

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____	)	
	)	
Roxy Guandique,	)	OEA Matter No. 1601-0017-17
Employee	)	
	)	Date of Issuance: January 4, 2018
Vs.	)	
	)	Joseph E. Lim, Esq.
D.C. Department of Parks & Recreation,	)	Senior Administrative Judge
Agency	)	
_____	)	
Kemi Morten, Esq. Employee Representative		
Janea J. Hawkins, Esq., Agency Representative		

**INITIAL DECISION**

INTRODUCTION

On December 2, 2016, Roxy Guandique (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) from D.C. Department of Parks & Recreation’s (“Agency” or “DPR”) final decision removing her, effective November 15, 2016, for “any on-duty or employment act or omission that interferes with the efficiency and integrity of government operations: specifically, malfeasance: misuse of official position for unlawful or personal gain.”

The parties engaged in mediation on March 30, 2017, but they failed to settle their differences. This matter was then assigned to me on April 5, 2017. I conducted a prehearing conference on June 7, 2017, and an evidentiary hearing on October 20, 2017. I closed the record at the conclusion of the hearing.

JURISDICTION

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

ISSUES

1. Whether Agency timely notified Employee’s union regarding his adverse action, and if not, whether such action precluded taking adverse action.
2. Whether Employee committed the acts with which she was charged.
3. Whether Employee’s actions constitute cause for adverse action, and if so, whether the penalty of removal was appropriate under the circumstances.

## BACKGROUND

### Parties' Allegations

Agency accuses Employee, a Recreation Specialist, of “Any On-Duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations: specifically, malfeasance: misuse of official position for unlawful or personal gain.”

In summary, Employee was accused of soliciting and accepting a monetary bribe from a lifeguard applicant to allow said applicant to pass a lifeguard training course without taking a test. Employee denies any impropriety and asserts that Agency has violated their Collective Bargaining Agreement by failing to timely notify her union of her proposed adverse action via official mail.

### UNCONTROVERTED FACTS<sup>1</sup>

1. Employee was initially hired by Agency as a summer employee in 2004, and worked in this capacity each year until 2009.
2. Agency rehired Employee as a seasonal Pool Manager for the Aquatics Program in 2012.
3. Employee was converted from Pool Manager to a Career Service Recreation Specialist, CS-188-07/01, effective September 23, 2012.
4. Employee's Recreation Specialist position is in the collective bargaining unit represented by the American Federation of Government Employees (“AFGE”) Local 2741. AFGE Local 2741 has a Collective Bargaining Agreement (“CBA”) with the Agency.
5. Article 24, titled “Corrective and Adverse Action” of the applicable CBA in this matter states in relevant part as follows:

#### SECTION 1:

1. Corrective and Adverse Actions, as defined in Personnel Regulations, may be imposed on employees only for cause, in accordance with the provisions of the Comprehensive Merit Personnel Act (“CMPA”) D.C. Law 2-139, as amended and the DPM. [...]

3. Corrective and Adverse Actions will be appropriate to the circumstances, with due regard to the principles of progressive discipline in accordance with Chapter 16 of the DPM.

---

<sup>1</sup> Derived from the parties' joint stipulations of facts and uncontested documents and exhibits of record.

SECTION 2:

[...] 2. An employee and the Union shall be notified in writing of any proposed disciplinary or adverse action within forty-five (45) days, no [sic] including Saturdays, Sundays, or legal holidays, after the date that the Employer knew or should have known of the act or occurrence.

[...] The failure of the Employer to issue such notice shall preclude the discipline pursuant to the law. [...]

6. On June 27, 2013, Employee received a temporary promotion to assist in the management of the Department of Parks and Recreation's Summer Aquatics Season, effective until September 13, 2013. Upon the expiration of the temporary promotion, Employee returned to her previous position of Recreation Specialist.
7. In November 2014, Employee earned an Ellis/International Lifeguard Training Program ("ILTP") certification as a Lifeguard and Lifeguard Instructor. As a Lifeguard Instructor, Employee administered the training course that was mandatory for all newly hired lifeguards.
8. On April 9, 2016, Employee taught ILTP New Pool Lifeguard Training in conjunction with Instructor Aisha Moten at H.D. Woodson High School, located at 540 55<sup>th</sup> St. NE, Washington, DC 20019. The course had a number of students enrolled, including Daquawn Paige, Lenia Samuels, Sabrina Sanabria, and Kent Hight. The course had training sessions on the following dates: April 9, April 16 and ended on April 23.
9. On or about April 16, 2016, Employee, along with Daquawn Paige, Lenia Samuels, Sabrina Sanabria and Kent Hight, visited a 7-11 convenience store during the course break. All individuals traveled in Employee's car.
10. Daquawn Paige received an overall course score of "pass" in the training course led by Employee.
11. On or about September 7, 2016, Agency's General Counsel Amy Caspari interviewed Employee at Agency headquarters located at 1250 U Street, NW, Washington DC 20009. Employee was represented by her union representative, Devlin Hillman. Mr. Hillman requested that Ms. Caspari record the interview. Ms. Caspari denied Mr. Hillman's request.
12. After Ms. Caspari's interview with Employee, Ms. Caspari did not interview Mr. Paige in person. Rather, Ms. Caspari spoke with Daquawn Paige by telephone and email during the course of her administrative investigation. By email, Ms. Caspari asked Mr. Paige to respond to

her investigatory questions via email. Mr. Paige responded to Ms. Caspari's questions by return email.

13. Of the four students in Employee's car on or about April 16, 2016, Mr. Paige was the only student that Ms. Caspari interviewed.
14. Ms. Caspari did not conduct an in-person interview with Timothy Niles, the Agency's Fiscal Officer. Rather, Ms. Caspari contacted Mr. Niles, via email to ask several questions pertaining to the administrative investigation. Mr. Niles responded to these questions via email.
15. On or about September 9, 2016, former Aquatics Director Tyrell Lashley submitted an unsworn statement to Agency.
16. By letter dated October 12, 2016, Agency issued to Employee an Advance Notice of Proposed Removal ("Notice") with one charge: "Any On-Duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations: specifically, malfeasance: misuse of official position for unlawful or personal gain."<sup>2</sup>
17. This notice was also simultaneously forwarded to Union President David Brooks via email.<sup>3</sup>
18. Employee was advised of her rights to review material upon which the proposed action was based, to respond in writing within six (6) days of receipt of the Notice, to be represented by an attorney or other representative of her choice, to an administrative review by a hearing officer, and to a written decision, respectively.
19. Agency submitted the following evidence for consideration by the hearing officer:
  - a. Advanced Written Notice of a Proposed Removal
  - b. Notice of Administrative Leave with pay for Employee
  - c. Statement of Tyrell Lashley
  - d. Timothy Niles' email response to investigatory questions by DPR General Counsel
  - e. Daquawn Paige's email response to investigatory questions by DPR General Counsel
  - f. Credit Union checking account monthly statement for period 3/19/16 through 4/16/16 of Daquawn Paige.
20. Employee submitted a response through counsel, dated October 17, 2016, to the hearing officer for review. Employee submitted the following evidence for consideration:
  - a. Declaration of Roxy Guandique
  - b. Declaration of Curtis Williams

---

<sup>2</sup> Employee Exhibit 13.

<sup>3</sup> *Id.* at 3.

- c. Declaration of Lenia Samuels
- d. Declaration of Torna Harrison-Samuels
- e. Advance Written Notice of Proposed Removal and Supporting Documentation
- f. Cellphone text message exchange between Employee and Tyrell Lashley
- g. Email exchange between Roxy Guandique and James Washington
- h. Email exchange between Roxy Guandique and DPR General Counsel
- i. Email exchange between Roxy Guandique and Tyrell Lashley

21. The hearing officer's written decision was issued on October 24, 2016.
22. On November 15, 2016, the Agency's Deputy Director of Recreation Services, M. Themba Masimini, issued the Final Decision sustaining the removal of Employee from her position as a Recreation Specialist, effective the same day.
23. Employee contests the termination and filed a Petition for Appeal with OEA on December 2, 2016.

Evidence on Disputed Issues

- a. Daquawn Paige ("Paige") testified (Tr. p. 13 – 60) as follows.

Paige worked at the Verizon Center and volunteered as an Emergency Medical Technician ("EMT") at the fire department. Prior to that, he held a summer job for two years at Hill Recreation Center working as a lifeguard for DPR.

Paige testified that he met Employee at his lifeguard training certification class. He explained that she was the instructor for their class of twelve people. The certification class was to be completed over the course of three Saturdays. At the second class on April 16, 2016, he was not able to participate due to a knee injury and he was on crutches. Paige called Employee to explain the situation and said that he could not participate, but he could still come and listen.

Paige testified that Employee then told him that if he gave her one hundred fifty dollars, she would pass him in the class. He said that Employee drove five people in her personal vehicle to the 7-Eleven ("restaurant"). Paige explained that at the restaurant, he withdrew one hundred sixty dollars out of the Citibank Automated Teller Machine ("ATM"), used a twenty dollar bill to break change, and gave Employee the money while they were on their lunch break at the restaurant. After the break was over, they returned to complete their training.

On the third class, Paige stated that his knee was still injured, but he was able to get into the water and do some of the exercises with the class. After the class exercise, they took a written exam. Paige stated that he received assistance while taking the test. He explained that Employee provided a booklet and an answer sheet to the entire class, but his booklet was

different. Ultimately, he completed the course, passed the written test, and received an overall passing grade of ninety-six.

Paige did not begin work as a lifeguard until June 11, 2016. He testified that it was a blessing to be a lifeguard since he made a thousand dollars, more money than he had ever seen in his life. He stated that in August of that summer, he received a call from James Washington (“Washington”), the Assistant Manager at Agency, asking him to come to one of the pool locations. Paige thought the call was Agency offering him a year-round position because the pool location he was at was scheduled to close the following week. When Paige arrived at the site, he was called into a room by Washington and Tyrell Lashley (“Lashley”), the manager for Agency. He explained that Lashley heard that Paige gave Employee one hundred and fifty dollars. Lashley told Paige to tell the truth and stated that they were the government, so they were going to find out. Paige stated that he forgot about the agreement he made with Employee and admitted that he did pay her because he sprained his knee before the second lifeguard class. Lashley took away his lifeguard license and told him that he would receive his last check and asked him not to discuss what transpired with anyone.

Paige stated that he was ordered to go to Judiciary Square to make a recorded statement on what happened during the lifeguard class. Paige testified that on September 16, 2016, he emailed Amy Caspari (“Caspari”) the events that transpired prior to him getting his lifeguard certification. Caspari asked him to provide her with a copy of his April 2016 bank statement. He explained to her via email that two transactions on the statement represented one hundred sixty dollars of which one hundred fifty dollars was given to Employee at the restaurant.

Paige clarified that the September 9, 2016, email from Caspari was regarding his residential address. Paige testified that he did not pay for his training course because he originally provided Agency with his state ID which indicated that he was a District of Columbia (D.C.) resident, and D.C. residents’ fees were waived for the course. However, he resided in the state of Maryland when he registered for the course. Paige stated that he never spoke to Timothy Niles regarding what happened in his class, as the only time he spoke with him was about scheduling.

On cross-examination, Paige testified that he could not recall the names of the other students in the vehicle. He stated that he only knew one person, Big Kent. Paige stated that he had the ATM receipt at the restaurant, but did not have the receipt to produce to Caspari and did not contact the bank to ask for a copy of the ATM receipt.

b. James Washington (“Washington”) testified (Tr. p. 61 –242) as follows.

Washington worked for Agency since 2011 as the Aquatics Program Manager, Director of Aquatics. He stated that he recruited lifeguards. On August 24, 2016, Supervisory

Recreational Specialist Courtney Barber (“Barber”) reported to him that Paige received his lifeguard certification by paying Employee. Barber indicated that Aquatics Recreation Specialist Timothy Niles (“Niles”) reported this information. Once Washington was aware of the news, he brought the information to Aquatics Program Manager Tyrell Lashley’s (“Lashley”) attention and subsequently, Agency conducted an investigation.

Washington stated that the following day Agency questioned Paige regarding the events that transpired. He explained that he served as a witness to the conversation and Tyrell documented the account. After the meeting, Agency served Employee with a notice of proposed removal and Washington witnessed Employee’s refusal to sign the acknowledgement of receipt. (72)

On cross-examination, Washington testified that he was copied on an email sent by Lashley to a number of senior managers stating that Paige was unsuccessful in passing all of the required skills during his lifeguard class, but noted that he did pass one part of the exam. He further stated that the email indicated that Paige may not have been the only lifeguard who paid Employee in exchange for a passing grade and certification.

- c. Amy Caspari (“Caspari”) testified (Tr. p. 85-145, 259 - 265) as follows.

Caspari worked as General Counsel for Agency. She advised Agency on employment issues, legal compliance, and she handled complaints. Caspari stated that Lashley emailed her a complaint that a lifeguard instructor accepted money from a student. The email stated that Lashley would investigate and follow up with the Board of Ethics and Government Accountability (BEGA).

Caspari explained to Lashley that her team would determine what the next step would be as she felt that Lashley should not handle the investigation due to the severity of the complaint. She wanted to ensure that Agency was not biased. Caspari testified that Niles, who was at the Aquatic Center with a few lifeguards, informed her that he heard Paige bragging that he paid Employee to receive a passing grade.

After Caspari’s conversation with Niles, she spoke with Paige and asked him to provide the receipt from the ATM transaction. Paige did not have the receipt so she asked him to provide his bank statement and he did.

Caspari testified that she immediately began the investigation and emailed Employee and her union representative to provide a statement. She stated that Employee stalled for two weeks by saying she would be unable to meet at a particular date and time, or if Caspari suggested another day, Employee would claim that it was not her regular tour of duty. When Caspari finally met with Employee and her union representative Devlin Hillman in September 2016, she

informed Employee of the allegation made against her for taking one hundred fifty dollars for passing someone in the class she taught in April. Caspari stated that she did not reveal any names and asked Employee to walk her through the facts of what had occurred in that class.

Based upon her investigation, documentary evidence, and interviews that she conducted, Caspari determined that more likely than not that Employee accepted money from Paige for a passing grade in the class. Caspari stated that the bank statement corroborated the statements of Paige and the trip to the restaurant. Further, Caspari explained that the money Paige alleged that he paid to Employee suggested that it was accurate because during the interview with Employee she informed Caspari that one hundred and fifty dollars was the amount of money that a non-resident would have to pay for the class. Caspari determined that it was more likely that the amount was accurate, and an amount that she would have relied on to charge him in the event that it was ever disclosed.

Caspari stated that her conclusions led to her recommendation that Agency remove Employee. She explained that Agency has thirty-two pools and two hundred and seventy employees, and they had to ensure the public's safety. The matter was referred to BEGA as Agency had a legal obligation to report credible evidence of a violation of the code of conduct. Caspari testified that the matter was still under investigation with BEGA who stayed their matter until the proceeding was over.

Caspari further stated that it was not necessary for Agency to send a copy of the Proposed Adverse Action to the union president but stated that the union did receive notice. It was common practice to send an email transmission of the proposed discipline as notice. Subsequently, the hearing office recommended removal and Agency's final determination was removal.

On cross-examination, Caspari stated that the Collective Bargaining Agreement ("CBA") does not specify who has to provide notice to the union, but states that notice must be given. She explained that within her Agency a manager or someone from Human Resources could give employees notice of their removal.

Caspari testified that Paige originally stated that he was a D.C. resident, but when they verified his address, he was not. She was unsure if he originally put it on his employment application and explained that she was not privy to his employment application at the office. She merely asked him if he was a resident because the classes were free for residents, but that year Agency waived any summer lifeguards' fees because they were desperate for lifeguards.

On September 16, 2016, Caspari asked Paige to provide the bank statement and to provide the time of the transaction. He emailed her back and stated that the bank was unable to determine the time that the transaction took place. She stated that she did not pressure Paige

about the time because the evidence showed that more likely than not, the money was taken out of the store. She testified that she did not contact the bank to find out whether they could find the ATM receipt or time.

Caspari explained that this particular case was a more likely than not case, and not a beyond a reasonable doubt criminal matter standard of proof. She stated that although she could have requested the time, there was no best evidence rule that applied. Further, she testified that Agency had evidence that showed Paige withdrew the money out that day and it corroborated the rest of his story. Her investigation solely involved Employee. She explained that the procedural posture was to complete her investigative report and then Agency determined whether to move forward. Subsequently, Agency made a proposed removal and it went to the hearing officer. The hearing officer then gave Employee an opportunity to reply to the notice and then makes the final determination.

Caspari explained that she did not interview the other youths in the car with Paige because she found that after interviewing Employee, some of the youths were related or friendly with Employee, and Caspari felt that they would be biased.

Caspari stated that in her initial investigation meeting with Employee, Employee did not remember if Paige was in the vehicle, but stated in her most recent testimony that she did remember that he was in the vehicle. Caspari stated that Agency relied heavily on Paige's statement against his own interest in corroboration with Employee's admission that they went to the restaurant and the bank statements. Caspari testified that she did not promise employment to Paige or that he could work again as a lifeguard with Agency.

- d. Benjamin Butler "Butler" testified (Tr. p. 146 - 153) as follows.

Butler, a Recreation Specialist assigned to the senior services division, was elected president of the union in 2009 and served two terms until 2015. He stated that he was not privy to disciplinary matters against Employee as he was not the union president in 2016.

Butler explained that the practice of the CBA indicates that the union should receive forty-five days' notice in writing via mail. He stated that he never received any notice via email and claimed that the CBA did not call for email as official notice to the union. He did not consider an email to be a notification. He also testified that the CBA does not say that giving notice had to be by regular mail, but in their practice when the union received notification it would come through the mail, not email.

- e. Tara Blunt ("Blunt") testified (Tr. p. 153 – 172)

Tara Blunt ("Blunt") served as the union secretary and treasurer of the Executive Board.

In addition, she worked as a firefighter for the City of Alexandria Fire Department and an Emergency Medical Technician. She stated that per her understanding of the CBA, the union was to receive notice via mail and that email was not acceptable.

Blunt testified that she spoke with Paige via telephone regarding a rumor that there was some money exchanged between him and Employee, but Paige denied it. She then asked Paige if she could conference call Devlin Hillman, the Chief Shop Steward of Local 2741 union and an ex-employee at Agency. During the conference call she told Paige she wanted to make sure that he told the truth and asked to meet Paige when she was back in town. After the phone call, Blunt testified that Paige texted her and stated that he could not lie anymore and that he wanted to be a lifeguard again because of the money he was able to make. Blunt explained that the conference call with Paige took place in May 2017, and she was not aware that Paige was not to discuss the matter with anyone.

When Blunt was back in town, she, Hillman, and Paige met where he informed them that he was called down for a suitability test at D.C. Human Resources (“DCHR”). He had to take a urinalysis for pre-employment, but when he arrived to the location it was not a urinalysis test and two females, an African-American and a Caucasian, brought him into a room and asked him some questions while recording him.

Blunt explained that she was able to review the bank statement a few months later when she met Employee. When Blunt realized that the statement was from Navy Federal she told Employee that she banked with them as well and that the statement did not look right. She could not explain why it did not look right, but also did not understand why someone would withdraw sixty dollars and then take out one hundred dollars in the exact same day to pay somebody instead of taking out the one hundred and sixty dollars in a lump sum. Subsequently, Blunt contacted Navy Federal and asked the supervisor to provide her date, place, and time of her last transaction and the bank provided the information to her.

On cross-examination, Blunt stated that she received a five-day suspension that she was grieving and Hillman represented her at the time she filed her grievance. She stated that she was a full-time firefighter, but worked simultaneously for Agency part-time. She was employed as a lifeguard from 1991-2016. Blunt explained that she was an American Red Cross lifeguard and was terminated for insubordination because of her refusal to take another course. She testified that the new director bought into a program that was not bargained by the union. Blunt explained to the director that she was a Cardiopulmonary Resuscitation lifeguard instructor, but he did not want to consider it. Thus, she was terminated.

Blunt testified that she was removed from Agency for insubordination in June 2016. She testified that she grieved the removal from Agency, and filed an appeal of that removal which was pending before the Office of Employee Appeals (“OEA”) and that her counsel of record is

Ms. Kemi Morton.

f. Devlin Hillman (“Hillman”) testified (Tr. p. 173 – 206)

Hillman worked for Agency from January 2013 through August 2016. In addition, he was the chief steward for AFGE Local 2741, making him one of the six members of the Executive Board. He was tasked with supervising all shop stewards in the bargaining unit. Hillman testified that there were three hundred sixty members of their union and eight or nine divisions, which included aquatics, community recreation, et cetera.

Hillman represented Employee after Employee received a standard administrative leave letter that was very vague. Ultimately, Employee and Hillman had an investigation meeting with Caspari on September 7, 2016. From his experience with Agency, what was said in prior meetings were misconstrued or miscommunicated on paper, Hillman felt that the meeting should be recorded to protect all parties involved. In the past, he was allowed to record meetings and there was never an issue. But Caspari was adamant about not having the meeting recorded. She threatened to stop the meeting and stated that she would continue the investigation without him.

Hillman said that during the hour long meeting, Employee stated that she was not related to anyone in the vehicle. He recalled Caspari asking Employee how many times they drove to the Seven-11 store and how many people were in the vehicle, but Employee stated that she did not remember because the occasion took place six months ago. Caspari also asked if Employee ever received any financial compensation for the class, but Employee stated that she had not.

Hillman explained that Employee received a Notice of Proposed Removal and stated that normally the employee is to receive the copy, but a carbon copy was sent to President David Brooks. From his experience, the union president should not have been emailed.

Hillman stated that Paige wanted his job back with Agency with a year-round position. Paige told Hillman that he thought that he was being interrogated and felt threatened and scared. Paige told him that at Judiciary Square, the two women recorded him on a mobile device, and that two weeks later, Paige received a letter saying he was ineligible to work at Agency as a lifeguard.

On cross-examination, Hillman admitted that he was removed for insubordination on August 24, 2016, but that he appealed the removal at OEA and Ms. Kemi Morten was his attorney. Hillman explained that he was removed from his position because he refused to take the Ellis course. He stated that per their CBA, it should have been negotiated, but Agency continued to move forward without negotiating.

He testified that he was not present during the lifeguard class or the car ride over to the

restaurant and stated that the information that he was aware of is from what Employee stated at the investigation hearing.

- g. Roxy Guandique (“Employee”) testified (Tr. p. 207 – 246) as follows.

Employee worked at Agency for thirteen years as a lifeguard. In addition, she was a water safety and lifeguard instructor at the American Red Cross. Currently, she works part-time as a pool operator and instructor for the City of Alexandria. Employee stated that she taught over seven hundred students when she worked at Agency and was never accused of taking money from them.

Employee testified that on August 24, 2016, she received a text from Lashley stating that he wanted to talk to her. Because she was in a math class at the University of the District of Columbia, she said that she would contact him the next day. Subsequently, she received a message from Lashley that stated that she needed to go into the office and get paperwork. She asked him if she needed representation and he told her that she did not. However, Employee did not feel comfortable and asked him if she could have representation but Lashley reiterated that she did not need it. He told her not to report to work until she spoke with him.

Employee met Lashley and was served with an administrative leave paper which stated that she was suspended for a pending investigation and she was ordered to return her keys. She was asked to sign acknowledgement that she received the notice, but did not sign the notice because she did not have representation. James Washington was contacted to witness her refusal to sign the administrative leave paper.

Caspari emailed her to meet with her regarding a complaint she received regarding one of the lifeguard classes that she taught. Afterwards, Employee contacted Hillman to represent her during the investigative interview. Employee verified that Hillman asked if the interview could be recorded, but Caspari told them no. Hillman asked why it could not be recorded and Caspari stated that was not how she conducted interviews and if they were going to record it she would stop the interview and would proceed with the investigation without Employee’s input. Employee told Hillman that she wanted to proceed with the interview because she did not have anything to hide and wanted to know who made a complaint against her.

Employee was informed by Caspari that a complaint about her lifeguard class came from a parent and from a couple of students. Employee stated that in her April 2016 class, she taught thirteen students. During the course, she transported some of the students in the class to the restaurant every Saturday for lunch. On cross-examination, Employee testified that Paige was in the vehicle with her when she drove to the restaurant on April 16, 2016.

At the end of the meeting Employee was informed that there was a complaint that she

accepted one hundred and fifty dollars from a student, but told Caspari that it was not true. Employee stated that Caspari asked her why the accuser would state such a specific number and she told her that she did not know, but reasoned that the course was offered to D.C. residents for one hundred dollars and was offered to non-residents for one hundred and fifty dollars. Employee explained that she did not enroll students or deal with the exchange of money. She only received the roster of students that had already paid or given a fee waiver. After the meeting concluded, she was informed by Caspari that she would receive more information, but never did. Employee emailed Caspari to find out the status of her case, but Caspari never responded. Subsequently, James Washington (“Washington”) contacted her via email to pick up a notice, but Employee told him that she did not have representation. Washington responded that she did not need representation because they were not interviewing her, only providing her a letter. The letter Employee received was a Notice of Proposed Removal.

Lashley, Washington, and Brandon Vahey informed her that she had six days to appeal the removal. The notice had her name and included statements of Lashley, Paige, and Timothy Niles. She thought the document was odd because it was not stapled with the rest of her paper work and there were two pages labeled number three.

Employee stated that she had six days to contact the students who were on her roster and determine who was in her vehicle to help testify and prove that she did not accept the money. Employee contacted Lenia Samuels (“Samuels”), a former student in her class that Paige was in, and asked her if she remembered anything from the class. Samuels provided Employee with a written statement stating she did not observe Paige giving her any money. Employee stated that Samuels was always with her at the restaurant, in the car, at the school, and the pool. She explained that if Paige offered her money Samuels would have seen it.

Employee testified that she questioned the bank statements because she did not bank with Navy Federal, but knew that her friend Tara Blunt (“Blunt”) did. She compared Blunt’s bank statement to Paige’s statement and saw that it did not appear the same. She noticed that on Paige’s statement there was no date and time stamp like there was on Blunt’s statement.

Employee stated that on the second day of the class, Paige informed her that he hurt his leg and inquired what would happen if he did not complete the class. Employee explained that if he did not stay for the class he would have to re-enroll in a new class because he would be considered a fail student. Employee attested that Paige was fine because although Paige hurt his leg, he stated that he was still able to participate. She explained that his leg looked fine to her and he was able to get in the water and treaded water. He passed all of the tests.

Employee testified that she believed Paige lied about giving the money to her because Paige desperately wanted to be in a career service position. She explained that he asked everyone at Agency what he needed to do to become a year-round employee. Employee believed that

Paige was promised a full-time job if he testified falsely. She further explained that because he was caught sleeping while on duty, he knew that he would lose his job, and knew that Employee had a pending case and would do or say anything to save his job.

Employee did not understand why Paige would testify that she was the one who accepted the money because she did not know him until her class. She stated that Niles overheard Paige bragging about an instructor, but it did not mean it was her. Employee believed that Paige was promised something by Agency and that was why he cooperated to try and retain his job.

Employee testified that there was an allegation that Paige was sleeping in his lifeguard chair while on duty. Employee explained that he was negligent because he should not have been sleeping while there were patrons swimming in the water and that sleeping while on duty was a firing offense. Paige was caught sleeping in the chair by Timothy Niles (“Niles”), the same person who reported that Paige paid an instructor to pass his class.

Employee maintained that she did not take money from Paige and stated that she was a single mother with two children. She worked for Agency since she was fourteen years old and that her job was her livelihood.

#### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

##### Whether Agency timely notified Employee’s union regarding his adverse action, and if not, whether such action precluded taking adverse action.

Based on both the documentary and testimonial evidence presented, it is undisputed that Agency presented the Proposed Adverse Action to Employee on October 12, 2016, and on the same date, Agency emailed a copy to Union President David Brooks. It is also undisputed that the CBA merely states that a proposed adverse action against an employee must be sent by written notice to both said employee and his or her union. The CBA is silent on which particular union official must be notified nor does it state what form of notification is required, other than that it must be in writing.

Employee argues that the email is insufficient and that only an official letter with Agency’s letterhead will suffice. Employee also quibbles with notifying her union president as the proper person to notify. Employee presented union officials below the rank of president to assert that a notice by email does not satisfy the CBA. However, Employee failed to present her union president to back up this assertion.

I do not find Employee’s witnesses on this matter credible. Employee’s witnesses were all employees with appeals of adverse actions against them; thus, their understandable animus against Agency detracts from their credibility.

By its plain language, Agency abided by the notice requirement as stated in the CBA. Employee's assertions are not supported by the CBA. Typically, every term in a CBA has been bargained for in lengthy negotiations between union officials and Agency management, and the fact that the CBA is not more specific in its notice requirements belies Employee's assertions. Employee's assertion that notifying her union president is insufficient belies belief.

I therefore find that Agency complied with all the procedural requirements of the CBA when it initiated adverse action against Employee. Thus, I find that Agency's adverse action against Employee is not precluded by the CBA.

Whether Agency has proven, by a preponderance of the evidence, that Employee committed the act with which he/she was charged.

The charge against Employee centered on whether or not Employee solicited and received a monetary bribe from her student. On one hand, we have Employee herself denying the charge and a union official named Blunt, who claimed that Paige denied giving a bribe to Employee. On the other hand, we have Paige, the student who consistently admitted giving a bribe to Employee to obtain a full-time lifeguard job that he coveted.

Based on the witnesses' demeanor during testimony and the documentary evidence of record, I find by a preponderance of the evidence that Agency's witnesses are much more credible than Employee's.

By a preponderance of the evidence, I find Paige to be more credible than Employee and her union witnesses. First, Paige testified forthrightly and consistently, not only throughout his testimony at the hearing, but also throughout the entire investigatory process. He admitted without hesitation and with candor that he really enjoyed and desired a full-time job as a lifeguard. His confession to the different Agency investigators was consistent, even when it became clear to him that Agency would not hire him as a lifeguard because of his admission. Paige had nothing to gain and had already lost what he wanted by testifying against Employee. Thus, Employee's explanation as to why Paige would lie against her is unconvincing.

I therefore find that Employee did solicit and obtain a bribe from applicant Paige for him to pass the lifeguard course without testing.

Whether Employee's actions constitute cause for adverse action, and if so, whether the penalty of removal was appropriate under the circumstances.

I find sufficient evidence of malfeasance, which Agency defines as the misuse of official position for unlawful or personal gain. Employee obtained a monetary bribe to pass a lifeguard

applicant without taking the required test. Thus I find that Employee engaged in the misuse of her position as lifeguard instructor for unlawful or personal gain. Accordingly, I conclude that the Agency has met its burden of establishing cause for taking adverse action.

As this Office has stated in the matter of *Huntley v. Metropolitan Police Department*,<sup>4</sup> the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to Agency, not this Office. Our scope of review as to the appropriateness of a penalty is limited to a determination of whether the penalty is 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 has been a clear error of judgment by the agency.

When assessing the appropriateness of a penalty, this Office will leave Agency's penalty undisturbed when it is satisfied, on the basis of the charges sustained, that the penalty is appropriate to the severity of the employee's actions and is clearly not an error of judgment.

Based on the Table of Penalties as stated in 6 DCMR, Chapter 16, General Discipline and Grievances, the penalty for either a first or second offense of malfeasance includes removal. Here, the penalty is clearly not an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

It is hereby ORDERED that Agency's action is upheld.

JOSEPH E. LIM, Esq.  
Senior Administrative Judge

---

<sup>4</sup> *Juliette Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review*, (March 18, 1994).