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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
SHELBY FORD Employee	OEA Matter No. 1601-0066-13
v.	Date of Issuance: January 12, 2016
DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES Agency	Lois Hochhauser, Esq. Administrative Judge

Harry Spikes, Esq., Employee Representative
Sonia Weil, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Shelby Ford, Employee, filed a petition with the Office of Employee Appeals (OEA) on March 21, 2013, appealing the final decision of the District of Columbia Department of Youth Rehabilitation Services, Agency, to terminate her from her employment as a Cook Leader, effective March 8, 2013.

The matter was assigned to this Administrative Judge (AJ) on March 24, 2014. The prehearing conference (PHC), scheduled for April 29, 2014, was continued after the parties agreed to mediation. On or about August 2, 2014, the AJ was notified that mediation had not been successful. She issued an Order on August 5, 2014, scheduling another PHC for September 23, 2014. The PHC was thereafter continued several times at the unopposed request of one or the other party. It took place on February 9, 2015 and an Order memorializing the matters resolved at the PHC and scheduling the hearing was issued on February 10, 2015.

The evidentiary hearing took place on March 18, 2015. At the proceeding, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence.[1] Following the submission of closing briefs,[2] the record closed on June 30, 2015.

[1]At the proceeding, witnesses were sworn and the hearing was transcribed. The transcript is cited as "Tr" followed by the page number. Exhibits are identified as "A" (Agency) or "E" (Employee) followed by the exhibit number. Gladys Smith-McPherson was present as an observer throughout the proceedings.

JURISDICTION

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

ISSUES

Did Agency meet its burden of proof in this matter? Is there any basis to disturb the penalty imposed by Agency?

FINDINGS OF UNDISPUTED FACTS, POSITIONS OF THE PARTIES, AND SUMMARY OF THE EVIDENCE

Findings of Undisputed Facts

1. Employee, was removed from her position with Agency as a Cook Leader, effective March 8, 2013. At the time of her removal, she was in permanent and career status, and had been in this position for approximately six years.

2. During the relevant time period, Jerome Johnson, was Employee's supervisor. Mr. Johnson had been employed at Agency for about 17 years. Shuree Curtis, had been employed with Agency as a Cook for about four years in March 2013. During the relevant time period, Employee and Ms. Curtis worked the same shift and Employee served as Lead Cook. Both Employee and Ms. Curtis were supervised by Mr. Johnson. (Tr, 112).

3. On November 15, 2012, Agency issued the advance written notice of proposed removal, in which it detailed the reasons for its decision:

> On August 22, 2012, at approximately 12:25 p.m., you reported to a meeting with your supervisor, Mr. Jerome Johnson, and Ms. Shuree Curtis, a cook at the Youth Services Center (YSC) facility, during which you discussed allegations of workplace deficiencies by Ms. Curtis that you had reported to Mr. Johnson. When Mr. [Johnson] asked you to substantiate the claims you made about Ms. Curtis, you denied that you told Mr. Johnson that Ms. Curtis had failed to properly perform her duties. However, cook Kenneth Hines corroborated that you made the claimed allegations against Ms. Curtis to Mr. Johnson. When confronted with the inconsistencies in statements you made about the quality of Ms. Curtis's work-performance, you became agitated and left the meeting. When Ms. Curtis left the meeting, you verbally attacked her, calling her a profane name, and physically assaulted her by putting your hands on her neck in a threatening manner. There

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[2] Submission of closing briefs was delayed to give the parties the opportunity to respond to Orders issued on April 9, 2015, April 13, 2015 and April 29, 2015. It is also noted that Agency captioned its closing brief as "Agency's Proposed Initial Decision" although the April 29, 2015 Order specifically ordered that closing briefs be filed. Agency's submission was considered a closing brief.

were witnesses to both your argument with and unprofessional behavior towards Ms. Curtis. Upon investigation of the incident, the Office of Internal Integrity substantiated the referral that you violated the employee conduct policy.

Cause 1: On-Duty or Employment-Related Act or Omission That an Employee Knew or Should Reasonably Have Known Is a Violation of Law and which constitutes a Criminal Offense

District personnel regulations define acts that an employee knew or should reasonably have known is a violation of law, in part, as engaging in activities that have criminal penalties. While on duty and on the YSC premises, you placed your hands on Ms. Curtis' throat and pushed her. Your conduct fits squarely within the category of physical assault and is clearly in violation of the law.

Cause 2: Any On-Duty or Employment-Related Act or Omission That Interferes With the Efficiency and Integrity of Government Operations

District personnel regulations define misfeasance, in part, as providing misleading, or inaccurate information to your superiors. You provided inaccurate or misleading information to your superiors and were dishonest in your actions when you falsely informed Mr. Johnson that Ms. Curtis had engaged in a negative workplace practice. When later questioned about your statements regarding Ms. Curtis, you stated that you had not leveled any allegations against Ms. Curtis, despite corroboration from both Mr. Johnson and Mr. Hines that you had informed Mr. Johnson of Ms. Curtis' supposed improprieties.

Cause 3: On-Duty or Employment-Related Reason for Corrective or Adverse Action That is Not Arbitrary or Capricious

District personnel regulations provide for corrective or adverse action for matters that are not "*de minimis*" or arbitrary or capricious. Coupled with your physical assaultive actions was your use of profane language towards Ms. Curtis; this was both abusive and offensive. Your actions, which were witnessed by a number of other employees, have severely impeded DYRS efficiency and economy. Your behavior was unethical and unprofessional and was a departure from the standard of conduct expected of a DYRS employee and a District government employee.

4. On March 1, 2013, Agency issued Employee its notice of final decision, stated that her termination would take effect on March 8, 2013. (Ex A-1, Tab 2). The notice stated

that the action was being taken in accordance with Section 1608 of the D.C. Personnel Regulations, based on the following causes:

> Cause (1): Any on-duty employment-related act or omission that an employee knew or should reasonably have known is a violation of law, specifically; assault and/or battery and fighting on duty;
>
> Cause (2): Any on-duty employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: misfeasance (providing misleading or inaccurate information to superiors and dishonesty); and
>
> Cause (3): Any on-duty on employment related reason for corrective or adverse action that is not arbitrary or capricious, specifically: the use of abusive or offensive language.

Positions of the Parties and Summary of Evidence

Agency's position is that Employee engaged in the charged unprovoked misconduct and that termination of employment was the appropriate penalty.

Jerome Johnson testified that on or about August 20, 2012, when he asked Employee if she knew who left peas in the drain a few days before, she said Ms. Curtis was responsible. (Tr, 85). He said that since Ms. Curtis was not at work at the time, he waited until she returned to work on August 22 to discuss the matter. He testified that on August 22, while meeting with Ms. Curtis and Employee in his office about the matter, Employee denied that she had previously told him that Ms. Curtis had left the peas in the drain. (Tr, 86). The witness stated that Employee "got upset" when he was "trying to get the truth out" and that the "conversation just got loud." He said Employee left his office, followed by Ms. Curtis, and that the two continued to argue. He testified that he heard Employee call Ms. Curtis "a stupid bitch" as she exited his office. (Tr, 87, 112, 115). Mr. Johnson testified that he was telephoning his supervisor to report the incident, when he heard Ms. Curtis say, "Oh, you put your hands on me. You touched me." (Tr, 88). He stated that by the time he finished the call, Employee had left the area. He said that he then was advised that Employee had gone to the "intake" unit. He said that he contacted the unit and was told that she had gone to her car. (Tr, 89). Mr. Johnson stated that he went to her car, and told her to go home. (Tr, 90). He stated that he then found Ms. Curtis crying. She told him that Employee "put her hands on her and choked her." (Tr, 91). He said when he later asked Employee to explain what happened, she said that Ms. Curtis had spit on her. (Tr, 95).

Shuree Curtis testified that on August 22, at a meeting in Mr. Johnson's office, Mr. Johnson told her that Employee had accused her of "throwing vegetables" down the drain. (Tr, 124). She said that as she and Employee were leaving the office, Employee called her a "stupid [bitch]." (*Id*). She said that the two continued to "exchange words." She said that she became upset, and received permission from Mr. Johnson to go to her car. Ms. Curtis testified that Employee followed her,

antagonizing her, and deliberately brushing up against her. She said she tried to get away from Employee, telling her that she was going to tell Mr. Johnson. She testified that Employee then grabbed her by the neck and started choking her. (Tr, 126). She said Employee squeezed her neck hard, frightening her and making her feel "helpless." Ms. Curtis said that she did not know what to do, so she did not respond. She stated that she was "very nervous" after the incident. (Tr, 127- 128). She said that she did not go for medical treatment and did not photograph the bruises. (Tr, 136).

Ms. Curtis said that she did not recall swearing or using offensive language during the incident. (Tr, 130-131).[3] She testified that she did not spit on, threaten or provoke Employee. (Tr, 156, 160). She said she could not estimate how close the two were, because Employee kept "leaning in and trying to hit" her, so she kept moving to avoid Employee. (Tr, 159).

Kenod Hines, a Cook at Agency for about eight years, stated he had worked with Employee more than three years at the time of the incident. (Tr, 181). He said that on August 22, he was washing dishes outside of Mr. Johnson's office, while Employee and Ms. Curtis met with Mr. Johnson in the office. He said that he saw Employee leave the office, followed by Ms. Curtis. He stated that he did not see Ms. Curtis trying to get around Mr. Johnson to get to Employee. (Tr, 190). The witness stated that while he was near Ms. Curtis and Employee, he both saw and heard Employee call Ms. Curtis "a stupid bitch." (Tr, 182, 188, 196-97). He said that he could not hear everything that the two were saying because the water was running while he was washing the dishes, but that he was certain that Employee and not Ms. Curtis uttered the words, explaining he was familiar with their voices. (Tr, 189, 191). Mr. Hines said that he did not see an altercation, but afterwards saw that Ms. Curtis's neck "was sort of…red." (Tr, 186).

Mr. Hines stated that prior to August 22, Mr. Johnson had asked him how the peas had gotten in the sink, and he told him that he did not know. He testified that he heard Employee tell Mr. Johnson that Ms. Curtis had cooked the peas and left them in the sink. (Tr, 194). He said that on August 22, Mr. Johnson called him into the office after Employee denied making the statement, and that he confirmed that she had earlier made the statement about Ms. Curtis. (Tr, 195).

Angie Gomez has been employed as a Cook with Agency for more than seven years at the time of the incident, and was working with Employee at the relevant time period. She said that on August 22, she was washing dishes while Employee and Ms. Curtis met with Mr. Johnson in his office, and that she heard Employee call Ms. Curtis a "stupid bitch." (Tr. 204). Ms. Gomez testified that although the water makes a lot of noise, she was certain that it was Employee who was speaking, noting that they were near the sink where she was working at the time, and that she familiar with their voices. (Tr, 206, 210-11, 214).

The witness testified that she did not see a physical altercation, but heard Ms. Curtis say "Don't put your hands on me." (Tr, 206). She said that she knew it was Ms. Curtis speaking

[3] Since Employee alleged the existence of a hostile work environment, the AJ should have permitted Ms. Weil to question Ms. Curtis regarding the work environment at the time. However, this oversight, if it was one, was *de minimis* since the focus of Ms. Curtis's testimony was on the improved work environment following Employee's removal. (Tr, 134).

because she recognized her voice. (Tr, 214). She said that Employee then left the kitchen area and that Ms. Curtis was crying. Ms. Gomez stated that Mr. Hines then told her to look at Ms. Curtis's neck, and when she did, she saw fingerprints on her neck. (Tr, 205). She said Ms. Curtis did not tell her what had happened. *(Id).*

Stephen Luteran, Agency Deputy Director of Programs and Services, was the Deciding Official. He testified that before reaching a decision, he reviewed the advanced written notice, the internal investigation report, Employee's submissions, and Agency's policies, procedures and code of conduct for employees. (Tr, 37-39). He stated that Agency's policies procedures and code of conduct prohibit employees from using the language that Employee was charged with using. (Tr, 39; Ex A-1, T3). He stated that based on its investigation, Agency's Office of Internal Integrity concluded that Employee "used verbally abusive language ['stupid bitch'] toward, and physically assaulted ['purposely bumped and pushed']" Ms. Curtis. (Tr, 41, Ex A-1, T3).

Mr. Luteran was uncertain if he had reviewed the hearing officer's report (HOR) which had concluded that there was insufficient evidence to establish that that Employee had assaulted Ms. Curtis. (Tr, 44, Ex E-1). He noted that Agency is not required to accept the recommendations, and that the investigative report was completed closer to the date the events took place. (Tr, 73-74). After reviewing the HOR, he stated that even if he had reviewed it earlier, it would not have changed his decision, asserting that he was aware of the concerns raised in the HOR, including the fact that there was no witness to the charged assault. (Tr, 48-49). He testified that although no one saw a physical altercation, witnesses stated that they heard Ms. Curtis say "get your hands off me" and soon thereafter saw red marks on her neck. (Tr, 59).

Mr. Luteran stated that it would have been "good supervision practice" if Mr. Johnson had handled the matter of the peas in the sink differently, but that Agency's focus in the disciplinary matter was the "name calling." The witness stated that even if the assault charge was not upheld, he would still have removed Employee based only on the use of inappropriate language. (Tr, 61). Mr. Luteran testified that Agency has removed other employees, including managers, solely for using "inappropriate language," even when a first offense, and even when the employee had been with Agency for many years with an unblemished record. (Tr, 56-57, 60). He explained that employees working with the youth population at the facility must "have higher sets of standards." (Tr, 75-78).

> [I]n terms of expectations, especially when you look at what we do. We work with juvenile offenders and role modeling is critical to the work that we do. (Tr, 77).

The witness stated that it was irrelevant who initiated the argument. (Tr, 76). He testified that after reviewing the documents, he did not find that Ms. Curtis was the aggressor or that Agency treated Employee differently, asserting that if Ms. Curtis had engaged in misconduct, Agency would have initiated charges. (Tr, 72).

Employee's position is that she did not engage in any of the charged misconduct. She contends that Ms. Curtis was the aggressor. Employee maintains that she was the victim of disparate treatment and a hostile work environment. (Tr , 19, 25).

Employee testified that Mr. Johnson asked her who left the peas in the sink several weeks before August 22. She said that she told him that since Ms. Curtis had served the peas that evening, and since the peas had a lot of water, it was likely that peas fell into the drain when Ms. Curtis drained the peas. She said they were unaware that the peas had fallen into the drain because they had not checked the drain that evening. (Tr, 171).

Employee testified that on August 22, Mr. Johnson spoke with Ms. Curtis in his office for about 20 minutes before calling her in; and that when he finally asked her to join them, he did not give her a chance to speak, but kept accusing her of lying. (Tr, 168-169). She said that she became upset because Ms. Curtis and Mr. Hines also accused her of lying. She stated that it was not her intention to blame Ms. Curtis, but rather she was reasoning how the peas had gotten in the sink...

Employee stated that because she was so upset about the accusations, she started to leave Mr. Johnson's office, telling him it was "stupid" for him to bring up the incident with the peas, which had taken place weeks earlier. (Tr, 165). She said that Ms. Curtis "pursued" her and started an argument that was so "intense" and "violent" that Mr. Johnson had to intervene. She testified that Ms. Curtis told her that her son was going to attack her. She said that Ms. Curtis asked her if she had called her a" stupid bitch," and when she did not respond, Ms. Curtis called her a "stupid bitch." (Tr, 165). She testified that she responded that Ms. Curtis was one also and then continued to work.

Employee testified that Ms. Curtis "kept on fussing." She said Mr. Johnson then came out of his office and told them to return to his office:

> We still arguing. We go back to his office door. He got in the middle of us. [Ms. Curtis was] screaming and hollering, spitting. Spit coming out of her mouth…I never put my hands on her, period. (Tr, 166).

In response to the question on cross-examination if she thought Ms. Curtis deliberately spit on her, Employee stated:

> I don't guess she was intentionally doing it. When you're sometimes talking, you're yelling…Spit was emerging out of her mouth. So to block it from getting in my face, I just put my hand up… (Tr, 170).

Employee asserted she did not put her hands around Ms. Curtis's neck, and did not choke her. (Tr, 165).

Analysis, Findings and Conclusions

This Office has jurisdiction to hear this appeal pursuant to Section 101(d) of The Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. D.C. Official Code § 1-616.51 (2001) (Code) states that the Mayor shall "issue rules and regulations to establish a

disciplinary system that includes…1) a provision that disciplinary actions may be taken for cause… [and]… 2) A definition of the causes for which a disciplinary action may be taken" for those employees of agencies for whom the Mayor is the personnel authority. Agency is under the Mayor's personnel authority. The charges constitute "causes" for which employees can be disciplined. *See*, Section 1603.3, 46 D.C. Reg. 7096.

Agency carries the burden of proving each of the charges. This burden must be met by a "preponderance of the evidence" which is defined in OEA Rule 628.2 as "[t]hat 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."

At the proceeding, the AJ dismissed Cause 2, concluding that Agency had not met its burden of proof that Employee has engaged in "misfeasance" by providing "misleading or inaccurate information" to Mr. Johnson and "dishonesty" thereby interfering with the "efficiency and integrity of government operations." Agency contended Employee lied to Mr. Johnson at the August 22 meeting when she denied that she initially told him that Ms. Curtis was responsible for leaving the peas in the sink. In order for that charge to be sustained, Agency had to establish, by a preponderance of evidence, that Employee made the accusation against Ms. Curtis and later denied it; that the statement interfered with the "efficiency and integrity of government operations," and that Employee's conduct constituted misfeasance. (*Infra*, 2). Assuming, *arguendo*, that Employee had initially accused Ms. Curtis of leaving the peas, and then denied it at the meeting, Agency did not establish by a preponderance of evidence that this conduct interfered with the integrity or efficiency of Agency's operations. The events took place over a short period of time, and as testified by Agency witnesses, co-workers continued to do their work during that time.

The AJ also concluded that Agency also failed to meet its burden that the conduct, even if true, constituted misfeasance, *i.e.*, that Employee intended to provide misleading or inaccurate information to Mr. Johnson and that her actions constituted dishonesty. Misfeasance is defined in Black's Law Dictionary (5th Ed. 1979) as the "improper performance of some act which [an employee] may lawfully do." According to Employee, she responded to Mr. Johnson's initial inquiry by stating that Ms. Curtis was in charge of the peas that evening, and that in draining the excess water, some peas must have spilled into the drain. According to Employee, her intention was to provide a reasonable explanation, not to make an accusation. Therefore, she was understandably upset when Mr. Johnson characterized it as an accusation; and accused her of lying when she denied making an accusation. The AJ found that Employee's statement that she was providing an explanation and not making an accusation to be reasonable. As she stated, she reasoned that since Ms. Curtis was in charge of the peas that evening, and since there was a lot of water in the pot with the peas, and since Ms. Curtis was responsible for draining the water from the pots, she would likely have been responsible for the peas that fell in the sink. Mr. Johnson testified that Employee accused Ms. Curtis of the action, but he did not state if there was more content to Employee's statement.

In addition, Agency did not establish that even if Employee initially accused Ms. Curtis and then denied making the accusation, this conduct would constitute "dishonesty." Dishonesty is

defined in Black's Law Dictionary (5th Ed. 1979) as "[d]isposition to lie, cheat or defraud; untrustworthiness; lack of integrity." Agency did not meet its burden of proof that even if the accusation and subsequent denial were made, that one could reasonably conclude that Employee was disposed to "lie, cheat, or defraud," or that she was untrustworthy and lacked integrity. The testimony by Mr. Johnson and Mr. Hines about what Employee initially stated, did not contradict Employee's testimony because neither offered testimony regarding the entire conversation. Their statements are not untrue since Employee stated she thought it was reasonable that Ms. Curtis was responsible for leaving the peas in the sink since she was responsible for the peas. It was a question of interpretation, and the AJ concluded that Agency did not meet its burden that its interpretation of Employee's words was correct and constituted dishonesty or lack of integrity.

The two remaining charges pertain to the use of offensive language and the physical assault. The only eyewitnesses to both events were Employee and Ms. Curtis, and they presented contradictory versions. Credibility determinations were required. Indeed, as Employee stated in her closing brief, "[t]his matter will rise or fall on the issue of credibility." (Employee Brief, 1).

The District of Columbia Court of Appeals has emphasized the importance of credibility determinations by the individual, in this case the Administrative Judge, who can make "first hand" observations. *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). This A J has about 30 years of experience, as an Administrative Judge and Arbitrator, in making credibility assessments. In resolving issues of credibility, she carefully assessed the witness's demeanor and character, the inherent probability of the witness's version, inconsistent statements made by the witness, and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). In assessing demeanor, she considered, among other factors, the witness's tone of voice, posture, eye contact, and behavior while testifying. It is imperative that these assessments be made while the witness is testifying, because these factors cannot be ascertained from a review of the transcript. . *See, e.g., Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 496 (1951)

Upon review of these criteria, the AJ concluded that Ms. Curtis was more credible than Employee.[4] Ms. Curtis's recitation of the events was clear and consistent. She spoke calmly but with emotion when recalling the events. She maintained eye contact with the AJ and counsel. On the other hand, Employee did not maintain eye contact. She became increasingly defensive and accusatory during her testimony. Her responses appeared more self-serving than responsive. In making these determinations, the AJ considered that Employee had more at stake than Ms. Curtis, and that the stress of the removal and hearing could cause some of these actions. She notes that Employee, when asked to reexamine her allegations that Ms. Curtis spit at her, did reassess her position and take a less accusatory approach, conceding that she did not think the spitting was intentional. (Tr, 166).

[4] The AJ notes that even if parts of a witness's testimony is discredited; other parts can be accepted as true. *DeSarno, et al., v. Department of Commerce,* 761 F.2d 657, 661 (Fed. Cir.1985). Therefore, it is reasonable that Employee's testimony on Charge 2 was found more credible than the other witnesses, while her testimony on the other two charges were found to less credible.

Employee's testimony also supports the conclusion that she may have lost control early in the August 22 incident. This loss of control could impact on her ability to describe the events accurately. Employee testified that she became increasingly angry and frustrated about Mr. Johnson's accusations that she was lying. She testified that she told Mr. Johnson that it was "stupid" for him to bring up the matter of the peas weeks after it happened. Although there was not a charge related to this statement, it is not appropriate language to use in the workplace, and especially to a supervisor. It evidences a loss of control and a lack of judgement.

The AJ found both Mr. Hines and Ms. Gomez, both of whom supported Ms. Curtis's rendition of the events, to be credible witnesses. Neither had a vested interest in the outcome, and both gave direct and factual testimony. They both stated that they did not hear everything because of the noise caused by the running water. They both stated that they did not see any physical confrontation. However, each witness stated that he or she was in close proximity to the participants when "stupid bitch" was said. They both testified that Employee said "stupid bitch," not Ms. Curtis, each explaining they were familiar with both individuals and could distinguish their voices.[5] According to the evidence, the exchange between the two was loud, and it is not unreasonable that the witnesses could hear the words and recognize the voice that said the words. In addition, Mr. Hines testified that he also saw Employee when she was calling Ms. Curtis a "stupid bitch."

The testimony of Mr. Hines and Ms. Gomez also supports Agency's position regarding the physical confrontation. Employee stated that she never touched Ms. Curtis, but only raised her hand to avoid Ms. Curtis's spit. However, raising her hand to avert the spit would not leave red marks on Ms. Curtis's neck. Although neither Mr. Hines nor Ms. Gomez saw any physical contact, both testified that they saw the red fingerprints or bruising on Ms. Curtis's neck after Employee left the area. Further, Ms. Gomez stated she had heard Ms. Curtis earlier tell someone not to touch her. Since the interaction involved only Employee and Ms. Curtis, it is reasonable to conclude that Ms. Curtis was speaking to Employee. It is also reasonable to conclude that the red bruises and fingerprints on Ms. Curtis's neck were left by Employee since there was no allegation of a third person being present or that Ms. Curtis bruised herself. Ms. Gomez stated that when she when she saw the bruises on Ms. Curtis's neck, Ms. Curtis was crying. This supports Ms. Curtis's testimony of being frightened and feeling helpful during the assault. In sum, on each of the disputed facts related to the use of the charged language and the physical assault, the AJ found Agency witnesses to be more credible that Employee. The AJ considered that there was a lack of direct evidence, but points out that circumstantial evidence is often relied upon to draw inferences and factual conclusions. She concludes that Agency met its burden of proof that Employee used the language and engaged in the conduct with which she was charged.

Having concluded that Agency met its burden that Employee placed her hands around Ms. Curtis's neck which resulted in the bruising, the AJ must determine these actions constitute misconduct. She finds that, Employee engage in this conduct while on-duty and in the work place. Agency described the conduct as "squarely within the category of physical assault and is clearly in violation of the law." (Tr, 3). Assault is defined as a criminal offense in the District of Columbia,

[5] At the hearing, the AJ could easily distinguish between the voices of Ms. Curtis and Employee.

punishable by imprisonment and/or a fine. *See* D.C. Official Code § 22-404(a)(1).[6] However, the Code does not provide the elements necessary to establish assault. Those elements are established through case law. For example, in *Stroman v. United States,* 878 A.2d 1241, 1244-45 (D.C. 2005), the Court listed the elements needed to a simple assault:

> In a prosecution for simple assault, the government must prove, beyond a reasonable doubt, that the defendant made: (1) an attempt, with force or violence, to injure another; (2) [with] the apparent present ability to effect the injury; and (3) with the intent to do the act, constituting the assault. Assault requires general intent, which may be inferred from doing the act that constituted the assault.

In this matter, the AJ concludes that Agency met its burden of proof on each element, *i.e.*, that Employee attempted to injure Ms. Curtis, that Employee had the ability to do so, and that Employee intended to do so. Assault is a crime of general intent, *i.e.*, the intention of the aggressor may be inferred from the conduct. Employee knew or should have known that this conduct was impermissible.

Agency has the primary responsibility for managing its employees. This responsibility includes the imposition of appropriate discipline. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994). This Office limits its review of a penalty to determining if "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia,* 502 A.2d 1006, 1010 (D.C. 1985). An Administrative Judge cannot substitute his or her judgment for that of Agency regarding a penalty provided the penalty is "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment". *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985).

In this matter, since one charge was not sustained, a determination must be made if the penalty must be reduced. In such cases, the matter can be remanded to Agency to reassess the penalty in view of the reduced charges. The AJ considered this option, and determined it to be unnecessary. Mr. Luteran, the Deciding Official, testified that he would have removed Employee even if only Charge 3 was sustained. He stated that he had terminated other employees where the only charge was the use of "inappropriate language with another person." He added that this was true even if the employee was a manager, even if it was a first offense, and even if the employee had been with Agency more a long time and had an unblemished record. Thus Agency's position that it

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[6] Section 22-404(a)(1) states:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both. (2) Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both. For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention.

would remove Employee if only the only regarding the use of inappropriate language was sustained, makes it unnecessary to remand the matter to Agency to reassess the penalty.

The D.C. Court of Appeals has consistently relied on the Table of Penalties outlined in the District Personnel Manual (DPM) Section 1619 when determining the appropriateness of a penalty. *See, e.g., District of Public Works v. Colbert*, 874 A.2d 353 (DC 2005), and *Brown v. Watts*, 993 A.2d 529 (2010). DPM Section 1619.1(6)(h) lists the range of penalties for the charge of "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction." The penalty for a first offense ranges from a ten day suspension to removal. Therefore, Agency could properly remove Employee based solely on the assault charge.

Agency must weigh relevant factors in determining the penalty. The factors were first listed in *Douglas v. Veteran's Administration*, 5 MSPR 208 (1981), and are commonly referred to as the" *Douglas* Factors." All factors need not be considered. Mr. Luteran did not refer to the *Douglas* Factors during his testimony, but he did consider some of the factors when describing how he reached his decision to remove Employee. He stated that Agency considered the nature and seriousness of the offense, that Employee was on notice that such conduct was prohibited since it is contained in its code of conduct, that the penalty was consistent with the penalty imposed on others who engaged in similar misconduct, and that the misconduct related to the role of employees at the facility since it is responsible for at-risk youth. He stated that Agency concluded that these considerations outweighed the fact that this was Employee's first offense, that she had longevity at Agency, and that there were alternative sanctions. The AJ concludes that Agency established that it did not act arbitrarily or abuse its discretion in determining the penalty.

Employee raises several arguments that must be addressed since they may impact on the penalty. First, she argues that Agency engaged in disparate treatment, contending that she was treated differently than Ms. Curtis and Mr. Johnson. Employee claims that no action was taken against Ms. Curtis or Mr. Johnson. She further maintains that Mr. Johnson provided counseling to Ms. Curtis that day, but did not offer any to Employee.

This Office will review the appropriateness of a penalty when there is a claim of disparate treatment in order to ensure that employees receive "fair and equitable treatment" where "genuinely similar cases" are presented. *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C.Reg. 2915 (1985). For a claim of disparate treatment to be addressed, Employee must first make a *prima facie* showing that she was treated differently than other similarly-situated employees. The burden then shifts to Agency to show the legitimacy of its differing actions. If the agency cannot meet this burden, the penalty will be reduced. *Baker v. D.C. General Hospital*, OEA Matter No. 1601-0081-90 (May 5, 1992).

Employee did not make this *prima facie* showing with regard to Mr. Johnson. She did not establish that they were similarly-situated either in terms of employment status or alleged misconduct. Unlike Employee, Mr. Johnson was in a supervisory position. Employee did not allege that Mr. Johnson used unacceptable language or engaged in physical contact. With regard to Ms. Curtis, the charge of disparate treatment fails because Agency determined that Ms. Curtis did

not engaged in the conduct that resulted in Employee's removal. Therefore, Agency did not charge Ms. Curtis with misconduct.

To the extent that Employee may be arguing that the basis for the claim of disparate treatment is that both Mr. Johnson and Ms. Curtis should have been charged with misconduct, the AJ has determined that with regard to Mr. Johnson, the two are not similarly-situated. In addition, his alleged "misconduct," if any, relates to how he handled the "peas in the drain" situation. While the AJ does not agree with how he handled the matter, she does not agree with Employee that his conduct merited adverse action. With regard to Ms. Curtis, Agency determined that she did not engage in misconduct, therefore it could not impose any penalty

Employee's second contention is that she worked in a hostile work environment. The phrase "hostile work environment" is largely associated with allegations of violations of claims of prohibited discrimination. In *Harris v. Forklift Systems*, 510 U.S. 17 (1993), the U.S. Supreme Court described a hostile work environment as a "workplace permeated with discriminatory intimidation, ridicule and insult...that is sufficiently severe or pervasive to ...create an abusive working environment." Employee did not testify with specificity as to why she considered the work environment to be hostile. She did not present evidence that the "workplace was permeated with discriminatory intimidation, ridicule and insult." The only allegations that that Employee made that could arguably fit in this category were that Mr. Johnson counseled Ms. Curtis, but did not counsel her; that witnesses supported Agency's position, and that Agency charged her and not Ms. Curtis, with wrongdoing. The AJ concludes that Employee did not establish the veracity of any of these allegations. Assuming, *arguendo*, that she did prove the allegations were accurate, she did not establish that the work environment was "sufficiently severe or pervasive" with "intimidation, ridicule and insult."

In sum, based on a careful review of the testimonial and documentary evidence and on the findings and conclusions as discussed herein, the Administrative Judge concludes that Agency met its burden of proof in this matter and that the petition for appeal should be dismissed.

ORDER

It is hereby

ORDERED: Agency decision to remove Employee is sustained; and Employee's petition for appeal is dismissed.

FOR THE OFFICE:

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Lois Hochhauser, Esq.
Administrative Judge