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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0070-12
KEVIN BALDWIN,)	
Employee)	
)	Date of Issuance: January 14, 2015 ¹
v.)	
)	
DEPARTMENT OF YOUTH REHABILITATION)	
SERVICES,)	
Agency)	
_____)	Arien P. Cannon, Esq.
Kevin Baldwin, <i>Pro se</i>)	Administrative Judge
Corey P. Argust, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 27, 2012, Kevin Baldwin (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) challenging the Department of Youth Rehabilitation Services’ (“Agency” or “DYRS”) decision to terminate him. At the time of his termination, Employee worked as a Youth Development Representative (“YDR”). The effective date of Employee’s termination was the close of business on January 31, 2012.

I was assigned this matter in August 2013. A Status Conference was held on March 28, 2014. Based upon the representation of the parties at the Status Conference, a Prehearing Conference was convened with the anticipation of going forward with an Evidentiary Hearing. An Evidentiary Hearing was held on August 12, 2014, where both parties presented documentary and testimonial evidence. Both parties filed written closing briefs. The record is now closed.

¹ The Initial Decision in this matter that was issued on January 13, 2015, inadvertently omitted the signature of the undersigned and should be considered void. This Initial Decision is now being issued which bears the appropriate signature. Other than the date of issuance, there are no differences between the two Decisions.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee.
2. If so, was the penalty of termination 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.

SUMMARY OF TESTIMONY

On August 12, 2014, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Agency's Case-in-Chief

Captain Steven Baynes ("Captain Baynes") Tr. 19-107

Captain Baynes is the Chief of Residential Programs and Services with Agency. In this capacity, Captain Baynes oversees the operations at both of Agency's secure facilities, Youth Services Center and the long-term facility, New Beginnings Youth Development Center. Captain Baynes has worked with Agency for over three and a half years. Prior to becoming the Chief of Residential Programs and Services, Captain Baynes was Superintendent at the New Beginnings facility for approximately two years. His duties here included overseeing the

operations and therapeutic services provided at New Beginnings. In this capacity, Captain Baynes was also the supervisor of the Youth Development Representatives (“YDR”).

YDRs are responsible for the safety and security of the youth in the custody of Agency. The position description that explains the duties and responsibilities of YDRs was entered as Agency Exhibit 1. Baynes testified that YDRs are governed by Agency’s Use of Force policy, which was entered as Agency Exhibit 2. He testified that the Use of Force policy establishes that YDRs “shall not strike or lay hand upon any youth, unless it be in defense of themselves, other employees, or youth, to prevent escape or serious injury to personnel or destruction of property, or to quell a disturbance not otherwise controllable. In such cases, only that amount of force necessary to accomplish the desired results shall be used. Excessive force shall not be tolerated. Corporal punishment or any deliberate physical abuse is absolutely forbidden.”² Baynes stated that the use of excessive force “halts the rehabilitative process” and is “just contrary to what we believe.”³

Captain Baynes also testified regarding Agency’s policies on the documentation of unusual incidents by YDRs. Agency’s Reporting Unusual Incidents policy was entered as Agency Exhibit 3. Baynes testified that Agency’s policy requires YDRs to accurately communicate information regarding serious incidents involving youth and that it is important for YDRs to accurately document incidents to ensure the safety of youth and facilitate Agency’s investigation of serious incidents.⁴

Baynes further articulated that YDRs receive training on Agency’s Use of Force and Reporting Unusual Incidents policies and that Agency documents the type of training that each YDR receives. The Employee Transcript documenting the training of Employee received from Agency was entered as Agency Exhibit 4. Baynes explained that the Employee Transcript documented that on June 16, 2010, Employee completed training in Safe Crisis Management, and that on August 25, 2010, Employee completed training in Report Writing. He testified that at the Safe Crisis Management training, YDRs learn “de-escalation techniques on how to de-escalate a youth.”⁵ Part of the curriculum utilized at the training was the Safe Crisis Management Workbook, which was entered as Agency Exhibit 5. Baynes explained that Agency’s policy is that “excessive force should not be utilized for any incidents where there could be lesser force used.”⁶

Baynes identified the surveillance recording of the incident involving Employee and a youth in Unit A-200 at Agency’s Youth Service Center, which was entered as Agency Exhibit 6. Baynes testified that beginning at approximately the 17:32:00 mark, the recording shows a youth who had a broom removed from his hands by another YDR, eventually pick up a plastic chair. He testified that after the youth picked up the plastic chair, Employee grabbed the youth by the neck, causing the plastic chair to drop, and slammed the back of the youth’s head into non-breakable windows on the wall. After slamming the youth into the wall the first time, Baynes

² Tr. at 25.

³ Tr. at 26.

⁴ Tr. at 28.

⁵ Tr. at 31-32.

⁶ Tr. at 34.

testified that, “still grabbing [the youth] by the neck,” Employee slammed the youth “into the wall with a lot of force” a second time.⁷ Baynes explained that it is inappropriate to grab a youth by the neck, that “none of [Agency’s] training techniques teaches that,” and that slamming the back of a youth’s head into a wall is “never appropriate.”⁸ In particular, Baynes noted that at the point in the recording that Baldwin grabbed the youth by the neck and caused the plastic chair to drop, at approximately the 17:33:14 mark, the youth did not present a legitimate threat. Further, even if the youth had presented a legitimate threat and was making verbal threats toward Baldwin, the force used was not appropriate. Accordingly, Baynes testified that Employee’s use of force violated Agency’s Use of Force policy because it was excessive.

Baynes then identified the Incident Assessment Report completed by the medical personnel who treated the youth at Agency’s Youth Service Center, which was entered as Agency Exhibit 7. He testified that the youth was sent to Washington Hospital Center for a CT scan and to evaluate possible sutures wounds.

Baynes also identified the Incident Notification Form submitted by Employee regarding the December 17, 2010 incident, which was entered as Agency Exhibit 8. The Incident Notification Form stated:

[The youth] had picked up a broom at that time this writer and [another DYRS employee] was trying to persuade [the youth] to put the broom down and to go into his room. Pursuant to Safe Crisis Management, emergency intervention was need it [*sic*] when [the youth] made a threatening gesture with the broom becoming a threat to self and staff. While attempting to disarm [the youth] of the broom he continued to be combative and it appeared he hit his head on the wall.⁹

Baynes testified that the statement in the Incident Notification Form by Employee, which stated that Safe Crisis Management techniques were needed to respond to the youth making a threatening gesture with the broom was inaccurate because at the point Employee initiated physical force, the broom had already been removed from the youth’s hands. Further, Baynes explained that the Incident Notification Form was inaccurate because Employee omitted that he used physical force by grabbing the youth’s neck and slamming the youth into the wall twice. As a result, Baynes testified that the Incident Notification Form completed by Employee violated Agency’s Reporting Unusual Incidents policy because the report was inaccurate and the youth never made a threatening gesture with the broom. He also stated that emergency intervention was not necessary to remove the broom from the youth.

On February 23, 2011, Employee was charged with simple assault and attempted second degree cruelty to children. The documentation of the criminal charges filed against Employee was entered as Agency Exhibit 9. On March 8, 2011, Agency’s Office of Internal Integrity issued a Project Hands Investigative Report concerning Employee’s use of force on December 17, 2010. The Project Hands Investigative Report was entered as Agency Exhibit 10. Baynes

⁷ Tr. at 40.

⁸ Tr. at 39-40.

⁹ Agency’s Exhibit 7.

testified that he agreed with the Project Hands Investigative Report's conclusions that Employee's actions violated Agency's Use of Force and Reporting Unusual Incidents policies.

As a result of the conclusions reached in the Project Hands Investigative Report, Agency issued an Advance Written Notice of Proposed Removal to Employee on July 25, 2011, which was entered as Agency Exhibit 11. Agency proposed removal based on the following charges: (1) neglect of duty, incompetence, and misfeasance; (2) any act which constitutes a criminal offense; and (3) violation of DYRS policies on Reporting of Unusual Incidents and Use of Force. On August 29, 2011, the Hearing Officer who conducted an administrative review of Agency's proposed removal issued a Report of the Hearing Officer in which she found that Agency established by a preponderance of the evidence that there was cause for removal and that removal was within the range of appropriate penalties. The Report of the Hearing Officer was entered as Agency Exhibit 12. On January 19, 2012, Agency issued a Notice of Final Decision on Proposed Removal, sustaining the proposed action, and removing Employee effective January 31, 2012. The Notice of Final Decision on Proposed Removal was entered as Agency Exhibit 13. Captain Baynes testified that he agreed with Agency's decision to remove Employee because he "ha[d] no confidence that [Employee] would keep the safety and security of the youth."¹⁰ He explained that Employee's actions interfered with Agency's operations and were contrary to its purpose and mission.¹¹

On cross-examination, Baynes testified that he has been trained in Safe Crisis Management and that part of the training includes learning to deflect punches and restraining techniques. He testified that in the surveillance recording of the incident, he did not believe that neither the "broom nor th[e] chair looked like it was being used as a weapon" by the youth.¹²

When asked about documentation of the youth's injuries, Baynes explained "that the facility medical team evaluated [the youth] and determined that his injury was sufficient enough to be sent to Washington Hospital Center."¹³ He concluded that the youth suffered physical injuries based "on the report that . . . the medical team evaluated [the youth] at the Youth Services Center and the medical team determined that [the youth] needed to go to the ER at the Washington Hospital Center due to possible head trauma, which means that the youth was injured."¹⁴

Baynes testified that the amount of youth-on-staff assaults occurring at Agency's facilities is "at the standard of any other facility . . . throughout the country."¹⁵ He further stated that whether or not an employee is disciplined for use of force against a youth depends on the level of force used by the employee in the specific situation and whether the use of force was in self-defense. Baynes stated that Agency does not train YDRs to disregard protocol under any circumstances.

¹⁰ Tr. at 61-62.

¹¹ Tr. at 62.

¹² Tr. at 70.

¹³ Tr. at 82.

¹⁴ Tr. at 88.

¹⁵ Tr. at 92.

Tony Newman (“Newman”) Tr. 108-157

Newman testified in relevant part that: he is currently employed by Agency as the Program Manager for the Risk Management Office and Quality Assurance, and he previously held the position of Internal Integrity Officer and Program Manager for Agency’s Office of Internal Integrity (December 2013—June 2014). Newman testified that the Office of Internal Integrity holds youth hearings taken against the youth and conducts internal investigations. He explained that Project Hands internal investigations concern allegations of abuse or neglect by staff against youth. Newman testified that essentially there is a “firewall” between the Office of Internal Integrity and Agency so that the Office of Internal Integrity can independently conduct internal investigations.¹⁶

Newman further testified regarding Agency’s Use of Force policy as it pertains to the timeline for completing Project Hands investigations; specifically Agency’s Exhibit 2, Roman Numeral V, B(6). Newman described the time line goal for a Project Hands investigation under this section as a traditional goal, but that the timeline is not mandatory and that many factors might prolong the completion of a Project Hands investigation. Newman testified that Agency “is under a consent decree and there are certain goals that the agency has to hit in order to comply with what we called the Jerry M Lawsuit and that becomes the Jerry M Work Plan and with respect to that, one of the work plan targets/goals for [the Office of Internal Integrity] is all Project Hands cases must be adjudicated within 35 days of – from the time there’s notice of it.”¹⁷ The Jerry M Work Plan was entered as Agency Exhibit 14.

Newman testified that criminal investigations by the Metropolitan Police Department, investigations by the Child and Family Services Agency, and uncooperative or untruthful witnesses are some of the reasons why the 35-day target may not be possible. If MPD is investigating the same case as a Project Hands incident, then the 35-day target is tolled until the completion of MPD’s investigation.¹⁸ He further testified that with respect to the Project Hands investigation of Employee’s use of force against the youth, interactions between Agency and Child and Family Services Agency Social Worker, Donna Wright, and Metropolitan Police Department Detective Lowell Grier, caused a delay in the completion of the investigation. Newman testified that when the Metropolitan Police Department initiated a criminal investigation of Employee’s actions, Agency was required to put its Project Hands investigation on hold until the criminal investigation was completed. MPD became involved in this case few days after the incident took place.

With regard to the conclusions reached in the Project Hands investigation, Newman testified that he agreed with the conclusion that Employee’s use of force against the youth was an “egregious” violation of Agency’s Use of Force policy.¹⁹ He further testified that he agreed with the conclusion that Employee’s Incident Notification Form violated Agency’s Reporting Unusual Incidents policy because the report was “untruthful relative to the [surveillance] video.”²⁰

¹⁶ Tr. at 111.

¹⁷ Tr. at 114-115

¹⁸ See Tr. at 118.

¹⁹ Tr. at 129-130.

²⁰ Tr. at 113.

Newman believed that Employee inaccurately asserted that the youth was making a threatening gesture with the broom, failed to make any mention of the youth holding the chair, and misleadingly indicated that the youth “accidentally bumped his head.” Newman asserted that the Incident Notification Form completed by Employee (Agency’s Exhibit 8), contained a “series of inaccuracies that basically goes to deception of and violation of the policy.”²¹

Newman further testified that he believed Employee should be terminated for his misconduct. Furthermore, Newman believed that Employee’s actions were inconsistent with the expectations of Agency’s staff and the objectives of the Agency in terms of its rehabilitation goals. Newman stated that Employee’s actions interfered with the efficiency and the operations of the agency and exposed Agency to potential liability.

On cross-examination, Newman testified that he was familiar with Safe Crisis Management training and confirmed that he did not receive Safe Crisis Management training from the Office of Professional Development. He is familiar with Safe Crisis Management because he supervises investigators who are trained in Safe Crisis Management. He testified that an individual from the “Training Department” did not have to view the surveillance recording of the incident involving Employee and the youth to conclude that Employee’s use of force violated Agency’s Use of Force policy. Newman testified that the investigators completing the Project Hands investigation had training in Safe Crisis Management and, as a result, could conclude that Employee’s actions violated Agency’s Use of Force policy. Newman further testified that the youth’s action in picking up the chair “was not a threat that required the application of the force necessary to disarm the chair.”²²

Newman stated that verbal threats made by the youth in Agency’s custody would not justify the use of force that was displayed in this incident.

Employee’s Case-in-Chief

Kevin Baldwin (“Employee”) Tr. 158-178

Employee testified in relevant part that: on December 17, 2010, he responded to a call from Unit A200 to assist in directing a group of youths to their rooms. Employee testified that one of the youths in Unit A200 picked up a broom and became very agitated that the youths were being told to go to their rooms. He testified that once the youth grabbed the chair, he “determined that it was time for hands-on.”²³ Employee then grabbed the youth and “put him on the wall but everything was controlled...” He testified that the youth began to cry and he attempted to “try to keep [the youth] on – on the wall.”²⁴ Employee further testified that he was having a hard time keeping up with the youth and keeping him on the wall because of his “[bad] knee” and the other staff members did not want to get involved.

²¹ Tr. at 142.

²² Tr. at 151-152.

²³ Tr. at 160.

²⁴ Tr. at 161.

Employee also testified in regards to completing the Incident Notification Form, which he stated in relevant part:

[A]fter the incident was over, I got my boys back to – to the unit, I’m trying to write my report. The phone keep [sic] ringing. I got to keep jumping up and going to the phone, go back to the front door, come back to the phone, go back to my report, and I probably missed my place in my report as to far as what was [sic] – you know, it wasn’t no attempt to lie or, you know, to put something misleading in my report.²⁵

Employee believed that the youth picking up the broom “call[ed] for emergency intervention, and during our training, they said forget protocol[.]”²⁶ He testified that he had “been involved in – in numerous take-downs and none of them been [sic] by procedures/policies. None of them.”²⁷ Employee further stated that the procedures do not work in the “real world” and that the Training Manual does not address the proper procedures for dealing with a kid who has a weapon.

On cross-examination, Employee testified that even after the youth released the broom to another YDR, “Emergency Intervention” was needed because the youth had initially picked up the broom and “[t]hat means I can go hands-on now.”²⁸ Employee stated that the youth then picked up a chair and was crying, at which point Employee pushed the youth against the wall to control him because he kept resisting Employee.

Employee had experience with the Incident Notification Form and he understood that completing these reports when necessary was a part of his job. Employee also stated that he let the youth involved in this incident vent when he was told to go to his room but when the youth picked up the broom, “[t]hat changed everything.” Employee testified that when completing the Incident Notification Form, he was relieved of his supervision duties, taken off his unit, and sent to the break room to complete his report of the incident. Employee concluded by saying that none of the take-downs he has performed were “text[book]” examples because the kids make it difficult to get close to them.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Undisputed Facts

On December 17, 2010, Employee was called to Unit A-200 to help de-escalate an incident stemming from youths threats of violence and their refusal to return to their rooms for the night. Employee got into a confrontation with a youth and the incident was capture via surveillance camera inside of the unit. As a result of the confrontation, the youth was transported to Washington Hospital Center for medical treatment. Subsequent to the incident, Employee submitted a written statement detailing his version of the confrontation. On February 23, 2011,

²⁵ Tr. at 161-162.

²⁶ Tr. at 162.

²⁷ Tr. at 164.

²⁸ Tr. at 167.

Employee was charged with simple assault and attempted second degree cruelty to children. These charges were ultimately dismissed.

On January 19 2012, Agency issued its Notice of Final Decision on Proposed Removal. Employee's termination became effective on January 31, 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 (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, *placement on enforced leave*, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1603.3 of the District Personnel Manual ("DPM") sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Employee's termination was based on Section 1603.3: (f) 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; (h) Any act which constitutes a criminal offense whether or not the act results in a conviction: attempted second degree cruelty to children and simple assault; and (f) Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: violation of DYRS Reporting of Unusual Incident Policy; violation of DYRS Use of Force Policy; and violation of DYRS and District Employee Conduct policies.

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.

Neglect of Duty

The District's personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.²⁹ Here, Employee, as a Youth Development Representative ("YDR"), was responsible for the safety and security of the youth in the custody of Agency. YDRs are governed by Agency's Use of Force

²⁹ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

policy, which was entered as Agency Exhibit 2. The Use of Force policy establishes that YDRs “shall not strike or lay hand upon any youth, unless it be in defense of themselves, other employees, or youth, to prevent escape or serious injury to personnel or destruction of property, or to quell a disturbance not otherwise controllable. In such cases, only that amount of force necessary to accomplish the desired results shall be used.”³⁰

The undersigned was able to watch the surveillance video that captured the confrontation between Employee and the youth at the Evidentiary Hearing and several times while this matter has been under consideration.³¹ Although there is no audio with the surveillance footage, the image is clear. At approximately the 17:32 mark in the video, the youth picks up a broom, which was eventually removed by another staff member at Agency without a physical confrontation. While the other staff member was removing the broom from the youth, it appears that Employee and the youth are also engaging in a verbal exchange. As the youth walks away from the situation, Employee uses his legs to slide a chair to block off the youth’s pathway. It is unclear at this point what Employee’s intentions are with the youth. The youth then walks away from Employee and aggressively picks up a chair, but does not swing it. Immediately after the youth picks up the chair, Employee grabs the youth by the neck and slams him into a glass window, causing the chair to drop, and eventually alongside the wall into a corner. After being slammed into the corner, the youth fell to the ground and immediately grabbed the back of his head.

Employee raised the argument that Newman and Captain Baynes were not qualified to determine whether the force he used was excessive because neither of them were trained in Safe Crisis Management. However, Newman testified that an individual from the “Training Department” did not have to view the surveillance recording for Agency to conclude that Employee’s use of force violated Agency’s Use of Force policy. Newman testified that the investigators completing the Project Hands investigation had training in Safe Crisis Management and, as a result, could conclude that Employee’s actions violated Agency’s Use of Force policy. As such, I give great deference to the investigators and upper management at Agency who determined that Employee’s actions constituted excessive force.

While the youth may have acted in an aggressive manner, I do not find that the force used by Employee was necessary to quell the situation. I also find that Employee aggravated the circumstances when he slide the chair to block off the youth’s path from walking away after the broom was taken away. Accordingly, I find that Employee neglected his duty when he failed to follow instructions and safety precautions regarding the safety of the youth and used excessive force.

Incompetence

The District’s personnel regulations provide that incompetence includes the following: (1) careless work performance; (2) serious or repeated mistakes after giving appropriate counseling or training; or (3) failing to complete assignment timely.³² Here, Employee believed that the situation called for emergency intervention. While Employee may have believed this to

³⁰ Agency’s Exhibit 2, Section II, A.

³¹ Agency’s Exhibit 6.

³² See D.C. Mun. Regs. tit. 16 § 1619.1(6)(e). Table of Appropriate Penalties.

be the case, Agency disagreed, and after review of the evidence presented, I concur that emergency intervention was not needed in this matter.

There was ample testimony provided regarding the protocol employed by YDRs when dealing with the youth. Employee stated that he was instructed to “forget” protocol in times where emergency intervention was needed. Employee testified that he believed emergency intervention was needed when the youth picked up the broom. However, the video demonstrates that the broom was released by the youth with little resistance and that Employee followed the youth and placed a chair in front of the youth, cornering him off. Based upon the review of the video, perhaps Employee believed that emergency intervention was needed when the youth picked up the chair in an aggressive manner. While this may have posed a threat to Employee, the force used was not necessary to quell the disturbance. Also, based on the video evidence, Employee does not seem to employ any de-escalation techniques, but rather seems to further agitate the youth. It is clear that a lesser amount of force should have been used to quell the situation, rather than the forced used by Employee, which resulted in the youth suffering injuries to his head. Therefore, I find that Employee was careless in his work performance and Agency has satisfied its burden that Employee was incompetent in applying its Use of Force Policy.

Misfeasance

The District’s personnel regulations provide that misfeasance includes: (1) careless work performance; (2) failure to investigate a complaint; (3) providing misleading or inaccurate information to superiors; (4) dishonesty; (5) unauthorized use of government resources, or (6) using or authorizing the use of government resources for other than official business.³³ Here, Agency cites Employee for misfeasance for providing misleading or inaccurate information in his Unusual Incident Report. Based on a complete review of the evidence, I do not find that Employee provided misleading or inaccurate information.

Employee’s Incident Notification Form states the following:

[The youth] had picked up a broom at that time this writer and [another DYRS employee] was trying to persuade [the youth] to put the broom down and to go into his room. Pursuant to Safe Crisis Management, emergency intervention was need it [*sic*] when [the youth] made a threatening gesture with the broom becoming a threat to self and staff. While attempting to disarm [the youth] of the broom he continued to be combative and it appeared he hit his head on the wall.³⁴

Employee repeats that the youth picked up the broom, and makes a threatening gesture with it. While the evidence does not support that the youth made a threatening gesture with the broom, it does support that the chair was picked up in a manner that could be perceived as a threatening gesture. Employee does not mention the chair being picked up by the youth in his written statement; however, I do not find that this fact was omitted intentionally. In fact, I find that if Employee had included that the youth picked up the chair, it would have enhanced his argument

³³ See D.C. Mun. Regs. tit. 16 § 1619.1(6)(f). Table of Appropriate Penalties.

³⁴ Agency’s Exhibit 7.

that “emergency intervention” was needed, considering the manner in which the chair was picked up. Perhaps while trying to recall the events play-by-play, Employee meant to write “while attempting to disarm the *chair*,” and not the *broom*, he confused the two objects. Employee does write that “[w]hile attempting to disarm” the youth, he hit his head on the wall. Although Employee was not very descriptive in how he went about attempting to disarm the youth, I do not find that his statement was contrary to the events that unfolded. Certainly, Employee may have provided a more detailed narrative of the events in which he used force on the youth; however, I do not find that Agency met its burden in citing Employee for misfeasance.

Any act which constitutes a criminal offense whether or not the act results in a conviction: attempted second degree cruelty to children and simple assault.

I find that Agency had cause to take adverse action against Employee for any act which constitutes a criminal offense whether or not the act results in a conviction. Here, Employee was charged with simple assault and attempted second degree cruelty to children.³⁵ It is uncontroverted that Employee was charged with attempted second degree cruelty to children and simple assault, even though the charges were ultimately dismissed. D.C. Mun. Reg. tit. 16 § 1619.1(8) (Table of Appropriate Penalties) provides that a conviction is not needed to sustain an adverse action based on this cause. An agency may act on the arrest if the arrest is related to the job.³⁶ It is clear that Employee’s arrest and criminal charges were work-related. Accordingly, I find that Agency has met its burden to take adverse action against Employee for this cause.

Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: violation of DYRS Reporting of Unusual Incident Policy; violation of DYRS Use of Force Policy; and violation of DYRS and District Employee Conduct policies.

This cause of action is similar to the previously discussed charges of “misfeasance” and “neglect of duty.” Based on the above discussion on misfeasance, I do not find that Agency had cause to take adverse action against Employee. However, based on the above discussion on neglect of duty, I find that Employee violated Agency’s Use of Force Policy.

Office of Internal Integrity, (“Project Hands”) Timely Investigative Findings

Employee asserts that Agency violated its own ten (10) business day rule by failing to timely complete its investigative findings surrounding this matter. Newman testified regarding Agency’s Use of Force policy as it pertains to the timeline for completing Project Hands investigations; specifically Agency’s Exhibit 2, Roman Numeral V, B(6). Newman described the time line for a Project Hands investigation under this section as a traditional goal, but that the timeline is not mandatory and that many factors might prolong the completion of a Project Hands investigation.

³⁵ See Agency’s Exhibit 9.

³⁶ See D.C. Mun. Reg. tit. 16 § 1619.1(8) (Table of Appropriate Penalties).

Newman also elaborated that Agency “is under a consent decree and there are certain goals that the agency has to hit in order to comply with what [is] called the Jerry M Lawsuit and that becomes the Jerry M Work Plan and with respect to that, one of the work plan targets/goals for [the Office of Internal Integrity] is all Project Hands cases must be adjudicated within 35 days of – from the time there’s notice of it.”³⁷ The Jerry M Work Plan was entered as Agency Exhibit 14. The Work Plan addresses timely investigations and disciplinary actions against employees of Agency.³⁸ This goal is listed as “conditional” and Newman explained the reasoning behind it being listed as conditional.

Newman testified that criminal investigations by the Metropolitan Police Department (“MPD”), investigations by the Child and Family Services Agency, and uncooperative or untruthful witnesses are some of the reasons why the 35-day target may not be possible. If MPD is investigating the same case as a Project Hands incident, then the 35-day target is tolled until the completion of MPD’s investigation.³⁹ He further testified that with respect to the Project Hands investigation of Employee’s use of force against the youth, interactions between Agency and Child and Family Services Agency Social Worker, Donna Wright, and Metropolitan Police Department Detective Lowell Grier, caused a delay in the completion of the investigation. Newman testified that when MPD initiated a criminal investigation of Employee’s actions, Agency was required to put its Project Hands investigation on hold until the criminal investigation was completed. Detective Grier of MPD was assigned this case on December 21, 2010, four days after the incident.

Although the Project Hands investigation was not completed until March 8, 2011, beyond the 35-day target goal from completing such a report, I find that Agency was justified in doing so. It is without question that MPD and Child and Family Services were also involved in investigating this matter. The *Jerry M* Work Plan provides that the 35-day target goal for investigations and disciplinary actions are conditional and I find that the reasons provided by Agency satisfy its burden in demonstrating that it did not violate its own policy in timely completing the Project Hands Investigation/Report for Employee.

Employee’s Enforced Leave

Employee asserts that Agency violated his right when it placed him on Enforced Leave status on April 4, 2011. This assertion raises a jurisdiction issue. Enforced Leave is a separate appealable action a part from the charges addressed in this Initial Decision (removal). OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that “[t]he *employee* shall have the burden of proof as to issues of jurisdiction...”

D.C. Official Code § 1-606.03 provides that: *Any appeal shall be filed within 30 days of the effective date of the appealed agency action.* Here, Employee was issued a Written Notice of Final Decision on Proposed Enforced Leave on April 22, 2011.⁴⁰ This noticed provided Employee his appeal rights on the decision to place him on enforced leave. Based on the record

³⁷ Tr. at 114-115

³⁸ See Agency’s Exhibit 14, p. 12

³⁹ See Tr. at 118.

⁴⁰ Agency Answer, Exhibit 9 (March 29, 2012).

before me, Employee only appealed his removal, and not the enforced leave. While it appears that Employee is now attempting to raise his appeal of the enforced leave imposed by Agency, it is well beyond the 30-day limit to appeal such action. As such, it is beyond the undersigned's jurisdiction to address Employee's enforced leave argument.

Appropriateness of penalty

As discussed above, I do not find that Agency proved by a preponderance of the evidence that Employee's actions amount to misfeasance. However, I do find that Agency met its burden of proof in establishing that it had cause to take adverse action against Employee for neglect of duty, incompetence, and acts which constitute a criminal offense, whether or not the act results in a conviction, and violation of DYRS Use of Force Policy.

In assessing the appropriateness of the penalty, the Office of Employee Appeals is limited to ensuring that "managerial discretion has been legitimately invoked and properly exercised."⁴¹ When an Agency's charge is upheld, the Office of Employee Appeals 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 judgment."⁴²

Chapter 16 of the District Personnel Manual ("DPM") establishes a Table of Appropriate Penalties by which Agencies are instructed as to the level of punishment permissible for a specific cause. It reads, in relevant part:

CAUSES SPECIFICATIONS/GENERAL CONSIDERATIONS	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
6. Any On Duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations:			
(c) Neglect of Duty: Failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; careless or negligent work habits.	Reprimand to Removal	Suspension for 15 days to Removal	Suspension for 30 days to Removal or Reduction in Grade
(e) Incompetence: Includes careless work performance; serious or repeated mistakes after given appropriate counseling or training; failing to complete assignment timely.	Suspension for 5 – 15 days	Suspension for 20 – 30 days	Reduction in Grade to Removal
(f) Misfeasance: Includes careless	Suspension for	Suspension for	Removal

⁴¹ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

⁴² *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources for other than official business.	15 days	20 – 30 days	
7. Any Other On-Duty or Employment-Related Reasons for Corrective or Adverse Action that is not Arbitrary or Capricious:			
“Catchall” phrase; may include any activities for which the investigation can sustain that it is not “ <i>de minimis</i> ” . . .	Reprimand to Suspension for up to 15 days	Suspension for 20 – 30 days	Removal
8. Any Act which Constitutes a Criminal Offense whether or not the Act Results in a Conviction:			
Conviction not needed; may act on the arrest if the arrest is related to the job. Proof Needed: Arrest record	Suspension for 10 days to Removal	Removal	N/A

The DPM’s Table of Penalties, sections 6(c) and 8 cover neglect of duty and acts which constitute a criminal offense. The range of penalty for these offenses alone, permit removal of an employee for a first offense. I do not find that Agency exceeded the limits of reasonableness with the penalty imposed against Employee. Accordingly, in light of the testimony and evidence presented, I find that Agency’s penalty of removal was appropriate based on the neglect of duty, incompetence, and acts which constitute a criminal offense charges.

ORDER

Accordingly, it is hereby **ORDERED** that Agency’s removal of Employee is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge