THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE,	OEA Matter No. 1601-0100-16-R21
v.	Date of Issuance: October 27, 2022
D.C. DEPARTMENT OF PARKS & RECREATION, Agency	ERIC T. ROBINSON, ESQ. SENIOR ADMINISTRATIVE JUDGE

Employee *Pro-Se*
Jhumur Razzaque, Esq., Agency Representative

INITIALDECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On September 22, 2016, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Department of Parks and Recreation's ("DPR" or the "Agency") adverse action of removing him from service. Employee's last position of record with DPR was Recreation Specialist (Lifeguard). Of note, Employee was also serving as Chief Shop Steward for American Federation of Government Employees ("AFGE") Local 2741 at all relevant times prior to his removal from service. By notice dated August 24, 2016, Employee was served DPR's Final Decision on Proposed Removal. Employee responded by filing a Petition for Appeal contesting that his removal was inappropriate. The parties were involved in extensive litigation and settlement talks while this matter was initially pending before the Undersigned. This process culminated in an Initial Decision ("ID") which was issued on November 16, 2018. The ID found, *inter alia*, that Employee was converted from a Career Service to At-will due to his inability to become fully licensed as a Lifeguard pursuant to a change in the licensure requirements. Employee appealed this matter first to the OEA Board and then the District of Columbia Superior Court. DPR's removal action was affirmed in both tribunals. Employee then appealed to the District of Columbia Court of Appeals. On October 7, 2020, the District of Columbia Court of Appeals ("DCCA") issued an Order granting DPR's

Motion to Vacate and Remand this matter for a decision on the merits. This matter was remanded to the Undersigned in adherence to the DCCA order. An Evidentiary Hearing was held on November 30, 2021. The parties were then tasked with submitting written closing arguments. After some delay, DPR submitted its brief. Employee alleged he never received the Order. However, Employee decided that he did not want an extension of time to submit his brief and opted to proceed without submitting his written closing argument. After reviewing the record, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

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.

ISSUES

Whether the Agency's adverse action was taken for cause. If so, whether the penalty was appropriate given the circumstances.

Summary of Relevant Testimony

Tyrell Morris[1] ("Morris") Transcript ("Tr.") pp. 17 – 142.

Morris testified in relevant part that he is presently the Director for all emergency communications for the city of New Orleans, Louisiana. This job entails managing 311, 911 and dispatch of public safety units. Prior to his stint in New Orleans, Morris worked for DPW as its Director of Aquatics from 2014 through 2017. In his role with DPR, he was responsible for all city owned aquatic facilities including indoor and outdoor pools and splash parks. Morris was also a certified facility operator instructor and lifeguard instructor. Morris spearheaded the

[1] Tyrell Morris changed his name at some point after the events in question. Morris' former name was Tyrell Lashley. Any mention of Lashley refers to Morris.

implementation of the International Lifeguard Training Program ("ILTP"). This program was a lifeguard training curriculum that was slated to replace the previous DPR approved certification provided by the American Red Cross ("ARC"). Morris explained that after a drowning, it was decided by DPR upper management that DPR would transition from the ARC to ILTP due to its increased rigor that would, in theory, increase the overall readiness of its lifeguarding staff. One of the important factors that went into authorizing the change was that the ILTP certification required yearly recertification whereas ARC had a three-year recertification cycle. DPR management determined that this shortened certification cycle and increased rigor would increase overall patron safety and was therefore worthwhile to implement. DPR decided that it would move away from ARC to ILTP. DPR started the logistical process of retraining all of their lifeguards with the new certification process. DPR bore the cost of the ILTP training course and provided paid on-duty time for its full-time lifeguards to take the course. Regarding the urgent need to transition from ARC to ILTP, Morris explained as follows:

> Q: So, knowing the different components of each program, why did you feel it necessary to switch to ILTP from American Red Cross?
>
> A: So, it would introduce oxygen administration to our facilities, which greatly improve the standard of care we were providing individuals that had a near drowning incident. We know firsthand that in water respiratory care, opening an airway, and giving breaths initially as soon as you get them to the surface of the water, was critical to saving someone's life. That's a skill that was included in the ILTP program, but not in American Red Cross. Also, the spinal management precautions, per se, were -- made more sense where the person's unconscious or not breathing, we're going to get them out of the water as opposed to try to maintain their spine immobilization or rather could be alive, you know? With their back and with their head and so -- and also the audit component, the ability -- the system of accountability was critical because like a training, you would go to school for nine months at a college and come back. These are the same certifications that you learned and be back in lifeguard chair again and never touched the water last nine months. That's why we were in the situation we were in when I arrived, there was no element of accountability.[2]

Regarding Employee, Morris noted that Employee was at one point a Union Shop Steward and was then elected to Chief Shop Steward. Morris recalled that Employee still held the position of Chief Shop Steward when he was removed from service. Morris examined the Collective Bargaining Agreement ("CBA") that was in effect at the time that the ILTP was implemented. According to his assessment, per the CBA, DPR was not required to get Union approval before opting to change its lifeguard certification requirements.[3] Morris recalled that the Union filed an Unfair Labor Practices Complaint. From that first Complaint, the parties (DPR and the Union) entered into a settlement agreement wherein monthly status meetings that were already being held, would continue for several months thereafter. Employee, under his own auspices, filed a second Unfair Labor Practices Complaint alleging identical issues that the original complaint asserted.

[2] Tr. pp. 32 – 34.
[3] See Tr. pp. 37 – 41.

Regarding these complaints it was determined by PERB that the filings were untimely and moreover by the time these actions were filed, a vast majority of DPR's lifeguards had already successfully completed the ILTP course.

Morris also noted that the seminal duties of the lifeguards remained unchanged with the certification change from ARC to ILTP. It was noted by PERB that Employee's *pro-se* complaint was dismissed. Morris identified Agency Ex. No. 4, which was a written directive from then Acting Director Keith Anderson to DPR staff alerting them that the accepted lifeguard certification course was changing from ARC to ILTP. The deadline for completion was May 18, 2015. Morris explained that the rollout of this new certification initiative was done during the DPR's staff tour of duty and the entire cost for the training course was bore by DPR. Morris recalled that Employee "refused to participate in the training."[4] It was further explained that approximately 97% of DPR's lifeguarding managers and staff successfully completed the ILTP certification course. Employee was in a small group that did not successfully complete the ILTP course. More specifically, Employee and his former colleague, Tara Blount, did not take the ILTP course and were subjected to adverse action as a result.[5] Morris testified that there were several other DPR employees who did not take the course but were otherwise exempted due to health concerns or that upon review of their job description, they were not required to be certified lifeguards.[6] Throughout Employee's removal process, the insubordination charge was affirmed by the pre-termination hearing officer and Agency's upper management, culminating with Employee's termination. Morris testified that Employee's proposed notice of removal was sent to both Employee and then Union President, David Brooks.

Regarding Employee's acts of insubordination, Employee was provided multiple opportunities to attend DPR provided ILTP training. Moreover, Employee was given multiple reminders to attend trainings and extensions of time to comply, all to no avail. In its effort to implement progressive discipline, Agency served Employee with a Notice of Five-day suspension for insubordination – refusal to attend Agency training dated February 11, 2016.[7] It was then hoped that Employee would comply and complete the DPR mandated ILTP training course. Employee still failed to comply and DPR issued another Notice of Proposed Suspension for 15 days. These were vetted through Hearing Officer proceedings, management review and were eventually sustained.[8] During cross examination, Morris was asked about several colleagues that did not have ILTP certifications and it was explained that the employees referenced had different job duties or health exemptions from Employee herein and were not required to have lifeguard/ILTP certifications.

Mziwandile Themba Masimini ("Masimini") Tr. pp 141 – 158.

Masimini testified that he worked for DPR from March 2016 through April 2018 as its Deputy Director for Recreation Services. He supervised Morris and was familiar with Employee's inability to complete the ILTP course. He explained that the implementation of the ILTP

[4] Tr. p. 62.
[5] Tr. pp 67 – 70.
[6] Tr. pp. 70 – 78.
[7] *See*, Agency Exhibit No. 9.
[8] *See*, Agency Exhibits Nos. 12, 13, 14, & 15.

certification was underway when he first started with DPR. Moreover, approximately 98% of the Agency's lifeguards were ILTP certified when he was onboarded into DPR. Masimini authorized the 15-day suspension and later on Employee's removal due to his inability to obtain the ILTP certification.

*Eboni Gatewood-Crenshaw ("*Gatewood-Crenshaw*") Tr. 158 – 220.*

At the time of the hearing, Gatewood-Crenshaw was working as the Associate Director, Port Administration for Prince Georges County Government, Department of Public Works and Transportation. Prior to this position, she worked for the District of Columbia Child and Family Services Agency as its Human resource Director from December 2015 through 2017. Gatewood-Crenshaw had a brief stint with DPR during the earlier portion of 2015 as its Human Resources Director of Management – Supervisory Management Liaison Specialist. Gatewood-Crenshaw detailed an extensive career in HR that entails negotiating and interpreting various collective bargaining agreements. While at DPR, a part of her duties was notifying Union officials of pending discipline of its members. Gatewood-Crenshaw explained that notifications of this sort would be permissible to any number of Union officials including President, Vice President, Chief Steward, or Steward.[9] Notification was effective either by hand delivery or email to one of the officials mentioned. Further, per the CBA between Employee's Union and DPR there was no requirement that disciplinary notification be sent by certified mail to a Union official.

Gatewood-Crenshaw explained that when it was decided by DPR management that it would transition away from ARC to ILTP that conversations were held with Union management so that they would be aware of the change. However, Gatewood-Crenshaw clarified that it was not required that DPR bargain with the Union for the right to transition due to managements right to have the final say on how it operates. It was determined that the transition was not a proper topic that was negotiable or grievable.[10] Gatewood-Crenshaw recalled that only three employees failed to attain ILTP certification. Regarding the position description, Gatewood-Crenshaw elaborated that at that time, the entire District of Columbia government was under a moratorium for updating positions descriptions due to a year's long ongoing classification and compensation review. Solely due to this process, there was a delay in updating the position descriptions for the Recreation Specialists with lifeguarding duties.[11] However, Gatewood-Crenshaw clarified that DPR only changed the entity that provided the lifeguarding certification, and it was not a substantial change to the Recreation Specialist position description.[12] Further elaboration noted that a number of position description may have a requirement that an applicant have a bachelor degree but it would not require that said applicant have a bachelor degree from a specific university (e.g. University of the District of Columbia).[13]

During cross examination, Gatewood-Crenshaw noted that the discipline imposed by DPR was subjected to a *Douglas* Factors analysis that influenced the punishment that was ultimately meted out. Regarding the CBA, Gatewood-Crenshaw noted that the CBA was silent on the mode

[9] Tr. p. 166 – 167.
[10] Tr. pp. 174 – 176.
[11] Tr. pp 177 – 180.
[12] *Id*.
[13] *Id*.

of delivery of notices to the Union of impending disciplinary actions. Because of this silence, it was determined that an acceptable means of providing written notice to the Union was through the use of e-mail. Further, Gatewood-Crenshaw explained that service to the Chief Steward or higher was considered acceptable means of notice to the Union.

Kwelli Snead ("Snead") Tr. pp. 219 – 258.

Snead testified that since 2019 she has worked for the District of Columbia Government Department of Human Resources ("DCHR") as a Supervisory HR Manager/Dean. During her tenure with the District government, she has worked for several agencies, most relevant to this matter she worked for DPR as a HR Manager starting in August 2015. Initially, she worked in the same department and was subordinate to Gatewood-Crenshaw. However, she was named Interim HR Director when Gatewood-Crenshaw departed DPR. Snead was then promoted to permanent HR Director in June 2016. Snead was HR Director when Employee was terminated. Snead recalled that she followed all applicable processes as she processed Employee's Notice of Proposed Removal. Part of that process was providing a copy of the removal notice to then Union President Brooks. Along with Brooks, this email was courtesy copied to the following: DPR Chief of Staff, DPR General Counsel, DPR Deputy Director of Aquatics and the DPR Aquatics Director.[14] Regarding the process used to remove Employee, she explained that the *Douglas* Factors were considered when Employee was removed. Snead further explained that at the time Employee was removed, there was no requirement that DPR's *Douglas* Factor analysis be in writing.[15] She noted that DPR provided Employee with ample opportunity to obtain his certification but after the inordinate amount of time without successful certification, it was decided that removal was the only option left. Snead noted that one other similarly situated employee was also removed from service due to her inability to become ILTP certified. All other employees noted by Employee herein had differing job descriptions that did not have a lifeguarding requirement.[16]

James Washington ("Washington") Tr. pp. 258 – 283.

Since 2013, Washington has worked for DPR as a Recreation Specialist, Competitive Swimming Programs Manager, Grade 11. He is tasked with managing DPR's competitive swimming programs. In this position he does not have lifeguarding duties and was not required to acquire ILTP certification. Further, swim coaches within DPR do not have lifeguarding responsibilities. Washington further elaborated that when swim practices are being conducted, swim coaches are responsible for conducting the practice while separately lifeguards perform their duties of scanning the area for possible emergencies.

Angel Gooden ("Gooden") Tr. pp. 293 – 307.

Gooden worked for DPR from 2009 through 2019. Her last position of record was Recreation Specialist – Pool Manager. She recalled the Agency changing its certification provider from ARC to ILTP. Her last position of record had lifeguarding duties that required her to

[14] Tr. pp. 230 – 231.
[15] Tr. pp. 236 – 237.
[16] Tr. pp. 240 -241.

complete the ILTP course. Gooden explained that she never completed the course due to health issues that prevented her from completing the physical portions of the training course. She later became pregnant which further extended her time frame for being unable to complete the physical components of the ILTP certification. Gooden supplied DPR with the appropriate medical documentation substantiating her physical condition and she was given an American with Disabilities Act accommodation ("ADA").

Tara Blunt ("Blunt") Tr. pp. 306 – 325.

Blunt testified that she works for the City of Alexandria, Virginia as a Firefighter 3. Prior to this, she started working for DPR in 1991 in a number of lifeguarding or lifeguarding adjacent positions. DPR removed her from service due to her inability to get ILTP certified. During cross examination, she admitted that she was removed from service for Insubordination due to her failure to become ILTP certified.

Employee Tr. pp. 322 – 350.

Employee testified that he is in an Apprenticeship program to become a journeyman electrician. Regarding his removal, he had an erstwhile problem with a supposed violation of a 45-day rule pursuant to the CBA. This was not explained in detail which rule he was referencing or how it relates to his predicament. Employee also disagreed with the settlement agreement but did not present any credible argument but rather made disparaging reference to former Union President David Brooks and former Agency Director Jason Yuckenberg. During cross examination, Employee admitted that he did not complete the ILTP course and that he failed to attend most of the class offerings that were presented to him by DPR. He further admitted that he was Chief Shop Steward during 2016 when he was removed from service. Employee explained that his reasoning for failing to take the ILTP was more philosophical in that he did not/does not believe that the Agency had legal authority to change the certification protocol without Union bargaining.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Agency removed Employee from service based on the following cause: "Any On-Duty or Employment-Related Act or omission that interferes with the efficiency and integrity of government operations: specifically, insubordination: includes the refusal to comply with direct orders, accept an assignment or detail; and carry-out assigned tasks." This action was taken after Employee was issued and endured a corrective action in the form of a five-day suspension and a prior adverse action of a 15-day suspension. These prior actions were imposed due to Employee's continued refusal/inability to obtain the ILTP certification. Employee has asserted that Agency's imposition of the ILTP requirement was an illegal action because it had not been bargained for with the Union. Agency contends that how it manages its workforce is its unfettered right and the switch of its lifeguarding certification regimes was an appropriate use of its managerial discretion. It also notes that the switch has been the subject of "two unfair labor practice complaints filed by Employee at the Public Employee Relations Board ("PERB"). Agency has argued and continues

to contend that such an argument concerned an unfair labor practice issue and was not related to whether Employee's termination was without cause or was otherwise inappropriate."[17]

The record is clear in noting that DPR opted to switch its lifeguard certification from ARC to ILTP. It is also clear that DPR provided ample notice to its impacted staff and paid for the training and scheduled the necessary courses during its employees' tour of duty so as to accommodate a smooth transition and relieve any residual pressure that switching may have imposed on the lives of its impacted workforce. Employee eschewed this opportunity and decided that he was not going to follow DPR's order to obtain ILTP certification. This was after his Union filed the Unfair Labor Practice ("ULP") complaint with PERB and settled and then Employee filed his own ULP that was dismissed. Despite these glaring roadblocks, Employee inexplicably persisted in disobeying this lawful order from DPR management. The collective testimonies of Morris, Masimini, Gatewood-Crenshaw, and Snead were consistent, compelling, and credible in noting that DPR had a good faith belief that it was seeking to improve the capabilities of its lifeguard staff by switching from ARC to ILTP. I also take note that DPR's asserts that the switch was lawful but in essence Employee disobeyed a direct order after having been provided over a year in which to comply. DPR contends that this act of disobedience is the main crux of why its action should be upheld.

I find that Employee disobeyed DPR's direct order to obtain ILTP certification. I further find that Employee's refusal/inability to comply with this directive to be a clear act of Insubordination as noted by the DPM. I also find that Employee's counter arguments were spurious and cannot be seriously entertained in this matter. A competent quasi-judicial entity (PERB) considered Employee's certification challenge twice; once through his Union and subsequently through a personal action and at all times his certification change complaint was rebuffed through a settlement and a dismissal. Despite this, he maintained his challenge through a personal choice of Insubordination. Blunt and Employee both testified that they felt that ILTP certification was easier to obtain than ARC certification, but Employee persisted in squandering the yearlong opportunity afforded to him to obtain ILTP certification during his regularly scheduled tour of duty free of charge.

Overall, I find that Employee's explanation of his actions in this matter are self-serving and disingenuous. Moreover, given that he admitted to the *actus rea* that gave rise to the instant sanction, I do not have to look behind the circumstances to arrive at this determination. Notwithstanding his explanation to the contrary, I find that Employee admitted to the salient facts that are the subject of the instant adverse action. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof. *See*, *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987). I find that Employee did not persuasively or credibly argue that Agency's action was not done in accordance with applicable laws or regulations. My examination of the record reveals that Agency's action was proper. Given the gravity of the conduct and the proper procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to terminate Employee.

[17] Agency Closing Argument p. 4.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[18] OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[19] 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.[20] 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.[21] An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[22] I find that the evidence did not establish that the penalty of termination constituted an abuse of discretion. I conclude that given the totality of the circumstances as enunciated in the instant decision, DPR's action of removing Employee from service should be Upheld. [23]

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

[19] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011).

[20] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

[21] *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.
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> citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

[22] *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).

[23] 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").

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of REMOVING Employee from Service is hereby UPHELD.

FOR THE OFFICE:

/s/ *Eric T. Robinson*

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE