Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Chief Operating Officer of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	OEA Matter No. 1601-0049-25
	)	
v.	)	Date of Issuance: November 4, 2026
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	MONICA DOHNJI, Esq.
Agency	)	Senior Administrative Judge
	)	

Alexus Viegas, Esq., Employee Representative
Angel Marshall, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On June 16, 2025, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("DCPS" or "Agency") decision to terminate him from his position as a Social Worker, effective June 18, 2025. Employee was terminated pursuant to 5-E District of Columbia Municipal Regulation ("DCMR") §§ 1401.2(g)[2] and (t).[3] On June 18, 2025, OEA issued a Request for Agency Answer to Employee's Petition for Appeal. Agency filed its Answer to Employee's Petition for Appeal on July 18, 2025.

This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on July 18, 2025. Thereafter, the undersigned issued an Order on August 11, 2025, convening a Status/Prehearing Conference for September 8, 2025. Employee filed a Motion for Discovery and Production of Evidence on August 19, 2025. The undersigned issued an Order on September 9, 2025, scheduling a Prehearing Conference for October 14, 2025, with Prehearing Statements due by September 29, 2025. Both parties submitted their Prehearing Statements. On October 10, 2025, Agency filed a Motion for Continuance of Prehearing Conference. Subsequently, on October 14, 2025, Employee filed a Motion for Sanction and Ruling in Favor of Employee due to Agency's Failure to Respond to Written Discovery. On the same day, Employee filed a Motion in Response to Agency's Motion for Continuance of Prehearing Conference. On October 17, 2025, the undersigned

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Intoxication while on duty.
[3] Violation of the rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rule of the Board of Education.

issued an Order granting Agency's Motion for Continuance of Prehearing Conference and denying Employee's Motion for Sanctions. The Prehearing Conference was continued to November 12, 2025. Thereafter, the undersigned issued an Order scheduling an Evidentiary Hearing for January 5, 2026. Subsequently, Employee filed a Motion to Continue Evidentiary Hearing. This Motion was granted and the Evidentiary Hearing was held on March 10, 2026, and March 18, 2026, with both parties present.[4] On April 20, 2026, the undersigned issued an Order requiring the parties to submit written closing arguments by June 5, 2026. Both parties have submitted their closing arguments as required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action.

2) Whether the penalty of removal was appropriate in the circumstances and within the range allowed by applicable law, rules, or regulations.

SUMMARY OF MATERIAL TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing on March 10, 2025, and March 18, 2026, as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Volume I (Vol. I): March 10, 2026

Agency Case-in-Chief

Denae Clarke ("Clarke") Tr. Vol. 1. pgs. 33-93

Clarke served as the Assistant Principal at Jefferson Middle School with the D.C. Public Schools ("Agency"). She testified that she supervised a team of teachers and staff members that were assigned to her by the principal. Clarke stated that Employee was the school social worker who was assigned to her team the prior school year. She testified that she had a positive relationship with Employee and found it refreshing to see how well he worked with the students and their emotional needs. Tr. Vol. I. pgs. 33-35.

Clarke recalled an incident that involved Employee on May 29, 2025. She explained that while she was wrapping up an IMPACT[5] evaluation with Ms. Williams ("Williams"), a teacher with Agency, she noticed that Employee and Ms. Livingston ("Livingston") approached the side of the building. As Employee and Livingston approached Clarke, Livingston asked Clarke and Williams if they were friends. Williams responded that they were not and explained that she was receiving her

[4] The parties submitted Amended Prehearing Statements.
[5] Clarke explained that IMPACT was an Agency evaluation system for teachers.

IMPACT evaluation. Subsequently, Employee knelt to talk to Clarke. Clarke stated that she found Employee's short exchange with her odd because she was in the middle of the evaluation which Employee and Livingston were interrupting. Tr. Vol. I. pgs. 38-39.

Clarke testified that Employee's eyes appeared hazy, and Livingston's actions were inappropriate. For example, Livingston used expletive language, which made her engagement with Clarke uncomfortable. To combat those feelings, Clarke stated that she tried to laugh her way out of their encounter. Clarke cited that she decided to walk away from Livingston and Employee and walked to the main office. Tr. Vol. I. pgs. 46-50. While reviewing Agency Exhibit 9B, Clarke saw herself on the video surveillance footage at approximately 14:30 timestamp. She explained that she was leaving the main office to speak to Principal Howard ("Howard") to discuss her interaction with Livingston and Employee. At the 14:32 timestamp on the surveillance, Clarke testified that she was in the parent resource room sharing her concern with Howard. Howard informed her that pursuant to Agency policy, two witnesses were needed to observe Employee and Livingston's actions. Clarke also shared her concerns with Dean Clemmons ("Clemmons"), the school's dean, to determine if her suspicions about Livingston and Employee were valid. Tr. Vol. I. pgs. 53-59.

Upon reviewing Agency Exhibit 9C video surveillance, Clarke described the main hallway. She stated that in the video, she saw Livingston, the security guard, Ms. Bragg, and Employee talking to a student. Clarke stated that Livingston should have been teaching her class and explained that Employee had various duties. She noted that this was unusual because social workers typically did not remain in the hallway after the bell rang and the staff were not encouraged to remain in the hallways after the students transitioned from the previous class. Tr. Vol. I. pgs. 60-64.

At the 14:35:50 timestamp, Clarke testified that she saw Clemmons observe Employee and Livingston. Subsequently, Livingston and Employee entered the parent resource center where Clarke was stationed. Clarke stated that Livingston said, "I'm sorry, I'm lit." Tr. Vol. I. pg. 68, lines 16-17. Clarke understood Livingston's comment to mean that she was inebriated. She told Livingston that it was inappropriate for her to come to work inebriated. However, in response, Livington claimed that she was lit off of life. Tr. Vol. I. pgs. 68-71.

On cross-examination, Clarke testified that she was conducting the IMPACT evaluation for Williams and that Employee was in the vicinity and did not afford them privacy. Tr. Vol. I. pgs. 76-79. Clarke testified that she did not smell alcohol on Employee during their interaction nor did she witness Employee stumbling or slurring his words. She also stated that Employee was not combative or disoriented. Tr. Vol. I. pgs. 80-83. Clarke testified that while she was a trained administrator, she had never completed a reasonable suspicion form. She asserted that she did not complete the form for this matter because she was not aware that she was required to complete one and it was her first time encountering an incident of this nature. Clarke testified that she wanted to ensure that she followed the correct procedures; thus, she leaned on individuals with more experience to navigate through the process. Tr. Vol. I. pgs. 84-87.

Clarke stated that she did not privately meet with Employee to discuss her suspicions or the symptoms she observed of him. However, Clarke noted that she was aware that Mandatory Alcohol and Drug Testing ("MDAT") policy required supervisors to meet with employees privately to discuss their suspicions. Clarke was not present throughout the MDAT testing process nor did she have any

personal knowledge of what transpired after Employee entered the building and went out of her sight. Tr. Vol. I. pgs. 88-90.

Latasha Clemmons ("Clemmons") Tr. Vol. I. pgs. 95-150.

Clemmons testified that she served as the Dean of Students with Agency. In that role, she was responsible for fostering a welcoming environment and developing and implementing policies and procedures. Clemmons recalled on May 29, 2025, that Clarke spoke with her and said that she believed Employee was under the influence of a controlled substance or alcohol. After receiving direction from Principal Howard ("Howard"), she contacted an Assistant Principal from another school to understand the process of reasonable suspicion procedure. Clemmons and Clarke went back to the parent center to observe Employee and Livingston. Clemmons described Livingston's behavior as erratic. She explained that Livingston was rude, used expletives, and appeared under the influence of alcohol. As it related to Employee, Clemmons stated that when she approached Employee and asked him to come with her, he made a remark and she smelled alcohol on his breath. Tr. Vol. I. pgs. 95-98.

Clemmons reviewed Agency Exhibit 9D surveillance footage at 14:44:00, where she identified herself walking down the hallway towards Employee's office. She testified that she wanted the students in Employee's office to leave and go to their classroom. Once the students left, Clemmons explained to Employee and Livingston, that they were unable to leave the room, and they were not permitted to consume any food or beverages. Tr. Vol. I. pgs. 107-109. However, she recalled that Employee dismissed her request and passed a water bottle back and forth to Livingston. Additionally, Clemmons saw Employee take candy out of a candy dish after she told them not to consume food or beverages. Clemmons cited that she messaged Howard notifying her that the employees failed to refrain from consuming food and beverages. Clemmons stated that she remained in the room with Employee and Livingston until Howard arrived. Tr. Vol. I. pg. 111.

Clemmons testified that Ms. Smith ("Smith"), a Manager at Agency, informed Employee that a collector would collect a urine sample to verify if the employees had any controlled substance in their body and a breathalyzer test. She stated that Smith explained that if they refused to take the test or if they left, they would be in jeopardy of their employment being terminated. Tr. Vol. I. pg. 115. Clemmons stated that Ms. Nero ("Nero"), the union representative, entered the mental health suite where Clemmons was with Employee. Clemmons testified that tensions arose in the room and Employee called Smith a "nigger". Additionally, Nero told Smith that Smith was a [President Donald] Trump ("President Trump") supporter. Tr. Vol. I. pg. 120. Clemmons testified that she did not complete a reasonable suspicion form because she was not asked to do so. She further testified that, at the time of the incident, she had not received training or certification as a reasonable suspicion observer under MDAT. Tr. Vol. I. pg. 124.

On cross-examination, Clemmons reiterated that she had no prior MDAT training experience and was not qualified to make the observations she made during the incident. She recalled smelling alcohol on the breath of Employee and Livingston when they hugged. While Clemmons was not yet trained in MDAT, she believed that reporting the incident was about student safety. Tr. Vol. I. pgs. 126-131. Clemmons stated that she informed Employee and Livingston that they were suspected of being under the influence of a controlled substance and they could not consume food or beverages. Tr. Vol. I. pg. 137. She provided that Employee did not ask her for his union representative, but she

was unsure if he asked someone else. Clemmons stated that although she did not ask Nero to leave the room, Smith instructed her to do so. Tr. Vol. I. pg. 141. Clemmons testified that the entire room that the employees were waiting in smelled of alcohol. However, she could not recall if Employee slurred his words or had any other symptoms that stood out to her. Tr. Vol. I. pgs. 144. Clemmons testified that she left the room after Howard arrived. Tr. Vol. I. pg. 148. On redirect, Clemmons testified that prior to being in the office with Employee, she initially smelled alcohol on Employee in the hallway. Tr. Vol. I. pg. 150.

Sheneka Smith ("Smith") Tr. Vol. I. pgs. 155-215.

Smith worked at Agency as a Manager of Strategy and Logistics ("MGL"). She held this position for a year and a half before she was a coordinator for strategy and logistics. As a MGL, she was responsible for enrollment, attendance, nurse suite, the cafeteria employees, security, facilities, and the front office, amongst other responsibilities. Smith testified that she did not have any supervision over Employee. Her only interaction with Employee was when he needed something for his office. Smith described her relationship with Employee as cordial. Tr. Vol. I. pgs. 155-156.

Smith testified that on May 29, 2025, she was in her office in the afternoon, having an enrollment meeting and Howard told her that she believed that there was someone under the influence and instructed Smith to go to the counselor's suite to observe her suspicions. When Smith entered the suite, she saw Clemmons, Livingston, and Employee. Smith stated that when she opened the door, she immediately smelled alcohol. Smith also observed Employee and Livingston passing a water bottle back and forth and they were both drinking from it. She testified that both employees were talkative and loud. Smith was unable to discern which employee smelled of alcohol, but she determined that they were under the influence and did not need to be around children. Tr. Vol. I. pgs. 158-161. Smith testified that Livingston stated that she needed to use the restroom, Smith warned Livingston not to leave the room because of the MDAT training she received, stating that employees were not to leave the room. Livingston ignored Smith's warning and left the room. Smith subsequently left the room to return to her meeting and left Clemmons, Employee, and Livingston in the room. Tr. Vol. I. pgs. 164-165.

Smith testified that Employee did not request a union representative. However, once she learned that Nero arrived in the room with the employees, Smith contacted the deputy director of operations to receive advice on the procedures that should occur for this type of incident. Smith asserted that she was informed that Nero did not need to be present in the room. However, Nero argued that the employees were entitled to representation, and in response, Smith explained that typically they were, but the incident was not a union matter. In response, Nero asked if Smith was President Trump. Tr. Vol. I. pgs. 166-167. Smith took Nero's comment negatively and understood it to mean that President Trump was a dictator. Tr. Vol. I. pgs. 168-169. Smith recalled that Employee referred to her as a "nigger", and she told Employee that she would not tolerate him speaking to her in that manner. Tr.167, lines 18-21. Smith was offended by Employee's comment because they were in a professional environment and that was not how her colleagues spoke to one another. Tr. Vol. I. pg. 169.

According to Smith, Employee attempted to leave the room, and Smith told him that he could not leave. Employee asked if Smith was trying to hold him hostage. Smith reiterated that he could not leave the room and had to stay and wait to be tested. Tr. Vol. I. pg. 168. After viewing Agency

Exhibit 9D at 15:32:35, Smith explained that in the video, she was talking to Employee and explained that if he left the room, he could possibly lose his job, and she wanted to save him from losing his job. Tr. Vol. I. pg.171.

Smith identified Agency Exhibit 2, as a MDAT referral form. She testified that she completed the form in connection with the incident on May 29, 2025. Smith stated that she wrote that she was asked to observe Employee by Howard. Smith stated that upon opening Employee's office door, there was a strong alcohol smell. Smith cited that she explained to Employee her reasonable suspicion observation. In response, Employee slurred his words and told her that he was not inebriated. Smith noted that Employee was loud when he was talking to Livingston. Smith also noted on her form that she observed that Employee had poor physical coordination. Smith asserted that when Employee stood up, he was fidgety and leaned on his desk to keep his balance. Tr. Vol. I. pgs.175-177. Smith recalled that Hall arrived at Agency, but she was not present for the collection process. Tr. Vol. I. pg.178.

On cross-examination, Smith testified that Employee was not under her supervision; however, she became involved because she was a trained MDAT observer. Smith could not recall whether the MDAT policy required one or two observers. Tr. Vol. I. pg.179. Smith testified that her statement on the reasonable suspicion referral form was dated May 29, 2025; however, she did not sign the form until June 2, 2025. She attested that the MDAT policy required the form to be completed on the same date. She explained that although the form had initially been completed, she was required to redo it because additional information was requested. On the form, Smith indicated that she observed Employee from 2:30 p.m. to 3:45 p.m. However, she clarified that this timeframe did not mean that she continuously observed Employee for the entire period. Smith stated that she submitted all documents to MDAT. Tr. Vol. I. pgs.180-182. Smith testified that she provided two statements. She reviewed Employee Exhibit 8, an email she sent to MDAT dated June 3, 2025. Tr. Vol. I. pg. 202. Smith stated that she sent the email to MDAT because her initial report was too vague. Tr. Vol. I. pg. 205.

After reviewing Agency Exhibit 9C at 14:41:40, Smith admitted that she was not in Employee's presence from 2:00 p.m. until 2:40 p.m. The video also showed that Employee had not entered his office and was instead in the main hallway. Tr. Vol. I. pg.186. After reviewing Agency Exhibit 9D, Smith testified that she entered Employee's office immediately after he did, such that Employee was present in his office for only approximately two seconds before she entered. Smith admitted that, during their interaction in the hallway, she did not get close enough to Employee to smell his breath. She further testified that she did not smell anyone's breath while she was in the office; however, she detected the odor of alcohol in the room. Smith acknowledged that the surveillance video did not show that she was observing Employee between 2:30 p.m. and 2:54 p.m. Tr. Vol. I. pgs.187-190. After reviewing Employee Exhibit 8, Smith testified that her May 30, 2025, email to MDAT indicated that she observed two employees at 1:50 p.m., whereas her reasonable suspicion form reflected an observation time of 2:30 p.m. However, Agency Exhibit 9D established that she did not observe Employee until closer to 3:00 p.m. Tr. Vol. I. pg. 205. Smith testified that the discrepancy resulted from her failure to record the correct time. Tr. Vol. I. pg. 206.

Smith reiterated that Employee slurred his words when he protested that he was not under the influence. She also stated that Employee and Livingston were both drinking out of a water bottle and passing it back and forth. Tr. Vol. I. pg.192. Additionally, Smith provided that she did not hold

Employee hostage, but blocked the door preventing him from leaving because she knew that if he left, he could lose his job. Tr. Vol. I. pg. 196. As it related to Nero, Smith reiterated that she could not be present in the room with Employee. She asserted that Employee did not seek union representation nor was he denied representation. Tr. Vol. I. pgs.197, 199.

On redirect, Smith reviewed Agency Exhibit 2, and she explained that her understanding of the document was what time Employee was observed, not necessarily the time that she observed him. Smith cited that she was aware that there are cameras throughout the school building and it was not her intention to misrepresent the period of time that she observed Employee. Tr. Vol. I. pg. 211. Smith asserted that she was not sure how long Employee had been in his office before the time that she entered with him. Tr. Vol. I. pg. 212. Smith stated that the initial observation and reporting was made by Clarke. Tr. Vol. I. pg. 214.

Allecyn A.G. Howard ("Howard") Tr. Vol. I. pgs.216-315.

Howard worked at Agency as the Principal of the school. She testified that she hired Employee and their relationship was cordial and collegial. She cited that at times they interacted in a jovial manner; however, their interactions always remained professional. Howard stated that Employee was lighthearted, he came to her with concerns when he had them, and they were able to address them collaboratively. She noted that it was nice to have a black male in the role he served in at the school because most of the student population was black males. Tr. Vol. I. pgs. 216-217.

Howard testified that on May 29, 2025, Clarke brought it to her attention that Employee and Livingston were intoxicated. She asserted that she then asked Clemmons to observe the employees. Clemmons observed the employees and informed Howard that Employee smelled of alcohol; however, Clemmons explained that she was not MDAT certified. Subsequently, Howard went to observe the employees for herself. She recalled entering the hallway to make an observation. Howard heard Employee and Livington being loud and were yelling in the hallway. She described their behavior as uncharacteristic. Howard stated that once she came into close proximity to Employee, she smelled alcohol on his breath. Tr. Vol. I. pgs. 218-220. She stated that her primary concern was that Employee was around students. Tr. Vol. I. pg. 225.

Howard testified that once an employee is identified for reasonable suspicion testing, an administrator trained in MDAT must remain with the employee throughout the process. Howard stated that Clemmons was initially in the room with the employees, and Smith later arrived to observe them. Howard further testified that she did not enter Employee's office until after school was dismissed, at approximately 3:20 p.m. or 3:25 p.m. Tr. Vol. I. pgs. 228-229. Howard reviewed Agency Exhibit 9B, which depicted video surveillance of herself entering the mental health suite at 15:19:25.[6] Howard stated that when she entered the mental health suite, she saw Nero in the office and asked her to leave. It was Howard's understanding that because it was not a disciplinary matter, Nero was not required to be there. Howard testified that in response, Nero informed her that her presence was requested, and as a union representative, she had the right to remain present. According to Howard, Nero stated that she also was not leaving because Livingston was using her cellular phone. Tr. Vol. I. pgs. 230-232.

[6] This is equivalent to 3:19 p.m.

Howard provided that at the 15:25:30 mark on the surveillance video, she saw Nero, Employee, Livingston, and herself leaving the suite and explained that one of the employees had to use the restroom. Howard testified that it was against MDAT policy for anyone to leave the room, use the restroom, or consume any food or beverage while under reasonable suspicion; however, one of the employees stated that if they did not use the restroom, they would urinate on themselves, so she escorted them to the restroom. Tr. Vol. I. pgs. 232-234.

Prior to waiting for the test collector, Jaqueline Hall ("Hall") to arrive, the employees and Nero waited in Employee's office. Howard stated that Nero remained present until Hall left. Tr. Vol. I. pg. 240. Howard stated that Hall arrived around 5:00 p.m. Howard stated that Hall explained the process to employees. According to Howard, Hall asked Livingston for a sample first. After Livingston was tested, the machine locked based on Livingston's breathalyzer's concentration. Howard further testified that Hall explained that if an individual's Blood and Alcohol Concentration ("BAC") was over the limit, the machine locked for ten minutes. Howard explained that because the machine locked, Hall asked Employee for a urine sample while they waited for the machine to recalibrate. Howard stated that Employee did not understand why he had to provide a urine sample if the collector was called to conduct a breathalyzer test. In response, Hall explained that she was required to collect the urine sample and the breathalyzer test. Howard further testified that Employee stated that he had a medical marijuana card; however, Hall told Employee that he was required to take both tests. Tr. Vol. I. pg. 243-244.

Howard asserted that it appeared to her that Employee did not want to take the test and Employee subsequently said that he had to leave. Howard informed Employee that if he left, it would be considered a refusal and grounds for termination. Howard stated that Employee left and Howard messaged her contact from MDAT that Employee had left the testing site. Howard explained that she was instructed to notate that Employe left and timestamp it. Tr. Vol. I. pgs. 245-246. She testified that approximately ten minutes later, Employee returned ready to test. However, Howard cited that she explained to Employee that because he left the collection site, he was not permitted to test. Howard noted that she also explained that she reiterated this to him several times prior to him leaving. Howard described a back-and-forth exchange of Employee asking Hall if she would test him and Hall explained that she had to follow procedure. Tr. Vol. I. pgs. 262-264. Howard noted on the reasonable suspicion referral form that she observed Employee's mannerisms. She explained that when Employee was walking, he used his hands in very exaggerated movements. Howard stated that instead of walking in a straight line down the hallway, he was weaving; his eyes appeared glassy and he appeared disoriented. Tr. Vol. I. pgs. 267-268.

On cross-examination, Howard admitted that she reported on the Reasonable Suspicion referral form that she observed Employee at 1:50 p.m.; however, the surveillance video depicted a different time stamp that she observed him. Tr. Vol. I. pg. 270. Howard said she did not contact MDAT prior to seeing Employee in the hallway. Tr. Vol. I. pg. 274. Howard explained that she asked Smith to observe Employee because Clemmons informed her that she was not trained in MDAT. Tr. Vol. I. pg. 277.

Howard testified that she did not see Employee stumble, fall, or have difficulty walking. However, she noted that she observed Employee for over an hour and that Employee had bloodshot, glass, or watery eyes based upon the box she checked on the reasonable suspicion form. Tr. Vol. I. pg. 284. Howard testified that when Hall arrived, Hall tested Livingston first. Howard could not

recall if the MDAT policy allowed another individual to be in the same vicinity when another employee was testing. Howard attested that because Hall provided that the BAC was high, the machine locked for ten minutes. She explained that rather than leaving the room, Employee could have provided a urine sample while waiting for the breathalyzer machine to unlock. Howard reiterated that prior to Employee leaving the room, she advised him that leaving would be considered a refusal to submit to testing and could result in termination. According to Howard, Employee responded that he was not refusing but ultimately left the collection site. Tr. Vol. I. pgs. 296-300. Howard disagreed with the assertion that Employee's departure from the room while remaining elsewhere in the school meant that he had not left the testing site. Tr. Vol. I. pgs. 303-304.

After the May 29, 2025, incident, Howard recalled receiving a grievance from Employee via email. Howard explained that Employee's email was not an official grievance. She explained that the grievance was not filled out on the official grievance form provided by the Washington Teachers Union ("WTU"). Howard asserted that she did not schedule the grievance, Step 1, Stage 1, because Employee was on leave and a grievance hearing cannot be scheduled when employees are on leave. Howard stated that Employee was terminated by Agency because he was considered to have refused testing, and in collaboration with Labor Management and Employee Relations ("LMER") Tr. Vol. I. pgs. 310-311.

On redirect, Howard reviewed Agency Exhibit 10, which was an email from Employee sent to Howard, Smith, Nero, the WTU president, WTU field representative, and a WTU executive Board member. Tr. Vol. I. pg. 313. The document in pertinent part provided that Employee wrote "Out of frustration, I said to myself aloud, oh, no, niggers ain't about to hand me up like this." Tr. Vol. I. pg.314, lines 2 -3. Howard said she found Employee's email to be erratic and unprofessional, given the explicative language used within the email. Tr. Vol. I. pg.314.

Jaqueline Hall ("Hall") Tr. Vol. I. pgs. 318-357.

Hall worked as a Specimen Collector with White Glove Drug and Alcohol Testing. Her duties included traveling to a test site or an office to administer alcohol breathalyzer tests, saliva tests, and collecting urine samples for drug tests. She has served as a testing collector for ten years. Hall explained that she received an intensive online training that must be renewed every five years. The training consists of rules and regulations of what could be considered as good quantity for a urine sample, what should be done if a sample was too hot or cold, the action that should be taken if an individual stayed or left, amongst other policies. Tr. Vol. I. pgs. 319-320. Hall explained that in a thirty-day period she collected approximately four hundred (400) tests in sites such as in schools and the Department of Transportation. She testified that she provided service in the District of Columbia and Maryland. Tr. Vol. I. pg. 321.

Hall testified that if an individual left the facility while waiting to have a test administered, it would be considered a refusal. She defined leaving the facility as leaving the eyesight of the collector. Hall asserted that it was critical for the individual to remain in the collector's eyesight. She noted that the collector was there to administer the test or collect samples and because they are not aware of what the individual has done, the individual could contaminate the specimen to be collected. Tr. Vol. I. pg. 321. Hall stated that the individual must sign a form agreeing to take the test. Hall cited that she asks the donor for their government identification, obtain any relevant information to include on the form, then she signs a copy, and provides the donor with their copy. An individual that

provides a sample for drugs would be given a copy of the form and provide a sample for her. Hall stated that she would fill two tubes of the sample in front of the individual and ensure that the tubes match the numbers from the form, and the individual would initial. Tr. Vol. I. pg. 322. Hall testified that many of her collections were performed at D.C. Public Schools. She stated that most of the collections were reasonable suspicions because Agency does not conduct random drug tests. She noted that she was called to conduct the test, not observe the individual accused. Tr. Vol. I. pg. 323.

Hall recalled arriving at Agency on May 29, 2025. She believed that she arrived between 4:45 p.m. and 5:00 p.m. Hall testified that she tested Livingston first. She stated that she conducted a breathalyzer test first because alcohol leaves the system faster than drugs can leave urine. Hall stated that Livingston blew above a .02, and when that occurs, a confirmation test must be conducted. Subsequently, a fifteen-minute waiting period is required for the machine to recalibrate. Hall stated that after the waiting period, Livingston blew into the breathalyzer again and she was able to confirm her test number. Tr. Vol. I. pgs. 325-327. Hall explained that while she was waiting for the machine to recalibrate, she told Employee that he would take his test after she finished with Livingston. Hall testified that Employee told her that he had a prior engagement. Hall cited that she told Employee that if he left, it would be considered a refusal. Employee told Hall that he was not refusing the test and reiterated that he had a prior engagement. Hall stated that Employee left and returned fifteen minutes later to test; however, because of MDAT policy, she did not allow him to take the test because he left the room. Tr. Vol. I. pgs. 328-330.

On cross-examination, Hall testified that the testing location afforded visual privacy and none of the employees protested about being in the same room. Hall also noted that Employee did not have any reservations about being in the same room with Livingston. Hall stated that there was typically one employee the majority of the time when she arrived at a testing site. She explained that if an individual provided that they were not comfortable, she would then ensure that they were comfortable. Tr. Vol. I. pgs. 338-339. Hall cited that Employee remained out of the room for fifteen minutes and during that time, she was able to test Livingston twice and collect her urine sample. Hall stated that Employee returned when she was packing up her equipment. Tr. Vol. I. pg. 342.

Hall reviewed Agency Exhibit 9 at the 17:07 timestamp where she identified Employee. The video was fast-forwarded to the 17:16:09 mark, where Employee returned. Hall testified that she could not recall the exact time that Employee left and reentered the room to be tested. She stressed that even if Employee left her sight for four minutes and came back, Employee would not be able to take the test. Tr. Vol. I. pg. 350-352.

Volume II (Vol. II): March 18, 2026

Agency's Case-in-Chief

Rosa Rodriguez ("Rodriguez") Tr. Vol. II. pgs. 5-68

Rodriguez worked as a Specialist in the Office of Labor, Management, and Employee Relations ("LMER"). She was the primary contact for all drugs and alcohol testing for Agency. Rodgriguez also guided administrators and employees to ensure that the policy was followed. Additionally, she oversaw the MDAT program. Tr. Vol. II. pgs. 5-8.

Rodriguez testified that reasonable suspicion testing occurred when a trained administrator had reason to believe that an employee may be under the influence of drugs and alcohol while on duty. She explained that the administrator could start the process to refer an employee for reasonable suspicion testing. She stated that Agency's reasonable suspicion policy provided that if a supervisor suspected that an employee was under the influence of drugs and alcohol, they would make the first observation and contact a second trained administrator to conduct the second observation. Rodriguez reviewed Agency Exhibit 3 and provided that under the policy, a supervisor constituted a superintendent, principal, assistance principal, directors, or managers. Rodriguez cited that once a supervisor contacted MDAT, MDAT confirmed whether the two trained administrators made an observation, they informed the school of next steps, ensured that the employee was moved to a secure area, and commenced the process of calling a testing collector to dispatch to the school. Rodriguez stated that MDAT did not have a specific policy for the collector to arrive; however, it typically took a collector up to two hours to arrive at a school. Tr. Vol. II. pgs. 9-12.

Rodriguez further reviewed Agency Exhibit 3 and testified that under Section 6.5, a refusal is any behavior that would prevent the employee from completing the required drug test. That would include failure to appear for a required test, failure to remain at the collection site, or failure to comply with any part of the testing process. Rodriguez asserted that once the collector arrived, the employee could not leave the room unless directed by the collector. Rodriguez stated that the policy required the collector to move the employee to a separate room to complete the test. She stated that refusing to complete a reasonable suspicion test was grounds for termination. Rodriguez provided that if the collector reported that there was a refusal, they would move to the next phase of termination for the employee. She also testified that she was the primary point of contact for drug and alcohol reasonable suspicion. Rodriguez stated that she was contacted by Assistant Principal Miller ("Miller") of the suspicion, and she started the process of sending a collector to the school. Tr. Vol. II. pgs. 14-16. Rodriguez stated that Agency Exhibit 5, provided that Employee signed an acknowledgment form on June 24, 2024, wherein, Employee acknowledged and received Agency policy. She noted that the third bullet on the form provided the individual notification of MDAT policy. Tr. Vol. II. pgs. 17-18.

Rodriguez stated that Agency followed the reasonable suspicion procedure by confirming that they had two trained administrators on site to complete the form. Rodriguez asserted that once the first administrator saw the signs of impairment, they went to find a second administrator. Tr. Vol. II. pg. 20. However, Rodriguez testified that every administrator who interacts with an employee under reasonable suspicion is not required to fill out the form. Tr. Vol. II. pg. 23. According to Rodriguez, LMER made the decision to terminate Employee. She testified that neither the principal nor Agency have any input or influence in their decision. Tr. Vol. II. pgs. 25-26.

On cross-examination, Rodriguez testified that she never interacted with Employee. She stated that her communication was with Howard, Smith and Miller. Tr. Vol. II. pgs. 28-29. Rodriguez stated that Howard did not inform her that Employee had to make a telephone call or leave the room. She also testified several times that once the test collector arrived at the school, an employee may not leave or the employee leaving would be considered a refusal. She however noted that prior to the collector arriving, it was encouraged that an employee remained at the testing site. Tr. Vol. II. pgs. 33-35 and 45-49. Rodriguez stated that whenever alcohol testing occurred, other individuals may be in the same area or room; however, if an employee was providing a urine sample, it would be in a private testing area. The tester would go into the restroom with an employee if a

direct observation was required, and if required, the same gender observer would go with the employee. Tr. Vol. II. pg. 39.

Rodriguez testified that collection for reasonable suspicion did not occur offsite. Tr. Vol. II. pg. 52. She explained that when an employee is accused of reasonable suspicion, an administrator should verbally inform the employee that they have been referred to reasonable suspicion testing. She further provided that an employee was provided with written communication via LMER that they were placed on administrative leave for reasonable suspicion. Tr. Vol. II. pgs. 56-57.

Rodriguez reviewed Agency Exhibit 3, at Section 9.3.5 and stated that Agency should provide alternative transportation to employees who were under reasonable suspicion. Rodriguez clarified and stated that if an employee was unable to make it home on their own, they could ask for assistance with transporting the employee to their home or contact the police to have them escorted home. Rodriguez cited that if Agency believed that an employee could drive themselves, they did not have to provide assistance. Tr. Vol. II. pg. 60. Rodriguez further testified that the administrators were not there to diagnose, so they could not definitely state that an employee is under the influence. Rodriguez was not aware if alternative transportation was arranged for Employee or Livingston. Tr. Vol. II. pg. 61.

Rodriguez stated that only two trained administrators were required to complete the reasonable suspicion form, regardless of the number of trained administrators who were present at Agency. Tr. Vol. II. pg. 62. On redirect, Rodriguez reiterated that once an employee was referred for a reasonable suspicion, they could not leave the site or the school before the collector arrived. Rodriguez noted that once an employee left the site, it was considered a refusal, even if the employee came back. Tr. Vol. II. pgs. 66-67.

On examination by the undersigned, Rodriguez testified that the MDAT policy did not provide guidance on testing after an employee's tour of duty. She explained that once the collector arrived, the employee should remain on site, which was part of the policy; thus, it was expected that employees would remain on site after their tour of duty for the collection of the tests. Rodriguez stated that employees were not accommodated for other duties or engagements outside of their tour of duty. Tr. Vol. II. pgs. 67-68.

Employee's Case-in-Chief

Ta'Tiana Miles ("Miles) Tr. Vol. II. pgs. 70-85.

Miles worked as a Social Worker for Agency. In her role, she provides behavioral support services for students that have behavioral concerns that impact their access to the generalized education. Miles testified that she and Employee were colleagues. She stated that Employee was extremely professional, a strong advocate for the students on his caseload and the community that he served. According to Miles, Employee fostered an atmosphere between the students and teachers that allowed them to exist in the same space. Tr. Vol. II. pgs. 70-72.

Miles testified that on May 29, 2025, she and Employee conducted a home visit for a student who had been absent from school for an extended period of time. She explained that when a home visit was conducted, they checked for the safety and wellbeing of the student. Miles stated that after

the visit, she and Employee went to a bakery and walked back to Agency. She stated that Employee did not consume alcohol in her presence nor did he show any signs of impairment. Miles described his speech, demeanor, and physical coordination as normal. Miles stated that she left Agency at approximately 12:00 p.m., so she was not present for the incident that occurred later that afternoon. Miles noted that because she was on leave, she did not learn of the incident until the following Monday. She provided that she has never witnessed Employee consuming alcohol or being intoxicated at work. Tr. Vol. II. pgs. 73-75.

Miles recalled two times that Employee filed a grievance. The first grievance occurred in March or April of 2025. She explained that the grievance was filed on behalf of the social work team pertaining to caseloads. Mile noted that another incident occurred with a student that damaged Employee's property. Miles stated that initially Employee was told by the administration to document the cost of the items, which included a glass hourglass and a computer monitor. According to Miles, Employee was told that he would be reimbursed and when he was not, Employee filed a grievance. Tr. Vol. II. pgs. 76-78. Miles testified that Employee and Howard's relationship shifted at some point. Miles explained that in the past, Employee and Howard would be able to converse; however, during meetings, management would cut Employee off whenever he would express his opinion. Miles stated that their relationship was contentious. Tr. Vol. II. pg. 79.

On cross-examination, Miles testified that she left Agency at approximately 12:00 p.m., so she was unsure whether Employee went to lunch and what he may have consumed. Miles also noted that she was unaware that there were student complaints that Employee's office smelled of marijuana. Miles testified that she was aware that Agency selected and interviewed Employee for an administrator role; however, she was not aware that he made it as a finalist in the selection process. Tr. Vol. II. pgs. 81-82. Miles asserted that she was unaware that Employee's request for reimbursement for the property damage was typically handled by the Office of Risk Management and not Agency directly. Tr. Vol. II. pg. 83.

Dr. Lonzo Sasso ("Sasso") Tr. Vol. II. pgs. 86-145.

Sasso worked as a School Counselor and Coordinator with Agency. He was responsible for social-emotional learning, scheduling, groups, 504 coordination and activation, and advocacy for students. Sasso testified that Employee was an astute practitioner of education and an excellent clinician when helping students navigate their emotional triggers. As related to their professional relationship, Sasso stated that he and Employee worked together on various initiatives. Tr. Vol. II. pgs. 86-92. He also testified that Employee was excellent at advocating for himself and others. Sasso provided an example of an incident where a student damaged property in Employee's office, causing Employee to file a grievance. It was Sasso's opinion that the property damage was the beginning of the conflict between Employee and administration. Tr. Vol. II. pg. 114.

Sasso testified that he never observed Employee under the influence of any intoxicating substances. He recalled working with Employee on May 29, 2025. Sasso explained that Employee was in the hallway, walking towards their suite. Sasso asserted that he saw Employee enter his office and he subsequently witnessed an ambush from Smith, followed by Clemmons, rushing into Employee's office. He stated that he could not understand what they were saying, but he explained that there was a substantial amount of activity and commotion within the suite. Sasso stated that he contacted Nero to come to the suite because he felt uncomfortable with the ambush that he witnessed.

Tr. Vol. II. pgs. 93-94. Sasso stated that Employee was approximately two to three feet away from him in the hallway. Sasso testified that he did not smell alcohol on Employee's breath, nor did he observe Employee slurring his words or experience coordination issues. Tr. Vol. II. pgs. 96-98.

Sasso stated that once Nero arrived, she was blocked by Smith from entering the office suite. He noted that he heard Smith being harsh towards Nero and Employee. Sasso asserted that Nero was eventually able to enter the office, and Sasso went back to his office and resumed working on his scheduling. He stated that he was not asked by Agency to provide a statement about what he witnessed. Tr. Vol. II. pgs. 103-104. Sasso stated that prior to the incident, he could not recall Employee interacting with Smith or Clemmons. Tr. Vol. II. pgs. 108.

On cross-examination, Sasso reviewed the video surveillance on Agency Exhibit 9, he testified that at timestamp 14:53:19, he saw Miller in the hallway. At 14:54:24, he confirmed seeing Employee wearing a black shirt and Smith walking behind him. He stated that he would not describe the footage as the ambush he previously referred to. At 14:48:01, Sasso testified that he saw himself entering the mental health suite and as he watched the surveillance, he testified that Employee left the suite at 14:48:41. Tr. Vol. II. pgs. 115-119. Sasso claimed that while the surveillance did not depict the ambush, he asserted that a surveillance camera was not in the office to capture what truly happened. Tr. Vol. II. pg. 127.

Sasso testified that while he was not trained in reasonable suspicion determination, he was trained to know whether or not someone was coherent and he affirmed that he never observed Employee under the influence. He also stated that he was not aware of student complaints regarding Employee's office smelling of marijuana. Sasso noted that he was unaware that the property damage that Employee filed a grievance about was handled by the Office of Risk Management, not Agency. Tr. Vol. II. pgs. 128-130. Sasso stated that he did not hear Employee refer to Smith as a 'nigga'. He reiterated that while he could not specifically hear what Employee and Smith were saying to one another, he opined that Smith's overall tone was accusatory in nature. Tr. Vol. II. pg. 132.

On redirect, Sasso testified that there was no other way to enter his office as there was no back hallway or other way to enter the suite. Tr. Vol. II. pg. 139. Sasso stated that he did not believe that Agency Exhibit 9 captured an accurate view of the interaction that he had with Employee. Tr. Vol. II. pg. 143-144.

Latisha Nero ("Nero") Tr. Vol. II. pgs. 148-234.

Nero worked as a Teacher with Agency. She was elected as a WTU building representative in the Spring of 2020. She explained that as a union representative, they were required to take two trainings per year. Nero assisted Employee on the date of the incident. She stated that Employee called her personal cellular phone around 3:00 p.m. to inform her that he needed union representation in his office. Nero stated that when she arrived at his office, she was not immediately able to enter because Smith blocked the door and stated that Nero was unable to enter. Nero informed Smtih that Employee contacted her for assistance and it was Employee's legal right to have representation. According to Nero, Smtih was hostile towards her. Nero stated that Smtih contacted someone by telephone, and in response, Nero contacted the union president, who advised her that she had the legal right to be present. Nero stated that she was only able to enter the room because Smith stepped aside to make a telephone call. Tr. Vol. II. pgs. 148-154.

Nero testified that she was legally permitted to be in the presence of Employee because of Weingarten rights.[7] She explained that if an employee believed that they would be interviewed in an investigatory manner or it could lead to potential disciplinary actions, the employee had a right to have union representation with them. Tr. Vol. II. pg. 155. Nero said when she entered the room, she saw Clemmons and Livingston. Clemmons informed Nero that she could not be present. However, Nero saw Livingston in the room, and she handed Livingston her cellular phone so that she could speak with the union president privately. She testified that she was unable to privately speak or confer with Employee because Clemmons was still in the room. Tr. Vol. II. pgs. 156-157.

Nero stated that she was in close proximity to Employee. She explained that she was sitting directly next to him when she sat down and Livingston was on the other side of Nero. Nero did not notice the presence of alcohol on Employee's breath. Tr. Vol. II. pg. 158. However, she smelled alcohol on Livingston. Tr. Vol. II. pg. 161. Additionally, she stated that Employee's eyes did not appear glassy or bloodshot, and Employee did not slur his words. Nero asserted that Employee was flustered because he was unable to have his union representative and she also felt frustrated. Tr. Vol. II. pgs. 158, 160.

Nero testified that she did not recall hearing statements made about marijuana usage or alcohol until Howard entered the office and made a comment that Livingston stated that she was lit. Nero presumed that it was a vernacular term that Howard used to indicate that she was intoxicated. Nero stated that Miller arrived with paperwork and Howard stated that there was a reasonable suspicion of the employees being under the influence of alcohol. Nero further testified that Howard stated that a test collector ("Hall") would arrive on site to administer the tests. Howard allowed Nero to remain in the room. Nero recalled that it took about two hours for Hall to arrive. Nero did not recall Employee drinking water; however, she recalled Livingston drinking water. She stated that she did not recall either of the employees consuming food. Tr. Vol. II. pgs. 165-169.

While Nero and the employees waited for Hall to arrive, Nero recalled Employee explaining that he had a very important appointment pertaining to his clinical work outside of Agency. Nero estimated that Employee made the comment about having another appointment around 4:00-4:15 p.m. Employee made the statement to Howard because they were trying to understand the cause of the delay and determine when Hall would arrive. Tr. Vol. II. pgs. 169-171. Nero stated that once Hall arrived, they were taken to a new location, that was outside of Employee's office. Tr. Vol. II. pg. 173. Nero stated that they all felt uncomfortable standing there while Hall tested Livingston. Nero testified that Employee objected multiple times of being in the same vicinity as Livingston while she tested as it pertained to the Health Insurance Portability and Accountability Act ("HIPAA") laws. Tr. Vol. II. pg. 175.

Nero testified that while Livingston was being tested by Hall, Employee stated that he needed to make a telephone call, and he left the room to make the telephone call. Prior to Employee leaving the office, Nero stated that Howard warned Employee that he could not leave the testing site. Tr. Vol. II. pgs. 178-180. Nero stated that Employee came back to the office and was ready to test. Howard informed Employee that he was unable to test because he left the site. Nero stated that it was her

[7] A Weingarten meeting is an investigatory interview conducted by an Agency in order to question an employee. The result of this meeting may or may not result in Agency administering corrective or adverse action. Generally, an employee subjected to a Weingarten meeting may choose to have a representative (union or legal) present to assist him or her through this process.

opinion that leaving the site meant leaving Agency, not an office. According to Nero, Employee asked Hall if he could test and Hall stated that it was up to Howard. However, Howard stated that Employee could not test. Tr. Vol. II. pgs. 184-188. Nero testified that Agency did not arrange transportation for Employee to go home. She stated that Employee drove himself home.

Nero asserted that following the incident, she filed a grievance with Agency for Employee and Livingston's denial of their Weingarten rights. Tr. Vol. II. pg. 189. She noted that the grievance was ignored. She explained that per Article 6 of the Collective Bargaining Agreement ("CBA"), a meeting should have been calendared within five business days to meet with Howard directly about the grievance for Stage 1, Step 1. Tr. Vol. II. pg. 194. Prior to the grievance filed on May 29, 2026, Nero testified that she filed a grievance related to property damage made by a student. Tr. Vol. II. pg. 196.

On cross-examination, Nero testified that Employee called her on the telephone and requested representation. She could not recall whether Sasso contacted her; however, she recalled that Sasso stopped her in front of his office to inform her of the incident that occurred with Employee. Nero provided that Sasso stopped her before she arrived at Employee's office. She stated that she would be surprised if the video surveillance did not show that Sasso was in the mental health suite because she spoke to him before entering Employee's office. She further explained that Sasso's office was the first door upon entering the suite. Tr. Vol. II. pgs. 200-203.

Nero reviewed Agency Exhibit 9D at 15:02:52 to 15:05:29 timestamp. Upon review, Nero confirmed that she was in the video at the marked time. She stated that when she arrived, Smith was not at the suite blocking Nero from entering the office where Employee was. There were approximately two minutes and thirty seconds that passed prior to Smith arriving. Tr. Vol. II. pgs. 205-208. After viewing the video, Nero maintained that she was not able to privately speak with Employee and stated that she did not recall if someone was blocking her. While Nero may have misstated the time, she was adamant that Smith blocked her from entering the room. Tr. Vol. II. pgs. 209-211.

Nero confirmed that she referred to Smith as [President Donald] Trump ("President Trump"). She explained that President Trump held people against their will and denied them representation of an attorney. Nero found this analogy similar to Employee's incident because she was prohibited from providing representation to Employee. Tr. Vol. II. pg. 214.

When asked if Employee called Smith a "nigger", Nero testified that Employee did not directly refer to Smith as a "nigger", she claimed that it was a statement of exclamation, similar to someone who would say, "oh my gosh". She understood that people in black culture defined the word differently. Nero stated that she believed Employee made the racial slur out of frustration and provided that in her own experience, she used language that she was not proud of. Nero noted that given the unprecedent situation that Employee was placed in, she believed Employee's use of the epithet was acceptable. Tr. Vol. II. pgs. 225-227.

On redirect, Nero reviewed Agency Exhibit 9. She identified herself in the video at the 15:03 timestamp. However, she testified that Smith entered the doorway at approximately 14:05, which corresponded to the period during which Nero encountered Smith and testified that Smith blocked her

from entering the room. Nero attributed the discrepancy in the timeline to the chaotic nature of the incident and explained that she inadvertently misstated the time. Tr. Vol. II. Pgs. 232-233.

Employee Tr. Vol II. pgs. 238-393.

Employee worked as a Social Worker with Agency. He served in this role for seven years, and he worked at Jefferson Middle School for one year. In addition to being a social worker, he served as a school behavior health coordinator. Tr. Vol II. pgs. 238-239. Employee testified that on May 29, 2025, he and Miles conducted a home visit for a student who had persistent truancy. After they conducted the home visit, they stopped at a bakery and walked back to school. Employee left school again for lunch with Livingston. After lunch, Employee returned to Agency around 2:00 p.m. Tr. Vol II. pgs. 240-243.

Employee testified that Agency Exhibit 9 at the 14:28 timestamp, he saw Clarke and Williams in front of the school, which was also around the time that he returned from lunch. When Employee approached Williams and Clarke, they engaged in a conversation. Clarke informed Employee that she was in the middle of an evaluation. He did not realize that she was conducting an evaluation because it was not typical for evaluations to occur on the front steps of the school. Employee immediately stepped away so that they could continue the evaluation. Tr. Vol II. pgs. 244-246.

Employee reviewed Agency Exhibit 9A at the timestamp 14:53:55. Employee asserted that he walked in a straight line in the video. Subsequently, he went to his office and when he entered, Livingston, Clemmons, and Smith were already there. Employee stated that he inquired why they were in his room; however, they ignored his inquiry and spoke amongst themselves. He testified that from their conversation, he gathered that the issue was related to an alcohol or drug issue and he felt threatened. Tr. Vol II. pgs. 258-262.

Employee stated that he requested several times to have union representation; nonetheless he was told that he could not receive representation. Tr. Vol II. pg. 263. Employee protested for Nero to be allowed to enter the room. Employee noted that Smith placed her body between Employee and the door and stated that no one could enter or exit the room. Tr. Vol II. pg. 266. Employee stated that during the interaction in the office, the administration did not make any statements about his marijuana use. Employee stated that he tried to discreetly share his marijuana card with Hall. He believed that Howard saw him pass the card, which was how the information of his marijuana usage was spread amongst his colleagues. Tr. Vol II. pg. 269.

Employee admitted to using the word "nigger". He stated that he did not call anyone the "N" word or use the language in a derogatory way directed towards anyone. Employee testified that his use of the word was in response to the administration not providing him with an opportunity to have union representation. Employee said, "oh, no, niggers ain't about to hand me up like this." Tr. Vol II. pg. 270, lines 6-7. He cited that he did not understand why he was not afforded representation. Employee stated that he felt threatened and was afraid for his livelihood. Tr. Vol II. pg. 273.

Employee testified that Smith ultimately left the room, so she did not let Nero in. He also stated that it was possible that he used explicative language towards Smith. Employee stated that prior to testing, he received correspondence from the administration. One of the documents were Frequently asked Questions, the other was Notification of Suspension. Employee claimed that

Agency suspended him before he was tested. Tr. Vol II. pg. 277. Employee asserted that on May 29, 2025, he was not under the influence of alcohol or drugs, his speech was not slurred, and he did not have poor physical coordination. In fact, he opined that as a mental health professional, he was trained to monitor alertness. Tr. Vol II. pg. 281.

According to Employee, Agency never explained the basis for reasonable suspicion. He asserted that he was not combative or argumentative. Tr. Vol II. pg. 282. Employee stated that he waited for Hall to test him for over two hours, which was beyond his tour of duty. He testified that it was important for him to test, so he stayed. Employee testified that he requested that he make a telephone call because he had an appointment at 6:00 p.m. Tr. Vol II. pg. 283. He explained that he needed a private space because privacy was required in therapist-client communication. Tr. Vol II. pg. 303. Employee testified that he was not told that he could not consume food or beverages. He also could not recall reviewing the information in the MDAT policy. Employee contended that while he had a beverage, he did not share it with Livingston. Tr. Vol II. pg. 286.

Employee recalled that Hall arrived to test them at 5:00 p.m. Employee stated that Hall spoke with Howard, but no information was shared with him. Employee noted that he was then instructed that they were going to be moved to another location, but he was not told why. Tr. Vol II. pg. 291. He claimed that he asked to be tested first because of his appointment but stated that he was ignored. Tr. Vol II. pg. 293. Livingston was tested first and as the result of the number for her first test, she was required to test again. Employee explained that because of the score Livingston received, the machine automatically locked and they had to wait for the machine to unlock. Employee asserted that by this time, it was 5:00 p.m. and he wanted to make a telephone call because he knew that he would not be able to leave by 5:30 for his 6:00 p.m. appointment. Employee testified that he briefly stepped into the hallway, walked down the hall and made a telephone call. Tr. Vol II. pgs. 295-296. Employee stated that Howard informed him that if he left, the test would be considered a refusal. In response, Employee told her that he was not leaving, he was making a telephone call, and that he would come back. Tr. Vol II. pg. 298. Employee testified that he believed that leaving the site meant the school, not the office and that the instructions were not clear to him. Tr. Vol. II. pg. 300.

Upon review of Agency Exhibit 9, Camera 62, timestamp 17:08:05, Employee testified that he viewed himself walking to the mental health suite that led to his office to make the telephone call to his client. Employee testified that once he made the telephone call, he carried some boxes and exited the office. He explained that this happened at the end of the school year and he had planned to leave the school and he thought that he could waste time gathering his belongings. Employee stated that his client had not answered during his first call, and he had to contact the client again to reschedule the appointment. At the 17:15:50 timestamp, Employee testified that he made his way back to the test site. When he entered the room, Hall administered the second portion of the breathalyzer test to Livingston. When Livingston completed testing, Employee informed Howard that he was ready to be tested. Howard informed him that he could not test because he left the room and it was considered a refusal. Employee stated that he did not like Howard's answer and asked Hall if he could test and Hall responded that he could not test if Howard did not allow it. He pleaded to test and they refused. Employee stated that he was never provided an opportunity to submit a urinalysis. Tr. Vol II. pgs. 303-312. He maintained that he did not refuse to test. Tr. Vol II. pg. 314.

Employee stated that when he went back to his office, he had a conversation with the union, and it was agreed that they would file a grievance pursuant to the incident that occurred. Tr. Vol II.

pg. 314. He stated that he responded to Nero's grievance from his account. Employee never received a response following the email that he sent. He claimed that Agency was in violation of the CBA agreement. He explained that within five business days from the filing of the grievance, Howard should have scheduled a meeting. Employee cited that on June 4, 2025, he received a Notice of Termination, stating that he refused to test. Tr. Vol II. pgs. 319-322. Employee testified that his prior grievances, including the grievance filed about property damage made by a student, soured his relationship with Howard. He was initially told that he would be reimbursed and when he was not, he contacted Agency, who informed him that the Office of Risk Management handled those claims. Tr. 334, 338-339.

On cross-examination, Employee testified that he did not consume alcoholic beverages during lunch with Livingston. He recalled having a small sample of sangria before lunch and he had water or Sprite during lunch. He was unsure what Livingston had as a beverage because he went to the restroom and she already had her beverage when he returned. Tr. Vol II. pg. 351. Upon reviewing Agency Exhibit 9 at 14:54:03, Employee testified to viewing himself in the video talking to Smith and Howard. He claimed that they did not have a conversation but considered their verbal exchange a directive from Howard. Tr. Vol II. pg. 354. Employee stated that when Nero arrived, Smith stood by the door and did not allow Nero to enter.

Employee opined that Halls' testimony under oath was untruthful. He explained that she testified that she informed Employee that he could not leave the room or it would be considered a refusal; however, Employee testified that Hall's assertion was not factual. Tr. Vol II. pg. 365. It was Employee's understanding that leaving the collection site was leaving Agency, not the office. He maintained that the MDAT policy provided that the collection should be private and confidential, yet the testing was not. Tr. Vol II. pg. 366.

Upon review of Agency Exhibit 9F, 17:08:13 timestamp, Employee was holding boxes. He reiterated that it was always his intention to leave at the end of the school year, given the trials he was subjected to by administration throughout the school year. Tr. Vol II. pg. 381. Employee testified that Hall remained in the room and did not follow Livingston into the restroom for her urinalysis. Tr. Vol II. pg. 382. However, at the Agency Exhibit 9F, Camera 48, 17:21:34, Employee identified Livingston and Hall walking down the hallway to the restroom. Tr. Vol II. pgs. 383-384.

On redirect, Employee stated that he filed a grievance because Agency was in violation of his Weingarten rights. Tr. Vol II. pg. 391. He cited that upon review of the video at 17:22, Hall had not packed up her equipment or completed testing Livingston. Tr. Vol II. pg. 393.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW[8]

Pursuant to OEA 631.2, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Pursuant to 5-E DCMR 1401.1, adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and

[8] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

shall not be arbitrary or capricious. 5-E DCMR § 1401.2 also provides that: For purposes of this section, "just cause for adverse action" may include… the following grounds: 5-E DCMR § 1401.2 (g) - Intoxication while on duty and 5-E DCMR § 1401.2 (t) - Violation of the rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education.

1) Whether Agency had cause for adverse action

Agency argues that it had reasonable suspicion that on May 29, 2025, Employee was intoxicated while on duty. Agency explains in its specification that Employee's refusal to submit to a mandatory drug and alcohol testing when the drug test collector was on site constitutes a violation of DCPS Employee Mandatory Drug and Alcohol testing Policy and the Child and Youth, Safety and Health Omnibus Amendment Act of 2004.

Employee, however, argues that he was not intoxicated while at work; he did not refuse to submit to the mandatory drug and alcohol testing and that Agency violated the Mandatory Drug and Alcohol testing Policy. Specifically, Employee avers that he did not leave the testing site, Agency deprived him of union representation, and Agency allowed him to drive home after alleging that it had reasonable suspicion that he was intoxicated. Employee further argued that Agency violated his privacy by placing him and another employee, Livingston, in the same room. During the Evidentiary Hearing, I had the opportunity to assess the credibility of the witnesses, and overall, I did not find the testimonies of Clemmons, Smith and Sasso to be credible. As noted below, I also find that Agency failed to follow the mandatory guidelines of the MDAT Policy.

Reasonable Suspicion

D.C. Official Code § 24–211.21(9) defines reasonable suspicion as ". . . a belief by a supervisor that an employee is under the influence of an illegal substance or alcohol to the extent that the employee's ability to perform his or her job is impaired." Moreover, DPM § 499.1 defines a reasonable suspicion test as "an examination that is administered to a District government employee based on the reasonable belief by a supervisor that an employee is under the influence of a drug or alcohol to the extent that the employee's ability to perform his or her job is impaired." Therefore, Agency must show that Employee's supervisor believed that he was under the influence, to the extent that his ability to perform his job was impaired.

Here, Agency relied on DCPS Employee Mandatory Drug and Alcohol testing Policy and the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("MDAT Policy") in the instant matter. MDAT Policy Section 5.1 – Reasonable Suspicion Testing provides as follows:

> "Drug and alcohol testing is required *when a supervisor has a reasonable belief that an employee, while on duty, is impaired* or otherwise under the influence of a drug or alcohol, as more fully described in 6-B DCMR § 431[9], including when the employee is 1) under the influence of illegal drugs or alcohol…" (Emphasis added).

[9] It should be noted that 6-B DCMR § 431applies to Randon drugs and alcohol testing and not Reasonable suspicion drug and alcohol testing.

Additionally, section 9.1 of the MDAT Policy also cites that: "A supervisor shall make a "reasonable suspicion referral" if the supervisor has a reasonable belief that an employee is 1) *under the influence of illegal drugs or alcohol while on duty*; 2) impaired in his/her ability to perform his/her duties due to the use of any drugs (including prescription drugs) or alcohol …" (Emphasis added). In the current matter, Agency's supervisors, Smith and Howard testified that they had a reasonable belief on May 29, 2025, that Employee was under the influence of illegal drugs or alcohol while on duty.

On Agency's Reasonable Suspicion Referral Form, Howard described that Employe had 'Poor physical coordination'; 'Bloodshot, glassy, or watery eye'; 'Disorientation'; 'Alcohol odor on breath'; 'slow reaction or slur speech'; 'unusual restlessness'; 'Combative behavior, loud arguing or fighting'. Smith also provided in the Reasonable Suspicion Referral form that Employee had 'Poor physical coordination'; 'Alcohol odor on breath'; 'Combative behavior, loud arguing or fighting'. She described that Employee was very loud and disruptive. Howard stated in her Reasonable Suspicion Referral form that she observed Employee at 1:50 p.m. However, Employee was not at the school premises at that time. Employee returned from lunch at around 2:30 p.m., approximately 40 minutes from when Howard stated that she observed Employee. Additionally, Howard asserted that she heard Employee and Livington being loud and were yelling in the hallway. She described their behavior as uncharacteristic. Howard stated that once she came into close proximity to Employee, she smelled alcohol on his breath. Tr. Vol. I. pgs. 218-220. Howard noted that Employee used his hands in very exaggerated movements when walking. She stated that instead of walking in a straight line down the hallway, Employee was weaving; his eyes appeared glassy and he appeared disoriented. Tr. Vol. I. pgs. 267-268.

Clarke, who made the initial reasonable suspicion observation, testified that she did not smell alcohol on Employee during their interaction nor did she witness Employee stumbling or slurring his words. She stated that Employee was not combative or disoriented. Tr. Vol. I. pgs. 80-83. Clarke noted that she found her short exchange with Employee odd because she was in the middle of an evaluation and Employee and Livingston were disturbing. Tr. Vol. I. pgs. 38-39. Clarke cited that Employee's eyes appeared hazy, and Livingston's actions were inappropriate.

Clemmons stated that when she approached Employee and asked him to come with her, he made a remark and she smelled alcohol on his breath. Tr. Vol. I. pgs. 95-98. However, Clemmons is not a trained reasonable suspicion supervisor. The record provides that Employee and Livingston were held in the same room while waiting to be tested and Clemmons asserted that the entire room smelled of alcohol. Clemmons stated that she could not recall if Employee slurred his words or had any other symptoms that stood out to her. Tr. Vol. I. pgs. 144.

Smith testified that when she entered the suite, she saw Clemmons, Livingston, and Employee and that when she opened the door, she immediately smelled alcohol. Smith stated that both employees were talkative and loud. Smith was unable to discern which employee smelled of alcohol, but she determined that they were under the influence and did not need to be around children. Tr. Vol. I. pgs. 158-161. Smith noted that she explained to Employee her reasonable suspicion observation and that in response, Employee slurred his words and told her that he was not inebriated. Smith also cited that Employee was loud when he was talking to Livingston and that when Employee stood up, he was fidgety and leaned on his desk to keep his balance. Tr. Vol. I. pgs.175-177. Smith stated in her Reasonable Suspicion Referral form that she observed Employee from at 2:30 p.m., to

3:45 p.m. However, this is not supported by the record. Further, she stated in her June 3, 2025, email that she observed Employee at 1:50 p.m. But, pursuant to the record, Employee entered the school premises around 2:30 p.m., which is approximately 40 minutes before the time Smith alleged she observed Employee.

While there is contradictory testimony in the record regarding whether Employee smelled of alcohol, whether he was intoxicated, and the observation time as listed in the Reasonable Suspicion Referral forms submitted by Howard and Smith, I find that there is substantial evidence in the record of a belief by a supervisor that Employee was under the influence of an illegal substance. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.

In accordance with the MDAT Policy 9.3.5, "*If the employee drove to work, the supervisor **shall** offer alternative transportation. If the employee refuses alternate transportation and insists on driving, the supervisor **shall** notify the Metropolitan Police Department immediately*." (Emphasis added). It is undisputed from the record that Employee drove to work on May 29, 2025, and that he drove from work on that same day, after multiple reasonable suspicion trained Agency supervisors testified that they observed that Employee was intoxicated while on duty. It is also undisputed that Agency did not offer Employee alternate transportation after it had reasonable suspicion that Employee was intoxicated while on duty. Additionally, it is indisputable that Agency did not immediately notify the Metropolitan Police Department Employee insisted on driving despite its suspicion that Employee was intoxicated.

Therefore, I find that Agency violated MDAT Policy 9.3.5.[10] Moreover, the undersigned finds it particularly troubling that despite the clear instructions prescribed in MDAT Policy 9.3.5., and the risk of driving while intoxicated, several MDAT trained supervisors would allow an employee they claimed: 1) smelled of alcohol; 2) had poor physical coordination; 3) was combative; 4) had a slow reaction and slurred his words; 5) was disoriented; and 6) was unusually restless to drive from work, putting himself and the entire public in danger. I further find that Rodriguez's assertion that if Agency believed that an employee could drive themselves, Agency did not have to provide assistance does not align with the plain reading of MDAT Policy 9.3.5. Tr. Vol. II. pg. 60. Moreover, I find that Agency cannot claim that it believed that Employee could drive himself home, with no regard to the safety of the general public, and yet, claimed that it was concerned about student safety based on its belief that he was intoxicated.

Furthermore, MDAT Policy 9.3.1 – Training for Supervisors, provides that, "Supervisors of employees in safety-sensitive positions are required to attend training in drug and alcohol abuse detection and documentation." In this matter, it is undisputed that both Smith and Howard, who completed the reasonable suspicion form, were trained in reasonable in drug and alcohol detection and documentation.

In addition, MDAT 9.3.2. provides that "following an observation of suspicious behavior, a trained supervisor **must** document their observation and **receive a second documented** *observation* from another supervisor trained in drug and alcohol abuse detection **prior** *to making a reasonable suspicion referral…*" (Emphasis added). Here, the initial observation was made by Clarke. Clarke

[10] *See. Employee v. D.C. Department of General Services*, OEA Matter No 1601-0059-22 (April 17, 2022).

testified that while she was a trained administrator, she never completed a reasonable suspicion form. Howard was the first trained supervisor who observed Employee and documented her observations on a reasonable suspicion referral form.

Howard explained that she asked Smith to observe Employee as the second trained supervisor. Smith testified that she observed Employee and also documented her observation. However, pursuant to the record, Smith's reasonable suspicion referral form was signed a few days after the May 29, 2025, observation, and not prior to Agency making a reasonable suspicion referral as required by MDAT Policy 9.3.2. Smith testified that her statement on the reasonable suspicion referral form was dated May 29, 2025; however, she did not sign the form until June 2, 2025. She also explained that although the form had initially been completed, she was required to redo it because additional information was requested. The record is void of any evidence to support this assertion. Also, the record highlights that on June 3, 2025, Smith responded to an email sent by Dedra Adams[11], on May 30, 2025, wherein, she documented the May 29, 2025, incident. Contrary to Smith's assertion, there's no evidence that she documented her observation prior to June 3, 2025. Thus, it can be reasonably assumed that Smith only completed the reasonable suspicion referral form after she received the May 30, 2025, email from Adams. Therefore, the undersigned finds that the record is void of credible evidence that Howard *received a* **second documented observation** from another supervisor trained in drug and alcohol abuse detection **prior** *to making a reasonable suspicion referral*…" (Emphasis added).

Additionally, the record highlights inconsistencies with the reasonable suspicion referral forms completed by both Howard and Smith in this matter. For instance, Howard noted in her reasonable suspicion form that she observed Employee at 1:50 p.m., but based on video footage, Employee returned to the school from lunch at about 2:30 p.m. Further, Smith indicated on the form that she observed Employee from 2:30 p.m. to 3:45 p.m., however, this is not supported by the record. Smith testified during the Evidentiary Hearing that this timeframe did not mean that she continuously observed Employee for the entire period. Also, after reviewing Agency Exhibit 9C at 14:41:40, Smith admitted that she was not in Employee's presence from 2:00 p.m. until 2:40 p.m. The video also showed that Employee had not entered his office and was instead in the main hallway. Tr. Vol. I. pg.186. Smith also acknowledged that the surveillance video did not show that she was observing Employee between 2:30 p.m. and 2:54 p.m. Tr. Vol. I. pgs.187-190. Also, Smith indicated in her June 3, 2025, email found in Employee's Exhibit 8 that she observed two employees at 1:50 p.m., whereas her reasonable suspicion form reflected an observation time of 2:30 p.m. Further, Agency Exhibit 9D established that Smith did not observe Employee until closer to 3:00 p.m. Tr. Vol. I. pg. 205. Smith testified that the discrepancy resulted from her failure to record the correct time. Tr. Vol. I. pg. 206. Smith claimed that she was aware that there are cameras throughout the school building and it was not her intention to misrepresent the period that she observed Employee. Tr. Vol. I. pg. 211.

Additionally, MDAT Policy 9.3.3, recording and submitting observation highlights that, "*supervisors* **shall** *document their observations in* **writing** *and submit them to the MDAT team* using a process prescribed by DCPS. *Observations* **must** *be submitted as soon as possible* **but no later than 24 hours of the suspicious behavior**." (Emphasis added). Smith attested that the MDAT policy required that the form be completed on the same date. She explained that although the form had

[11] Adams is Agency's Deputy Chief, Strategic School Operations and Logistics.

initially been completed, she was required to redo it because additional information was requested. Based on Employee's Exhibit 8, Smith submitted her written observation of the May 29, 2025, incident to MDAT on June 3, 2025, after she received a May 30, 2025, email from Adams narrating a telephone conversation they had on May 29, 2025. Also, as previously noted, Smith signed the reasonable suspicion referral form on June 2, 2025, more than 24 hours of the suspicious behavior. Therefore, I find that Smith violated MDAT Policy 9.3.3.

In its closing argument, Employee distinguished the current matter from *Manning v. District of Columbia Public Schools*,[12] citing that unlike the employee in *Manning*, here, Employee never stated that he would not submit to testing. Employee further asserted that here, the collector classified the incident as 'Other' and not 'refusal to test' because Employee never verbally refused testing. While I agree that the current matter is distinguishable from *Manning* in that Employee did not verbally deny testing, I also find that pursuant to MDAT Policy 6.5.2, Refusal to Submit to Testing, includes a failure to remain at the collection site for a required test.

Employee further argued that the MDAT Policy does not define what constitutes a 'collection site.' After the collector arrived at the school, Employee and Livingston were moved to a different site for drug and alcohol testing. Both Nero and Employee stated that they understood the 'collection site' to mean the agency or school, and not an office. Hall defined the collection site as being within the collector's eyesight. Howard described the collection site as the location they were in while the testing was ongoing. Based on the record, it appears Nero, Employee, Hall and Howard all have different definitions of what constitutes a collection site. Absent a written definition of what constitutes a 'collection site', I find the term to be ambiguous.

Agency also charged Employee with violating rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education based on Employee's refusal to submit to testing. The collection site is not defined in the MDAT Policy. Therefore, I find that terminating an employee from service who has not directly violated any written policy, regulation or law is not in keeping with a fair and equitable review of a removal action. Moreover, based on the record, Employee requested to be tested first, and he waited for approximately two (2) hours after his tour of duty for the collector to arrive so he could be tested. Consequently, I find that Employee's conduct does not constitute a refusal to submit to testing. Additionally, while Employee left the site, he could be seen on camera walking to his office, carrying some boxes to the parking lot. He did not leave the school premises, and he returned to be tested approximately nine (9) minutes later.

Employee also testified that he waited for Hall to test him for over two hours, which was beyond his tour of duty. He argued that it was important for him to test, so he stayed. Employee stated that he requested to be tested first because he has an appointment at 6:00 p.m. He explained that when the machine locked during Livingston's testing, and he realized that the test would not be completed by 5:30 p.m., he requested a private space to make a telephone call. Employee stated that he needed a private space because privacy was required in therapist-client communication. Agency does not deny that the collector arrived at DCPS after Employee's tour of duty or that Employee waited for the collector to arrive so he could be tested. Hall recalled that she arrived between 4:45 p.m. and 5:00 p.m., and that the machine locked for 15 minutes while he was testing Livingston.

[12] OEA Matter No. J-0046-18R20 (September 3, 2020).

During the Evidentiary Hearing, the undersigned asked if Agency had any policies relating to what happens if the testing extended after an employee's tour of duty to which Rodriguz testified that the MDAT policy did not provide guidance on testing after an employee's tour of duty. She explained that once the collector arrived, the employee should remain on site, which was part of the policy. While Agency does not have a written policy on this, Rodriguz asserted that employees were expected to remain on site after their tour of duty for the collection of the tests. Rodriguez stated that employees are not accommodated for other duties or engagements outside of their tour of duty. Tr. Vol. II. pgs. 67-68.

Howard testified that Employee left the collection site for approximately ten minutes, and when he returned, he stated that he was ready to test. Howard explained that she informed Employee that because he left the collection site, he was not permitted to test. According to Howard, Employee responded that he was not refusing but ultimately left the collection site. Tr. Vol. I. pgs. 296-300. Howard stated that Employee asked Hall if she would test him and Hall explained that she had to follow procedure. Tr. Vol. I. pgs. 262-264. Howard asserted that Livingston was tested first. Rodriguez stated that Howard did not inform her that Employee had to make a telephone call or leave the room. Rodgriguez cited that once an employee was referred for a reasonable suspicion, they could not leave the site or the school before the collector arrived.

Nero recalled that around 4:00-4:15 p.m., Employee explained to Howard that he had a very important appointment pertaining to his clinical work outside of Agency. Nero stated that Employee made the statement to Howard because they were trying to understand the cause of the delay and determine when Hall would arrive. Tr. Vol. II. pgs. 169-171. Nero also testified that while Livingston was being tested by Hall, Employee stated that he needed to make a telephone call, and he left the room to make the telephone call. Tr. Vol. II. pgs. 178-180. Nero stated that Employee came back to the office and was ready to test but Howard informed Employee that he was unable to test because he left the site.

Hall testified that she tested Livingston first and that because Livingston blew above a .02, a confirmation test had to be conducted. Hall explained that a fifteen-minute waiting period is required for the machine to recalibrate. Hall asserted that while waiting for the machine to recalibrate, Employee asked if he could be tested, to which Hall responded that she could only test Employee after she was finished testing Livingston. Hall testified that Employee stated that he had a prior engagement. Hall then told Employee that if he left, it would be considered a refusal, to which Employee told Hall that he was not refusing the test and reiterated that he had a prior engagement.

It is undisputed that Employe was not in the presence of the collector or Agency official for approximately nine (9) minutes and that he did not leave the school premises. However, I find that because Agency conducted the test after Employee's tour of duty, it should have accommodated Employee's request to make a phone call to rearrange his schedule. Based on the record, Employee requested to be tested first, and he waited for approximately two (2) hours after his tour of duty for the collector to arrive so he could be tested. Throughout this period, Employee did not at any point indicate that he was not willing to submit to the required tests. Howard, Hall and Nero testified that Employee stated that he had a prior scheduled engagement. The collector was still at the site when Employee returned and requested to complete the test, but Agency denied testing him.

In addition, Rodriguez testified that there is no explicit written policy or procedure governing the issue of testing an employee after their tour of duty. Rodriguez stated that Agency did not accommodate employees for other duties or engagements outside of their tour of duty. Yet, Agency expects employees to remain in school for official school business after their tour of duty. I find this to be unreasonable, especially without accommodation. Employee's tour of duty ended approximately two (2) hours before the collector arrived at the school. Employee accommodated Agency during this time by remaining at the school premises after his tour of duty. But Agency could not accommodate Employee by allowing him to make a telephone call to adjust his prior engagements. Employee testified that he requested a private space to make a telephone call because he had an appointment at 6:00 p.m., and that it was important for him to stay for the test. Nero and Hall testified that Employee informed Agency of his prior engagements and his need to make a phone call prior to leaving the site. However, Agency did not make any arrangements for Employee to contact his clients or rearrange his schedule since he had to remain at the site past his tour of duty to complete the test. For example, Howard could have provided Employee with a 'visual' private space to make his phone call, monitor Employee by way of video footage or accompany Employee to make the phone call as she did when Livingston had to use the restroom prior to Hall's arrival. Moreover, Employee testified that he asked to be tested first because of his appointment but stated that he was ignored. Thus, I find that Agency could have also accommodated Employee by allowing him to be tested first.

The MDAT Policy does not provide any written guidance or procedure for testing after an employee's tour of duty. At the very least, Agency should have made arrangements for Employee to contact his clients since he had to remain at the testing site past his tour of duty. Accordingly, I find that terminating an employee for failure to submit to testing despite their willingness to test as displayed by their actions of waiting for over two (2) hours after their tour of duty to be tested; attempting to rearrange their schedule so they can be tested; and requesting to be tested contradicts Agency's assertion that Employee refused to test and is not in keeping with a fair and equitable review of a removal action. Moreover, given the lack of quantifiable written guidance, I conclude that Employee's conduct herein does not constitute a refusal to submit to testing.

Wherefore, based on the foregoing documentary and testamentary evidence presented in this matter, I find that while Agency proved its belief that Employee was intoxicated, Agency failed to appropriately follow the guidelines for Reasonable Suspicion testing as outlined in MDAT Policy. As such, I further find that Employee did not violate rules, regulations, or lawful orders of the Board of Education or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education. Thus, I conclude that Agency did not meet its burden of proof for cause in this matter.

2) Whether the penalty of termination is appropriate under District law, regulations or the Table of Illustrative Action

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).[13] According to the Court in Stokes, OEA must determine whether the penalty was within the range allowed by law, regulation, and any

[13] *See also. Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In this matter, because I find that Agency has not met its burden of proof for the above-referenced charges, Agency cannot rely on these charges in disciplining Employee. As a result, I find that the adverse action in this matter cannot be sustained and must be reversed.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's adverse action of terminating Employee from service is hereby **REVERSED.**

2. Agency shall **REINSTATED** Employee to his previous position of record.

3. Agency shall reimburse Employee all back-pay, and benefits lost as a result of the adverse action.

4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge