THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ALICE HOLLAND,	)	
Employee	)	OEA Matter No. 1601-0062-08
	)	
v.	)	Date of Issuance: April 25, 2011
	)	
D.C. DEPARTMENT OF CORRECTIONS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

James E. McCollum, Jr., Esq., Employee Representative
Mitchell J. Franks, Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Alice Holland ("Employee") filed a petition for appeal challenging an adverse action by the Department of Corrections ("DOC" or "the Agency") whereby she was removed from service. On August 3, 2007, Employee was served with a notice of proposed adverse action suggesting she be removed from her position as Management Liaison Specialist. Employee was accused of Malfeasance to wit; any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations.

On September 24, 2007, Employee filed a response to the proposal suggesting that she did not commit any acts of Malfeasance and therefore should not be removed. On December 13, 2007, Hearing Officer John C. Greenhaugh made his recommendation on the case. He recommended that the deciding official find Employee not guilty of Malfeasance but instead insubordination. Based on that finding, he suggested Employee not be removed but instead be suspended without pay for ten days.

On February 22, 2008, the deciding official and DOC director, Devon Brown, issued the final decision on proposal of removal. In his final decision, Devon Brown

stated that Employee's "breaches of the hiring protocol and program statement, and the blatant failure to comply with an order given directly to you from the second highest ranking Agency official makes it impossible to trust you with the day-to-day responsibilities encumbered in your position of Management Liaison Specialist in Agency's office of Human Resources." Based on this determination, Devon Brown disregarded the Hearing Officer's recommendation and decided to remove Employee from her position.

Employee has since the filed a petition for appeal arguing her removal was not justified. She points out that the Hearing Officer recommended that she be suspended and that Agency fired her out of retaliation. DOC responded to her appeal on May 5, 2008, pointing out the various reasons why her removal should be upheld. On May 13, 2008, Employee filed a Motion for Default Judgment. Employee asserted that the Agency's response to her appeal should have been filed by April 28, 2008. Agency did not file its Answer until May 5, 2008. Employee further argued that the Agency never filed any motion for an extension of time to file its answer. Soon after, the Agency filed its response to the Motion of Default Judgment. Agency argued its representative faxed a letter to the Office of Employee Appeals (OEA) asking for a delay in submitting the response. Administrative Judge Wanda Jackson granted the Agency an extension of time, until May 12, 2008, to submit the response. Agency argued that Employee's Motion for Default Judgment should be denied. On May 22, 2008 Employee filed a response stating no letter was ever attached from OEA asking for an extension. Employee also argued that communication with Administrative Judge Wanda Jackson was prohibited. Agency responded that to their best knowledge the letter was in fact included. Employee's Motion for Default Judgment was ultimately denied by the undersigned.

The Undersigned was assigned this matter on or around June 9, 2008. I then convened a prehearing conference. After considering parties arguments and difference of opinion relative to the facts of this matter, I decided that an evidentiary hearing was required. Accordingly, an evidentiary hearing was held on October 7 and 8, 2008, and November 18, 2008. On February 18, 2009, Employee submitted a Motion to Reopen the Record so that it may introduce a DOC Office of Internal Affairs Final Report produced by a District of Columbia Office of the Inspector General Freedom of Information Act Request. Employee argued that this information was made available to her after the evidentiary hearing in this matter was held and as such the record should be reopened in order to admit this new found information. Considering as much, Employee's Motion to Reopen the Record is hereby GRANTED and Exhibit Nos. 2, 3, and 4 of that motion are hereby admitted into the record. The record is now closed.

ISSUES

1. Whether the Agency's adverse action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.2, id. states:

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

JURISDICTION

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

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Summary of Relevant Testimony

Agency's Case in Chief

Patricia Britton ("Britton")

Britton testified in relevant part that: she is employed by the D.C. Department of Corrections ("Agency") as the Deputy Director. She has been in that particular position since January 2004. However, prior to her promotion, she was a "special assistant to the director/risk manager." *See* Tr. at 17. Britton's supervisor at Agency is Director Devon Brown who has been her supervisor since January 2006. Britton stated that she first met Employee in the later part of 2004 over the phone. However, she then subsequently stated that she met Employee in the early part of 2004. Britton explained that they met over the phone but did not meet Employee in person until she came to work for Agency. *See* Tr. 18. Britton then stated that Employee worked in "Human Services, Human Resources," where she served as a Human Resources "liaison person." *See* Tr. 19. Britton testified that there was a hiring freeze on new staff in "1995 because there was going to be significant Reduction in Force of employees, approximately 2,500 employees slated to be impacted by that." *See* Tr. 19-20. However, by the summer of 2006, the Agency hiring freeze was lifted and it began to recruit and hire new correctional officers.

Britton testified that Employee was responsible for the "Ergo Metrics" portion of the hiring process during orientation as well as coordinating all of the documentation related to the hiring process. Employee was also responsible, according to Britton's testimony, for requesting the criminal history checks for correctional officer applications. The Office of Internal Affairs conducted the criminal history check; however, Employee was to take charge of the reports on each of the candidates. However, it was the Office of Internal Affairs that made the determination of whether someone was cleared or not.

Subsequently, Britton testified that there were several individuals who failed the physical fitness portion of the orientation; however, three of them were able to return for a second orientation. Some of those individuals from the second orientation were invited back according to Britton. *See* Tr. 47. Upon inviting the three individuals back to repeat the orientation, no one objected. No one informed anyone that this was improper. Britton admitted that she herself invited them back to repeat the orientation. However, in a conversation between Britton and Johnson, it was revealed that in addition to the three candidates that would be returning, there were three more candidates that were going to go through orientation. Britton stated that the additional three were added by Employee. *See* Tr. 52-53. Britton immediately phoned Employee and informed her that this was unacceptable. Britton stated that the orientation for the returning candidates was not going to be the entire orientation but just the physical and psychological portions of it. The fact that only three candidates would be completing the physical and psychological portions of the orientation was made clear to Employee. Britton testified regarding Agency's Exhibit 3 which is an Official Report of Extraordinary Occurrence. The report, according to Britton, was prepared by Ms. Joan Murphy regarding an incident that occurred on August 24, 2006 involving Employee. Britton stated that Employee informed Ms. Murphy that she has set up the lunchroom for the test. Ms. Murphy described in her report that this was totally unacceptable, that it had not been approved and that it was not within the guidelines that were set up for any type of prerequisite processing of the protocols for conducting the orientation. The lunchroom was described as to small in order to do a thorough evaluation of a candidate's qualifications. Britton stated that the only place where the orientation could be done was at the "old D.C. General Hospital complex." *See* Tr. 62. Moreover, the designated area could not be changed without approval from Britton.

Gregory McKnight ("McKnight")

McKnight testified in relevant part that: he is employed by Agency as a "Sergeant, Correctional Officer." See Tr. 100. McKnight has worked for the D.C. Department of Corrections for over 19 years. As a Sergeant, McKnight is responsible for coordinating the training academy, which administered the fitness agility test to each prospective applicant. On August 23, 2006, McKnight administered the fitness agility test to six applicants, only three of whom actually showed up for the test. The fitness agility test is comprised of five events, each of which must be done to the satisfaction of those judging in order to pass. Agency's Exhibit 5 was the document shown to McKnight and he testified that it was the form used for the August 23, 2006, fitness agility test that he

administered. However, the document was dated August 12, 2006. On cross-examination, McKnight explained that "August 12 was more than likely on Saturday; the 23rd was probably on a Wednesday. And the 23rd was a makeup date for individuals that did [not] show up that Saturday for orientation." *See* Tr. 104-105.

Joan Murphy ("Murphy")

Murphy testified in relevant part that: she is employed by the Agency as Special Projects Officer through which she is responsible for human resource related matters at the Agency. *See* Tr. at 107. She is supervised by DOC Deputy Director Patricia Britton. She was professionally acquainted with Employee prior to and during her last job stint with the DOC. Murphy described Employee's last position of record generally as an initial point of contact for the DOC staffing and recruitment area. *See* Tr. at 110 -111.

Murphy explained that DOC did not actively recruit for new entry level recruits for its correctional officer corps until June 2006, because the DOC was working through a list of eligible former employees who had been removed from service through two successive Reductions in Force. *See* Tr. at 111 – 112. The process of recruiting for these positions generally entailed an initial background check by the DOC Office of Internal Affairs ("OIA"). If the applicant passed this check, they would then submit a packet of documents and be invited to attend an orientation. During this orientation, the applicant would be given an oral interview by an OIA investigator. If the applicant failed this portion of the process, then they were not allowed to proceed any further in the hiring process. However, if said applicant passed, then they were given a physical agility examination. If successful, the applicant would then sit for the "Ergo-Metrics" written examination process. *See* Tr. at 114 – 118. According the Murphy, the aforementioned hiring process was memorialized in the DOC Entry Level Correctional Officer Hiring Orientation Process Protocol (Agency's Exhibit No. 1). Employee was tasked with a lead role with regards to staffing and recruitment. *See* Tr. at 117 – 118. Murphy testified that nothing within Agency's Exhibit No. 1 could be altered without the prior approval of Britton or Brown. *See* Tr. at 119 – 120.

According to Murphy, Employee was primarily responsible with the initial phase of receiving applications and everything that is entailed with queuing applicants for the background checks and evaluations by the OIA. If an applicant failed the initial background check they were not allowed to go any further in the recruitment process. Only OIA could determine what constituted a permissible criminal history check. *See* Tr. at 126. If an applicant was successful through all portions of the hiring process, Employee was tasked with notifying said applicant and preparing the employment packages that were sent to the DC Office of Personnel for processing their hire. Tr. at 127.

Murphy testified regarding Agency Exhibit No. 2. It is the document that contains, among other things, the recruitment schedule for the entry level correctional officer hiring process and its attendant schedule of events for August and September

2006. According to Murphy, at the relevant time in question, orientations could only occur at the Training Academy which is on the grounds of the former D.C. General Hospital. Formerly, the Training Academy was housed at the Lorton facility, however, with its closure, that site was no longer a viable option. Furthermore, only Devon Brown, Agency Director, could authorize orientations being held elsewhere. *See* Tr. at 131 – 132.

On August 22, 2006, Murphy had a discussion with Britton and Paulette Johnson regarding the coordination of logistics surrounding applicant physical agility testing that was set to occur the following day. During this meeting, it was first discovered that six applicants had been scheduled for further testing. However, Britton had only authorized three of the applicants to undergo said testing. It was discovered that Employee, under her own initiative, had authorized three additional persons for further testing. They then queried Employee about this discrepancy but Employee did not, at that time, provide an explanation. Further, Employee did not proffer a full explanation as to who authorized the testing of the additional three applicants. It was "assumed" by Murphy that at the conclusion of this conversation that only the three applicants that Britton had previously authorized would be allowed to continue with further testing. *See* Tr. at 135 – 137.

On August 23, 2006, Murphy discovered that Employee had set-up their office's break room/kitchen for an Ergo – Metric test for two correctional officer applicants. Murphy instructed Employee that the Ergo – Metric test cannot be conducted in this setting and that she is to contact the applicants and let them know that the test could not be conducted at that time. Murphy took photographs of the break room set-up that Employee had arranged. On the following day, Murphy informed Britton of what she saw. Britton then indicated that they have to inform Brown of what has transpired. After voicing their concerns with Director Brown, he instructed them to conduct a full scale investigation into this matter and to put Employee on administrative leave while this investigation was pending. *See* Tr. at 144 – 148. Murphy further reiterated that Employee did not have authorization to conduct that test in that setting. *See* Tr. at 151. On another note, she testified that a fellow colleague Keith Godwin did not have the authority to say where a test could be administered nor was he in Murphy's or Employee's chain of command. *See* Tr. at 152 – 153.

Paulette Hutchings-Johnson ("Johnson")

Johnson testified in relevant part that: she is employed by Agency in the Office of Human Resource Management. She has worked for Agency in one capacity or another for over 24 years. Her current title with the Office of Human Resource Management is Labor Relations and Workforce Liaison. Johnson's supervisor in the Office of the Human Resource Management is Joan Murphy. One of her responsibilities in 2006 was to find "a psychological services component to do testing and to assist Ms. Holland ("Employee") with the recruitment process and also develop the physical fitness plan and some of the documents and verifications of that." See Tr. 164. Johnson stated that Employee "spearheaded" the recruitment efforts of correctional officers for Agency which Johnson

herself participated in. See Tr. 165. Johnson was unable to definitively state who was in charge of the work group; however, she did say it was either Employee or Murphy.

Johnson testified that in terms of the physical fitness portion of the orientation, if an applicant failed this portion it resulted in said applicant failing the entire orientation process. *See* Tr. 168. However, on or about August 21, 2006, Johnson recalled that a "few" potential candidates were allowed to redo the physical fitness portion of the orientation. She also stated that she participated in the conversation with Britton that took place on August 21, 2006 in Britton's office regarding how many would be returning for the physical portion of the orientation. According to Johnson, Britton said there would be three whereas Employee had said six.

According to Johnson, Employee told her that "the people that were supposed to come to take the Ergo Metrics test would not be taking it that day because Ms. Murphy said that the location was inappropriate and that they weren't going to have the test that day, so she was not going to finish the psychological either." See Tr. 171-172.

During cross examination, Johnson stated that Employee questioned why Britton would allow some candidates to go through a re-do of the orientation and not allow others. However, Johnson also stated that Employee was a good employee.

Devon Brown[1] *("Brown")*

Brown testified in relevant part that: he is the Director of the DOC and has held this position since January 2006. He was the final decision making authority within the Agency with regards to removing employee from service. *See* Tr. at 177 – 178. Brown was aware that Employee, prior to her removal, worked in the DOC Human Resources Unit. He was also aware of the circumstances that surrounded Employee's removal from service. He recounted that there was time that the DOC was not actively recruiting correctional officers due to the reduction in force that occurred because of the closure of the Lorton Correctional Facility and the requirement that the DOC exhaust the persons who were negatively impacted as a result before recruiting new hires. *See generally* Tr. 178 – 179. During 2006, the Agency exhausted this list and started actively recruiting for new correctional officers. Employee was part of the work group tasked with implementing this recruitment effort. Brown tasked Britton with leading this work group. Employee was also tasked with participating in this work group. *See* Tr. at 179 – 180. The work group created a "… schematic which details the process the new applicants would go through and who was responsible for various functions of doing that process." Tr. at 179 – 180. This schematic was entered into evidence as Agency's Exhibit No. 1. Brown was the person who authorized the chart and the processes detailed therein. He further asserted that only Britton and he had the authority to change the process outlined

[1] Brown was identified and first called as witness for the Agency and later as a rebuttal witness for the Agency. Brown's salient testimony, as encapsulated herein, integrates both instances when he was called as a witness in this matter.

within this exhibit. *See* Tr. at 180.

Wanda Patten created an investigative report that detailed the results of an investigation into Employee conduct relative to the incident in question (Agency's Exhibit No. 8). As a result of this report, Brown drew the following conclusions: "I drew from the report that [Employee] had, without authorization, deviated from our established procedure, thereby allowing the individuals who had not received prior approval to seek employment with the Department, unbeknownst to [Britton] or [Murphy] or myself." Tr. at 183.

Brown testified that this matter was referred to an independent hearing officer. The hearing officer recommended that Employee be suspended for insubordination. Brown rejected the hearing officers' recommendation and testified as follows:

> Because I looked upon what Ms. Holland had done as highly egregious, it went to the heart and soul of the Agency. The Agency was in a period of transition, it had been subjected to a history, a long period, extended period of corruption, cronyism, of hiring individuals who do not deserve to be hired as public safety guardians.
>
> And again, I mean personnel is a central function of all agencies and to have any personnel procedures that strike at hiring people who should not be hired I see as extremely atrocious and egregious. Tr. at 184

Brown further asserted that even though the alleged misconduct never happened, Employee's actions still merit removal from service. Employee's attempted subversion of the COVT was only discovered by accident and would have occurred but for it being uncovered by Employee's colleagues. Given DOC's mission, Brown indicated that such acts cannot be tolerated. *See generally* Tr. at 188.

Brown was called as a rebuttal witness and testified relative to Employee's Exhibit No. 13 which is a series of e-mails between Brown, Mary Montgomery (Deputy Director of Organization), and others regarding DOC hiring practices. *See* Tr. at 464 – 466.

Wanda Patten[23] *("Patten")*

Patten testified in relevant part that: she is the DOC Chief of the Office of

[2] DOC included within its written closing argument an affidavit from Patten that was created after the evidentiary hearing in this matter. This affidavit is hereby excluded from the record. It was not utilized during the undersigned's decision making process.

[3] Patten was identified and called as witness for both parties. Patten's salient testimony, as encapsulated herein, integrates both instances when she was called as a witness in this matter.

Internal Affairs ("OIA"). She has been in this position for the past four years. Prior to her current stint, she was an Criminal investigator with the Office of Internal Affairs, the Metropolitan Police Department in their Applicant background Investigations section; she was also with D.C. Public Schools in their School Security Division; and she spent 11 years working with the Amtrak Police Department. *See* Tr. at 209 – 210. According to Patten, the OIA conducts administrative and criminal investigations. She further indicated that criminal history checks are conducted for all new Agency employees. *See* Tr. at 211. Patten testified that Ben Collins, her subordinate, was tasked by her to conduct an investigation into the incident in question involving Employee. Mr. Collins completed this task and created an investigative report that was eventually given to Patten who then forwarded same to Brown. *See* Tr. at 212. During cross examination, Patten indicated that she had no knowledge about the DOC's policy regarding the implementation of policies. *See* Tr. at 240.

Keith A. Godwin ("Godwin")

Godwin testified in relevant part that: he has been employed by DOC for approximately 16 years. Currently, he is the DOC Chief of Network Operations. He remembers Employee as a fellow work colleague at DOC. During August 2006, he recalled discussing with Employee about conducting the Correctional Officer Video Test ("COVT") in the kitchenette area of the Grimke Building where Employee's office was located. He indicated to her that the equipment used for the COVT test could be set-up at the aforementioned kitchenette area. *See* Tr. at 277 – 278. On cross examination, Godwin admitted that he did not have authority over where the equipment could be used or where the COVT is administered. *See* Tr. at 279. He further admitted that Employee was not in his chain of command. *See* Tr. at 281.

Alice S. Holland ("Employee")

Employee testified in relevant part that: she has worked for the District of Columbia government off and on and with different agencies since 1992. *See* Tr. at 291 – 293. Employee explained that she was initially tasked to find a suitable testing procedure for new correctional officers because the current workforce was aging and the pool of former employees that were on the RIF priority list was dwindling. When she found a suitable product, COVT, she had the vendor provide a demonstration for Brown. After the demonstration, Brown approved COVT and authorized its use during the new correctional officer recruitment process. Employee claimed that she had not seen Agency's Exhibit No. 1 prior to the evidentiary hearing. She denied the accuracy of the protocol contained within that exhibit. *See* Tr. at 297 – 298. Employee also detailed her contributions to the aforementioned planning committee in terms of helping to design and implement the hiring program. Once a prospective employee filed a completed employment application, Employee was integrally involved in the recruitment process. Employee completed a number of tasks including sending prospective employee information to the OIA so that investigative background checks could be performed.

Contrary to prior testimony from various other witnesses, Employee asserted that when she sent a form request for background information for prospective applicants to the OIA, they in turn would send the form back with no indication of approved or disapproved. It was her practice to allow an applicant to proceed unless OIA specifically indicated that an applicant was disqualified. *See* Tr. at 309. The reason for this is because if information presented itself during a background investigation, the applicant was given an opportunity to refute or explain the disqualifying factor. *See* Tr. at 310.

With respect to the charge of misfeasance for failure to follow Patten's orders, Employee explained that with regard to applicant SC[4], she actually conducted some portion of OIA's duties in that SC had passed OIA's background check even though Employee uncovered that SC had a shoplifting charge on her record. *See* Tr. at 313 – 322. Ultimately, SC was disqualified from continuing due to Employee's actions. Employee recounts discussions that she had with Britton and Johnson regarding applicants who had failed the physical portion of the testing on August 12, 2006 but were allowed to re-take the test with another applicant group on August 23, 2006. The discussions surrounded the logistics of holding another round of testing and integrating those that passed with the new group that was being tested on August 23, 2006. Employee alleged that Britton had singled out three persons from a larger group that had failed and allowed them to take the COVT test on the same day as the August 23, 2006, applicants. Employee alleged that Britton made this statement in the presence of herself, Godwin, Murphy, Johnson. Employee replied that the three applicants who were taking the re-test were all males and Employee voiced concern that it could be alleged that Agency was showing favoritism in its hiring practices. Employee took it upon herself to invite all of the persons who had failed to a re-test in order to protect the DOC from allegations of discrimination. Employee went through the folders of all applicants who had not progressed through the application process and invited two other applicants that had failed a prior portion of the process (KC[5] and JCB[6]) to re-take portions of the exam along with the three other persons Britton had previously authorized to re-take the exam. *See* Tr. at 313 – 345. Employee contends that at that time the Agency did not have a written policy with respect to re-testing for the entry-level correctional officer recruitment effort. *See* Tr. at 353 – 354. Employee stated that prior to her inviting KC and JCB for the re-test, that neither applicant, at that point, had been disapproved by OIA even though she was aware that KC had a battery charge that was being investigated by OIA. *See* Tr. at 355 – 356.

On or around August 2006, Employee had a conversation with Murphy where she initially disclosed that she was planning on conducting the COVT in the Grimke Building lunch room. Employee admitted that at that time, Murphy forbad her from conducting

[4] This correctional officer applicant full name is not being used in this matter for the protection of her identity.
[5] This correctional officer applicant full name is not being used in this matter for the protection of his identity.
[6] This correctional officer applicant full name is not being used in this matter for the protection of her identity.

the COVT in the lunch room. *See* Tr. at 342 – 345. Employee also admitted that she failed to disclose that she had invited KC and JCB to take the re-test along with the three other applicants Britton had already authorized. *Id*. Employee alleges that she had a conversation with Johnson during which she informed her that the COVT test that was initially set up in the Grimke Building lunch room was cancelled after Murphy had indicated to her that the lunch room was not a suitable location for that test. *See* Tr. at 346 – 348. Employee then recounts an impromptu meeting that she had with Murphy during which Murphy showed Employee pictures of the lunch room set up for the unauthorized COVT. Employee responded that the test never occurred. Employee alleges that Murphy then gave her the option of resigning in lieu of an investigation into her conduct. Employee refused. Employee was then placed on administrative leave and ultimately was removed from service. *See* Tr. at 346 – 351. Employee asserted that she did nothing illegal in the performance of her duties. *See* Tr. at 359. Employee also alleged that during the course of the investigation, she made a whistleblower allegation to OIA complaining of waste, fraud, and abuse at DOC. Employee felt that her whistleblower allegation, in part, led to her dismissal. *See generally* Tr. at 379 – 385.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis, and conclusions of law are based on the documents of record and testimonial evidence presented by the parties during the course of Employee's appeal process with this Office.

The DOC is a paramilitary agency within the District of Columbia government charged with protecting the safety and well-being of its citizenry. It is a shared mission with other District government agencies. The DOC accomplishes its portion of this shared mission by providing safe and secure confinement of those accused of crimes while awaiting trials and for convicted offenders. The DOC's mission is one of the highest priorities for a properly functioning government and as such it must hold itself and its employees to a higher standard than would otherwise be required for most other District government entities. It is quite evident to the undersigned that Employee has not lived up to this standard and has in no small way jeopardized the DOC's mission by failing to follow proper protocol and chain of command with respect to the entry level correctional officer hiring process.

During the evidentiary hearing, Patton, Murphy, and Britton testified credibly and consistently that Employee usurped Agency protocol with respect to the entry level correctional officer hiring process by attempting to conduct the COVT in an unauthorized area and manner and that Employee disobeyed a direct order by inviting three individual to re-take portions of the exam in spite of Britton's explicit order that only three *other* specific persons were allowed to re-take the exam. Further buttressing Agency's contentions is the fact that Employee admitted to the salient facts that DOC cited in order to substantiate its removal action. *See* Tr. at 313 -345. Employee has testified that she heard Britton order that only three specific applicants at the August 21, 2006, Orientation were to be invited back for re-testing on August 23, 2006. Employee has argued that she

was justified in not following those orders. She also argued that following those orders would have caused the Department to act in an illegally discriminatory manner. I find that there is no credible evidence within the record that would lead me to believe that Britton's direct order to Employee was illegal. Employee did not proffer any credible testimony that would lead the undersigned to believe that Britton was attempting to coax Employee to commit an illegal act. If such were the case, Employee should have alerted either the OIA or an outside Agency e.g. the Office of the Inspector General and informed them of her concerns *instead* of taking matters into her own hands.

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). Considering as much, I find that the Agency has met its burden of proof in this matter. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia,* 502 A.2d 1006, 1010 (D.C. 1985).

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. *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ ( ). While it may be argued that Brown should have given Employee another opportunity to rehabilitate her conduct and possibly punished Employee with a lesser penalty e.g. suspension, I find that based on the preceding findings of facts and resulting conclusion thereof that the penalty of removal was within managerial discretion and otherwise within the range allowed by law.

ORDER

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

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
ADMINISTRATIVE JUDGE