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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)
In the Matter of:)
) OEA Matter No. 1601-0055-09
CHRISTOPHER SCURLOCK)
Employee) Date of Issuance: April 12, 2010
)
v.) Sheryl Sears, Esq.
) Administrative Judge
D.C. ALCOHOLIC BEVERAGE)
REGULATION)
ADMINISTRATION)
Agency)
_____)

Pamela Smith, Esq., Agency Representative
Darrel S. Parker, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

Christopher Scurlock (“Employee”) was a compliance and investigative specialist (“Investigator”) in the enforcement unit of the D.C. Alcoholic Beverage Regulation Administration (“Agency” or “ABRA”). The unit is tasked with ensuring that all establishments licensed by the Alcohol and Beverage Control Board (“the Board”) are in compliance with applicable provisions of the D.C. Code and regulations. Alleged violations are reported by the police or citizenry. Sometimes an Investigator will observe one. Examples are not having a manager on duty or selling liquor after hours. As a penalty for a violation, Board may suspend or revoke the liquor license of an establishment. The written findings and testimony of the Investigators are considered in these determinations. They visit the sites to perform investigations in cars owned by the agency. An Investigator is assigned to a car for a finite period of time.

During Employee’s tenure, Johnnie Jackson was the chief of the investigations unit. Employee was removed from his position effective November 21, 2008. Agency

charged Employee with neglect of duty, assault, misfeasance, incompetence and insubordination. Employee filed an appeal with the Office of Employee Appeals (“the Office”) on December 8, 2008. This matter was assigned to the undersigned Judge on June 8, 2009. The parties convened for a pre-hearing conference on August 12, 2009. They presented testimony and documents at an evidentiary hearing on November 20, 2009, after which they submitted final written briefs. The record is now closed.

JURISDICTION

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

ISSUES

- I. Whether Employee neglected his duty by failing to timely report a missing vehicle.
- II. Whether Employee committed an act of assault during a fight with his coworker.
- III. Whether Employee committed misfeasance by failing to properly report the fight.
- IV. Whether Employee was insubordinate by failing to comply with orders to timely complete work reports.
- V. Whether Employee was incompetent in the performance of his job duties.
- VI. Whether the penalty of removal was commensurate with the offense/s.

POSITIONS OF THE PARTIES

Agency charged Employee with neglect of duty for allegedly failing to report the loss of a car assigned to him in a timely manner. Agency asserts that Employee knew the car was missing on Sunday and waited to report it until Wednesday of that week. Employee maintains that he became aware of the car missing on Tuesday. Also, Employee thought that he was the victim of a prank in which someone had moved the car.

Agency charged Employee with assault for allegedly fighting with David Bailey, a co-worker who later became his supervisor, in Agency’s parking garage. Employee asserts that he was provoked. Agency charged Employee with misfeasance for misrepresenting to an agency official that the fight occurred off site while he was off duty. Employee responded that he was fearful of retaliation if he revealed the true details. He also believed that his conversation with his supervisor was confidential.

Agency charged Employee with insubordination and incompetence for allegedly presenting improperly prepared and late reports over a period of six (6) months). Employee contends that he was not given a sufficient opportunity to increase his productivity. Employee challenges the penalty of removal as excessive and contends Agency should have applied progressive discipline.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” In accordance with OEA Rule 629.1, *id.*, the applicable standard of proof is by a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat 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.” Agency has the burden of proving, by a preponderance of the evidence, that Employee committed the acts in question, that they constitute legal cause to suspend him and the penalty of removal was commensurate with the offense or offenses that he committed.

SUMMARY OF TESTIMONIAL EVIDENCE

Summary of Testimony of Agency’s Witnesses

Camille Robinson, Administrative Officer

Camille Robinson, Administrative Officer, identified Employee’s position description as an Investigator, Grade 9, Step II, salary \$43,263. During his tenure, he served several sequential term appointments. Over the course of that time, Agency increased his grade to an 11 and his salary to \$53,000.00. The Chief of Enforcement, Johnnie Jackson and Agency’s Director, Maria M. Delaney authorized the increases.

Maria M. Delaney, Agency Director

During Employee’s tenure, Maria M. Delaney had oversight of all licensing, adjudication and enforcement matters within the department. She testified before the city council and worked on the agency’s budget. Delaney recounted Employee’s employment history. He started out as a minor performing undercover work for the National Capital Coalition to Prevent Underage Drinking (NCCPUD) to identify establishments willing to sell liquor to customers who were not of legal drinking age. This work was conducted jointly with Agency and the Metropolitan Police Department (MPD). She encouraged Employee to submit an application to become an investigator.

Delaney was a friend of Employee’s aunt and sought her input when she noticed Employee’s poor performance at work. The aunt told Delaney that Employee was having trouble with his supervisor. When Delaney asked Employee about that, he told her that there had been an altercation between him and a supervisor. Out of concern that it

happened in a D.C. bar under the agency's regulation, Delaney asked Employee where it took place. He said that it was in Maryland. Employee came back to her later and explained that there was a physical, rather than verbal altercation in the garage at the workplace and that a minor named Michael was present when it happened.

Delaney said that she was especially concerned about Employee having lied about the fight when he first talked to her about it because "ABRA had a policy that if we caught an employee, especially an investigator, lying about something, then that individual's credibility, as far as the witness stand was concerned, was an issue." (*Transcript, Page 68, Lines 19 - 22*). The incident was reported to the Office of the Attorney General for further investigation. That Office indicated that it would no longer be able to use him as a witness. The Inspector General's investigation into the matter was ongoing at the time of the hearing. She remembered that three other employees were also removed for making a misrepresentation. On cross-examination she acknowledged that, in at least one instance, the employee made a false statement about a work matter.

Delaney also recounted the incident involving the missing car. Craig Stewart, another agency employee, reported to Delaney that the car assigned to Employee was missing and that he had encouraged Employee to report it as stolen. She assisted Employee in contacting a Commander in the MPD to make a report. Later, it was discovered that a member of agency's security company had moved the vehicle.

Delaney said that, for a while, after her conversation with his aunt, Employee's performance improved. Then, it declined again. Before initiating the removal action against the employee, she offered him the option of resigning. When he did not, she proceeded with the removal action on advice from the Office of the Attorney General and the Labor Relations Department. Delaney said that "the altercation was not a major issue in the termination." (*Transcript, Page 74, Lines 13 - 16*). Delaney was more concerned that he lied in reporting it and that he failed to report the vehicle when it first went missing. She acknowledged that other vehicles have gone missing before but said that, when that happens, the employee assigned to the car usually reports it.

Marian R. Howell, Administrative Assistant

Marian R. Howell maintained Agency's database and handled phone calls and appointments. Her cubicle was right across from Employee's. She also kept the keys for the vehicles used by the Investigators. When they needed one, they would ask her for it. Due to the varying tours of duty among the investigators, the cars were moved several times a day. Sometimes, it was hard for them to remember where they had put them. She did not recall any standard operating procedure for reporting a missing car.

On cross examination, Employee's attorney queried her about David Bailey, the employee with whom the appellant was allegedly involved in an altercation. She said that, once or twice, she saw Bailey looking like he was sleepy or had a hangover. She also smelled alcohol on his breath. On those occasions, he was sullen and short tempered. She saw him asleep at his desk.

Craig Stewart, Supervisory Investigator

While substituting for another employee, Stewart supervised Employee in October of 2008. Stewart described the duties of Investigators. He explained that they prepare written reports that are reviewed by the chief Investigator and present testimony before the ABC Board. Stewart counseled Employee to do the best work he could and avoid being distracted by outside matters.

There were six (6) or seven (7) investigators at the time and nine (9) cars shared between them. On Wednesday of the week that Employee's car went missing, Employee told Stewart that he had not seen it since the previous Sunday. Stewart thought that common sense dictated that Employee report it sooner. They stopped all enforcement action and gathered the team of Investigators to look for the vehicle.

Stewart said that, although there is no written practice in place, when an inspector cannot locate a vehicle he sends out a mass email to the other investigators. Employee did not. Jackson directed Stewart to have Employee write a memo documenting the event. Despite reminders, Employee did not so that day. Jackson directed Stewart to have Employee file a report with the MPD. However, when Employee told the MPD that he thought someone in the agency might have the vehicle, they declined to take a report immediately.

On cross examination, the witness acknowledged that Employee reported that he had not used the car (reported missing on Wednesday) since a work shift that went from the previous Saturday into Sunday. According to their work shift schedules, Employee should have reported to work on Monday morning and had the opportunity to know the car was gone. Stewart said that, no matter what Employee thought might have happened, including a prank, he should have reported that the car was missing.

David Bailey, Former Investigator

Bailey testified that he and Employee went to Virginia State University together and later worked together at Agency. They remained friendly, going out together regularly and calling one another on their personal cell phones. On the evening of the altercation, Bailey went to the garage to meet a friend and give him something from his car. A former employee who was visiting the area greeted him with playful wrestling. The friend approached Bailey from behind.

Employee approached him in a manner that suggested that he was about to start wrestling with him as well. Bailey told him not to. According to Bailey, Jeff Jackson, a supervisor, told him that kind of play at work was not appropriate. Employee continued his approach and swung playfully at Bailey. Bailey blocked him and then maneuvered away from Employee. Employee walked away and got in his car. Later, they met at a club in D.C.. When they talked, Employee expressed distress that Bailey hit him. Bailey explained that he wasn't trying to hit him and apologized. Bailey heard later that the Office of the Inspector General was investigating the matter. He chose not to speak to

Employee while the investigation was ongoing. After that, “they had no contact whatsoever.” (*Transcript, Page 210, Lines 5 – 6*).

Bailey was Employee’s acting supervisor from April until October of 2008. Employee expressed to Bailey that he was not comfortable with someone he spent time with outside of the office supervising him. This included giving out daily assignments and reviewing reports. He found Employee to be “very poor” at meeting deadlines. (*Transcript, Page 180, Line 20*). “I observed that his work performance was not meeting expectations as cases were constantly late. He was constantly late to work, always calling in explaining he's going to be late this morning. It was a constant thing.” (*Transcript, Page 189, Lines 3 - 7*). Bailey highlighted one investigation in particular, that of the club H20 in S.W. D.C.. He said that Employee did not work diligently on it because he did not see him at his desk typing when he should have been. When Employee asked him for a transfer, Bailey told him that he would have to bring his work up to date before he could recommend that.

Bailey said that he was in Florida when Employee’s car was reported missing. He acknowledged that he did move Employee’s personal vehicle once as a prank. He explained that he moved Employee’s personal vehicle from one floor of the parking garage to another because Employee left it in a driving lane. According to Bailey, Employee discovered it within an hour and called Bailey laughing about it.

Bailey’s testimony was clear and straightforward except when he was queried about his personal exchanges with Employee. When asked about those matters, he was less forthcoming.

Johnnie E. Jackson, Jr., Chief of Enforcement

Jackson is responsible for daily supervision of the unit. After Employee’s immediate supervisor, Jackson was the final reviewer of Employee’s memos, reports and investigative case reports. Jackson requires reports to be presented to him seven (7) to ten (10) days before a hearing. Both the immediate supervisor and the employee are the subject of scrutiny when a report is late. The supervisor is addressed during his review. Jackson found that “Former Investigator Scurlock exhibited very careless work habits. He would turn in work that was half done. I would review his work, send it back to him. The same initial corrections I had requested would come back to me not changed at all.

He would turn in his reports consistently late. He just didn’t take any -- it seemed like he had a lack of professionalism regarding his work product.” (*Transcript, Page 251, Lines 20 – 22 and Page 252, Lines 1 - 5*). This impacted Agency’s ability to complete work in a timely fashion. Jackson noted that the ABC Board requires the submission of reports on a complaint within thirty (30) days and the licensees who were the subjects of the complaints had a right to due process within a reasonable period of time.

Jackson recounted that, in one high priority matter assigned to Employee in approximately March of 2008, “[Employee] had to interview the complainants, he had to

actually interview the owner, go to the establishment, take photographs . . . of the interior and exterior, the surrounding neighborhood, do a little legwork as far as what type of neighborhood the establishment is located in, and then compile all of that information into a report, and also answer the questions that are being protested, that the protestors have actually issued.” (*Transcript, Page 254, Lines 18 -22 and Page 255, Lines 1 – 4*). When Jackson asked to see his work product in May, he found that Employee had done “little, if any, work on the investigation.” (*Transcript, Page 255, Lines 21 - 22*). He ordered Employee’s supervisor to go back, along with Employee, to the establishment that was the subject of the investigation to complete the work. Employee acknowledged that he had not put enough work into the report.

Jackson was questioned about the history of promotions granted to Employee and recalled granting one on March 16, 2008. Employee was one of a group of six (6) employees who were promoted at the time. Jackson noted that getting a promotion does not indicate that an employee has no areas of deficiency. “But basically at that time, I thought he was doing the work sufficient to go to the next level.” (*Transcript, Page 297, Lines 19 - 20*).

Jackson found out, on a Wednesday, that a car assigned to Employee had been missing since Monday. He was informed by an acting supervisor, Craig Stewart. Jackson was given to understand that Employee was reporting the matter only at the acting supervisor’s insistence. “Anytime any government property is missing from ABRA, they’re supposed to report it to an appropriate supervisor or authorities within the division or agency.” (*Transcript, Page 231, Lines 15 – 18*). When Jackson asked Employee why he had not reported the matter sooner, he said that he thought the car would turn up. The car was discovered to have been stolen. It was located in Virginia.

Jackson said of Employee’s behavior in the matter of the stolen vehicle, “His response was unprofessional. He did not take the proper action of notifying ABRA officials and, basically, he just didn’t care because he waited two days to even report it.” (*Transcript, Page 245, Lines 19 - 22*). Jackson also recalled that, in the spring of 2008, Employee left an ABRA vehicle overnight in an unattended parking lot place rather than place the vehicle in a parking space in the locked structure designated for ABRA vehicles. Employee explained that there was a miscommunication between him and Bailey about who was supposed to put the car in the correct space.

Jackson also detailed how Employee was penalized with the loss of two (2) weeks of pay when he was suspended for parking his car in Jackson’s parking space. “And basically, he was given specific instructions where to park. He, for whatever reason, decided to park in my space and make a joke about it to everybody.” (*Transcript, Page 278, Lines 19 - 22*). Jackson considered this to exemplify Employee’s “inability to follow instructions.” (*Transcript, Page 279, Line 6*).

Jackson said that, in October of 2008, when Employee was explaining why he had issues with Bailey, he “said he was assaulted by Investigator Bailey.” (*Transcript, Page 280, Lines 19 – 20*) in December of 2007. At the time, Employee’s request for a transfer

to another unit was already pending. After hearing that, Jackson told Employee that he would be transferred immediately. Jackson did not have reason to believe that Employee was fearful of Bailey because he worked many hours of overtime with him. He found out, when discussing the matter with Delaney, that Employee had told her a different version of the events. This raised a question, for Jackson, of Employee's credibility. "If he lied about that, I don't know what else he lied about." (*Transcript, Page 262, Lines 19 - 20*).

On cross examination, Jackson was asked to reconcile a discrepancy between his written statements in agency documents about Employee's failure to report the missing car and his testimony. Specifically, in writing Jackson alleged that the car in Employee's control went missing on October 7 and he reported it on October 8. Jackson clarified by referencing the days of the week rather than dates of the month. He said that Employee knew the car was missing on Monday of the week in question but did not report it until Wednesday. Jackson conceded that nothing in Employee's job description or written policy required him to do so. Jackson said that he thought common sense would require Employee to report the missing vehicle sooner. Jackson said that he recalled that Employee went to the police to report the vehicle on Wednesday, the 8th but they did not log it in until the 10th.

When explaining how he chose removal as a penalty, Jackson said:

"[T]here was a progression of behavior by former Investigator Scurlock which resulted in his termination. It got to the point where, basically, I would have to order him to sit at his desk and do his work. He was distracted. He didn't seem to care. I counseled him on numerous occasions about the timeliness of his work, the work product. And I actually had to order him to sit at his desk. Even when I ordered him to sit at his desk, it was still instances where he still did not do the work that I told him to do. (*Transcript, Page 304, Lines 10 - 21*).

Jackson said that Employee's attitude was as much a problem as his lack of work. He had a negative attitude and performed his work with reluctance. Employee lost his keys and his badge and failed to turn in vouchers for a trip that he took. He came in late and did not complete his work in a timely fashion. Jackson said that he thought, although Employee started off well, he got "cocky." "The other Investigators were consistently improving." (*Transcript, Page 309, Lines 20 - 21*).

Jackson answered with fully descriptive responses except when he was asked if he had received reports of Bailey being under the influence of alcohol. Then, he became visibly uncomfortable and short in his responses denying that anyone had reported that to him.

Summary of Testimony of Employee

Employee testified that the last time he saw the missing car was on Monday when he went to lunch. For the rest of that day, Jackson had him stay in the office to concentrate on his work. He finished his tour of duty around 4:00 or 4:30 p.m. On Tuesday when he reported for duty, Employee noticed that the car was not where he left it. That did not cause him any alarm because “cars do get moved. They're in someone's spot or someone would like to utilize a spot, so cars do get moved or relocated.” (*Transcript, Page 314, Lines 16 - 19*).

Employee began his inquiry by talking with the employee whose car was parked in the space where he had left the one he was driving. “I had assumed that she had relocated my car to make room for her car.” (*Transcript, Page 315, Lines 8 - 9*). He then walked around the block to look for it and checked with all available staff. He contacted Fleet Management, which performs maintenance on vehicles to determine whether it had been towed for repairs. Employee was unable to locate the car.

On Wednesday, the next day, he reported it to Craig Stewart. Stewart walked Employee to Jackson's office to report to him as well. Jackson told Employee to check with Fleet Management and call the Mayor's City Hotline to find out if the car had been towed. Employee then went to the police. When he first reported it to the police, he was told that “they cannot classify a vehicle stolen until the Metropolitan Police Department has canvassed the area and done their investigation.” (*Transcript, Page 326, Lines 14 - 16*). He wrote a memo as instructed that day. He recalled that, although he went to the police on the 8th, an Officer Edelin did not create a final police report until the 10th of the month.

Employee said that, on the evening he encountered Bailey in the garage, Employee was escorting one of the minors working for National Capital Coalition to Prevent Underage Drinking home. Bailey drove in and approached the young man in greeting. However, Employee testified, Bailey became too physically aggressive with the young man holding him “in a headlock.” (*Transcript, Page 337, Line 15*). Employee could smell alcohol on Bailey. He said something to Bailey about his behavior. And then Bailey struck him. Employee hit him back. Although they had verbal altercations during their combined tenure at ABRA, this was the first time it got physical. He told Delaney about the incident when he was explaining why he did not have a good relationship with Bailey as his supervisor. However, because there were so many events between them over the years, he believed that he mixed them up in his report and that is why he appeared to be lying.

Employee contradicted Bailey's account of the car that Bailey admitted moving. Employee said that he did not leave that car in a lane of traffic and that there was no need for Bailey to move it. Instead, according to Employee, Bailey, as a prank, moved the car to a parking space between two closely spaced pillars.

Employee recounted that he did thorough work in the H20 case. "I did those reports to the best of my ability and I know that the community -- both the community and the Agency were extremely satisfied with the results that were rendered as a result of my work for this protest case." (*Transcript, Page 354, Lines 8 - 12*). He said that he worked under several different supervisors and, with all of the changes, he did not have a chance to learn the job. He acknowledged a decline in his work ethic in the last six months of his tenure because he was getting so many critical comments on his reports by the supervisors that it affected his morale.

FINDINGS OF FACT
AND
ANALYSIS AND CONCLUSIONS

Agency officials acknowledge that there are no written policies and procedures in place that specify a deadline for reporting an agency vehicle missing. They rely, instead, on the professional responsibility of the investigators to whom the car is assigned. According to the weight of the evidence, Employee was assigned an agency car that he used on Saturday for a work shift that ended on Sunday. On Monday, he reported for work and noted the car missing. For the next two days, he apparently only made casual inquiries among his colleagues rather than making any official report to agency officials or the local police. This was based upon his speculation that the car had been moved as a prank. Employee, of course, countered the other witnesses' testimony with his statement that the car was not missing until Tuesday. Although the weight of the evidence does not support this assertion, even if it was true, Employee delayed in making his report by at least twenty-four (hours).

Employee's actions in this matter indicate his lack of understanding of his responsibility for the safety of agency's property. Whether stolen or moved as a prank, as long as the car was assigned to Employee, he was responsible for its whereabouts. Although there was another investigator also sharing the car, there was no evidence that he was using it on any of the days in question. Employee was responsible for the car and he did not act with professional responsibility. He treated the matter as less than serious and failed to report it to the proper authorities. Although it is clear that the police delayed in taking a report because of Employee's representations that a prank might have been involved, he waited longer than he should have to initiate it. What was timely, in this instance, was a matter of common sense. And by waiting for even one day after he knew the car was missing, Employee neglected his duty to timely report the missing vehicle.

Employee did not, however, commit the act of assault alleged by the agency. Based on their testimony and that of others to whom they spoke about it, it is clear that Employee and Bailey shared a long standing friendship that colored their work relationship. Employee's testimony about the incident was more credible than Bailey's. Employee described, in detail, how Bailey was aggressive and smelled of alcohol. This is credible in view of other testimony that at least one other employee observed Bailey to be under the influence while at work. Bailey acknowledged that he was running a personal errand by meeting a friend at Agency's parking lot. He had no professional

reason to be there. And while Employee would have been well advised to call for security or police assistance if he was concerned about the well being of the youth who was the object of Bailey's drunken attention, he did not. This Judge finds that Employee said something to Bailey about his behavior. Bailey struck him and Employee returned the blow. Employee acted in self-defense. He did not commit any act of unprovoked assault as alleged by Agency.

Agency treated with even more seriousness Employee's failure to truthfully report his encounter with Bailey. Rather than admitting that it happened on agency property, Employee said that it occurred in another jurisdiction. According to Agency officials, any compromise in the appearance of veracity of their investigators can disqualify them for testifying. This Judge full acknowledges and appreciates the efforts of agency to maintain a high level of integrity among the investigators. However, as distinguished from the case of the investigator who was removed for lying about a matter that he was investigating, Employee delayed in reporting what was essentially a personal encounter on work grounds. As noted above, neither Employee nor Bailey should have engaged as they did. Even so, there is no basis for Agency's conclusion that this rendered him incapable of telling the truth in his reports or testimony as an Investigator. Employee's failure to truthfully report the incident with Bailey simply does not amount to the act of misfeasance alleged by the agency.

Agency has, however, proven that Employee's work performance was inadequate. Employee's supervisors testified, in great detail, about his failure to devote adequate attention and diligence to his assignments. They reported how this resulted in him turning in shoddy work that required several reviews and revisions. Even when specifically directed to concentrate on his work, Employee did not.

According to former Director Delaney and supervisor Jackson, Employee attributed this, in part, to his problems with Bailey. It is clear that their personal friendship muddled their work relationship. However, Employee had the responsibility to focus on his duties regardless of the ups and downs of their friendship. And he had recourse to address any problems it caused them in their professional environment. As soon as Jackson was directly informed of the tension between them, he acted swiftly to remedy the situation by reassigning Employee. Employee's failure to timely complete his work is not excused by his issues with Bailey.

Employee also maintains that he turned work in on time but it was heavily criticized. And he acknowledged the decline in the quality of his work product. In a time sensitive situation such as preparing for Board hearings, it was important for Employee to present work of a sufficient quality that review and revisions did not take an inordinate amount of time. Employee's work required a combination of timeliness and excellence. Where one was missing, it affected the other. Agency's charges of incompetence in the performance of his duties and insubordination for failing to comply with deadlines are sustained.

Employee challenges the penalty of removal as excessive. Employee contends that he was entitled to a lesser penalty as discussed with him by Chief Jackson. Employee recounts that, on October 2, 2008, he was advised by Chief Jackson that a letter of warning would be issued to him and he would have six (6) months to improve his performance. Employee urges that this, rather than removal, would have been “consistent with the Management Guide to Progressive Discipline.” Employee’s previous record does contain a thirty (30) day suspension for parking his car in Jackson’s space.

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that “managerial authority has been legitimately invoked and properly exercised.” See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must be based upon a consideration of relevant factors. See *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an agency’s penalty “undisturbed” when “the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment.” *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

This Judge found that Employee did not commit all of the acts with which he was charged. However, the charges of insubordination and incompetence in the performance of his job duties and neglect to of duty for his failure to timely report an agency vehicle missing were sustained. These are all matters that go to the core of Employee’s ability to effectively and responsibly perform his duties as an Investigator. Failing to do so rendered Employee ineffective in his position. Although Agency had the option of setting a performance improvement plan in place, it was not obliged to do so. Over the course of time, Employee had notice that his work was not up to par. Having failed to remedy that, he was lawfully subject to removal.

ORDER

It is hereby ORDERED that Employee’s removal is UPHELD.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE