THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHAEL DUNN,	)	
Employee	)	OEA Matter No. 1601-0047-10
	)	
v.	)	Date of Issuance: October 5, 2012
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

James McCollum, Esq., Employee Representative
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 20, 2009, Michael Dunn ("Employee") timely filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Youth Rehabilitation Services' ("DYRS" or "Agency") decision to terminate him from his position as a Lead Youth Development Specialist effective September 23, 2009. Following an Administrative review, Employee was charged with the following specifications:

1) Any on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Incompetence (violation of the following Agency policies: Reporting Unusual Incidents, Use of Physical Restraints, and Use of Force); and
2) Any knowing or negligent material misrepresentation on other document given to a government agency (falsified and backdated a Restraint Form and Incident Report).

On November 23, 2009, Agency submitted its Answer to Employee's Petition for Appeal. On June 14, 2010, Administrative Judge ("AJ") Wanda Jackson granted the parties' Motion for a Protective Order. Thereafter, on March 3, and March 11, 2012, Agency submitted a Motion for an Extension of Time to respond to Employee's Discovery Requests. Subsequently

on May 6, 2011, Employee submitted a Motion to Compel and a Motion for Scheduling Order. On August 30, 2011, Employee submitted a Supplemental Motion to Compel. This matter was initially assigned to AJ Lois Hochhauser. On December 19, 2011, AJ Hochhauser scheduled a Prehearing Conference for January 10, 2012. During the Prehearing Conference, Employee's representative requested that AJ Hochhauser recuse herself from the case, which she agreed. Employee also requested that this matter be submitted to mediation. However, Agency did not respond to this request. On January 31, 2012, Employee submitted a Motion for Assignment and Scheduling Order.

This matter was reassigned to the undersigned AJ on February 13, 2012. Thereafter, I issued an Order requesting Agency's response to Employee's request to submit this matter to mediation. Agency was ordered to submit its response to the mediation request by February 22, 2012. However, Agency failed to comply. On February 24, 2012, the undersigned issued an Order scheduling a Status Conference in this matter for March 21, 2012. Both parties were in attendance. Because this matter could not be resolved based on the documents on record, the undersigned on March 27, 2012, issued an Order scheduling an Evidentiary Hearing for May 21, and 22, 2012. Prior to the Evidentiary Hearing, the parties submitted their witness lists and subpoena requests, which were all granted by the undersigned AJ. Both parties were present for the Evidentiary Hearing. Following the Evidentiary Hearing, I issued an Order dated June 18, 2012, notifying the parties that the transcripts from the Evidentiary Hearing were available for pick up at this Office. The Order also provided the parties with a schedule for submitting their written closing arguments. The written closing arguments were due on July 20, 2012. Employee complied, but Agency did not. On July 20, 2012, Agency filed a Motion to Enlarge the Time to submit its Closing Argument. This Motion was granted in an Order dated July 24, 2012. Agency had until July 27, 2012, to submit its written closing arguments. On July 25, 2012, Employee submitted an Opposition to Agency's Motion to Enlarge the Time to submit its Closing Argument. Agency again, failed to submit its written closing arguments by the July 27, 2012, deadline. Thereafter, I issued an Order for Statement of Good Cause to Agency, requesting that Agency submit its written closing arguments, along with a statement of good cause for its failure to comply with the July 24, 2012, Order by August 13, 2012. This Order also provided Employee with the opportunity to submit a rebuttal to Agency's written closing arguments by August 23, 2012. Both parties have complied. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for removal; and

2) Whether the penalty of removal is within the range allowed by Law, Rules, or Regulations.

FINDINGS OF FACT

The following are undisputed facts:

1) Employee was a Lead Youth Development Specialist for Agency at the time of his termination;
2) On May 16, 2008, Employee was acting in the role of Acting Officer of the Day ("AOD"), because Agency was short of staff;
3) Prior to May 16, 2008, Employee had acted in the role of AOD on several occasions;
4) Employee did not receive any formal training on filling out the Use of Restraint Form because he was not a supervisor;
5) Employee received training on filling out the Unusual Incident Report form;
6) David J. Thomas, a Deputy Superintendent for Operations was within Employee's chain of command, but not his direct supervisor;
7) It was not unusual for residents to become violent at Oak Hill;
8) Employee was a member of a Union at the time of the May 16, 2008, incident until the date of his termination;
9) On May16, 2008, one of the residents ("resident A.D.") started a fire in unit 10B, that caused the other residents to be moved to unit 10A;
10) Following the fire, A.D. was seen by the Physician Assistant ("PA") Dr. Scales at 2:00pm and placed on suicide watch;
11) There was another incident involving resident A.D. on the same day around 4:30pm, to which Employee, as AOD, was called to assist;
12) During the second incident with A.D., restraints (Handcuffs) were used;
13) Four employees (Glen Adams, Robert Taylor, Saladine Simmons and Employee) were involved in the May16, 2008, incident that led to Employee's termination;
14) The resident A.D. was not taken to see the PA after the second incident as required by Agency's policy;
15) There was another incident on the same day regarding unescorted residents delivering food, for which Employee was reprimanded by David Thomas;
16) Weeks after the second incident involving resident A.D., Employee was interviewed by Project HANDS investigator Wayne Mr. Copeland because the Unusual Incident and Use of Restraint reports were missing;
17) Employee slipped the Unusual Incident Report and the Use of Restraint Forms under David Thomas' door;
18) Project HANDS submitted its report in this investigation on September 5, 2008, substantiating that Employee failed to file the following Unusual Incident Report and Use of Restraint Form in violation of Agency's Policies. The report also substantiated that Employee falsified and backdated a Restraint form and Unusual Incident report form; and that Employee used excessive force and also abused the Use of Restraint Policy;
19) On September 26, 2008, Agency served Employee with a Proposed Notice of Adverse Action, notifying him of Agency's intent to terminate him from his position of Lead Youth Development Specialist;
20) A Hearing Officer assigned to this case sustained three of the charges against Employee and recommended a thirty days suspension; and

21) On September 18, 2009, Agency filed a Notice of Final Agency Decision, terminating Employee from his position effective September 23, 2009.

SUMMARY OF MATERIAL TESTIMONY

1) David J. Thomas (May 21, 2008. Transcript pgs.16-65; May 22, 2008. Transcript Pages 220-222).

David J. Thomas ("Mr. Thomas") is a Deputy Superintendent for Operations with Agency. His duties include supervising security, safety, secure transportation and movement of inmates. Although in this capacity he was not Employee's direct supervisor, Employee was within his chain of command. When questioned about his understanding of the May 16, 2008, events, Mr. Thomas testified that as the supervisor on duty, Employee failed to submit the Use of Restraint Form following the incident with resident A.D., where handcuffs had to be used to restrain said resident for not complying with rules and regulations. Mr. Thomas noted that Agency requires supervisory authorization before restraints are used on residents. He explained that Agency has policies regarding the Use of Restraint, which Employee was familiar with. According to Mr. Thomas, Employee has acted as AOD several times; however, he has no personal knowledge as to whether or not Employee was trained on completing a Use of Restraint Form. He explained that restraints had to be authorized by supervisors. He also stated that a Physical Restraint is reserved specifically for supervisory staff and Employee was not experienced enough to receive training for Use of Restraint. He noted that since Employee was not a supervisor, he did not receive any formal training on reporting or filling out the Use of Restraint Form.

Mr. Thomas also testified that Employee failed to comply with Agency's reporting Unusual Incident policy, because he did not submit the Unusual Incident Report Form within the required 24 hour window prescribed in Agency's policy. He explained that the incident involving resident A.D. on May 16, 2008, was an unusual incident and Employee was required to submit an Unusual Incident report within 24 hours after the incident occurred. He also noted that while it is protocol for all employees to receive training on reporting Unusual Incidents, he does not have personal knowledge as to whether Employee did receive such training. Mr. Thomas further testified that anyone acting in Employee's capacity as an AOD and anyone who witnessed the incident was responsible for submitting an Incident Report within 24 hours. However, he did not receive Unusual Incident Reports or Use of Restraint Forms from any officers on May 16, or May 17, 2008.

According to Mr. Thomas, he was not aware of the May 16, 2008, incident until a few weeks later. He noted that he learned about the incident through the investigation. He later testified that the time frame between the incident and the time he found out about the incidents was within several or a few days, but he was certain it was not within the required 24 hours requirement. Mr. Thomas also testified that he does not recall the exact date he received Employee's Use of Restraint Form and Unusual Incident Report. (Tr. pg. 34). After reviewing the affidavit he signed and which was submitted by Agency as part of its Answer in this matter, Mr. Thomas questioned the accuracy of the date listed in the affidavit in regards to when he actually received the forms. He explained that he received the forms in May 2008, and not June

2008, as stated in the affidavit. When asked if he reviewed the affidavit before signing it, he testified that he does not recall reviewing it before signing it. (Tr. Pg. 35). He also testified that he believed someone read the affidavit to him prior to him signing it, but he can't recall since it's been so long ago. (Tr. pgs. 44-45). However, Mr. Thomas later testified that his memory was somewhat better on the date of this hearing than it was on the date he prepared the affidavit.

Additionally, Mr. Thomas testified that the Use of Restrain Form and the Unusual Incident Report were placed under his door, and he was concerned about the reports being late and the dates/times listed on the Restraint Form in relation to who witnessed it – medical staff, Psychological staff, Superintendent/Deputy Superintendent. He stated that although he did not receive the reports on May 16, or 17, 2008, both reports listed May 16, 2008, as both the incident date and the date the report was submitted. Regarding the times listed on the Use of Restraint Form, he explained that if an incident occurred at 4:30 pm, then Dr. Scales would not sign before the actual incident time, she would have to sign it after the incident time. And since the report showed that the incident occurred at 4:30 pm, and it also shows that Dr. Scales signed the report at 2:00 pm, he found the report questionable, but he did not question Employee about the discrepancy because the matter was already being investigated by Project HANDS. He further stated that he did not sign the report nor was it signed by any other Superintendent/Deputy Superintendent. Mr. Thomas also testified that until May 21, 2012, he has not seen the project HANDS report that was prepared for resident A.D.

In addition, Mr. Thomas testified that he was aware after roll call that Agency was short staffed and that none of the supervisory staff showed up for that shift. He admits to having assigned Employee as AOD during his tenure, but he did not assign Employee as AOD on May 16, 2008. He explained that it was protocol for Lead Youth Development Specialist to fill the post of AOD due to shortage of staff. According to Mr. Thomas, Employee volunteered on May 16, 2008, to be AOD, and since he had filled the position before, it wasn't necessary for Employee to receive Mr. Thomas' permission because it was protocol. When asked if he had personal knowledge of Employee assuming the position of AOD on May 16, 2008, he said no, stating that he wasn't there when that happened. And Mr. Thomas doesn't know who asked Employee to be AOD. Mr. Thomas further testified that the AOD was a protocol and not a policy.

Mr. Thomas further testified that Employee did not notify him by telephone about the May 16, 2008, incident. Mr. Thomas testified that he does not recall having any type of conversation with Employee at any time on May 16, 2008. (Tr. pgs. 221 & 223-224). He also testified that he does not recall being near 10A on May 16, 2008. (Tr. pg. 62). And when asked again if he went to Unit 10A or 10B any other time on May 16, 2008, Mr. Thomas testified that he does not recall, but noted that it was possible he did; however, he can't recall the exactly what time. (Tr. pg. 56). He also testified that he does not recall Employee verbally reporting to him that resident A.D. had been restrained and handcuffs had been used. Again, he testified that it is possible that it could have happened. Additionally, he testified that he does not recall having a conversation with Employee asking him to prepare the Unusual Incident report and/or Restraint Form and to slide them under his door. (Tr. pgs. 64-65). Mr. Thomas further testified that while he carries a radio occasionally, he specifically recalls not having a radio with him on May 16, 2008. Mr. Thomas also testified that he does not recall the name of the staff involved in

restraining resident A.D. (Tr. pgs. 53-54). Mr. Thomas later stated that he went to Unit 10 on May 16, 2008 when he heard of the fire but does not recall what he saw. (Tr. pg. 56). Mr. Thomas also testified that he does not recall hearing a "commotion" on the date of the incident. (Tr. pg. 63).

Additionally, Mr. Thomas testified that he had worked with Employee prior to May 16, 2008, and Employee was a good Lead Youth Correctional Officer, whom he had confidence in. Prior to May 16, 2008, he never viewed Employee as someone who would neglect his duties, or be dishonest. He believed Employee was a person who would learn from his mistakes. Also, Mr. Thomas testified that he was aware of the fire on May 16, 2008, and the fact that the residents had to be moved from 10B to 10A. Mr. Thomas also testified that he was not aware of any Agency employee being terminated for failing to turn in an Unusual Incident Report or a Use of Restraint Report. He further testified that proposing disciplinary action is done at a higher level and he is not aware of other employees disciplined for misconduct relating to Employee's charges.

2) Wayne Copeland (Transcript pgs. 72-107).

Wayne Copeland, ("Mr. Copeland") a Senior Investigator in Agency's Office of Integrity was assigned to investigate the May 16, 2008, incident involving resident A.D. following allegations from resident A.D. that he had been physically restrained, and abused as staff tried to get him to place his hands behind his back so they could put handcuffs on him. Resident A.D. also alleged that after being escorted to his room, the handcuffs were left on until dinner was brought to him. Mr. Copeland testified that this case was referred to Project HANDS on May 23, 2008, and he initiated a Project HANDS investigation on May 27, 2008. He testified that dinner was typically served between 5:00 -6:00 pm, depending on the unit.

According to Mr. Copeland, he interviewed Employee on June 4, 2008, about the incident on May 16, 2008, involving resident A.D. while Employee was walking outside one of the buildings toward the parking lot. He also testified that he was aware that Employee had Union rights. However, he did not notify Employee about his right to Union representation when he interviewed Employee because, he was advised by his supervisor Mr. Lennox, that because Employee was acting as a supervisor on May 16, 2008, he did not have to advise him of his Union rights since supervisors are not under Unions. He stated that, when he asked Employee if he filled out an Unusual Incident Report, Employee responded that he did, but also noted that if he didn't, he would fill one out. As to the Use of Restraint form, Employee responded that no restraints were used since resident A.D. had a cast on his arm, and as such, he didn't have to complete a Use of Restraint Form. However, Mr. Copeland testified that he was informed by other staff present at the incident that restraints were used. Mr. Copeland believes, but is not certain that he informed Employee that he was under investigation, and that the investigation could lead to disciplinary action against Employee. Mr. Copeland also testified that he did not have a tape recorder when he interviewed Employee because it was not allowed.

Mr. Copeland also testified that he spoke with Mr. Thomas after interviewing Employee. He asked Mr. Thomas if he received an Incident Report or Restraint Form from Employee and he said no. He testified that he checked with Mr. Thomas two-three times in the course of the

week to see if he had received the Incident Report and/or Restraint Forms from Employee and Mr. Thomas initially said no. Mr. Copeland further testified that three weeks after the incident (sometime in June, 2008), he received a phone call from Mr. Thomas, and when he got to Mr. Thomas's office, he showed him the Incident Report and Restraint Form from Employee, dated May 16, 2008. He stated that they were under his door when he got in.

Additionally, Mr. Copeland testified that, in preparing the investigative report for this case, he spoke to Dr. Scales who informed him that he saw resident A.D. after the fire shortly after 2:00pm, but he did not see him after the second incident involving the use of restraint. Mr. Copeland testified that he was aware of the time discrepancy on the Use of Restraint Form which indicated that resident A.D. was seen at 2:00pm, while the second incident occurred around 4:30pm. Mr. Copeland explained that, when restraints are used, the resident has to be taken to medical unit for evaluation to make sure there were no injuries caused by the restraint. But according to Dr. Scales, she did not see resident A.D. after the second incident, which involved the use of restraints. Mr. Copeland also testified that, following the use of restrains, the supervisor had to be immediately notified that restrains were used and why they were used.

Mr. Copeland also testified that this matter was referred to Project HANDS on May 23, 2008. When asked if he was aware that Project HANDS had ten (10) business days within which to complete its investigation, Mr. Copeland noted that Project HANDS has thirty-five (35) days to complete its investigation, and that since he has been working with Project HANDS, it has never had ten (10) days to complete his investigation. Mr. Copeland explained that, in May/June 2008, Project HANDS had thirty-five (35) days to complete its investigation.

Mr. Copeland additionally testified that the area where the May 16, 2008, incident occurred was under video surveillance. However, he is not certain if there was a videotape of the incident. Mr. Copeland explained that during his investigation of this case, he inquired as to whether there was a videotape of the incident but was told it was not available. He further explains that the video system has been upgraded since 2008. And that while the current system automatically records over every fourteen (14) days, he does not know the period of time the videotapes were retained on the system in 2008. When questioned about the email he sent to Amble Prasad on June 2, 2008, regarding the videotape, Mr. Copeland testified that he does recall requesting that the videotape be preserved, but he does not recall sending the email. However, he believes he did send the email since there is documentation to prove that he did.

Mr. Copeland also testified that his investigative report substantiated a failure to complete an Unusual Incident Report for Glen Adams, Employee and others involved in the May16, 2008, incident. He however testified that he did not propose disciplinary action and does not know if they were disciplined or not.

3) Glen Adams (Transcript pgs. 110-129).

Glen Adams ("Adams") worked with Employee at Oak Hill during the May 16, 2008, incident. He retired from Agency in March of 2009. He was a Youth Correctional Officer for Agency. He testified that on May 16, 2008, he was Employee's assistant. He explained that he was assisting Employee when they received a call for a unit requesting assistance. He stated that

they responded to unit 10 to assist with a matter involving resident A.D. being out of control. He further testified that they tried to control resident A.D. when they arrived at the unit, but he became enraged. Adams, Employee and other staff eventually secured resident A.D. Adams assisted Employee in putting restraints (handcuffs) on resident A.D. They all escorted resident A.D. to his room. He noted that resident A.D. was a danger to himself and staff, he was aggressive and restraints were necessary to avoid other issues such as staff being assaulted. He further testified that resident A.D. was calm when he was initially escorted to his room, but later became verbally disruptive. Mr. Copeland also testified that the timeframe in which restraints may stay on a youth is determined on an individual basis - whether or not the resident is still violent or aggressive, and resident A.D. was still acting out and aggressive when Mr. Copeland left the area on May 16, 2008. Adams testified that he wasn't present when the handcuffs were taken off resident A.D.

Adams also testified that he prepared an Unusual Incident Report, and as Employee's assistant, he asked the other staff to do the same. Later that evening, he collected the reports from the staff, including Employee and placed them in the log book in the Officer of the Day's office. However, he did not process the reports because he was called to respond to another incident in another unit. He explained that Incident Reports should typically be completed by end of an employee's shift, but that is not necessarily the case at all times. Adams also testified that the Officer of the Day's Office was locked and only supervisors had access to the office. He explained that he has no idea as to what happened to the Unusual Incident Reports he left in the log book.

Adams testified that he did not fill out a Use of Restraint Form or ask the other staff to complete Use of Restraint Forms because Supervisors, not Correctional Officers completed the Use of Restraint Forms. He explained that handcuffs are not standard issued equipments for Correctional Officers, but are available on the units. He further testified that learning to complete a Use of Restraint Form is an on-the-job training. He stated that he has completed a Use of Restraint Form before, and that he learned what was required in completing the form from another supervisor, Mr. Layton, as he had watched him complete one. Mr. Copeland also testified that he was suspended for three (3) days for failure to produce an Incident Report even though he wrote one up.

4) Tyrone Bryant (Transcript pgs. 130-139).

Tyrone Bryant ("Bryant") worked for Agency from 1989-2008. His last position was a Captain of Security/Shift Commander, (a supervisory position). Bryant testified that he supervised Employee while he was at Agency. According to Bryant, Employee was a good staff member. He stated he was the supervisor for the morning shift. When he got to the office on the morning of May 17, 2008, there were unprocessed Incident Reports in the Officer of the Day's log book, with Employee's report on top of the stack. The reports had to have been processed by the midnight Officer of the Day, but since they were not processed, Bryant did not touch the reports. However, he also testified that he glanced at Employee's report which was on top and it was related to a student assaulting staff. He also testified that while he was glancing at the report to familiarize himself with the events of the previous day, he was called away and he did not go through the report. He stated that he did not know who the youth was nor did he know the details

of the incident. Bryant further testified that the Officer of the Day's office was unsecured and anyone could come in there. Bryant explained that he made several complaints regarding this issue. In response, he was allotted a cabinet where he kept his Incident Reports.

5) Employee (Transcript pg. 140-192).

Employee was a member of the Fraternal Order of Police (Union) on May 16, 2008, until his termination from Agency in 2009. Employee testified that prior to May 16, 2008, he had served as AOD on several occasions. Employee also testified that on May 16, 2008, due to a shortage of supervisors, he was asked by Mr. Thomas to be the AOD. Employee explained that at about 4:30 pm on that day, he received a radio call alerting him that staff needed assistance in unit 10A. He went to unit 10A with Adams where they saw resident A.D. with his back up against the wall, threatening staff, talking about fighting some juveniles in the unit with him. Employee further testified that after talking to resident A.D. for a few minutes, resident A.D. pushed one of the staff and at that point, Employee determined that resident A.D. had to be restrained using Agency's 'handle with care' technique. Four staff members were involved in restraining resident A.D. Resident A.D. was put to the floor, with his hands behind his back, and restraints were put on him, and he was escorted to his room. Employee testified that he put the restrains on resident A.D. following the take down maneuver he had been taught.

According to Employee, shortly after restraining resident A.D., Employee received a call from Mr. Thomas. Employee went out the front door in front of the unit to speak with Mr. Thomas, while the other three staff took resident A.D. to his room. Employee testified that when he met Mr. Thomas outside the unit, Mr. Thomas asked Employee why residents were delivering food by the school and Employee stated that he advised Mr. Thomas he had been called to deal with an incident with resident A.D. who assaulted staff and that resident A.D. had been restrained. Employee also testified that after verbally explaining the incident, Mr. Thomas did not really have a response; he was more concerned with the residents delivering food. Employee testified that after the conversation with Mr. Thomas, he returned to the unit to make sure the situation had calmed down. The handcuffs used to restrain resident A.D. were handed back to him and he instructed Robert Taylor who was watching resident A.D., because he was on suicide watch as a result of the fire, to take resident A.D. to the PA to be examined. Employee also testified that he alerted the medical unit by radio that resident A.D. would be coming in for evaluation. Employee testified that he did not speak to Dr. Scales, but he spoke to the officer manning the medical post, so they could secure the front door to the medical unit. Employee further testified that Robert Taylor told him that he took resident A.D. to the medical unit, and Employee did not find out that resident A.D. was not actually taken to the medical unit until he took the Use of Restraint Form to the medical unit to be signed.

Employee further testified that he prepared an Unusual Incident Report on May 16, 2008, before he left for his shift. He explained that the Unusual Incident report was placed in the incident log book, along with other incident reports. Employee also testified that he did not complete a Use of Restraint Form on May 16, 2008, because he had never been trained on completing such form. Employee also stated that, since he had informed Mr. Thomas of the incident involving resident A.D., Employee thought Mr. Thomas would prepare the Use of Restraint Form.

According to Employee, no one questioned him on May 17, 2008, about an Unusual Incident Report or Use of Restraint Form, until a couple of weeks when Mr. Copeland approached him while he was walking to the parking lot and asked about the incidents. Employee testified that he told Mr. Copeland that he would locate the report, and if he couldn't locate it, he would write another one and make sure Mr. Copeland got a copy. Employee testified that Mr. Copeland did not inform him of the purpose of the interview, he did not tell him that he was obtaining information for a possible disciplinary action, nor did he inform him that he had the right to union representation. They spoke for approximately five (5) minutes. Employee also testified that, later on that same day, about forty-five (45) minutes to an hour after he was approached by Mr. Copeland, Mr. Thomas approached Employee and asked Employee to fill out an Incident and a Restraint Form for the incident involving resident A.D. and slide it under Mr. Thomas' door if he was not there. Thereafter, Employee prepared the forms and put them under Mr. Thomas' door in response to Mr. Thomas' instructional.

Employee testified that he wrote Mr. Thomas and Dr. Scales' names on the Use of Restraint Form. Employee also stated that Dr. Scales filled in the time she saw resident A.D. on May 16, 2008, on the Use of Restraint Form. Employee further testified that Dr. Scales' signature on the Use of Restraint Form indicated that she did not see resident A.D. for the incident where restraints were used. Employee also testified that he became aware of the fact that the 2:00pm time entered in the Restraint Form was not related to the 4:30pm incident after Dr. Scales filled out the Use of Restraint Form and gave it to him. However, he did not make a notation or advise anyone as to the discrepancy because he thought it was self-explanatory. Employee testified that he did not ask Dr. Scales about the discrepancy in the times.

Employee also testified that Agency was short staffed, and he did not neglect his duty on May 16, 2008, according to his duties as Lead Correctional Officer. In addition, Employee testified that he never received training as an AOD and was never trained on how to complete a Use of Restraint Form. Employee stated that, he thinks he actually rose above and beyond what any other officer would do. Employee also testified that he does not feel he was incompetent because Agency kept asking him to be AOD. As to the charge of falsifying and backdating the Use of Restraint Form and the Unusual Incident Report, Employee testified that he did not intend to falsify anything; he was instructed by his supervisor, and the evening shift supervisor, Mr., Layton to complete the reports. Employee further testified that he did not get any monetary benefit out of the situation. He did not have any motive to not complete the reports.

Employee testified that he was reprimanded about the incident involving the unescorted youth and the food on May 16, 2008, by Mr. Thomas, on May 23, 2008, proving that Mr. Thomas was there and knew what was going on. Employee also testified that prior to May 16, 2008; he had never been warned in any fashion for failure to fill out paper work. Employee also admitted that he had been the subject of a prior investigation which was conducted by Mr. Copeland; however, there was no animosity between Mr. Copeland and Employee.

6) Vasantha Samala (May 22, 2012, Transcript pgs. 213-219)

Vasantha Samala ("Samala") works as Medical Record Technician for Agency. She testified that in this position, she maintains medical records – custodian of the medical records.

She testified that she was not the custodian of record in 2008 when the said incident occurred, and that she only joined Agency in October 2011.

ANALYSIS AND CONCLUSION

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of terminating Employee was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. In a nutshell, when it came to salient instances regarding Employee's conduct that were cited as a predicate to Agency's action, Mr. Thomas generally used a variation of the refrain "I don't recall." Mr. Thomas testified that he does not recall being near 10A or 10B any other time on May 16, 2008 (Tr. Pg. 62), and he does not recall contacting Employee at anytime on that day (Tr. Pg.223). Mr. Thomas testified that he does not recall whether he was standing at the doorway of the unit at the time resident A.D. was restrained (Tr. pg. 62-63). He testified that he does not recall hearing "a commotion" on the day of the incident (Tr. pg. 63). Mr. Thomas further testified that he does not recall asking Employee to prepare the reports and slide them under his door. (Tr. pgs. 64-65). Mr. Thomas also used this refrain when asked if he remembered having a conversation with Employee on May 16, 2008. (Tr. pgs. 221 & 224).

1) Whether Employee's actions constituted cause for removal

According to the Final Agency Decision ("FAD"),[1] Agency's decision to terminate Employee was based upon several enumerated causes: 1) Any on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Incompetence (violation of the following Agency policies: Reporting Unusual Incidents, Use of Physical Restraints, and Use of Force); and 2) Any knowing or negligent material misrepresentation on other document given to a government agency (falsified and backdated a Restraint Form and Incident Report). Further, the FAD and Agency's Closing Argument[2] recited the specific conducts justifying the above referenced causes.

A) <u>Any on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Incompetence.</u>

Unusual Incident Report

Agency asserts that Employee failed to file an Unusual Incident Report, in violation of Agency's policy YSA1.14 – Reporting Unusual Incidents Policy. Agency explains that following the May 16, 2008, incident involving the use of restraints on resident A.D., Employee did not complete and file an Unusual Incident Report in a timely manner. Agency further highlights that, according to Mr. Thomas' testimony, he did not receive said report on May 16, or May 17, 2008, from Employee. And Mr. Copeland also testified that when he questioned Employee on this issue, Employee replied that he was not certain if he filed one or not. And as such, Agency

[1] Final Agency Decision (September 18, 2009).
[2] Agency's Closing Argument (August 15, 2012).

argues that because both incidents involving resident A.D. were significant, Employee should have remembered whether or not he filed an Unusual Incident Report for the May 16, 2008, incident.

Employee on the other hand contends that, he did complete and submit a timely Unusual Incident Report before the end of his shift, and placed it in the incident log book, along with the other reports from staff members.[3] Employee also highlights that, Adams and Bryant testified to having placed and/or seen the Unusual Incident Reports, including Employee's in the incident log book. Bryant testified that he skimmed through Employee's unprocessed Unusual Incident Report Form and that, the office where the reports were kept, was unsecured.[4]

According to Agency's Reporting Unusual Incidents - Youth Services Administration ("YSA") Policy YSA 1.14 (III), all Agency employees who perform official duties or provide services on behalf of Agency, are required to file an Unusual Incident Report when necessary. And because the incident involving resident A.D. was an unusual incident (YSA 1.14(V)(B)(2))[5], Employee, along with anyone who witnessed the incident were required to complete and submit an Unusual Incident Report no later than within two (2) hours of the incident. Employee and Adams testified to having completed and filed the Unusual Incident Report in this matter on the date of the incident, however, the documents could not be located and there was never a plausible explanation for the disappearance of the report. Employee also testified that he completed and filed the report before he left for his shift. (Tr. Pgs. 150-151). The incident with resident A.D. occurred at about 4:30 pm, Employee's shift ended at about 11:00 pm. For the report to be timely, Employee would have had to file the Unusual Incident Report by 6:30 pm. Neither party has provided this Office with information as to the exact time in which Employee filed his Unusual Incident Report. Bryant testified that he saw an Unusual Incident Report with Employee's name in the log book on the morning of May 17, 2008, referring to a student assaulting staff. Bryant also testified that the office where the reports were kept was unsecured. Bryant explained that he made several complaints regarding the office security issue, and he was eventually provided with a cabinet where he kept his reports. Agency did not provide any evidence to rebut Employee's or Adams' testimony that they did in fact, file timely Unusual Incident reports. Agency also failed to provide any evidence to refute Bryant's testimony that the office was unsecured and that Bryant made several complaints to this regard. Given the totality of the circumstance, I find that Agency has not provided sufficient credible evidence in support of its assertion that Employee did not submitted a timely Unusual Incident Report. Consequently, I find that Employee's action does not constitute cause for termination.

Use of Physical Restraints

Employee was also charged for failing to complete and file a Restraint Form following the May 16, 2008, incident involving resident A.D. were restraints (handcuffs) had to be used. Agency submits that by not completing and filing a Restraint Form, Employee violated YSA

[3] Employee's Closing Argument (July 20, 2012).
[4] *Id*.
[5] Class II Incidents – incidents which are serious in nature but do not present a significant risk to the facility, public safety or attract media attention shall be considered Class II incidents and *shall be reported no later than within two (2) hours of the incident*. (Emphasis added).

9.16.[6] Agency argues that this policy applies to all Agency staff such as Employee. Agency further notes that, because Employee authorized the use of restraints, he had to sign the Use of Restraint Form, in compliance with YSA 9.16. Agency also asserts that, Employee's claim that he was unaware of the Use of Restraint Form because he had never received formal training on completing said form is not credible.[7]

Employee however contends that, he did not fill out a Restraint Form after the incident where handcuffs were placed on resident A.D. because he immediately reported the incident to Mr. Thomas. Employee also states that he instructed Robert Taylor, who was watching resident A.D. since he was on suicide watch to take resident A.D. to the medical unit for evaluation. Employee notes that he also contacted the medical unit via radio alerting them of resident A.D. Additionally, Employee highlights that he was unaware of the Use of Restraint Policy and he never received any training on being AOD or completing Restraint Forms. Employee also submits that no other staff who witnessed or participated in this incident filed a Restraint Form.

YSA 9.16 is Agency's policy that addresses the Use of Physical Restraint. YSA 9.16(III) states that, this policy applies to all Agency employees and contract staff who perform official duties on behalf of Agency. Therefore, as an employee with Agency, Employee is required to comply with this policy. YSA 9.16 (V)(A) further states that, the control and use of restraints shall be directed by supervisor. While Employee was acting in the capacity of a supervisor on May 16, 2008, Employee's official position of record was not listed as a supervisor. Employee was a Lead Youth Development Specialist, and as such, was not subject to all of the provisions under this policy that apply to supervisors. Agency asserts that because Employee eventually completed the Restraint Form in this matter without any training, he violated YSA 9.16. YSA 9.16 (E) highlights that every use of restraints (handcuffs) shall be reported on the Restraint Form. As an AOD, Employee authorized the use of restraints on resident A.D., and therefore, he had to submit a Restraint Form because handcuffs were used on resident A.D. However, I agree with Employee's contention that he was not a supervisor and therefore, had not been trained on filling out a Restraint Form. Moreover, Mr. Thomas also testified that Employee was not a supervisor, and had not been trained to be a supervisor before the May 16, 2008, incident (Tr. pg. 41). Mr. Thomas also testified that because Employee was not a supervisor, he was not trained on completing a Restraint Form. Additionally, Adams testified that he did not receive any training for AOD; and that the only AOD training he received was on-the job training. Adams further noted that he did not receive training for completing Restraint Forms since he was not a supervisor. Adams explained however that he learned how to complete the form by being at the right place at the right time – Adams was present when another supervisor was filling out a Restraint Form, and he watched the supervisor fill out the form. Although Employee testified that he had worked as AOD on several occasions prior to May 16, 2008, neither party provided this Office with any evidence to prove that Employee had completed a Restraint Form in his role as AOD prior to the May 16, 2008, incident. Therefore, I find that, because Employee was not a supervisor and he did not receive any training as AOD on how to complete a Restraint Form, his failure to submit a timely Restraint Form does not constitute cause for termination.

[6] *See* Agency's Exhibit 1 (May 21, 2012).
[7] Agency's Closing Argument, *supra.*

Furthermore, as a general rule, an Agency must follow its own rules, unless Agency's rules violate a statute.[8] Employee argues that Agency violated its own policy - YSA 9.16(V)(G)(4) which states that "Project HANDS shall complete a final report on its investigation of an allegation of improper use of restraints with youth within ten (10) business days after receiving oral or written notice of an allegation of staff physical abuse." Employee explains that, the May 16, 2008, matter was referred to Project HANDS on May 23, 2008. Project HANDS had ten (10) business days from May 23, 2008, to submit its investigative report, but did not do so until September 5, 2008. I agree with Employee's assertion that pursuant to Agency's own rules, it should have completed its investigation in the required timeframe. The investigative report from Project HANDS should have been completed by June 6, 2009, which is ten (10) business days from May 23, 2008. And because Project HANDS submitted this report on September 5, 2008, Agency violated YSA 9.16(V)(G)(4). Furthermore, Agency's Use of Physical Restraint policy does not appear to be in conflict with the D.C. Code. Since Agency failed to comply with its own rules, I further find that Employee's action does not constitute cause for his termination.

Use of Force

Agency asserts that resident A.D. was left in handcuffs for an excessive period in violation of YSA 9.16. Agency explains that the handcuffs were left on resident A.D. from around 4:30 pm to when dinner was served around 5:30 pm. Agency also notes that resident A.D. was restrained by Employee after he regained control of himself, in violation of Agency's Use of Force policy. Agency explains that there is no evidence in the record to show that resident A.D. was out of control when his dinner was brought to him, and that the Use of Restraints Form completed by Employee contained inaccurate information, and accordingly, Agency has met its burden of proof.

Employee maintains that resident A.D. was placed in physical restraint only after he physically assaulted and battered a staff member. Employee also submits that, Adams testified that restraints on resident A.D. were necessary as he was a danger to himself and to staff. Employee further asserts that Agency failed to provide any evidence as to whether Employee violated this policy.

I find that Agency has not presented any credible evidence in support of its allegations that resident A.D. was left in handcuffs for an excessive amount of time, or that resident A.D. was calm when the handcuffs were put on. During the Evidentiary Hearing and in its Closing Argument, Agency did not present any evidence relating to this charge. Agency's only evidence in support of this charge is resident A.D.'s allegations which are unsubstantiated. Additionally, according to submissions from other employees who were present and witnessed the May 16, 2008, incident, resident A.D. assaulted staff and he was still agitated when his dinner was served.[9] Moreover, the parties conceded that there was a videotape that covered the May 16, 2008, incident involving resident A.D., however, Agency failed to preserve said evidence for the Project HANDS investigation or for presentation to this Office for the undersigned to make a

[8] *Martin v. Dist. OF Columbia Courts*, 753 A.2d 987 (D.C. 2000); *Seman v. Dist. of Columbia Rental Hous. Comm'n*, 552 A.2d 863 (D.C. 1989); *Lerner v. Dist. of Columbia*, 362 F. Supp. 2d 149 (D.D.C. 2005).
[9] Project HANDS Report, Agency's Exhibit 3.

determination that the charge of Use of Force was appropriate. In addition, as stated above, Project Hands failed to complete its investigative report within the ten (10) business days prescribed in YSA 9.16, in violation of Agency's own policy. I therefore, find that this does not constitute cause for Employee's termination.

Abuse by Use of Excessive Force

Agency submitted in its FAD that Employee used excessive force in wrestling resident A.D. to the floor on May 16, 2008. However, Agency did not present any evidence during the Evidentiary Hearing to this effect. Moreover, Agency conceded in its Closing Argument that Employee did not use excessive force or abuse resident A.D. Consequently, I find that this does not constitute cause for termination.

B) <u>Any knowing or negligent material misrepresentation on other document given to a government agency (falsified and backdated a Restraint Form and Incident Report).</u>

Agency argues that because Employee acknowledged that he completed the Use of Physical Restraint and Unusual Incident Report forms several weeks after the incident, but yet listed May 16, 2008, as the date he completed the forms, he knowingly made a false statement on a government document. Agency further notes that, Employee knowingly submitted the Restraint Form containing inaccurate and misleading medical entry without notating that on the Restraint Form.

Employee submits that Agency has failed to establish a prima facie case. He explains his action does not constitute an intentional act because he did not receive any financial benefit from filling out the form. Employee also notes that he backdated the dates on the Unusual Incident Report and Restraint Form at the instruction of Mr. Thomas. Employee testified that he did not notify anyone of the discrepancies in the Restraint Form because it was self-explanatory.

Employee testified that he was asked by his supervisor and Mr. Thomas to complete the reports and slide them under Mr. Thomas' door. Mr. Thomas on the other hand testified that he does not recall asking Employee to prepare the reports and sliding them under his door. (Tr. pg. 64-65). Assuming *arguendo* that Mr. Thomas instructed Employee to fill out the forms and slide them under his door, there is no evidence however, to prove that Mr. Thomas or anyone else asked Employee to backdate the forms. In filling out the document, Employee listed the date of the incident as the report date on both the Unusual Incident Report and the Restraint Form, instead of the date the forms were actually filled out. Further, Employee was aware that some of the information contained within the Restraint Form was unrelated to the May 16, 2008, incident were restraints were used. Nonetheless, Employee failed to notify anyone of the discrepancies. As such, I find that, Employee put the credibility of the Unusual Incident Report and Restraint Form in question, and therefore, this constitutes cause for discipline.

<u>Collective Bargaining Agreement</u>

During the Evidentiary Hearing and in his Closing Argument, Employee argues that his termination should be reversed because Agency violated Article 7, Section 4 of the Collective

Bargaining Agreement ("CBA") between Agency and Employee's Union. As a member of the Fraternal Order of Police ("Union"), Employee notes that, he was entitled to certain privileges, specifically, Employee asserts that, Mr. Copeland failed to inform him of his right to Union representation when he interviewed him. Employee also notes that Mr. Copeland did not inform him that the purpose of his interview was to obtain information for disciplinary purposes. Agency concedes that it violated the CBA in this respect; however, it submits that its action does not constitute harmful error as Employee has not introduced any evidence to show that Agency's failure to advise him of his Union rights taken individually or as a whole would have had an outcome determinative effect on this case. In its Reply to Agency's Closing Argument, Employee explains that, Agency's violation of the CBA constitutes harmful error because Agency used the "information/statements alleged to be have given by Mr. Dunn against him (1) in the process to terminate his employment, (2) in this present proceeding, and 3) in its Closing Argument."[10]

Agency's violation of Employee's rights standing alone constitutes harmful procedural error as to the charge of [a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Incompetence because Agency's decision to terminate Employee was based largely on the tainted interview between Employee and Mr. Copeland. However, since this charge is now moot as discussed above, Agency's violation of Employee's CBA rights is now irrelevant as it pertains to this cause of action. Nonetheless, as to the charge of [a]ny knowing or negligent material misrepresentation on other document given to a government agency (falsified and backdated a Restraint Form and Incident Report), I disagree with Employee's assertion that Agency's violation of the CBA by not informing him of his rights constitutes harmful error. Harmful error is defined as an error with "such a magnitude that in its absence, the employee would not have been released from his or her [employment]."[11] Here, it can be reasonably assumed that if Employee was informed of his Union rights as stated in the CBA, he would not have provided Mr. Copeland with the information Agency used as justification for his termination. However, the backdated and inaccurate Unusual Incident Report and/or Restraint Form submitted by Employee, standing alone, constitutes sufficient cause for Agency to discipline Employee for this charge. I therefore find that, as a whole, Agency's violation of Employee's CBA rights although severe, does not constitute harmful error in this case, because it is highly probable that the inaccurate information Employee provided in the documents alone would have been sufficient cause for Agency to discipline Employee.

Penalty Within Range Allowed by Law, Regulation, or Applicable Table of Penalties

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[12] According to the Court in

[10] Reply to Agency's Closing Argument at pg. 10 (August 22, 2012).
[11] DPM 2405.7, 47 D.C. Reg. 2430 (2000).
[12] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and*

Stokes, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that because Agency has not met its burden of proof for [a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Incompetence, Agency can only rely on the following charge in disciplining Employee:

> 1) Any knowing or negligent material misrepresentation on other document given to a government agency (falsified and backdated a Restraint Form and Incident Report).

In reviewing the Agency's decision to terminate Employee, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the District Personnel Manual ("DPM") outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for violating [a]ny knowing or negligent material misrepresentation on other document given to a government agency is found in § 1619.1(4) of the DPM. Agency maintains that Employee's conduct of backdating and falsifying the reports was an intentional act. However, Employee argues that, because he did not receive any financial benefit from filling out the reports, it was not intentional. The penalty range for any cause of action under § 1619.1(4) is a five (5) days to a fifteen (15) days suspension for a first offense.[13] The record shows that this was the first time Employee violated 1619.1(4), as such, his penalty for violating either § 1619.1(4)(a) or (b) should be no more than fifteen (15) days suspension. Therefore, I find that, by terminating Employee, Agency abused its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[14] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was not within the range allowed by law. Accordingly, Agency was not within its authority to remove Employee given the Table of Penalties.

Order on Petition for Review (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[13] *See* Agency's Answer at TAB 5, pgs. 14-15 (November 23, 2009).

[14] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

Disparate Treatment

Employee also asserts that the penalty of termination in this case is not progressive. Adams testified during the Evidentiary Hearing that he received three (3) days suspension for his failure to submit a timely Unusual Incident Report in the May 16, 2008, incident that led to Employee's termination. This raises the issue of disparate treatment. OEA has held that, to establish disparate treatment, an employee must show that he worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period.[15] Additionally, "in order to prove disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[16]

The penalty for violating [a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty is found in § 1619.1(6)(c) and Incompetence is found in § 1619.1(6)(e). In 2009, when Employee was terminated, the TAP recommended penalty for a first time offense under these sections were reprimand to removal for Neglect of duty and reprimand to ten (10) days suspension for Incompetence. A failure to timely file an Unusual Incident Report falls under DPM 1619(6)(c) and 1619.(6)(e), and because removal is within the range allowed under DPM 1619.(6)(c), an agency is justified in terminating an employee for this cause of action, as long as it does not abuse its discretion.

However, Adams testified that he received a suspension of three (3) days after being charged for the same offense as Employee. After a careful review of the record, it appears that Adams and Employee held the same official position titled;[17] they were involved in the same incident; they were both investigated by the same Project HANDS investigator, Mr. Copeland; they were disciplined for the same cause of action (failure to submit a timely Unusual Incident Report which was substantiated by the same Project HANDS investigative report) for the May 16, 2008, incident that involved resident A.D., by the same administration; and within the general time period following the September 5, 2008, Project HANDS investigative reported submitted by Mr. Copeland. Agency had the opportunity during the Evidentiary Hearing and in its Closing Argument to provide evidence to rebut the appearance of disparate treatment, however, Agency failed to provide any such evidence. Agency could have provided information to discount the fact that Adams, or the other employees who were investigated in relation to the May 16, 2008, incident involving resident A.D. and the use of restraints, and who received a lesser penalty were not similarly situated as Employee. As such, Employee, Adams and/or the

[15] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[16] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).
[17] Copeland testified that he is familiar with the Lead Youth Development Specialist position title; however, the title is only used depending on who you talk to. He explained that, someone in the higher ups around Agency will tell you there's no such thing as Lead.

other employees who participated in this incident should have received the same penalty for this offense, unless there were specific mitigating factors to the contrary.

The selection of an appropriate penalty must involve a balancing of the relevant factors in the individual case. Here, Employee has provided enough evidence to at least raise the question of whether he received the same treatment as similarly situated employees. It is uncontested by the parties that the events relating to Adams' suspension and Employee's termination result from the same incident. Moreover, they worked in the same organizational unit and they were disciplined by the same administration following the findings in Project HANDS' investigative report. Although the issue of disparate treatment is now irrelevant in this case since Employee's violation of [a]ny on-duty act or employment-related act or omission that interfered with the efficiency and integrity of government operations: Neglect of Duty and Incompetence is now moot, I find that Agency engaged in disparate treatment in this matter. Employee was similarly situated with Adams at the time of his termination and the penalty Agency imposed against Adams was three (3) days suspension, and consequently, Employee should have received the same penalty for the same cause of action.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[18] Employee argues that, by removing him, Agency abused its discretion. The evidence does establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee. The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

[18] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

In this case, the penalty for a first time offense for specification one ranges from reprimand up to removal, and the penalty for a first time offense for specification two ranges from a five (5) up to a fifteen (15) days suspension. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency gave credence to the nature and seriousness of the offense; Employee's type of employment; the erosion of supervisory confidence; notoriety of the offense on the reputation of the Agency; Employee's past disciplinary record and his past work record; and mitigating and aggravating circumstances. However, because Agency engaged in disparate treatment, I find that it abused its discretion and its action of removing Employee from service should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse him all back-pay, benefits lost as a result of his removal and attorney's fees; and
3. Employee is suspended for fifteen (15) days for falsifying and backdating the Unusual Incident Report and the Use of Restraint Form; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Administrative Judge