

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of)	
)	
EDWINA L. ALFRED,)	OEA Matter No. 1601-0041-08
)	
Employee)	
)	September 29, 2008
v.)	
)	
DEPARTMENT OF HUMAN RESOURCES,)	ROHULAMIN QUANDER, Esq.
)	Senior Administrative Judge
Agency)	
_____)	

Edwina L. Alfred, *pro se*, Employee
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On January 23, 2008, Employee, a Human Resources Assistant, DS 023-06/01, with the Benefits and Retirement Administration (the "BRA"), D.C. Department of Human Resources (the "Agency"), filed a Petition for Appeal with the D.C. Office of Employee Appeals (the "Office" or "OEA"), challenging Agency's final decision, effective January 18, 2008, which separated her from a career service position, based upon allegation of neglect of duty. This matter was assigned to me on March 21, 2008. On June 26, 2008, I conducted an Evidentiary Hearing, at which time sworn testimony was received from several witnesses, and documents were admitted into the record as formal exhibits. The transcript of the hearing became available on or about July 10, 2008, and shortly thereafter, the respective parties filed their proposed final orders. The record is now closed.

JURISDICTION

Pursuant to *D.C. Official Code* § 1-606.03(a) (2001), the Office has jurisdiction over Employee's claim.

ISSUE

Whether Agency's action separating Employee from Government service was conducted in accordance with applicable law, rule and regulation.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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.

STATEMENT OF THE CHARGE

Charge: § 1603.3: on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations.

Specification: During the period of August 2007 to present, and after counseling and reasonable managerial attempts to correct your behavior, your performance/behavior has not improved. In fact, your performance continues to decline. As a result of your careless work habits you have made repeated mistakes in routine assignments and jeopardized the integrity and efficiency of the office; failed to complete assignments in a timely manner; and have repeatedly failed to follow supervisory instructions.

The following elements were also enumerated in the Advanced Written Notice of Proposed Removal, dated December 3, 2007, as being a component of the consideration to terminate the Employee:

1. October 10, 2007 – Counseling regarding personal telephone calls.
2. October 19, 2007 – Letter of Admonition, failure to complete duties as assigned.
3. November 15, 2007 – Failure to obtain advanced approval for leave, charge LWOP.

4. November 21, 2007 – Failure to comply with written instructions to sign and return the Confidentiality Statement by November 16, 2007.
5. November 21, 2007 – Failure to retrieve voice messages from main phone line, 120 messages were in the voice mailbox dated back to November 5, 2007.
6. November 26, 2007 – Insubordination – Failure to comply with request to assist in the HR Answers bullpen.
7. November 27, 2007 – Failure to comply with office policy on attendance.
8. November 28, 2007 – Failure to properly log incoming benefits documents, mail and phone calls in assigned Access database.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Agency's Case in Chief

Testimony of Michael Scott (the “witness”): The witness testified in his capacity as a Human Resources Specialist for the District Government, noting that he was the custodian of Employee’s personnel file. The Employee’s personnel files reflected that Employee was hired in 2004 as a Human Resources Assistant with the Benefits Retirement Administration, and remained in the same capacity until she received a Final Notice of Removal on January 4, 2008. *See Agency Exhibit #1 & # 2.* All the paperwork filed for Employee’s termination was routine and created near or at the time of her dismissal. (*Tr., Pp. 21- 27*)

Testimony of Karla Sumpter (the “witness”): The witness is the Chief Operating Officer for the Human Resources Department and the acting Associate Director of the District of Columbia Benefits & Retirement Administration (“BRA”). BRA is responsible for securing and maintaining the medical, dental, vision and death benefits for all District of Columbia Government employees and their families. As such, efficiency and effectiveness are of the utmost importance to BRA and the clients that it serves. (*Tr., Pp. 27-28*)

The witness was Employee’s direct supervisor between July 2007 and January 2008. Employee was the BRA office receptionist. Her major duties included answering the telephones, sending outgoing mail twice a day, checking and recording messages in the mainline telephone voicemail box, date stamping all incoming correspondence, and logging-in all employee benefit packages in a timely manner. Despite repeated verbal and written attempts aimed at the rehabilitation of Employee’s performance, her performance in each of the noted areas was unacceptable and prove to be detrimental to the integrity of the office. (*Tr., Pp 29-31*)

On two separate occasions the witness found stacks of new employee benefits packages in Employee’s desk drawer which had not been logged-in within a reasonable amount of time. Logging-in of employee benefit packages is extremely important because if the District government does not receive a new employee’s benefits paperwork within thirty-one (31) days of his/her hiring, then the employee is automatically placed in a waived status, resulting in D.C. employees and their families suffering a potential loss of

benefits and gross inconvenience. (*Tr.*, *Pp.* 32 – 38) During this period, the witness was notified by the main office of Human Resources that customers were complaining that the BRA voicemail box was full, despite the capacity to store up to 120 messages. Investigating, the witness was astonished to discover that the mailbox contained 120 unchecked messages, dating back three to four weeks.¹ (*Tr.*, *Pp.* 32-38)

All of BRA's incoming calls are time-sensitive. The majority of callers are District employees who need immediate assistance for matters ranging from medical insurance to death benefits. Retrieving the messages was the sole responsibility of the Employee and vital to the efficiency and reputation of the office. The Employee's failure to faithfully fulfill her duty may have led to employees paying out of their own pockets for covered medical expense or foregoing care entirely.²

The Employee did not conduct herself in a professional manner in accordance with BRA's policies and procedures, including engaging in personal phone calls at the front desk within earshot of customers and other employees on several occasions. Because of the ongoing disruptive nature, on October 10, 2007, the witness counseled employee regarding the personal phone calls. *See Agency Exhibit #7*. Further, Employee often failed to comply with the office policy regarding attendance, by not first obtaining express permission before taking leave. Instead, she often dropped a leave slip into the witness's mailbox the day before the Employee was requesting time off, then taking the leave, without first learning whether the leave request was approved or denied. On occasion, leave was not approved, but Employee was still absent, and was subsequently placed on leave without pay (LWOP). Her sudden, unanticipated absence adversely impacted upon BRA staff's capacity to serve the public, especially when the unanticipated leave was taken during the busy enrollment season. (*Tr.*, *Pp.* 39-45)

The Agency was concerned that sensitive information, including Social Security numbers and confidential medical information, was being improperly disclosed. Consequently, BRA mandated that all employees sign and return a confidentiality agreement. Employee failed to sign and return the confidentiality statement by the deadline of November 16, 2007, because she admitted that she neglected to read the entire e-mail mandating such. (*Tr.* *Pp.* 38-39)

It is a normal practice of BRA for clerical staff to cover the HR bullpen when DCHR is conducting a staff meeting. On at least one occasion, November 26, 2007, Employee was insubordinate, refusing to comply with an order to cover the bullpen, providing telephone coverage as directed. On at least one occasion, Employee was

¹ Other testimony in the record reflects that most of the messages were more recent, but that some were up to 21 days old.

² The witness's testimony regarding the unretrieved telephone messages was corroborated by Kimberly Thorpe, a subsequent witness and BRA's Chief Technical Advisor. (*Tr.*, *Pp.* 33-39; 69-70)

observed eating or displaying food at the front desk of BRA while interacting with walk-in customers, in violation of office policy.³ (*Tr.*, *Pp.* 43-45)

Although the witness initially intended to only suspend Employee, upon retrieving Employee's personnel file, the witness discovered a pattern of conduct, including that Employee was suspended one year earlier, in 2006, for the same behavior. After that suspension, the next step in progressive discipline was to consider removal. Among the specific violations cited as the basis for the prior suspension were eating at her desk, failing to retrieve telephone messages, and non retrieval and sorting of the incoming mail. *See Agency Exhibits #4 & #5.* Notably, the prior suspension notice predated the witness's assignment to the BRA office. In light of the prior suspension, the witness felt that suspending Employee again would be a futile act, and decided that termination was appropriate. (*Tr. Pp.* 46-51)

Testimony of Diana Haines-Walton (the "witness"): The witness is Deputy Director of Human Resources for the Agency, and the deciding official in this matter. After carefully reviewing the findings of the hearing officer, and reading Employee's written response, the witness determined that Employee's poor performance substantiated the charge, and that there was a neglect of her duty, which hindered the efficiency and integrity of the office. The witness then composed the Notice of Final Decision: Removal document. (*See Agency Exhibit # 6.*) The witness noted that Employee's failure to retrieve phone messages and to log-in employee benefits packages was particularly "egregious," and weighed heavily in her decision, as D.C. government workers, when they contact the Agency for help, are often in a level of immediate distress, depending upon a prompt response and assistance from the Agency.

In addition to timely responses to employee requests, to avoid the possibility of lost benefits or undue burdens being placed upon the employee, the Agency's employees must conduct themselves in a professional matter at all times. In this respect, the Employee proved to be deficient. The witness considered other factors such as Employee's length of service, disciplinary history, and possible mitigating circumstances before reaching a decision to terminate. (*Tr.*, *Pp.* 65-77)

Testimony of Kimberly Thorpe (the "witness"): The witness, who was called as a rebuttal witness, is the Chief Technical Advisor for the Agency. Part of her job-related duties included responsibility for the day-to-day operation of the Agency-wide area network, including telephones. There are multiple phone lines within the Agency, with BRA having its own telephone lines and voicemail box. The voicemail box in BRA, from which the Employee was responsible to retrieve messages, can hold up to 150 messages.⁴ Multiple telephone calls started calling through the Agency's main telephone number,

³ On direct examination, Employee would adamantly deny this claim, stating that she "never ate at the front desk," contrary to the testimony of Lela Jones, BRA's rebuttal witness.

⁴ Testimony varied regarding the capacity of the voicemail box. At any rate, the message storing capacity was at least 120 messages.

with callers indicating that they could not leave messages on the BRA line. The witness investigated, discovering that the BRA mailbox was full, with its maximum of 150 messages, some of which were up to 20-30 days old, as every message left in the mailbox receives a date and time stamp. The witness corroborated Sumpter's earlier testimony regarding the existence of unlogged-in mail and employee benefits packages, noting that some of the mail was multiple days old, a crucial situation, given that it was "Open Season", when employees can change their health benefits package, but are mandated to act within the proscribed 31-day window. The witness's testimony contradicted Employee's earlier testimony that she logged-in all mail the day it came in, or the following day. (*Tr., Pp. 132-138*)

Testimony of Lela Jones (the "witness"): The witness, who was called as a rebuttal witness, is a retirement system specialist for the Police and Firefighter Retirement Relief Board. She filled in for Employee on several occasions when the Employee was on leave. Although BRA receives a large quantity of mail on a daily basis, the witness always managed to at least time stamp the incoming mail, whenever she was assigned to work at the front desk, and left the mail in a designated location, for the Employee to later process and disseminate as a part of her job-related duties. It was discovered in November 2007, during Open Season, that certain very important mailed documents could not be found. The witness was asked about whether it came in or where it might be located. She verified that a large stack of mail had been received by her during the period in question, and that she had herself filed stamped it. Armed with this verification, Agency conducted a search and found the stack of mail in Employee's desk.⁵ The witness had no personal recollection of the Employee ever stating that she needed help in working at the front desk. (*Tr., Pp. 152-157*)

Employee's Case in Chief

Testimony of Edwina L. Alfred, Employee (the "Employee"): Employee testified on her own behalf, disputing the allegations and generally denying that she had committed the enumerated acts of neglect regarding the performance of her duties and responsibilities. Employee explained her position regarding several of the charges against her, noting that she tried to fully comply, and had a familiarity with how the Agency operated, which helped direct the time of day that certain functions needed to be carried out.

For example, although being directed by her supervisor to deliver the outgoing mail to the mail room at 10:00 am and 3:00 pm daily, Employee often processed a greater amount of this mail, because she was fully aware that the outgoing mail did not leave the building until 1:15 pm and 4:00 pm. On occasion, she delivered the outgoing mail more than twice in a day. As well, the amount of clients present and incoming telephone calls

⁵ Based upon the testimony of witnesses Sumpter and Thorpe, it would appear that some of this then located mail is the same mail that was located during a search of Employee work area. The search disclosed that some of the mail and documents benefits packages had not been time stamped at the intake desk, which delayed processing and compromised the employees' entitlement to a decision on request for benefits.

for service also dictated the time when the Employee could leave her office and mail could be taken to the mail room. (*Tr.*, *Pp.* 96-97)

The allegation regarding her alleged failure to follow Agency policy with regard to the use of accumulated leave, was directly related to her personal stress, caused in significant part by her ignored, prolonged request for permanent help on the front desk. Before Sumpter became the supervisor, Employee would take an occasional day of leave by simply submitting a leave slip, without having to wait to be advised that the request was approved. As the new supervisor, Sumpter questioned Employee's use of leave, especially when the request was during Open Season. This is BRA's busiest time of the year, when the Agency must initiate, update, and modify health and other benefits packages. The work load at this time of year was so heavy, that two people needed to be formally assigned to complete the many tasks that came, seemingly all at once. Employee felt that she simply needed a break. (*Tr.*, *Pp.* 100-101)

Employee denied that she ever refused or failed to cover the HR bullpen, denied ever eating at her desk, claimed she retrieved the phone messages twice a day, and testified that her failure to promptly log-in employee benefits packages was the result of being overworked because of open enrollment. (*Tr.*, *Pp.* 101; 127; 104-105; & 97-99)

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Findings of Fact

From the outset, I note that much of Employee's testimony is inconsistent with the credible testimony of multiple Agency employees. Sumpter testified credibly that Employee refused to cover the HR Answers Bullpen when directed to do so. In particular, Kimberly Thorpe testified that they observed Employee eating lunch at her desk, with Sumpter testifying that on at least one other occasion, Employee's young adult son came to the office and, in full view of the Agency's clients, proceeded to open and partake of his lunch, using the Employee's desk as his table. Sumpter counseled the Employee about the incident, because of her failure to exercise proper judgment and control over the situation.

In addition, Sumpter and Thorpe testified that they found about 120 phone messages, dating back three weeks, that had not been retrieved from the voicemail box. Finally, Sumpter, Thorpe, and Lela Jones testified that they discovered a stack of mail containing employee benefit packages, legal inquires and other time sensitive documents that had not been logged-in in a timely manner. The numerous inconsistencies in Employee's testimony severely undermine her credibility and preclude this Office from relying on her testimony as the basis for a decision.

Employee did not dispute that in November 2007, a significant quantity of mail was found in her desk, but only quarreled with the size of the stacks. She maintained that she was unaware of any instance where any employee did not receive benefits because of

her neglect of duty.⁶ Employee's central contention throughout her testimony was her inability to complete the job-related tasks, because she was overwhelmed by her work at the time of these incidents. Sumpter testified that, in about July 2007, just about the time that Sumpter came to be Employee's supervisor, she told Employee that if she ever fell behind again, that she was to ask for assistance. Further, to Employee's assertion of being overwhelmed because of the heavy workload, Sumpter noted that although there is always a workload, July is not the busy season.

Subsequently, and prior to the occurrence that ultimately led to Agency's termination actions, it is disputed whether Employee ever requested task assistance from her supervisor. Although Employee testified that she requested assistance, Sumpter, on cross examination, denied that Employee sought assistance "on several occasions." Rather, Sumpter testified, ". . . I do recall your asking for assistance after being counseled on not completing tasks." Sumpter also noted that despite Employee's claim of not having enough time to complete her tasks, she still managed to spend significant time on personal e mails and personal telephone calls, which created an issue of prioritization.

Sumpter testified that all BRA employees are given four administrative hours every week that can be used to catch up on work without having to deal with customers. Noting that Employee and she did not have "several conversations," as Employee claimed, regarding the use of administrative time to catch up on accumulated office work, she did not recall whether Employee took full advantage of these administrative set-aside hours, although she was aware than Employee did utilize the opportunity on occasion.

Agency's basic contention, from which position it never varied, is that the action of termination was taken for cause, and is supported by the preponderance of the evidence. Employee was given a 15 day advance notice of removal on December 3, 2007, alleging Neglect of Duty, and citing particular failures on Employee's part, primarily committed, but not exclusively, between October 10, 2007, and December 2, 2007. In essence, the itemizations enumerated against Employee were failures to:

- 1) Comply with the directives of her supervisor to deliver the outgoing mail to the mailroom twice daily at a precise time;
- 2) Cease engaging in personal telephone calls at the front desk, near the intake counter;
- 3) Help in the HR Answers bullpen when directed to report;
- 4) Keep an appropriate record of her time by signing in and signing out on a daily basis;
- 5) Comply with office policy on attendance, by first properly requesting to use accumulated annual and sick leave, and obtaining notification that permission for

⁶ At the hearing, Ms. Sumpter demonstrated with her hands, what she believed to be the height of the stacks, the ALJ estimated that Sumpter's hands were 18 inches apart. During Employee testimony, Employee made a similar demonstration with the ALJ noting that her hands were 8 inches apart.

- the use of same had been granted, before electing not to report to work at her normal report time;
- 6) Properly and timely log incoming benefits documents, including the mail, and disseminate to BRA staff for prompt processing;
 - 7) Promptly retrieve and log up to 120 telephone call messages from the answer box, some of which calls were close to 30 days old; and
 - 8) Cease eating at her desk, in plain view of the clients, rather than in the designated lunch room. *See Agency Exhibit #3.*

The facts supporting these charges were stated in the advance notice. In December 2007, Employee responded to the charges at the Agency level, and was granted an administrative review, which consisted of an opportunity to fully respond to the allegations in writing, including the presentation of supportive documentation, plus an interview with Donna Harrison-Scott, Agency's designated hearing officer. On January 2, 2008, Harrison-Scott issued a Recommendation of Hearing Office Report, which found that all the charges were sustainable. She recommended that Employee be terminated for Neglect of Duty in accordance with §1603.3 of the District Personnel Manual. *See Agency Exhibit #7, P. 4.* The recommended decision was adopted by Haines-Walton, the deciding official, and a Final Agency Decision, dated January 4, 2008, was served upon the Employee stating that she was terminated. *See Agency Exhibit #6.*

I find that the testimony and exhibits presented to me on behalf of the Agency were all highly credible. In summation, they affirmed that the Employee committed the acts or failed to perform in compliance with established and known job performance standards, underscoring that she was liable as charged. The Agency case-in-chief consisted of the following witnesses: Michael Scott, Human Resources Specialist for the Office of Human Resources; Karla Sumpter, Associate Director Benefits & Retirement Administration; and Diana Haines- Walton, Deciding Official.

The following enumeration of the Findings of Fact and Conclusions of Law are based upon the testimonial and documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

1. Edwina Alfred (Employee) was hired by the D.C. Government effective August 2, 2003, and served the Agency in the most recent capacity as a Human Resources Assistant, DS-6, Step 2, effective December 6, 2004. *See Agency Exhibit. #1* Employee's main responsibilities included greeting incoming customers, notifying specialists that an appointment had arrived, disseminating forms from incoming mail, delivering outgoing mail twice a day to the lobby area/mail room, responding to official government-related e mail inquiries, and answering the telephone.
2. As a result of disciplinary action, which included a list of formal charges relating to allegations of Neglect of Duty, Employee was terminated from her position with the Agency, effective January 18, 2008. *See Agency Exhib. #2* Prior to termination, Employee was properly served with an advance written notice of

- proposed removal on December 3, 2007, (*See Agency Exhib. #3*), and a Notice of Final Decision on January 7, 2008. (*See Agency Exhib. #6*).
3. Prior to Agency's final decision, Employee refuted the proposed removal before Hearing Officer Donna Harrison Scott, who interviewed the Employee and allowed her to submit a written response to the allegations. After evaluating the entire record, Scott concurred with Agency's proposal to remove Employee, as reflected in her Recommendation. (*Tr., Pp. 75-76; See Agency Exhib. #7.*)
 4. Karla Sumpter, the Agency's Chief Operating Officer, was the Employee's immediate supervisor between July 2007 through the January 18, 2008, the date of termination. Sumpter noticed or was advised of Employee's performance deficiencies, especially between October 2007 and December 2007, which included: a) failing to adhere to office policy when directed; b) not reading e-mails timely; c) not performing daily functions for which she had verbally been counseled and issued letters of warning; d) not running the mail timely; e) failure to more timely log incoming documents, many of which were time sensitive or contained information which mandated immediate action; f) not retrieving telephone messages to a point where the Agency had at least 120 voice mail messages in the answer box, some of which were at least three weeks old.
 5. Employee was the sole person responsible on a daily basis for opening and processing for dissemination to staff the large stack of unprocessed mail, which contained employee benefits forms, attorneys' requests for information, child support orders, and enrollment forms. All of the mail required prompt responsive action by the Agency. Otherwise, a D.C. Government employee might be placed into both a waive status and a financial hardship status, if the enrollment forms and documents are not received within 31 days. The circumstance could have adverse effect upon the affected employee's general health, vision, dental, or life insurances, or force the entitled employee into an unnecessary self-pay status, due to the appearance that he or she does not have Agency-guaranteed insurance coverage.
 6. Both the October 2007, discovery of a huge stack of unprocessed incoming mail, and likewise the retrieving at least 120 voice mail messages, which was discovered in November 2007, were anomalies discovered as a result of citizen complaints about the inability to obtain timely service.
 7. Employee failed to properly and promptly complete several of the tasks to which she was assigned, including: a) failing to properly process and disseminate incoming mail to staff, for immediate processing for entitled benefits; b) failing to follow written instruction to deliver the outgoing mail to the mailroom precisely at 10:00 a.m. and 3:00 p.m.; c) failing to timely respond to a time-sensitive incoming e-mail which directed her to sign and return a confidentiality agreement; d) failure to report to work on at least one or more occasions between October 2007 and December 2007, part of which period was during the Open Enrollment season, without receiving prior notice whether her leave request had been approved or denied, yet fully on notice that on a prior occasion her request for leave had been denied; f) despite a supervisory directive, and under the pretense of having too much work to do, declining on one or more occasions to assist with telephone coverage in the HR Answers bullpen.

8. Sumpter had several conversations with the Employee in an attempt to correct her deficient performance in completing her responsibilities and duties. This effort included adding a second person to assist at the front desk, plus providing administrative hours when all employees, including this Employee, would be excused from answering the telephone. This option allowed the employees to catch up on paperwork and other job-related responsibilities.
9. The efforts to correct Employee's performance problems also included customer service training as well as training in Word and Excel applications. However, Employee showed no improvement after she attended training.
10. Employee responded to Sumpter's verbal counseling and corrections by stating essentially that her own job-related deficiencies were, in significant measure, the fault of others.
11. Employee's tour of duty was also checked with personal e-mails, loud personal telephone calls, and eating at the front desk, which is plainly visible to the incoming clients. On at least one occasion Employee's son came to the office, spread out his lunch on Employee's desk, and likewise proceeded to eat his lunch. Employee was present and appears to have done nothing to prevent this activity from occurring. The Agency does not allow employees to eat at the front desk. Further Employees are not allowed to make personal telephone calls at the front desk, within the earshot of customers. Rather, an occasional personal call should be taken away from the general public's range of hearing.
12. Sumpter initially considered imposing a suspension rather than termination, but discovered that Employee had previously been suspended for the same performance problems in July 2006. The problems included eating at the front desk, failing to retrieve phone messages and mail, and failing to distribute mail throughout the day as directed.
13. Based upon the referral by Sumpter, supplemented by the Recommendation of Hearing Examiner Donna Harrison-Scott, Deputy Director Diana Haines-Walton ("Haines-Walton") made the final determination and served as the Deciding Official who prepared the final agency decision removing Employee from her position as Human Resources Assistant.
14. Prior to rendering her decision Haines-Walton considered the nature and/or seriousness of Employee's offense, reviewed the hearing officer's report and the supporting documentation, and considered Employee's response to the charge against her. She determined that the charge against Employee was "very, very serious," given that all 34,000 employees for the District Government depend upon the BRA regarding their respective benefits. The most frequent occasion for an employee to initiate communications with BRA is when there is a problem that needs immediate attention. Whether the employee is at the hospital and trying to get coverage, or needs quick response to submitted documents, these types of problems require immediate assistance. Employee's failure to act could have resulted in employees going without benefits to which they were justly entitled.
15. As mitigation, Haines-Walton considered Employee's length of service and the history of previously applied progressive discipline, but decided that the seriousness of the offense outweighed any mitigating factors. Regarding progressive discipline, Employee was counseled verbally, given written warnings

and previously suspended, but the prior disciplinary action did not make a difference or result in an improvement in Employee's ability to continue to do her job in an appropriate fashion.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Employee was the sole witness testifying on her own behalf, and although she seemed very sincere in her testimony, her credibility was not that high in my view. Typically, she was not able to respond with sufficient details and/or documentation, to counter instances where it was alleged that she failed to act in compliance with the expectations of her job and to complete her assigned duties both on time and in the professional manner expected. At the end of her case, Agency also called Kimberly Thorpe and Lela Jones as rebuttal witnesses, both of whom were likewise highly credible.

Given the exhibits and testimony presented at the evidentiary hearing by the Agency, there is sufficient evidence on the record to support a finding, and then a conclusion, that the Agency's action of charging the Employee with Neglect of Duty is supported by the preponderance of evidence. *Black's Law Dictionary*, 7th Edition at P. 1055 (1999), defines the term "neglect" as, "the omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding." Based upon this record, I conclude that Employee actions and inactions, demonstrate that she neglected her duty, in that she failed to give proper attention to several major, critically significant functions of her position. Therefore, as supported by the preponderance of the evidence, the Agency had cause to take an adverse action, and to impose disciplinary action, which resulted in Employee's termination.

Employee argued that the imposed penalty was too harsh, and that under the long recognized and established theory and practice of imposing progressive discipline, perhaps she might have been subjected to a suspension, but not a termination. I disagree, and conclude that the penalty imposed in this case was appropriate. Both Sumpter and Haines-Walton each testified regarding the factors considered prior to identifying the penalty, Sumpter enumerating in Agency Exhibit #3, the Advance Notice of Proposed Adverse Action, the primary specifics that constituted Employee's neglect of duty, reflecting that in July 2006, Employee had previously been suspended for this same behavior. Therefore the next progressive disciplinary action was removal.

Haines-Walton testified that as the deciding official, she reviewed the findings of the hearing officer, along with any supporting documentation that was in the case file, considering whether to affirm, modify, or reverse the recommended decision of the hearing officer. *See Agency Exhibits #3, #4, #5, & #7*. She also considered Employee's response, prior to preparing the Agency's final decision regarding Employee's neglect of duty. In rendering a decision, including selecting the penalty, Haines-Walton considered Employee's past performance, the nature of the offense, length of service and previous disciplinary actions, and the serious nature of Employee's actions.

OEA's review of a penalty is limited to whether the agency's managerial discretion has been legitimately invoked and properly exercised. *See Douglas v. Veterans Admin.*, 5 M.S.P.B. 280 (1981). This means that OEA will sustain an agency decision unless: 1) it is unsupported by substantial evidence; 2) there was harmful procedural error; or 3) it was not in accordance with law or applicable regulations. *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010. The Merit Systems Protection Board (the "MSPB"), the federal counterpart to OEA, established criteria that supervisors must consider in determining the appropriate penalty to impose for an act of employee misconduct. In *Douglas, supra.*, the MSPB established that there must be an adequate relationship or "nexus" between the misconduct and the efficiency of the service. *Id.* at 302. To determine what penalty would then be appropriate, Agency was mandated to consider all relevant mitigating and aggravating factors. Agency considered the criteria established in *Douglas* in determining the appropriateness of this penalty. The factors of greatest significance were the seriousness of Employee's actions, Employee's disciplinary history, and the consideration of any mitigating factors.

The record shows that the penalty is within the range allowed by law, regulation or guidelines and is clearly not an error of judgment. *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 1915, 1916 (1985).

Agency then determined that Employee's neglect of duty was a very serious offense, which interfered with the efficient operation of the District of Columbia. Pursuant to the criteria established in *Douglas*, an Agency must consider Employee's past disciplinary record in determining the penalty for Employee's action, including previous corrective actions taken against Employee as required by *Douglas*. Agency likewise considered all mitigating factors in determining the appropriateness of the penalty.

Agency next determined that no mitigating factors were present, despite Employee's belatedly claiming, as a mitigating factor, that she needed assistance in performing all her duties. Sumpter credibly challenged this claim, noting that Employee did not make that representation prior to the commencement of the adverse action. Neither did any witness corroborate that Employee had previously made such a request. Agency then concluded, contrary to Employee's assertion, that this element was not a mitigating factor, and there were no mitigating factors for Agency to consider.

I conclude that because Employee's action was an employment related omission that interfered with the efficiency of government operations, it is within the DPM's definition of "cause," and likewise within Agency's purview to take action. Agency has represented to this AJ that although, at the time this adverse action took place, the Agency did not have a table of penalties, the District government's Director of Personnel has since issued amendments to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (the "CMPA"), as amended, including to Chapter 16,

General Discipline and Grievances, now incorporated into the DPM, which reestablished a table of penalties for designated offenses.⁷

Although the provisions of this new document has no direct bearing upon the outcome of the matter at bar, I take administrative notice that termination and removal from a job position is a permissible penalty for Agency's proving the charge of neglect of duty, *even if it is the first offense*. (Emphasis added by the AJ). Accordingly, the penalty is permitted by existing regulations.

ORDER

Based upon a careful review of the evidence presented and the pertinent laws and regulations, the charge of Neglect of Duty is sustained. The Agency's managerial discretion has been legitimately invoked in selecting a penalty, and this Office will not disturb either the decision to remove the Employee or modify the penalty.

Therefore, it is hereby ORDERED, that Agency's action of removing Employee is UPHeld.

FOR THE OFFICE:

/ s /

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

⁷ Effective April 25, 2008, the Director, D.C. Department of Human Resources (DCHR), with the concurrence of the City Administrator, issued new regulations on employee discipline and grievances, codified at Title 1, Chapter 6, Subchapter XVI, General Discipline and Grievances. This subchapter amends the prior Subchapter XVI by establishing a Table of Appropriate Penalties for certain enumerated offenses. In both the prior and current sections of 1603, *Definition of Cause: General Discipline*, of the Subchapter, Neglect of Duty (Sec. 1603.3(f)(3)), is included in the definition of the causes for which disciplinary action may be taken. The new section 1619, *Table of Appropriate Penalties*, provides that the disciplinary penalty available to the Agency upon a determination that cause has been established, includes the imposition of reprimand to removal, for the first offense of neglect of duty.