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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MADELEINE FRANCOIS,)	
Employee)	OEA Matter No. 1601-0007-18
)	
v.)	
)	
OFFICE OF THE STATE)	Date of Issuance: October 31, 2018
SUPERINTENDENT OF EDUCATION,)	
Agency)	Michelle R. Harris, Esq.
)	Administrative Judge
_____)	
Denise M. Clark, Esq., Employee Representative)	
Hillary Hoffman-Peak, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 13, 2017, Madeleine Francois (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the Office of the State Superintendent of Education’s (“Agency” or “OSSE”) decision to terminate her from her position as a Bus Attendant, effective close of business September 18, 2017. Agency submitted its Answer to Employee’s Petition for Appeal on November 6, 2017. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on December 11, 2017. On December 19, 2017, I issued an Order convening a Prehearing Conference in this matter for January 22, 2018.

Both parties appeared for the scheduled conference. During that conference, I determined that an Evidentiary Hearing was warranted in this matter. On January 23, 2018, I issued an Order Convening an Evidentiary Hearing for April 3, 2018. On March 12, 2017, Employee, by and through her counsel, filed a Motion to Compel Discovery. Agency filed its response to Employee’s Motion on March 20, 2018, and produced the documents requested in Employee’s Motion. As a result, on March 23, 2018, I issued an Order finding Employee’s Motion to be moot. The Evidentiary Hearing was held on April 3, 2018, where both parties presented testimonial and documentary evidence. In an Order dated April 20, 2018, parties were required to submit closing arguments on or before May 21, 2018. Agency submitted its closing argument on May 17, 2018. On May 21, 2018, Employee filed a Motion for an extension of time to file her closing argument. On May 22, 2018, I issued an Order granting Employee’s request and required that her closing arguments be submitted by May 29, 2018.

Employee submitted her closing argument in accordance with the deadline. On May 31, 2018, I issued an Order requiring Agency to submit a supplemental closing argument addressing its use of the District Personnel Manual (DPM) in its administration of the adverse action against Employee because it was not addressed in its previously submitted argument. Agency's supplemental brief was due on or before June 14, 2018. Agency submitted its supplemental brief on June 12, 2018. On June 18, 2018, Employee submitted a Response to Agency's Supplemental Closing Argument. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether termination was appropriate under the circumstances; and
3. Whether Agency utilized the appropriate version of the DPM in its administration of the adverse action against Employee.

BURDEN OF PROOF

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

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

On April 3, 2018, 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. For the protection and privacy of the students involved in this matter, any references made with regard to their statements or otherwise will be denoted by the initials of their first and last name.

Agency's Case-in-Chief**Patrice Bowman ("Bowman") Tr. Pages 9 – 54**

Bowman was the associate director for terminal operations at Agency. Bowman testified that she is responsible for overseeing all activities regarding transportation of students with disabilities. Bowman cited that Agency trains all bus attendants. Bowman stated that when a student stands on a bus, attendants are trained to follow certain rules. Bowman testified that bus attendants should be direct with students and instruct them to stay seated. Bowman indicated that if a student does not comply and get back into their seat, a bus attendant can put a child in their seat. Bowman testified that an attendant can make contact by gently placing their hands on a student's shoulder and work to redirect them to their seat and insure that their seatbelt is fastened.

Bowman cited that Agency's policies give specific instructions on how to respond to riders who break the rules (referring to Agency's Exhibit 1). Bowman indicated that the instructions specify that corporal punishment should not be used. Bowman testified that she signed the Advanced Written Notice of Proposed Removal for Employee. Bowman stated that she was not directly familiar with Employee, but may have seen her upon her visits to the bus terminals. Bowman testified that she does the Advanced Notices, and in Employee's matter, found that there was cause because Employee inflicted corporal punishment on a rider. Bowman cited that in her eight years of experience, any employee found to have mishandled a student has been removed from service.

On cross-examination, Bowman testified that in her position, she has been a part of investigations, but has never interviewed an employee directly or a special needs student. Bowman testified that Jason Campbell and his audit compliance team are responsible for the investigation guidelines and conduct the investigations. Bowman could not recall which team members were responsible for the investigation of Ms. Francois' case. Bowman also testified that she isn't given facts, but that once it has been substantiated that a student has been mishandled, then information is provided to her and an investigation begins. Bowman testified that there are a series of forms that are completed relating to incidents involving students. Bowman could not recall if an incident form was submitted with the documentation for Ms. Francois.

Bowman testified that she typically does not include an address of where the incident occurred in her memos regarding incidents. Bowman cited that her July 10, 2017 memorandum relied primarily on the investigator's report in this matter. Bowman cited that she did not prepare the September 18, 2017 memorandum that bears Director Brumley's signature. Bowman indicated that the procedures and policies dated 2010 were still in effect. Bowman cited that there were several trainings for employees at Agency, but she did not personally verify that Employee attended trainings. Bowman cited that she did not recall if anyone had reported previous issues with Ms. Francois.

On redirect examination, Bowman testified that despite policies not having been updated since 2010, there were monthly meetings to discuss procedures and policies for all staff. Bowman testified that there is a sign-in sheet at these meetings. Bowman cited that if someone is a swing attendant, and is not present for training, but has approved leave or is otherwise not required to be at work, they then are not required to attend that meeting. Bowman testified that a child can be gently touched on the shoulder to get them back in their seat. Bowman stated that method could be used to redirect the child back to their seat.

The administrative judge asked Bowman to clarify what is considered corporal punishment. Bowman described corporal punishment as a point in which there has been harm inflicted upon the student. Bowman cited that during the training, it is described as any physical harm to a student. Bowman testified that with regard to nonverbal students, there are staff members who can speak sign language to help, but if not, gently placing your hands on their shoulders to redirect them to their seats can be done. Bowman testified that de-escalation procedures for special needs children were developed by Dr. Linda Bluth and that she did not draft those. Bowman could not recall what disability the student had in Ms. Francois case, but cited that there are different de-escalation tactics for students with different disabilities. However, those tactics are not in the 2010 procedures, but are in a separate document.

Warren Lewis (“Lewis”) Tr. Pages 55-111

Lewis was an investigator at the OSSE Department of Transportation and investigated cases regarding corporal punishment and school bus incidents. Lewis testified that he conducted the investigation regarding Employee after receiving a complaint. Lewis stated that he received a complaint from the Office of Investigations and then conducted his investigation. Lewis cited that he reviewed the trip ticket to see who was assigned to the route and the schools and students on the bus. Lewis indicated that the call regarding a possible issue came from the school itself, so he contacted the person from the school who made the complaint.

Lewis testified that he conducted interviews and scheduled appointment with school officials to meet with students. Lewis cited that after his interviews he concluded that the bus attendant for this route had used force on a student. Lewis testified that he drew this conclusion because the stories from the three students on the bus were consistent. Lewis also said that when he interviewed Employee, she exhibited unprofessional behavior which also led him to conclude that there was cause. Lewis cited that Employee used profanity in his presence and didn't want to comply with her union representative. Lewis maintained that he found there was evidence to show that Ms. Francois had pushed a student into her seat and that policies were violated in her doing so.

On cross examination, Lewis testified that he worked the evening shift and has been an investigator for about 12 years. Lewis indicated that he follows certain procedures when investigating incidences and has received training regarding the different disabilities students have who are transported by Agency. Lewis could not recall the disabilities that each of the students had who were on the bus at the time of the incident. Lewis stated that he took into account the students' disabilities when interviewing them. Lewis noted that Catherine Decker, the assistant principal at St. Collette's School called and reported the incident. Lewis could not recall exactly how the Agency received the call from Ms. Decker. Lewis cited that he did not complete the “top” portion of the investigative report, but that his report starts at another section in the investigative report. Lewis testified that he spoke to Ms. Decker on the phone on March 22nd. Lewis cited that he spoke with the parent of the student who had allegedly been harmed by Ms. Francois, JY. Lewis could not recall if JY's mother indicated any concern for her harm, and just told him that the matter had been assigned to an MPD detective. Lewis could not recall whether Ms. Decker indicated that JY had been harmed during his call with her.

Lewis testified that he spoke with Jean Fontaine, the bus driver at the time of the incident. Lewis could not recall if he interviewed Fontaine before or after he had written his witness statement. Lewis stated that he did not find any inconsistencies between what Fontaine wrote in his witness statement or the conversation he had with him during his interview. Lewis cited that Fontaine said in

his interview that Employee had not harmed the student, but Lewis cited that he concluded she had harmed the student based on other parts of his investigation. Lewis testified that he didn't favor the students' interview over Fontaine. Lewis also stated that the trip ticket for the day of the incident indicated that JY needed a one-to-one aide, which meant that she needed one to one assistance during the bus ride. Lewis cited that this means that there should have been an attendant with JY. Lewis could not recall if he asked the bus driver if there was a one to one aide present for JY.

Lewis testified that whoever took the original call from Ms. Decker wrote in the report that JY had been hit or pushed. Lewis could not recall whether Ms. Decker confirmed this during his interview with her over the course of his investigation. Lewis later indicated that he wrote in his report that Ms. Decker indicated that the bus attendant hit JY. Lewis noted that during his interview with Mr. Fontaine, he maintained that no one hit the student, and that he and Employee were trying to ensure and catch the student to prevent her from falling on the floor. Lewis cited that even though he did not interview JY, he found that despite differences in the other students' stories, he found them to be consistent enough to suggest that Employee mishandled the student.

Lewis testified that he spoke to the MPD detective over the phone and cited that the MPD detective substantiated the allegation and said that Employee had mishandled the student, but that he did not have a copy of his report. Lewis said he did not know whether there was any evidence that corroborated that Employee harmed the student. Lewis indicated that one student said that JY was pushed and another said she was hit, but he could not recall if the MPD investigator verified those statements. Lewis maintained that even though the students' stories were different, he found them to be consistent in suggesting that the bus attendant put her hands on/pushed the student.

Lewis said that he met with Employee and her union representative was also present. Lewis explained that he asked her questions about the job. Lewis cited that when he interviewed Employee, he noted that a one-to-one aide was on the trip ticket, but that he did not ask Employee about or nor did she bring it up. Lewis indicated that he could not recall whether he investigated why there was not a one-to-one aide assigned in accordance with the trip ticket. Lewis testified that during his interview with Employee, she said that JY presented challenges while she was trying to get her seatbelt fastened. Lewis said that Employee said that she called the bus driver for assistance.

On redirect examination, Lewis explained that he took notes during his interviews with the other students on the bus and recorded their impressions in his report. One student indicated that Employee was very rough with JY, and another said JY was pushed and another indicated that JY was thrown into the seat. Lewis said that despite the driver indicating that nothing happened, he found the students' stories to be consistent enough to conclude that Employee had mishandled the student, and to discount the driver's statement because he found the other students to be more credible. Lewis cited that he could not recall if Mr. Fontaine told him that two of the students were to get off at the same address that day. Lewis also maintained that Mr. Matthews was present when Employee used profanity during his interview with her.

Patrice Bowman ("Bowman") Tr. Page 115 – 129

Bowman testified again with regard to the requirement for one-to-one aides on bus rides. Bowman cited that based on a student's IEP, they make accommodations on the buses to meet a child's needs. Bowman cited that if there is a one-to-one aide designation, then they are required to have an aide for that student. Bowman cited that if there is only one aide on the bus and if there is a student who has a one-to-one aide requirement, then the staff member would act as an aide to that

student. Bowman cites that because JY was a one-to-one aide designation and because Employee was the only attendant on the bus, then she was assigned to JY.

On cross examination, Bowman testified that there is no documentation that told Ms. Francois that she was to be a one-to-one aide to JY that day. Bowman also cited that there was no information to suggestion that there was a communication to Francois that she was supposed to function as a 1:1 aide that day. Bowman cited that notifications are to come directly from managers with regard to trip ticket assignments for a bus run. Bowman indicated that instructions are given to attendants on how to manage students and not to bus drivers.

Gregory Johnson (“Johnson”) Tr. Pages 130 – 134

Johnson was a Supervisory Investigator in the Office of Investigations at Agency. Johnson testified with regard to the transportation concern following a call from Catherine Decker indicating that there was an incident aboard a bus where a student may have been kicked or pushed. Johnson explained that he was not in the office at the time of this incident, but that the typical process for a case like that is that it would be immediately assigned to an investigator. Johnson indicated that this particularly case was assigned to Warren Lewis, who is one of their most experienced investigators. Johnson cited that Lewis would have contacted Ms. Decker to understand the complaint and obtain more information. Johnson testified that he “accepted” the report that Lewis submitted with regard to the investigation. This meant that he reviewed the report in its entirety, asked clarifying questions and would close the case. Johnson could not recall if he asked any clarifying questions with regard to this investigative report and explained that he did not have anything else to do with this particular investigation.

Johnson testified that he did not recall speaking with Ms. Decker. Johnson also did not speak to the social worker, Employee’s manager, Mr. Fontaine, or JY’s parent. Johnson also could not recall whether he spoke to the MPD officer in this matter.

Employee’s Case-In-Chief

Detective Ryan Anselmo (“Anselmo”) Tr. Pages 139 – 146

Anselmo was employed by the Metropolitan Police Department (MPD) and was a Detective with the Youth and Family Services Division. Anselmo testified that he was called to investigate a bus incident involving Employee and student JY. Anselmo explained that he was assigned to investigate the allegation with regard to physical abuse. Anselmo cited that he spoke with all three children that were identified in the report, several individuals at the school and the parents of the children. Anselmo also spoke with OSSE investigators who were assigned to the case and to Employee. Anselmo was asked to review the investigative report conducted by Warren Lewis. Anselmo testified that the facts included in that report were inaccurate with what occurred at the time. Anselmo stated that the last sentence in the report indicated that he confirmed abuse, which he did not. Anselmo testified that he concluded that there was no evidence of abuse in this case. Anselmo indicated that if he had concluded that if there was abuse, he would have made an arrest or presented a warrant for the arrest of an individual, of which he did neither. Anselmo explained that he closed the case as ‘unsupported’. Anselmo testified that he made this determination after speaking with all three of the student witnesses and parents. Anselmo also testified that he spoke with Warren Lewis during this time. Anselmo reiterated that Lewis’ statement with regard to the conclusion of his MPD investigation was inaccurate.

On cross examination, Anselmo explained that he found that the allegation was unsupported, which meant that the person did not break the law or that there was insufficient evidence to prove or disprove the allegation reached a criminal act. Anselmo stated that he did not know what the threshold of a criminal act as opposed to an employment disciplinary action. Anselmo explained that for it to be a criminal act, to support an allegation of abuse, that there would have to be evidence of cruelty, which he did not find for this matter. On redirect, Anselmo cited that he did not find any violation that would have warranted charges to Employee and no evidence of violation of any criminal law.

Catherine Decker (“Decker”) Tr. Pages 149 -165

Decker was the Assistant Principal of Admissions at the school and was the individual who made a phone call to OSSE regarding a student being mishandled by bus staff. Decker testified that she was familiar with all the students included in the investigative report. Decker cited that she was vaguely familiar with student JW, and did not remember her ever complaining about bus drivers or bus attendants. Decker also could not recall whether JW had ever made any reports to school administration that was credible or not credible. Decker indicated that she was also familiar with student JW and does not recall any reports made about bus drivers or attendants. Decker was also familiar with student AL and could not recall any complaints about bus drivers or bus attendants that she previously had made. Decker testified that all three of the students have cognitive impairments. Decker said that with JW she is able to recall facts and information, but did not have an experience where maybe she perceived something differently. Decker explained that with people with cognitive impairments that can happen, particularly with others, peers and friends. Decker cited that this was not something she had experienced with JW. Decker indicated that they focus on interactions with others with all three students and it's a part of their education. Decker further explained that sometimes with they engaged with someone else, they may misinterpret something that somebody says or may need help on how to understand the perspective of others. Decker testified that this was similar with AL as well.

Decker also stated that at least one of the students worked with social workers to work on peer and social skills, but she was unsure if all three were involved. Decker stated that she was familiar with where JW and AL were dropped off each day, as they were dropped off at the same place. Decker testified that JW was the student who reported the bus incident, although not directly to her. Decker believed that JW may have reported to the transportation coordinator and then that person brought it to her attention. Decker stated that they notified JW's parents when they were told that OSSE was coming in to do an investigation. Decker could not recall whether JW's parent ever expressed concerns, but indicated that the parent may have mentioned that JW said something and that the parent told her to say something about it. Decker cited that she never spoke to JY's parent and that the parent did not reach out to her. Decker testified that she did not believe that either student's account of the incident was purposely untruthful. Decker explained that when a student with cognitive disabilities tries to recall details, that it can be difficult. Decker stated that she could not say what happened in this case, but they always follow up if they receive a report like this as if it is an accurate report. Decker indicated that she made the call with regard to the incident after one of her subordinates spoke with the three students.

Jean Lucien Michel Fontaine ("Fontaine") Tr. Pages 165 -199

Fontaine was the bus driver on the day of the incident. Fontaine testified that he completed a statement for the investigative report on March 22, 2017. Fontaine explained that it was route 113 and it was an afternoon route. Fontaine indicated that he was not the regular driver for this route and that Employee was not the regular bus attendant. Fontaine testified that the bus schedule shows the times where students were dropped off. Fontaine recalled that he attempted to drop student AL off at an address in Southeast that day at 3:59pm, but later had to call dispatch which indicated AL was to be taken to the same address as JW. Fontaine said he called dispatch to confirm the drop off and that he called the dispatch at 4:41pm.

Fontaine indicated that a student in a booster seat had unfastened her seatbelt and got on the seat and starting jumping. Fontaine said that he and Employee spoke to the student to try to get her back in the booster seat. Fontaine said that the only time Employee touched JY was when the student tried to get to the top of the seat and to prevent her from falling and injuring herself, so they had to hold her. Fontaine said that AL and JW were still on the bus, because JW was a latch kid (means she can go by herself into the home. Fontaine said that when JY was on top of the seat, he tried to hold her and asked her to please sit down, and that Employee was doing the same thing. Fontaine explained that Employee was doing it by herself while he was talking to dispatch. Fontaine said that there were four students on the bus at the time of the incident. Fontaine cited that the drop off for JW and AL were at the southeast location and that dispatch told him that AL could go with JW.

Fontaine testified that when the investigator spoke to him, he did not indicate who made the complaint about the bus incident. Fontaine could not remember whether the investigator told him that he was investigating a complaint of misconduct. Fontaine indicated that in his statement to the investigator with regard to the incident, that JY was jumping on the seat and would not listen for nearly an hour, and that no one hit the student. Fontaine maintained that he and Employee touched JY, but never mishandled her. Fontaine testified that he never saw Employee hit the student, but that she touched JY when she was about to fall and Employee had to hold JY to prevent her from falling down. Fontaine indicated that he did not recall that JY was scared of Employee and tried to hide under the bus seat. Fontaine said that Employee did not slam JY into the booster seat, nor did Employee push her shoulders to make her fall into the seat. Francois also testified that he did not hear Employee curse or yell at JY on the bus. Fontaine said that the trip ticket indicates only one other student other than JY was on the bus, but that when the incident started there were four on the bus. Fontaine maintained that AL and JW were still on the bus and that he was waiting on dispatch to provide permission to let them off the bus. Fontaine indicated that AL and JW were on the bus during the situation with JY, but were off the bus by the time the MPD officer arrived. Fontaine stated that he and Employee were on the bus with JY and JW for a long while before the police officer arrived.

Fontaine explained that he received the trip ticket for this assigned route from his supervisor and that he gave it to Employee before they got on the bus. Fontaine stated that Employee said it was a "one-on-one" on the trip ticket. Fontaine testified that he went back to the supervisor and asked about JY. Fontaine stated that his supervisor said that JY was doing ok for the day, and to ask someone at the school if she was doing okay that day. Fontaine maintained that the supervisor said for him that if JY is acting up, then do not transport. Fontaine explained that from the time they left school until the address in SE, that JY was acting okay, and that he had asked the person at the school if she had had a good day. Fontaine said that he spoke with the supervisor, Mr. Douglas, but did not remember the name of the teacher at the school. Fontaine said that usually when there is a "one-on-one" indication for a student, there is a second bus attendant on the route that is just for that

student specifically. Fontaine indicated that the supervisor assigned the attendants. Francois testified that on the day of the incident, the supervisor told him that they were short bus attendants and did not assign a one-on-one. Fontaine said that Employee was not in the office during this conversation with the supervisor.

Fontaine also testified that he followed the instructions from the supervisor to ask about how JY did at school and if it were okay to transport her on the bus. Fontaine said that he arrived at St. Colletta's school at 3:26 and left at 3:43 in accordance with the trip ticket. He said he was driving the bus and doing drop-offs from 3:43pm until 4:41pm. Fontaine indicated that he would talk to the kids on the bus if necessary. Fontaine said that he did call dispatch at 3:59pm about AL because she did not want to get off at the designated stop. He also called dispatch around 4:41pm, near JW's house because of how JY was acting. Fontaine explained that when he called dispatch about JY, that they asked what was happening and if he wanted them to call the police to help with the situation, and he said yes. Francois maintained that the only time he saw Employee touch JY was when she was trying to climb to the top of the seat to prevent her from falling. Francois said that he did not remember the exact time he put in the call to dispatch.

Madeleine Francois ("Employee") Tr. Pages 201- 213

Employee worked at OSSE from July 23, 2007, until September 18, 2017. Employee testified that in 2017, she was a swing attendant, which meant that she would work different hours and routes. Employee cited that she had not faced any disciplinary problems before, had never been suspended or received any written admonitions or warnings of any type. Employee indicated that she did not curse at the investigator Warren Lewis during a meeting she had with Mr. Matthews, her union representative. Employee said that Matthews was not in the room the entire time of the meeting with Lewis. Employee recalled that Matthews told her that she would have to sign the letter with regard to the disciplinary action, but she did not want to. Employee cited that Willie Harrison gave her a letter and explained everything in the letter, including information about administrative leave. Employee said that she asked Harrison to explain why she was being put on administrative leave. Employee said she reviewed the letter and asked to speak to Quiyana Hall. She said that Harrison explained that the administrative leave was leave with pay and that she would be paid every 15 days. Employee stated that Matthews again instructed her to sign the letter, telling her that it was procedure, but that she asked him to tell her the reason why she is out of a job. Employee said that she did not curse at Matthews during this conversation.

Employee testified that the problem with JY started when they arrived at the address in Southeast DC. Employee said that she did not yell or scream or hit JY. She said that when JY was physically standing on top of the seat that she opened her arms (witness demonstrated the action while testifying) so that JY would not fall to the ground. Employee maintained that she tried to protect the student from hurting herself, and that it was sometimes her trying and or the driver, Mr. Fontaine.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed at Agency as a Bus Attendant for ten (10) years.¹ In a Notice of Final Decision on Proposed Removal dated September 18, 2017, Employee received notice of Agency's decision to remove her from service for the following causes: "(1) Any on-duty or

¹ Employee's Petition for Appeal (October 13, 2017).

employment-related act or omission that employee knew or should have reasonably have known is a violation of law. (2) An on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations specifically misfeasance. (3) Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. (4) Any act which constitutes a criminal offense whether or not the act results in a conviction. [See section 1603.3 (e), (f)(6), (g) and (h) of Chapter 16 of the regulations.]”² The effective date of the termination was September 18, 2017.

ANALYSIS

Agency’s Use of District Personnel Manual

The District Personnel Manual (“DPM”) 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, 2012,³ and was effective until the 2016 DPM version was made effective on February 5, 2016.⁴ The 2016 DPM version was effective until May 2017 when the current DPM was made effective. In the instant matter, Agency levied an adverse action against Employee utilizing the 2012 DPM version. To support its use, Agency cites that it was still in bargaining (impacts and effects) with the AFGE union with regard to the DPM and had not yet come to an agreement with the union and as a result, this is why the 2012 DPM version was used. In this same submission, OSSE cites that it came to an agreement with the [sic] “AFSME”⁵ union.⁶ Agency also indicated that it “made the difficult decision to transition its non-AFGE employees to the new District Personnel Manual and utilize the old District Personnel Manual for its AFGE employees.”⁷

Employee indicated in her Petition for Appeal, dated October 13, 2017, that she is a member of the AFSCME Local 1959.⁸ Additionally, in a response dated June 18, 2018, Employee cited that she is not a member of AFGE and that pursuant to Agency’s admission with regard to this being a non-AFGE union, that the new District Personnel Manual should have been followed. The undersigned agrees. Based on Agency’s own admission, it should have utilized the new (2016) version of the DPM.⁹ However, Agency levied the instant adverse action under the 2012 version. Further, the substantive changes in the 2016 DPM with regard to the charges and penalties such that the undersigned would be unable to ascertain which charges should have been levied against Employee had Agency utilized the appropriate version.¹⁰ Pursuant to OEA Rule 631.3¹¹, I find that

² Employee’s Petition for Appeal at Final Notice (October 13, 2017).

³ Transmittal Date reflects as of August 27, 2012 for the 2012 DPM Version, and the 2016 Transmittal Date is as of February 26, 2016.

⁴ *Id.*

⁵ The undersigned believes that this is a typographical error, and that Agency meant to indicate “AFSCME.”

⁶ Agency’s Supplemental Closing Argument (June 12, 2018).

⁷ *Id.*

⁸ See Employee’s Petition for Appeal at Page 4.

⁹ 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.” 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.” See also, *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 1, 2010), citing *Landgraf v. USI Film Productions*, 511 U.S. 244, 115 S.Ct. 1482 (1994). The 2017 DPM version would not be appropriate, as it was not in effect until May 2017, and the incident occurred in March 2017.

¹⁰ The only similar charge found in the 2016 DPM §1605.4(a)(3) provides that “conduct prejudicial to the District of Columbia government including – conduct that an employee should reasonably know is a violation of law.” However, for the reasons cited in this decision, the undersigned finds that even if Agency had levied the charge under this version, that it would not have met its

Agency has not demonstrated that its use of the wrong DPM version was harmless error. Further, because of the substantive differences in the charges and penalties for adverse action, the undersigned is unable to determine what the corresponding charges in the 2016 DPM would have been to those cited by Agency from the 2012 DPM version. OEA has held that it is required to adjudicate an appeal on the “grounds invoked by agency and may not substitute what it considers to be a more appropriate charge.”¹² Agency failed to levy the charges under the appropriate DPM, and as a result, I find that this was harmful procedural error. Consequently, I find that Agency failed to follow the appropriate laws, rules and regulations in its administration of the instant adverse action.

Whether Agency had cause for adverse action¹³

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).*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee’s termination was levied for the following causes – “1. *Any on-duty or employment-related act or omission that employee knew or should have reasonably have known is a violation of law.* 2. *Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; specifically, misfeasance.* 3. *Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.* 4. *Any act which*

burden of proof with regard to this cause of action. Further, the penalty for a first offense for this charge under the 2016 Table of Illustrative Actions ranges from Reprimand to Removal. However, the 2012 DPM version has different penalty ranges for first offenses that range from Suspension to Removal. Additionally, the other charges levied against Employee in this action, including “any act which constitutes a criminal offense whether or not the act results in conviction”, does not have a corresponding provision in the 2016 DPM version. Nor does the 2016 DPM have a corresponding charge for “any reason for “adverse or corrective action that is not arbitrary or capricious” or “misfeasance.” See DPM 2016 §1607.1. Accordingly, it would be improper for the undersigned to essentially ‘guess’ or ‘estimate’ what the appropriate charge would have been had Agency used the appropriate DPM version.

¹¹ OEA Rule 631.3 provides that: “Notwithstanding any other provisions of these rules, the Office shall not reverse an agency’s action for error in the application of its rules, regulations or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency’s procedures, which did not cause substantial harm or prejudice to the employee’s rights and did not significantly affect the agency’s final decision to take action.”

¹² *Kenya Fulford-Cutberson v. Department of Corrections*, OEA Matter No. 1601-0010-13 (December 19, 2014). Citing to *Gottlieb v. Veterans Administration*, 39 M.S.P.R 606, 609 (1989) and *Johnston v Government Printing Office*, 5 M.S.P.R 354, 357 (1981).

¹³ Assuming *arguendo* that Agency had appropriately administered this action under the 2012 DPM version, which it did not, the following analysis reflects that version. However, the undersigned finds that Agency failed to appropriately administer this adverse action against Employee in its use of the wrong version of the District Personnel Manual.

constitutes a criminal offense whether or not the act results in a conviction. [See section 1603.3 (e), (f)(6), (g) and (h) of Chapter 16 of the regulations.]”¹⁴

In the instant matter, Agency charged Employee with the aforementioned following an incident with a student during an afternoon bus route in March 2017. Following a report from a school official, Agency launched an investigation whereby it concluded that Employee had “inappropriately handled a student.”¹⁵ Specifically, Agency found that on March 21, 2017, another student passenger reported that Employee “put her hands on a student.” The investigator interviewed the other students present on the bus and concluded that their stories, while different, were consistent enough in nature to show that Employee “handled the student roughly and inappropriately.” Further, Agency averred that during the investigation, Employee used profanity toward the investigator and acted inappropriately. To support its contention, Agency relied on the “Audit and Compliance” report of the investigator, Warren Lewis, and his findings. Further, Investigator Lewis cited in his report that MPD Detective Anselmo “concluded his investigative report and confirmed that there was evidence of abuse.”¹⁶

However, MPD Detective Anselmo testified during the Evidentiary Hearing in this matter, and explained that he did not tell Investigator Lewis that there was evidence to support the claim, rather, he found that after his investigation, wherein he interviewed the three student witnesses (same witnessed that Lewis interviewed) and the parent of the student that Agency alleges Employee mishandled, and concluded that this claim was *unsupported and that there was no evidence* to show any abuse or other criminal activity had been done on the part of Employee.¹⁷ Detective Anselmo indicated that he closed his investigation as “unsupported.”¹⁸ Employee maintained that she never mishandled the student and only touched the student in an effort to prevent her from falling. Employee also maintained that she never used profanity toward the investigator.

Agency avers that it conducted a thorough investigation and appropriately concluded that Employee mishandled the student on the day of the March 2017 incident. Agency cites that “given that three students on the bus indicated that Employee displayed behavior of “anger, hitting, pushing or throwing” another student in the seat, that it was reasonable for the investigator to find that Employee had mishandled a student, and that removal is the appropriate penalty under 6B DCMR §1603.3(e). The undersigned disagrees. In the instant matter, the undersigned finds it significant that MPD Detective Anselmo found that there was no evidence to support that Employee had engaged in or committed a criminal offense or violated the law. There was no arrest or any formal charges brought against Employee. Further, Detective Anselmo explained in his testimony that if he had found that there was abuse or otherwise, that he would have made an arrest, or would have requested that a warrant be issued for arrest. Additionally, the driver of the bus on the day of the incident, Mr. Fontaine, testified that Employee did not strike or curse at the student, but only tried to get her back in the seat. He testified that Employee never hurt the student or threw her into the seat or otherwise. I found this testimony to be credible and forthcoming.

Further, the undersigned finds that Investigator Lewis inaccurately reported in his final investigative report that Detective Anselmo had concluded that there was evidence of criminal action

¹⁴ *Id.*

¹⁵ *Id.* at Advance Written Notice of Proposed Removal.

¹⁶ Agency’s Exhibit 4 – Report at Page 4 (Evidentiary Hearing April 3, 2018).

¹⁷ Evidentiary Hearing Transcript Pages 142-143 (April 3, 2018).

¹⁸ *Id.*

on the part of Employee, as this was directly contradicted by Detective Anselmo during his testimony during the Evidentiary Hearing in this matter. I had the opportunity to listen to the testimony of Detective Anselmo and found him to be credible. OEA has previously held that a charge for adverse action levied under 6B DCMR §1603.3(h), “makes clear that a conviction need not result, but that there must be a determination that there was probable cause to lead to an arrest for the conduct in question.”¹⁹ Specifically, the Table of Penalties cites that the proof needed to administer this charge against an employee is a record of arrest.²⁰ Here, Employee was never arrested or otherwise subject to criminal penalty with regard to this investigation. Accordingly, the Table of Penalties also provides that a charge with regard to any action that employee knew or should have known was violation of law, indicates that an employee was “engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws and statute.”²¹ For the same reasons previously described, I find that Agency had no cause for adverse action under this charge, and has not met its burden of proof that Employee committed an act that constitutes a criminal offense, nor have they shown that Employee committed an act that she should have known was a violation of law.

The District of Columbia personnel regulations provide that misfeasance includes: (1) careless work performance; (2) failure to investigate a complaint; (3) providing misleading or inaccurate information to superiors; (4) dishonesty; (5) unauthorized use of government resources, or (6) using or authorizing the use of government resources for other than official business.²² With regard to this charge, the undersigned finds that Agency has not shown where Employee had exhibited misfeasance. In its closing argument, Agency cites that a “first offense for misfeasance is suspension under 6B DCMR §1603.3(f)(6) and that reprimand to suspension is in the range of penalties for a first offense of use of abusive or offensive language, under 6B DCMR §1603.3(g).”²³ Agency indicated that Investigator Lewis cited that Employee was “loud and used unprofessional and profane language”, in its specification in its Advance Written Notice of Proposed Removal dated July 10, 2017. Employee maintained that she never used any foul language toward the student or toward Investigator Lewis. I had the opportunity to observe Employee during her testimony and found her to be credible and forthcoming. Further, Agency has not provided any other supporting evidence, to show that Employee used profanity. Accordingly, the undersigned finds that for the aforementioned reasons, Agency has failed to meet its burden of proof in this matter. Consequently, I further find that Agency lacked cause for adverse action against Employee.

Whether the Penalty was Appropriate

Based on the aforementioned findings, including Agency’s failure to utilize the appropriate version of the District Personnel Manual in its administration of this action, I find that Agency did not have cause for adverse action against Employee. As a result, I find that the penalty of termination was inappropriate under the circumstances.

¹⁹ *Kenya Fulford-Cutberson v. Department of Corrections*, OEA Matter No. 1601-0010-13 (December 19, 2014).

²⁰ See D.C. Mun. Regs. Tit 16§1619.1(6)(f). Table of Appropriate Penalties.

²¹ *Id.*

²² *Id.*

²³ Agency’s Closing Argument at Page 8 (May 17, 2018).

ORDER

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

1. Agency's action of terminating Employee from service is hereby **REVERSED**.
2. Agency shall reinstate Employee to her position of record, and Agency shall reimburse employee all pay and benefits lost as a result of her removal.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Michelle R. Harris, Esq.
Administrative Judge