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**THE DISTRICT OF COLUMBIA  
BEFORE  
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
CHARIS TONEY,	)	
Employee	)	
	)	OEA Matter No. 1601-0053-16
v.	)	
	)	Date of Issuance: February 21, 2018
D.C. DEPARTMENT ON DISABILITY	)	
SERVICES,	)	
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
<hr/>		
Darnise Henry Bush, Employee Representative		
Mark D. Back, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On June 8, 2016, Charis Toney (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department on Disability Services (“Agency” or “DDS”) decision to suspend her from service for a total of thirty (30) days<sup>1</sup>. On July 8, 2016, Agency filed its Answer to Employee’s Petition for Appeal.

Following a failed attempt at mediation, I was assigned this matter on September 7, 2016. On September 16, 2016, I issued an Order Convening a Prehearing Conference to be scheduled for November 8, 2016. However, upon review of that date and determining it was Election Day; the undersigned issued a subsequent Order on October 12, 2016, rescheduling the Prehearing Conference for November 16, 2016. Both parties were present for the Prehearing Conference on November 16, 2016. Following that conference, on November 18, 2016, I issued a Post Prehearing Conference Order requiring the parties to submit briefs addressing whether Agency had cause to take adverse action against Employee and whether the 30-day suspension was appropriate under the circumstances. Agency’s brief was due on or before December 16, 2016, and Employee’s brief was due on or before January 17, 2017. Briefs were submitted in accordance with the prescribed deadlines.

Following a review of the briefs, I issued an Order scheduling a Status/Prehearing Conference for March 13, 2017. Following the Status/Prehearing Conference on March 13, 2017, I

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<sup>1</sup> Two fifteen-day suspensions were levied against Employee and were served consecutively.

issued a Post Status/Prehearing Conference Order requiring parties to address additional issues in supplemental briefs. Agency's supplemental brief was due on or before March 27, 2017, and Employee's brief was due on or before April 10, 2017. Both parties submitted their respective briefs. Based on the review of the supplemental briefs, the undersigned determined that an Evidentiary Hearing was warranted in this matter. As a result, I issued an Order on June 8, 2017, scheduling a Status Conference for June 28, 2017 for the purposes of scheduling an Evidentiary Hearing.<sup>2</sup> Following the status conference, on June 30, 2017, I issued an Order Convening an Evidentiary Hearing in this matter for Tuesday, October 17, 2017. The Evidentiary Hearing was held on October 17, 2017, where both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on November 1, 2017, requiring both parties to submit their written closing arguments on or before December 1, 2017. Both parties submitted their written closing arguments by the prescribed deadline. 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 the two fifteen (15) day suspensions were appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

### 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.

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<sup>2</sup> On June 19, 2017, Agency filed a Motion to reschedule the June 28, 2017 status hearing. I issued an Order on June 19, 2017 granting Agency's Motion and rescheduled the Status Conference to June 27, 2017.

### SUMMARY OF TESTIMONY

On October 17, 2017, 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 Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

#### Agency’s Case-In-Chief

##### Rachel Phillips (“Phillips”) Tr. 42-114

Rachel Phillips (“Phillips”) worked for the Department of Disability Services (“Agency”) as a Human Resources and Benefits specialist. She was responsible for processing employee benefits and was the Family Medical Leave Act (“FMLA”) and Paid Family Leave (“PFL”) coordinator.

Phillips testified that the Paid Family Leave (“PFL”) Act was provided by Agency and offered to its employees. She explained that if an employee requested PFL, they could receive up to three hundred and twenty hours (320) of leave, which equates to eight (8) weeks of paid benefits. However, FMLA was unpaid and employees were required to use their own annual or sick leave because it was due to their own medical conditions. Phillips indicated that PFL is used when an employee is taking care of a family member, a birth of a child, adoption or foster care.

Phillips testified that when Employee requested leave, she indicated on the form that the care was for her mother. She stated that Employee filled out the forms on November 2, 2015, and requested to receive paid leave of one hundred and sixty (160) hours.

Initially, Phillips processed the request as a PFL because she thought it was for the care of Employee’s family member. In addition, the document that Employee filled out indicated that she would be providing care for her mother, Karen B. Toney. Phillips stated that Employee provided her birth certificate as proof of relationship to her mother. After reviewing the medical documents signed by Dr. Sarhan, Phillips testified that she then realized that Employee was not caring for her mother, and that Employee was the person having surgery.

Phillips testified that Employee contacted her via email on November 6, 2015, asking for an update regarding her request. Phillips was out of the office the day Employee sent the email, but she contacted Employee the day that she returned to the office. Phillips stated that in her November 9, 2015 email, she informed Employee that she anticipated having her request processed by the end of the week. Phillips testified that Employee emailed her back stating that she was having surgery the next day. Phillips stated that she processed the PFL form so that Employee’s request would go through.

Phillips explained that the medical form stated that Employee would be incapacitated from November 10, 2015 to December 10, 2015. The documentation stated that Employee could return to light duty on December 1, 2015. Phillips testified that, the note stated that Employee could come back to regular duty on December 10, 2015. However, Employee came back to work on December 8, 2015, and submitted a return to work note to Phillips.

Phillips stated that she relied on the documentation that she received to approve Employee for PFL, but since she did not qualify for that type of leave, Employee needed to submit a request for

FMLA. Employee subsequently filled out the FMLA paperwork and Phillips approved the letter on November 12, 2015. She stated that Employee indicated on her application that she used sixty (60) hours of annual leave and sixty (60) hours of sick leave.

On February 2, 2016, Phillips stated that Agency received a return to work notice that was signed by Dr. Rifka and dated November 30, 2015, indicating that Employee could be excused from work from November 15, 2015 to December 1, 2015. After further review of the document, Phillips testified that it appeared that there were other changes in the documentation that Employee previously provided to Agency. At this time, Phillips indicated that she thought that the documentation was altered and requested a copy from the practice/office where Employee was treated. Phillips stated she received a fax on February 9, 2016, from the office, and that she and her supervisor, Gria Hernandez (“Hernandez”), compared that the documentation with that previously submitted by Employee. Phillips testified that they discovered that Employee had redacted some of the documentation about her medical condition and diagnosis.

On cross-examination, Phillips stated that when she processed Employee’s FMLA she had only worked for Agency for two (2) months. She testified that she most likely helped Employee complete the necessary application form. She attested that she emailed Employee the forms needed to submit her leave request. Phillips testified that the PFL and FMLA were the same application forms. She explained that while she could not recall if Employee expressed to her that she did not know how to fill out the forms, she would have assisted her in completing the forms. Phillips was unsure if Employee referred to PFL as Personal Family Leave.

Phillips stated that when Employee initially submitted the form, she marked the box that said that she was caring for a family member. Subsequently, it was discovered that Employee was not caring for a family member, so Phillips marked through it with a pink line. Phillips confirmed that Employee did not state that she needed surgery. She stated that the information that was put on the original PFL form was not the same information that went on the FMLA form. Phillips admitted that she told Employee to make a change in the leave category because she was having the surgery. Phillips explained that she asked Employee to submit her birth certificate to prove her relationship to her mother because at the time, Employee submitted a request for PFL. The FMLA was approved via a letter dated November 12, 2015. Phillips explained that it was approved after Employee’s surgery on November 10, 2015, because she did not receive all documentation back prior to Employee taking leave for surgery. She did not recall what information that was missing in order to process the FMLA.

On redirect, Phillips stated that Agency had five (5) business days to process PFL or FMLA requests. She explained that four (4) business days transpired from November 2, 2015 and November 6, 2015, and explained that November 9, 2015, was the fifth business day. On November 9, 2015, Phillips contacted Employee to inform her that there was a discrepancy with her form. That was when Phillips received the revised and completed application for FMLA. She stated that the letter was approved on November 12, 2015. Phillips also testified that November 11, 2015, was Veteran’s Day, a legal holiday; so she submitted and approved within two (2) days of receiving Employee’s completed application.

Gria Hernandez (“Hernandez”) Tr. 116-205

Gria Hernandez (“Hernandez”) testified that she has worked as a Human Capital Administrator with Agency since January 2, 2012. Hernandez was responsible for all facets of Human Resources (“HR”) benefits, labor relations, employee relations, and training. She stated that

she was the final authorizer for PFL and FMLA requests. Hernandez explained that Phillips was the HR specialist in her division, and received the applications for PFL, FMLA, and Americans with Disabilities Act (“ADA”). She stated that Phillips verified and validated the applications and presented it to her with the record. Hernandez affirmed that she worked closely with Phillips and that she reviewed and signed off on the applications that were presented to her. Hernandez stated that the application forms could be found in their office or, if requested, emailed by Phillips.

Hernandez explained that PFL was a form of FMLA, but the benefit of PFL was to allow employees of the District of Columbia to care for a loved one with a chronic illness or to spend time with a newly placed foster or adopted child. She stated that an employee was entitled to receive up to three hundred and twenty (320) hours of paid leave.

Hernandez testified that she does not automatically process applications that come in for PFL or FMLA. She testified that if someone requested PFL for the birth of a child, Agency might submit the application in June, but the child may not be due until October, so there would be some time lapse in the processing of the request. She explained that once the application was verified and deemed valid, it was Phillips’ responsibility to send the required forms to payroll. Payroll would subsequently load up to three hundred twenty hours onto the employee’s leave bank on PeopleSoft.

Hernandez testified that after reviewing Employee’s application, it was not clear to her if Employee was providing care for her mother, or if she was going to be on leave for her own health conditions. Hernandez explained that Phillips asked her to review Employee’s application. Hernandez indicated that the answers given on the PFL form were from a fertility clinic. Hernandez stated that she asked Phillips if she was sure that the application was for Employee’s mother or for herself. Hernandez testified that she had Phillips contact the doctor’s office to confirm. The doctor’s office informed Agency that Employee was receiving care and that it was not her mother. Hernandez indicated that there was email correspondence exchanged between her, Employee, and Phillips with regard to the documentation. Hernandez stated that Employee indicated in the November 6, 2015 email to Phillips that she was having surgery. Hernandez testified that she told Employee that she could not use PFL for herself.

On the form dated November 9, 2015, Employee requested time off from November 10 through December 10, 2015, for a personal health condition. She requested the use of sixty (60) hours of annual leave and sixty (60) hours of sick leave. Hernandez stated that she allowed the November 2, 2015 PFL Form to be approved because Agency did not want to cause its employees a hard time, especially if they were going through a serious health condition. She explained that if they were able to be flexible, they would work with the employee because the PFL and FMLA were essentially the same form and questions. Further, Hernandez stated that Employee indicated on the form and in her email that she was having surgery on November 10, 2015.

Hernandez confirmed that the FMLA application was approved on November 12, 2015. She stated that it was approved within two (2) business days and stated that Agency generally has seven (7) business days to approve an application. She testified that the approval letter stated that Employee was required to provide a return to work note. Hernandez stated that Employee returned to work on December 8, 2015. Hernandez testified that when the return to work note was brought to her, it was clear that it was a copy and not an original note. Hernandez noticed that the number “eight” was written in pen. Hernandez asked Phillips to contact the doctor’s office to confirm that the note came from their office.

Hernandez testified that Phillips contacted the doctor's office to speak with Dr. Sarhan, but she was unavailable. Hernandez indicated that when they reviewed the notice, she saw Dr. Rifka's name and realized that Drs. Rifka and Sarhan were part of the same practice. On February 10, 2016, Hernandez received a copy of the return to work notice from Dr. Rifka that stated that Employee was under his professional care and excused her from duty from November 10, 2015 through December 1, 2015. Hernandez indicated that the notice stated that Employee was to return to light duty on December 1, 2015 and regular duty on December 15, 2015. Hernandez testified that the documentation previously received from the doctor's office did not match this documentation that Employee submitted.

Hernandez indicated that upon review, she prepared a supervisory record citing Employee's abuse of FMLA and for altering the forms. Hernandez testified that on the first page, there was language that had been redacted (white out) regarding Employee's medical diagnosis. She also stated that on page two of the form that Employee submitted, that it stated that she would be out from November 10, 2015 through December 10, 2015. However, the form that was faxed over by the doctor's office stated that she would be out from November 10, 2015 until November 17, 2015.

Hernandez explained that the approved FMLA form indicated that Employee was granted leave from November 10, 2015 to December 10, 2015. She stated that Agency relied on the certification from the doctor that Employee provided to them. Hernandez stated that at the time of Employee's submission, she did not believe that the forms had been altered. Further, Hernandez explained that "no" was circled for the question asking if Employee required care on an intermittent or regular basis. However, the documentation that Employee provided clearly depicted a markup of the word "no." Hernandez posited that the word "no" had been changed to "yes". Hernandez testified that on February 10, 2016, she received a copy of the return to work notice from Dr. Rifka. That form stated that Employee was under Dr. Rifka's professional care and that she was excused from working from November 10, 2015 through December 1, 2015. The form also indicated that Employee was to return to light duty on December 1, 2015, and resume to regular duty on December 15, 2015.

Hernandez stated that she also scheduled a meeting with Employee regarding the forms. Hernandez testified that during the investigation, Employee and her representative were recorded during an interview that was held on February 10, 2016.

*(The recording was played during Hernandez's testimony. The following reflects a summary of the events from the February 10, 2016, recorded interview).* On the recording, Hernandez stated her name and asked Employee and her representative, Darnise Henry-Bush, to identify themselves. Hernandez informed them that the purpose of the investigation was to discuss the documentation submitted for FMLA. In addition, Jessica Gray, Legal Relations Specialist at the Department on Disability Services, was present. During the investigation, Employee stated that she knew that FMLA was Family Medical Leave Act. Employee also stated that she requested FMLA at the end of October because she had a scheduled surgery. Employee submitted her forms to the HR department. Employee told Hernandez that there was an error because Phillips assumed that the request was for her mother, but it was for Employee. Further, Employee explained to Hernandez that there was a miscommunication because when Phillips contacted her doctor, Phillips asked the office for information regarding her mother, and not her. Employee stated during the investigation/interview that she filled out the FMLA form and her doctor completed his portion. Employee recalled filling out the document that was a certification of a health care provider for family member's serious health condition.

On the recording of the interview, Hernandez explained that Employee stated her name and indicated on the form that she was providing care for her mother. Employee told Hernandez that she did not understand the form and thought that because she was having surgery, the form asked her to provide an emergency contact. Thus, Employee provided her mother's contact information because she would be providing care for Employee after surgery. Employee stated that she did not know who checked the box that said she was caring for a family member because she knew that she was the one having the surgery and not caring for a family member.

During the interview with Hernandez, Employee acknowledged that she requested one hundred and sixty (160) hours of leave for November 10, 2015 through December 10, 2015. Subsequently, Employee spoke with Phillips because she found out that her leave was not approved. Phillips asked Employee if her mother was having surgery and Employee told her that she was having surgery. Phillips informed Employee that she would have to use her own annual and sick leave. Employee explained that she emailed Phillips a note from her doctor that she was returning to work early on December 7, 2015.

During the same interview, Hernandez went over two forms with Employee, one form was typed and the other was handwritten. Employee acknowledged that the forms were the same, but that some of the information was missing off of the form that she submitted. She explained that her doctor allowed her to whiteout the personal details of her medical condition. Further, she explained that she altered her return to work date from December 1, 2015 to December 8, 2015 because she was not well enough to return to work and received verbal consent from her doctor to alter the date on the return to work form. Employee also stated on the recording that she did not alter the forms that were sent to her doctor by Phillips. While Employee altered her return to work document, she stated that she did not alter the document other than her personal diagnosis while she was out on FMLA. *(End of Summary of Recorded Interview)*

After the interview, Hernandez testified that she contacted Employee's doctor. She explained that she had to contact two offices because although both doctors were in the same practice, they were in different offices. Dr. Sarhan's office completed the FMLA form and informed Hernandez that they do not give patients permission to alter documents. Hernandez indicated that when they contacted Dr. Rifka's office, they did not indicate that they gave Employee permission to change the form. The office informed Hernandez that they would fax over the documents that they had on file for Employee.

Hernandez testified that Agency charged Employee with adverse action that proposed a thirty (30) day suspension. She stated that Employee received the March 7, 2016, advanced notice of proposed thirty-day suspension and confirmed that she was the proposing official, and that Ms. Bonsack was the deciding official. Hernandez explained that Ms. Bonsack did not sustain all three causes because she dismissed the Absent without Official Leave ("AWOL") charge. Hernandez stated that she applied the February 2016 revised District Personnel Manual ("DPM") in applying Employee's discipline because of the newly-adopted Table of Penalties<sup>3</sup>. Further, she explained that if Employee was reviewed under the old DPM, the penalties would have been greater and she would have proposed termination.

On cross-examination, Hernandez opined that Employee lied because of her demeanor. She explained that Employee looked surprised when she pointed out the difference between the faxed documents that Agency received from Dr. Sarhan's office and what was previously submitted by

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<sup>3</sup> The newly adopted table is called the "Table of Illustrative Actions."

Employee. Further, Employee continued to look at her representative Ms. Henry-Bush for help answering the questions and asked for a break to speak with her representative privately. Hernandez testified that it was Employee's responsibility to fill out her portion of the FMLA form. She stated that she made sure that Phillips explained what FMLA was when there was confusion with PFL.

Deborah Bonsack ("Bonsack") Tr. 207-220

Deborah Bonsack ("Bonsack") worked as the Deputy Director for Administration for Agency. She was also Hernandez's supervisor. Bonsack testified that she was the deciding official in Employee's case. She issued and signed the advance notice of proposed discipline. Before signing the May 5, 2016 Final Decision, Bonsack considered the attachments that were provided as part of the investigation.

Bonsack testified that based upon her review of Employee's return to work notice that extended Employee's leave until December 8, 2015, Bonsack decided that she would not sustain the AWOL charge. However, she sustained the two allegations of false statements because it was determined that Employee falsified information on an official record. She explained that Employee's conduct constituted a serious offense because she was entrusted with the distribution and decisions regarding training, vocational rehabilitation and future funding. Bonsack stated that it was essential to be able to trust Employee, and that falsifying any type of official documents caused concern regarding Employee's trustworthiness.

Bonsack indicated that she did not recall if the 2012 Table of Penalties or the February 2016 Table of Illustrative Actions were used in selecting Employee's penalty. She did list out the *Douglas Factors* in order to determine what the penalty would be. Bonsack testified that after reviewing the factors, although termination was an option, she believed that suspension was a reasonable disciplinary measure under the circumstances. Bonsack stated that she believed that a thirty (30) day suspension was severe enough to get Employee's attention and correct the behavior so it would not occur again.

On cross-examination, Bonsack testified that she based her decision on the false statements that were made by Employee and deemed falsifying documents to be a serious offense.

Employee's Case-In-Chief

Dr. Safa Rifka ("Dr. Rifka") Tr. 12-39

Dr. Safa Rifka ("Rifka") is a physician at Columbia Fertility Associates. He testified that he provided medical care to Charis Toney ("Employee") and gave verbal consent/permission for her to redact her personal diagnosis from the Family Medical Leave Act ("FMLA") form in relation to her procedure and to alter the return to work form. He confirmed that Karen Toney was not his patient.

On cross-examination, Dr. Rifka stated that he filled out the FMLA form. Dr. Rifka further stated that he wrote the original note excusing Employee from work from November 10, 2015 through December 8, 2015. He explained that Dr. Sarhan, his partner in the practice and Employee's surgeon, provided the return to work notice because it was customary for the surgeon to do so. While Dr. Rifka did not provide the return to work notice, he stated that it was not unusual for the original physician to also provide a return to work notice.

Dr. Rifka testified that he could not recall the exact date that he gave Employee verbal permission to alter the document that he signed which certified her time out of work as a result of her



side effects from the surgery. Dr. Rifka explained that on November 30, 2015, he indicated that Employee was able to return to light duty work on December 1, 2015, and released Employee to perform regular activity on December 15, 2015. Dr. Rifka testified that the type of surgery Employee underwent required between two (2) to four (4) weeks of recovery. He explained that after November 30, 2015, Employee asked him to extend her time from December 1, 2015 to December 8, 2015, due to ongoing issues from the surgery. Dr. Rifka testified that he gave Employee verbal permission to make that change on the form. Dr. Rifka testified that because Employee's request was still within the legal time frame for recovery from this type of procedure, he had no issue in extending the time for the return to work.

Dr. Rifka stated that he also allowed Employee to redact portions of the form in paragraph three and Part A, "Medical Facts," where it asks the doctor to describe other relevant medical facts related to the condition where the patient needed care. In addition, Dr. Rifka testified that he gave Employee verbal permission to redact anything private in nature that divulged the nature of her disease. He explained that in his practice, he allows his patients to redact information that is in violation of the privacy laws of the Health Insurance Portability and Accountability Act ("HIPAA"). Dr. Rifka testified that he physically saw Employee in his office on November 24, 2015. He stated that the next time he saw her in the office was in February 2016. Dr. Rifka explained that Employee also visited the Bethesda office of the practice where she was treated by Dr. Sarhan, the surgeon who performed the procedure. Dr. Rifka explained that Dr. Sarhan primarily works out of the Bethesda office, while he is in the Washington, D.C. location of the practice.

### ***Employee's Position***

Employee contends that she did not falsify any information in submitting her documents for FMLA. Employee maintains that she was confused with regard to the forms and that due to personal cognitive challenges she didn't understand all the requirements of the forms.<sup>4</sup> She indicated that on several occasions she asked for assistance, and believed that what she provided to Ms. Phillips was correct. Employee indicated that she received verbal permission from her doctor, Dr. Rifka, to alter the documents with regard to her medical diagnosis and also for the return to work form that she submitted.<sup>5</sup> Employee contends that Dr. Rifka was her treating physician, while Dr. Sarhan only completed the surgery. Employee asserts that she did no wrongdoing with regard to any of the forms and believes that the thirty (30) day suspension was unwarranted.

### ***Agency's position***

Agency asserts that it appropriately administered an adverse action in this matter. Agency contends that with regard to preparation and submission of FMLA documentation, Employee made (1) *false statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter*, pursuant to Chapter 16 1605.4(b) (2); and (2) *made false statements, including knowing and willfully reporting false and misleading information or purposely omitting facts to any supervisor* pursuant to Chapter 16 1605.4(f) (2).<sup>6</sup> Agency contends that on September 24, 2015, Employee submitted a PFL form which indicated a need of 160 hours of leave.<sup>7</sup> On the form, the care was indicated for her mother, Karen Toney. On November 2, 2015, Employee provided Section III from the treating surgeon, Dr. Abba Sarhan, which reflected a leave

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<sup>4</sup> Employee Petition For Appeal (June 8, 2016).

<sup>5</sup> Employee Closing Arguments (December 1, 2017).

<sup>6</sup> Agency Closing Arguments (December 1, 2017).

<sup>7</sup> Agency Answer at Tab 3 (July 8, 2016).

time of November 10, 2015 through December 10, 2015.<sup>8</sup> Through a subsequent email thread on November 6, 2015 through November 9, 2015 with Agency HR Specialist Rachel Phillips and HR Gria Hernandez, Agency determined that Employee was the actual recipient of leave for medical care, and needed to fill out a FMLA form. On November 9, 2015, Employee submitted the DC FMLA form. This form was signed by Agency HR Specialist, Rachel Phillips on November 12, 2015 and was subsequently approved.

Upon Employee's return to work on December 9, 2015, Agency avers that its representatives realized inconsistencies with the documentation submitted by Employee, specifically that (1) dates appeared to have been altered on a return to work notice and that medical information had been redacted (with white-out) Consequently, Agency contacted the Columbia Fertility Associates (practice that provided care for Employee) directly for documentation related to Employee. Materials received via fax on February 9, 2016, and February 10, 2016 were reviewed and were found to be inconsistent with documents submitted by Employee. Specifically, Agency noted that the November 2, 2015 document reflected Dr. Sarhan's medical incapacity section indicated an estimated date of November 10, 2017 through November 17, 2017. Further, Agency noted that the November 30, 2015 return to work form received had a return to work date of December 1, 2015.

Following these events, Agency asserts that it began its investigative process. Agency avers that Employee had redacted information in Section III, the dates for leave were November 10, 2015 through December 10, 2015, and the return to work date was December 8, 2015. Agency argued that it appeared Employee had used white out and had written over the date in altering these documents. Agency asserts that Employee maintained that she had some confusion in filling out the forms, and claimed that she received verbal consent from her doctor to alter the forms. Following the investigation, Agency proposed suspension for a total of thirty days<sup>9</sup>, charging employee with two charges of false statements pursuant to DPM §1605.4(b)(2) and §1605.4(b)(4), and unauthorized absence of five workdays or more, pursuant DPM §1605.4(f)(2). In a Final Agency Action dated May 5, 2016, the hearing officer sustained the two charges of false statement but dismissed the AWOL charge because of receipt of return to work dated February 29, 2016. The hearing officer noted that she was unpersuaded by Employee's claim that she had receives verbal consent to alter the forms. As a result, Agency suspended Employee for two (2) fifteen (15) day periods to be served consecutively, effective May 31, 2016<sup>10</sup>.

Agency avers that it considered all the relevant Douglas factors in making its determination with regard to assessing the penalty in this matter. Agency also contends that it appropriately utilized the DPM Chapter 16 ("2016 DPM") that was made effective February 5, 2016 (versus the DPM that was effective as of July 13, 2012, hereinafter noted as "2012 DPM"), because in this instance, they were not aware of the misconduct until the DPM 2016 was effectuated and also because the bargaining unit (ASFMCE) that Employee was a part of had already engaged in impacts and effects bargaining.<sup>11</sup> However, Agency notes that if OEA disagrees and finds that the incorrect version was

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<sup>8</sup> *Id.*

<sup>9</sup> Thirty days were comprised of two fifteen day suspensions to be served consecutively.

<sup>10</sup> Employee's Petition for Appeal at Final Agency Notice (June 8, 2017).

<sup>11</sup> Agency's Closing Arguments at Page 17. (December 1, 2017). It should be noted that Agency in making this argument provided no subsequent documentation, the CBA or otherwise, that would substantiate this assertion. Rather, Agency relied on the testimony provided by Ms. Gria Hernandez during the Evidentiary Hearing on October 17, 2017.

used (which it does not concede) that it would result in harmless procedural error since the penalty range would be the same.<sup>12</sup>

### FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee is employed by Agency as Vocational Rehabilitation Specialist, with the DDS Rehabilitation Services Administration (“RSA”).<sup>13</sup> In a final agency action notice referred to as the “Final Decision on the Proposed Suspension of 30 Days”, dated May 5, 2016, Employee received final notice of Agency’s decision to suspend her without pay for a total of thirty (30) days (two fifteen day suspensions to be served consecutively) from her position for violation of Chapter 16 of DPM §1605.4(b)(2)—“False statements, including: misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; (2) DPM § 1605.4 (b)(4) - “False statements, including: knowingly and willfully reporting false or misleading information or purposely omitting material facts to any superior.” The effective date of the suspension was May 31, 2016.<sup>14</sup>

### ANALYSIS

#### Appropriate Version of DPM

In an Order dated March 13, 2017, the undersigned required the parties to address whether Agency, in administering the adverse action against Employee utilized the appropriate version of the District Personnel Manual (“DPM”) in administering the instant adverse action. Specifically, parties were to address whether the DPM Chapter 16 version effective as of August 2012<sup>15</sup> or February 2016<sup>16</sup> should be applicable to this action. Employee proffered that Agency did not use the appropriate code version. Employee asserted that Agency used the rules punitively and did not use the “correct choice in the cause of action.”<sup>17</sup>

Agency asserted that its adverse action was properly guided by and assessed under the February 2016 (“2016 DPM”) version of DPM Chapter 16. Agency argued that its assessment was done appropriately under the 2016 DPM citing that, “notwithstanding the general rule that a statute should not be applied retroactively absent clear legislative intent, the Agency applied the 2016 version of DPM Chapter 16 in these circumstances because the latest version of the regulations did not change the legal consequences of Employee’s various behaviors between September 2015 and February 2016.”<sup>18</sup> Further, the Agency cites that they “were not even aware of the misconduct for which adverse action was taken until on or after February 9, 2016, and the adverse action was initiated by Agency after the regulations became effective.” Additionally, Agency argues that, “DDS applied the correct version of the District Personnel Manual Chapter 16 effective, February 6, 2016, in recommending and taking corrective action because Ms. Toney is a member of the collective bargaining unit (“AFSCME”) that had already engaged in impacts and effects bargaining.”<sup>19</sup> Further,

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<sup>12</sup> *Id.*

<sup>13</sup> Employee’s Petition for Appeal (June 8, 2016).

<sup>14</sup> Employee was also charged with violating DPM § 1605.4(f) (2) - “Unauthorized absence of five (5) workdays or more.” However, the hearing officer rescinded that charge in the final action.

<sup>15</sup> DPM Chapter 16 effective July 13, 2012, as reflected by the August 26, 2012, Transmittal Date.

<sup>16</sup> DPM Chapter 16 effective February 5, 2016, as reflected by the February 26, 2016 Transmittal Date

<sup>17</sup> Employee’s Legal Brief (April 10, 2017).

<sup>18</sup> Agency’s Supplemental Brief at Page 4 (March 27, 2017).

<sup>19</sup> Agency Closing Arguments at Page 17 (December 1, 2017).

Agency contends that Employee's "affirmative" conduct that resulted in the instant adverse action took place between September 2015 and December 2015.<sup>20</sup>

Agency asserts that the "balance of the affirmative conduct", occurred after the effective date (February 5, 2016) for the 2016 DPM.<sup>21</sup> Agency also avers that they were not aware of Employee's misconduct until they found discrepancies in documentation submitted by Employee following a facsimile communication received from Employee's treating physician on February 9, 2016. Consequently, Agency argues that it did not provide its Notice of Proposed Adverse action until March 6, 2016, and the final decision was not delivered to Employee until May 5, 2016. As a result, Agency argues that under these circumstances it was appropriate to use the 2016 DPM version in administering this adverse action. Lastly, Agency argues that *assuming arguendo* that they did utilize the incorrect version of the DPM (which it does not concede that they did) in administering the instant adverse action that procedurally, the application of either version of DPM Chapter 16 would have resulted in the same adverse action and would constitute harmless procedural error."<sup>22</sup>

The District Personnel Manual regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. The 2012 DPM version was effective as of July 13, 2012,<sup>23</sup> and was effective until the 2016 DPM version was made effective on February 5, 2016.<sup>24</sup> Consistent with the findings of the U.S. Supreme Court, OEA has held that there is a presumption in which the "legal effect of one's conduct should be assessed under the law that existed when the conduct took place."<sup>25</sup> Further, OEA has noted that "the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact."<sup>26</sup> Here, Agency recognized upon Employee's return to work on December 9, 2015, that there were potential discrepancies in FMLA documentation submitted by Employee. Agency does not provide any reasoning as to why it was not until February 9, 2016, that subsequent documentation was requested from the treating physicians' office to confirm their suspicions. A subsequent investigative interview was held on February 11, 2016, wherein Agency maintains that Employee submitted false statements as well. The undersigned finds that upon review of the record Agency improperly used the 2016 DPM given that it was not made effective until February 5, 2016. The actions for which Employee was charged occurred in September 2015 through December 2015, with only one additional instance during a period of investigation in which false statements were alleged.

However, given that the Table of Penalties (2012 DPM)<sup>27</sup> and the Table Illustrative Actions (DPM 2016)<sup>28</sup> reflect the same range for penalties for this cause of action, I find that Agency's error constituted harmless procedural error pursuant to OEA Rule 631.3. The range of penalties for these causes of action in comparing the 2012 DPM Table of Appropriate Penalties ("TAP") and the 2016 DPM Table of Illustrative Actions ("TIA"), reflect similar penalty ranges. Under TAP, a first offense

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<sup>20</sup> Agency's Supplemental Brief at Page (March 27, 2017).

<sup>21</sup> *Id.* at Page 6.

<sup>22</sup> Agency Supplemental Legal Brief at Page 4 and 8, citing *Recio v. DC Alcoholic Beverage Control Bd.*, 75 A.2d 136, 140 (D.C. 2013); and *Montgomery c. District of Columbia*, 598 A.2d 163,166 (D.C. 1991). (March 27, 2017).

<sup>23</sup> Transmittal Date reflects as of August 27, 2012 for the 2012 DPM Version, and the 2016 Transmittal Date is as of February 26, 2016.

<sup>24</sup> *Id.*

<sup>25</sup> *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 10, 2010).

<sup>26</sup> *Id.*

<sup>27</sup> 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

<sup>28</sup> DPM §1607.2(b) (2016)

for violation of DPM §1603.3(c), and DPM §1603.3(f) (6)<sup>29</sup> both range of Suspension for 15 Days.<sup>30</sup> The penalty in the TIA reflects that a first occurrence for false statements in connection DPM § 1605.4(b)(2), is reprimand to removal, and for §1605.4(b)(4), the range is a seven day (7) suspension to removal. Wherefore, the undersigned finds that Agency's assessment of the fifteen (15) day penalty for each charge fell into the range of penalties under both versions of the DPM. Thus, the undersigned finds that while Agency improperly utilized the 2016 DPM given that misconduct occurred at the time the 2012 DPM was effective, that this error did not cause "substantial harm or prejudice" to Employee, and did not affect its final decision to take action in the instant matter.

### ***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*).

Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. 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. Employee was assessed two (2) fifteen days suspensions pursuant to: DPM § 1605.4(b)(2) – "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter."; and DPM 1605.2(f)(2) – "False statements, including knowing and willfully reporting false and misleading information or purposely omitting facts to any supervisor."

### **Charge 1- DPM § 1605.4(b) (2) – "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter."**

OEA has held, that to sustain a falsification charge, that "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency."<sup>31</sup> In sustaining the aforementioned charge upon Employee,

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<sup>29</sup> DPM §1603.3(c) – "Any knowing or negligent material misrepresentation on other document given to government agency; DPM §1603.3(f) (6) – Any on-duty or employment-related act or omission that interfere with the efficiency and integrity of government – misfeasance." Misfeasance, as described by the DPM includes: careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized uses of government resources; using or authorizing the use of government resources for other than official business. The undersigned relies on this comparison of the DPM because Agency relied on these causes of actions in its Supplement Brief submitted on March 27, 2017.

<sup>30</sup> 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

<sup>31</sup> *John J. Barbudsin v Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), citing *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); See also *Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

Agency considered and was ultimately “unpersuaded”, with “Employee’s assertion that she had verbal permission to alter the parts of FMLA form or return to work notice.”<sup>32</sup> Agency determined that the charge should be sustained because of Employee’s admittance of “whiting out” and changing the forms on two (2) previous occasions.<sup>33</sup> However, during the Evidentiary Hearing held in this matter on October 17, 2017, Dr. Safa Rifka, Employee’s physician, corroborated Employee’s assertions, as he confirmed that he provided Employee with verbal consent to extend her return to work until December 8, 2015; and that he gave permission to redact any items that may violate Employee’s privacy protections.<sup>34</sup> Without going into the personal and private nature of Employee’s condition, the doctor explained that the type of procedure Employee underwent could result in up to four (4) weeks of recovery time.<sup>35</sup> Further, Dr. Rifka explained that any patient had the right to redact any information of a private nature and that he gave verbal permission to Employee to redact private information.<sup>36</sup>

During the course of the Evidentiary Hearing, I had the opportunity to listen to the testimony provided by Dr. Rifka and found his testimony to be credible. Further, the undersigned finds it significant that Agency rescinded the charge of AWOL once it received confirmation in February 2016 that Employee’s return to work date was in fact extended until December 8, 2015.<sup>37</sup> The undersigned finds that this also supports Employee’s claim that she had verbal permission to alter the return to work form to reflect December 8, 2015. In assessing this adverse action, Agency maintained it was unpersuaded by Employee’s claims of having received verbal consent from her physician. Upon consideration of the aforementioned findings and the documentary and testimonial evidence set forth in the record, I find that Agency has not met its burden of proof by a preponderance of evidence with regard to this cause of action.

**Charge 2 -DPM 1605.2(f) (2) –“False statements, including knowingly and willfully reporting false and misleading information or purposely omitting facts to any supervisor.”**

In considering this cause of action, Agency again attested that it was unpersuaded by Employee’s assertion that she received verbal consent to alter the documents. Specifically, Agency cited that Employee provided false statements to Ms. Hernandez, during the course of the internal investigation. Agency noted that this charge was distinguished with regard to the changes made in the “medical incapacity” section of the form. Agency found that Employee changed the document that was signed by Dr. Sarhan (surgeon) on November 2, 2015. In particular, Agency cited that the document received on February 9, 2016 from Dr. Sarhan reflected the estimated medical incapacity as November 10, 2015 through November 17, 2015. Employee’s submissions of these same documents contained a medical incapacity date of November 10, 2015, through December 10, 2015. Upon consideration of the record, the undersigned finds that there is not substantive evidence to support Employee’s claim that she was given the verbal consent to change the medical incapacity date in the forms. Further, the medical incapacity listed in the documentation submitted by Employee in November 2015, does not correspond with the medical record that bears the same signature date (November 2, 2015) that was received by fax directly from the office on February 9, 2016. Consequently, the undersigned finds that Agency has met its burden by preponderant evidence and has adequately proven that there was cause for action with regard to this charge.

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<sup>32</sup> Agency Answer at Page 8 (July 8, 2016).

<sup>33</sup> *Id.*

<sup>34</sup> *See*. Evidentiary Hearing Transcript (Tr.) held October 17, 2017 at Pages 13, 22-37.

<sup>35</sup> *Id.* at page 26.

<sup>36</sup> *Id.* at Page 30

<sup>37</sup> Received in accordance with directive in Final agency Action and was signed by the surgeon, Dr. Abba Sarhan.

**Whether the Penalty was Appropriate**

Based on the aforementioned findings, I find that Agency's action with regard to the charge of false statements pursuant to DPM 1605.2(f) (2) –“False statements, including knowingly and willfully reporting false and misleading information or purposely omitting facts to any supervisor” was taken for cause, and as such Agency can rely on this charge in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).<sup>38</sup> According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in DPM 1619.1; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, “the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.”<sup>39</sup> Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercise.”<sup>40</sup>

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to suspend Employee from service.<sup>41</sup> Further, Chapter 16 § 1607.1(b)(2)(4) of the District Personnel Manual Table of Illustrative Actions

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<sup>38</sup> *Shairmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

<sup>39</sup> See *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>40</sup> *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

<sup>41</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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

("TIA") provides that the appropriate penalty for a first occurrence for a charge of violating DPM 1604.5(b)(4) ranges from "7-day Suspension to Removal."<sup>42</sup> Wherefore, the undersigned finds that Agency properly exercised its discretion and its chosen penalty of a fifteen (15) suspension is reasonable under the circumstances and not a clear error of judgement.

With regard to the false statements charge pursuant to DPM §1605.4(b)(2); the undersigned finds, for the reasons previously cited, that Agency did not meet its burden to establish a cause for adverse action for "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter." As a result, I find that the penalty of the fifteen (15) day suspension was not appropriate. Consequently, I conclude that Agency's action should be upheld, in part, and reversed in part.

### ORDER

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

1. Agency's action of suspending Employee from service for fifteen (15) days with regard to Charge 2 is hereby **UPHELD**.
2. Agency's action of suspending Employee from service for fifteen (15) days with regard to Charge 1 is hereby **REVERSED**; and Agency shall reimburse employee all pay and benefits lost as a result of this suspension.
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:

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MICHELLE R. HARRIS, Esq.  
Administrative Judge

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<sup>42</sup> Table of Illustrative Actions 2016. It should be noted that under the 2012 DPM Table of Appropriate Penalties ("TAP"), the penalty for this cause of action on a first offense is Suspension for 15 days see Chapter 16 §1619.1.