**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| TIMOTHY REEVES, | ) | |
| Employee | ) | OEA Matter No. 1601-0029-07 |
| | ) | |
| v. | ) | Date of Issuance: February 13, 2009 |
| | ) | |
| D.C. PUBLIC SCHOOLS (DIVISION OF TRANSPORTATION), | ) | |
| Agency | ) | ERIC T. ROBINSON, Esq. |
| | ) | Administrative Judge |

Timothy Reeves, Employee *Pro-se*[1]
Brian Hudson, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL BACKGROUND

By letter dated November 29, 2006, Timothy Reeves ("Employee") was removed from service with the District of Columbia Public Schools – Division of Transportation ("Agency") for the alleged cause of corporal punishment (assaulting a child). Employee's last position of record prior to his removal was Motor Vehicle Operator. The effective date of Employee's removal from service was December 14, 2006. Employee filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") on December 1, 2006, contesting the aforementioned removal from service. After considering the parties positions as provided for in Employee's petition for appeal and Agency's Answer, I determined that an evidentiary hearing was necessary for the proper consideration of the facts in this matter. Accordingly, an evidentiary hearing was convened on June 4 and 7, 2007. The record is closed.

### JURISDICTION

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

[1] Initially, Employee was represented by Ronnie Thaxton, Esquire. However, at the start of the first day of the evidentiary hearing, Employee informed the court that he did not wish to continue to utilize Mr. Thaxton's services during his appeal process. Mr. Thaxton was excused from further participation in this matter.

606.03 (2001).[2]

BURDEN OF PROOF

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

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

1. Whether Agency's adverse action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

***Summary of Relevant Testimony***

*Agency's Case in Chief*

*Danette Lawrence*

Danette Lawrence ("Lawrence") testified in relevant part that: she works for the

[2] The Comprehensive Merit Protection Act ("CMPA"), codified at D.C. Official Code §1.601.01 *et seq.*, provides for jurisdiction over appeals related to adverse employment action, including but not limited to demotions and terminations, filed by employees of the Agency. Although the U.S. District Court for the District of Columbia appointed David Gilmore as Administrator of the Agency's Division of Transportation of the D.C. Public Schools (the "DOT"), in an Order issued on June 25, 2003, that Order specifically requires the Transportation Administrator to adhere to the laws and regulations of the District of Columbia. While the Transportation Administrator has the ability to petition the District Court for relief from any such laws or regulations, he has not done so. Accordingly, the Office has not been divested of jurisdiction over appeals of adverse employment actions filed by the Agency employees.

Agency as a Compliance Coordinator/Manager. Her job responsibilities include investigating accidents, incidents, and complaints involving the Agency. *See*, Tr. at 50.

According to Lawrence, the main purpose of the Agency is to transport special needs children to and from school. *Id*. at 50. Lawrence described "special needs" children as those children who "have an identified disability, whether it's physical or emotional." Tr. at 50. Transportation of special needs children is accomplished via a bus with a driver and at least one aide. While on the bus, the children are in the joint care of the bus driver and the aide. *See*, Tr. at 51.

Lawrence testified that she is familiar with Employee and the circumstances that gave rise to the instant matter. She helped conduct the Agency's investigation of said incident which included allegations of corporal punishment levied against Employee. On or around October 20, 2006, Lawrence was alerted that someone had alleged that they saw Employee grabbing and pushing a student. On this same date, she requested that Employee come to the Penn Center (central office of the Agency) so that he could be questioned regarding this incident.

According to Lawrence, during said interview, Employee related that he had parked the school bus in front of the subject child's home.[3] When Employee went to pick up C1 at his home, C1 allegedly started cursing at Employee and informed him that he was not going to school that day and that he was going to jump out of the back door of the school bus. *See generally*, Tr. at 55 – 56. Allegedly, Employee then told Lawrence that he instructed C1 to put on his seat belt and then admitted that he walked to back of the bus to C1, grabbed C1 by his upper arm and placed him in his seat. This allegedly occurred after C1 made a failed attempt to go out of the bus's back door. *See generally*, Tr. at 56. Afterwards, Employee allegedly told Lawrence that since C1 was not being cooperative, he instructed the aide to escort C1 off of the bus.

Lawrence also interviewed other persons regarding this incident. One of the other persons interviewed was Verna Crowder. She is an Attendant/Aide who allegedly witnessed this incident from the vantage point of another Agency bus which was located behind the Employee's bus at the time of the incident. Verna Crowder ("Crowder") did not testify in this matter. However, she allegedly provided a written statement which was a part of Agency's Exhibit No. 1. This exhibit was first introduced through Lawrence's testimony. It is a memorandum, dated November 16, 2006, which detailed Lawrence's investigation into the instant matter. According to Lawrence, Andrea Burnett ("Burnett") and Crowder were located in an Agency bus located directly behind the bus the Employee was operating. According to Lawrence, as indicated in Agency's Exhibit No. 1, Burnett observed the incident and detailed her observations, in part, as follows:

> [Burnett] said that she was parked behind this bus. She had asked [Crowder] to get off the bus to ask the driver if he could just move over a little bit because she wanted to continue with her run. She

[3] In order to protect the privacy of the child who was allegedly the victim of corporal punishment in the instant matter, I shall refer to him as "C1".

> said that that didn't occur, [Crowder] got back on her bus.
>
> [Burnett} said that she saw the attendant from the other bus walking the student onto the bus and she said that then she saw these bodies - - the body of the student being grabbed and pushed by an adult male. [Burnett] could not make out who the adult male was, but she did - - she said she saw - - all she saw were these bodies.
>
> Tr. at 60.

According to Lawrence's investigation, Employee was the only adult male present at the time of the alleged incident. *See generally*, Tr. at 61. As part of her investigation, Lawrence interviewed Denise Abney ("Abney"), an Attendant/Aide, who was on Employee's bus at the time of the alleged incident. Abney indicated to Lawrence that at the time of the alleged incident, C1 was cursing at Employee and had thrown a piece of paper at him. Abney also noted that she did not see Employee touch C1. *See generally*, Tr. at 63 – 64.

Lawrence indicated that she conducted a telephone interview of C1, on November 1, 2006, relative to the alleged incident. C1 indicated to her that at the time he did not want to go to school and refused to put on his seat belt. Employee approached C1, at which point C1 jumped up and the Employee "pushed him in his seat." Tr. at 65. This process repeated a second time before Employee instructed Abney to escort C1 off of the bus. *See generally*, Tr. at 65 – 66.

Lawrence interviewed two other students[4], relative to this alleged incident. Both were present on the Employee's bus, as passengers, when this alleged incident occurred. C2's and C3's rendition of events, as told to Lawrence, generally mirrored C1's rendition of events. *See generally*, Tr. at 66 – 68. Neither C2 nor C3 provided a written account of the alleged incident to the Agency. The information that was elicited from these two was based on a conversation held at their respective schools by Lawrence.

During direct examination, Lawrence indicated that the Agency has prohibited the use of corporal punishment by its employees. She further indicated that the Agency has adopted a no touch policy with regards to all interactions between Agency employees and students. Even in extreme circumstances where a student is fighting another student, Agency employees are required to verbally redirect the students to stop fighting and to notify Agency dispatch and the local police department. If the fighting continues, Agency employees are required to wait for police intervention and to continue to verbally redirect the students to stop fighting. *See generally*, Tr. at 68 – 76.

Lawrence also revealed that the Agency provided behavior management training to its employees in the summer as well as periodically throughout the school year. *See generally*, Tr. at 77. Agency's Exhibit No. 3 was admitted into evidence through

[4] In order to protect these children's privacy, I shall refer to them as "C2" and "C3" respectively.

Lawrence's testimony. It is a sign-in sheet for one of the behavior management classes conducted by the Agency. Employee's signature appears on the form, ostensibly indicating that he was present for said class.

Lawrence admitted that there have been instances in the past where a student has run out of the back of the bus without prior authorization. When such acts have occurred in the past, the Agency would decide on a case-by-case basis whether it would pursue disciplinary actions against agency employees responsible for these students care and safety. *See generally*, Tr. at 81 – 83.

Lawrence indicated that C1 was previously diagnosed with Emotional Disturbance ("ED"). Generally speaking, Lawrence described children with ED as follows: "... they're more likely to fight, they're more likely not to respond to directives. Usually, students who are ED respond very well to structure, they're more likely not to want to go to school. They're actually one of the most difficult of the population to transport because of the fact of some of the issues that they present with." Tr. at 82 – 83.

Lawrence testified that in spite of the difficulties presented with transporting children with ED, Employee failed to follow established Agency protocol during the incident in question and that the tactics allegedly used by the Employee were inappropriate for the situation. It is her belief that Employee's actions warranted his removal from service.

At the conclusion of Employee's case in chief, Agency called Lawrence as a rebuttal witness. During her rebuttal testimony, Lawrence clarified that on the date of the incident, she met with Employee at her office to discuss what happened. She recalled taking Employee to an empty space within her office, and it was there that Employee orally related his version of events. She then had Employee write down his recollection of events for the Agency's record. Lawrence then had further discussions involving various topics including Employee mimicking the motion that he used during the incident as well as Employee asking her what he could have done differently given the circumstances. When Employee cross examined Lawrence on rebuttal he questioned whether he and Lawrence had a substantive conversation as part of Lawrence's investigation before Lawrence asked that he write down his rendition of events. Lawrence was adamant that, based upon the facts as culled from the witnesses she interviewed, Employee's actions warranted his removal from service.

Christa Philips

Christa Philips ("Philips") testified in relevant part that: she is currently employed as a Senior Advisor to the Transportation Administrator. She has served in this role for the past year and half. Her current duties and responsibilities include overseeing the audit investigation unit for the District of Columbia Public Schools ("DCPS"); liaison for the Office of Special Education; and assists with "soft side" training for DCPS. Philips also implements and conducts behavioral management training, *inter alia*, for Agency personnel. *See generally*, Tr. at 134 – 135. Philips is familiar with the investigation into

Employee because she was tasked with assisting Lawrence in investigating this incident. Philips assisted Lawrence by gathering evidence and interviewing witnesses.

Philips was tasked with making a recommendation to the Transportation Administrator as to what the appropriate Agency action should be, given the circumstances. Agency Exhibit No. 2 was introduced into evidence through Philips's testimony. It is an excerpt from the Agency's Policies and Procedures Manual ("Policy Manual"). Philips contends that relative to the instant matter, Employee violated Policy Manual § 212.2 E, which states that: "under no circumstances shall [an Agency] employee inflict corporal punishment on riders." *See generally*, Tr. at 139 – 140. However, Philips went on to clarify that the Agency has "... a no touch policy, unless there's a threat to yourself or to the child or harm to the child." Tr. at 140. In weighing the appropriate Agency response to this allegation, Philips considered § 2403.6 of the D.C. Municipal Regulations ("DCMR"). In spite of this regulation, given the instant facts, Philips contends that Employee's use of force to get C1 to sit was unnecessary given that C1 was not a threat to himself or others. According to Philips, regardless of her recommendation, the Transportation Administrator is the final arbiter, at the Agency level, on whether an allegation of employee misconduct has been substantiated.

Philips testified, during cross examination, C1's parent made a complaint regarding this incident as well as alleging that the bus was late in picking up C1. The initial complaint that is at the heart of the instant matter came from two other Agency employees – Verna Crowder and Andrea Burnett.[5]

During the incident, Burnett and Crowder's bus was positioned directly behind Employee's bus and could not maneuver around it because the street was too narrow. During cross examination, it was revealed that the bus on which the incident occurred had tinted windows which may have obscured Crowder's and Burnett's viewpoint of events. *See generally*, Tr. at 200 – 205.

*Employee's Case in Chief*

C2

C2 testified in relevant part that: he was present during the incident that is at issue in the instant matter. C2 was riding on the bus along with C1and C3. Denise Abney is C2's cousin. C2 went on to describe the Employee as generally friendly and caring toward him and his fellow passengers. Regarding the incident in question, C2 testified as follows:

> Q: Can you please briefly give me a description of what went on inside the bus on that day?
>
> A: [C1] didn't want to go to school that day and his stepfather told

[5] These two employees did not present sworn testimony during the evidentiary hearing convened in this matter.

him to get on the bus and [C1] was trying to jump out of the back door. And we was about to leave and there was a car behind us.

And he tried to ask him to sit down nicely and then he said he was going to hit you if you touched him and so you just asked him to sit down. And then you like gently placed him in his seat and that's when he got off the bus.

Tr. at 113.

Denise Abney

Denise Abney ("Abney") testified in relevant part that: at the time of the alleged incident she was employed by the Agency as a bus attendant and was assigned to the same bus as Employee. Regarding the incident in question, Abney testified as follows:

Q: So you're aware, we're here for the incident that happened with [C1] on October 20th.

A: Yes.

Q: Could you tell in your own words what happened?

A: I got off the bus to get C1, knocked on the door. He came out. When he came out, he was saying that he didn't want to go to school, he wasn't going to get on the bus. I escorted him on the bus. He was in the back, saying that he wasn't going to get on - - he wasn't going to sit down, put his seat belt on. He didn't want to do anything. So, I said, "[C1], you've got to sit down and put your seatbelt on before, you know, we leave." He said, "No. I'm going out the back door and if you try to stop me, I'm going to swing on you."

That's when [Employee] got up and told him, [C1] you have to sit down, put your seat belt on." C1 said, "No," and proceeded to go out the back door. That's when [Employee] grabbed his hand and told me to escort him off the bus.

Q: So at that time, was there any physical contact by me, with me, you know, roughing him up, pushing him, slamming him?

A: No, the only thing I seen you do was put your hand on his hand to stop him from going out the back door.

Q: Do you recall him saying he was going to swing on me?

A: He said if you touched him, he was going to swing, he was going to punch you in your "mother fucking face."

Q: So was I mad at him or temperamental...

A: Not to my knowledge.

Tr. at 240 – 242.

Abney indicated that the force used by Employee when he touched C1 was slight. *See generally*, Tr. at 244. Abney also related that C1's father was standing at the entrance to the bus during the incident in question. Tr. at 246.

Abney indicated that during the incident, Burnett and Crowder's bus was positioned directly behind their bus and could not maneuver around it because the street was too narrow. Also, according to Abney, Burnett and Crowder did not leave their bus during said incident. *See generally*, Tr. at 247 – 248.

Terry Joe

Terry Joe ("Joe") testified in relevant part that: at the time of the evidentiary hearing, he had worked for the Agency for approximately six years as a bus attendant. Joe related that he had known Employee for approximately three years and that on occasion they had been assigned together to run a hot route. This occurred when the Agency assigned Employee and Joe to transport extremely troubled children to and from school. Joe testified that in the commencement of these duties that touching of the children was not uncommon, particularly since these children were particularly aggressive. *See generally*, Tr. at 262.

Joe also indicated that he serves as a union representative. Because of his position with the Union, Joe had informal conversations with some of the investigators and Agency hierarchy relative to this incident. One of these conversations was with Burnett where she related to Joe that it was felt that Employee had "[slung] the child from chair to chair." Tr. at 269. Joe related that while he was not an eyewitness to these events, he found it hard to believe that Employee had committed the acts alleged by the Agency.

During, cross examination, Joe indicated that he had attended Agency training courses and that one of the topics discussed was the restraining of children. The training he received as administered by Philips allowed for the restraining of a child "if a child is being harmful to self, destructive, destructing government property, or [physically assaulting] another student or bus driver or attendant." Tr. at 273 – 274.

When queried as to what he would do if a child wanted to go out of the back door while on a bus that is parked in front of the child's home, Joe indicated that he would try to verbally re-direct the child to use the front door. However, when introduced with the

additional caveat of this same child wanting to "swing on him" then Joe indicated he would consider using restraint to stop the child. *See generally*, Tr. at 275 – 277.

Timothy Reeves (Employee)

Employee testified in relevant part that: on October 20, 2006, he was parked in front of C1's home in a regularly scheduled attempt to procure C1 so that he could be transported to school. During C1's pick up, the bus ("Bus 2") containing Burnett and Crowder came behind Employee's bus. At which point, Crowder approached Employee and asked that he move his bus so that they could pass. The street that C1's house is located on is very narrow, thereby making it impossible for Bus 2 to pass Employee's bus. Employee asked that Bus 2 wait because he was in the process of picking up C1. According to Employee, Crowder was very dissatisfied with that response. *See generally*, Tr. at 301 – 303.

In the weeks leading up to the incident in question, Employee remembered noting to Agency managers that C1 was constantly reluctant to ride the bus to school. *See generally*, Tr. at 304. On the date in question, C1's father accompanied him to the entrance to the bus. C1's father[6] strongly admonished C1 to get on the bus and to go to school. However, when C1 got on the bus, Employee recalled that he was more belligerent than usual. C1 went on to voice his disdain for going to school on the bus that day, so much so that he was ready to both fight as well as escape out of the back of the bus in order to avoid going to school. *See generally*, Tr. at 304 – 306. Employee then discussed certain options with C1 in an attempt to get C1 to sit in his seat. Apparently, this was all to no avail since C1 walked towards the emergency door located at the back of the bus. Employee then approached C1 and generally speaking asked C1 to return to his seat. Employee asserts that C1 refused that request and then put his hand on the latch for the emergency door as if he were about to leave through that door. Employee then states the following occurred:

> So when [C1] goes to reach for the back door, I reach to remove his hand from the back door. So he took a lunge to try to swing at me. I then caught his hand, I said, "Stop, [C1], stop. Sit down, sit down." He sat down on his own.
>
> I let him go. He then jumped back up like he wanted to fight. I then told [Abney], "Come on and take him off, he don't have to ride the bus." Tr. at 306

During cross examination, Employee recalled that he asked C1 to get off of the bus before approaching him while he was standing at the back of the bus. In explaining the discrepancy between this statement and other statements he made before, wherein he

[6] There is some confusion in the record as to whether the person referred to in this matter as C1's father is his actual biological father, stepfather, or maintains some other relationship with C1 and/or C1's mother. To date, this confusion remains unresolved. However, I have determined that making said distinction is ultimately immaterial to a proper resolution of this matter.

did not previously reveal that he offered C1 the option of leaving the bus before he approached C1 at the back of the bus, Employee explained that his recollection while testifying in the instant matter was very clear. *See generally*, Tr. at 332 – 334.

On another note, Employee thought that it was strange that the Agency was pressing forward with the instant action given that, to the best of his knowledge, C1's parents did not register a complaint with the Agency regarding the incident in question. *See generally*, Tr. at 315 -317. It was his colleagues operating the aforementioned 2nd bus that registered the complaint that gave rise to the instant matter.

***Findings of Fact, Analysis and Conclusion***

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.

There is one salient fact that is at the heart of this matter – Employee touched C1. Employee admitted as much in both his written statement, which can be found in Agency's Exhibit No. 1, as well as his own testimony during the evidentiary hearing convened in this matter. What remains for the undersigned to decide is whether the facts and circumstances that surround the aforementioned touching of C1 warrant Employee's removal from service.

During the evidentiary hearing, I heard from only three eyewitnesses who were present on October 20, 2006, when the incident in question occurred – Abney, C2, and Employee. Both Burnett and Crowder refused to testify before the undersigned in this matter. Employee, Abney, and C2 each testified in a collective capacity that Employee lightly touched C1 in an attempt to prevent C1 from using the back of Employee's bus as a means of egress. From Employee's perspective, I gather that he felt that he was in a "no-win" situation in that C1 vehemently did not want to go to school that day and presented Employee with two very undesirable options:

1. Exiting from the emergency exit at the back of the bus which was against Agency policy given the instant circumstances.

2. Or, before the bus left the front of C1's home, starting an altercation with Employee, Abney, and/or one or more passengers within the bus.

This situation was compounded with the fact that C1 suffered from ED making a workable solution all the more vexing for Employee to resolve especially given that this situation escalated within a matter of moments. In attempting to ameliorate this critical situation, Employee tried to first verbally convince C1 to go to school. When that failed and as he approached C1 he noticed that C1 was attempting to flee via the emergency exit. The incident as retold by Employee notes that the situation quickly degenerated to

the point that the option of Employee and Abney safely transporting C1 to school on that day quickly disappeared as C1 was then escorted off of the bus.

For the evidentiary hearing, Agency proffered the testimony of Lawrence and Philips which in the collective tended to show that Employee used unwarranted force in placing C1 in his seat. However, both Lawrence and Philips account of the incident at hand were culled from their collaborative investigation into the matter, and given the instant circumstances, I find that their testimony as to how the incident in question transpired is textbook hearsay.

Regarding the admissibility of hearsay in an administrative proceeding, the District of Columbia Court of Appeals held in *Compton v. D.C. Board of Psychology*, 858 A.2d 470, 476 (D.C. 2004) "that duly admitted and reliable hearsay may constitute substantial evidence. See, e.g., *Coalition for the Homeless v. District of Columbia Dep't of Employment Services.*, 653 A.2d 374, 377-78 (D.C. 1995) ("Hearsay found to be reliable and credible may constitute substantial evidence . . . ."); *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987) (explaining that reliable hearsay standing alone may constitute substantial evidence); *Simmons v. Police & Firefighters' Ret. & Relief Bd.*, 478 A.2d 1093, 1095 (D.C. 1984); *Jadallah v. District of Columbia Dep't of Employment Servs.*, 476 A.2d 671, 676 (D.C. 1984); see also *Richardson, 402 U.S. at 402; Hoska v. United States Dep't of the Army*, 219 U.S. App. D.C. 280, 287, 677 F.2d 131, 138 (1982). Thus, nothing in the hearsay nature of evidence inherently excludes it from the concept of "substantial" proof in administrative proceedings."

The Court of Appeals went on to explain that "just because hearsay may constitute substantial evidence does not be mean that it will do so in every case. The circumstances under which hearsay rises to the level of substantiality are not ascertained by any definitive rule of law, but rather by a set of considerations applied to the particular facts of each case. See *Robinson v. Smith*, 683 A.2d 481, 488-89 (D.C. 1996) citing *Washington Times v. District of Columbia Dep't of Employment Servs*., 530 A.2d 1186, 1190 (D.C. 1997) (stating that even hearsay "that lacks indicia of reliability may be entitled to some weight"). The weight to be given to any piece of hearsay evidence is a function of its truthfulness, reasonableness, and credibility. *See Wisconsin Ave. Nursing Home*, 527 A.2d at 288 (quoting *Johnson v. United States*, 202 U.S. App. D.C. 187, 190-91, 628 F.2d 187, 190-91 (1980)). We have said that:

> [A]mong the factors to consider in evaluating the reliability of hearsay evidence are whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, **whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn.** *Id.*; *see also Gropp*, 606 A.2d at 1014 n.10." *Emphasis added.*

*Compton v. D.C. Bd. of Psychology*, 858 A.2d 470, 476-477 (D.C. 2004).

Agency supported both Lawrence and Philips rendition of events with supporting documentation in Agency's Exhibit No 1, which included, among other things, a hand written account of the incident from Employee, Abney, Burnett, and Crowder. For the evidentiary hearing, Agency was unable to procure the sworn testimony of either Burnett or Crowder. Their collective account of events is what initiated the adverse action against Employee. However, I find that Lawrence and Philips credibly testified that the Agency had provided adequate training to Employee in order to guide him as to proper course for dealing with stressful situations not unlike the incident in question. According to them, Employee had other options available to him that could have been utilized before touching C1 including:

1. Instructing Abney to escort C1 off of the bus at first sign of trouble.

2. Instead of approaching and/or touching C1, Employee could have tried talking to him in an attempt to calm him down.

3. Procuring the assistance of C1's parent(s) or adult guardian in order to deal with the situation, since Employee's bus was parked in front of C1's house at the time of the incident and C1's father (or adult guardian) was standing at the entrance to the bus at the time of the incident.

4. Calling the Agency dispatcher and/or the Metropolitan Police Department in order to report incident as it escalated.

I must also take into account Employee's testimony which was, at times, inconsistent. Foremost among those inconsistencies was when Employee asserted that he instructed C1 to get off of the bus before he proceeded towards the back of the bus where C1 was then located. *See generally*, Tr. at 332. However, Employee then admitted that the evidentiary hearing was the first opportunity in which he disclosed that salient allegation, despite having been given the opportunity to disclose it earlier in writing, both during Agency's internal investigation into the incident (see, Agency's Exhibit No. 1) as well as part of his submission of documents to the OEA as a component of his appeal process. *See generally*, Tr. at 333 – 334. I take further note that Abney's account of events was inconsistent in that she disclosed during the evidentiary hearing that Employee touched C1. *See*, Tr. at 251. However, she did not disclose this same fact when Philips and Lawrence asked her to write down her observations relative to the incident as noted within Agency's Exhibit No. 1. I find that while Employee may have had good intentions in trying to rectify the difficult situation that presented itself the morning of October 20, 2006, he did not exhaust all reasonable means for rectifying the situation before touching C1.

Based on the preceding, I find that Employee violated Agency procedures when he touched C1 in an attempt to gain control of C1's difficult behavior. I further find that

the Agency's adverse action was taken for cause. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See*, *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ ( ).

I CONCLUDE that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing the Employee from service should be upheld.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of removing the Employee from service is hereby UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge