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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0044-12R14
KAREN FALLS,)	
Employee)	
)	Date of Issuance: August 12, 2014
v.)	
)	
DEPARTMENT OF GENERAL SERVICES,)	
Agency)	
_____)	
)	Arien P. Cannon, Esq.
)	Administrative Judge
Edgar Ndjatou, Esq., Employee Representative)	
Charles Brown, Jr., Esq., Agency Representative)	
C. Vaughn Adams, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Karen Falls (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on December 27, 2011, challenging the Department of General Services’ (“Agency”) decision to terminate her, effective December 24, 2011. This action was proposed in accordance with Chapter 16, §§§ 1603.2, 1603.3(f), 1605.1 of the District Personnel Manual (“DPM”). At the time of her termination, Employee was a Lead Protective Services Officer with Agency.¹ Employee’s removal was based on the following cause: Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include: neglect of duty, insubordination, incompetence, and malfeasance, as defined in the District Personnel Manual § 1603.² This matter was assigned to me on August 9, 2013.

A Prehearing Conference was held on September 30, 2013. In its Answer, and at the Prehearing Conference, Agency argued its Motion to Dismiss for Lack of Jurisdiction. The motion was denied. Subsequently, Agency filed an Interlocutory Appeal with the OEA Board on October 8, 2013. On October 29, 2013, Agency’s Interlocutory Appeal was denied and the

¹ The Protective Services Police Department falls under the ambit of the Department of General Services.

² See Agency’s Answer, Tab 8 Notice of Final Decision (February 6, 2012).

matter was remanded to the undersigned so that the case could continue on its merits. As such, an order was issued on October 31, 2013, by the undersigned requiring the parties to address the issues discussed at the Prehearing Conference. Both parties submitted briefs on November 22, 2013. Employee also submitted supplemental filings on December 3, 2013 and December 13, 2013, respectively. Based on the submissions of the parties, it was determined that an Evidentiary Hearing was warranted. Accordingly, an Evidentiary Hearing was convened on May 19, 2014. Both parties submitted written closing briefs. The record is now closed.

JURISDICTION

This 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 (termination) against Employee.
2. If so, was the penalty of termination appropriate 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.

Agency's position

Agency asserts that from January 1, 2010 through September 16, 2011, leadership of the Protective Services Police Department ("PSPD") reported that Employee did not adequately schedule her annual and sick leave.³ After being placed on leave restriction in April of 2011,

³ In Agency's Advance Notice of Proposed Removal, Answer to Employee's Petition for Appeal, and Agency's Brief Regarding Petitioner's Appeal, it cites that Employee was removed based on the following causes: *unauthorized absence*, neglect of duty, insubordination, and incompetence. However, the Notice of Final Decision issued to Employee, which serves as Agency's official termination letter, cites the following causes: neglect of duty, insubordination, incompetence, and malfeasance; *it does not include the cause of unauthorized absence*.

Employee struggled to properly schedule leave at work. During this time, Employee had utilized 251 hours of annual leave; however, only 26 of those hours were scheduled in advance. During this same time period, Employee took 148 hours of sick leave with only 12 hours being scheduled in advance. Agency asserts that it tried to contact Employee through several mediums, including phone calls, e-mails, and visits to her residence to conduct welfare checks. Agency argues that Employee's unauthorized absence, neglect of duty, insubordination, and incompetence left her unable to perform her duties. Agency provides a list of progressive discipline with Employee, which is the reason why Agency elected to terminate Employee.

Agency asserts that its leadership has documented multiple instances of Employee's neglect of duty, insubordination, and incompetence during her tenure with Agency. Agency argues that Employee's refusal to exercise her authority when required, sleeping on the job, insubordination, and lack of competency in basic skills as a PSPD Officer, presented a threat to the public and her co-workers. In its Advance Written Notice of Proposed Removal, dated September 16, 2011, Agency states that it documented Employee's behavior of neglect of duty, insubordination, and incompetence, which included: sleeping on duty, reporting to work late, noncompliance of proper uniform, leaving her service weapon unsecure, abandoning post, inability to focus on the job during tour of duty hours, lack of improvement during field training, lack of comprehension of training material, lack of retention of job duties, using profanity to co-workers and supervisors, refusing to obey an order, providing false statements, failing to make proper notification, and being absent without leave. Agency asserts that it attempted to provide counseling, training, and that it applied progressive discipline to get Employee to fulfill the requirements of her position.

Employee's position

Employee asserts that she was subjected to concerted efforts by her superiors to single her out for discipline and to create a tenuous work environment for her. Employee further asserts that Agency's actions were in retaliation for filing discrimination complaints and complaining about the misconduct of other Agency employees, who were more favored by Agency.

SUMMARY OF TESTIMONY

On May 19, 2014, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their positions.

Agency's Case-in-Chief

Captain Steve Parker ("Parker") Tr. 9-58

Parker testified in relevant part that: in 2010 and 2011, he was a Police Captain for the Protective Services Division. Parker currently works for the Protective Services Division

(“PSD”) of the Department of General Services as a civilian contract compliance monitor. Parker came to know Employee when he arrived at Agency in 2009. Employee worked on the day shift at some point while Parker was the police captain. Parker stated that Employee was a Lead Protective Services Officer. Parker further described a Protective Services Officer’s job, which was to respond to patrol calls in the city, shelters, and other District government buildings to perform security duties, building sweeps, and to protect and serve the citizens of the District of Columbia.⁴ Patrol Officers are licensed by the Metropolitan Police Department (“MPD”) Security Officer’s Management Branch. Officers with this license from MPD are authorized to arrest, patrol, and use force on District property. Patrol Officers are provided a badge, gun, OC spray (pepper spray), handcuffs, baton, report writing material, access to cruisers, and a police radio.

Parker further testified that he never directly supervised Employee, but had a sergeant and lieutenant on his shift that primarily provided direct supervision over Employee. Parker oversaw the whole shift. Parker also stated that he had disciplinary responsibilities and that there came a time when he had to take disciplinary actions against Employee.⁵ Parker testified that he issued Employee a letter of leave restriction on April 6, 2011, based on Employee’s history of taking both scheduled and unscheduled leave. Parker explained that an audit was conducted of Employee’s use of leave. Based on this audit, it was determined that Employee exhibited a pattern of abusing her leave. Parker also described leave restriction as a directive from the District Government that states, “although we’re not denying you leave, you must go through certain steps in order to get that leave approved.”⁶ The leave restriction provided guidelines that Employee should have followed for requesting leave. Parker also stated that Employee was not the only employee that he had placed on leave restriction. The parameters for Employee to request leave required her to contact Captain Parker, via telephone, and if she was unable to reach Parker, then she was to call another person up the chain of command. The leave restriction letter noted that during the 12 months prior to the leave restriction being implemented, Employee used 134 hours of annual leave, with only 26 hours being scheduled in advance. Eighty percent of Employee’s leave was unscheduled during this time frame.

Parker stated that Employee’s excessive use of leave posed a problem for Agency because personnel is deployed based on who is scheduled to work during a particular shift. When employees call out sick or do not come to work as scheduled, it causes Agency to have other officers stay longer than their scheduled tour of duty, or come in earlier than their scheduled tour of duty. Doing so costs Agency additional funds because they have to pay the fill-in Officers overtime pay.

Parker also testified that during the same 12 month period addressed in the leave restriction letter, that Employee used 144 hours of sick leave, but only scheduled eight (8) hours in advance. Ninety-four (94) percent of Employee’s leave was unscheduled during this time period. Parker stated that these numbers were received from Agency’s personnel, who is responsible for maintaining attendance records in the computer system.⁷ Parker stated that once

⁴ See Agency’s Exhibit 5.

⁵ See Agency’s Exhibit 9.

⁶ Tr. at 16.

⁷ See Agency’s Exhibit 16.

Employee failed to meet the requirements of the leave restriction, he had further discussions with her regarding her use of leave.

Parker testified regarding a memorandum, dated April 27, 2011, from Commander Prentice concerning Employee. The memo outlined an incident wherein Employee attended training and wanted to leave four hours into her shift. Employee requested leave from Lieutenant Matthew Sheldon, who denied Employee's leave request and told Employee to report back to headquarters. Employee was given a ride back to headquarters. Instead of going into the building, Employee got into her car and left the premises, abandoning her post. Parker stated that based on the leave restriction letter Employee received a couple weeks prior, that Employee should have contacted him or Commander Polk to request leave. Employee did not contact either person. Despite Employee being denied, she took leave anyway, which amounted to Employee being insubordinate. As a result of the incident on April 20, 2011 (abandoning post), Parker issued an Advance Written Notice of Proposed Suspension, which proposed suspending Employee for three (3) days. The basis for this proposal was insubordination and neglect of duty.⁸

Parker further testified, in detail, that he observed Employee in the report writing room sleeping while on duty. Parker prepared a written statement regarding this incident.⁹ Parker testified that he observed Employee sleeping. Parker stated that based on his 52 years of living, he was able to determine that Employee was, in fact, sleeping in the writing report room. Although Parker did not hear Employee snoring and did not try to get her attention, he was positive she was sleeping. When Parker walked to and from the door to the report writing room, Employee did not react and made no acknowledgement of Parker's footsteps.

On September 16, 2011, Employee was given an Advance Written Notice of Proposed Removal. Parker testified that he signed the "Acknowledgement of Receipt" section of the advance notice as a witness to Employee being served with the notice. Parker added that Employee's removal was based on her overall performance, write-ups, and different insubordination charges over the preceding year and a half prior to the notice being issued.¹⁰

Parker testified that he was unaware of Employee's medical condition at the time she was placed on leave restriction and did not inquire about her medical condition.

Parker further testified about a letter of admonition issued to Employee on April 5, 2011. The letter of admonition was based on an incident, which occurred on April 2, 2011. Employee had requested sick leave; however, she failed to contact Agency an hour prior to her shift.¹¹ Employee contacted an official at 5:55 a.m., while her duty started at 6:30 a.m. The cause relied upon for this letter was neglect of duty and insubordination. This incident occurred before Employee was placed on leave restriction.

⁸ See Agency's Exhibit 14.

⁹ See Agency's Exhibit 6, Attachment 3.

¹⁰ See Agency's Exhibit 3.

¹¹ See Agency's Exhibit 24.

Sergeant John Holloway (“Holloway”) Tr. 59-99

Holloway is currently employed by Agency as a Sergeant. Holloway testified that while Employee was with Agency, he had the opportunity to supervise her when she was a Lead Patrol Officer. Holloway stated that Employee’s primary responsibility was to respond to different Agency facilities for building checks, guard checks, and answer radio calls for service. Holloway also stated the Employee had arrest powers. Prior to coming to Agency, Holloway worked for the Metropolitan Police Department for 20 years.

Holloway further testified that Employee’s work habits were below average based on her work ethic, routine calls, and report writing. Holloway testified regarding an incident in which he felt Employee was insubordinate. This incident occurred on the morning of April 6, 2011, when Employee called in to report that she would be running late and requested leave. Employee was denied leave and placed on Leave Without Pay Status (LWOP). When Holloway attempted to ascertain Employee’s reason for being late, Employee hung up after she was told she was being placed on LWOP. Holloway stated that Employee was being insubordinate when she hung up. He also stated that Employee was routinely late for work or calling in to request leave. As a result of Employee’s pattern of tardiness and unscheduled leave requests, sick leave, and emergency annual leave, Agency requested a Fitness for Duty Physical on April 5, 2011.¹²

Holloway also testified regarding several times when he observed Employee in situations where he believed that she should have taken police action, but failed to do so. Specifically, Holloway talked about a disturbance with one of the residents at D.C. General Family Shelter, in Building 42, which occurred on July 27, 2011. Holloway stated that he and Lieutenant Sheldon responded to the incident and went inside the building and learned that a security guard had been in a tousele with one of the residents. Holloway stated that when they arrived, they observed Employee standing outside smoking a cigarette and drinking a soda. Holloway asked Employee why she was not assisting the security staff to which Employee responded “I’m on break...” Employee was in her uniform at the time and was armed with her service weapon. None of Employee’s police powers had been revoked. Employee did not provide any assistance during this incident.

Holloway stated that Employee was on break from a training session at the time of the incident at the D.C. General Family Shelter. Holloway stated that, despite being in a training session, Employee had an obligation to respond. Simply getting on her radio to notify officers of the incident was not enough to satisfy her obligations as an officer. Because Employee was already on the scene she had the responsibility to assist the contract security guard who was in a tousele with a resident.

Holloway also testified in regards to an incident when he served as Employee’s training officer and they responded to a burglary alarm at the DMV in Georgetown.¹³ Part of Holloway’s duties as a Training Officer was to observe Employee’s actions in how she handled being on various scenes, calls, and her report writing. Holloway described an incident that happened prior

¹² See Agency’s Exhibit 22.

¹³ See Agency’s Exhibit 27.

to arriving to the scene of a burglary alarm. Employee was on her cell phone, and as they went down an alley, adjacent to the side entrance of the DMV, to respond to the call, Employee remained on her cell phone.¹⁴ Eventually Employee got off the phone. Holloway stated that although burglar alarms may be routine, the inherent nature of their business requires them to be alert at all times, especially in the dark.

On the same night, after responding to the burglary alarm, Holloway stated that they saw a United States Park Police car conducting a traffic stop along the lower Tidal Basin in a very dark and hazardous area along the parkway. Holloway stated that the officer was by himself. Holloway told Employee that they needed to go assist the officer for his safety until he got back up. When he was approaching the police officer, Holloway noticed Employee was not getting out of the car. Holloway stated that, as his back up officer, Employee's failure to get out of the car posed an officer safety issue.

Holloway further stated that he did not have any conversations with Employee about any of her medical conditions or anything going on in her personal life. Holloway testified that Employee never provided a statement regarding why she was taking so much leave, even after she was afforded the opportunity to do so.

Holloway testified that he was appointed as Employee's training officer based on his prior experience in law enforcement. Holloway was also never aware that Employee had any complaints regarding him (Holloway) training her. Holloway stated that he never made any sexually discriminatory remarks or threats regarding her work performance to Employee.

Sergeant Marian Foster ("Foster") Tr.-100-147

Foster testified in relevant part that: she has been with Agency for eight years and is currently with Agency's training division. Foster first came to know Employee when Foster was a union member; however, their relationship soured when she (Foster) got promoted to Sergeant in 2010.

Foster testified in regards to her attempts to accommodate Employee. Foster stated that she provided training from the D.C. Government E-learning website to help Employee gain a better understanding of how to use the Metropolitan Police link when making reports for arrests. Foster believed that Employee felt that she (Employee) did not need to carry out her duties as she was trained to do. Foster testified that, on a few occasions, she did ride-alongs with Employee. She observed Employee turn off her radio, leave her radio in the car, and left her radio at home. Foster stated that as a uniformed officer, it is required to have your radio on you at all times.

Foster also testified in regards to an incident wherein Employee was sleeping while on duty in the report writing room.¹⁵ When Employee was asked if she was sleeping, she "became very angry and insubordinate and [started] yelling."¹⁶ Foster testified that she, along with two other supervisors, Barbusin and Parker, saw Employee sleeping. In an attempt to wake

¹⁴ *Id.*

¹⁵ See Agency's Exhibit 6.

¹⁶ Tr. at 106.

Employee, Foster touched Employee and had to shake her to wake her up. Foster stated that Employee was leaning over at the computer while the computer was off. Employee had previously filed sexual harassment complaints against some other officers, thus, Parker and Barbusin did not feel comfortable touching Employee while she was asleep during the July 29, 2011 incident.

Employee was written up for insubordination after being questioned if she was sleeping. Foster stated that she felt threatened when Employee became angry and started pointing her fingers because Employee was a uniformed officer carrying a firearm. Foster described the conversation with Employee after being confronted for sleeping as “out of control.”¹⁷ Foster further stated that Commander Prentice had to take control of the meeting. Following this incident, Employee went out on sick leave. Because Agency was unable to get in contact with Employee while she was out on sick leave, Foster, Lieutenant Jackson, and Sergeant Green went to retrieve Employee’s service weapon.

Further, Foster provided a statement on July 29, 2011, regarding an incident where Employee did not assist the contract officers in handling a disorderly person at the D.C. General Family Shelter in Building 42. When Employee was asked whether she assisted the contract officers, Employee responded that she got on her radio and let MPD know about the incident. When Employee was asked whether she told the contract officers to call 911 when they asked for her assistance, Employee responded “I plead the Fifth.”¹⁸ Foster stated that anytime Employee was challenged with questions, or something that she did not want to do as an officer, she would plead the Fifth or get hysterical and then call out sick the next day.

Employee’s supervisors held weekly meeting with her while she was assigned to training.¹⁹ Employee was required to get at least 70 percent correct on her online training in order to pass the various tests. While Employee was able to pass majority of the tests, she had issues passing the D.C. Code test. Specifically, on July 20, 2011, Employee received a 25 percent on an open-book test. Based on the 25 percent score, Foster believed that Employee did not make an earnest attempt to pass. Other officers were also offered the training; however, because there were issues with Employee’s report writing, Agency had to make sure that she understood the basics and required her to take training in the areas she proved to be deficient.

Foster also discussed another incident where it was believed that Employee was sleeping while on duty. On January 8, 2011, Foster observed a dispatcher call Employee’s name several times over the radio, but Employee never responded. Foster also observed Employee’s head tilted against the window. Foster then witnessed Captain Floyd approach Employee’s vehicle to check on her.²⁰

Foster stated that Employee’s noncompliance with following directions in regards to issuing parking tickets led to Employee being disciplined. Specifically, Employee was writing

¹⁷ Tr. at 108.

¹⁸ See Agency’s Exhibit 8.

¹⁹ See Agency’s Exhibit 11.

²⁰ See Agency’s Exhibit 28.

tickets with pencils rather than black pens. Employee also failed to completely fill out the tickets.²¹

Sergeant John Barbusin (“Barbusin”) (Tr. 149-178)

Barbusin testified in relevant part that: he is currently a desk sergeant with Agency. He has been with Agency since July of 2006. Barbusin testified that he had the opportunity to supervise Employee during her time with Agency, around 2010 and 2011. Barbusin testified that they trained Employee on firearms, use of batons, and report writing. Barbusin also testified regarding his trouble with training Employee. Barbusin stated that he wrote a memorandum dated June 29, 2011, regarding an incident where Employee was insubordinate.²² This incident involved a direct order that Barbusin gave Employee while training to write parking tickets. Barbusin told Employee that she must write “No permit visible” on the tickets that she issued to let the judge know that she did in fact look for a parking permit on the vehicles she issued the tickets to. However, Employee refused to comply and stated, “I’m not going to do it. [H]e should know that.”²³ Barbusin testified that Employee’s refusal to write “No permit visible” on the tickets interfered with the integrity and efficiency of government operations because the issued tickets would be dismissed because they were not properly written.

Barbusin further testified regarding an incident of Employee’s neglect of duty. The incident revolves around a time when Barbusin went to go get Employee so that he, along with Commander Prentice and Sergeant Foster, could go over Employee’s performance improvement plan (PIP). Barbusin stated that when he went to get Employee, he observed her sleeping in the report writing room. Barbusin further stated that he called Employee’s name, but Employee did not move and kept her arms folded and head down. Barbusin testified that people generally have no problem hearing him when he walks around because of his equipment, keys, and the noise from his department radio. Barbusin stated that when Employee finally came into the room and they confronted her about sleeping on duty, she became very agitated and mad. Barbusin stated that Employee started yelling at Foster.²⁴ Barbusin believed that Employee was going to strike Foster.

In addition, Barbusin testified regarding an incident where he was transporting Employee from one facility to another and when they arrived at their destination, Employee got in her Agency Vehicle, to go home. Barbusin stated that there were about three hours left in their shift when Employee abandoned her post. This incident occurred on April 20, 2011.

Barbusin testified in regards to why Agency had to keep changing Employee’s Field Training Officers (FTO). Barbusin stated that in order to pass certain exercises, Employee needed to receive a score of 3, on a scale of 1 to 5. Barbusin stated that Employee consistently received ones and twos, which caused Employee to complain that she was being harassed by her supervisors. Employee’s FTOs included Sergeant Holloway, Stan McDarrow, and FTO

²¹ See Agency’s Exhibit 15.

²² See Agency’s Exhibit 15.

²³ Tr. at 154.

²⁴ See Agency’s exhibit 6.

Weeks. Barbusin testified that he was not aware of any investigations that may have been launched as a result of Employee's complaints.

Barbusin was unaware of any medical conditions that Employee may have had during the course of her time with Agency. Barbusin stated that he heard some rumors about some personal issues involving Employee's son although he was unclear about the particulars.

Employee's Case in Chief

Karen Falls ("Employee") (Tr. 179-279)

Employee testified in relevant part that: her last position of record with Agency was a Lead Officer. Employee had been with Agency since 1999. Employee stated that the group of officers she came into training with received promotions before her. Employee became lead officer in 2009 after applying for the job announcement. Employee stated that in 2009, her supervisor was Sergeant Cox, who gave her satisfactory ratings. Sergeant Cox passed away in 2009 and Employee was subsequently reassigned to Sergeant Easley. In 2010, Sergeant Easley also gave Employee a satisfactory rating. Employee stated that before Sergeant Cox passed away, he told her, "for all of the times that I have written you up, and I did wrong things to you as a supervisor, I apologize."²⁵ Employee further asserted that Sergeant Cox told her that he was forced to write her up.

Employee stated that while Sergeant Easley was her supervisor, he told her that she was doing a good job, but she needed to "stay on top of [] being late."²⁶ From that point forward, Employee stated that she tried to always follow proper procedures when she called in late. Employee understood that the procedure for calling in late required her to call the Command Center and let them know that she would not be coming in, or that she was coming in late.

Shortly after Employee was assigned to Easley, she was reassigned to a different supervisor on four (4) different occasions. Those supervisors included: Lieutenant Holden, Captain Parker, Barbusin, and Sergeant Foster, respectively. Employee testified that the rapid change of supervisors was a result of her filing a complaint against then-Officer Holloway in February 2011 for making derogatory statements towards her and driving through stop signs and red lights while they were in the car together. Employee stated that she first reported these incidents to Lieutenant Bostick and Captain Floyd, who told her to write a complaint about it. Employee further testified that Captain Floyd told her that if she valued her job, she would not file the complaint against Holloway.²⁷ Employee stated that she also complained to Darren Lehman in the personnel office regarding Holloway.

After Employee complained about Holloway, her situation at work got worse. Employee testified that she had a meeting with Commander Gainey, along with representatives from her union, at which time Gainey told Employee that if she went forward with the write-up against

²⁵ Tr. at 184.

²⁶ Tr. at 188.

²⁷ Tr. at 191.

Holloway that they were going to “make it hard for [her]” and that she would not have a job.²⁸ Employee stated that she went forward with her complaint against Holloway with the Inspector General’s Office. She also stated that the harassment she was endured at Agency was “getting out of hand.”²⁹ She testified that the following supervisors harassed her: Holloway, Barbusin, Foster, Gainey, Commander Collins.

Employee had approximately three field training officers: Holloway, McDarrow, and Weeks. Weeks was the only training officer that gave Employee a passing score, the other two FTOs did not.

Employee testified that the phone call she took while responding to the burglary alarm with Holloway only lasted a couple of seconds. Employee stated that she answered the phone while they were still in the car and told the person on the other end that she would call them back because she was responding to a burglary alarm.

In regards to the incident where Holloway alleged that Employee did not properly assist him when he went to assist another office during a traffic stop, Employee stated that she got out of the car and did everything she was supposed to do. Employee further stated that when they arrived on the scene with the other police officer, he had already written the ticket, and told them, “Thank you very much, but I got it.”³⁰ Employee believed that Holloway mischaracterized this incident because she wrote him up in 2010.

Employee stated that she was placed on a Performance Improvement Plan at the end of 2010, although she was unaware who made the decision to place her on the improvement plan. Employee testified that Captain Parker notified her that she was being placed on the PIP, but no one ever explained to her the reason that she was being placed on a PIP.

Employee testified that she started having some medical issues in 2010. Employee stated that she went to work, unaware that she had walking pneumonia. Employee stated that she called Lieutenant Holden and told her she was having trouble breathing, to which Holden advised Employee to call 911. Employee stated that emergency respondents came and eventually took her to the emergency room. Employee was out of work almost a month because of her pneumonia. Employee further stated that she did not go back to her doctor to get an update on her condition because she knew she had to return to work so that she could pay her bills, notwithstanding the doctor’s evaluation. Employee also stated that she suffered from migraines, stomach pains, and acid reflux as a result of her stress and anxiety. Employee stated that whenever she went to the doctor’s office, she would provide Agency with her doctor’s note, and Captain Parker would sign off on her paper work.

Employee stated that an ambulance was called for her while she was at work one day and she was told that she was having a heart attack. As a result of her medical conditions, Employee had to take a lot of sick leave. Employee stated that everyone in her supervisory chain was aware of her medical conditions. Employee testified that when she was taken to the emergency

²⁸ Tr. at 194.

²⁹ Tr. at 196.

³⁰ Tr. at 206.

room in the ambulance, Foster followed the ambulance to the hospital and Foster saw the condition that she was in.

In regards to the incident in Building 42 at D.C. General Hospital, Employee stated that she could not have made an arrest because she did not have any identification to indicate that she was an officer. Employee testified that this is the why she only used her radio to report the disorderly resident, rather than assist the contract officers with the resident. Employee did acknowledge that she was in uniform at the time of the incident. Employee also stated that she believed she was following proper procedure because she called and let Protective Services know that an incident was going on. Employee stated that she believed she left her service weapon home on this particular day, and received a verbal reprimand for doing so. Employee acknowledged that she is expected to come to work every day fully equipped in her uniform.

Employee testified in regards to the April 20, 2011 incident in which Agency alleged that Employee left work early without seeking proper leave. Employee stated that she had to go to the EEO Office, which closed at 4:00 p.m. that day and stated that she asked Barbusin for permission to leave. Barbusin reminded Employee that she was on leave restriction. When Employee reiterated her question as to whether she could leave, Barbusin responded, "Well, okay, Falls, you can go."³¹ After Employee left, she received a call from Lieutenant Sheldon, who was upset, and said "What are you doing? Why are you leaving?" Employee responded that she had received permission from Barbusin to leave. Sheldon then told Employee that he was putting her down for AWOL.

Employee testified that she followed the parameters of her leave restrictions, which required her to contact either Commander Parker or Mark Polk. However, Employee stated that she received permission from Barbusin to leave, and then Lieutenant Sheldon called her and told her that she was being listed as AWOL. Employee testified that she was not supposed to talk to Commander Polk about taking leave, despite the parameters set forth in the leave restriction letter.³²

Employee also testified in regards to the incident where Agency alleged that she fell asleep in the training room. Employee asserted that she had been on the computer since 6:00 a.m. and when her superiors came in the room to get her, it was around 1:00 or 2:00 p.m. Employee stated that she had finished all of the training exercises that she was supposed to complete. Employee further stated that no one touched her to get her attention, nor did anyone call her name to awake her. Employee stated that when she went into the room with Foster, Prentice, and Barbusin to discuss her PIP, they were all insulting her about her training and her inability to do her job. Employee requested a union representative and they told her that she did not need a union representative. Employee maintained that there was not an altercation between herself and Foster and that she did not make any hand gestures towards Foster. Employee testified that she only asked Foster to see the picture that Foster alleged to have taken of Employee while she was sleeping.

³¹ Tr. at 231.

³² Tr. at 252.

Employee testified that other than the training she received under Weeks, she was not properly trained by any other training officers. Employee stated that at no time between 2010 and 2011 did she believe that she was ever insubordinate or neglected to fulfill her duties. Employee's last day working at Agency was in September of 2011.

James E. Johnson (“Johnson”) (Tr. 279-293)

Johnson testified in relevant part that: he is currently self-employed. Johnson stated that he worked for Agency from July 2003 through August 2009 as a VIPS technician and Special Police Officer (“SPO”). Johnson testified that he worked with Employee from June 2000 through 2009. Johnson stated that the employees that were transferred from D.C. General received training on basic report writing, APS training, and OC certification.

Johnson testified that he knew Employee was experiencing some personal difficulties in her life. Specifically, Johnson stated that Employee was taking care of her gravely ill mother, which required Employee to take time away from work. Johnson further testified that Employee would sometimes come speak with him about issues that she was having with Agency because he was a former union representative.

Johnson stated that once he left Agency, Employee would confide in him about issues that she was experiencing while on the job. Specifically, Employee told Johnson about a supervisor (later learned to be Holloway) that would often speed in his vehicle while they were in training together, which created a safety issue. This, along with taking care of her mother, created a lot of stress for Employee.

Vincent A. Harris (“Harris”) (Tr. 293-310)

Harris testified in relevant part that: he knows Employee from their time working together at D.C. General. He also is a personal friend of Employee. Harris was a SPO at D.C. General from 2009 to 2012. Harris' employer was a private contractor, Hawk One Security, which was a part of the City-Wide Government contract that assisted Agency in policing properties under its jurisdiction. Harris stated that the duties of SPOs were similar to those of a lead officer: to protect the properties owned by the District government. Harris stated that every time he saw Employee, she was doing her job to the best of her ability.

Harris further stated that Employee complained to him about her medical issues; specifically, her migraines due to job-related stress. Harris testified that Employee had a mild heart attack while on duty which caused Agency to call an ambulance. Harris stated that this was a result of Employee's work-related stress. Harris he knew it was a heart attack because Employee's doctor told him.³³ Harris stated that Employee complained to him that she was being harassed and retaliated against by individuals at Agency. Harris stated that all of the stress took a toll on Employee and caused her to lose weight.

³³ Tr. at 304.

According to Harris, Employee always followed the proper procedures and called in to request leave. Harris further testified that he knew Employee followed proper procedure because he was right there with Employee every time she called in. Harris also testified that he could hear the person on the other end of the line say “okay” and approve Employee’s request for leave. Harris said that he witnessed this every time Employee called in.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency had cause to take adverse action against Employee

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.

Here, Employee was terminated for any on-duty or employment-related act that interferes with the efficiency and integrity of government operations to include: neglect of duty, insubordination, incompetence, and malfeasance, as defined in DPM § 1603.

Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, insubordination, incompetence, and malfeasance.

Neglect of Duty

The District’s personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.³⁴ Here, Employee’s position as a Lead Protective Services Officer included ensuring the security of property owned and leased by the District of Columbia. Agency and its Lead Officers also had the responsibility to provide emergency response support to contracted security guard forces located at various properties throughout the District. This branch of Agency was also tasked with providing protection against hazards such as workplace violence, civil disturbances, and trespassing throughout District-owned and leased property.³⁵

³⁴ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

³⁵ See Agency Answer, Tab 2 (February 6, 2012).

Agency argues that Employee's neglect of duty is support by several instances, dating from January 1, 2010 through September 2011. Employee was placed on leave restriction on April 6, 2011, based on her excessive pattern of taking both scheduled and unscheduled leave.³⁶ On July 19, 2011, Employee's leave restriction was extended for another 90 days.³⁷ The leave restrictions provided guidelines that Employee should have followed for requesting leave. Employee was required to first get approval from her shift supervisor, Captain, or anyone further up the chain of Command. In the absence of these individuals, Employee was required to contact Captain Parker or Commander Prentice. The parameters for the use of sick leave provided that Employee would be required to submit a medical certificate from her doctor, regardless of the duration of her absence. Employee provided no documentary evidence in support of her medical issues that she asserted caused her to frequently miss work.

I find that Agency had cause to take adverse action against Employee for neglect of duty. The memo from Commander Prentice, dated April 27, 2011, outlined an incident wherein Employee attended a training session with Foster and wanted to leave early; however, Foster told Employee that she could not grant her leave request because of Employee's leave restriction status. Employee then requested leave from Lieutenant Matthew Sheldon ("Sheldon"), Employee's immediate supervisor at the time, who denied her leave request. Sheldon requested that Employee report back to headquarters so that they could address the issue. When Employee arrived back to headquarters, she got into her personal vehicle and left the premises without speaking to Sheldon, thereby abandoning her post. Based on the leave restriction letter, dated April 6, 2011, Employee's leave request should have been approved by Sheldon, who was the shift supervisor.³⁸ Employee was never granted leave by Sheldon or any other supervisor before she left. Failure to do so amounted to a neglect of duty. Further, Employee's failure to submit any medical documents, as required by her leave restriction, to support her argument that she used sick leave because of medical issues or conditions, amounted to neglect of duty.

Employee's neglect of duty is further supported by several of Agency's witness's testimony regarding the incident on July 27, 2011. Specifically, the witnesses testified that when they arrived on the scene at D.C. General Family Shelter, they observed Employee standing outside smoking a cigarette and drinking a soda. Further, Holloway asked Employee why she was not assisting the security staff, to which Employee responded, "I'm on break..." Employee was in her uniform at the time and was fully authorized to exercise her police powers. Employee did not provide any assistance during the incident. Employee testified that she was in uniform, but she did not have her credentials on her at the time. Employee also testified that she left her service weapon at home that day. Although Employee may have been on break from a training session when the incident transpired did not excuse her from her responsibility to take police action. Employee simply getting on the radio and reporting a disorderly individual did not satisfy her obligations as an officer and demonstrated a neglect of duty. The fact that Employee failed to have her credentials with her at the time of the incident is inexcusable. Thus, I find that Agency had cause to take adverse action against Employee based on her neglect of duty.

³⁶ Agency's Exhibit 9.

³⁷ *Id.*

³⁸ Agency Exhibit 9.

Insubordination

Insubordination includes an employee's refusal to comply with direct orders, accept an assignment or detail; or refusal to carry out assigned duties and responsibilities.³⁹ Here, testimony was provided by Parker, Foster, and Barbusin regarding an incident wherein Employee was found sleeping in the report writing room. All of Agency's witnesses who testified regarding this incident gave very consistent accounts and were all very credible. When Employee was confronted about being asleep, she "became very angry and insubordinate and [started] yelling."⁴⁰ Employee started yelling at Foster after she was told that Foster had taken a picture of her sleeping. Commander Prentice eventually had to take control of the meeting after Employee refused to stop yelling at Sergeant Foster. Accordingly, I find that Agency had cause to take adverse action against Employee for being insubordinate after being confronted about sleeping while on duty.

Agency also took adverse action against Employee for being insubordinate by not following the directives set forth in her leave restriction. Employee acknowledged that she left work on April 20, 2011, prior to the end of her shift. Employee stated that she followed the parameters of her leave restrictions and was granted permission to take leave by Barbusin. However, Barbusin testified that Employee abandoned her post. I found Barbusin's testimony to be more credible than Employee's. Harris, who also testified on behalf of Employee, stated that he observed Employee call in to request leave and that he heard the person on the other line approve Employee's request. I did not find Harris' testimony to be credible; thus, it was not given much weight. Based on the foregoing, I find that Agency also had cause to take adverse action against Employee for insubordination for failing to follow the parameters set forth in her leave restrictions.

Incompetence

The District's personnel regulations provide that incompetence includes the following: (1) careless work performance; (2) serious or repeated mistakes after giving appropriate counseling or training; or (3) failing to complete assignment timely.⁴¹ Here, the testimony shows that Employee demonstrated a history of careless work performance and repeated mistakes after being given appropriate counseling and training. Employee was placed on a performance improvement plan (PIP) on June 21, 2011 because her job performance failed to meet the minimum requirements of her position. The PIP provided Employee an opportunity to improve her job performance in specific areas.⁴² Despite Commander Prentice issuing Employee a PIP, she refused to sign it. Employee maintained that she did not know why she was being placed on a PIP; however, based on Employee's refusal to sign the PIP form, I did not find Employee credible in this regard. Employee met weekly with her superiors to go over the PIP. One of the deficiencies Foster testified about was Employee's struggle with passing the D.C. Code test.

³⁹ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(d). Table of Appropriate Penalties.

⁴⁰ Tr.at 106.

⁴¹ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(e). Table of Appropriate Penalties.

⁴² See Agency Exhibit 13.

Employee also took over two weeks to complete an open book test, and various training exercises, which should have taken a maximum of six to eight hours to complete.⁴³

Again, Parker, Foster, and Barbusin all testified regarding the incident wherein Employee failed to provide assistance to the security guards at the D.C. General Family Shelter on July 27, 2011. In addition, Holloway and Foster, whom I found to be very credible, gave testimony regarding incidents wherein Employee's actions demonstrated her incompetence. Specifically, Holloway testified regarding an incident when he was training Employee and they responded to a burglar alarm at the DMV in Georgetown. Holloway testified that Employee was on her cell phone as they went down an ally to respond to the alarm. Despite Employee's contention that the phone call lasted only a few seconds, I find Holloway's version of the incident to be more credible. Further, Foster testified that while doing ride-alongs with Employee, she observed a number of instances where Employee was deficient in using her radio. Foster testified that she observed Employee turn her radio off, leave her radio in the car, and leave her radio at home. This demonstrates Employee's pattern of careless work performance. Based on the aforementioned, I find that Agency had cause to take adverse action against Employee for incompetence.

Malfeasance

The District's personnel regulations provide that malfeasance generally entails doing something illegal. Malfeasance is often used when a professional or public official commits an illegal act that interferes with the performance of his or her duties.⁴⁴ Here, there was no testimony regarding Employee doing any illegal acts that interfered with her performance or duties. Thus, I find that Agency did not have cause to take adverse action based on malfeasance.

Whether the penalty of removal was appropriate under the circumstances

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.⁴⁵ This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.⁴⁶ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.⁴⁷

The Table of Appropriate Penalties, as set forth in Chapter 16 § 1619.1(6), of the District Personnel Manual, provides that the appropriate penalty for a first time offense of neglect of duty ranges from a reprimand to removal. Here, the undersigned finds that Employee neglected her duty by failing to follow the leave restriction parameters and by failing to assist the contract security guards at the D.C. Family Shelter. I do not find that Agency exceeded the limits of

⁴³ See Agency Exhibit 11.

⁴⁴ D.C. Mun. Regs. tit. 16 § 1619.1(6)(g). Table of Appropriate Penalties.

⁴⁵ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁴⁶ See *Id.*

⁴⁷ See *Id.*

reasonableness with the penalty imposed against Employee. Accordingly, I find that Agency's penalty of removal was appropriate based on her neglect of duty.

Additionally, the Table of Appropriate Penalties provides that the appropriate penalty for a first time offense of insubordination ranges from a reprimand to a ten (10) day suspension. A second time offense for insubordination ranges from a 15-30 day suspension to removal. Here, the undersigned finds that Employee was insubordinate when she was questioned about being asleep in the report writing room and when she failed to follow the procedures set forth in her leave restriction letter. Accordingly, I also find that Agency's penalty of removal was appropriate for the two instances of insubordination.

Because I find that Agency's penalty of removal was appropriate for Employee's neglect of duty and insubordination, I will not discuss the appropriateness of the penalty for incompetence.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's decision to terminate Employee is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge