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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0257-12
BOMA JACK,)	
Employee)	
)	Date of Issuance: December 2, 2015
v.)	
)	
DISTRICT OF COLUMBIA)	
YOUTH REHABILITATION SERVICES,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Donna Williams Rucker, Esq., Employee Representative		
Eric Huang, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 11, 2012, Boma Jack (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Youth Rehabilitation Services’ (“Agency” or “DYRS”) action of suspending her for fifteen (15) days. Employee, who worked as a Youth Development Representative (“YDR”), was charged with: 1) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (neglect of duty; incompetence, and misfeasance); and 2) Any other on-duty or employment-related reason for corrective action that is not arbitrary or capricious: violation of DYRS Reporting Unusual Incidents Policy. The events which form the basis of this appeal stemmed from a May 1, 2012 incident, wherein Employee allegedly failed to provide proper supervision to students located in a vocational barbering class when she left the room with a youth. Employee returned to duty on September 11, 2012 after serving her fifteen (15) day suspension.

I was assigned this matter in March of 2014. On March 24, 2014, I issued an Order convening a Prehearing Conference for the purpose of assessing the parties’ arguments. During the May 21, 2014 Prehearing Conference, the Undersigned determined that an Evidentiary Hearing was warranted because there were material issues of fact to be decided. Orders convening an Evidentiary Hearing were subsequently issued on August 14, 2014, November 17, 2014, and March 30, 2015, due to scheduling conflicts. After the Evidentiary Hearing was held,

the parties' were ordered to submit written closing statements on or before August 21, 2015. Agency and Employee complied with the Order. 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's action was taken for cause.
2. If so, whether the penalty imposed was appropriate under the circumstances.

BURDEN OF PROOF

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

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

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

OEA Rule 628.2 *id.* states:

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

Agency's Position

Agency argues that it had cause to suspend Employee without pay for fifteen (15) days. According to Agency, Employee violated DYRS' "Eyes On" policy because she failed to adequately supervise students in the barbering class when she followed a student out of the class and left the other residents alone, without supervision by a YDR. Agency submits that Employee's actions on May 1, 2012 constituted careless work performance, and that she was previously counseled regarding her performance deficiencies. In addition, Agency contends that Employee violated the DYRS Reporting Unusual Incidents Policy when she left the residents unattended in a classroom because Employee created a situation that posed a risk of harm to youth residents. Agency states that Employee was obligated to document the incident in writing under the circumstances. Lastly, Agency argues that a fifteen (15) suspension was warranted based on the Table of Appropriate Penalties, in addition to Employee's previous disciplinary history.¹

¹ Agency Answer to Petition for Appeal (October 15, 2012).

Employee's Position

Employee argues that her fifteen (15) day suspension should be overturned because Agency did not establish the requisite cause to take adverse action against her. Employee asserts that she was assigned as a “One-on-One” for one youth resident on May 1, 2012, and was compelled to leave the barbershop when the youth left the barbershop. According to Employee, Agency failed to provide her with timely backup coverage after she called for assistance, thus placing her in a difficult circumstance—following her assigned One-on-One youth or staying in the barbershop. Employee believes that she did not neglect her duties on May 1, 2012, and that Agency should not have suspended her for fifteen (15) days.

SUMMARY OF RELEVANT TESTIMONY

The following represents what I have determined to be the most relevant facts adduced from the transcript generated as a result of the Evidentiary Hearing. Both Agency and Employee had the opportunity to present documentary and testimonial evidence during the course of the hearing to support their positions.

Steven Baynes (Transcript pages 15-115)

Steven Baynes (“Baynes”) was the Superintendent of New Beginnings at DYRS on May 1, 2012. New Beginnings Youth Development Center (“New Beginnings”) is a sixty (60) bed secure facility for court-involved male youth. The youth stay there between 9 and 12 months and get rehabilitated in an effort to make better choices once they return to their communities. Baynes explained that the facility is totally locked down and fully fenced. Residents cannot go freely in and out of the premises and there is a high level of security throughout the whole facility.

Baynes testified that a Youth Development Representative (YDR) is considered part of the front line staff. They are with the youth 24 hours a day, 7 days a week. They work three shifts; one in the morning, one in the afternoon, and one in the evening. There is also a midnight shift. The shifts usually last for 8 hours. The YDRs are tasked with ensuring the safety and security of the youth and also assist in their rehabilitation. Baynes stated that the YDRs go to lunch, dinner, vocational training, and recreation with the youths. The YDRs are with them all the time.

Baynes testified that the YDRs have policies and regulations that they are required to follow. One of those policies is the “Eyes On” supervision policy, which means that the YDRs must maintain ‘eyes on’ supervision 24 hours a day. He explained that the YDRs need to be in eyesight and arm’s length of the youths. A YDR’s job description includes the day to day direct supervision and positive engagement of the residents. Baynes testified that YDRs should have full knowledge of all of the policies pertaining to their position. YDRs received 100 hours of pre-service training before they take their positions. They also receive annual refresher training. He explained that the training included training in the “Eyes On” policy.

Baynes stated that Vincent Schiraldi, the previous Director for Agency, issued a memo in 2008 regarding the “Eyes On” policy. On November 9, 2011, Chris Shorter, the previous Chief of Staff, issued a memo regarding the presence of Agency’s staff with volunteers. He stated that YDRs are supposed to report any unusual incidents that occur at the facility. He stated that the staff must utilize an incident notification form for reporting the unusual incidents. He explained that an unusual incident could be any kind of youth on youth or youth on staff assault, disrespect toward staff, any injury that occurs, or anything out of the norm. He testified that accidental injury would be considered something out of the norm.

Baynes testified that on July 20, 2012, he issued an Advanced Written Notice of Proposed Suspension of 30 days for Boma Jack (“Employee”). He stated that based on his understanding of the matter, Employee was in charge of residents in a barbering vocational class, and she left the room unattended for an amount of time, in violation of DYRS policies and regulations. Specifically, Baynes stated that Employee’s conduct was against the “Eyes On” policy. He stated that the teacher of the class was a contractor and the teacher had no supervision authority over the youth residents. Baynes also reviewed the video footage of the incident.

Baynes testified that he previously wrote advance notices of proposed suspension and that he utilized the Table of Penalties. Based on his knowledge of the facts of the case involving Employee, Baynes believed that his proposed penalty was appropriate. He explained that leaving the youth unattended was a serious breach of security and against Agency’s policies and procedures. He stated that Employee could have contacted her supervisor and indicated that she needed to transport one of the youth to another area, and wait until there was someone else to relieve her of her duties. He stated that leaving the youth should not have been an option. He stated that the “Eyes On” policy is extremely important. Baynes stated that, without the mandatory policy, there would be a complete operational breakdown of the facility and people could get hurt.

Baynes testified that his understanding of One-on-One supervision is that the YDR supervises one youth that may be having some behavioral issues. He explained that at all times they supervise the person wherever they go. He stated that if a YDR has to supervise other youth, and the One-on-One person needs to go to the restroom, then the YDR needs to make sure that there is someone to relieve them to make sure that they are supervising the other youth before going to use the restroom. Baynes stated that the YDR is not inside the restroom with the person. The YDR is also not supposed to be in the bathroom while the individual is taking a shower. Baynes stated that the “Eyes On” policy applies to the One-on-One supervision.

Baynes stated that when the incident occurred with Employee, the contractor was not required to prepare an incident report. He noted that if someone observes a youth that appears to be unaccompanied, the control room should alert the Senior YDR on duty that there is a youth that is unaccompanied. Baynes stated that the control room could not observe what was going on inside the barber shop.

Baynes reviewed the May 1, 2012 videotape and observed Employee leaving the barbershop. He stated that prior to Employee arriving in the shop, there was someone else there. Baynes stated that prior to issuing his decision, he conducted an investigation, which included

speaking to witnesses, looking at the videotape, and reviewing Employee's HR record to determine if there were any prior adverse actions. Baynes stated that he spoke to the barber and the senior YDR in charge. Baynes and Marcus Ellis, the Deputy Superintendent at that time, also spoke to the witnesses.

Baynes testified that if a youth that has been assigned as a One-on-One decides to walk somewhere alone, the YDR is supposed to notify the supervisor via radio or notify control that a youth is out of bounds. Baynes stated that with regard to Employee's incident, she should have not left the youth residents in the barbershop unattended. He explained that she should have alerted the senior YDR or the control room that there was a youth out of bounds and that she has four youth that cannot be left unattended.

Baynes testified that if a youth is suicidal, that constitutes having them on a one-on-one supervision. He also stated that if a youth is not in a good space, then Agency would assign them one YDR. He stated that for green lines, One-on-One supervision is required and the supervisors make that determination. Baynes explained that green line is a term used for the level of service for the youth. He explained that the level depends on the type of behavior the youth is exhibiting. He explained that the levels range from warning watch to alert.

Marcus Ellis (Transcript pages 117-148)

Marcus Ellis ("Ellis") is the Superintendent at New Beginnings. He has been working for Agency for approximately three and a half years. In 2012, Ellis was the Lead Deputy Superintendent and Captain Baynes was the Superintendent.

Ellis is familiar with the policies at New Beginnings. He is also familiar with the policies dealing with YDR's responsibilities and obligations, including the unusual incident report, "Eyes On" supervision, and the expectations of "Eyes On" supervision. Ellis testified that the "Eyes On" supervision policy is reflected in the YDR's job description.

Ellis stated that the incident involving Employee was reported to him. He explained that he prepared an incident report notification form dated May 1, 2012. Ellis testified that Nancy Fisher reported the incident to him. In his report, he stated that Employee left the youth residents alone in the barbering class for an hour. He stated that he had a verbal conversation with Ms. Fisher and that most of his knowledge pertaining to the case came from Ms. Fisher. He stated he reported the incident to his immediate supervisor, Captain Baynes. Ellis testified that he was not present to observe anything on May 1, 2012. Ellis also testified that the barber spoke to him about the incident. He explained that the barber and Ms. Fisher stated that Employee left the class. Ellis stated that from his understanding of the incident, the doors were locked.

Ellis did not speak with Employee regarding the incident because he follows the chain of command and the employee that worked under him spoke to her. Ellis stated that he is vaguely familiar with the One-on-One policy. He explained that this policy required an assigned staff member to stay focused on a youth who required special assistance. He testified that the staff member is to remain with that particular youth at all times. Ellis stated that "green lines" are connected with the One-on-One supervision. He explained that the green line is when a youth

poses a threat to themselves and needs a higher form of monitoring. Ellis testified that if there is a conflict in Agency's policies, it would be reported to the immediate supervisor for reconciliation. He explained that something would have to be done to make sure that the youth are safe and secure, and all the points are covered. He explained that if a conflict arises, something needs to be done to address it and make sure that the conflict does not exist.

Ellis testified that there needs to be eyes on supervision in the facility where residents with serious offenses are housed at all times. When an employee has a One-on-One situation that conflicts with their ability to keep eyes on the classroom, the employee can contact the supervisors and ask for assistance. He explained that they are able to ask for backup and extra staff to assist. He stated that the supervisor directs the YDRs to do one-on-ones. The supervisor is expected to be familiar with the policies and procedures for YDRs.

Catherine Ohler (Transcript pages 150-180)

Catherine Ohler ("Ohler") is a Management Liaison Specialist in the Human Resources Department at Agency. She has been working at Agency for eight and a half years. Her duties include recruitment, on-boarding, employee relations, performance management, discipline and issues pertaining to the Family Medical Leave Act ("FMLA").

With regard to the case involving Employee, Ohler testified that management submitted a personnel request form for a disciplinary matter, and that she wrote the letter that was given to Employee. Ohler stated that she wrote the advanced written notice of Employee's proposed suspension. Ohler reviewed the case and looked at Employee's personnel record. Ohler acknowledged that Employee received two previous admonitions and served a 9 day suspension. Ohler also reviewed Employee's past training record. Ohler testified that Safe Crisis Training is a three-day course for new hires, and then there are refresher courses held annually. She explained that this training goes over de-escalation procedures for staff that have direct care with youth residents and how to de-escalate situations that get out of hand or when the youth become assaultive. She explained that the training discusses the best physical recourses that staff members can use to maintain a safe environment. Ohler testified that Report Writing Training discusses what YDRs are required to write on incident reports. The Secure Care Operations and Training is for the facility-based staff, which includes people who work on the secure side of Agency, including direct care staff, medical staff, behavioral health staff, YDR staff, and recreation staff. She explained that these employees are usually within arm's length of the youth and receive more training on how to work with the youth in that setting.

Ohler testified that she is familiar with Chapter 16 of the District Personnel Manual and the Table of Penalties. Ohler did not have any personal knowledge regarding the facts of Employee's case. She stated that she read the incident report and the personnel request form that was submitted. She explained that a personnel request form is an internal form that Human Resources created as a way to document incidents. A manager is required to sign off on the disciplinary action that is imposed upon an employee. From there, the disciplinary form goes to Human Resources, where it is reviewed along with any supporting documents. HR also reviews the manager's request for disciplinary action. Ohler stated that the individual should have investigated the event and know what occurred.

With regard to Employee's matter, Ohler stated that she reviewed the videotape prior to drafting the notice that Employee received. Ohler stated that she would have thought that in addition to Mr. Ellis filling out an incident report, Agency would have gotten an incident report from the barber and any employees that were relevant to the case. Ohler stated that although the barber was a contractor, his understanding of the policy is that anyone who works with the youth should be writing incident reports when an unusual incident occurs.

Steve Luteran (Transcript pages 181-203)

Steve Luteran ("Luteran") started working for Agency on July 1, 2012. He is currently the Deputy Director of Programs and Services. With respect to Employee's matter, Luteran reviewed the suspension letters and the letters that he received from the union. He also reviewed an attachment to an email that he received about seeking an appeal of the decision. Luteran testified that the deciding official in this case was Barry Holman, Deputy of Strategic Planning. Luteran stated that although he did not author the decision, it was a decision that he would have made.

Luteran testified that the original proposed suspension was thirty (30) days; however it was subsequently reduced to fifteen (15) days. The decision to reduce the penalty was made after he reviewed all of the evidence that was brought to him, including Agency's point of view, and Employee's response through the union. He stated that he reduced the penalty because there seemed to be some unclear information regarding Employee's exact role on May 1, 2012. Specifically, it was unclear if she was supposed to be on one-on-one with a particular youth or whether she was responsible for providing supervision to the barbering class. He stated that obviously there had been some discrepancy in that regard. He reduced the suspension because he knew at that point that when a youth left the class, a decision had to be made. Luteran stated that he knew Employee would not be at two places at one time.

Luteran's rationale for reducing the suspension was that Employee followed the youth out, which caused the class to be left unsupervised. He explained that in Agency's training in safe crisis management, it is critical that the youth are always supervised. He explained that even though a few minutes passed before the teacher came back, anything could have happened. Furthermore, Luteran noted that he did not see in Employee's response an attempt to alert Agency that the youth were unsupervised and that someone needs to come to supervise them. Luteran stated that it was poor judgment on Employee's part, especially after receiving the training that Agency provides to its YDRs.

Luteran testified that he is familiar with part of Chapter 16, the Table of Penalties. He stated that he found that the fifteen (15) day suspension was appropriate because there was also another disciplinary action where she was suspended for nine (9) days. He stated that he tried to give Employee the benefit of the doubt when selecting the appropriate penalty.

Luteran stated that no one told him what Employee's assignment was for May 1, 2012. He stated that it would have mattered what assignment she was on because he would have known where she was. He explained he decided to suspend Employee based on her poor and unsafe

judgment. He also stated that he did not see where Employee made a call to alert someone that she was assigned a one-on-one and that she needed to leave. He stated that even in the response that the union provided, he did not see where Employee explained that she was assigned to one-on-one duty and could not stay in the class. He did not know if any other YDR was interviewed about the incident. Luteran testified that a 'five-six' is a code for additional assistance being brought to the scene.

Nancy Fisher (Transcript pages 223-327)

Nancy Fisher ("Fisher") is a Supervisory YDR (SYDR) with DYRS. She has been with Agency since June of 2009 and works at the New Beginnings facility. In 2012, Fisher was a Unit Manager. She has also worked at the Youth Services Center in Washington, D.C., and in 2013, she was an Assistant Program Manager at New Beginnings.

Fisher was Employee's supervisor in 2012. She testified that an individual service plan is a treatment plan that is created monthly for each resident. The plan consists of different strategies and interventions that Agency utilizes to help the resident progress through the system. Once the plan is developed, it is printed and placed in a book so that the YDRs have access to it if they need to reference the information or need some assistance in trying to address a behavioral issue. The agreement or plan is between the youth, staff, and/or the manager—they will work on intermittent or incremental short term goals so that Agency can help the resident get back on track.

Fisher testified that a 'green line' is a mental health term used by Agency for a resident who is suicidal. For the residents who are on green line, it is mandatory that the YDR work with the youth individually, or One-on-One. The YDR is assigned to that resident for the duration that the resident is on green line alert. Fisher stated that the green line is not a part of the individual service plan and separate for the safety of the resident. The behavioral contact is not the same as a green line.

Fisher testified that on May 1, 2012, there were three employees on staff at New Beginnings, including Employee. Fisher had an opportunity to review the video footage of Employee's actions. Based on the video, there was a resident sitting in a chair behind the barber in the barbershop, and another resident in the barber chair getting a haircut. Employee was sitting to the right and another resident was in a corner. Employee was wearing a gray t-shirt and beige khaki pants. Fisher testified that the ratio in any classroom for staff and youth is one staff member to six residents. In total, there were five people in the barbering class—three residents, Employee, and the barber. Fisher stated that this room is where the residents get their haircuts and also where they learn how to cut their hair. On May 1, 2012, residents were learning how to cut hair and used other residents as mannequins.

Fisher testified that at 17:43:39 of the video, she saw that Kevin Smith, another YDR, was in the room. Then, at 17:58, she saw Employee get up, open the door, and a resident stepped out of the room. Employee put a chair in between the door to prop it open. Then, Employee got up and was standing in the doorway. Fisher also identified YDR Recinos at the 18:23 mark of the video. At 18:24, YDR Salters looked at the room. She also stated that the barber left the room.

Angela Powell, the treatment manager, brought the videotape to Fisher's attention. She stated that the eyes-on supervision was not consistent. She explained that Employee left the barbering room several times to deal with one of the residents. She explained that the first time she left, she kept eyes on supervision, but in the last counseling session, Employee stayed away from the door for a considerable amount of time. Fisher stated that eyes-on supervision is not something that is intermittent; she stated that it is consistent and constant.

Fisher stated that she did not know if Employee knew that there was another supervisor that was present outside the door, or if she said anything to that staff member regarding whether the room was unattended. Fisher stated that she did not know if Employee radioed anyone, or if she contacted a 'floater' staff member. Fisher stated that Employee could have even radioed her to let her know that she was having difficulty and needed for someone to come over so that she could maintain the eyes-on supervision with the residents in the barbering room. Fisher explained that if an employee calls for assistance, that employee needs to stay with the majority of the residents until the assistance arrives. She explained that Employee could have stepped out of the room, looked at the window, and then looked at the kid at the same time.

Fisher testified that YDRs are trained in security or secure care operations. She explained that they review all the policies, including youth supervision policies and on-the-job training. She explained that if a YDR has years of experience, there are times when they have to make quick decisions for the safety of everybody that is on the compound. Fisher testified that on the day of the incident involving Employee, she did not receive any radio calls. Fisher explained that she instructed Employee to take a youth to the barbering class because she felt that the kids were very volatile and it was necessary to keep two staff members on the unit to deal with the rest of the residents.

According to Fisher, a PRF is a form that is used when an employee has to write up a staff member. She stated that a PRF can serve several roles—to describe what took place, what infraction transpired, and what the scenario consisted of. She explained that Agency has to decide whether the employee's behavior requires an admonition, suspension, or a different kind of write up. After that, the form is submitted to Human Resources and they will write a counseling form or a memo.

Fisher testified that in the case involving Employee, she requested suspension of thirty (30) days based on the events that transpired. Fisher listed the times that Employee left the barbering room to justify the lack of eyes-on supervision. She stated that in addition to reviewing the video, it was reported to her that Employee left the residents unattended.

Fisher testified that Mr. Chamberlain, a Senior YDR, was standing outside of the glass doors. Fisher stated that he had his back turned and that Chamberlain was never in the doorway of the barbershop. Fisher stated that Employee's role that day was to be in coverage of all the youth that were in the shop, in conjunction with the staff that was working with her that day. She stated that employee Stith was also supposed to be on staff in the shop, but he left that day and that Stith was not disciplined. The youth supervision movement policy in 2001 provided that there could only be one staff per ten youth residents. However, that ratio was subsequently

revised. She testified that Stith did not violate Agency policy by leaving the room because the ratio for staff to youth is 1 staff member per every 6 youth. She stated that at one point in the video, she saw seven youth in the shop, and in this case, there was a violation of policy.

Fisher testified that she did not determine the roles of the people who were present in the video. She did not know whether any of the staff arrived as a result of the radio call that Employee made, or whether they were present due to the call that Mr. Stith made prior to leaving that day. She stated that she did not make an inquiry into the radio communication either. Fisher did not recall having a conversation with Employee prior to issuing the proposed discipline. Further, if Employee was doing a One-to-One that day, Fisher stated that she should not have left the room and that she should have called someone on the radio. She explained that if a youth leaves the classroom, and a YDR has six kids, the YDR needs to call someone and let them know that there is a youth out of bounds.

After reviewing the video during the OEA hearing, Fisher stated that her opinion about the discipline that was given to Employee did not change. She explained that it is not uncommon that a YDR starts out with one group of residents in a location and ends up with another group of residents in a different location due to the movement and what is happening in the program. However, Fisher did not know if Employee had a conversation with someone to request relief because the youth were unattended. Fisher testified that she did not know if other individuals besides Employee were disciplined for the incident. Fisher did not receive any radio calls from Employee on May 1, 2012.

Kevin Smith (Transcript pages 327-338)

Kevin Smith ("Smith") is a YDR for Agency. He has been working for Agency for nine (9) years. On May 1, 2012, he brought five or six youth residents to the barbershop. At around 4pm to 6pm, Smith had the opportunity to call a 'five-six.' He explained that a five-six is when a staff member escorts youth from point A to B. He explained that the staff member's duty is to escort the youth. Smith testified that Employee also arrived with a youth member. However, he is not sure whether the five-six arrived before he left. He stated that Officer Raper was conducting the fix-six's on that day.

Smith testified that he can leave if there is a staff member in a room with enough kids. He explained that on May 1, 2012, he left the room because Employee was present. When Smith left the room that day, he was finished with his work. He explained that Employee knew that he was finished for the day.

Boma Jack (Transcript pages 340-386)

Employee is a YDR at Agency. She has been working for Agency for twenty-two (22) years. On May 1, 2012, Employee was assigned to work at New Beginnings and Ms. Powell was her supervisor for the day. When Employee arrived for her tour of duty, she was provided her work assignment. Per Ms. Fisher, Employee's work assignment on May 1, 2012 was to work with ten (10) youth at the facility.

Employee testified that Fisher told her to go to the school and pick up a resident (S.R.), who has mental issues. Employee stated that Fisher orally instructed her to go anywhere that S.R. went because of his mental status. Employee testified that, from her understanding, she needed to do a one-to-one with the youth.

When Employee went to pick S.R. up from the school, she sat with him and watched him. She subsequently took S.R. to the barbershop. Employee stated that the S.R. was wearing a white and blue hat that day and could be identified in the video at 16:58:06 mark. Employee stated that she left the barbershop because the youth kept asking her to take him back to the unit. She stated that he started 'acting up.' According to Employee, when this happened, she used her radio to call Officer Raper to do a five-six. So that she could take the youth back to the unit. Employee testified that Officer Raper stated that he was in route to the barbershop.

Employee testified that she counseled the youth resident and said that she was telling him to sit down and learn from the barbershop class. At some point, the youth threw the smock on the floor and told her that he wanted to go back to the unit. Employee stated that she went to get her badge and pocketbook, and left the unit. She stated that when she left, the five-six was present to provide coverage. Employee testified that she told the five-six about the youth's behavior. She stated that she left because she had relief and that her supervisor told her that she must follow the youth anywhere that he wanted to go, which was the Reflections Unit. After Employee returned, she wrote everything down about the youth's movements in the logbook.

Employee stated that no one told her that she was assigned to the barbershop on May 1, 2012. She stated that no one came to and asked her to complete an incident report. Approximately a week after the incident, Employee was contacted by her supervisor regarding a proposed suspension for leaving youth residents unattended in the barbershop. Employee told her supervisor that no one asked her about the five-six that she called. Employee stated that she followed the "Eyes-On" policy on May 1, 2012 because she was told to watch the youth one-on-one while supervising the barbering students in the classroom. When her assigned youth left the room, she requested a five-six, who eventually arrived at the barbershop. Employee stated that she cannot allow the youth to leave the barbershop alone because if she would have done so, she would have been fired.

Employee stated that when she arrived at the barbershop, Mr. Stith, a coworker, was present. She stated that she discussed with him that he was going to leave at about 6 p.m., and that he would call a five-six. Employee told him she was calling a five-six as well. Employee stated that she told Raper and Chamberlain about the youth having a behavior problem and that she needed to leave with him. Employee stated that the evening five-six was Officer Raper, and the morning five-six was Officer Salter. Employee stated that she had a conversation with all of the five-six officers and let them know about how her youth wanted to leave. She stated that when she left, all of the officers were fully aware that she needed relief.

Employee stated that her understanding of the one-on-one policy is that when the YDR staff is assigned to one youth, there must be two staff members present; one staff member doing the one-on-one and the other staff member to handle the rest of the youth. She stated that from her understanding, she was required to leave with her assigned resident. Employee stated that no

one came to interview her about what occurred on May 1, 2012. Further, no one talked with her about the conversations she had with Stith, Raper, or Chamberlain. She stated that Raper arrived after Stith called for a five-six. Employee stated that although she called Mr. Raper too, this was after Stith contacted him. Employee stated that since Raper arrived and provided coverage, she left with her one-on-one.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Uncontested Facts

1. Employee works as a Youth Development Representative (“YDR”) at New Beginnings. YDRs are responsible for providing the day-to-day direct supervision and positive engagement of youth in the department’s care and custody. As a YDR, Employee’s duties also include assisting youth with their academic and vocational lessons, and providing the safe, secure, and human treatment of youth in custody.²
2. On May 1, 2012, Employee was on duty at New Beginnings, in the barber shop. At approximately 6:25 p.m., the barbering instructor left the classroom. At approximately 6:26 p.m., Employee followed one of the students outside of the classroom. The instructor returned to the classroom at approximately 6:27 p.m. There was no YDR present in the barbershop room between 6:27 p.m. and 7:00 p.m. Agency subsequently took adverse action against Employee.
3. On July 24, 2012, Agency issued Employee an Advance Written Notice of Proposed Suspension of 30 Days. Employee was charged with: 1) “Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty; incompetence, and misfeasance; and 2) Any other on-duty or employment-related reason for corrective action that is not arbitrary or capricious: violation of DYRS Reporting Unusual Incidents Policy.” The notice provided that Employee could submit a written response to the proposed charges.
4. On August 20, 2012, Agency issued Employee its Final Decision Notice on Proposed Suspension of 30 Days. After reviewing the suspension notice, in addition to Employee’s response, Agency’s Deputy Director, Barry Holman, decided to reduce the suspension to fifteen (15) days. Employee was given the option to appeal the final decision to either OEA or to file a grievance with her union.
5. Employee subsequently filed a Petition for Appeal with this Office on September 11, 2012.

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

² Agency Answer to Petition for Appeal, Exhibit 7 (October 15, 2012).

(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.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3 of the District Personnel Manual (“DPM”) defines cause to include: “Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations” (neglect of duty; incompetence, and misfeasance); and 2) “Any other on-duty or employment-related reason for corrective action that is not arbitrary or capricious.”

Charge No. 1

Employee was suspended for failing to maintain Agency’s “Eyes On” supervision during her tour of duty on March 1, 2012. The importance of the “Eyes On” policy was enumerated in a September 4, 2008 Memorandum to all DYRS Personnel, which states the following:

“In an effort to emphasize the safety for youth and staff, we have created simple and memorable reminders around campus on the importance of “Eyes On” supervision for DYRS staff, visitors, and our youth, and have supplemented that with the new materials for current training courses...“Eyes On” Supervision, safety, and awareness are essential elements to creating safe and caring environments....”³

Agency’s Youth Supervision and Movement Policy states in pertinent part:

YSA 9.3: It is the policy of DYRS that youth are never left unsupervised or unattended in any area within the perimeters of a secure facility. Direct care staff must maintain ongoing visual contact with all youth under their supervision and engage youth in a positive and developmentally appropriate manner in support of the goals of rehabilitation, active positive engagement, safety and security of youth in the custody of DYRS. All movement of individual youth from one location to another is lead and supervised by staff.

VII A(1): Staff shall directly supervise all youth movement. Staff must remain within one arm’s length of an escorted youth and must

³ Agency Exhibit 1.

be strategically placed when moving youth; preferably within one arm's length of the group.

VII A(7): If a youth leaves the assigned unit/location within the facility for any reason, it must be communicated to the TL or SYDS, the Control Center, and documented.⁴

In this case, I find that Employee was suspended for cause because she failed to maintain the "Eyes On" supervision policy and the Youth Supervision and Movement policy during her tour of duty on May 1, 2012. Employee's primary argument is that she did not violate Agency policy because: 1) she was assigned to "One-on-One" supervision with a youth resident S.R. and was required to escort him as directed by Fisher; 2) she contacted Officer Raper for a 'five-six' coverage so that she could take S.R. back to the unit; and 3) Officer Raper confirmed that he was en route to the barbering room to cover the unattended students.

Employee contends that Fisher verbally assigned her to One-on-One duty with S.R. on May 1, 2012, and that she believed that she could not leave him unescorted when he left the barber shop. However, Fisher denied this contention in her testimony during the Evidentiary Hearing. According to Fisher, who was Employee's supervisor at the time, there was no individual service plan or treatment plan produced for S.R. to indicate that he was on 'green line' supervision at the time. If S.R. was required to have One-on-One supervision, it would have been indicated in Agency's records, which are accessible to all YDRs for reference in assisting youth residents with their behavioral issues. After observing her demeanor and disposition during the Evidentiary Hearing, I find that Fisher's testimony was both consistent and credible. Employee may have been unclear as to what her specific assignment and duties were on May 1, 2012; however, there is no evidence to support a finding that she was assigned to official One-on-One duty with S.R., and was still required to maintain the "Eyes On" supervision policy at all times.

Employee also argues that she requested 'five-six' relief from Officer Raper, via radio, when S.R. left the barbering room to return to the unit. Employee testified that Raper confirmed that he was on his way to the room to ensure that the remaining residents were not left unsupervised. However, the documentary and testimonial evidence does not support Employee's contention. Baynes testified that if a resident is 'out of bounds,' then the YDR who is escorting them is required to notify their SYDR or the control room that the youth is outside of their assigned area. Fisher was in possession of a radio on May 1, 2012 and testified that she did not hear Employee call for assistance when S.R. left the barbershop. Moreover, several witnesses, including Baynes, Ellis and Luteran, testified that even if Employee was assigned to One-on-One duty, Agency procedure still required that she physically remain with the students in the barbershop until a 'five-six' or another YDR or SYDR came to cover the room. Employee also failed to produce any witness testimony or documentary evidence to support a finding that she actually radioed Officer Raper to come supervise the remaining youth residents in the barbershop.⁵

⁴ Agency Exhibit 3.

⁵ In the video footage, Officer Raper appears in view at approximately the 18:24 mark. However, Raper did not approach the barbershop door and did not enter the barbershop room in an attempt to supervise the residents. At approximately 18:27, Raper can be seen leaving his post, and cannot be viewed in the surveillance footage.

As a YDR, Employee is tasked with maintains the ongoing visual contact with all youth under her supervision, while engaging the youth in a “positive and developmentally appropriate manner.”⁶ YDRs are also tasked with escorting youth residents to and from housing units, monitoring youth movements to maintain safety and security. YDRs are required to “use sound judgment when adapting DYRS guidelines in resolving problems that a youth might be having when ensuring the safety of both staff and youth.”⁷ Based on a review of the record, I find that Employee failed to follow “Eyes On” protocol during her tour of duty on May 1, 2012. When S.R. left the barbershop, Employee did not ensure that another staff member arrived before leaving the classroom of unattended youth residents. The Undersigned recognizes that Employee was faced with the difficult decision of following S.R. after he left the room or remaining with the barbering students until another YDR or ‘five-six’ officer came to relieve her. However, by leaving students in the barbershop with the instructor and no DYRS staff present, Employee greatly compromised the safety of the residents and the teacher. Her failure to follow Agency guidelines regarding movement and maintaining “Eyes On” supervision was a neglect of her duties as a YDR.⁸ As such, I find that Agency has met its burden of proof with respect to Charge No. 1. I further find that Employee’s actions on May 1, 2012 constituted an on-duty act that interfered with the efficiency and integrity of DYRS’s operations; therefore, this charge must be upheld.

Charge No. 2

Employee was also charged with “Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.” Specifically, Agency argues that Employee violated DYRS Unusual Incident Policy by failing to report the May 1, 2012 incident. In support thereof, Agency cites to Youth Services Administration (“YSA”) 1.14 (July 15, 2002), which states in pertinent part:

Reporting Unusual Incidents—Policy: It is the policy of the Youth Services Administration (YSA) that all unusual incidents be reported in a timely manner. The effective operation of the agency depends on accurate communication of information regarding serious incidents involving both youth and staff.

Scope—This policy applies to all YSA employees and YSA contractors who perform official duties or provide services on behalf of the Administration.

⁶ Agency Exhibit 2.

⁷ *Id.*

⁸ See DPM, Section 1619. Under the Table of Appropriate Penalties, Neglect of Duty includes: Failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; and careless or negligent work habits. Incompetence includes careless work performance; serious or repeated mistakes after given appropriate counseling or training; failing to complete assignments in a timely manner. Misfeasance includes careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources; and using or authorizing the use of government resources for other than official business.

Definitions—Incident: An event or happening outside the ordinary routine that results in disruption or threatens security, safety, order of the facility and/or harm or threat of harm to youth, staff, visitors or the physical plant.⁹

YSA-1.14 divides reportable incidents into three classes; Class I Incidents, Class II Incidents, and Class III Incidents.¹⁰ Class I incidents includes occurrences that are severe in nature and present a risk to public safety, and include death, fire, hostage taking, and riots. Class II incidents include youth on staff assault, youth on youth assault, felony arrest (staff), felony arrest (youth), and escape apprehension or return. Lastly, Class III incidents are of a nature that requires notification and completion of the Incident Notification Form. The Form must be submitted to YSA Administration within twenty-four (24) hours or the next work day and include the following occurrences: fights, accidental injury, staff discipline, damage to property, theft, inappropriate sexual behavior, illegal use of drugs/alcohol seized, possession of contraband; and other incidents similar in nature.¹¹

Here, I find that Agency has met its burden of proof with respect to Charge No. 2. Employee failed to adhere to Agency's "Eyes On" policy on May 1, 2012, thereby creating an increased risk of harm to DYRS staff and youth residents. The stated purpose of YSA 1.14 is to report serious incidents involving both youth and staff. Employee's act of leaving a classroom of unattended residents also violated Agency's Movement Policy (YSA-9.3VIIA(1)), which requires a YDR to document any incident wherein a youth leaves their assigned unit or location for any reason. When Employee exited the barbering room in pursuit of the youth, YSA-1.14 and YSA-9.3 required her to both report and document the incident; however, she did not. I find that Employee's failure to document a "reportable offense" served as sufficient grounds for Agency to charge her with "Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious." Accordingly, Charge No 2. was taken for cause.

Whether the penalty was appropriate under the circumstances.

With respect to Agency's decision to suspend Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.¹² Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."¹³ When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of

⁹ Agency Exhibit 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).

¹³ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). 1601-0417-10

judgment."¹⁴ Agency argues that a fifteen day suspension was warranted based on the Table of Appropriate Penalties and Employee's previous disciplinary history. According to the record, Employee was previously charged with the following:

1. June 1, 2011—Nine (9) days suspension. Reason: Neglect of Duty, Incompetence, and Unreasonable Failure to Assist a Fellow Government Employee. Disposition: Sustained.
2. May 14, 2010—Letter of Admonition. Reason: Failure to Report Unusual Incidents.
3. March 5, 2010—Letter of Admonition. Reason: Violation of DYRS policy on youth supervision/neglect of duty.¹⁵

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."¹⁶ The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations" (Neglect of Duty) is reprimand to removal. The penalty for a first of offense of incompetence is suspension for five (5) to fifteen (15) days, and the penalty for a first offense of misfeasance is a fifteen (15) day suspension. A charge of "Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious" carries a penalty of reprimand to suspension for up to 15 days.

In this case, I find that Agency acted reasonably within the parameters established in the Table of Penalties in selecting the appropriate penalty to levy against Employee for Charge No. 1 and Charge No 2. Employee's initial proposed suspension of thirty (30) days was reduced to fifteen (15) days in Agency's Final Decision Notice on Proposed Suspension. According to Deputy Director, Barry Holman, the decision to reduce the penalty was based on a review of the suspension notice, in addition to Employee's response to the notice.¹⁷ As previously stated, Agency has met its burden of proof in establishing that Charge No. 1 and Charge No 2. were taken for cause; thus, a fifteen (15) day suspension is the appropriate penalty to impose against Employee for her acts of neglect, misfeasance, incompetence, and failing to complete an Unusual Incident Report. Moreover, Employee has failed to prove that Agency abused its discretion in selecting a fifteen (15) day suspension as the appropriate penalty for her actions. Based on the foregoing, I conclude that Agency's decision to suspend Employee should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action is **UPHELD**.

¹⁴ *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

¹⁵ Agency Answer to Petition for Appeal (October 15, 2012).

¹⁶ *See Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

¹⁷ Final Decision Notice on Proposed Suspension of 30 Days (August 20, 2012).

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE