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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MARIAN SMITH,)	
Employee)	OEA Matter No. 1601-0041-12
)	
v.)	Date of Issuance: April 6, 2016
)	
UNIVERSITY OF THE DISTRICT)	
OF COLUMBIA,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
_____)	
John W. Davis, Esq., Employee Representative		
Gary L. Leiber, Esq., and Jacquelyn Thompson, Esq., Agency Representatives		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 16, 2011, Marian Smith (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the University of the District of Columbia’s (“UDC” or the “Agency”) action of removing her from service. Employee’s last position of record was Student Recruitment and Marketing Administrator. Employee was removed from her position based on multiple allegations of discrimination and harassment of her fellow employees and assigned subordinates. More specifically, according to Termination Letter dated September 8, 2011, Employee was removed from service due to her “exhibiting offensive behavior during duty hours, which caused discredit to the University and which violates the University’s standard of conduct as well as violating District of Columbia and Federal laws governing human and civil rights.” The effective date of Employee’s removal was November 18, 2011. I was assigned this matter on or around August 2013.

On September 17, 2013, a Prehearing Conference was held in this matter. During it, the parties participated in mandatory settlement talks conducted under the auspices of the OEA's Mediation and Conciliation Department. Ultimately, settlement negotiations were unsuccessful. Thereafter, an evidentiary hearing was originally scheduled to be held on June 16 and 17, 2014, however, UDC informed the undersigned that one of their witnesses, Yasmin Mitchell, was out on maternity leave and it was unknown when she would return. Eventually, the evidentiary hearing was held on March 11 – 13, 2015. Afterwards, the parties were ordered to submit written closing arguments. After acquiescing to Employee's multiple requests for extensions of time, the parties eventually submitted their written closing arguments. The record is now closed.

JURISDICTION

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

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 RELEVANT TESTIMONY

Colin Touhey (Transcript pages 54 -163)

Colin Touhey ("Touhey") currently works for the University of the District of Columbia ("Agency") as the Director of the Student Success Team at the university's community college. He has held that position since June of 2012. Touhey oversees the academic advisors at the community college. Prior to that, Touhey was working on a grant program in the Department of Urban Affairs from 2005 to 2006. Touhey left Agency for about a year and a half and returned in March of 2008. Touhey spent two years working in Student Affairs. Touhey also worked in the Office of Admissions in January of 2010.

When Touhey worked for the Office of Admissions, he was a Recruitment Specialist. He assisted prospective students with getting through the admissions process so that they could enroll in classes. Touhey provided that although he reported to Anne-Marie Waterman, the Vice President of Enrollment Management, on a day to day basis, Ms. Waterman delegated her duties to Marian Smith ("Employee"). Touhey testified that there were other recruiters who worked in the department, including Andrea Linthicum, Doni Russell, Delancia Browning and Kim Pennamon. He stated that he had daily interaction with most of them.

Touhey stated that he had daily interaction with Employee. He explained that some of the interaction was face to face, but a good amount of it was via email. He explained that the recruitment specialists are in a large open area that is shared with processors. There were no walls between each desk. Employee and Waterman sat in another area that was down the hall. Touhey stated that Employee would have sporadic meetings with the recruiters. Touhey testified that one particular meeting that they had in February, 2010 was contentious. After this meeting, the recruiters and Employee did not meet unless Waterman was present.

Touhey stated that there was a lot of friction between Employee and anyone that she supervised. As time went on, Touhey was less confident in Employee's ability to supervise the group and did not go to her for any assistance with his duties. Touhey testified that he did not feel that Employee was competent to hold the position.

Touhey testified that during the February 2010 meeting, Employee became very caustic, using offensive analogies to describe working for Agency. He explained that in describing the processors and recruiters, Employee referred to them as house Negroes and field Negroes. Touhey stated that Employee was referring to the type of treatment that slaves were subjected to and the reason why there was friction between slaves who worked in the house versus slaves who worked in the field. Touhey stated that the first time he had heard this term was when he studied literature while at Agency. He stated that it was a common term. Touhey stated that he was offended by the remarks. He informed Waterman of what had occurred and Waterman stated that she wanted to meet with the group regarding what Employee said. Touhey stated that during the meeting with Waterman, other employees stated that they were offended by Employee's comments. He explained that employees thought the comment had a racial overtones to it was inappropriate, and made reference to slavery.

Touhey stated that Employee described her relationship with the Administration as "gang rape" with regard to the treatment that she was receiving. Touhey stated that Employee said these things multiple times. Touhey informed Waterman of the statements and informed her that he thought the comments were inappropriate. He stated that the staff echoed his sentiments. He explained that he felt uncomfortable about the comment because he was the only male staff member.

Touhey also stated in July of 2010, while working on a new student orientation project, Waterman gave the employees instructions on how to execute the project. However, Employee gave directions that contradicted Waterman's directions. Touhey felt like Employee's plan was not going to work and was not productive. Eventually, Touhey told Waterman that he could not work with Employee and requested a transfer. Touhey stated that working in Admissions was the most challenging position in his career. He stated that Waterman told him that she would take care of the issue that occurred regarding the new orientation project. He explained that other recruitment specialists, including Linthicum, Russell, and Browning, were upset about Employee's conduct. However, Touhey stated that nothing changed despite going to Waterman five times to discuss Employee.

Touhey stated that about a month later after the new orientation incident, he learned that the community college was moving to a new location and requested to be sent there. At first, Waterman agreed with the move, but then asked him to stay. Waterman told him that the office was being reconfigured and that Employee would not be in a supervisor role. However, that did not occur. Six months later, close to 2011, Touhey told Waterman that he felt that Employee was over her head in responsibilities. Then, in April 2011, during Touhey's performance review, he told Waterman that he did not want to be a part of any plans because he did not plan on being at the office any longer. He explained to her that the office was untenable and asked for assistance with leaving the department. Two months later, Touhey went to work at the community college and switched places with Andrea Lithicum.

During another incident where Touhey, Waterman and Employee were in a meeting with DC CAP counselors, Touhey stated that Employee made a comment regarding fee waivers. Touhey explained that very often, the issue of fee waivers would come up. In response to this question, Employee stated that the students should not be asking for waivers when they are walking around in \$400 sneakers. Touhey stated that he was taken aback by the statement and thought that it was inappropriate. After the meeting, a few of the counselors came to Touhey and asked him what that was all about.

Touhey believed that Waterman did not effectively manage Employee. He reasoned that the issues with communication and the friction between Employee and the other employees continued. In Touhey's opinion, Employee had too many responsibilities. Touhey also stated that Employee made reference to a dress code for the employees. Employee told him to wear grey suits with red or maroon ties. On one occasion, Employee told him to get a pearl tie pin to match the jewelry that the female employees should be wearing. Employee also stated that the female employees should be wearing red dresses. Employee told Touhey that he dressed conservative. In response to this, Waterman sent out an email stating that there was no dress code beyond what Agency required, which was professional attire. Waterman explained to them that when they are going out, they are to go above the normal professional attire because they are representing the school.

Touhey described another incident in which Employee described Delancia Browning's jewelry as looking like a nipple. Then, in another incident during a staff meeting involving Tran Vu, a new recruitment specialist, Employee gave Ms. Vu an American flag and then made eye contact with the other employees. Touhey took this as Employee's way of making reference to Vu's ethnic background. He stated that Vu is Korean. During another incident, Employee questioned Touhey's ethnicity. Touhey explained that Employee asked him if he was black. In another incident, Employee asked Touhey if he was Jewish. Touhey explained that both of these incidents were during work hours and in the office. He explained that during both incidents, there were other recruitment specialists present. He explained that in his opinion, the question was inappropriate. He did not recall the conversation that led to being asked if he was black. However, with regard to the question on being Jewish, Touhey stated that he was having a conversation with another co-worker and laughing about his son stating that he grew up as a New York Jew.

Touhey testified that he had a chance to speak with Vu after the incident. She stated that she was not offended by Employee's actions, but was confused by the environment. Touhey stated that Vu was from Boston. When Vu came to Agency, she had just graduated from Brown University.

Touhey testified that Employee would give gifts to him and other staff members. He explained that in recognition of his institutional knowledge, Employee gave him a plastic elephant. On another occasion, Employee gave him a dinosaur which was significant to him because he was at UDC for many years.

Touhey testified that during an open house in early spring, 2011, Employee used the term "BMW." Touhey explained that Employee told them that she was waiting on her "BMW" which meant 'black man wealthy.' Touhey explained that this comment was made in front of prospective students who had not yet been admitted to the school. He explained that there were about 75 prospective students. Touhey did not think that this comment was appropriate.

In one incident that Touhey described, he explained that he escorted his co-worker, Russell, out of the meeting. He explained that Russell and Employee had got into a shouting match regarding an administrative issue. He stated that he escorted Russell out of the meeting because he felt that they were not getting anything accomplished by shouting at each other. He also stated that when Employee held meetings, they would end with people getting into shouting matches with her or endless disagreements.

Touhey testified that after Employee was released, the professionalism of the office improved. He explained that he knew there was improvement because he was called back to work at the campus when Waterman and Employee were released. Touhey stated that he worked at the campus from September 2011 until late January 2012. Touhey stated that Waterman was released around the same time Employee was released. Touhey stated that when they were

released, their duties were divided up and incorporated into duties of the Director of Admissions and Assistant Provost for Enrollment Management. Touhey stated that one of Employee's duties was to distribute information and materials. Three months later, Browning was terminated from Agency. Touhey testified that as time went on, he found Browning to be unreliable.

Touhey stated that he did not do a lot of field recruitment during the summer months. He explained that field recruiting happened more during the first half of the school year. He explained that he would go out recruit three times a week to different high schools. When he came to the admissions department, he was interviewed by Dr. Epps, the Vice President for Student Affairs. He explained that when he was interviewed for the transfer, it was not clear what his position was going to be. He was told that he would be moving to admissions following the orientation of spring students for the spring semester of 2010. He explained that this was just before he heard that Waterman had been brought on to be the Associate Vice President of Admissions. He stated that prior to this, Waterman worked in the School of Business. Touhey stated that he and Waterman began working in Admissions around the same time.

Touhey testified that his relationship with Employee started out as a collegial one, but over time became distant and guarded. He explained that he became distant and guarded when he and Employee had a disagreement about how to run the new orientation program. He explained that this occurred in the summer of 2010. Prior to that incident, he described his relationship with her as moderate.

Touhey testified that every staff member, except for him, is black. The comment regarding house Negroes and field Negroes made him feel uncomfortable because he was the only staff member. Touhey thinks that the Admissions office is underfunded and that Agency expects too much from the Admissions office. He stated that everyone in Admissions works very hard. He stated because they are underfunded, they cannot get everything accomplished.

Touhey stated that during open house, Employee gave the recruitment team red polo shirts to wear. He stated that in the office near his work space, he heard profanity. Touhey stated that when Employee is focused, she is a hard worker. He stated that Employee was dedicated to her job when she was focused. He explained that many times, he would learn that there were long emails regarding dress codes and employee start and arrival times. He stated that this was a huge waste of time and took away from what they were supposed to be doing. Touhey stated that there were times that he had to work the front desk.

Touhey testified that an EEO investigation was conducted for a complaint that Browning filed against Employee. He was interviewed by the EEO Officer. He stated that the EEO Officer took notes during the interview. Touhey testified that there was a significant age disparity between Russell, Vu, Pennamon and Browning.

Touhey testified that Employee did not supervise the processors. He explained that the processors evaluated the paperwork submitted for applications. They would evaluate the paperwork for accuracy and enter the information into the system. He stated that for the most part, Waterman supervised the processors. Touhey stated that his office had a lot of paperwork to handle and on any given day, the paperwork could take up to 100 percent of the work day. He stated that the filing systems were inadequate and chaotic. He explained that documents would come in via mail, in-person, or through recruitment specialists working in the field, and the processors would need the documents. He stated that whoever had the document last was responsible for ensuring that they got into the file. He stated that there was an individual file folder for each student. He stated that the files were based on each semester and things were chaotic because you could not determine at any time where a document was located.

Doni Russell (Transcript pages 165-196)

Doni Russell (“Russell”) is a Bilingual Recruitment Specialist at Agency. She has been with Agency for five years. Her duties include: promoting the university, attending recruitment efforts, and representing the university in general.

Russell testified that Employee was her supervisor. She did not have a positive relationship with Employee. She explained that their relationship was not friendly or amenable. Employee supervised Russell for two years. Russell testified that Employee held regular staff meetings. She stated that Andrea Lithicum, Colin Touhey, Delancia Browning, Tran Vu, and Kim Pennamon were present for the meetings. Russell testified that during the meetings, Employee made inappropriate statements. She explained that Employee would give the employees weekly superlatives instead of referring to them by their government name.

Russell also stated that the comment regarding gang rape was inappropriate. She explained that Employee was referring to Noele-Levitz, a consultant for Agency. She stated that after the meeting, she documented on a post-it note what happened during the meeting. She stated that she was collecting documentation to present to Human Resources to show that Employee’s work place actions were egregious. Russell explained that it was not the proper place for Employee’s comment. She stated that it was unnecessary to make people uncomfortable, especially the males in the room. Russell stated that she would write down what occurred because it was the only way that she would have information about what was happening. Also, she did not have anyone else that she could trust, and that in her notes she would explain how Employee made her feel.

In 2010, Russell had a meeting with Human Resources concerning her performance reviews. Employee was present for this meeting. Russell explained that Employee wanted to terminate her. Russell appealed the termination. During the meeting, Russell provided Human Resources all of the notes that she had on the incidents concerning Employee. She did not understand why he was being terminated because she had outstanding performance reviews.

Employee was Russell's supervisor up until the time she was terminated. Employee orally reprimanded Russell because of profanity.

When Russell was hired, there were two other recruiters: Lithicum and Touhey. She explained that there were times when she had to work long hours. Russell stated that it was rare for Employee to be present during these times.

Russell stated that Employee's nickname for her was 'bacon.' She stated that Employee told her she was hot and sizzled like bacon. She thought that this comment was inappropriate because she was in a professional setting. Russell testified that once when she had a personal health issue, Employee told her to go 'commando.' She stated that her undergarments should not be a topic of discussion at work. In another incident, Employee asked to try on Russell's shoes.

Teri Huet (Transcript pages 197-222)

Teri Huet ("Huet") currently works in the Division of Workplace Development and Lifelong Learning, which is in the community college at Agency. She is the Faculty Coordinator. Prior to this position, Huet was the Office Manager and Executive Assistant to the Vice President of Enrollment Management and Director of Admissions and Financial Aid. In these roles, Huet assisted Waterman with general duties. As an Office Manager, Huet handled all of the travel, administrative and management functions. She talked with staff, solved problems, and assisted with administrative issues, attendance issues, and managing the front desk of the admissions office. Huet also created a schedule for the front desk. At this time, there were approximately nine employees on staff in admissions. Huet has been working for Agency since September of 2010.

Huet testified that during the time that Employee was the supervisor of the Admissions team, the office was rambunctious. She stated that there were people who wanted to do their jobs, but there was a constant air of conflict and angst. Huet stated that it was not a comfortable environment to work in. Huet stated that she did not report to Employee. However, there were times when Employee would ask her to talk with her staff regarding management related issues. She stated that there was tension in the office and it was often a result of the approach that Employee had toward her staff. Huet stated that there was no profanity used, but often people were loud.

Huet testified that Employee demanded that she create an attendance book for the staff. This consisted of a binder. She explained that the binder was approved by her boss. Huet stated that she somehow became the attendance miser and had to make sure people signed in and out. This made her very uncomfortable. Huet stated that there were times when Employee would ask her whether employees arrived on time, if they left for lunch, and if they took a break. Huet felt like this put her on the spot and put her between Employee, management and recruitment staff. Huet stated that the recruitment staff felt as though the attendance sign in and out was treating

them as if they were children. She explained that the recruitment staff felt that there were other ways to handle attendance.

Huet testified that there came a time when Employee asked her staff to dress in a certain manner; she wanted the women staff to wear red lipstick and jewelry. Huet testified that Employee used to wear a broach and she wanted her staff to reflect more of her image. Huet stated that this caused a great deal of consternation in the office. Huet stated that there was no dress code, but there Employee demanded that the recruitment staff dress in a certain manner, including skirts and pants. Huet stated that the staff did not want to pay out of their own pocket for the attire.

Huet recalled an incident where Employee stated “tell your son to go to bed naked.” Huet stated that she was taken aback by this comment. Huet explained that there was a snowstorm coming and Employee was thinking about pajamas. Huet explained that she thought Employee wanted her son to go to bed naked because she wanted it to snow. Huet stated that she was shocked. Huet stated that she told her son not to come to the office from that point on. Huet stated that Browning was appalled by the comment and wanted her to file a complaint. Huet thought it was a good idea, but did not want to add to the uneasy environment. Huet stated that she informed Waterman about the comment.

Huet testified that all of the recruitment staff were required to serve a tour at the front desk. Huet devised a schedule for the front desk because often she would be the only person working the desk and her boss did not want that to happen. She explained that the purpose of the schedule was so that everyone had equal time at the front desk. Huet stated that there were employees who refused to take their tours at the front desk.

Yasmin Mitchell (Transcript pages 223-305)

Yasmin Mitchell (“Mitchell”) is the Americans with Disabilities Act (“ADA”) Compliance Policy Manager at the Washington Metropolitan Area Transit Authority (“WMATA”). She has held this position since the beginning of 2015. Her duties are to process ADA accommodations for employees. She also handles the Section 503, affirmative action plans and religious accommodation requests. Mitchell has a Bachelor’s degree in English with a concentration in communications sciences and disorders. She also has a Master’s degree in Human Resource Management, as well as Senior Professional Human Resources certification. She began working at WMATA in 2013.

Prior to 2013, Mitchell worked for Agency as a Human Resources (“HR”) Manager and Equal Employment Opportunity (“EEO”) Manager. She stated that she was responsible for investigations and affirmative action planning. Mitchell worked for Agency for three years. Mitchell was the Chief EEO Officer. Prior to that, Mitchell worked for the D.C. Child and

Family Services Agency as an Employee and Labor Relations Specialist. She has over 8 years of experience in Equal Employment Opportunity.

Mitchell conducted an EEO investigation involving Employee's conduct. She explained that Browning filed an EEO complaint against Employee. Mitchell interviewed members of the staff that reported to Employee. Mitchell also discussed the matter with Ms. Waterman so that she was aware of the complaint. In addition, Mitchell discussed the matter with Dr. Epps. Mitchell stated that she took notes during all of her interviews. After Mitchell interviewed everyone, including Employee, she analyzed all of the documents that were relevant to the investigation. She also reviewed Employee's EEO complaint file to see if there were any other EEO complaints filed against her. Then, Mitchell wrote an analysis and conclusion and sent it to the Vice President of Human Resources. In summary, Mitchell recommended that disciplinary action be taken against Employee based on her violation of the discrimination and harassment policy following the investigation. Further, based on the nature of the allegations and how egregious they were, Mitchell suggested that the minimum disciplinary action be suspension. Mitchell explained that the comment regarding 'gang rape' and the comment regarding house and field Negroes were the most egregious comments. In discussing the complaint with Employee, Mitchell stated that Employee gave reasons and justifications for the statements. However, Mitchell stated that while it may not have been Employee's intent to create a hostile work environment for employees, it was clear in the course of the investigation that a hostile work environment was created. Mitchell stated that as a supervisor, Employee was responsible for creating an environment of inclusion and the comments that she made did the opposite. She explained that in many ways, Employee's comments created a separatist way of thinking between two groups, or encouraged separation or shined light on it. She stated that employee's comments were offensive and violated the policy. Furthermore, Mitchell stated that Employee's comments showed a lapse in judgment and did not support the tenets of the discrimination harassment policy. She explained that the house vs. field Negroes comment should not have been stated to the employees of Agency. She stated that if there was any issue with unfair or disparate treatment, it should have been discussed with Employee's supervisor, not announced to the team. Mitchell testified that Employee participated in harassment and discrimination training that was facilitated by the Office of General Counsel and Human Resources.

After Mitchell provided Waterman the investigative findings, Waterman told her that she was going to terminate Employee. Mitchell directed Waterman to talk to the employee relations person. Mitchell recalled Waterman shaking her head and saying that this could not occur at Agency.

Mitchell testified that Agency's harassment policy was adopted by the Board of Trustees in April of 2011. However, it was posted to Agency's website in 2010. Off the top of her head, Mitchell could not define the elements that established a hostile work environment. However, at the time of her investigation, she referred to the definition of a hostile work environment in

Agency's policy. She stated that Employee was responsible for adhering to Agency's policy. With regard to the incident in which Employee referred to Browning's jewelry as a breast nipple, Mitchell testified that Employee did not show her the piece of jewelry. Mitchell is familiar with the terms "house Negroes" and "field Negroes." She stated that comments related to the terms are offensive depending on the context in which they are used and where they are used. She explained that there are things that may be appropriate at home that are not appropriate at work. Mitchell stated that Agency's prior Policy on harassment and training was not as robust as the one adopted in 2011. She stated that all supervisors were required to take the training program that was based on the prior policy. Mitchell stated that Renae Lee and Smruti Radkar conducted the training.

Valerie Epps (Transcript pages 314-374)

Dr. Valerie Epps ("Dr. Epps") is the Vice President for Student Affairs at Agency. She has held this position since 2009. She is responsible for the Offices of Counseling and Student Development, Student Life Services, Judicial Affairs, Career Services, federally funded TRIO Programs and the New Student Center that is currently being built. Dr. Epps was also previously responsible for the Office of Admissions and Office of Financial Aid. Dr. Epps has a doctorate in higher education academic administration.

Dr. Epps stated that she knew Employee and knew that she worked in the Office of Admissions. In 2010 and 2011, Employee was not under Dr. Epps' direct supervision. She explained that her direct supervisor was Ann-Marie Waterman. Dr. Epps stated that Waterman reported to her and was the Vice President for Enrollment Management.

Dr. Epps stated that she received oral complaints from Delancia Browning and Doni Russell regarding Employee's philosophy on supervision. She explained that the most egregious complaints were regarding staff being referred to as "house Negroes" and "field Negroes," and the comment regarding Agency treating her like gang rape. Dr. Epps stated that she was aware of the EEO Complaint that was filed by Delancia Browning. She received a copy of the complaint, as well as notification from the Office of Human Resources. Dr. Epps stated that Yasmin Mitchell conducted the investigation portion of the complaint and that she received a copy of Mitchell's report. Dr. Epps stated that she met with Mitchell to review the report. She explained that Mitchell went over the points that were pertinent to her investigation and they talked through it. The meeting ended with Mitchell's final recommendations. Dr. Epps stated that her recommendation was that Employee receives no less than a suspension.

Dr. Epps stated that as a supervisor, she thought the behavior that was exhibited between Employee and her staff was egregious and horrible. Dr. Epps did not think it was a good example of the supervisor to refer to her employees as being house and field Negroes. She explained that those are slavery terms and they are very demeaning. Dr. Epps stated that she was familiar with the staff, and did not think Employee's statements were accurate. She stated that Employee's

comments were unacceptable as a front line supervisor. With regard to the gang rape comment in reference to the administration's treatment of Employee, Dr. Epps stated that she is part of the administration, and would never make that comment to any employee or refer to any employees in that manner. Dr. Epps stated that this was not an isolated incident; she explained that there were seven allegations altogether that Employee admitted to doing. Dr. Epps stated that she did not find Employee's response to the allegations acceptable. Dr. Epps made the decision to terminate Employee. Dr. Epps talked with Mitchel about terminating Employee. Dr. Epps explained that she made this decision because she felt that the situation was not going to get better. She explained that she could not afford to lose staff nor have the staff be treated this way. Dr. Epps stated that all of the staff had lost confidence in Employee's ability to supervise.

Dr. Epps did not have any personal relationship with Browning or Russell. She stated that Russell was brought on to work at Agency under her administration by Employee. She stated that Colin Touhey was working as a Student Life Specialist in the Office of Student Life and Services, and under her supervision, he was asked to be transferred to the Office of Admissions. Dr. Epps stated that he made the approval to transfer Touhey to the Admissions Office. She stated that prior to the transfer; she discussed the transfer with Waterman. Dr. Epps had known Employee since 2009. Dr. Epps stated that all of her employees are free to come and visit her when they want to. If they have a request or they just want to stop by and say hello, they can do so. Dr. Epps stated that Ms. Browning came to her office and made complaints regarding Employee's supervision. She explained that there was a complaint about the dress code and a complaint about Waterman's lack of follow up.

Dr. Epps states that she considered another form of discipline for Employee. She stated that she considered more training and suspension. However, she eliminated suspension from consideration because of the nature of the complaints in terms of the language that was used with employees and also Employee was a seasoned supervisor who admitted to the statements. She also considered the number of allegations and the egregiousness of the statements.

Dr. Epps stated that she understood the terms "house" and "field" Negroes. She explained that the "field Negro" was always thought of as the lesser figure in terms of education and this type of slave worked in the field. She explained that the house Negroes had more privileges, but were still slaves. She explained that this slave worked in the master's mansion or house. She stated that the term Negroes was very positive at one time, but now is a very negative term. She stated that it refers to slavery because there was a difference on how the slave owners placed their slaves. Dr. Epps stated that the statements made by Employee were derogatory and no one wants to be referred to as slaves. She explained the terms were meant for divisiveness. She stated that no one wants to be a slave and nobody treasures being one. She stated that she does not see that as a positive term. Dr. Epps stated that the terms are not appropriate in the workplace. Dr. Epps stated that the Agency is not a plantation. She stated that it is funded by the D.C. Government and the Federal government.

Dr. Epps stated that at one time, Employee was considered a good supervisor. She was also an extremely hard worker and dedicated to Agency's mission. However at some point, Employee's performance in dealing with customer service and the employees started to decline. Dr. Epps stated that Employee's supervisor stated that she needed work on her supervisory skills and how she related to her employees in general.

With regard to the termination, Dr. Epps stated that she completed the paperwork and attached the letter of recommendation for termination. Dr. Epps stated that she directed Human Resources to terminate Employee. Dr. Epps stated that she did not talk to Employee prior to making her decision because her front-line supervisor and the EEO Investigator had talked with her. Dr. Epps stated that Waterman, Employee's supervisor, recommended additional training at first, but prepared correspondence for termination. After looking at all of the information, Dr. Epps made the decision that Agency should go forth with termination.

Dr. Epps stated that there was a time when Waterman came to her and stated that Employee was having problems supervising Browning and Russell. She stated that there were insubordination issues, problems with them missing assignments, and their not showing up for things. Dr. Epps talked with Browning about some of the issues she was having with Employee.

Dr. Epps testified that she hired Waterman, and Dr. Janice Borlandoe was her predecessor. Prior to Ms. Waterman coming onboard, LaVerne Hill-Flanagan was Employee's supervisor. Prior to making the decision to terminate Employee, Dr. Epps did not pull Employee's personnel file from Human Resources and review it. Dr. Epps stated that Employee received harassment training.

Anne-Marie Waterman (Transcript pages 376-450)

Anne-Marie Waterman ("Waterman") is currently employed at Howard University. She is the Assistant Dean for Administration and Operations in the School of Law. She has been in this position for three months. Prior to working there, Waterman worked at Agency as the Assistant Dean in the School of Business and Public Administration and then she became the Associate Vice President for Enrollment Management and Student Affairs. In her position as Associate Vice President, Waterman supervised Employee. She began this position in January of 2010.

Prior to January of 2010, Waterman knew Employee as a colleague in the admissions field. She met her at an event dealing with District enrollment or college activities. Waterman stated that Employee's previous supervisor was LaVerne Hill-Flanagan. At that time, Ms. Flanagan was the Registrar and the Director for Admissions. Waterman stated that the major thing that occurred at Agency was the creation of a different division or the organizational chart. She explained that the Registrar's office reported to the Provost and enrollment, financial aid, admissions, recruitment, and other things reporting to the Vice President of Student Affairs.

Additionally, Agency had decided that it was changing direction and moving away from being considered a finishing school. She explained that Agency wanted to really press being a four year institution. She stated that the Board decided that there needed to be a full blown Admissions Staff in order to raise its profile and bring in the numbers and kind of students that it needed to fill the community college and the undergraduate program. What that meant is that the admissions staff was going to change. As a result, the admissions team went from being Employee and one other person to Employee and a team of recruiters. Eventually, the recruiters were called Enrollment Management Officers that consisted of a team of five people. The team also consisted of processors. Waterman stated that Mr. Touhey and Tran Vu came on board after she became the Associate Vice President.

Waterman testified that she supervised Employee for one full year. She stated that they had daily interaction, discussing recruitment plans and strategies. Waterman testified that Employee was a hard worker and committed to Agency's mission. She noted that Employee had an amazing work ethic. One of the major directives that Waterman gave Employee was to establish a recruitment planning schedule for the entire year. Waterman stated that Employee completed this directive.

Waterman testified that Employee's subordinates made complaints about Employee's management style. She explained that the recruitment officers felt that Employee was not doing things the way that they should have been done and not taking their recommendations into consideration. Waterman explained the sign-in and out sheet. She provided that she inherited this sheet and it was produced by Ms. Flanagan and the office manager. She provided that the Enrollment Management Officers felt that they were professionals and did not need to comply with the sign in and sign out sheet. Waterman stated that she had a conversation with Colin Touhey and the "house negroes" vs "field negroes" issue came up. She stated that she discussed the complaint with Dr. Epps, who was her supervisor at that time. Waterman explained that she would meet with Dr. Epps and the other managers on Tuesdays. Further, Waterman and Dr. Epps had meetings when they were required. She explained that during this time, a lot of things were going on; there were meetings about consultants; budget meetings; meetings to discuss financial aid and reporting the financial aid data.

The "gang rape" statement was brought to Waterman's attention along with a group of other statements. She explained that Dr. Epps told her about the statement when the EEO complaint was filed. There was also a complaint regarding Employee giving a flag to Tran Vu. Waterman stated that in 2010, Dr. Epps knew that there were employees who were unhappy with Employee. Employee discussed with Waterman the problems she was having with her subordinates. There came time when Employee proposed to terminate Doni Russell at the end of her probationary period. Waterman talked with Mr. Russell about the situation. She also talked with Dr. Epps. Waterman stated that Employee proposed to terminate Delancia Browning. She also talked with Dr. Epps regarding Employee's performance. There came a time when Dr. Epps

and Waterman discussed training for Employee. She stated that she proposed managerial skills training because there were complaints and because Employee never had any formal training on being a good manager. She explained that even though Employee supervised another person previously, it was more of a team that worked together.

Waterman testified that Agency did not provide Employee formal training. However, she stated that Employee spent some of her leave and money on training. She explained that Agency did not provide training because there were time and financial constraints. She explained that there was a short amount of time to execute expectations and they needed all hands on deck.

Waterman evaluated Employee for the period of January 1, 2010 to August 31, 2010. She gave Employee an overall score of 3.75 out of 4. She explained that this is considered a strong rating. This was also during the time that Employee supervised all of the recruiters. Then, for the performance evaluation for the period of September 2010 to August 2011, Waterman gave Employee an overall score of 3.25. She stated that there was a drop in her score because although Employee was meeting expectations, she was not exceeding them. She explained that the criteria for the evaluation changed because they had already gone through a full recruitment cycle that implemented the new staff, metrics and orders.

At the end of the EEO investigation against Employee, Waterman recalled receiving a document in writing from Mitchell. There also came a time during the investigation when Dr. Epps expressed to Waterman that she wanted to terminate Employee. Dr. Epps asked Waterman for her recommendation. Waterman testified that she thought that termination was not prudent; that when one looked at the entire expanse of work that Employee did, there should have been another route taken. Waterman provided Dr. Epps two recommendations; she explained that because the EEO investigator did not recommend termination, she did not provide a recommendation for termination. She thought that Employee was valuable and trainable. She thought that the training would help Employee move back into the performance rating of 3.75. Waterman noted that Dr. Epps signed off on Employee's evaluations.

Waterman stated that she recommended that all of the parties involved be reprimanded, which included Russell and Browning. She also recommended administrative days and for Employee to receive sensitivity training. She explained that even though Employee was the supervisor, there were documented complaints about Browning and Russell that were filed by Employee. Waterman stated that Agency was unable to terminate Browning because of a complaint she had against Employee. Waterman stated that she recalled having a conversation with Employee regarding her role as supervisor. She stated to Employee that the conversations she is having with her staff should only be about the work. She reasoned that one minute Employee, Russell and Browning are all friendly and the next they were at war

With regard to the comments that Employee made, Waterman testified that she thought they were inappropriate. Waterman stated that the recruiting staff was not being properly

managed. Towards the end of 2011 cycle, employees believed that there was no improvement with Employee. Mr. Touhey came to Waterman expressing that the team was not as productive as it could be. Waterman explained that Mr. Touhey was frustrated with the back and forth and animosity in the workplace with his coworkers. He basically told Waterman that Employee was incompetent and making the matters worse. She explained that Mr. Touhey's overarching theme was that the atmosphere in the office was not conducive for him to be productive. She stated that Touhey thought that the back and forth between Ms. Russell, Ms. Browning and Employee was impacting the staff meetings. Waterman stated that she placed the blame on the operation, not solely Employee. She stated that it was partially Employee's fault.

Waterman's assistant was Teri Huet. She met with Huet on a regular basis. Essentially, Huet informed Waterman that the recruiting office was not functioning properly. Waterman stated that Employee's comment regarding 'gang rape' was inappropriate. However, Waterman did not think the comment was egregious. She thought Employee's sentiments could have been expressed in a different way using different words. Waterman testified that she did not think Dr. Epps conclusion to terminate Employee was made in good faith. She explained that she watched the way Dr. Epps had managed other directors who reported to her. It seemed to Waterman that when Dr. Epps made up her mind personally about an individual, whether that was reflected or was a direct impact from their work performance, no other new evidence could change her mind.

Waterman was terminated after Employee was terminated. She suspected that the cause of her termination had to do with the failure of the recruitment office. Waterman testified that she vaguely remembers a comment that Employee made during a DC-CAP meeting regarding sneakers. She stated that she had a conversation with Employee about work choices. She explained that Employee used the wrong word choices. She explained that the discussion was about prospective students and what they chose to spend their money on. She explained to Employee that she needed to be mindful of context and formal situations. Waterman testified that she talked with Employee about these issues during the second performance period.

Waterman testified that there was a shift in the use of technology in the admissions office. She explained that there was student information system, then a home grown data system in the beginning, and finally "Banner," which was an enterprise system. She explained that Banner had the capability to eliminate or reduce paper because things could be completed online. The intent of this system was to streamline the admissions process. At first, Banner was not doing the job that Agency expected from it. As a result, this created more problems. She explained that the issues with Banner persisted until the end of her employment. Waterman stated that the recruitment office still needed processors. She stated that the Banner was implemented for the whole Agency.

Waterman stated that Employee did not supervise the processors. She explained that this created problems because the processors are an integral part of the admissions process. For example, if Employee was charged with bringing in 1500 students, the processors had to work

with enrollment managers. She stated that how the processors worked with enrollment managers was essential to the process. Waterman supervised the processors.

Marian Smith (Transcript pages 452-494)

Marian Smith (“Employee”) was employed by Agency for eight and a half years. When Employee first started with Agency, she was the Lead Recruitment Specialist and she supervised one other recruitment specialist named Mary Tegley. Eventually, Ms. Tegley left and someone else came on board. Then, that employee left and another recruitment specialist came on board. At some point, Andrea Linthicum came on board and was a recruitment specialist. Eventually, the recruitment staff increased to five people. This included Colin Touhey, Doni Russell, Tran Vu, and Kimberly Pennamon. Ms. Pennamon was promoted and then Delancia Browning came on board. Employee did not hire Mr. Touhey, Tran Vu, Kimberly Pennamon or Delancia Browning. Employee hired Doni Russell.

Employee testified that she received a copy the EEO report of investigation against her that was filed by Delancia Browning. She confirmed that her response to the investigation was accurate. Employee stated that she never required Ms. Browning to wear lipstick. She explained that Agency’s school colors were red and gold because the Firebirds or Phoenix and that indicated fire. She stated that whenever recruiters go out, they wear their school colors, school logo, or something regarding the school. When she started working at Agency, the recruiters in the Office of Admissions wore red polo shirts. She explained that the recruiters wore red in some shape or form, like a jacket or a blazer. She stated that during registration, everyone would dress up in school colors as a sign of school pride. She stated that she was tailored to have her very own red blazer with the university logo. She stated that it was an honor to represent the school. She explained that Agency did not provide a budget for attire. However, she stated that after an employee’s first year anniversary, a recruiter received a red blazer. She stated that whenever the recruiters went out with the President for events, the President, Provost, and Directors supported the school’s colors.

With regard to Employee’s response to her comments about being gang raped by the university, Employee provided that things kept happening to her. They were given directives to bring in 1500 or 2000 students. Employee provided that she would plan an event to host the D.C. Public School counselors for a luncheon and needed purchase orders approved, but on the day before the event, they would learn that the money would be redirected or pulled. She was charged to develop marketing materials for the Metro for brochures for distribution throughout the university. She had to work on that for the entire year and get purchase orders and graphic artists. She stated that she would work on all that only to find out that the money had been pulled. Employee stated that every year before registration in the fall, the university is somehow involved in a scandal that is in the newspaper. Employee referenced one of the scandals as the UDC President taking his wife and children to Egypt on an Agency funded trip. She explained that the money was not missing, it was misappropriated. Employee provided that this would

occur just before school started. She stated that just before a NACAC convention, the news would report something that was being done wrong. Employee stated that to her, this was a bad statement. Therefore, Employee referenced being gang raped. She explained that she felt this way with the whole system, the culture, the way that things worked, and the culture of the relationship with the University and different mayors. Employee testified that if she had to do it over again, she would not have made that statement.

Employee's confirmed that she made a comment about house Negroes and field Negroes. She explained that she used it as an example and to make it a point to Browning that they had to go out in the field. She explained that there were two lines of work; the recruiters planted the seed. She explained that they talked to kids and presented them information about college. She stated that the recruiters "hunted and gathered." She stated that the recruiters go out in the 'field' and bring things back to in the 'house' where the processors were located. She stated that the recruiters would bring their fruit. She explained that it was means of production for the university. She explained that the term was meant to explain that the recruiters hunt, gather and plant seeds, while the processors finish the work. Employee stated that the staff was fifty percent African American.

Employee stated that she did not make a comment regarding a piece of jewelry looking like a breast nipple. Employee was wearing the piece of jewelry, and she stated that it is a Shamanic breastplate that was given to her by a Shaman in Sedona, Arizona following her completion of a rite of passage into wise womanhood. She explained that she had just returned from her trip in May of 2010. She stated that it was a beautiful gift and that she was proud of it. Employee stated that Ms. Browning complimented her on the jewelry.

Regarding the American flag incident with Tran Vu, Employee stated that she gave Vu an American flag pennant around July 2 or 3 of 2010. When Employee gave this to Vu, she explained to her that it was for her to decorate her balcony. Employee explained that Vu had just moved into a new apartment and it was her first Fourth of July in D.C. Employee stated that she had been to Vu's apartment.

With regard to the incident involving Colin Touhey, Employee confirmed asking whether he was Black or Jewish. Employee confirmed that in December of 2010, she made a suggestion that Huet's son sleep without clothes on so that the school would close due to inclement weather. Employee confirmed that on September 8, 2011, she was terminated and was given a report. Employee testified that she believed that she had a filter, but it was not enough. Employee stated that she knew that Huet was offended by her comments regarding being in the nude.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. According to the Termination Letter, UDC's removal action in this matter is primarily predicated on District of Columbia Municipal Regulations Title 8 B Chapter 11 § 1131.2 which provides as follows: Supervisors shall provide leadership for the persons they supervise, shall respect the dignity and rights of administrative employees and students as individuals, and shall set an example by their conduct, attitudes and work habits. It is virtually uncontroverted that Employee did the following acts which, I find, created an improper working environment for her colleagues and subordinates including:

- Requiring Browning to wear red lipstick, suits, purses, and shoes as official recruitment attire.
- Giving Russell, her subordinate, the nickname of "bacon" because she was hot and sizzling.
- Telling Russell to go "commando" on one occasion when she was experiencing feminine health issues.
- Describing her experience and treatment at the University as analogous to being "gang raped."
- Employee using the terms "house Negroes" and "field Negroes" to describe the duties and treatment of the processors and the recruitment team. These terms are inappropriate and offensive in a workplace setting.
- Employee stating that a necklace she was wearing looked like a breast nipple to Browning.
- Giving Tran Vu, a new recruiter of Asian descent, an American flag during a meeting; and, asking a Caucasian recruiter, Colin Touhey, if he was Black or Jewish.
- Suggesting that Huet's underage son sleep without clothes on when an impending snowstorm was forecasted. *See*, Agency Exhibit No. 10.

Employee admitted that most of these allegations regarding her offensive remarks and unbecoming behavior were true. *See* Tr. 286 & 466 – 493. During the evidentiary hearing I had the opportunity to observe the demeanor, poise, and credibility of Touhey, Russell, Huet, and Dr. Epps. I find their collective testimony relative to this matter to be both credible and persuasive. I also had the opportunity to observe the demeanor, poise, and credibility of Employee. I find that her testimony relative to this matter to be self-serving. I note that an administrative judge must find facts and in that capacity must assess the credibility of witnesses. *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985). To assess the credibility of witnesses, the Administrative judge can consider the demeanor and character of the witness, the inherent impossibility of the witness's version, the witness's bias or lack of bias, 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, 7-8 (1987). As a supervisor, consistent with DCMR Title 8 B Chapter 11 § 1131.2, Employee was required to set a tone of civility with her colleagues and subordinates. Employee failed to do so when she created an improper working environment for her subordinates and colleagues as noted above. From the collective testimony presented in this matter, it is clear, that these actions, taken over an extended period of time, eroded the amity and trust that should be positively fostered between co-workers who were working diligently in support of UDC's mission. I find that Employee's conduct was in direct violation of DCMR Title 8 B Chapter 11 § 1131.2. I further find that Employee failed to live up to the standard that was required for her to supervise an office in a collegial manner that does not create a work environment that *may* run afoul of District of Columbia Human Rights laws.¹

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.² This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.³ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.⁴ Here, it has already been established that Employee created an improper (possibly hostile) work environment for her colleagues and subordinates. This was done over several instances where Employee failed to exercise tact, restraint or common sense in how she chose to interact with co-workers. This is enhanced by the fact that Employee was within UDC's management therefore her conduct was subject to intensified scrutiny. For this, I see no plausible reason to disturb UDC's selection of penalty in this matter. Therefore, I find that Agency's decision to remove Employee from her position was appropriate based upon the circumstances.

ORDER

It is hereby ORDERED that Agency's action of removing Employee from service is UPHeld.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

¹ Agency has argued that Employee's acts as outlined in this matter constitute a violation of the District of Columbia Human Rights Act and Title VI of the Civil Rights Act of 1964. The Undersigned declines to decide the merits of these arguments due to the fact that Agency did not properly cite to which provisions of said laws she allegedly violated when it sought to remove her.

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

³ See *Id.*

⁴ See *Id.*