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

In the Matter of:	)	
	)	
ANDRA PARKER	)	OEA Matter No. 1601-0056-08
Employee	)	
	)	Date of Issuance: March 11, 2009
v.	)	
	)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF CORRECTIONS	)	Administrative Judge
Agency	)	
	)	

Andra Parker, Employee  
Mitchell Franks, Agency Representative

**AMENDED<sup>1</sup> INITIAL DECISION**

**INTRODUCTION AND STATEMENT OF FACTS**

Employee filed a petition with the Office of Employee Appeals (OEA) on March 13, 2008, appealing Agency’s final decision to remove him from his position as Correctional Officer, effective March 17, 2008.<sup>2</sup> At the time of the adverse action, Employee was in permanent career status and had been employed at Agency for approximately 18 years.

This matter was assigned to me on May 27, 2008. At the prehearing conference on June 20, 2008, the parties agreed to enter into OEA’s mediation program. On or about November 28, 2008, I was advised that mediation had not been successful and scheduled a hearing. At the hearing, which took place on January 7, 2009, the parties had full opportunity to, and did in fact, present testimonial

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<sup>1</sup> This Initial Decision replaces the one issued on March 2, 2009. It has been amended to correct a typographical error on page 9, *i.e.*, “Coley” replaces “Brinson” as the second word on line 9 of the first full paragraph on that page.

<sup>2</sup> Agency issued a final notice on March 10, 2008 which provided for a March 10, 2008 effective date of removal. (Ex A-9) On March 11, 2008, it issued an amended notice which changed the effective date to March 17, 2008. (Ex A-8). The notices are otherwise the same.

and documentary evidence as well as argument in this matter.<sup>3</sup> The record closed on January 7, 2009.

### JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

### ISSUE

Did Agency meet its burden of proof in this matter?

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Agency charged Employee with insubordination based on his “repeated failure” to follow directives of a superior, in violation of the District Personnel Manual Chapter 16 and Correctional Officer General Order Number 2. In the final notice, Agency Director Devon Brown stated:

By letter dated January 12, 2007, I placed you on Administrative Leave with pay, pending an investigation by the Agency’s Office of Internal Affairs. The letter directed you to contact Major Gary Brinson between the hours of 8:30 a.m. and 9:00 a.m. each day, Monday through Friday, during the period of Administrative Leave. The letter also instructed you to “comply with any and all instructions that you received from Major Brinson”.

On March 6, 2007, Acting Major Coley sent you a certified letter to your address of record documenting the following:

“You are directed to report to Ms. Wanda [Patten] in the Office of Internal Affairs located at 300 Indiana Ave., Room 2018, NW, Washington, DC [on] Friday, March 9, 2007 at 1:00 p.m.”

“If you have any questions regarding this appointment, you are to contact Ms. Wanda [Patten] at (202 727-2700)”.

The return receipt shows that you signed for this letter on March 10, 2007, which was the day after your scheduled appointment, however according to Supervisory Investigator Patten, upon receipt of the letter you did not contact her regarding the missed appointment or to reschedule.

On March 14, 2007, Acting Major Coley contacted you telephonically and informed you that Major Brinson was on leave and that he would be

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<sup>3</sup> Testimony was presented under oath. The transcript is cited as “Tr”, followed by the page number. Exhibits are cited as “J” for joint, “A” for Agency and “E” for Employee, followed by the exhibit number. The parties chose to present oral closing arguments in lieu of submitting written briefs.

assuming his duties. During this conversation, Acting Major Coley again instructed you to call Ms. Patten, and again you failed to do [so]. Because of your repeated failure to contact Ms. Patten as instructed by Major Coley,

Investigator Ms. Patten dispatched the Warrant Squad to your private residence in order to deliver...a written correspondence notifying you of your obligation to respond to the Office of Internal Affairs for official questioning.

Although you did not receive the aforementioned letter from Acting Major Coley until the day after your scheduled [appointment] , you knew or should have know that you had a responsibility to make contact with Ms. Patten as ordered by Acting Major Coley...As a Correctional Officer, General Order Number 2 states, "Obey all orders of my superiors, Post Orders, Special Orders and orders passed on to me by the officer whom I relieve". ..

You were insubordinate inasmuch as you failed to follow the directive given to you by Acting Major Coley, your superior, to contact Wanda Patten. Acting Major Coley gave you a directive that was reasonable, clear, and related to the matter that led you being placed on Administrative Leave and you intentionally disobeyed his orders. (Ex A-8).

On January 12, 2007, Agency placed Employee on administrative leave after he was accused of providing contraband to an inmate in the form of a fish sandwich. The matter was referred to Agency's Office of Internal Affairs (IA) for investigation. While on leave, Employee was directed to contact Major Gary Brinson between 8:30 a.m. and 9:00 a.m. each day from Monday to Friday and to comply with "any and all instructions" he received from Major Brinson. (Ex A-3). It is undisputed that he complied with this directive, telephoning Major Brinson as directed, and when Major Brinson was not available, telephoning Acting Major Walter Coley or administrative staff.

#### Positions of the Parties and Summary of Evidence

Agency's position is that Employee was insubordinate because of his "repeated failure" to contact Ms. Patten as directed by Acting Major Coley. Wanda Patten, Chief of IA, testified that she was assigned to investigate the allegation that Employee had supplied contraband in the form of a fish sandwich, to an inmate. She stated that she initially spoke with Major Brinson about scheduling Employee for an interview, and that after Major Brinson went on vacation, she contacted Major Coley and told him she was "trying to have [Employee] scheduled for an interview and asked him would he have [Employee call her] once he called in daily...so [she] could schedule a time...for an interview". (Tr, 19). She testified that she could not contact Employee directly because Agency did not have his telephone number. When she did not hear from Employee, she contacted Major Coley who told her that he had directed Employee to contact her. (Tr, 20). She said the first letter, dated March 5, 2007, was sent to Employee by certified mail and directed him to report to her on March

9.<sup>4</sup> (Tr, 21). Ms. Patten stated when she learned Employee did not receive the letter until the day after the scheduled appointment, she sent another letter rescheduling the appointment for March 26, 2008, which was hand-delivered by the Warrant Squad to Employee's home. (Ex J-2). Employee kept the appointment.

Ms. Patten testified that her interpretation of the statement in the March 5<sup>th</sup> letter, that if Employee had "any questions regarding this appointment", he should contact her; was that Employee should telephone her when he received the letter. (Ex, J-1, Tr, 32).

Walter Coley was Acting Major during the relevant period. He testified that on occasion he telephoned Employee at home and thought he had obtained the telephone number from the Warden's Office. He could not recall if Ms. Patten had asked him for Employee's telephone number. (Tr, 57, 62). He testified that when he took Employee's calls, there was generally no conversation, but at times he issued directives to Employee, usually concerning leave. He recalled contacting Employee on one occasion "to pass on some information...from Internal Affairs" but did not recall when that conversation took place. Mr. Coley testified he wrote the March 5 letter to Employee at Ms. Patten's request and thought that March 5 was the first time Ms. Patten asked him to contact Employee. (Tr, 63-64).

The witness testified that he became aware that Employee had not received the March 5 letter until March 10<sup>th</sup> when the postcard certifying receipt was returned. He said he then waited for "further instructions from Ms. Patten or [his] superiors". (Tr, 43). He said he received instructions to have Employee contact Ms. Patten. He said he never discussed Employee's receipt of the notice a day after the schedule meeting with Employee. (*Id*). The witness testified he was certain he spoke with Employee on March 14 "because that would have been one of the days he would have called in". (Tr, 44). He said he directed Employee to contact Ms. Patten during that conversation and that Employee kept asking him why he had to call her. When asked if Employee told him he would call Ms. Patten, he replied:

No, no he just kept asking me why he – he had to call her and what she wanted to talk to him about. (Tr, 69).

He said he next spoke with Employee on March 20 when Employee hung up on him. On March 20, Acting Major Coley wrote a memorandum to Major Brinson recommending that Employee be cited "for cause". The memorandum stated in pertinent part:

On March 6, 2007 I sent a certified letter to [Employee]. The letter had specific directions for [Employee] to report to Ms. Wanda Patten...on March 9, 2007. The letter also included a contact number for Ms. Patten if [Employee] had any questions regarding this appointment. [Employee] signed for the letter on March 10, 2007, however; he did not report to nor contact Ms. Patten.

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<sup>4</sup> This is the same letter referred to in the final agency notice as the March 6, 2007 letter. It is actually a memorandum from Major Coley to Employee that is dated March 5. It was sent on March 6.

On March 14, 2007 at approximately 9:05 a.m. I spoke to [Employee] and informed him that Major Brinson was on leave and that I would be assuming his duties. I then directed [Employee] to call Ms. Patten ... [Employee] asked what she wanted to talk to him about; I told him that I did not know and that he could find out when he talked to her. I then ensured that he had the telephone number to reach her. [Employee] stated that he was not going to call her and as of this time he still has not followed this direction.

On March 20, 2007 at approximately 9:52 am [Employee] called in. As I attempted to give him orders to report to Joan Murphy... [Employee] knowingly and willfully hung up the telephone. (Ex A-2).

The witness concluded that Employee “displayed a total disregard and lack of concern” for his position and that he “refused to follow the orders given to him”. (Id). These charges were the bases of the removal action.<sup>5</sup> Mr. Coley testified that he was aware that Employee had filed discrimination complaints against him, but that he did not have a strained relationship with Employee. (Tr, 60).

Devon Brown, Agency Director and Deciding Official, testified that he considered Employee’s conduct to be insubordinate and to merit dismissal. He explained that the correctional environment is “dictated by strict adherence to rules and regulations” and that each employee must “obey the rules of [his or her] superior [and to] interact with that superior in a professional and respectful way”. (Tr, 105). Director Brown stated that in his view when Employee received the March 5 letter, he “expected the Employee to call his supervisor and explain his reason for not reporting”. (Tr, 107). He noted that although the initial letter placing Employee on administrative leave instructed him to contact Major Brinson, the “rank structure” of the Agency, required Employee to follow commands of any superior officer. (Tr, 114). When asked what part of the March 5 letter he considered an order, he stated:

Well, he was told if there’s any question to contact [Ms. Patten].

When he got notification and it was too late, indicating that he was to report to her, it was my expectation that even though the notification was received late, that the content of it clearly indicated that he was to contact her. (Tr, 142).

Director Brown testified that he was aware that Employee had filed “numerous grievances” against Agency prior to his tenure as Director in January 2006. (Tr, 128). He initially stated he was not familiar with an Order from the D.C. Office of Human Rights (OHR) issued on September 26, 2005 which concluded that Agency had “subjected Employee to a hostile work environment based

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<sup>5</sup> The charge of hanging up on Mr. Coley was included in the proposed notice of removal with a charge of malfeasance. (Ex A-5). However, it was not sustained by the Hearing Officer in his January 15, 2008 memorandum, and was not included in the final agency notice. The only charge sustained by the Hearing Officer was failure to contact Ms. Patten after being instructed to do so on March 14. (Ex A-7).

on his sexual orientation and ...ordered [Agency] to take corrective action”, noting that it predated his appointment as Director.<sup>6</sup> (Ex E-1, Tr, 130). However, upon reviewing documents at the hearing, he recalled that that he initially thought the corrective actions had been taken, but after reviewing the February 20, 2007 e-mail from OHR regarding Agency’s failure to document compliance, he met with staff. He stated that based on subsequent discussions with staff, he believed that compliance was achieved shortly thereafter. (Ex E-2, Tr 131, 132). When asked if he was aware that Employee had filed grievances against him “regarding being placed on administrative leave and [his] treatment”, Director Brown stated “there was a plethora of complaints” and he could not recall. (Tr, 124).

Director Brown testified that he placed Employee on administrative leave based on the allegation that he provided an inmate with a fish sandwich which is considered contraband. He said that the investigation did not result in a finding that the allegation was true. He said the investigation was completed before Employee’s removal, but was uncertain of the date, stating that during that time period, i.e., between January and September 2007, there were staffing difficulties that led to “prolonged investigations”. (Tr, 140). He stated that the review process could have increased the delay. Director Brown said Employee should have been notified of the outcome of the investigation, but he did not know if Employee was ever notified, explaining that the charges that resulted in Employee’s removal arose during that time. (Tr, 93, 115, 116).

Employee’s position is that he was not insubordinate because he did not fail to comply with a direct order. He stated that the March 5 letter directed him to contact Ms. Patten if he had any questions. Since he did not have any questions, he assumed he would be contacted by Agency to reschedule the March 9 meeting. (Tr, 156). He stated that after receiving the letter on March 10, a Saturday, he faxed the letter to his attorney. He spoke with his attorney on Monday and his attorney told him she would contact Ms. Patten. (Tr, 163). He said when he received the second letter scheduling the March 26 meeting, he again provided his attorney with a copy. The attorney again advised him that she would contact Ms. Patten and she accompanied him to the March 26 meeting.

Employee testified he did not speak with Acting Major Coley on March 14<sup>th</sup>. He stated that when he called each morning, he asked to speak with Major Brinson or Acting Major Coley, but often neither was available, and he would speak with Corporal Powell or other nonsupervisory personnel. (Tr, 160). He said he generally called between 8:30 a.m. and 9:00 a.m.. He recalled calling before 9:00 a.m. on March 14, because he was at a regularly scheduled therapy session beginning at 9:00 a.m. on that date. (Tr, 164). He said he spoke with Corporal Powell when he called in that morning, and did not talk with Acting Major Coley at all on that day.

Employee testified that he received directives from Major Coley. He said that on March 22, Major Coley directed him to report for duty to Joan Murphy the following day. He testified he telephoned Ms. Murphy on March 22, and she told him she had no knowledge that he was to report

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<sup>6</sup> These were to “immediately cease and desist all conduct contributing to the hostile work environment...immediately implement a mandatory plan for diversity training for all...employees, with particular emphasis on identifying and eliminating behavior that constitutes workplace harassment; [and] [within] 120 days...submit a detailed report...”. (Ex E-1).

to work. The following day Major Coley told Employee he was aware of the March 26 appointment, and Employee should not report to Ms. Murphy. (Tr, 169).

Senior Corporal Denon Jones testified on Employee's behalf. He stated that he was listening on the line when Employee telephoned Agency on March 14, and that Employee spoke with Corporal Genester Powell, and not Major Coley that morning. (Tr, 75). He estimated the call was made about 8:50 or 9:00 a.m. (Tr, 88). He said Employee was not given any instructions during that conversation. Mr. Jones said he listened in at Employee's request, and that he did this at times, explaining that he and Employee are plaintiffs in lawsuits against Agency and had concerns of retaliation and discrimination. (Tr, 73, 84, 87). Mr. Jones thought Employee and Mr. Coley had a strained relationship, since Mr. Coley was one of the defendants in the two discrimination suits in which Employee was a plaintiff. (Tr, 81).

Genester Powell was called as a rebuttal witness by Agency. Ms. Powell testified that in March 2007 she worked in the Major's office and received telephone calls from officers who were on administrative leave. She testified she "probably did" receive a telephone call from Employee on March 14, 2007 but was not certain. (Tr, 176-177).

#### Analysis, Findings and Conclusions

D.C. Official Code § 1-616.51 (2001) (Code herein) provides that the Mayor "issue rules and regulations to establish a disciplinary system that includes...1) a provision that disciplinary actions may be taken for cause... [and]... 2) A definition of the causes for which a disciplinary action may be taken" for those employees of agencies for whom the Mayor is the personnel authority. Agency is under the Mayor's personnel authority.

Agency removed Employee based on its contention that Employee failed to comply with a direct order from his superior. There is no question that Employee was required to comply with orders issued by Acting Major Coley, a superior officer. His "failure to comply with a direct order" would come within the ambit of "insubordination" which is included as a cause for which disciplinary action can be taken. *See*, Section 1603.3, 46 D.C. Reg. 7096. The Code does not provide a definition of insubordination, therefore the common meaning of insubordination controls. *See, Davis v. District of Columbia Fire Department, MPA 94-0015* (D.C. Super. Ct. September 26, 1995). Black's Law Dictionary (5<sup>th</sup> Ed., 1979) defines insubordination, in pertinent part, as the "[r]efusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a *willful or intentional disregard* of the lawful and reasonable instructions of the employer". (emphasis added). At issue, therefore, whether Employee willfully or intentionally disregarded an order from Acting Major Coley to contact Ms. Patten – first upon receiving the March 5<sup>th</sup> letter, and second, on March 14.

Agency is required to prove its case by a preponderance of evidence. Preponderance is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). In this matter, Agency had the burden of presenting enough

evidence to convince the factfinder that a disputed fact was more likely to be true. After carefully considering the record in this matter, the Administrative Judge concludes that Agency did not meet this burden

There is no factual dispute about the allegations relating to the March 5<sup>th</sup> letter. The parties disagree about whether the language was a directive to Employee to contact Ms. Patten. Based on a review of the record before her, including the testimony of the parties, the Administrative Judge concludes that Agency did not establish by a preponderance of evidence that its interpretation was correct so that Employee's failure to contact Ms. Patten constituted insubordination. In fact, she finds Employee's interpretation to be reasonable and literal. The memorandum stated that Employee should contact Ms. Patten if he had any questions. He did not have any questions. Having received the letter a day after the meeting, he expected Agency would contact him again to reschedule the appointment. He also notified his attorney who told him that she would contact Ms. Patten. These actions are consistent with Employee's testimony regarding his receipt of the second letter, and to this Administrative Judge appear reasonable under the circumstances presented. The evidence did not establish that Employee's conduct was willful or that he intentionally disobeyed an order.

The second allegation of insubordination relates to the March 14 conversation between Employee and Acting Major Coley. Based on a careful analysis of the record, the Administrative Judge concludes that Agency did not meet its burden of proof on this allegation. At issue was whether Employee spoke with Acting Major Coley on the morning of March 14. In trying to resolve issues of credibility, the Administrative Judge considered the demeanor and character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). Because of the conflicting testimony, the Administrative Judge adhered to these considerations carefully, particularly reflecting on the demeanor of the witness during the testimony since the substance of the testimony could be reviewed when the transcript was reviewed but the demeanor could not be captured in a transcript. *See, e.g., Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand". *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). The Administrative Judge was also mindful that even if some parts of a witness's testimony are discredited; other parts can be accepted as true. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir.1985).

The Administrative Judge considered the number of contradictory statements by Agency witnesses on some major and minor issues. For example, Ms. Patten stated Agency did not have Employee's telephone number, while Major Coley testified he telephoned Employee at his home. He thought he obtained the telephone number from the Warden's Office. He did not recall being asked by Ms. Patten for the number. A more disturbing contradiction was Ms. Patten's testimony that it was not until Acting Major Coley told her that he had a number of conversations with Employee in which he had directed Employee to contact her, that she decided to have the March 5<sup>th</sup> letter issued. She said Acting Major Coley told her that Employee responded to these directives

“by saying... what does she want”, and that Major Coley “was keeping [her] pretty much abreast of what was going on with these conversations”. (Tr, 21). The clear implication of this is that Acting Major Coley recounted multiple directives to Employee and Employee’s responses to those directives in conversations prior to March 5<sup>th</sup>. However, Major Coley testified that he believed that the first time Ms. Patten asked him to contact Employee about the matter was when she asked him to write the March 5<sup>th</sup> letter. (Tr, 63). He did not recall ever discussing the matter with Employee prior to issuing the directive on March 14<sup>th</sup>. The Administrative Judge credits Major Coley’s testimony on this disputed fact, and finds that there were, in fact, no conversations between Major Coley and Employee on this matter prior to the disputed conversation on March 14<sup>th</sup>.

Major Coley stated that he began his conversation with Employee on March 14<sup>th</sup>, by informing him that he was assuming Major Brinson’s duties while the latter was on leave. However, Major Coley did not state that the March 14<sup>th</sup> call was his first with Employee, and the record supports the conclusion that he was receiving Employee’s calls before then. Ms. Patten testified she began contacting Major Coley about the matter when he assumed Major Brinson’s responsibilities, prior to issuing the March 5<sup>th</sup> letter. In addition, the March 5<sup>th</sup> letter was issued by Major Coley. Therefore, it seems illogical that Major Coley would begin his conversation with Employee on March 14<sup>th</sup> by notifying him that he was assuming Major Brinson’s duties. Also, Major Coley testified he did not mention the matter to Employee until directed to do so. He did not say who directed him to do so, but presumably it would have been Ms. Patten since the order was for Employee to contact her. However, Ms. Patten testified that once she became aware that Employee had missed the March 9<sup>th</sup> meeting, she issued the subsequent memorandum and had it delivered by the Warrant Squad. Her testimony was consistent with her memorandum. In his memorandum recommending adverse action, Major Coley states that Employee explicitly told him that he would not contact Ms. Patten. However, in his testimony at the proceeding, Major Coley stated only that Employee kept asking the reason he had to contact Ms. Patten. The undersigned also had concerns regarding that alleged exchange. Employee had already received the memorandum from Ms. Patten, and therefore knew she wanted to schedule a meeting with him. In his memorandum, Major Coley stated he did not know the reason Ms. Patten wanted Employee to contact him. But by this time, however, Major Coley was aware of Ms. Patten’s efforts to schedule a meeting. In sum, the contents of the conversation, as described by Major Coley, are contradicted throughout the record.

Even without reviewing the purported conversation, I conclude that Agency did not meet its burden that Employee spoke with Major Coley on the morning of March 14. Employee’s recollection of the time of the call, i.e., before 9:00 a.m., is supported by his testimony that he was at a regularly scheduled therapy session at 9:00 a.m.. He thus had more reason to remember the time of the call than Major Coley, who estimated it to be at 9:05 a.m.. Employee’s testimony was supported by the testimony of Mr. Jones and Ms. Powell. While Mr. Jones could be said to have an interest in the outcome of this proceeding, Ms. Powell was called as a rebuttal witness by Agency. Although she was not certain, her testimony was that she “probably did” receive a telephone call from Employee on March 14, 2007. (Tr, 176-177).

Based on a careful review of the testimonial and documentary evidence as discussed herein,

the Administrative Judge concludes that Agency did not meet its burden of proof in this matter, and that its actions should be reversed.

ORDER

Based on the foregoing, it is hereby

ORDERED:

1. Agency's action removing Employee from service is reversed.
2. Agency is directed to reinstate Employee to his last position of record, issue Employee the back pay to which he is entitled and restore any benefits lost as a result of its action.
3. Agency is directed to file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents that evidence compliance with the terms of this Order.

FOR THE OFFICE:

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LOIS HOCHHAUSER, ESQ.  
Administrative Judge