This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	) OEA Matter No. 1601-0093-14
BEVERLY BAINES	)
Employee	) Date of Issuance: May 4, 2016
v	)
	) Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	) Administrative Judge
Agency	)

Beverly Baines, Employee, *Pro Se*
Carl Turpin, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Beverly Baines, Employee, filed a petition with the Office of Employee Appeals (OEA) on June 27, 2014, appealing the final decision of the District of Columbia Public Schools, Agency, to terminate her employment, effective May 30, 2014. At the time of her removal, Employee was a classroom teacher and held permanent status. The matter was assigned to this Administrative Judge (AJ) on October 10, 2014.

At the February 9, 2015 prehearing conference (PHC),[1] Employee stated that she had, in fact, engaged in the charged misconduct and did not dispute the charges that resulted in her removal, and that she deeply regretted her actions. Employee stated that her appeal was based solely on the penalty, arguing that other employees had engaged in similar misconduct, but had not been terminated. Employee also argued that she had worked in a "dishonest" environment and that her efforts to report the dishonesty were unsuccessful. She maintained that the disciplinary action was taken only after publication of a newspaper article about the matter. Employee stated therefore that there was no need for an evidentiary hearing. The parties agreed to submit written briefs.[2]

[1] The PHC, initially scheduled for November 17, 2014, was continued three times, at the unopposed request of one or the other party.

[2] At the PHC, the parties reviewed the documents in the official file and agreed that these documents would constitute the official record. The documents were not marked, and are identified by description and date herein.

Employee asserted that the information she needed about other employees who, she alleged, had engaged in similar misconduct but were not similarly treated, was not accessible to her. She asked that Agency be directed to provide the information to her. Agency objected to the request. The AJ determined that although Employee had the burden of establishing that she was the victim of disparate treatment, Agency maintained such records and unless provided, such documents would be difficult for Employee to obtain. After considerable discussion about how to provide this information while protecting the privacy of employees and not placing an unfair burden on Agency, the AJ directed Agency, over its continuing objection, to provide the information sought by Employee.[3] The parties agreed to, and the AJ ordered, a deadline for providing Employee with the information. Employee was then given the opportunity to file a brief in support of her charge of disparate treatment; or, if upon review of the material, she did not believe she could establish disparate treatment, to advise AJ. The parties were told that the AJ would notify the parties how the matter would proceed after reviewing the submission.[4]

Upon consideration of Employee's submission, the AJ ordered Agency to file a response. After reviewing Agency's response, the AJ determined that additional information was needed, and directed Agency to respond to five specific issues. Agency did so in a timely manner. Employee was then given the opportunity to reply, but did not do so. The record closed on March 7, 2016.

JURISDICTION

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

ISSUE

Is there a basis for disturbing the penalty imposed by Agency?

FINDINGS OF FACT, POSITIONS OF THE PARTIES, ANALYSIS AND CONCLUSIONS

Employee had been a classroom teacher at Plummer Elementary School for five years at the time of her removal. During the 2013/14 school year (SY), she taught fifth grade.

In its Notice of Termination, issued on May 14, 2014, Agency notified Employee of its final decision to terminate her, effective May 30, 2014 based on:

> Grounds: 5-E DCMR Section 1401.2(i) dishonesty and 5-E DCMR 1401-.2(b) Grave misconduct in office.

[3] Employee was unable provide names for most of the individuals she contended had engaged in similar misconduct, making Agency's task more difficult. However, Agency was able to identify the individuals. To protect privacy and confidentiality, individuals were identified by numbers, not names or initials, in pleadings and Orders. Employee promised that she would not disclose or provide any information or documentation from DCPS to any third party, and would not duplicate any documents.

[4] These directives were memorialized by Order dated February 23, 2015.

> Reasons: In April, you administered the DC Comprehensive Assessment System (DC CAS) to a group of students. During test administration, you obtained a student's test booklet and looked ahead to portions of the test that would be administered on subsequent days. You admit to taking notes while reviewing those portions of the student's DC CAS test booklet. You admit that you prepared a study guide base on your review of the DC CAS materials and that you distributed that guide to students at Plummer.
>
> Your decision to assist students during the DC CAS testing denied them a fair assessment of content mastery and performance, served as an extraordinarily poor model to young students, and amounted to an egregious violation of test security protocols. Based on your conduct, we have concluded that an adverse action is warranted and that termination is the appropriate action.

As noted above, Employee stated several times that she engaged in the charged misconduct and that she deeply regretted her conduct at the PHC. After discussing the impact of these admissions with Employee, the AJ determined that Employee made such statements knowingly and voluntarily. In addition, Agency's submissions and representations supported its position that Employee engaged in the charged misconduct. Based on these factors, the AJ concludes that Agency met its burden of proof that Employee engaged in the charged misconduct.

The basis of Employee's appeal is her position that the penalty of removal was unfair for three reasons. First, she maintained that she worked in a "dishonest" environment and was "repulsed" by the urgings of school officials and staff to engage in misconduct that would result in higher scores for students on standardized tests. She contended that she engaged in the charged actions only after her efforts to report these actions were unsuccessful. Second, she contended that Agency only charged her with misconduct after charges of testing misconduct at Plummer were made public in a newspaper article. Third, she argued that that other professional staff engaged in the same or similar misconduct but were not disciplined; or, if disciplined, were not removed

Agency has the primary responsibility for managing its employees. This responsibility includes the imposition of appropriate discipline. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994). This Office limits its review of the penalty to determining if "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). This Office will not substitute its judgment of the penalty imposed by Agency if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C.Reg. 2915 (1985). Agency contended that Employee's actions were sufficiently egregious to warrant removal. Employee did not disagree. However, she maintained that the penalty cannot stand because Agency failed to remove other employees who engaged in similar misconduct.

Employee's first argument is that she felt compelled to engage in the wrongdoing because of the pressure exerted on her in the "dishonest environment" in which she worked. In support of this

argument,[5] Employee stated that the environment at Plummer became increasingly "dishonest" each year she was there. She asserted that teachers were pressured to improve students' standardized test scores "by any means necessary." She stated that in 2012, in an effort to remove herself from these demands, she asked for, and was given, a teaching assignment in a non-testing grade. She said she hoped that with improved instruction, students would "test better." Employee noted that in 2013, test scores at Plummer had "dropped precipitously." For the 2013/14 SY, Employee was first assigned to a fourth grade class, but moved to a fifth grade class, which had had other teachers before Employee's appointment.

Employee alleged that colleagues and administrators increased pressure on her to take "improper measures" to improve test scores as the testing day approached. She stated that she was shocked at the "blatant disregard for integrity" and did not want to take part in such "wrongdoing." She asserted that she reported her concerns to her instructional coach, who advised her to ignore the demands but did not suggest that she report the matter. Employee stated that she left an anonymous message with Agency's Department of Data and Strategy, expressing her concerns about the "testing…and the overall feeling of testing dishonesty which …was all encompassing.…"

The AJ carefully considered Employee's first argument. This AJ is very familiar with the pressures placed on public school teachers having taught elementary school for several years in the New York City public school system, being the daughter of two New York City public school teachers, and the product of the public school system. The AJ believes that public school teaching is one of the most difficult, stressful, dangerous, underappreciated and undercompensated professions; but it is also one of the most important and rewarding. She knows firsthand that the school environment can be confrontational and contentious; and that teachers, particularly new teachers and those in schools that are considered "underperforming," are often placed under considerable pressure by administrators, peers and parents, to take measures to ensure that children perform well on standardized tests. Although some educators argue that standardized tests are culturally biased and therefore invalid, test results may still impact on funding, bonuses, and reputations of teachers and administrators.

For the purpose of this Initial Decision, the AJ accepts Employee's assertions that she was under increasing pressure to engage in actions she found repugnant in order to improve test scores; that she reported the pressure both to a supervisor and anonymously without result; and that it was only after these efforts proved unsuccessful, that she succumbed and engaged in the charged misconduct. However, the AJ does not find that the pressure placed on Employee or her unsuccessful efforts to report the pressure, in any way excuses, justifies or mitigates Employee's misconduct. Employee admitted that she prepared and distributed a study guide based on her review of confidential testing materials. She acted with full knowledge that her actions were impermissible. Although she may have been encouraged to engage in misconduct, she made the decision voluntarily – she was not forced to do so. By engaging in the charged misconduct, Employee betrayed the trust placed on her by the District of Columbia, by the parents of this community, and most important, by the children for whom she served as a role-model.

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[5] Employee's arguments and the quotations are taken from her undated statement entitled "Appeal Response."

Employee's second argument in support of her charge that the penalty of removal was too severe, is that Agency only initiated the adverse action after the "possible testing integrity issues" at Plummer were "leaked" to The Washington Post.[6] Agency, however, maintains that any "leak" was unrelated to the timing of the adverse action, maintaining that it took action only after the completion of investigations by the Office of Data and Accountability and the Office of School Superintendent of Education. Its position is supported by the numerous and lengthy investigations contained in the "Confidential Documents" submitted by Agency. Employee did not present any evidence or argument to support her assertion or to otherwise challenge Agency's position regarding the timing of its actions. Therefore, Employee's second argument must also fail.

Employee's third argument is that she was the victim of disparate treatment, *i.e.*, that she was treated more harshly than other employees who engaged in similar misconduct. When an employee raises a defense of "disparate treatment," this Office will review the appropriateness of the penalty to ensure that in "genuinely similar cases," an agency metes out "fair and equitable treatment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985).

Employee has the burden of proving that she was the victim of disparate treatment. *See, e.g., Manning v. Department of Human Services*, OEA Matter No. 1601-0071-98, *Opinion and Order on Petition for Review* (September 26, 2005). However, once she makes a *prima facie* showing that she was treated differently than similarly-situated employees, the burden shifts to Agency to establish the legitimacy of its actions. *Baker v. D.C. General Hospital,* OEA Matter No. 1601-0081-90 (May 5, 1992). In order to establish a *prima facie* case, Employee must present evidence that the employees she contends were not treated as harshly, were "similarly situated." To do so, she must present evidence that these individuals shared with her the same or substantially similar positions, had similar responsibilities, were in the same chain-of-command, shared the same supervisor, and that the circumstances surrounding the incident were substantially the same. *Robert Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94 (September 29, 1995). *See also, Carroll v. Department of Health and Human Services,* 703 F2d 1388 (Fed.Cir. 1983).

Employee alleged that several other employees engaged in similar misconduct, but were not removed. Agency, as directed, provided information to Employee regarding employees she identified as well as other employees it had investigated for testing misconduct. After carefully reviewing the information in these "Confidential Documents," the AJ determined that additional information was needed. She directed Agency to supply specific information and/or explanation regarding several individuals, and Agency responded in a timely manner. Employee was then directed to present factual or legal argument to support her position that she was the victim of disparate treatment. She did not do so.

In order to establish that an employee is "similarly situated," Employee must present evidence that the co-worker was employed in same organizational unit and was subject to the same supervision within the same general time period. Employee was a classroom teacher at Plummer

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[6] These arguments were raised primarily by Employee and Agency in their submissions of April 20, 2015 and October 16, 2015, respectively.

during the relevant time period. Employee identified the principal, assistant principal, City Year representative, instructional coach and test coordinator, as individuals who engaged in similar misconduct. However, Employee did not establish that any of these employees were "similarly situated." The documentation provided does not support the conclusion that any of these individuals held a similar position, had similar responsibilities, worked in the same organizational unit, and had the same supervisor. Therefore, as to these individuals, Employee did not establish a *prima facie* case.

However, Employee also alleged that at least one classroom teacher at Plummer engaged in similar misconduct, but was not terminated. The classroom teacher would be similarly situated since the individual shared the same title, responsibilities and chain-of-command as Employee. Agency was directed to provide information and documentation regarding the penalty, if any, imposed on any classroom teachers. Agency identified three classroom teachers, and submitted documentation that it removed two of them. Since the penalty was the same, Employee's contention of disparate treatment must fail with regard to these individuals. The remaining classroom teacher was given a five day suspension. Agency maintained that it properly imposed a lesser penalty because it determined the teacher's misconduct was less egregious. In support its position, Agency submitted the statement of Neela Rathinasamy, who, as a member of Agency's Test Integrity Council, investigated the allegations of misconduct at Plummer. Ms. Rathinasamy stated that, upon investigation, Agency determined that the only charge against the other teacher was his "failure to report test security violations." Agency imposed a lesser penalty because it determined that engaging in testing violations was more serious than failing to report the violations. Employee did not thereafter argue that this individual's actions were as egregious or should have been considered similar. She did not offer any argument or evidence that Agency's rationale was factually or legally flawed. Therefore, since the co-worker did not engage in similar misconduct, he cannot be considered "similarly situated."

An agency must apply "practical realism" to disciplinary matters to "ensure that employees receive fair and equitable treatment where genuinely similar cases are presented." *Jordan v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995). In *Jordan*, the Board explained that that it is not sufficient for an employee to "simply" show that another employee had engaged in misconduct, the employee must establish that the circumstances were substantially the same. Based on a careful review of the documents and arguments presented in this matter, the Administrative Judge concludes that Agency established that it applied "practical realism" in this matter. It offered reasonable explanations for its decisions regarding the discipline meted out to other employees charged with testing misconduct. It established that some of these employees either were not "similarly-situated" or did not engage in substantially the same misconduct; and that other employees had also been removed. Despite being given the opportunity to do so, Employee did not refute Agency's position.[7] . Based on this analysis, the Administrative Judge

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[7] In the "Confidential Documents, Agency provided substantial information, including the investigations, interviews, and notices of adverse action about individuals at Plummer as well as teachers at other elementary schools charged with testing misconduct. Employee was unable to identify a number of individuals by name or status. Agency is commended for its time and efforts in researching and producing these documents. The documents are confidential; and Employee is reminded that she promised not to discuss, duplicate or disclose any document or information provided by Agency; and to return the documents to Agency, if requested.

concludes that Employee did not meet her burden of proof that she was the victim of disparate treatment.

In sum, based on the findings of fact, conclusions of law and analysis herein, the Administrative Judge concludes that Agency met its burden of proof on the charged misconduct. She further concludes that Employee failed to support her charge that the penalty of removal was unfair. She did not present credible evidence that regardless of working in a "dishonest environment" and being placed under pressure to improve test scores, that her actions were anything but willing and voluntary. She did not present evidence that Agency only acted after allegations of testing misconduct were disclosed by the media. Finally, she did not present evidence or argument that established that she was the victim of disparate treatment. Agency offered reasons for its decision with regard to Employee and other staff charged with testing misconduct. Agency maintained that the egregiousness of Employee's actions merited removal in view of her duties as a classroom teacher and her failure to take responsibility for her actions. Finally, having concluded that Agency has met its burden of proof in this matter, the Administrative Judge concludes that this petition for appeal should be dismissed.

ORDER

It is hereby

ORDERED: Employee's petition for appeal is dismissed.

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge