THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0035-18
KYLE QUAMINA, Employee	
	Date of Issuance: May 14, 2019
v.	
	ARIEN P. CANNON, ESQ.
D.C. DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency	Administrative Judge

David A. Branch, Esq., Employee Representative
Milena Mikailova, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Kyle Quamina ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on February 23, 2018, challenging the District of Columbia Department of Youth Rehabilitation Services' ("Agency" or "DYRS") decision to terminate him from his position as a Materials Handler. Agency filed its Answer on April 5, 2018. The undersigned was assigned this matter on May 2, 2018.

A Prehearing Conference was initially scheduled for June 19, 2018. Agency's Representative was present; however, Employee's Representative failed to appear. Thus, this matter was rescheduled for June 22, 2018. At the June 22, 2018 Prehearing Conference, a briefing schedule was set by the undersigned. However, upon further review, it was determined that an evidentiary hearing was the more appropriate course of action in this matter. Accordingly, an evidentiary hearing was scheduled for September 10, 2018. On September 5, 2018, Agency a filed a Motion to Continue the evidentiary hearing. This motion was granted on September 7, 2018.

Prior to rescheduling the evidentiary hearing, Employee requested leave to file a Motion for Summary Reversal in light of an Initial Decision in Employee's favor in a separate OEA

Matter.[1] A telephonic status conference was convened on September 21, 2018, to address Employee's request. Employee was permitted to file his Motion for Summary Reversal, and Agency had the opportunity to respond. Both parties submitted their pleadings accordingly. On November 5, 2018, an Order was issued denying Employee's Motion for Summary Reversal and this matter proceeded to an evidentiary hearing on January 23, 2019.

On February 8, 2019, an order was issued which required the parties to submit written closing arguments. After granting two extension requests to submit closing arguments, Agency submitted its closing argument on April 8, 2019; Employee submitted his closing arguments on April 10, 2019. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee for: (1) Failure or Refusal to Follow Instructions; (2) Neglect of Duty; (3) Conduct Prejudicial to the District Government—Use of Abusive, Offensive, Unprofessional, Distracting or Otherwise Unacceptable Language; (4) Sexual Misconduct; and (5) Prohibited Personnel Practices.[2]

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

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[3] "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.

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.[4]

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[1] *See Quamina v. DYRS*, OEA Matter No. 1601-0035-18, Initial Decision (September 17, 2018). This matter has since been remanded to the AJ for further consideration of the case on its merits.
[2] While the Advance Written Notice of Proposed Removal cites six (6) charges, the Deciding Official rejected one of the six—Performance Deficits, leaving five (5) charges to form the basis of Employee's removal.
[3] 59 DCR 2129 (March 16, 2012).
[4] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

SUMMARY OF TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing held on January 23, 2019, as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.[5] During the Evidentiary Hearing, I was able to observe the witnesses' poise and demeanor. As a result, I was able to determine the credibility of the witnesses.

Agency's Case-in-Chief

William Boberg ("Boberg") Tr. 23-113

Boberg has been with Agency for about four years. He is currently the Program Manager for the Real Estate and Property Division with Agency. He started out as a warehouse manager, before being promoted to Facilities Manager, and now a Program Manager. In his current capacity as a Program Manager, Boberg is responsible for warehouse operations, fleet operations, maintenance operations, capital improvement program, the Prison Rape Elimination Act, and the risk management program. Employees under Boberg's purview include: Material Handlers, Maintenance Technicians, Facilities Manager, Fleet Supervisor, a Prison Rape Elimination Act Coordinator, and a Fire and Safety Risk Management Specialist.

Boberg had two Materials Handler and a foreman for the Materials Handler under his supervision. Boberg supervised Employee, who was a Materials Handler, for approximately two-and-half to three years prior to Employee's termination. The duties of a Materials Handler included, in part, receiving and distributing supplies and materials from the warehouse to Agency on an as-needed basis and maintaining the warehouse in a proper working order. A position description for Materials Handlers was moved into evidence as Agency's Exhibit 1.

Boberg issued an Advance Written Notice of Employee's termination on October 20, 2017. The Advance Written Notice cited six grounds for Employee's proposed removal: (1) Failure or Refusal to Follow Instructions; (2) Neglect of Duty; (3) Performance Deficits; (4) Conduct Prejudicial to the District Government—Use of Abusive, Offensive, Unprofessional, Distracting or Otherwise Unacceptable Language; (5) Sexual Misconduct; and (6) Prohibited Personnel Practices. Boberg addressed each incident that gave rise to him issuing an Advance Written Notice of Proposed Removal.

On September 13, 2017, Boberg and Shamika Moore ("Moore")[6] were working with a company who provided the new warehouse managment system for Agency. The company was scheduled to provide training via video conference call on September 14, 2017. At the request of Boberg, Moore sent an invite via email to all warehouse members, including Employee, to attend the training. Boberg testified that all employees under his supervision were informed that Moore was performing administrative assistant duties on his behalf. Boberg further stated that

[5] The summary of testimony reflects the witnesses' testimony as of the date of the evidentiary hearing.
[6] Moore is a Youth Development Representative ("YDR") with Agency who was placed on light duty and assigned to Boberg to perform the duties of an administrative assistant.

Employee was informed of his expectations regarding scheduled meetings which were highlighted in a letter sent to all of his employees.

Boberg further testified about an email he sent on August 11, 2016, informing employees that missed hand scans were on the rise and reminding them of the requirement to use the hand scan machine.[7] In this same email, Boberg also highlighted a memorandum that was included as an attachment which addressed his expectations of his employees attending meetings. Employee was a recipient of this email. Employee acknowledged receiving the attached memorandum, however, he declined to sign it and stated that he did not agree to the conditions set forth in the memo.[8]

Boberg sent Employee a Memorandum of Expectations on April 6, 2017, a document to which Employee acknowledged receipt.[9] This memorandum was presented to Employee after he was out from work for a while and Boberg wanted to make clear as to what was expected of Employee during his performance as a Materials Handler. This memorandum also addressed the expectations of attending meetings and hand scanning.

Boberg testified about the email invitation that was sent by Moore, which informed Employee of a training from Royal 4 Warehouse Management Systems that was scheduled for September 14, 2017, from 1:00 PM to 3:00 PM.[10] Boberg noted that Employee received a copy of this email based on the read receipt from September 13, 2017, at 4:32 p.m. Employee did not attend this training, nor did he contact Boberg or Moore regarding any questions about the training.

Boberg recalled seeing Employee on September 14, 2017, on the premises of Agency's facility with a supply cart. Boberg reminded Employee that he needed to be in the warehouse management training facility at the time. Employee responded, "okay" and walked off. Employee still did not attend the training.

Boberg stated that Employee was not in his assigned work area nor the adjoining maintenance area from 3:00 pm to 4:00 p.m. on September 14, 2017. Boberg testified that Mr. Eric Wade ("Wade") asked him if he had seen Employee, which prompted him to ascertain Employee's whereabouts. When Wade and Boberg checked to see if Employee had hand scanned out, they could not verify one way or another because Employee never hand scanned in. Boberg was unsure at what point Employee scanned in and scanned out on September 14, 2017.

Boberg also noted that Employee did not hand scan in on September 18, 2017 either. Boberg described the hand scanning process as a mechanism installed in the front lobby of Agency's administrative building where employees scan their hand and it records their time arriving and departing the Agency. Boberg required employees who reported directly to him to utilize the hand scan system.

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[7] Agency's Exhibit 2 at 36.
[8] Agency Exhibit 3.
[9] Agency's Exhibit 2 at 30-32.
[10] *See* Agency's Exhibit 2 at 26-28.

Boberg initially sent an email about hand scanning to his employees on June 29, 2015, shortly after he assumed his role as a manager.[11] Along with hand scanning expectations, this email also included other customer service guidelines and expectations of employees under Boberg's supervision. This email indicated that if the hand scan system was not working, then employees were expected to complete a form that would be submitted to Boberg in the absence of an electronically recorded scan.[12] Boberg sent several emails reminding his staff about hand scanning in and out.[13] One of the emails sent by Boberg was never read by Employee, and one was deleted without being read. Boberg believed that ample notice was given to Employee about the hand scanning requirements. Nevertheless, Employee failed to hand scan in on September 14, and September 18, 2017.

Boberg identified a hand scan report for Employee from September 1, 2017, through September 19, 2017.[14] The report shows that there were no attempted hand scans by Employee from September 12, through September 19, 2017. Employee did not notify Boberg of any hand scanning issues for September 14, or September 18, 2017. Boberg testified regarding the Weekly Punch Report for various employees from January 1, 2017, through December 31, 2017.[15] Based on these Weekly Punch Reports, other employees were able to clock in and out using the hand scanning machine on September 14 and September 18, 2017.[16]

Boberg testified regarding the incident identified in his Advance Written Notice that occurred between Employee and Wade. The incident was described as an "inappropriate verbal conflict [] in which inappropriate words were stated." This incident was brought to Boberg's attention through Wade the same day and documented in an incident notification form.[17] Boberg requested an incident report from Employee to get his side of the story; however, Employee never provided an incident report, nor responded to Boberg's email.[18]

Boberg testified about Agency's policy about reporting unusual incidents, which is documented in Agency Exhibit 12.[19] Boberg also testified regarding Agency's policy regarding inappropriate language, which was introduced as Agency Exhibit.[20] Based on Employee's disciplinary history, Boberg believed that a proposal for Employee's termination was appropriate.[21]

On cross-examination, Boberg testified that day-to-day instructions for Employee should come from himself or Wade. Boberg testified that the email from Ms. Moore regarding the September 14, 2017 meeting, did not indicate that the meeting was mandatory. Boberg acknowledged that Employee spent most of his days away from his workstation/desk and that

[11] Agency Exhibit 4.
[12] Tr. 45-50.
[13] Tr. 50-54. Agency Exhibits 5 and 6.
[14] *See* Agency's Exhibit 2 at 34.
[15] Agency Exhibit 7.
[16] Tr. 63-64.
[17] *See* Agency's Exhibit 2 at 42-43.
[18] *See* Agency Exhibit 13.
[19] Agency Exhibit 12.
[20] Agency Exhibit 2 at 20.
[21] Agency Exhibit 2 at 45-53; See also Agency Exhibit 11.

Employee also had an Agency-issued cell phone. Boberg did not try calling Employee's government-issued cell phone on September 14, 2017, about the meeting because he saw Employee in person and reminded him. Once Boberg was made aware that Employee did not attend the training session, he and Wade looked around the facilities for him. Boberg also did not call Employee on his government-issued cell phone after being made aware that Employee was not at the training session.

Boberg stated that the emails he sent to Employee regarding hand scanning were his expectations rather than an Agency-wide policy and he was unsure if an Agency-wide hand scanning policy existed.[22] Boberg first implemented his hand scanning expectations via email on June 29, 2015.[23] The official record for timekeeping with Agency was made through PeopleSoft and not through the hand scanning process.

According to the PeopleSoft Report introduced into evidence as Employee Exhibit 1, Employee was approved and paid for eight (8) hours of work each day for September 14, and 18, 2017. Employee's hours were approved by Arnita Bonner, an HR Representative, for September 14, 2017; and approved byWade for September 18, 2017. Boberg stated that although Employee was paid for eight (8) hours on these days, it does not mean that Employee hand scanned in on these dates. Additionally, on redirect, Boberg highlighted that although Employee was approved by Ms. Bonner for eight (8) hours on September 14, 2017, she was unaware that neither Boberg nor Wade were unable to locate Employee between the hours of 3:00 pm and 4:30 pm.[24]

Part of the basis for Boberg recommending termination for Employee was based on prior disciplinary history. Boberg testified that he believed a prior proposed thirty (30) day suspension that was considered in Employee's termination was still under review. Although a Final Decision Notice on Proposed Nine (9) Day Suspension was issued on October 4, 2017, the final notice did not provide the dates that Employee would serve the suspension.[25]

Najmu Chowdhry ("Chowdhry") Tr. 113-120

Chowdhry has been with Agency for eighteen (18) years and is currently a Materials Handler and Warehouse Coordinator with Agency. Chowdhry has been under Boberg's supervision since July of 2016. Chowdry explained the process he used for the hand scanning machine: enter his social security number and then put his hand on the hand scan machine. If the machine did not pick up the hand scan it would beep and he would repeat the process. Whenever the hand scan machine did not properly work, employees had to try again. If an employee was unable to get it to work, employees were expected to report the issue to their supervisor and complete a hand scan form.

[22] Tr. 87-90.
[23] Agency Exhibit 4.
[24] Tr. 106-107
[25] Agency Exhibit 2 at 51-53.

Charles Akinboyewa ("Akinboyewa") Tr. 121-145

Akinboyewa has been with Agency for twenty-seven (27) years and currently serves as a Senior Program Manager—a position he has held for approximately two (2) years. Akinboyewa was the Deciding Official in this matter. A Final Decision on Proposed Removal was issued by Akinboyewa on January 29, 2018. In making his final decision, Akinboyewa reviewed and considered the advance written notice of proposed removal and supporting documents, along with documents submitted by Employee's counsel. Akinboyewa also reviewed the administrative review by the Hearing Officer. Ultimately, Akinboyewa sustained five of the six charges against Employee and elected to accept the proposed termination. In electing to sustain the removal, Akinboyewa considered Employee's past disciplinary record and the pattern of progressive discipline. Akinboyewa also considered the *Douglas* factors and the overall impact on Agency in making his final decision.

Employee's Case-in-Chief

Kyle Quamina ("Employee") Tr. 146-192

Employee was employed with Agency from December 2012 through February 2018, when he was terminated. At the time of his termination, Employee was a Materials Handler. Employee initially started with Agency as a 13-month term employee and was converted into a career service permanent employee sometime in 2016.

In his role as a Materials Handler, Employee received products from various vendors to retain and replenish inventory stock in the warehouse located at Agency's New Beginnings Youth Development Center in Laurel, Maryland. Employee was tasked with maintaining an accurate count of the products stocked in the warehouse through physical count and through an inventory software program. Employee also made deliveries to internal and external customers throughout the facility. At some point, Employee did have an office located in the warehouse of New Beginnings, however, he testified that he generally did not have a work station. In delivering products throughout the facility, Employee used various carts such as flat beds and dollies with cart wheels. The products delivered consisted of various items, including office supplies, cleaning products, clothing, personal hygiene, culinary products, and medical and dental products.

Employee testified that he received evaluations on his performance up until Boberg became his supervisor in January of 2015. Employee stopped receiving performance evaluations after Boberg became his supervisor. Employee once received a performance improvement plan under Boberg's supervision; however, it was deemed invalid because it was issued outside of the time frame allowed by the District government's Human Resources agency.

In 2017, Employee testified that he was the only official Materials Handler. However, Chowdry, Ms. Moore, and Anthony Morris also worked and performed some duties of a Materials Handler. On average, Employee spent approximately two hours a day at his assigned work location and the rest of the time he was out delivering products. Employee's work hours were from 8:00 a.m. to 4:30 p.m., Monday through Friday. During 2017, Employee had a work-

issued cellphone and work email address. Wade was Employee's foreman from the time Employee began working at Agency until his termination.

Employee acknowledged receiving an email from Ms. Moore about a training, but he did not know that it was a mandatory training, nor that it was sent on behalf of Wade or Boberg. Employee was aware that Ms. Moore was a Youth Development Representative from another Agency location who was assigned to light duty under Boberg.[26] Employee also acknowledges that he did not attend this training because he was working, and he was directed by Boberg on several occasions that he should receive his day-to-day tasks from Wade or Boberg. Because the meeting notification did not come from either one, Employee did not think it was a mandatory training.

Employee noted that despite Boberg testifying that he saw Employee on September 14, 2017, shortly after the training started and told Employee that he needed to attend the meeting, Employee asserts that he never saw Boberg during that time frame. Employee maintained that Boberg never said anything to him on September 14, 2017, about the meeting. Employee first learned that there was an issue with him not attending the meeting when he received the Advance Written Notice of Proposed Removal, issued by Boberg.

In response to Boberg's testimony that Employee was not at his workstation or at the maintenance department on the afternoon of September 14, Employee said it was possible. Employee asserts that his work could have him anywhere throughout the New Beginnings facility. He provided a variety of scenarios that would have him elsewhere in the facility: because of his access to the fleet of Agency vehicles, he could have been at the gas pump filling up the car for next day deliveries or inquiring face-to-face with a customer. Employee testified that he did not receive any calls on his cellphone about the September 14 meeting.

Employee also testified that the facility has an intercom system and to his knowledge it was working in 2017. He based this on the fact that he heard announcements over the intercom requesting for people's cars to be moved. He does not recall hearing any announcements on the intercom system trying to reach him on the afternoon of September 14, 2017. He also did not recall Wade coming to him on September 14, 2017 and indicating that he was looking for him.

The hand scanning policy began shortly after Boberg became Employee's supervisor. Employee first learned of the hand scanning policy through one of Boberg's emails, although he never received, nor was aware of an official Agency-wide policy regarding hand scanning. Employee was resistant to the hand scanning policy expected by Boberg because they never had to do it before and was curious as to what created the need for the policy by Boberg. Although Boberg stated that everyone under his purview was expected to hand-scan, Employee did not believe that to be the case.

After serving a thirty (30) day suspension in April of 2017, Employee received a memorandum of expectations setting forth the hand scan policy. After returning from his suspension, Employee made it a point to hand-scan in and out from the time he came back to the

[26] Tr. 155

time he was terminated. Employee testified that he hand-scanned in and out each day, or at least made an honest attempt to hand scan in and out. He first learned of the allegations that he did not hand-scan on September 14 and September 18, 2017, when he received the Advance Written Notice of Proposed Removal from Boberg on October 20, 2017. Employee believed that he did hand scan on September 14 and 18, 2017. Employee testified that sometimes the hand-scan machine did not properly register your hand and it would display a message to scan again until it registered.

Employee described the incident between himself and Wade on October 10, 2017, as a "verbal disagreement."[27] The disagreement arose when Employee asked Wade if he had seen his cart with products on it. A heated exchange occurred between the two and Employee eventually laughed it off and went to the head of Human Resources at Agency, Sonya Fox. Although Boberg asked Employee to provide a written statement regarding the October 10, 2017 incident, Employee opted to contact Fox instead because of his distrust of Boberg. Employee felt that going to Boberg would only make the situation worse. When Employee went to see Fox, he was unable to speak with her because she was not in her office. However, Employee wrote her an email on his government-issued cellphone with the subject "Workplace Violence."[28] The subject matter of this email is the verbal disagreement between Employee and Wade on October 10, 2017. In it, Employee states that he is concerned for his safety working alongside Wade. Two days after sending the email, on October 12, Fox responded to Employee.

Employee also testified about a Facebook post written by Wade referencing Employee as a derogatory term and making other unflattering comments concerning himself and Employee.[29] Employee maintains that he knew Wade was referencing him because Wade only had one job and he only supervised two employees—himself and Anthony Morris.

Employee denied calling Wade a "bitch" during the October 10, 2017, incident. Employee also denied calling Wade a "sellout for the white man and sucking the white man's dick." Employee first learned of these allegations on October 12, 2017, when Fox responded to his email and asked him to come to her office to talk about the incident.[30] After meeting with Fox, Employee was placed on administrative leave pending an investigation after the October 10, 2017, incident with Wade.

Employee testified that although he received a 9-day suspension notice by Agency on October 4, 2017, it did not provide the dates for when the suspension was to be served. Additionally, Employee testified that he never actually served the suspension.[31]

On cross-examination, Employee acknowledged that he did not submit any forms or email his supervisor about the hand scanning machine malfunctioning.[32] Employee attributed this oversight to being sidetracked once entering the building. He also stated that Boberg made it

[27] Tr. 164
[28] Employee Exhibit 5.
[29] Tr. 170; Employee Exhibit 3.
[30] Tr. 176
[31] Agency Exhibit 2 at 45-53.
[32] Tr. 189

clear that if the form regarding the malfunctioning of the hand scan machine was not submitted by a certain time then it would not be accepted.

Anthony Morris ("Morris") Tr. 194-210

Morris has been employed with Agency for eleven (11) years. In 2017, Morris worked at Agency's Youth Service Center in Washington, D.C. Previously, Morris worked with Employee as a Materials Handler under the supervision of Wade and Boberg. While Morris and Employee were Materials Handlers they shared a cubicle desk area. Morris estimated that they would spend several hours a day outside of the facility delivering products.

When Morris worked at Agency's Laurel, Maryland facility, there was not a policy that required him to hand scan. Approximately seven or eight years after working with Agency, Morris learned that Boberg initiated a hand scanning policy. However, Morris was never provided an official policy from Agency requiring Materials Handlers to hand scan. When Boberg implemented the hand scanning policy for Materials Handlers, Morris testified that he would hand scan in everyday, however, there were occasional issues with the hand scanning machine. These issues included the machine being inoperable, giving error warnings, or stating that an employee did not previously clock out.

Morris testified about a Facebook post by Wade that made unflattering remarks about himself and Employee.[33] Morris also testified that he has been a part of conversations where Wade was being negative towards Employee. He described a conversation about a time when Employee was out on sick leave and Wade stated that he was "tired of this [motherfucker] calling out. He just started, he's a term employee. If he keeps playing, his [ass] will be fired."[34]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The undersigned was able to examine both the testimonial and documentary evidence presented by the parties throughout the evidentiary hearing and the documents of record. Employee was removed from his position based on the following charges: (1) Failure or Refusal to Follow Instructions; (2) Neglect of Duty; (3) Conduct Prejudicial to the District Government—Use of Abusive, Offensive, Unprofessional, Distracting or Otherwise Unacceptable Language; (4) Sexual Misconduct; and (5) Prohibited Personnel Practices.

Agency is required to prove the facts with respect to each of the alleged acts of misconduct by a preponderance of the evidence.[35] Pursuant to OEA Rule 628.1, "preponderance of the evidence" is defined as "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."

[33] Tr. 197-199
[34] Tr. 199
[35] OEA Rule 628.1, 59 DCR 2129 (March 16, 2012)

Whether Agency's adverse action was taken for cause

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Failure or Refusal to follow instructions: (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.[36]

Agency charges Employee with failure/refusal to follow instructions based on its assertion that Employee continuously and repeatedly failed to comply with requirements to attend mandatory meetings, trainings, request leave, and hand scan in and out. Specifically, this charge stems from Agency's assertion that Employee failed to hand scan in on September 14, and September 18, 2017. Furthermore, Agency asserts that Employee failed to attend a mandatory meeting on September 14, 2017.

To ensure that all staff under his supervision fulfilled their responsibilities in accordance with Agency policy, as well as his own expectations, Employee's manager, Boberg, sent an email titled "Employee Conduct" to all employees under his supervision on June 29, 2015.[37] One of the topics addressed in this email was hand scanning. Boberg made clear that he expected his team members to hand scan upon arrival and departure each work day. If the hand scan machine malfunctioned, employees were expected to notify the appropriate facility member and send Boberg an email indicating what time the employee arrived or departed. The June 29, 2015 email was the first documented notice provided by Boberg regarding his expectations for his employees' hand scanning.

Approximately seven (7) months later, on January 26, 2016, Boberg sent another email to several of his staff members, including Employee, reminding them to hand scan in and out.[38] Two months later, on March 21, 2016, Boberg once again sent a reminder email to his staff members, including Employee, reiterating that everyone must hand scan in and out daily and the

[36] See 6-B DCMR § 1605.4(d); See also 6-B DCMR § 1607.2(d)(1); See also 6-B DCMR § 1607.2(d)(2)
[37] Agency Exhibit 4.
[38] Agency Exhibit 5.

procedure that must be followed if a hand scan was missed.[39] Without explanation, Employee deleted this email. On August 11, 2016, Boberg sent another email outlining his expectations for his employees, including his expectation of hand scanning at the beginning and end of each work day. On August 29, 2016, Employee acknowledged receipt of Boberg's email regarding the expectations of Materials Handlers, however, he did not agree with the expectations in the email and declined to sign it.[40]

On April 6, 2017, Boberg issued another Memorandum of Expectations directed specifically to Employee that included Boberg's expectations of Employee's observance of work hours, including hand scanning.[41] Employee signed and acknowledged receipt of this Memorandum. Despite ample notice regarding the expectation that employees under Boberg's supervision hand scan in and out each work day, and the procedure for notifying the appropriate personnel if the hand scan machine malfunctioned, Employee consistently failed to hand scan in and out.

Morris testified that he was never given any notice of the proper procedures to follow for when the hand scan machine was down. However, several emails in which Morris was a recipient demonstrate that he was provided notice of hand scanning expectations and the proper procedure to follow when the machine malfunctioned. Morris' testimony was discredited based on the documentary evidence presented that shows he was in fact given the protocol to follow regarding the hand scanning procedures.

Employee's "Weekly Punch Report" admitted into evidence as Agency's Exhibit 7, shows his record of hand scanning in and out from August 29, 2017, through October 12, 2017. This report shows that Employee failed to hand scan on September 14, and September 18, 2017. I find that Employee had ample notice of his supervisor's expectations of hand scanning and the procedure to follow if Employee was unable to hand scan in or out. Boberg testified that he did not receive any notification from Employee about issues with the hand scan machine on September 14, or September 18, 2017. The record is also devoid of any such notifications. In further support of its position, Agency submitted seven (7) other random Agency employees' "Weekly Punch Report" that demonstrate that the hand scan machine was functioning on both September 14, and September 18, 2017.[42] Accordingly, I find that Agency had cause to take adverse action against Employee for his failure to comply with rules, regulations, written procedures, or proper supervisory instructions as set forth on multiple occasions by Boberg.

Neglect of Duty[43]

Agency charges Employee with neglect of duty for failing to attend a requisite training and to properly request leave from the training or the period after the training when he was nowhere to be found. Specifically, Agency maintains that Employee failed to attend a

[39] Agency Exhibit 6.
[40] See Agency Exhibit 3.
[41] Agency Exhibit 2 at 30-32.
[42] Agency Exhibit 4
[43] *See* 6-B DCMR § 1605.4(e)

mandatory training on September 14, 2017. It is not disputed that Employee was absent from the training; however, Employee contends that he did not know that it was mandatory.

Employee avers that he did not know the training was mandatory because the email request to attend the September 14 training came from Ms. Moore and was not a directive given on behalf of Wade or Boberg. However, Employee was aware that Ms. Moore was a YDR from another Agency location who was assigned to light duty under Boberg.[44] Employee testified that he was instructed to only take daily instructions from Boberg or Wade. Even if Employee was not aware that Ms. Moore was performing the duties of Boberg's administrative assistant and did not know that the training was mandatory, he could have contacted Ms. Moore, Wade, or Boberg for clarification regarding his attendance to the training. Instead, Employee simply ignored the email request without seeking further clarification and remained willfully blind to the directive in the email, sent on behalf of Boberg. Accordingly, I find that Employee was aware of the September 14, 2017 training, and failed to attend. Furthermore, I find that Agency had cause to charge Employee with neglect of duty for failing to attend the September 14, 2017 training.

Agency also based its neglect of duty charge against Employee on the contention that he failed to request leave from the training or the period after the training when Boberg and Wade were unable to locate him. Boberg testified that he and Wade were unable to locate Employee between 3:00 pm and 4:30 pm on September 14, 2017. Because they were unable to locate Employee, they assumed he had left for the day. However, the undersigned finds this argument unpersuasive. Employee testified that he possessed a work-issued cellphone and had email access, however, Boberg testified that he did not try to contact Employee on his cellphone during this time frame. Additionally, Employee testified that his duties carried him all throughout the Agency's New Beginnings facilities delivering products or filling up vehicles in Agency's fleet for the next day. Simply because Boberg and Wade were unable to locate Employee throughout the sprawling facilities does not mean that Employee was not at work. As such, I find that Agency failed to meet its burden of proof to show that Employee failed to properly request leave on September 14, 2017. However, as outlined above, I find that Agency had cause to take disciplinary action against Employee for failing to attend the September 14 training, and established cause for its "neglect of duty" charge.

Conduct Prejudicial to the District Government: Use of Abusive, Offensive, Unprofessional, Distracting, or Otherwise Unacceptable Language.[45]

Agency charges Employee with conduct prejudicial to the District government based on its assertion that Employee called Wade a "bitch." According to Boberg's Advance Written Notice of Proposed Removal and his testimony at the evidentiary hearing, the incident giving rise to this charge occurred on October 10, 2017, between Employee and Wade ("October 10 incident"). Boberg described the incident as an "inappropriate verbal conflict [] in which inappropriate words were stated." Employee described the incident as a "verbal disagreement."

[44] Tr. 155. While Employee acknowledges that he knew Moore's role as an assistant to Boberg during direct examination, he asserts that he was unaware that Moore was serving as Boberg's assistant during cross-examination. *See* Tr. 186. For purposes of this analysis, the undersigned credits Employee's testimony on direct examination and finds that Employee was aware that Moore was serving as an assistant to Boberg.
[45] See 6-B DCMR § 1605.4(a); See also See 6-B DCMR § 1607.2(a)(16).

This incident was brought to Boberg's attention by Wade on the same day and documented in an incident notification form.[46] Boberg requested an incident report from Employee to get his side of the story; however, Employee did not respond to Boberg's email or provide an incident report to Boberg.[47] Employee did, however, contact the head of Agency's Human Resources—Sonya Fox, on the day of the incident.

Employee initially went to see Fox in person the same day of the incident, but Fox was not in her office. Instead, Employee sent Fox an email the same day, shortly after the incident indicating that he did not feel safe working alongside Wade.[48] It is clear based on the testimony from the evidentiary hearing that Employee had a distrust of Boberg, hence his reason for not responding to Boberg's email inquiry regarding the October 10 incident. Fox responded to Employee's email two days later. Since Employee was placed on administrative leave two days after the October 10 incident, and after meeting with Fox, it is apparent that Agency credited Wade's version of events over Employee's.

Despite Wade still being in Agency's employ, he was not called to testified at the evidentiary hearing. Agency relied solely on Wade's unusual incident report at the evidentiary hearing to support its "conduct prejudicial to the District government" charge against Employee. By declining to call Wade as a witness, the undersigned was unable to make any credibility determinations on Wade's account of the incident. The record is clear that there was a contentious history between Employee and Wade. Boberg also testified that given the history of things that have happened in the warehouse, presumably concerning Employee, that the October 10 incident caused him concern.[49]

Making credibility determinations is seminal to deciding this charge against Employee. As set forth above, Agency holds the burden of proof in proving its case against Employee. Although an incident notification form was signed by Wade on the date of the verbal altercation, Agency's failure to call Wade as a witness to be examined under oath undermined the allegations against Employee. Employee testified that the October 10 incident began when he asked Wade if he had seen his cart. Employee stated that Wade responded in the negative and used profanity during the exchange. Employee adamantly denied using profanity towards Wade.

I find that Employee testified in a straightforward and credible manner with respect to the October 10 incident and the contentious relationship he had with both Boberg and Wade. Employee's email to Fox also shows that Employee reported the verbal altercation between himself and Wade to someone whom he believed could address the manner in an objective fashion. Because I find Employee's testimony credible regarding the October 10 incident, and I am unable to assess the credibility of Wade under oath, I find that Agency failed to satisfy its burden of proof that Employee engaged in conduct prejudicial to the District Government; specifically, the use of abusive, offensive, or otherwise unacceptable language. Employee's testimony and credibility outweigh the absence of testimony from the accuser—Wade.

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[46] *See* Agency's Exhibit 2 at 42-43.
[47] Agency Exhibit 13.
[48] Employee Exhibit 5.
[49] See Tr. 66.

Sexual Misconduct[50]

Agency charged Employee with sexual misconduct for engaging in remarks of a sexual nature towards Wade during the October 10, 2017 incident. Specifically, Agency asserts that Employee told Wade that he was a "sellout for the white man and sucking the white man's dick." As stated above, in assessing the October 17 incident, and the associated charges, credibility is paramount. Agency's failure to call Wade as a witness to the October 10 incident deprived the undersigned of the opportunity to make credibility determinations while the purported victim is under oath. Agency's failure to call Wade as a witness severely undermines such a serious charge.

Again, I found Employee credible and forthright in his testimony regarding the October 10 incident with Wade. Employee made clear that there was strained working relationship between himself and Wade. Additionally, Employee tried to contact the head of Agency's Human Resources, Sonya Fox, immediately after the incident but was unable to get in contact with her because she was not in her office. Ultimately, Employee decided to send an email to Sonya Fox right after attempting to reach her in her office. I do not find Employee's failure to provide a response to Boberg's email or an unusual incident report to Boberg regarding the incident detrimental to his credibility. Employee credibly testified that he had a distrust for Boberg and did not feel comfortable addressing the incident with him. Employee adamantly denied using the language towards Wade as described above and set forth in Agency's specifications. Employee's testimony regarding the October 10 incident, substantially outweighs the absence of live testimony and the unsworn incident form submitted by Wade. Accordingly, I find that Agency has failed to satisfy its burden that Employee engaged in sexual misconduct.

Prohibited Personnel Practices[51]

Agency charges Employee with violating prohibited personnel practices during the verbal altercation with Mr. Wade. As stated above under the "conduct prejudicial to District government" and "sexual misconduct" charges, Agency's failure to call Wade as a witness prevented the undersigned from making credibility determinations regarding Wade's account of the October 10 incident. The undersigned credits Employee's testimony over the incident report form that was submitted by Wade. Accordingly, I also find that Agency failed to satisfy its burden that Employee engaged in prohibited personnel practices during the October 10 incident.

Appropriateness of the Penalty

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). 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. Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative

[50] See 6-B DCMR § 1605.4(k)
[51] See 6-B DCMR § 1605.4(l); See also DYRS # 010 Employee Conduct Policy, Agency Exhibit 2 at 14.

Judge.[52] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[53] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[54]

Here, as set forth above, I find that Agency had cause to take adverse action against Employee for (1) Failure/Refusal to Follow Instructions and (2) Neglect of Duty. D.C. Personnel Regulations § 1607.2(d)(1) (Table of Illustrative Actions) addresses the appropriate penalty for Employee's failure/refusal to follow instructions. Specifically, 6B DCMR § 1607.2(d)(1) provides that the appropriate penalty for this charge ranges from counseling to removal.

D.C. Personnel Regulations § 1607.2(e) addresses the appropriate penalty for an employee's neglect of duty. Specifically, this section provides that an appropriate penalty for a first occurrence for neglect of duty also ranges from counseling to removal. Here, Agency elected to remove Employee based on five (5) charges. However, as discussed above, I find that Agency only had cause to take adverse action for two (2) of the five (5) charges. I further find that removal of Employee was within the allowable range as set forth under 6B DCMR §§ 1607.2(d)(1) and 1607.2(e).

Additionally, I find that Agency considered the relevant *Douglas* factors in its Advance Written Notice of Proposed Removal issued on October 20, 2017.[55] Agency also presented evidence that Employee received progressive discipline for the same or substantially similar conduct issues in the past. For example, in addition to verbal counseling that Employee received in June 2016[56], Employee also received an Official Reprimand, a 9-day suspension, and a 30-day suspension. Although Employee asserts that he never served the 9-day suspension and the 30-day suspension was reversed by an Administrative Judge of this Office, it is noted that the 9-day suspension was issued just eight (8) days prior to the adverse action giving rise to the instant matter. Employee not serving the 9-day suspension does not negate the Final Decision on the 9-day suspension that was issued on October 4, 2017.[57] Furthermore, the initial reversal of the 30-day suspension by an Administrative Judge of this Office was remanded by the OEA Board on April 9, 2019, for further consideration of the case on its merits. Thus, as it stands, the 30-day suspension remains valid. As such, I find that Agency properly considered the relevant *Douglas* factors and properly invoked its managerial discretion in electing to remove Employee from his position.

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[52] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[53] *Id.*
[54] *Id.*
[55] Agency Exhibit 2.
[56] Agency Exhibit 11.
[57] Agency Exhibit 2 at 51.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's removal of Employee from his position as a Materials Handler is **UPHELD**.

FOR THE OFFICE:

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ARIEN P. CANNON, Esq.
Administrative Judge