THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JONATHON LITTLE,	)	
Employee	)	OEA Matter No. 1601-0023-20
	)	
v.	)	Date of Issuance: August 6, 2020
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION,	)	MONICA DOHNJI, Esq. Senior Administrative Judge
Agency	)	
	)	

Jonathon Little, Employee, *Pro Se*
Stephen Milak, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

On December 31, 2019, Jonathon Little ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Parks and Recreation's ("DPR" or "Agency") decision to terminate him from his position as a Recreation Specialist, effective December 2, 2019. Employee was terminated for failure or refusal to follow instructions and neglect of duty. Employee was also terminated for violating DPR Policy Nos. 1.101 and 1.113 (Employee Conduct and Dress Code & Uniform Standard Update, respectively). On January 31, 2020, Agency submitted its Motion to Dismiss or in the Alternative Motion for Summary Disposition.[2]

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

[2] This Motion is hereby DENIED, and a decision will be made based on the merit of the case. This Office has historically relied on *Murphy v. A.A. Beiro Construction Co. et al.*, 679 A.2d 1039, 1044 (D.C. 1996), wherein the District of Columbia Court of Appeals held that "decisions on the merits of a case are preferred whenever possible, and where there is any doubt, it should be resolved in favor of trial." *See also*, *Diane Gustus v. Office of Chief Financial Officer,* OEA Matter No. 1601-0025-08, *Opinion and Order on Petition for Review* (December 21, 2009); *Jerelyn Jones v. D.C. Public Schools,* OEA Matter No. 2401-0053-10, *Opinion and Order on Petition for Review* (April 30, 2013); *Cynthia Miller-Carrette v. D.C. Public Schools,* OEA Matter No. 1601-0173-11, *Opinion and Order on Petition for Review* (October 29, 2013); *Carmen Faulkner v. D.C. Public Schools,* OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (March 29, 2016); *Carl Mecca v. Office of the Chief*

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on February 5, 2020. On February 10, 2020, I issued an Order scheduling a Status/Prehearing Conference for February 26, 2020. Both parties were in attendance. The matter was referred to Mediation after the Status/Prehearing Conference. Following a failed attempt at Mediation, the undersigned issued a Post Status/Prehearing Conference Order requiring the parties to submit briefs. Both parties have submitted their respective briefs. Employee also had the option to submit a reply brief on or before June 26, 2020. As of the date of this decision, Employee has not filed a reply brief. Upon further review of the record and considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

1) Whether Agency had cause to discipline Employee for failure or refusal to follow instructions; neglect of duty; and violation of DPR Policies;

2) Whether Agency engaged in disparate treatment; and

3) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions.

BURDEN OF PROOF

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

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

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

Technology Officer, OEA Matter No. 2401-0094-17, *Opinion and Order on Petition for Review* (September 4, 2018); and *Khaled Falah v. Office of the Chief Technology Officer,* OEA Matter No. 2401-0093-17, *Opinion and Order on Petition for Review* (September 4, 2018).

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW[3]

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA.

According to the record, Employee was a Recreation Specialist with Agency. On September 16, 2019, Employee was observed by his supervisor Erik McClain ("McClain") on the pool deck in non-work attire utilizing his cellular device, while still on duty. Mr. McClain took a picture of Employee in his non-work attire. The picture also showed that Employee was on his cellphone while still on duty. Employee was charged with neglect of duty for violating DPR Policy Nos. 1.113 and 1.101. Prior to the September 16, 2019, incident, Employee had signed an Acknowledgment of Uniform Policy.

On September 16, 2019, Employee's supervisor, Mr. McClain directed Employee to attend a staff meeting at 1:00 p.m. Employee did not attend the meeting. He was charged with violation of 16 DPM § 1605.4(d) – Failure/Refusal to Follow Instructions. Following an investigation by DPR's Safety Team Office, on October 29, 2019, Agency issued an Advance Written Notice of Proposed Removal to Employee. The matter was referred to a Hearing Officer and she issued her report on November 21, 2019, upholding Agency's decision to terminate Employee. Subsequently, on November 25, 2019, Agency issued its Final Agency Decision of Proposed Removal – Separation, with a termination effective date of December 2, 2019.

Employee's Position

Employee argues that Agency did not follow progressive discipline policy in terminating him. He explains that he was not near separation prior to the current incident.[4] Employee also argued that Agency engaged in disparate treatment in its decision to terminate him. Employee maintains that he was the only Employee who received the penalty of termination for the causes of action levied against him. Employee asserts that he, along with other employees, typically change their clothes prior to the end of their shifts, especially if they are not in the chair, physically watching the pool or on post in the First Aid Room.[5] Employee further acknowledges that he, along with other employees, use their cellphones on the pool deck, balcony, in the First Aid Room, or at the front desk, although these areas prohibit the use of cellphones while on duty. Employee also acknowledges that the cellphone policy is a zero-tolerance policy and all their cellphones are required to be turned off and stowed in the locker until the end of the shift.[6] Employee admits that he, along with other employees, have been in violation of these policies. However, he argues that he was singled out.[7]

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[3] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").
[4] Employee's Summary Brief (May 13, 2020).
[5] *Id*.
[6] *Id*.
[7] *Id*.

Additionally, Employee asserts that he did not attend the scheduled meeting with his supervisor, McClain, because McClain had disrespected him prior to the meeting. Employee avers that the meeting was a one-on-one and he did not feel safe due to McClain's harassment, temperament and hostility towards him.[8] Employee notes that, exercising his rights to have another manager or his union present at the meeting should not be considered as insubordination.[9] Employee alleges that McClain submitted several false, unlawful and distressing emails and reprimands against him, claiming that he violated Agency's Standard Operating Procedures within a short period of time.[10]

Furthermore, Employee argues that Agency violated the District of Columbia Family Medical Leave Act ("DCFMLA")[11] and the Collective Bargaining Agreement ("CBA") between Agency and his union on several occasions.[12]Specifically, Employee asserts that his *Weingarten*[13] rights were violated when Agency did not have his union representative present for the meeting. Employee also argues that McClain falsified a document stating that his union representative, Barbara Jones, was present for the September 16, 2019, meeting, and that Sally Hensen was a witness to the mandatory meeting on September 16, 2019.[14] Employee states that Agency did not properly acknowledge his disability.

Agency's Position

Agency asserts that it had cause to take adverse action against Employee due to his admitted neglect of duty and failure to follow instructions. Agency also notes that it engaged in progressive discipline as evidenced in Employee's short tenure at Agency with a strong history of needed counseling, reprimands and suspension. Agency avers that all these are incremental steps it took in an effort to correct Employee's behavior. Agency provides that Employee signed the Uniform Policy acknowledging that he received said policy. Agency highlights that it considered both mitigating and aggravating factors in its decision to terminate Employee. Agency asserts that it properly followed the District Personnel Manual ("DPM") and correctly based its action on the relevant factors in its decision to terminate Employee.[15]

In its brief, Agency argues that it followed all applicable statutes and regulations, and honored Employee's Collective Bargaining Agreement ("CBA"). Agency states that Employee's violation of either 16 DPM § 1605.4(d) and/or 16 DPM §1605.4(e) for Failure/Refusal to Follow Instructions and Neglect of Duty, respectively, permit termination as a possible adverse action.[16] Agency notes that Employee's allegations that it violated the CBA (*Weingarten* rights) by

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[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] The undersigned will not address the alleged DCFMLA violation as it is not germane to the current cause of action/issue at hand.
[12] *Id*.
[13] *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (*Weingarten* safeguards a unionized employee's right to union representation when adverse/corrective action is contemplated by either the employee or the agency); *see also Rodriguez v. D.C. Office of Employee Appeals*, 145 A.3d 1005, 1010 (D.C. 2016).
[14] *Id*.
[15] Agency's Motion to Dismiss or in the alternative Motion for Summary Disposition (January 31, 2020).
[16] *Id*.

requiring Employee to meet with his supervisor without a Union Representative present are baseless.[17]Agency explains that employees subject to the applicable CBA are not entitled to union representation before attending meetings with supervisors unless discipline is intended. Agency further explains that the purpose of Employee's meeting with McClain was to have an open discussion about DPR policy and that there is nothing in the record to support the notion that Employee contemplated the meeting with McClain would lead to any form of discipline.[18] Agency concludes that it neither violated Employee's DCFMLA nor his CBA, and followed all applicable laws and regulations in his termination.[19] Agency avers that Employee's guilt was, partially, secured through his own admissions.[20]

Agency notes that it did not engage in disparate treatment. It also notes that it has established a legitimate reason for terminating Employee. It explains that the two most recent charges of misconduct for Neglect of Duty and Failure/Refusal to Follow Instructions, both permit termination as a possible penalty. Agency maintains that these causes of action would amount to a total of five instances of misconduct that necessitated its intervention giving the short one-and-a-half-year period that Employee worked at Agency.[21]

1) Whether Agency had cause to discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency terminated Employee for violating DPM §1605.4(d) – failure or refusal to follow instruction and §1605.4 (e) – neglect of duty. Employee was also charged with violating DPR Policy Nos. 1.101 (Employee Conduct) and 1.113 (Dress Code & Uniform Standard Update).

Whether Agency had cause to discipline Employee for failure or refusal to follow instruction and neglect of duty

Agency charged Employee with failure or refusal to follow instructions, in violation of DPM §1605.4(d)(e). Specifically, Agency asserts that on September 16, 2019, around 1:10 p.m., Employee's supervisor requested that he attend a mandatory staff meeting that was scheduled for 1:00 p.m. but Employee refused to comply. Employee was however, seen by his supervisor and his union representative during this time, sitting on the pool deck in non-work attire, using his cellphone.[22]Agency also stated that Employee violated DPR Policy 1.113 which states that all lifeguards shall dress in lifeguard uniforms consisting of lifeguard bathing suits, shorts, DPR-branded t-shirts, fanny pack with pocket mask, and whistle. Additionally, Agency noted that

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

Employee also violated DPR Policy 1.101. which prohibits the use of cellphones or other electronic devices unrelated to work while on duty.[23]

The DPM provides that failure or refusal to follow instructions and neglect of duty constitutes cause for adverse action.[24] In addition, DPM §1607.2(d) defines failure/refusal to follow instructions to include (1) Negligence, including the careless failure to comply with rules, regulations, *written procedures, or proper supervisory instructions*; (2) *Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions*; (3) Failure to submit required statement of financial interests and outside employment (emphasis added). DPM §1607.2(e) defines neglect of duty to include failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; *careless work habits*; *conducting personal business while on duty*; abandoning an assigned post; sleeping or dozing on-duty, or loafing while on duty(emphasis added)."

In the current matter, Agency argues that Employee was charged with failure/refusal to follow instruction and neglect of duty for violating DPR's uniform and cellular device policy. Agency explains that Employee's union representative, Barbara Jones, informed Agency's SAFE team investigator on September 19, 2019, that she, Barbara Jones, was present on September 16, 2019, and observed Employee sitting on the deck with his street clothes, looking at his phone.[25] Agency further stated that Employee's supervisor McClain also observed Employee's conduct on September 16, 2019. Agency additionally included a picture of Employee taken on September 16, 2019, in support of its claim.[26] Agency contends that Employee signed the Uniform Policy acknowledging that he received said policy.

Employee on the other hand admitted in his brief that he, along with other employees, typically change their clothes prior to the end of their shifts, especially if they were not in the chair, physically watching the pool or on post in the First Aid Room. Employee further acknowledges that he, along with other employees, use their cellphones on the pool deck, balcony, in the First Aid Room, or at the front desk, although these areas prohibit the use of cellphones while on duty. Employee further notes that he is aware that the cellphone policy is a zero-tolerance policy and all their cellphones are required to be turned off and stowed in the locker until the end of the shift. Employee admits that he, along with other employees have been in violation of these policies. However, he argues that he was singled out.

Failure/refusal to follow instruction includes a deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions. Employee admitted to using his cellphone while on-duty, although he was aware that it was a violation of Agency's cellphone and other electronic use policy. Employee acknowledged that Agency had a zero-tolerance cell phone use policy while on-duty. Yet he was photographed using his cellphone while on duty. Employee's conduct is in direct violation of DPR Police No. 1.101.[27] Also, the

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[23] *Id*.
[24] DPM §1605.4(d)(e).
[25] Agency's Brief, *supra*, at pg. 3. *See also* Agency's Exhibit 8.
[26] *Id*. at Exhibit 6.
[27] *Id*. at Exhibit 7.

picture taken by Employee's supervisor portrays Employee sitting on the pool chair prior to the end of his shift in non-work attire.[28] Moreover, Employee also admitted to changing from his pool uniform prior to the end of his shift. Employee does not deny receiving Agency's cellphone and uniform policies. Thus, I find that Agency had cause to take adverse action based on the charge of failure or refusal to follow instructions.

With regards to the scheduled meeting on September 16, 2019, I find that Employee was within his rights to decline to attend the meeting, pursuant to the CBA between Agency and Employee's union. While Agency agrees that Employee is entitled to have union representation pursuant to *Weingarten, supra,* Agency argues that the scheduled meeting on September 16, 2019 was to have an open discussion about Agency policies and that there is nothing in the record to support the notion that Employee contemplated the meeting with Mr. McClain would lead to any form of discipline. I disagree with this assertion. In an email from McClain to Employee dated September 11, 2019, at 8:18:35 a.m., McClain stated that "I setup a meeting for us on Monday, September 16, 2019, at 1:00 pm. This meeting is mandatory. *We will need to issue pending AWOL notifications prior to the timecard approval window* (emphasis added) …."[29] As evidenced above, McClain wanted to discuss the pending (Absent Without Official Leave ("AWOL") notification. Based on the DPM, AWOL is considered an adverse action. So clearly, Agency was contemplating disciplinary action against Employee and as such, I conclude that Employee was within his *Weingarten rights* to refuse to attend the meeting without union representation. Nonetheless, because Employee violated the cellphone and uniform policies, I conclude that Agency can charge Employee for failure/refusal to follow instruction and neglect of duty against Employee.

For the charge of neglect of duty, I find that Employee's use of his personal cellphone and changing into his regular clothes while still on duty can be attributed to careless work habits and conducting personal business while on duty, which are all consistent with a neglect of duty specification pursuant to DPM §1607.2(e). As noted above, Employee admitted to changing into non-work attire and using his cellphone while on duty. Consequently, I find that Agency had cause to institute this cause of action against Employee.

Disparate Treatment.

Employee argued that Agency engaged in disparate treatment in its decision to terminate him. Employee explained that while he was not the only employee who violated the cellphone and uniform policy, he was the only one who received the penalty of termination. He maintains that he was singled out. OEA has held that, to establish disparate treatment, an employee *must* show that he worked in the same organizational unit as the comparison employees (emphasis added). 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 (emphasis added).[30] Further, "in order to prove disparate treatment, [Employee] *must* show that a

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[28] *Id*. at Exhibit 5.
[29] Employee's brief, *supra*, at pg. 44.
[30] *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

similarly situated employee received a different penalty."[31] (Emphasis added). An employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently."[32] If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[33]

Here, Employee simply made a blanket assertion that Agency engaged in disparate treatment. However, he did not offer any evidence in support of this allegation. Therefore, I find that Employee has not established a *prima facie* showing of disparate treatment and as such, I conclude that Employee has failed to prove that he was subjected to disparate treatment. Moreover, I find that Agency has established legitimate reasons for terminating Employee as stated above.

2) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Actions.

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).[34] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; 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 Agency has met its burden of proof for the charges of failure/refusal to follow instructions and neglect of duty. Consequently, I conclude that Agency can rely on these charges to discipline Employee.

With regards to the failure/refusal to follow instruction charge, the record shows that this was the first time Employee violated this cause of action. Pursuant to the Table of Illustrative Actions, DPM §1607.2(d)(2), the penalty for a first offense ranges from a three (3) day suspension to removal. For the charge of neglect of duty, the record shows that this was the third time Employee violated this cause of action. On July 20, 2018, Employee received a reprimand

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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).

[31] *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).

[32] *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30 ,2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).

[33] *Id*.

[34] *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 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).

for violating this cause of action.[35] On February 8, 2019, Agency charged Employee for neglect of duty. This was Employee's second violation of this cause of action and he was suspended for nine (9) days for this offense.[36] The penalty for violating DPM § 1607.2(e) ranges from counseling to removal for the first offense, and from a three (3) day suspension to removal for the second offense. As previously stated, this is Employee's third violation for this cause of action and the penalty of removal is within the allowable range.

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.[37] 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.

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.[38] Employee argues that Agency did not engage in progressive discipline. He avers that he was not near termination prior to the current incident. Agency, on the other hand, argues that it engaged in progressive discipline as evidenced in Employee's short tenure at Agency with a history of counseling, reprimands and suspension. Agency avers that all these are incremental steps it took in an effort to correct Employee's behavior.

I agree with Agency's assertion that it engaged in progressive discipline. Employee began his employment with Agency on March 5, 2018, and he was terminated effective December 2, 2019. During this short period of time, and prior to the current cause of action, Employee had been disciplined on three (3) different occasions – He received two reprimands on July 20, 2018, and August 20, 2018, respectively, as well as a suspension on February 9, 2019.[39]

In *Douglas,* the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to remove Employee, Agency included a worksheet of its analysis of the *Douglas* factors to it submission to this office.[40] It concluded that termination was

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[35] *See* Agency's Brief, *supra*, at Exhibit 17.
[36] *Id*. at Exhibit 16.
[37] *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 (1981).
[38] *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).
[39] *See* Agency's Brief, *supra*, at Exhibits 4, 15, 16, & 17.
[40] Agency's Brief, *supra*, at Exhibit 15.

the appropriate penalty. Accordingly, I conclude that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable. Consequently, I further conclude that Agency's action should be UPHELD.

ORDER

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

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge