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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0055-12
CASSANDRA GRAY,)	
Employee)	
)	Date of Issuance: April 9, 2015
v.)	
)	
DEPARTMENT OF YOUTH)	
REHABILITATION SERVICES,)	
Agency)	
_____)	
)	Arien P. Cannon, Esq.
)	Administrative Judge
J. Michael Hannon, Esq., Employee Representative)	
Laura Kakuk, Esq., Employee Representative)	
Eric Huang, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 30, 2012, Cassandra Gray (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) challenging the Department of Youth Rehabilitation Services (“Agency”) decision to terminate her. At the time of her termination, Employee was a Youth Development Representative (“YDR”). The effective date of Employee’s termination was January 6, 2012.

I was assigned this matter in August of 2013. A Status Conference was held on January 28, 2014. Based upon the representations of the parties at the Status Conference, a Prehearing Conference was convened with the anticipation of going forward with an Evidentiary Hearing. A Prehearing Conference was held on April 8, 2014, where the parties presented their witness lists and documents they intended to introduce at the Evidentiary Hearing. An Evidentiary Hearing was held over the course of two days on June 20, 2014, and August 26, 2014. Both parties filed written closing briefs. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the penalty of removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.¹ “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.

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.²

CHARGES AND SPECIFICATIONS

Employee was removed for: (1) any on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations; specifically: neglect of duty, insubordination, incompetence, and misfeasance; and (2) any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; violations of the Employee Conduct Policy, including arguing and use of abusive or offensive language.³ Specifically, Agency asserts that Employee failed to follow proper protocol at the main gate of the New Beginnings facility on two separate occasions. Additionally, Agency asserts that Employee worked an overtime shift when she was not authorized to do so. Finally, Agency asserts that Employee engaged in arguing and use of abusive or offensive language on three (3) separate occasions. Employee denies all of the allegations set forth by Agency.

SUMMARY OF TESTIMONY

An Evidentiary Hearing was held before this Office over the course of two days. 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 Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

¹ 59 DCR 2129 (March 16, 2012).

² OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

³ See DPM §§ 1603.3(f) and (g) and § 1619(7).

Agency's Case-in-Chief***Dionne Golden ("Golden")*** Tr. 26-81

Golden has been employed with Agency for approximately ten (10) years as a Youth Development Representative ("YDR"). Golden is currently a YDR in the Evolutions unit of the New Beginnings facility. Evolutions is one of six housing units that Agency uses to house youths at New Beginnings. During 2010-2011, Golden was a control clerk for the New Beginnings Unit. The Control Clerk is in the central control area that monitors cameras throughout the facility. Employees in the central control area can open doors, close doors, view cameras, conduct intake of youths, and discharge youths.

Golden is familiar with both Employee and Yvetta Ward ("Ward") in their capacities as YDRs. Golden testified regarding an incident that occurred on April 18, 2011, that was captured on surveillance video, and introduced as Agency's Exhibit 1. The first part of the video Golden described as the intake area of the facility where residents enter and exit for various appointments, such as court proceedings. The large windows on the left of the video are rooms/cells used for detaining the residents. The grey door in the top right of the video is where the officers escort residents into the intake area. On the right side of the screen, behind the seated women, is the control center door and window. The woman sitting down is Ms. Ward, who was responsible for the resident in the room across from her.

Around the 13:09 mark of the surveillance footage, Employee entered the intake area with two residents.⁴ Employee is observed handing in her paperwork to the control center. Around the 13:10:12 mark, Mr. Hughes, another YDR, is observed entering the video. At the 13:16:21 mark, Golden describes the video as depicting Employee trying to get the control center's attention for them to open the door so that she could exit with the resident. At the 13:16:45 mark, Ward is in the doorway of the control center, and Employee and Mr. Hughes are still at the exit door of the intake area. Seconds later, Mr. Hughes and Employee are exiting the intake area and Employee is seen returning back to the intake area within a matter of seconds. After returning to the intake area, Employee gets in Gray's face. One second later, Golden described an arm on the video to be her own, which was stretched out between Employee and Gray, in an attempt to quell the situation.

Golden further testified regarding Agency's Exhibit 1 from a different camera angle. This angle was a view inside the control center, which is listed as video 2 on the surveillance footage. Golden stated that she intervened between Employee and Ward as they were yelling and arguing. Golden stepped between the two employees to escort Employee to the exit area. Golden could not remember anything specific said by either individuals other than they were

⁴ Throughout the Evidentiary Hearing, Agency's counsel refers to the time markers in the surveillance video based upon the actual amount of time that has lapsed from the beginning of the video. However, the TruVision Navigator Player the Undersigned used in viewing the video in-camera does not provide the amount of time lapsed from the beginning of the footage. Rather, the time stamp appears to be based on a 24-hour clock and the first angle starts at 13:03:53 while the second angle starts at 13:06:30. Thus, throughout this decision, the Undersigned will reference time markers based on the 24-hour clock provided in the upper right corner of both camera angles.

“fussing.”⁵ At one point Golden remembered that Employee had her finger in Ward’s face.

After the incident between Employee and Ward, Golden prepared a written statement, which was submitted to Earnest Waiters, Golden’s supervisor at the time. The statement was introduced as Agency’s Exhibit 2.

On cross-examination, Employee’s counsel attempted to highlight the fact that Golden’s written report was on a form that was intended for unusual incidents involving youth residents. However, Golden clarified that the form she wrote her report on was for any unusual incidents or occurrences that did not happen every day.⁶

Marcus Ellis (“Ellis”) Tr. 82-131

Ellis has been employed with Agency for approximately three (3) years in various capacities, including, Deputy Superintendent and Superintendent for New Beginnings Youth Development Center, and currently as Deputy Program Manager of Operations. The New Beginnings facility is a long-term facility for incarcerated youth within the District of Columbia.

Ellis does not have personal knowledge of the events surrounding the incident between Employee and Ward, but he has read documents regarding the incident. As Deputy Superintendent, Ellis was involved with the disciplinary process of employees. When a midlevel manager issued discipline to an employee, often times it would come to Ellis for review.

Ellis testified regarding the main gate at New Beginnings, which he described as the primary entrance to the facility grounds. It is the first checkpoint before entering the grounds at New Beginnings. Anyone who comes to the New Beginnings campus will use the gatepost, including staff, visitors, and attorneys. Ellis testified that the post was formerly staffed by Agency personnel; however, this is no longer the case since this assignment has been outsourced to a private contractor.

Ellis further testified regarding Agency’s overtime policy. A Supervisor Youth Development Representative, or SYDR, would normally be authorized to grant overtime to a YDR. Anyone above a SYRD, such as a Deputy Superintendent or a Superintendent, would also be able to grant a YDR overtime.⁷ Ellis stated that a SYDR from one unit could authorize overtime for a YDR on a different unit. If time permitted, the SYDR from one unit who requested overtime of a YDR from a different unit, would talk to the YDR’s direct supervisor as a matter of professionalism. However, this professional courtesy does not always happen.

On cross-examination, Ellis testified that he has training in Manager Supervisory Service (“MSS”). Ellis further testified that the term “counseling,” a term of art used in his profession, describes a supervisor’s responsibility to help improve the conduct of an employee. MSS supervisors are trained in “counseling,” which is used “depending on the situation.”⁸ A

⁵ Tr. at 53.

⁶ See Tr. at 73.

⁷ Tr. at 96-97.

⁸ Tr. at 110.

supervisor would be expected to document any counseling sessions held with an employee to determine if that employee follows through with the counseling. Documenting a counseling session could also be used as a step in the disciplinary process if an employee makes further transgressions.

Christian Munoz (“Munoz”), a former supervisor, never worked under Ellis, and Ellis does not personally know Munoz. Ellis testified regarding Employee’s Exhibit 11, which was described as a counseling notice from Munoz. In the notice, Munoz lists himself as a Supervisory Youth Development Representative, which Ellis described as a MSS position. Ellis would expect someone in a MSS position to be versed in the procedures of counseling an employee. Ellis further stated that he would expect a counseling notice to be signed and dated. Ellis believes it is good practice for an MSS supervisor who was counseling an employee for potential misconduct to have a witness to the session.⁹ Some counseling sessions, depending on the level of discipline, require a witness, whereas some levels of discipline do not require a witness.

Christian Munoz (“Munoz”) Tr. 135-180

Munoz is currently employed with the Alameda County Probation Department in California. Prior to joining the Alameda County Probation Department, Munoz was employed by Agency as a SYDR. Munoz held this position for approximately three-and-a-half years. Munoz began working with Agency in 2002. He resigned from the Agency in the summer of 2012.

Munoz was Employee’s supervisor throughout his time as a SYDR. Munoz testified regarding Employee’s Exhibit 11, an incident brought to his attention by superintendent, Namon Ried, who was driving in the main-gate and observed Employee not following protocol. The superintendent advised Munoz that his staff was failing to adhere to the gate protocols, which made Munoz feel uncomfortable.¹⁰ Specifically, Munoz stated that Reid told him that Employee failed to wear her reflective vest and failed to properly place cones to control the flow of traffic at the gate.¹¹ When asked why the counseling notice was not signed, Munoz stated that protocol required him to send everything to the Administrative Office of the Superintendent, and then the superintendent would sit down with the staff member and union representative.¹²

Munoz also testified about an incident where Employee worked an overtime shift (Employee’s Exhibit 12). Specifically, Munoz described Employee’s response to his message about working overtime as “absolutely abrasive.”¹³ Munoz stated that if he needed to request personnel for overtime, he would need to communicate with one of the other unit managers from one of the six units throughout the New Beginnings facility. Munoz stated that he was not contacted by any of the unit managers to request overtime for Employee or any of his staff members on December 22, 2010. Munoz testified that he was required to justify in his weekly

⁹ Tr. at 117-118; See also Employee’s Exhibit 11 and 12.

¹⁰ Tr. at 144.

¹¹ See Employee’s Exhibit 11.

¹² Tr. at 145.

¹³ Tr. at 149.

reports the number of overtime hours worked by his staff. He also needed to know which unit they worked in and who had approved an employee's overtime. This process required a lot of communication between the SYDRs and unit managers so personnel overtime hours could be tracked and justified.

Employee's Exhibit 12 involved a time when Munoz became aware that Employee had assumed an overtime post on another unit without prior authorization, and without Munoz being made aware that Employee was working overtime. Initially, when Munoz called the unit where Employee was working overtime, he spoke with David Sommerville, Munoz's colleague, who told Munoz to "back off" of Employee.¹⁴ Munoz informed Sommerville that he did not feel it was appropriate to discuss Employee's overtime issues and requested to speak with Employee. Munoz then asked Employee who requested and authorized her overtime. Employee indicated that Mr. Davis, the unit manager for the Evolution unit, approved her overtime. Munoz reached out to Davis and was unable to confirm that Davis had authorized Employee to work overtime. Munoz asserted that this overtime request was something that Mr. Davis should have communicated to him, which was routinely the process for approving employees from different units to work overtime.

Munoz believed that Davis was on leave from work due to a death in the family during the time when Employee was working overtime. Munoz testified that he called Mr. Davis to inquire about Employee's overtime status.¹⁵ Munoz also testified that Robert Miller, who was a Lead Youth Development Representative, did not have the ability to authorize overtime of Munoz's team members without first consulting with him.

When asked why Employee's Exhibit 12 was not signed, Munoz again stated that he was following protocol "where everything needed to be vetted through the superintendent's administrative offices."¹⁶

Munoz provided an Incident Notification Form in which he stated that Employee again failed to follow the proper procedures at the main gate. The form was introduced as Agency's Exhibit 7. This incident was reported by then-Interim Director Neil Stanley, who reported it to then-Superintendent Namon Reid, who then brought it to Munoz's attention.¹⁷

Agency's Exhibit 8, another Incident Report submitted by Munoz, stated that Employee was "unpleasant" and "very abrasive, [and] very inappropriate and scathing as well."¹⁸ This incident revolves around a conversation Munoz had with Employee when he asked her to work the main lobby of the facility. All of Munoz's incident reports bear his initials "CMM" on the bottom right corner of the form.

Agency introduced a Memorandum addressing its overtime policy as Exhibit 9. Munoz stated that this memorandum came to mind regarding the incident where Employee was working

¹⁴ Tr. at 152.

¹⁵ Tr. at 154-155.

¹⁶ Tr. at 157.

¹⁷ Tr. 159-160.

¹⁸ Tr. at 162.

unauthorized overtime. Specifically, Munoz believed that the overtime shift Employee was working would have exceeded the 24-hour limit per pay period that an employee was allowed to work, absent a special request form. Munoz stated that the special request form had to be signed by the supervisor who requested the overtime and the employee's direct supervisor

At the time of the incidents involving Employee at the main gate post, Agency employees manned the gate. The rules governing how the main gatepost was to be covered were located in the New Beginnings operations manual and also were posted in the main gate booth.

Yetta Ward ("Ward") Tr. 180-292

Ward has been employed with Agency for ten (10) years. She currently serves as a YDR and transportation dispatcher. She held the same position in 2011, when she first started at the New Beginnings facility. When Ward first started, she was assigned to shadow various individuals. After a shadowing period, Ward was assigned to the Operations Unit. During Ward's shadowing period, she sometimes shadowed Employee.

Agency's Exhibit 10 is an Incident Report Form surrounding an incident that occurred on March 23, 2011. Specifically, this incident involved Ward walking through the doors at the New Beginnings facility at a security post where Employee was working. Ward placed her items on the x-ray machine and walked through the metal detector and extended her arms out to be searched.¹⁹ Employee told Ward to "turn around in a boisterous and loud manner."²⁰ Ward told Employee that the policy provided that she was supposed to be searched from the front, rather than the back. Employee again instructed Ward to turn around and Ward complied and allowed Employee to conduct her search. Ward retrieved her items and walked away when Employee followed behind her and asked Ward what her problem was.²¹ Ward told Employee that she needed to be more courteous and that she was not searched in accordance with the policy.

Employee's Exhibit 18, the New Beginnings Operations Manual, provides the general procedures for conducting a search. On page 11 of the manual, it states, "To begin a search, have the visitor face the staff, spring the arms horizontally to the side and square the legs about a foot apart." This was the policy Ward referenced when she told Employee that she was supposed to be facing her while conducting the search.

Ward also testified regarding an incident that occurred on April 18, 2011. Agency's Exhibit 11 is Ward's written statement involving this incident, which was submitted to Mr. Waiters. At the beginning of the video, Ward is sitting in a chair monitoring a youth that is in the cell room across from her. The area that is depicted on the screen where Ward is sitting is the intake area of the facility. The greyish door at the top right of the screen is the main exit and entering door for the intake area. The windows and door behind Ward are the control center area, which was described as the eyes and ears of the facility. The control center observes any actions and monitors every location throughout the facility.²² Ward testified that her

¹⁹ Tr. at 187.

²⁰ Tr. at 187

²¹ *Id.*

²² Tr. at 196

responsibilities in the intake area included logging residents in and out of the facility.

Ward described the surveillance footage starting around the 13:09:05 mark, where she states that there are two youths, Employee, and herself in the frame. Employee is at the door and is wearing what appeared to be a black sweater, black pants, and black tennis shoes. Around the 13:10:10 mark, Mr. Hughes, another YDR with Agency, enters the frame. At the 13:15:45 mark, Ward and Employee are communicating about the new resident that was in the intake area, and Employee is also communicating with the control center.²³ At the 13:16:40 minute mark, as Employee and Hughes are walking out of the intake area, Ward was asking Golden “How do you all just bring a youth into the intake area and nobody gives me information on who this youth is?” As Ward is talking to Golden, Employee came back into the intake area and got in Ward’s face, pointing her finger and said, “What is your problem?” and called Ward a bitch.²⁴ Ward then explained to Employee that she did not have the relevant information on the new youth that was just transported into the facility by Employee and Hughes.

As Employee and Ward continued to exchange words, Golden, who can be seen in dark clothing in the video, came in between the two and separated them. A maintenance man can be seen coming into the surveillance frame after Employee walks out of the exit door.

Ward also described the video from a different angle, inside the control room. Inside the control room was a supervisor, Dorinda Brown, to the far left, Ms. Perkins in the middle, and Golden was closest to the door with the dark colored shirt on. Ward did not receive any discipline as a result of the incident between herself and Employee.

On cross-examination, Ward provided testimony regarding the March 23, 2011 incident involving Employee at the security check point (Agency’s Exhibit 10). Ward was still in her shadowing period when she reported to work on March 23, 2011. Ward submitted her written incident report to Munoz regarding this incident. Additionally, Ward testified that she has pending legal action against several individuals within Agency’s management with the Equal Employment Opportunity Commission.

In addition, Ward described the incident with Employee in April of 2011. Right before Employee and Hughes exit the door, Employee stated, “come on, Hughes, because this bitch make me sick.”²⁵ Right before the door is about to close, Employee came back and got in Ward’s face. Ward maintained that she did not say anything to provoke Employee to come back after walking out of the door. Rather, Ward maintained that she was talking to Golden and Ms. Brown when she said “what type of place is this where they bring kids in here and nobody give you the information,” and expressing her concern that she did not know who the kid was.²⁶

Catherine Ohler (“Ohler”) Tr. 294-313

Ohler has worked for Agency for eight (8) years and currently serves as an HR Specialist.

²³ Tr. at 208-209.

²⁴ Tr. 212-213; Agency Exhibit 11.

²⁵ See Agency’s Exhibit 11.

²⁶ Tr. at 265-266.

In this position, Ohler's role includes advising managers on employee disciplinary actions. Ohler also creates and reviews all supporting documents that are submitted for disciplinary actions.²⁷

Ohler testified regarding the Advance Written Notice of Proposed Removal and the Final Notice of Proposed Removal for Employee, which were introduced as Agency's Exhibits 12 and 13, respectively. In considering its decision to terminate Employee, Agency relied upon Employee's prior discipline. Documents relating to Employee's prior discipline were introduced into evidence as Agency's Exhibits 15, 16, and 17.

Ohler testified that the Notice of Final Decision on Proposed Removal does not address Employee's past discipline nor does it mention any consideration of the *Douglas* factors. Ohler stated that it would be improper for the deciding official to rely upon the five-day suspension in 2006 mentioned in the Advance Written Notice of Proposed Removal in making a final determination to remove Employee.²⁸

Employee's Case-in-Chief

Ernest Waiters ("Waiters") Tr. 314-329

Waiters has been employed by Agency for approximately nine years. Currently, he is a SYDR. In this capacity, Waiters is responsible for maintaining the safety, security, and operations throughout the facility. From August 2008 to August of 2010, Waiters was an acting SYDR. Subsequently, he became a permanent SYDR.

Waiters has known Employee for approximately nine (9) years and stated that they have a great relationship. Waiters has worked with Employee as co-workers and as her supervisor. He described Employee as an exceptional employee and not hard to get along with. He also stated that everything he asked her to do as her supervisor, she did effectively. Waiters was also Ward's colleague and supervisor. Waiters testified that he has received complaints about Ward regarding her attitude and not being able to get along with her colleagues.

Waiters was the supervisor on April 18, 2011, when Employee and Ward got into a heated exchange in the intake area of the New Beginnings facility. Waiters received eight written reports in connection with this incident. The reports from Employee, Golden, Ward, Hughes, Christina Perkins, Dorinda Brown, Yvette Jackson, and Yvonne Williams were all received by Waiters on April 18, 2011. These reports were introduced as Employee's Exhibits 3-10. Once Waiters received these reports, he submitted them to the video compliance specialist to disseminate the video to the appropriate personnel in the administration to deal with the staff-on-staff incident. Waiters could not take any disciplinary actions towards either employee; thus, after he submitted the documents to the video compliance specialist, he had no further involvement with the incident.

²⁷ Tr. at 295.

²⁸ Tr. at 309-310.

David Sommerville (“Sommerville”) Tr. 329-349

Sommerville is currently employed with Blue Line Security. Sommerville worked with Agency for 28 years until he was forced to retire because of his age.²⁹ He has known Employee for 15 years and was once her co-worker. They worked together approximately 2-3 times a week. Sommerville described Employee as a people person, very professional, and had good interactions with the youth.³⁰

Sommerville was at work on December 22, 2010, when he reported for the midnight shift as a YDR. At the end of his shift, Sommerville saw Employee when he called her to ask if she could work for him. Sommerville spoke with Mr. Miller, who was the acting manager in place of Davis, about Employee working in his place. Miller told Sommerville that he had to talk with Mr. Davis. Miller then told Sommerville that it was not a problem for Employee to work in his place.³¹ Sommerville then relayed this information to Employee. Sommerville recounted that Munoz called when he found out Employee was working overtime and asked why Employee was working. Sommerville spoke with Munoz and “gave him hell.”³² Sommerville testified that he was tired and had no patience during this conversation since he was coming off of a 16 hour shift. Sommerville and Munoz continued to have words back and forth when Munoz asked to speak with Employee. Sommerville was standing about a foot away from Employee while she was on the phone with Munoz. Sommerville stated that he did not hear Employee use any foul or disrespectful language towards Munoz. He further stated that Employee is not the type of employee to work overtime without approval.

Sommerville described the Lead YDR as the person in charge and one who makes decisions.³³ The hierarchy of who is in charge of a unit was described by Sommerville: unit manager (SYDR), Lead YDR, and then a YDR. Whenever the unit manager was not present, the lead officer would have authority over a unit.³⁴

Robert Miller (“Miller”) Tr. 349-365

Miller has been employed by Agency for eighteen (18) years and currently serves as a Lead YDR. Miller has known Employee for approximately five (5) years as her co-worker. He describes Employee as a pleasant and very cooperative person to work with. Miller has worked with Employee as a co-worker and as her supervisor.

On December 22, 2010, Miller was serving as the supervisor in the Lead YDR role in the Evolutions unit. Only two people, Miller and Sommerville, were in the unit at the time when Employee was coming to work overtime. Miller instructed Sommerville to ask Employee if she could work overtime in the Evolutions unit because that unit was experiencing a shortage of staff at the time. Miller testified that he had the authority, through Mr. Davis, to permit employees to

²⁹ Tr. at 330.

³⁰ Tr. at

³¹ Tr. at 335.

³² Tr. at 336

³³ Tr. at 345.

³⁴ Tr. at 346.

work overtime. Miller called Davis since he was not at work to let him know that the Evolutions Unit was going to be using Employee for overtime. Davis stated that it was okay for Employee to work overtime on that unit. Miller testified that he did not need to speak with Munoz about Employee working overtime. Miller did not hear Employee use any foul language or profanity during her overtime shift that day and does not believe that Employee would have worked overtime on any of the units without getting the necessary approval.

Miller explained that the overtime policy provided that an employee may not work more than 24-hours of overtime in a pay period. An employee could work more than 24 hours if they were approved by the superintendent, not the unit manager. Miller was unaware if Employee had reached her 24-hour limit of overtime pay at the time she was approved to work in the Evolutions Unit. A report is generated that provides the number of hours that an employee has worked overtime which is privy to all of the unit managers, in this case, Mr. Davis.³⁵

Anthony Hughes (“Hughes”) Volume 2, Tr. 8-28

Hughes has been employed with Agency for nine (9) years and is currently employed as a YDR. Over the years Hughes has worked with Employee several times. Hughes stated that he and Employee worked well together. Hughes had never worked with Ward at the time of the April 18, 2011, incident between Employee and Ward. At the time of the incident, Hughes was working as a transportation officer and was responsible for picking youth up from facilities and taking them to other various facilities. Hughes was working overtime during the a.m., along with Employee.

Hughes testified regarding the surveillance video and described the setting as the intake unit. Hughes identified himself in the video wearing a brown outfit, and he also identified Employee and Ward. Hughes described Employee by stating that she was unshackling a youth and returning the shackles back to the control center and informing them about the youth that was just brought in. (13:13:15 mark). As Hughes and Employee were about to exit the intake area, around the 13:16:51 mark of the video, Hughes heard Ward say, “your mother, bitch.”³⁶ In response, Hughes heard Employee state, “what does my mother have to do with this?”³⁷ Employee then turned around to come back inside the intake area and Hughes continued walking out of the intake area. Hughes prepared an incident report regarding this incident, which was introduced as Employee’s Exhibit 6.

On cross-examination, Hughes was asked about his written statement versus what he testified to on direct regarding who said the word “bitch.” On direct testimony, Hughes said he heard Ward say “bitch,” however, in his written incident report, Hughes wrote that Employee said, “did you say my mother bitch.”³⁸ Hughes stated that he could not remember exactly who said “bitch.” Hughes was sure that Ward mentioned something about Employee’s mother which is what drew Employee to come back in the intake area.

³⁵ Tr. at 363-364.

³⁶ Tr. Vol. 2 at 16.

³⁷ Tr. Vol. 2 at 17.

³⁸ Employee’s Exhibit 6.

Cassandra Gray (“Employee”) Volume 2, Tr. 29-89

Employee is currently employed part-time at Hearts and Homes group home in Maryland. Prior to her part-time employment, Employee worked at Agency’s New Beginnings facility from May of 2005 to April 2011 in various capacities, with the latest being a YDR. Employee’s separation from Agency stems from the incident she had with Ward on April 18, 2011. Employee testified about the proposed removal she received, which also addressed incidents other than the April 18, 2011 incident with Ward. When Employee received the Advance Written Notice of Proposed Removal, it was the first time she was made aware of the other incidents of alleged infractions.

Employee testified about Agency’s Exhibit 5, which is an Employee Counseling Notice. The first sentence of the notice reads, “This memo has been written [sic] officially document the conference held with employee Cassandra Gray to address her neglect of duty on December 14, 2010.” Employee stated that she never attended a counseling session nor did she sign any documents indicating that she had attended a counseling session. The first time Employee saw this document was when she received her package for removal in May of 2011. Employee stated that no one ever approached her about not following the proper protocol at the main gate. Agency’s Exhibit 7 is an Incident Notification Form which also provides that Employee failed to follow proper protocol at the main gate.

Employee further testified about Agency’s Exhibit 6, which is also an Employee Counseling Notice. The first paragraph of this exhibit reads verbatim what is in the first paragraph of Exhibit 5. Again, Employee testified that she did not attend a counseling session nor sign any documents indicating that she had attended a counseling session. The second paragraph of Agency’s Exhibit 6 states that the incident regarding Employee working unauthorized overtime occurred on December 22, 2010. The Employee Counseling Notice states that Employee was not authorized to work overtime; however, Employee testified that she was authorized to work overtime by Miller. Employee asserts that she never worked an overtime shift without authorization. Employee maintained that she did not use any foul language when she was asked to leave her shift that day by Munoz.

Employee asserted that no one in management ever spoke to her about the conduct set forth in Agency’s Exhibit 8. The first time Employee was made aware of this infraction was in the package that she received on her proposed removal. Agency’s Exhibit 8 is an Incident Notification Form reported by Munoz which describes a conversation he had with Employee where she used foul language. Employee testified that she worked with Munoz every day and that they had good rapport. Employee stated that she was never disrespectful towards Munoz and that they had the type of relationship where they joked around with each other. Employee stated that the conduct set forth in Agency’s Exhibit 8 was a product of the type of jovial relationship between Munoz and Employee. On cross-examination, Employee stated that the language she used was said in jest.³⁹

Employee stated that she was assigned to work the lobby area on March 23, 2011, and

³⁹ Tr. Volume 2, at 76.

when Ward entered the facility, she (Employee) asked Ward to turn around so that she could conduct a search of her person. Employee stated that women prefer to be searched from the back rather than the front because being searched from the front makes them feel uncomfortable. As Ward continued “babbling about something,” Employee continued to ask Ward to turn around so that she could perform her search. Ward then turned towards Employee and stated, “The next time [you] say something, say please to me.”⁴⁰ Employee ignored Ward’s statement and allowed Ward to proceed ahead. The Incident Notification Form regarding this incident was not brought to Employee’s attention until she received her package for termination.

Employee stated that she refused to sign the Advance Written Notice (Agency’s Exhibit 12) because she believed the charges levied against her were false. Employee worked with Ward for about three weeks before she received notice of her termination. Ward had been recently transferred from another Agency facility and Employee and Ward’s relationship was “very limited.”⁴¹

Employee was working as a transportation officer on April 18, 2011, and described the surveillance video which captured the incident between her and Ward (Agency’s 1). Around the 13:15:30 mark, Employee describes the scene as she is communicating with Golden and asking what they needed to do with the new resident. Around the 13:16:51 mark, Employee is exiting out of the door to pursue other duties and to see what she had to do for the rest of the evening. While exiting the door, Employee comes back into the intake area because Ward stated, “your mother.”⁴² Employee then asked Ward several times, “what did you say?” At no time did Employee threaten Ward. Employee provided a written statement about this incident which was introduced as Employee’s Exhibit 3.⁴³ Employee testified that once Golden intervened between the two of them, Ward became loud and aggressive.⁴⁴ Employee received her advance notice of termination within two or three weeks of the April 18, 2011 incident.

Employee testified that she believed Agency’s 5 and 7 were fabrications by Munoz because she was never made aware of the incidents referenced.⁴⁵

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency’s adverse action was taken for cause

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

⁴⁰ Tr. Volume 2, at 49

⁴¹ Tr. Volume 2, at 53.

⁴² Tr. Volume 2, at 63.

⁴³ Tr. Volume 2, at 65.

⁴⁴ Tr. Volume 2, at 66.

⁴⁵ Id. at 81.

(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.

Chapter 16, Section 1603.3 of the District Personnel Manual (“DPM”) sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Here, Employee was a Career Service employee and her termination was based on (1) any on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations; specifically: neglect of duty, insubordination, incompetence, and misfeasance; and (2) any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; violations of the Employee Conduct Policy, including arguing and use of abusive or offensive language.⁴⁶

Any on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations; specifically: neglect of duty, insubordination, incompetence, and misfeasance

Neglect of Duty

The District’s personnel regulations provide, in part, that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.⁴⁷ Agency’s neglect of duty charge stems for its assertion that Employee violated the main gate protocol, which compromised the security of the facility on at least two occasions.⁴⁸ Agency’s neglect of duty charge is also based on its assertion that Employee violated policy and procedures by not receiving authorization to work an overtime shift.

Agency’s contention that Employee violated the main gate protocol is set forth in two documents: an Employee Counseling Notice (Agency’s Exhibit 5) and an Incident Notification Form (Agency’s Exhibit 7). The Employee Counseling Notice (“counseling notice”) is from Munoz and is dated December 14, 2010. This notice states, “[o]n Monday, December 13, 2010, during the AM tour, YDR Cassandra Gray demonstrated neglect of duty when she failed to follow the main-gate protocol.” The notice further states, “[w]hile assigned to the main-gate post, [Employee] did not exit the booth to either move the gate or the cones used to limit and control the daily flow of the institutional traffic to and from the facility. Additionally, [Employee] was not observed wearing the required [reflective] vest (provided).” Munoz, who was Employee’s immediate supervisor, stated that this incident was brought to his attention by then-Superintendent Namon Reid, who drove through the main gate and observed Employee not

⁴⁶ See DPM §§ 1603.3(f) and (g) and § 1619(7).

⁴⁷ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

⁴⁸ See Agency’s Exhibit 13, Notice of Final Decision on Propose Removal at 3.

following protocol. Munoz stated that Reid told him that Employee failed to wear her reflective vest and failed to properly place cones to control the flow of traffic at the gate.⁴⁹ According to Munoz, the Counseling Notice was “written [to] officially document the conference held with [Employee] to address her neglect of duty on December 14, 2010.” This counseling notice is not signed by either Munoz or Employee. When asked why the notice was not signed, Munoz responded, “that protocol required him to send everything to the Administrative Office of the Superintendent, and then the superintendent would sit down with the staff member and union representative.”⁵⁰

I find that the lack of Munoz’s or Employee’s signature on the notice to be concerning. Given Munoz’s response as to why the counseling notice is not signed, I am further perplexed that Munoz was allegedly required to send a written statement to the Administrative Office of the Superintendent without signing it and confirming the document’s veracity. Munoz provided testimony via FaceTime and was cooperative during his direct testimony. However, during cross-examination, Munoz’s attention appeared to be diverted elsewhere. The Undersigned, as well as Employee’s counsel, had to call Munoz’s name and ensure that his undivided attention was being given. This observance further called Munoz’s credibility into question.

Moreover, the testimony given by Munoz regarding Employee’s failure to follow the proper protocol at the main gate was based on hearsay supposedly provided by then-Superintendent Namon Reid. Munoz had no first-hand knowledge of Employee’s alleged failure to follow the proper main gate protocol. There was no testimony given by the actual observer, Namon Reid, of Employee’s alleged misconduct. It is also noted that Munoz did not testify as to what actually occurred during the counseling session that he held with Employee regarding her conduct at the main gate. Employee testified that the first time she heard about any misconduct on her part in failing to follow the main gate protocol was in the package that she received with the Agency’s proposed notice of removal. Based on the documentary and testimonial evidence, the Undersigned is not persuaded that this counseling session with Employee did in fact occur. The Undersigned does not give the counseling notice much weight and finds that Agency has not met its burden of proof that Employee neglected her duty by failing to follow the proper protocol at the main gate of the facility.

The other document Agency relies upon to support its neglect of duty charge is Agency’s Exhibit 7, an Incident Notification Form by Munoz regarding the same conduct alleged in the Employee Counseling Notice—failure to follow the main gate protocol. The language contained in the Incident Notification Form is nearly identical to the language contained in the counseling notice form, with the exception of the date of the alleged conduct. Munoz also wrote that the information given in the Incident Notification Form is “PER NAMON REID.” Munoz testified that this incident was reported by then-Interim Director Neil Stanley, who reported it to then-Superintendent Namon Reid, who then brought it to Munoz’s attention.⁵¹ Again, Munoz’s Incident Notification Form was based on hearsay and not first-hand knowledge of the conduct and Agency did not offer any testimony by the actual observer of the alleged misconduct. Employee testified that no one in management ever approached her about not following the main gate protocol. Based on the foregoing, I further find that Agency did not satisfy its burden of

⁴⁹ Tr. 147-148, Volume 1; See also Employee’s Exhibit 11.

⁵⁰ Tr. at 145.

⁵¹ Tr. 159-160.

proof for its neglect of duty charge against Employee for failing to follow the proper main gate protocol.

Agency's neglect of duty charge is further based on its assertion that Employee violated policy and procedures by not receiving authorization to work an overtime shift. Specifically, Agency asserts in its Advanced Written Notice of Proposed Removal (Agency's Exhibit 12) that on December 22, 2010, Employee was working an overtime shift on the Evolution Housing Unit without prior approval from her immediate supervisor, Munoz. Munoz testified that when a unit manager of another housing unit wanted to request overtime from one of his staff members, then that unit manager would have to communicate to him their desire to use Munoz's staff member to work overtime on a different unit. In the instant case, however, Munoz stated that he was never contacted by another unit manager seeking to have Employee work overtime. Contrary to Munoz's assertion that another unit manager was required to get his authorization to use one of his staff members for overtime, there was testimony which provided that unit managers from a different unit did not need Munoz's authorization to use one of his staff members for overtime. Specifically, Miller, who was serving as the supervisor in the Lead YDR role on the Evolutions unit, stated that he had authority, through Davis, to use employees for overtime on the unit he was supervising. Miller called Davis, who was on leave, and received approval to allow Employee to work overtime.

Miller explained that the overtime policy during the relevant time provided that an employee may not work more than 24-hours of overtime during a pay period. An employee could only work more than 24 hours if they were approved by the superintendent, not a unit manager. Miller was unaware if Employee had reached her 24-hour limit of overtime pay when he approved her to work on the Evolutions Unit. No documentary evidence was presented that Employee worked more than 24 hours of overtime during the relevant time period.

The testimonial evidence presented demonstrates that Employee did have approval to work overtime on December 22, 2010. Employee, Sommerville, and Miller all testified that Miller, through Davis, approved Employee to work overtime. Sommerville had just finished working a double shift of 16 hours and was supposed to work the next shift as well, but because he was tired, he requested that Employee come to work for him.⁵² Miller testified that he had authority to approve Employee's overtime, by way of being in contact with Davis who was out on leave.⁵³

The only evidence Agency presented to support its assertion that Employee worked unauthorized overtime was an Employee Counseling Notice (Agency's Exhibit 6) and Munoz's testimony. The counseling notice is not signed by either Munoz or Employee. Munoz's testimony regarding the conversation he had with Davis about whether or not Employee was approved to work overtime is unpersuasive. The details provided about this conversation were very curt. Munoz stated that he was "not able to confirm" that Davis had in fact approved Employee to work overtime.⁵⁴ Even in the counseling notice, the details about the conversation between Davis and Munoz are limited. Munoz does not directly state whether or not Davis

⁵² Tr. at 333-34.

⁵³ Tr. at 361.

⁵⁴ Tr. at 154

denied approving Employee for overtime; rather, Munoz seems to skirt around the details of the conversation he had with Davis about Employee working overtime. I found Munoz's testimony lacked credibility in this regard. Accordingly, I find that Agency has not met its burden that it had cause to take adverse action against Employee for working unauthorized overtime.

Insubordination

Insubordination includes an employee's refusal to comply with direct orders, accept an assignment or detail; or refusal to carry out assigned duties and responsibilities.⁵⁵ Further, insubordination is defined as a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.⁵⁶ Agency's removal of Employee is also based on an insubordination charge. Specifically, Agency asserts that Employee was "insubordinate by not scanning out and exiting the facility when instructed by [her] supervisor during the first phone call."⁵⁷

I am not persuaded that Employee was insubordinate. It is undisputed that the unit manager, Davis, was out on leave. The evidence is unclear about who was actually in charge of the Evolutions unit on December 22, 2010. While Munoz does not purport that he was in charge of that unit on the relevant date, he did testify that whichever unit manager requested overtime from one of his staff members was required to communicate such a request to him. However, Miller, who was filling in for Davis, testified that he did not need Munoz's authorization to grant Employee overtime. Further, Agency's Exhibit 9, a memorandum addressing Agency's overtime policy, provides that, "...the supervisor making the assignment must determine that such assignment will not exceed the maximum 24 hour overtime limit in that pay period."

Here, it is apparent that Miller was the acting supervisor of the Evolutions unit while Davis was out on leave. Although Miller had the apparent authority to grant Employee overtime on the Evolutions unit, the record is not clear as to why Miller needed to get authorization from Davis when he was out on leave. Although there is conflicting testimony as to whether Davis did in fact give Miller the authority to use Employee for overtime, Agency's Exhibit 9, does not state that an employee's immediate supervisor needed to be notified that one of their employees would be working overtime. Rather, the memorandum clearly states that "the supervisor making the assignment," in this case, Miller, "must determine that [the overtime] assignment [would] not exceed the maximum 24-hour overtime limit..." The fact that the acting supervisor, Miller, authorized Employee to work overtime and Employee's immediate supervisor, Munoz, instructed Employee not to work overtime and to clock out, placed Employee in a difficult situation. Employee was forced to choose between working overtime after being authorized by someone with apparent authority, versus leaving the facility at the instruction of her immediate supervisor. The burden is on Agency to demonstrate who had the actual authority to permit Employee to work overtime. Although Munoz testified that he believed the overtime shift Employee worked would have placed her beyond the 24 hour overtime limit, there were no documents submitted to support this assertion. Accordingly, based on the testimonial and

⁵⁵ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(d). Table of Appropriate Penalties.

⁵⁶ *Walker v. Dep't of Army*, 102 M.S.P.B. 474, 477, 2006 MSPB 207 (2006) (citing, *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989)).

⁵⁷ Agency's Exhibit 13, Notice of Final Decision on Proposed Removal at 3.

documentary evidence, I find that Agency has not satisfied its burden that Employee intentionally disobeyed an order from her immediate supervisor to which the supervisor was entitled to have obeyed.⁵⁸

Incompetence

The District's personnel regulations provide that incompetence includes the following: (1) careless work performance; (2) serious or repeated mistakes after giving appropriate counseling or training; or (3) failing to complete assignment timely.⁵⁹ Here, Agency asserts that Employee failed to follow the main gain protocol on multiple occasions after being given appropriate counseling from Munoz, her immediate supervisor. However, the Undersigned is not persuaded that Employee actually received counseling from Munoz about her alleged failure to follow proper protocol at the main gate. The same analysis set forth under the "neglect of duty" section addressing Employee's alleged failure to follow protocol at the main gate applies here.

In support of its incompetence assertion, Agency relies on an unsigned Employee Counseling Notice (Agency's Exhibit 5) and an Incident Notification form, both with identical language describing Employee's conduct. The Incident Notification form indicates that Employee was observed by Namon Reid, who then reported the conduct to Munoz. This second-hand account of Employee's alleged misconduct cannot support Agency's assertion that Employee was incompetent. Further, the details of the alleged counseling sessions held between Employee and Munoz are scant, thus calling the credibility of the counseling notice into question. The credibility of the counseling notice is further lacking since it is unsigned and the explanation by Munoz as to why it is not signed—that he was required to send everything to the Administrative Office of the Superintendent—is unpersuasive. Additionally, Employee testified that she never had a counseling session with anyone in management about any misconduct at the main gate. I found Employee's testimony to be credible. Accordingly, I find that Agency had not meet its burden of proof with regards to its incompetence charge against Employee.

Misfeasance

The District's 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.⁶⁰ Seemingly, Agency bases this charge on Employee's careless work performance in failing to adhere to the main gate protocol. The analysis of this charge is the same as discussed under the "neglect of duty" and "incompetence" charges. Thus, I find that the documentary and testimonial evidence do not support Agency's misfeasance charge against Employee.

⁵⁸ See *Walker v. Dep't of Army*, 102 M.S.P.B. 474, 477, 2006 MSPB 207 (2006) (citing, *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989)).

⁵⁹ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(e). Table of Appropriate Penalties.

⁶⁰ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(f). Table of Appropriate Penalties.

Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; violations of the Employee Conduct Policy, including arguing and use of abusive or offensive language.

Agency bases this charge on three separate incidents: the April 18, 2011 incident between Employee and Ward in the intake area of New Beginnings, a conversation between Employee and Munoz regarding Employee working in the lobby, and an instance where Employee searched Ward as she entered through the security check point into the facility. This charge is a “catchall” phrase which includes activities for which an investigation can sustain is not *de minimis*. I find that Agency had cause to take adverse action against Employee for her use of offensive language in two of the incidents: (1) during the April 18, 2011 verbal exchange with Ward; and (2) during her conversation with Munoz regarding working in the lobby area of the facility.

It is undisputed that Employee and Ward were engaged in a heated verbal exchange on April 18, 2011. Surveillance footage captured the encounter from two angles, although neither included audio of the incident. What was said during the exchange, and by whom, is disputed. Golden, who intervened between the two employees, testified that Employee put her finger in Ward’s face. Golden could not remember anything that was specifically said by the two employees other than they were “fussing.” Ward testified that Employee got into her face and called her a “bitch.” Despite Hughes testifying that he believed he heard Ward state, “your mother, bitch,” his written statement actually provides the contrary and asserts that Employee called Ward a “bitch.” On cross-examination, Hughes testified that he could not remember exactly who called who a “bitch,” but I find his written statement more credible since it was written on the same day as the incident and is a more reliable account of the events. However, Hughes was sure that he heard Ward mention Employee’s mother, which triggered Employee to return to the intake area right before the door closed to confront Ward. A written statement by E. Jackson, introduced as Employee’s Exhibit 9, further supports the assertion that Employee called Ward a “bitch.” Based on the testimonial and documentary evidence, I find that while Ward seemed to have provoked Employee, Employee used offensive language towards Ward by calling her a “bitch.” Although Ward also used offensive language when she inserted Employee’s mother into their exchange, the fact remains that Employee used offensive language. Accordingly, I find that Agency had cause to take adverse action against Employee for arguing and use of offensive language during the April 18, 2011 incident.

The second incident that Agency relies upon in its “use of abusive or offensive language” charge is the exchange between Employee and Munoz on March 23, 2011, which is set forth in Agency’s Exhibit 8. This incident involved Munoz requesting Employee to work in the lobby, to which Employee responded, “no shit,” in a seemingly sarcastic tone. When asked by Munoz to repeat herself so that he made sure he heard her correctly the first time, Employee repeated, “no shit.” Munoz described this incident to be very unpleasant, and stated that the language used by Employee was very abrasive and inappropriate.⁶¹ Employee does not deny that she used this language. Rather, she states that it was said in a joking-like manner. Employee testified that she had good rapport with Munoz and felt that she could joke around with him using the language described in Agency’s Exhibit 8. Munoz felt otherwise. Despite Employee’s belief that she had

⁶¹ Tr. at 162.

the type of relationship with Munoz where it was acceptable for her to use this language, Munoz's subjective belief that the language used was offensive must outweigh Employee's belief that it was acceptable. Accordingly, I find that Agency had cause to take adverse action against Employee for her use of offensive language in the March 23, 2011 exchange between Employee and Munoz.

The third incident that Agency forms the basis of its charge stems from the incident between Employee and Gray at the security check point when Employee conducted a search of Gray. This incident is set forth in Agency's Exhibit 10. Ward testified that Employee told her to "turn around in a boisterous and loud manner."⁶² Ward took issue with the fact that Employee searched her from the back, rather than the front. Employee again instructed Ward to turn around, to which Ward complied and allowed Employee to conduct a search. After the search, as Ward was walking away from the security check point, Ward told Employee that she needed to be more courteous and that her search was not done in accordance with the policy. It seems that Agency asserts that Employee violated that Operations Manual when she searched Ward from the back rather than the front. However, page 11 of the Operations Manual (Employee's Exhibit 18), provides general guidelines for conducting a search. The guidelines are not mandatory, but rather provide guidance as to how to conduct a search of those entering the facility. Employee testified that often times women prefer being searched from behind because being searched from the front makes them feel uncomfortable. Accordingly, I find that the conduct described here did not rise to the level of cause for Agency to take adverse action.

Appropriateness of penalty

As discussed above, I find that Agency only had cause to take adverse action against Employee for "any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious." Thus, I will not discuss the appropriateness of the penalty with regard to the remaining charges.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. DCMR § 1619.1(7) (Table of Appropriate Penalties) provides the range of penalties for the charge of any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. The penalty for the first offense for this cause ranges from a reprimand up to a fifteen (15) day suspension.

Upon review of the record, this is Employee's first offense for any other on duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. Although the Advance Written Notice of Proposed Removal (Agency's Exhibit 12) addresses other infractions in Employee's personnel file, none of the incidents involve a charge of arguing and use of offensive language. Further, the District Personnel Manual § 1606.2 provides that any

⁶² Tr. at 187

past discipline may not be considered for a period longer than three years from the effective date of the action. Here, in the Advance Written Notice, Agency considered “a 5-day suspension in 2006 for Inexcusable Neglect of Duty.” This past discipline should not have been considered in assessing the penalty of termination for Employee in this matter. It is further noted that although Agency based its decision to charge Employee for arguing and use of offensive language for several separate incidents, only one adverse action was taken, which culminated in Agency’s decision to terminate Employee. Thus, I find that the two specifications for which Agency had cause to take adverse action for use of offensive language should be considered Employee’s first offense for “any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.” The penalty for the first offense for this cause ranges from a reprimand up to a fifteen (15) day suspension.

In *Dunn v. DYRS*⁶³, the OEA Board held that this Office has the authority to modify an agency’s penalty when a decision is made to dismiss some causes of action while sustaining others. Here, several separate charges were levied against Employee which formed the basis of her removal. Only one charge was substantiated based on the testimonial and documentary evidence presented. The charge being substantiated is, any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious, was Employee’s first offense for this charge. As such, Agency abused its discretion in removing Employee from her position. The more appropriate penalty for this charge is a fifteen (15) day suspension.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency’s termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse her all back-pay and benefits lost as a result of her removal; and
3. Employee is suspended for fifteen (15) days for her first offense for arguing and use of abusive or offensive language; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

⁶³ See *Dunn v. DYRS*, Matter No. 1601-0047-10, Opinion and Order (April 15, 2014) (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313) (1981).