 2022. The parties conducted discovery and other procedural matters while this matter was assigned to AJ Cannon. Following several motions for extensions of time and prehearing conferences, AJ Cannon issued an Order on October 26, 2021, requiring the parties to submit briefs in this matter.[3] Agency's brief was due on or before December 10, 2021, Employee's response was due on or before January 10, 2022, and Agency had the option to submit a sur-reply brief on or before January 24, 2022. On December 13, 2021, Agency filed a Motion to Extend the time to file. On December 15,

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Agency was previously represented by Starr Granby-Collins, Esq. However, on November 1, 2022, Ms. Granby-Collins notified the undersigned through email that she would be leaving Agency. To date, no notice of appearance was filed as requested in the undersigned's response. Thus, the undersigned has captured Agency's General Counsel, Ms. Robinson.
[3] AJ Cannon required the parties to address the following in their respective briefs: "Based upon the representations made during the prehearing conference and the documents of record, the issues to be addressed are: (l) whether Agency had cause to take adverse action against Employee for violating the D.C. Human Rights Act, D.C. Code § 2-1401.01,et seq. and the District Personnel Manual § 1607.2(d)(2)- Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions; and (2) if so, whether removal was appropriate under the circumstances."

2021, AJ Cannon issued an Order granting Agency's Motion and modified the schedule to require Agency's Brief be submitted on or before January 10, 2022, and that Employee's brief was now due on or before February 10, 2022. Agency filed its brief on January 11, 2022. On February 7, 2022, Employee, by and through his counsel, filed a Consent Motion to Extend the time to file. On February 10, 2022, AJ Cannon issued an Order granting Employee's request. Employee's brief was now due on February 17, 2022, and Agency's sur-reply brief was due on or before March 3, 2022. Employee submitted his brief as required. On March 7, 2022, Agency filed a Motion to extend the time to file its Sur-Reply Brief. Agency filed its Sur-reply brief on March 14, 2022.

As was previously noted, the instant matter was reassigned to the undersigned administrative judge on September 8, 2022. On September 30, 2022, I issued an Order scheduling a Status/Prehearing Conference for October 18, 2022. Both parties appeared as required. During the Status/Prehearing Conference, the parties advised that they had no updates regarding this matter. As a result, no further submissions were required. Upon consideration of the parties' arguments as presented in their submissions to this Office, I have determined that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether termination was the appropriate penalty under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> 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.

SUMMARY OF THE PARTIES' POSITIONS

Employee worked for Agency as an Unemployment Tax Auditor for four (4) years. In a Final Written Notice dated September 3, 2019, Agency terminated Employee from service noting the following: "**On August 9, 2018, while on duty, you violated the DC Human Rights Act, DC Code §2-1401.01 et seq., and its implementing regulations, 4 DCMR §100 et seq. (1607.2(d)(2) of the District**

Personnel Manual (DPM)). Final Action: Removal." (Emphasis added). In an Amended Advance Written Notice of Proposed Removal dated July 22, 2019, the cause of the proposed action was noted as: "Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions. See § 1607.2 (d)(2) of the DPM."[4] It should also be noted that the record reflects that the original Advance Written Notice of Proposed Removal dated November 9, 2018, also charged Employee with violation of 1607.2.(d)(2).

Agency's Position

Agency asserts that it had cause to terminate Employee from service and that it did so in accordance with all applicable laws, rules and regulations. Agency avers that Employee was terminated on September 17, 2019, "for conduct which violated local District law and Department of Employee Services (DOES) policies."[5] Agency asserts that Employee "posted derogatory pictures of his co-worker's body parts and workstation and engaging in negative comments with his social media follower of nearly 2,000 people."[6] Agency avers that Employee admitted on two separate occasions that he posted pictures of other Agency employees on social media. Further, Agency cites that on "August 10, 2018[7], he posted a picture on his personal Instagram account of the carpet of a co-worker's workstation with the caption, "I'm trying to understand why my coworkers carpet at they desk is so damn filthy," followed by two emojis of a face slapping himself in the forehead."[8] Agency avers that Employee then "engaged with his followers regarding how filthy the carpet was and stated that "this shyt mad disrespectful." After this incident, Agency asserts that on September 7, 2018, "Employee posted a picture of a co-worker's ankles and feet with the caption "But why is his ankle this ashy though" followed by two emojis of what appears to be a person slapping himself in the forehead."[9]

Agency again cites that Employee posted this to his personal Instagram account. Agency asserts that another DOES employee, later identified as Jainaba Blagrove, commented on his post and said "This is such a violation…stop taking pics of people at work...or block me" followed by several emojis of what appears to be a horrified face."[10] Agency avers that Employee's actions "disrupted operations as it triggered loud cursing on the workplace floor when Employee Blagrove reacted to his Instagram Post." Agency also asserts that "it is not a coincidence that the co-workers he decided to degrade are both of

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[4] This notice included several specifications that mentioned the D.C. Human Rights Act:

> "Employee engaged in conduct that is deemed discriminatory, unprofessional, bullying and disruptive in violation of the D.C. Human Rights Act and its implementing regulations, DOES Policy 700.40-2; DOES Policy 300.20-1; DOES Policy 700.40-2; DOES Policy 700.40-7, and the DPM, when he took or received pictures of coworkers' body parts, coworkers' workspaces and posted said pictures on his personal social media platform. Employee made discriminatory comments related to the coworkers' personal appearance and engaged in conversation with others on his personal social media platform about the coworkers' personal appearance in said pictures. On September 6, 2018, DOES received a complaint that you posted a picture of a co-worker on your personal social media account and made comments that were discriminatory in nature about the personal appearance of the coworker, in violation of District of Columbia law, regulations, and policies."

[5] Agency's Brief at Page 5 (January 11, 2022).

[6] *Id.*

[7] The undersigned notes that Agency's brief and notices all reflect different dates of the incident. The final notice indicates that the incident took place on August 8, 2018. The Advance Written Notice of Proposed Removal dated November 9, 2018, and the Amended Advance Notice both cite that "on August 9, 2018, prior to your tour of duty you took a picture of a co-worker's workspace for the explicit purpose of posting on your social media account to make negative comments about your co-worker." In its brief, Agency cites that the actions occurred August 10, 2018 (carpet picture) and September 7, 2019 (ankle picture). For the purposes of this Initial Decision, the undersigned is relying upon the dates conveyed in the Final Notice and Hearing Officer's report.

[8] *Id.*

[9] *Id.*

[10] *Id*.

West African descent as Employee is on record stating that witness Jainaba Blagrove should not be believed because she is of African descent."[11]

Agency argues that it had cause to take action against the employee for violating the Human Rights Act, D.C. Code § 2-1401.01 et seq., and the District Personnel Manual § 1607.2 (d)(2) for deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions. Agency avers that Employee violated the DPM §1605.4 and § 1605.4(d) broadly and thus all penalties under this section of the DPM apply. Agency argues that the DPM lists the actions which include deliberate and malicious refusal to follow instructions.[12] Agency also asserts that Employee "broadly violated the D.C. Human Rights Act." Agency maintains that Employee made posts and statements on his social media regarding his co-worker's personal appearance and that it was not a coincidence that the co-workers were both of West African descent.[13] Agency asserts that Employee "created an environment where protected classes of people did not feel safe." Agency avers it was its duty to investigate and once it did, it determined that Employee's actions were discriminatory in nature. For these reasons, Agency asserts it had cause to effect Employee's termination.

Agency also asserts that Employee's conduct was so egregious that there was no comparable conduct. Agency cites that Employee's brief mentions the conduct of James Penn who was not terminated.[14] Agency argues that Penn said words in an isolated stairwell and during an argument, Penn misgendered a coworker. The other coworker was also disciplined, and Agency asserts that only three (3) people were present to witness this incident. Agency avers that this "is unequivocally distinguished from the behavior of Employee." Agency asserts that Employee "embarrassed and humiliated his co-workers before a social media following of almost 2,000 people."[15] Agency also asserts that none of Employee's due process rights were violated in the administration of the discipline. Regarding the investigative report, Agency asserts that an investigative report is not binding. Agency avers that just because the investigative report did not recommend Employee's removal, does not mean it had to adhere to that. Agency maintains that it was "well within the Agency's right to deviate from the investigative report as Employee's conduct was egregious and not comparable to any other conduct in the agency."[16]

Agency further asserts that Employee had notice of his removal and any errors it made in assessing the DPM provisions would amount to "harmless error" as noted in OEA Rule 631.3.[17] To that end, Agency asserts that whether they "charged Employee with deliberate or malicious failure to follow rules or negligent failure to follow rules, the result is the same and both penalties fall directly under District Personnel Manual §1065.4 (d) and subjected Employee to removal on the first offense.[18] Agency reiterates that Employee " took pictures in an area that was clearly marked by restrictive signage, as such his behavior deliberately failed to follow instructions."[19] Agency asserts that "Employee received its DOES Policy 700.40-2 and as such his failure to follow this policy can be seen as deliberate and malicious."[20] Agency also notes that it properly notified Employee of all charges and that all due consideration was given. Agency further cites that it "relied heavily on the independent administrative review by Hearing Officer Charles Thomas." Agency asserts that the Deciding Official noted in the final

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[11] *Id*.
[12] *Id.* at Page 9.
[13] *Id.*
[14] Agency Sur Reply Brief (March 14, 2022).
[15] *Id*. at Page 2.
[16] *Id*. at Page 3
[17] *Id*.
[18] *Id*.
[19] *Id*. at Page 4.
[20] *Id.*

notice that the "proposed separation is the appropriate resolution at this time."[21] Agency maintains it acted in accordance with all applicable rules and that the termination should be upheld.

Employee's Position

Employee avers removal was not warranted in this matter. Employee asserts that Agency "relied entirely on conclusory statements, failing to present even a single argument in support of removal."[22] Further, Employee asserts that the actions fell "far short of violating the D.C. Human Rights act or constituting "deliberate or malicious" failure to abide by the Department of Employment Services ("DOES") rules prohibiting discrimination."[23] Employee admits to posting photographs on his social media account, but argues that removal was inappropriate. Employee also asserts that in the administration of the instant action, that his due process rights were violated. Employee asserts that each stage of this disciplinary process "made it more difficult for [Employee] to defend against the charges because the charges themselves kept changing."[24] Employee also asserts that the Proposing Official ("PO") failed to consider the Douglas Factors as required and that Agency failed to provide Employee with the documentation relied upon by the PO.[25] Further, Employee avers that the Investigative Report did not mention removal, but found Employee's conduct supported "adverse action for four distinct offenses, each carrying a penalty of counseling to 5-30 days of suspension."[26] As a result, Employee avers that he was prevented from addressing the reason that the Proposing Official proposed removal as opposed to one of the lesser penalties for the other causes. Employee asserts that this "prejudiced his ability to adequately respond to the proposed action."[27]

Employee further argues that Agency failed to show that he violated DPM §§1605.4 or 1605.4(d). Employee avers that in the DPM there are "two relevant penalty levels for an employee who was found to have "failed to follow instruction": (1) Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions; (2) Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions." Employee notes that the deliberate or malicious refusal "carries a higher recommended penalty than negligence" and that is what he was charged with. Employee maintains that "[t]he first time the Agency made any attempt at explaining how [Employee's] conduct was deliberate or malicious came in the Agency's Brief, filed in January 2022."[28] Employee argues that Agency presented no evidence to support its contention that Employee was "given DOES policies upon onboarding and told that the policies may also be found on the intranet." Employee avers that "by the plain language of the charge [he] must have deliberately or maliciously refused to comply. Employee argues that there is no evidence that he was aware of any violation of rules, regulations, written procedures or instruction that he was violation; or that his intent was otherwise deliberate or malicious.

Employee avers that Agency had failed to prove he violated the D.C. Human Rights Act. Employee asserts that Agency relied upon "conclusory and unsupported assertions" to support its contentions regarding the DCHRA. Employee iterates that Agency asserts that his actions were discriminatory based on personal appearance, but that no explanation or case law has been provided to support that claim. Employee avers that one of the two (2) pictures for which he was investigated was of carpeting. The other picture was of an individual's ankle and "does include a body part, but involves

[21] *Id*. at Page 5.
[22] Employee's Response Brief (February 18, 2022).
[23] *Id.*
[24] *Id*. at Page 7.
[25] *Id*. at Page 9.
[26] *Id*.
[27] *Id*. at Page 9-10.
[28] *Id*. at Page 12.

personal hygiene, which is not clearly covered by D.C. Code § 2-1401-02 (22); and does not identify the individual in the photograph."[29] Employee asserts that Agency was obligated to explain how his conduct falls within the regulation for him to defend against such claims. Employee also argues that Agency's claim regarding national origin discrimination was the reason for removal. Employee cites that "there are one or two references to national origin in the entire removal record, but nowhere is national origin cited as a reason for [Employee's] removal."[30] Employee argues that the addition of this information at this "late stage is entirely improper and … in violation of [Employee's] due process rights.[31]"

Employee also argues that his termination was inconsistent with the only comparator employee in the record. "The comparator employee was James Penn who intentionally used improper pronouns when referring to a transgender colleague in front of [Employee] multiple times."[32] However, Penn was only proposed to be suspended for five (5) days and ultimately it was reduced to a formal written reprimand because it was Penn's first offense.[33] Employee argues that this case is similar to his because it was: 1) a first offense, 2) both were accused of discrimination, 3)both committed multiple acts that were the subject of the same action, 4) the conduct was admitted to and 5) the employee denied discriminatory intent.[34] Employee also raised the issue before the Hearing Officer, that he was on administrative leave for over (10) months in this matter and that violated DPM Section 1619. Employee also avers that removal was inconsistent with Agency's progressive discipline policies. For these reasons, Employee avers that his removal should be reversed.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

ANALYSIS[35]

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

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[29] *Id*. at Page 13.
[30] *Id*. at Page 14.
[31] *Id*.
[32] *Id*. at Page 15.
[33] *Id*.
[34] *Id*. at Page 16.
[35]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").

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. In the instant matter, Employee was terminated from service effective September 17, 2019, pursuant to Agency's Final Notice, dated September 3, 2019. Employee was terminated from service for the following: "On August 9, 2018, while on duty, you violated the DC Human Rights Act, DC Code § 2-1401.01 et seq., and its implementing regulations, 4 DCMR § 100 et seq (§ 1607.2 (d)(2) of the District Personnel Manual (DPM)." The undersigned would note that the Final Notice was preceded by two advanced notices. The first, dated November 9, 2018, followed by an Amended Advance Notice dated July 19, 2019. Both advance notices cite different causes of action than what was noted in the Final Notice.

Employee's discipline was effectuated due to an incident that occurred on August 9, 2018, wherein, Employee posted pictures of a co-worker's ankles/feet to his Instagram social media account. Agency avers that Employee's posts were seen by his followers and that another co-worker, identified as Jainaba Blagrove ("Blagrove"), was so upset at the post that she had an outburst in the workplace. Following a complaint received on September 6, 2018, an investigation into this incident was initiated by Agency and Employee was placed on Administrative Leave on September 10, 2018. The investigation of this incident was completed on October 2, 2018.[36] Thereafter, the first Advanced Notice dated November 9, 2018, was issued citing that Employee was being charged with violation of DPM§1607.2(d)(2) – Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions. A second Amended Advance Notice was issued July 22, 2019, which charged Employee with the same conduct. A Final Notice of removal was issued on September 3, 2019, which differed from the Advance notices, in that it charged Employee with violation of the D.C. Human Rights Act and its "implementing regulations" under DPM.[37]

Cause of Action - Violation of D.C. Human Rights Act

In the instant matter, there is no dispute that images were posted to Employee's Instagram social media accounts and that those pictures included one of co-worker's ankles, and another of carpeting in another co-worker's workspace. Agency's Final Notice deviated from the previously issued Advanced Notices that were issued in this matter. The Final Notice terminated Employee for violation of the D.C. Human Rights Act ("DCHRA"). Agency avers that the pictures that Employee posted to social media were discriminatory in nature and thus in violation of the DCHRA. The first picture was of carpeting in the workplace, wherein Employee captioned and commented on why that area was filthy. The next picture, which was specifically noted in the Final Notice, was a picture of an unidentified co-worker's ankle, wherein Employee cited in the caption that the ankle was "ashy". Agency avers that these actions constituted discrimination based upon personal appearance and violated the D.C. Human Rights Act, D.C. Code §2-1401.01 et seq.[38] Agency also asserts that comments made by Employee regarding coworkers of West African descent were "not a coincidence" and further exhibited the violation of the D.C. Human Rights Act. The D.C. Human Rights Act includes 23 Protected Traits for which discrimination is prohibited. One of those protected traits is personal appearance. Personal appearance is defined as

[36] These are the dates cited in the Hearing Officer's Report. As previously noted, Agency's submissions all include different dates, thus the undersigned has relied upon what was presented in the Hearing Officer's Report and Final Agency Notice. See. Hearing Officer's Report dated August 23, 2019.

[37] In a Final Written Notice dated September 3, 2019, Agency terminated Employee from service noting the following: "On August 9, 2018, while on duty, you violated the DC Human Rights Act, DC Code §2- 1401.01 et seq., and its implementing regulations, 4 DCMR §100 et seq. (1607.2(d)(2) of the District Personnel Manual (DPM)). Final Action: Removal."

[38] It should be noted that in enacting this code provision the Council cited that "It is the intent of the Council of the District of Columbia, in enacting this unit, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, **discrimination** by reason of race, color, religion, national origin, sex, age, marital status, personal appearance…" (emphasis added)

"outward appearance, irrespective of sex and gender identity or expression, including hair style and color, facial hair, tattoos, body size or shape, and body piercings, subject to business requirements and standards." Further, the D.C. Office of Human Rights (OHR) Enforcement Guide[39] on personal appearance provides that: "[t]he Human Rights Act provides that a person may not be *discriminated* against based on the individual's actual or perceived "personal appearance," which means employers, for example, may not refuse to hire someone because the individual wears a head scarf, or has dreadlocks. However, an employer or a place of public accommodation can establish requirements for cleanliness, uniforms or other standards so long as the established standard is for a reasonable business purpose and applied uniformly to everyone." (Emphasis added).

Upon review of Agency's assertions, I find that Agency has failed to prove that Employee's actions of posting the pictures to social media constituted discrimination and violated the D.C. Human Rights Act. Further, I find that Agency's assertions that it was "no coincidence" that the other employees involved were of West African descent and thus rose to discrimination, to be unsupported by the record. Agency's assertions in this regard are speculative and fail to provide specific evidence to support the contention that Employee's actions constituted discrimination. There is one witness statement wherein it is referenced that Employee referred to someone of West African descent; but the undersigned finds that the actions of posting the pictures, do not allude to national origin. The picture of the ankles and the associated comment by Employee does give rise to personal appearance ("ashy ankle"), however I find that Agency has failed to show how this rose to the level of discrimination that is prohibited by and in violation of the DCHRA. It should be noted that the Hearing Officer's report in this matter explicitly noted that Agency failed to state with specificity how Employee's actions resulted in a violation of the DCHRA.[40] The undersigned agrees with the Hearing Officer's conclusion in this regard. Further, Agency in its brief alludes to Employee's actions to have "broadly" violated the DCHRA. I find that this assertion by Agency also fails, as a "broad" sweep application of a regulation to levy discipline against an employee does not meet the standards of specificity that an agency should utilize in the administration of an adverse action. As a result, I find that Agency has failed to show it had cause for adverse action against Employee for this charge.

Additionally, as was previously mentioned, the undersigned notes that the Hearing Officer's report *specifically* found that Agency failed to show cause for adverse action for violation of the D.C. Human Rights Act. This is of particular note given Agency's assertion that it "relied heavily on the independent administrative review issued by Hearing Officer Charles Thomas."[41] That stated, the undersigned finds it perplexing that Agency changed its charges in the Final Notice, wherein it had previously charged Employee with deliberate and malicious refusal to follow instructions in the two (2) previously issued Advance Written Notices. It should also be noted that those charges were what the

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[39] OHR Enforcement Guidance 17-03 – "Unlawful Treatment Based on Personal Appearance, Political Affiliation and Matriculation. (September 18, 2017). o

[40] *See.* Hearing Officer's Report Pages 10-11. The Hearing Officer explicitly noted the following:

> "The agency was able to establish a prima facie case regarding the broad relevancy and coverage under the D.C. Human Rights Act. There is little to no doubt that the DOES Director is empowered to "...receive and investigate complaints of alleged discrimination in personnel matters, from employees who contend they have been discriminated against in connection with any aspect of District government employment because…personal appearance..." **However, a detailed review of the evidence submitted highlights that the agency <u>was not</u> able to make a clearly established argument as to which specific sections of the Act they deem are most relevant, and more importantly applicable, to the facts created by the employee's actions. To relay [sic] upon the Act in its totality, and all of "its implementing regulations", without specific section or citation references makes a review of the evidence and application of the facts nearly impossible given such a broad canvas of law and regulation. As a result, the agency's presentation, as submitted does not warrant an adverse action against the employee."** (Emphasis added). (August 23, 2019). The Hearing Officer in this matter was, Charles L. Thomas, Administrative Law Judge.

[41] Agency's Sur Reply Brief at Page 5 (March 14, 2022).

Hearing Officer's review was based upon, though his review included a review of the DCHRA since Agency referenced this as an "implementing regulation." This Office, in accordance with the rulings of the Superior Court for the District of Columbia ("D.C. Superior Court"), has held that agencies are required to specify the causes of actions for which employees have been charged in order for the employee to properly defend the action.[42] That noted, while I have already determined that Agency has failed to show cause for adverse action under the charges in the Final Notice, I also find that Agency's notices in this matter are deficient in that it changed the charges in the Final Notice from what was indicated in the Advance Notices.

Agency's Final Notice charged Employee with violation of the DCHRA and also included the language which cited that "you violated the DC Human Rights Act, DC Code §2- 1401.01 et seq., ***and its implementing regulations, 4 DCMR §100 et seq. (1607.2(d)(2) of the District Personnel Manual (DPM)*** **(**Emphasis added)**.** I find that this deviation from the previously issued Advance Notices, along with the fact that the Hearing Officer's review relied upon the charges noted in the July 22, 2019 - Amended Notice, clearly evinces Agency's failure to state the charges against Employee with the specificity standards required. While Agency avers that Employee had notice and that its actions regarding the DPM constituted harmless error under OEA Rule 631.3[43], I find that this argument fails based on Agency's actions of changing the Final Notice. Further, the undersigned finds it troubling that Agency would deviate from its previously issued charges, particularly given that the Hearing Officer found that its charges under the DCHRA did not warrant adverse action. The undersigned also finds that Agency erred in its citation of "implementing regulations." The undersigned finds that the DPM section that directly corresponds to the DCHRA is found in section 1607.2 (j) —Discriminatory Practices. Thus, I find that Agency also failed to rely on the correct associative DPM provisions related to the DCHRA in its administration of the instant adverse action. For these reasons, I find that Agency has failed to meet its burden of proof and has not shown cause for adverse action. I also find that Agency failed to administer this action in accordance with all applicable laws, rules and regulations.

Administrative Leave

In the instant matter, during the administration of the instant adverse action, Employee was on administrative leave for over ten (10) months. Agency avers that Employee was not harmed or prejudiced by this action. Employee avers that the DPM provides that administrative leave should not exceed 90 days, and that Agency's action of having him on administrative leave for over ten (10) months was in violation of those provisions. DPM §1619.2 – cites that "…Except as provided in §1619.3 and 1619.4, an agency may place an employee on administrative leave for no more than ninety (90) calendar days." DPM § 1619.3 notes that "prior to the expiration of the time limit in § 1619.2*,* an agency head may make a written request for an extension of the time to the personnel authority." Further, DPM §1619.4, notes that "the personnel authority may approve extensions of time in increments of no more than thirty (30) days in two instances."[44] DPM § 1619.5 requires that "when the time limits prescribed by this section are exhausted the employee *shall be returned to full duty* pending a final agency decision. (Emphasis

[42] D.C. Superior Court has opined that "[A]n employer is required to provide an employee, against whom an adverse action is recommended, with advance written notice stating any and all causes for which the employee is charged and the reasons, specifically and in detail, for the proposed action." *See also*. *Rachel George v. D.C. Office of the Attorney General,* OEA Matter No. 1601-0050-16, Opinion and Order (July 16, 2019); *See also Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994); *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981); and *Sefton v. D.C. Fire and Emergency Svcs*., OEA Matter No. 1601-0109-13 (August 18, 2014).

[43] Agency's Sur Reply Brief at Page 3-4 (March 14, 2022).

[44] DPM§1619.4 – " The personnel authority may approve extensions of time in increments of no more than thirty (30) days when: (a) Returning the employee to duty would undermine the integrity of District government operations, threaten the safety of employees, or threaten the safety of the health, safety or welfare of the public; or (b) The agency has been diligently pursuing a final decision and the delay is due to circumstances beyond the agency's control. (2017).

added)." In the instant matter, on or around September 6, 2018, Agency received a complaint about Employee's actions. Employee was placed on administrative leave on September 10, 2018.[45] An investigation was conducted by Agency and concluded on October 2, 2018.[46] Agency's first Advance Notice was issued November 9, 2018, and its Amended Advance Notice was issued July 22, 2019. However, the final notice was not issued until September 3, 2019.

Employee was on administrative this entire period. Agency has not provided any evidence citing that it made a written request to extend the time for administrative leave in this matter; nor has it provided any evidence or explanation for the extended administrative leave or the length of time it took in the administration of this disciplinary action. The record is void of any evidence of an investigation by another District investigative entity. Further, the Hearing Officer in this matter noted that Agency's investigation concluded on October 2, 2018. DPM § 1619.5*,* states if the timelines are exhausted as required by the other section of this rule, that the Employee *shall* be returned to full duty pending a final notice. I find that Agency failed to meet the requirements set forth in DPM §1619 by continuing to hold Employee in an administrative leave posture from September 10, 2018, until the final notice was issued on September 3, 2019. The undersigned has already determined that Agency failed to show cause and meet the burden of proof for this action against Employee. That noted, the undersigned would also cite that Agency's failure to administer this action in a timely manner in accordance with DPM 1619 would have also warranted a reversal of this action for failure to follow all applicable laws, rules and regulations.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency did not have cause for adverse action against Employee. Further, the undersigned finds assuming *arguendo* that there was cause in this matter, that Agency's penalty still would not have been appropriate. Agency's Advanced Notice of Proposed Adverse Action and Amended Advanced Notice, both differed in the charges in its Final Notice. As was previously cited, OEA, in accordance with the rulings of D.C. Superior Court, has held that agencies are required to specify the charges for which an employee has been charged so that the employee can adequately defend themselves.[47] Wherefore, I find that Agency's change to the Final Notice failed to meet this standard. Consequently, for the reasons outlined in this decision regarding Agency's failure to meet the burden of proof for cause in this matter, the undersigned finds that the penalty of termination was not appropriate.

ORDER

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

1. Agency's action of terminating Employee from service is hereby **REVERSED.**

[45] Employee's Petition for Appeal at Amended Response (October 10, 2019).
[46] *See.* Hearing Officer's Report (August 23, 2019).
[47] D.C. Superior Court opined that "[A]n employer is required to provide an employee, against whom an adverse action is recommended, with advance written notice stating any and all causes for which the employee is charged and the reasons, specifically and in detail, for the proposed action." *See also*. *Rachel George v. D.C. Office of the Attorney General,* OEA Matter No. 1601-0050-16, Opinion and Order (July 16, 2019); *See also Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994); *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981); and *Sefton v. D.C. Fire and Emergency Svcs*., OEA Matter No. 1601-0109-13 (August 18, 2014).

2. Agency shall reinstate Employee to his position of record, and Agency shall reimburse employee all pay and benefits lost as a result of his removal.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Senior Administrative Judge