THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BENEDDTA RHAMES,	)	
Employee	)	OEA Matter No. 1601-0036-18
	)	
v.	)	Date of Issuance: May 15, 2019
	)	
DISTRICT OF COLUMBIA OFFICE OF	)	
ADMINISTRATIVE HEARINGS,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

David A. Branch, Esq., Employee Representative
Rachel Noteware, Esq., Agency Representative
Maia Ellis, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 1, 2018, Beneddta Rhames ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of Administrative Hearings' ("OAH" or "Agency") decision to terminate her from her position as a Legal Assistant, effective February 15, 2018. Following an Agency investigation, Employee was charged with Conduct Prejudicial to District Government, to wit – Use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language; quarreling; creating a disturbance or disruption.[1] On April 5, 2018, Agency filed its Answer.

Following a failed mediation attempt, this matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on June 12, 2018. A Status/Prehearing Conference was scheduled for August 6, 2018. While Employee and Agency's representatives were present for the scheduled conference, Employee's representative was absent. Consequently, the undersigned issued an Order for Statement of Good Cause to Employee's representative. Employee's representative filed a response to the Order for Statement of Good Cause on August 16, 2018. On August 17, 2108, the undersigned issued an Order rescheduling the Status/Prehearing Conference for September 11, 2018. All parties were present for this conference. Thereafter, a Prehearing Conference was held on November 13, 2018. Subsequently, an Evidentiary Hearing was convened for January 24, 2019. Both parties were present for the Evidentiary Hearing. On

[1] District Personnel Manual §1607.2(a) (16). This is Employee's second offense under this cause of action.

February 28, 2019, the undersigned issued an Order requiring the parties to submit written closing arguments on or before April 1, 2019. While Agency timely submitted its written closing argument, on April 4, 2019, Employee filed a Motion for an Extension of Time to File Closing Argument. Employee, through her representative noted that she needed an additional week through April 8, 2019 to file her Closing Argument. Employee's closing argument was received by this Office on April 12, 2019. 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 Agency's action of terminating Employee was done for cause; and

2) Whether the penalty of termination is within the range allowed by law, rules, or regulations.

SUMMARY OF RELEVANT TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Agency's Case in Chief

1. Eli Benjamin Bruch ("Bruch") Tr. 28-84

Bruch worked as an Administrative Law Judge with the D.C. Office of Administrative Hearings ("Agency"). Bruch testified that from the beginning of his tenure with Agency, he did not have a good professional relationship with Beneddta Rhames ("Employee"). He stated that he went to Employee's supervisors and a different Legal Assistant. Bruch believed that if Employee was transferred, she might work better with a judge whom she had a rapport with. Bruch wrote an email to Louis Neal, who worked in the Office of the General Counsel. In his email, Bruch described his work relationship with Employee, including how she once walked away from him in the middle of a conversation; Employee stated that she was allergic to him; and Employee told Bruch that she was off the clock when he tasked her with an assignment. He also described their professional relationship as combative, volatile, and generally hostile.

Bruch testified that on December 14, 2017, he went to Employee's workstation because there was a clerical error with a motion. He stated that when he approached Employee about the error that needed to be corrected, Employee's response was dismissive. Bruch testified that Employee told him in a raised voice that he had to write the order because it was not her job to write orders. Bruch stated that he did not understand why Employee would not issue the order and was confused by Employee's aggressive tone and response. Bruch stated that when he told

Employee he was confused about Employee's response, Employee turned around in an angry and confrontational manner and responded that he, Bruch was "a judge and he was confused?" Bruch testified that Employee's voice was raised, but she was not shouting. Bruch stated that he did not have supervisory authority regarding evaluations or hiring and firing of Employee. Bruch testified that he never recommended that Employee be terminated or disciplined.

When asked if Employee was yelling at Bruch at any time during the day on December 14, 2017, Bruch reiterated that Employee's voice was raised, antagonistic and combative. Employee wanted to have a confrontation, while Bruch was doing his best to de-escalate the situation. Bruch explained that Employee was not yelling with all her might and she didn't reach her maximum volume, but her voice was raised. He also stated that he was not sure exactly where the decibel level is where it hits yelling, but Employee's voice was louder than her regular tone.

Bruch defined the word 'belligerent' to mean there was profanity, racial epithets, clenched fists, or somebody had to be restrained. He explained that Employee's behavior was not any of those things. Bruch also testified during the deposition that he would not go so high as to say Employee was belligerent based on his definition of the word, however, he believed that Employee was certainly combative, antagonistic, and hostile. Bruch maintained that Employee's response on December 14, 2017, "breached any sort of workplace expectation of being collegial, being professional, trying to resolve things in a positive, productive way."

Bruch averred that, after the incident at Employee's desk, Employee came to his office with Tyrone Williams ("Williams"), a Legal Assistant. Williams informed Bruch that the motion that was issued had a typo in the docket number. Williams told Bruch that he would fix the issue.

Bruch stated that he worked with Employee for four months before she was terminated. Brunch testified that he informed Employee numerous times that he could not perform the role of an EEO Counselor because he had not received certification. Bruch admitted that Employee shared her concerns about management at Agency with him. He stated that he was not announced as the Equal Employment Opportunity ("EEO") Counselor. Bruch explained that in order to be a District of Columbia EEO Counselor, he had to go through counselor certification, which occurred twice a year. But, he provided in his deposition testimony that he was announced as the EEO Counselor.

Bruch testified that during the deposition testimony, his memory failed him. He stated that he would never provide untrue information under oath. Bruch explained that he communicated to Vanessa Natale ("Natale"), Agency's General Counsel, that he was interested in the EEO Counselor position. Subsequently, in the fall of 2016, an email was sent to employees at Agency that Bruch was the EEO Officer, but the email did not indicate a counselor position. Bruch further explained that he received another email from Natale that stated that there was an error with the original email that was sent out. Bruch was inaccurately appointed as an EEO Officer instead of an EEO Counselor. Since Bruch was not certified, the Deputy Director informed Bruch to redirect any employee to the Office of Human Rights or to another EEO Counselor. Bruch made it clear to Employee that if she had any complaints regarding

management she should contact her union, the Office of Human Rights if it was an EEO issue, or Human Resources if it pertained to a personnel issue.

2. Tyrone Anthony Williams ("Williams") Tr. 85-89.

Williams worked as a Legal Assistant with Agency. He testified that he and Employee were former colleagues. Williams stated that Employee asked him to explain to Bruch why she could not write the transmittal order. Williams handled the matter and corrected the issue on the motion, to avoid any altercation. Williams stated that he agreed to correct the issue because he found that Employee's demeanor was hostile during their interaction with Bruch. He was not aware of an instance in which a Legal Assistant was removed or reprimanded for serving a transmittal order.

3. Jessica Pineyro ("Pineyro") Tr. 89-100.

Pineyro worked as a Forensic Science Technician with Agency. Pineyro testified that on December 14, 2017, she was at her desk when she heard Employee speaking to Bruch in a loud, disrespectful and combative tone. Pineyro saw that Employee had a file in her hand and refused to complete the assignment that Bruch asked her to do. Subsequently, she learned that Williams helped Bruch complete the assignment. During the interaction between Bruch, Williams, and Employee, Pineyro stated that Employee was hostile and loud. This interrupted her work and she and her co-workers had to stop what they were doing and look. Pineyro also testified that Bruch was speaking in a normal tone, but he looked scared because of Employee's tone and demeanor. Pineyro spoke with her supervisor, Natale about the altercation and was asked to draft an email regarding the events that transpired. Pineyro reiterated that anyone sitting near Bruch's office could hear the altercation between Bruch and Employee. Pineyro stated that she did not indicate in her email that Bruch seemed scared of Employee.

4. Charlotte Johnson ("Johnson") Tr. 100-122.

Johnson worked as the Deputy Clerk of the Court with Agency. She testified that on December 14, 2017, she witnessed Employee being aggressive, hostile and loud towards Bruch. Johnson noted that Employee sounded angry, and she was so loud that she could be heard down the hallway. Subsequently, Johnson spoke to Employee's supervisor Tanya Campbell ("Campbell"), who asked her to email her the events that transpired. Johnson testified that the other people working in the area at the time of the incident were shocked, confused and surprised about what was going on and they all could not get much work done during that time because Employee was loud and disruptive. Johnson testified that she has witnessed Employee exhibit disruptive or unprofessional behavior besides the December 14, 2017 incident. Johnson explained that she did not write a follow-up email to the previous incidents, however, Employee continued to display inappropriate behavior. After Johnson became a manager, she made sure not to allow her staff to believe that Employee's behavior was acceptable by management. Johnson stated that she verbally reported the incident that occurred to Employee's supervisor Tanya Campbell and followed up with an email five days later. She testified that in her opinion, Employee spoke to Bruch like a mother speaking to her child.

Johnson stated that the jurisdiction that an employee was in determined the responsibilities they were required to perform for a judge. For example, when Johnson was a paralegal specialist, she was required to draft motions or orders, not the legal assistants. However, within other jurisdictions at Agency, the legal assistants were required to draft orders. On redirect, Johnson testified that it was appropriate for an Administrative Law Judge to ask a legal assistant to send out a transmittal order.

5. Tanya Campbell ("Campbell") Tr. 123-141.

Campbell worked as a Deputy Clerk of the Court with Agency. She supervised Employee for seven years. Campbell explained that Johnson informed her of the incident that occurred on December 14, 2017. Campbell asked Johnson to send her an email of the events that transpired. In turn, Campbell spoke with her supervisor Angela Harley ("Harley") about the incident. Campbell also spoke with Bruch who requested to work with another Legal Assistant instead of Employee. Campbell stated that Bruch did not provide much detail of the altercation that occurred between him and Employee.

Prior to this incident, Campbell testified that she witnessed Employee exhibit disruptive or unprofessional behavior. On one occasion, Employee had an issue with the work that a superior tasked her to complete. Campbell explained that there was a back and forth exchange of words. Additionally, Employee was loud and disruptive to the other legal assistants that were working. Campbell stated that Employee was not disciplined for the incident.

On December 15, 2017, Campbell issued a verbal counseling notice to Employee for failure or refusal to follow instructions. Campbell stated that she emailed Employee the procedures of requesting leave. Employee was directed to submit her request for leave prior to the date of absence; however, Employee failed to follow protocol. Campbell was also unable to verbally counsel Employee because Employee refused to meet with her. Because of this, Campbell issued Employee a proposed reprimand for Employee's failure to follow Campbell's instructions. Campbell stated that she was not aware if Employee responded to the reprimand or filed a grievance.

Campbell testified that Harley prepared the revised proposed separation. Campbell learned that Employee was being proposed for termination because Harley asked for information on previous write-ups that Campbell had given Employee for not following instructions. Campbell explained that the revised proposed separation was issued because Employee was not provided adequate time to respond due to an error of the dates that were in the letter. Campbell stated that Harley was the Proposing Official for the proposed separation.

6. Angela Harley ("Harley") Tr. 142-183.

Harley worked as a Clerk of the Court with Agency. She explained that Johnson informed her of the incident that occurred on December 14, 2017. Harley testified that Johnson witnessed the unprofessional exchange that took place in Bruch's office. She stated that Employee spoke to her about Bruch tasking her with an assignment to serve a document that she

did not feel comfortable completing. Later she learned that Williams took on the assignment and completed it.

Harley testified that she witnessed Employee exhibit unprofessional behavior in February of 2017. She explained that Employee interrupted a senior management meeting and made accusations against the managers that were present. Harley stated that Employee was angry, irritated, and hostile. Employee was disciplined for the incident and issued a three-day suspension. Harley explained that she proposed a three-day suspension because it was Employee's first offense and believed that her actions were egregious enough to warrant the suspension. She stated that the range of penalty Agency could have imposed for the second offense was suspension to removal. For Employee's second offense, Harley proposed removal. The *Douglas* factors were used to determine the appropriate penalty for Employee. Additionally, Harley asserted that Employee received written and verbal warnings on her conduct.

After Employee received the three-day suspension, Harley stated that Employee's conduct improved slightly, but shortly thereafter, Employee reverted to her old conduct. Harley explained that the proposed action was consistent with actions taken against other employees under her supervision for similar conduct. She testified that in December 2017, another employee was issued a proposed separation for unprofessional, quarrelsome behavior in the workplace. Harley stated that she sympathized with Employee because Agency was aware that she had experienced personal issues, but she could no longer tolerate the continuous unprofessional behavior in the office.

Harley testified that she had three witness statements as well as an email from Bruch depicting the December 14, 2017 incident. She learned that Employee was terminated from her position through the deciding official, but she could not recall the exact date that Employee was removed. On redirect, Harley stated that she considered the witness statements before she issued the proposed separation. Based on the witness statements she found that Employee's behavior was belligerent.

Harley testified that the witness statements that she reviewed only included the version of events by the individual employees. It did not include information from Employee's perspective. Additionally, Employee's previous occurrence played a role in Harley's decision for a proposed removal. Harley also explained that Employee had an opportunity to respond once the proposed separation was issued, but Employee did not respond.

7. <u>Eugene Adams ("Adams") Tr. 189-225.</u>

Adams worked as the Chief Administrative Law Judge with OAH. He testified that he was the Deciding Official who terminated Employee from her position. Initially, Adams decided to place Employee on administrative leave due to the incident on December 14, 2017, but on December 15, 2017, Employee was charged with insubordination. Adams believed that placing Employee on administrative leave was the most efficient way to address all disciplinary actions at once. Adams explained that it was solely his decision to terminate Employee, but he consulted with the General Counsel and the Deputy General Counsel. Adams stated that Employee would have been afforded an opportunity to present an oral response before the Hearing Officer, but not

to him. Adams could not recall if there were mitigating factors to consider in Employee's case. Adams stated that according to the documentation that he had, Employee was granted an extension to the required ten days to respond to the proposed removal.

Employee's Case in Chief

1. **Beneddta Rhames ("Employee") 227-283**

Employee worked as a Legal Assistant with Agency from March 2007 until December 15, 2017. Employee testified that on December 14, 2017, Bruch came to her desk with a motion with some hand-written information on it. Employee reviewed the motion and noticed that it was not current. It was a motion from a previous year and Bruch asked her to send it out on a transmittal. Employee stated that she was trained on transmittal orders and motions, but she was uncomfortable completing his task because she had never sent out an older order. Employee told Bruch that she would hold on to the order and give it to Campbell. Employee suggested that Bruch bring it to the attention of Judge England ("England") because he was the Principal Judge at the Department of Employment Services. Employee stated that Bruch went to his office instead of asking England about the order.

Approximately ten minutes later, Employee saw Williams walk down the hall. She informed Williams of Bruch's request and he went into Bruch's office to explain what steps needed to be taken in issuing the order. Employee stated that after Williams offered to assist Bruch with the motion, she returned to her desk.

Employee asserted that she did not yell at Bruch or act in a belligerent manner. She also contested that she spoke to Bruch in a manner like a mother chastising her child. Employee claimed that she spoke with Bruch on a professional level. Additionally, she stated that she never confronted any of Agency's employees in an unprofessional, distracting, or quarreling manner to create any disturbance or disruption to her peers.

Employee testified that her duty as a legal assistant was to assist the judges in the jurisdictions that they were assigned to. She was also responsible for processing filed complaints, reviewing and sending out orders on behalf of the judges and she served the orders that the judges sent out. Employee stated that if a judge wanted a hearing date changed, she would be able to make the change because the judge provided her direction. However, Employee explained that she was uncomfortable handling the particular order from Bruch because the parties were asking for a decision and she did not know what language Bruch wanted her to use on the transmittal order. Employee stated that this was the first order that she refused to send out for Bruch.

Employee testified that she told Bruch that she would give the order to Campbell, but a few minutes later she saw Williams walking down the hall and explained the situation that occurred between Employee and Bruch. Employee stated that Williams explained to Bruch the process of submitting orders but decided to handle the task himself. Employee testified that on one occasion, Bruch asked her to serve a final order as she was leaving the office. Employee explained that legal assistants had an inbox for the judges to place their orders in. She also

explained that if a judge felt that a matter was important, the protocol was to have the correspondence go to Williams or Campbell.

Employee admitted to telling Adams that she used profane language towards Natale. Employee stated that she believed that Natale was messy, lied, and broke Health Insurance Portability and Accountability Act ("HIPAA") confidentiality. She also stated that she did not recall telling Bruch that she was allergic to him.

Employee received a notice of proposed suspension on February 18, 2017 for quarrelsome behavior that created disruption and disturbance in the office. Once Employee received the proposed notice, she sought help from legal counsel and her union representative. However, Employee did not receive a response from her representative and Agency granted her a five-day extension to respond. She never provided a response because her representative did not contact her. Employee agreed that creating disruption and confronting employees in an unprofessional manner was inappropriate.

Employee testified that Bruch told her that he was an EEO Counselor. She explained that she made EEO complaints to Bruch about management because she was being harassed in the office and Bruch told Employee that he would assist her. Employee stated that she was reprimanded on December 15, 2017, for failing to meet with her supervisor, but she did not receive notice until December 18, 2017. Employee could not recall if she submitted a response to the reprimand because she obtained an attorney.

Employee testified that she had a wonderful relationship with Adams. She explained that he had an open-door policy and they would gossip about her personal incidents that she was going through and discuss all of the unethical behavior that transpired in the office. She stated that Adams did not appear to be offended by any of the comments that she made.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of terminating Employee was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1607.2(a)(16), an Agency may administer adverse action if an employee's conduct is considered prejudicial to District Government, to include – Use of abusive, offensive,

unprofessional, distracting or otherwise unacceptable language; quarreling; creating a disturbance or disruption.

Conduct Prejudicial to District Government, to wit – Use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language; quarreling; creating a disturbance or disruption.

There is sufficient evidence in the record to support Agency's assertion that on December 14, 2017, Employee confronted Administrative Law Judge ("ALJ") Bruch in a loud and belligerent tone and in a manner that was heard by several other employees which created a disruption in the office environment. Three witness testimonies, plus ALJ Bruch's testimony support Agency's rendition of the events of December 14, 2017. ALJ Bruch testified that on the day of the incident, he went to Employee's workstation because there was a clerical error with a motion. He stated that when he approached Employee about the error that needed to be corrected, Employee's response was dismissive Tr. pg. 31. He further stated that Employee told him in a raised voice that he had to write the order because it was not her job to write orders. ALJ Bruch stated that when he told Employee that he was confused about her response, Employee turned around in an angry and confrontational manner and questioned how an ALJ could be confused. Tr. pg. 32. ALJ Bruch testified that Employee's voice was raised, but she was not shouting. Tr. at pg. 36.

Also, after refusing to send out the order as requested by ALJ Bruch, Employee asked Williams to come with her to ALJ Bruch's office to explain to ALJ Bruch why she, Employee could not write the transmittal order. Williams testified that while in ALJ Bruch's office, Employee was a little hostile, her voice tone was loud and unprofessional and ALJ Bruch looked terrified. Tr. pg. 87. Williams explained that he agreed to correct the issue with the order because Employee's demeanor was hostile during their interaction with ALJ Bruch.

Furthermore, Pineyro testified that she was at her desk when she heard Employee speaking to ALJ Bruch in a loud, disrespectful and combative tone. Tr. pg. 91. Pineyro explained that, during the interaction between ALJ Bruch, Williams, and Employee, Employee was hostile, and loud, which interrupted her work as she, and her co-workers had to stop what they were doing. Pineyro also testified that ALJ Bruch was speaking in a normal tone, but he looked scared because of Employee's tone and demeanor. Pineyro maintained that anyone sitting near ALJ Bruch's office could hear the altercation between ALJ Bruch and Employee.

Johnson also testified to witnessing the December 14, 2017. She stated that she witnessed Employee being aggressive, hostile and loud towards ALJ Bruch. Tr. pg. 101. Johnson noted that Employee sounded angry, and she was so loud that she could be heard down the hallway. Tr. pg. 102. Johnson testified that the other people working in the area at the time of the incident were shocked, confused and surprised about what was going on and they all could not get much done during that time because Employee was loud and disruptive. Tr. at pg. 103.[2]

[2] It should be noted that Employee alleged during the Evidentiary Hearing that Johnson was bias because of a prior incident involving Johnson that was reported to management. Employee believes their relationship deteriorated after Employee was interviewed about the incident by management. While Johnson's testimony is relevant in this matter,

Employee argues that Agency lacks substantial evidence to support its assertion that she confronted OAH employees. She further explained that she did not yell at ALJ Bruch in a loud and belligerent tone. Employee additionally noted that ALJ Bruch denied that she yelled at him in a loud and belligerent tone. Also, Employee stated that ALJ Bruch did not report the incident and Agency grossly exaggerated the incident to justify termination.[3] On the contrary, ALJ Bruch stated that although Employee was not yelling, her voice was raised, she was dismissive, and she was also angry and combative. When asked during the Evidentiary Hearing if Employee was yelling at ALJ Bruch at any time during the day on December 14, 2017, ALJ Bruch stated that;

> "[h]er voice was elevated. Her voice was raised. Her voice was combative. Her voice was antagonistic. She wanted to have a confrontation and I was doing my best to de-escalate it… She was not yelling with all her might … she didn't reach her maximum volume… Her voice was raised. It was elevated. I mean I'm not sure exactly where the decibel level is where it hits yelling, but it was louder than her regular tone, that's for sure."[4] Tr. pgs. 56-57.

While there was an issue with regards to the definition of the word 'belligerent', ALJ Bruch understood the word to mean "... there was profanity, racial epithets, there was clenched fists, somebody had to be restraint. [Employee's] behavior wasn't any of those things." Tr. pg. 59. ALJ Bruch also testified during the deposition that he would not go so high as to say Employee was belligerent based on his definition of the word, but Employee was certainly combative, antagonistic, and hostile. ALJ Bruch concluded that Employee's response on December 14, 2017, in his opinion, "breached any sort of workplace expectation of being collegial, being professional, trying to resolve things in a positive, productive way…" Tr. pg. 68.

According to the Merriam-Webster dictionary, the word 'belligerent' is defined as inclined to or exhibiting assertiveness, hostility, or combativeness.[5] ALJ Bruch testified that Employee was hostile, combative, loud and antagonistic on the day of the incident. Based on the above definition of the word 'belligerent' I find that Agency was correct in asserting that Employee yelled at another Agency employee in a loud and belligerent tone and did not grossly exaggerate the incident to justify its decision to terminate Employee. Because ALJ Bruch was not Employee's supervisor and did not have the authority to discipline Employee, his subjective definition of the term belligerent is irrelevant. (Tr. pg. 68).

Furthermore, two (2) other witnesses testified that Employee's behavior on December 14, 2017, was unprofessional, disruptive and distracting. Pineyro testified that anyone sitting near ALJ Bruch's office could hear the altercation between ALJ Bruch and Employee. Pineyro stated

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the undersigned concludes that absent Johnson's testimony with regards to the events of December 14, 2017, there is sufficient evidence in the record, such as the testimonies of Pineyro, ALJ Bruch and William to prove that Agency has met its burden of proof by a preponderance of evidence.

[3] The crux of the matter is not who reported the alleged incident, but rather whether Agency had cause to discipline Employee once it became aware of the alleged incident.

[4] ALJ Bruch similarly stated during his deposition prior to the Evidentiary hearing that he didn't believe Employee was ever yelling with all her might, but she was very upset.

[5] https://www.merriam-webster.com/dictionary/belligerent

that ALJ Bruch was speaking in a normal tone while Employee was loud, disrespectful and combative. Williams also testified that Employee's demeanor while in ALJ Bruch's office was hostile. Furthermore, while Employee asserts that Johnson was bias, and that ALJ Bruch lied to her prior to the December 14, 2017, incident with regards to her EEO issues, Employee has not provided any reason why Pineyro and Williams would testify against her. Based on the foregoing, I find that Agency had cause to discipline Employee for being unprofessional, and disruptive in the work place.

Whether Agency engaged in disparate treatment.

There is sufficient evidence in the record to conclude that Agency had cause to remove Employee. Employee acted unprofessionally and caused disruption in the work place. However, Employee argued that she was subjected to disparate treatment. She further argued that removal is egregious as OAH has had physical and verbal altercations in the office previously and failed to discipline those employees. Specifically, Employee referenced an incident involving a complaint made by Ms. Sinclair, a Legal Assistant, against ALJ Cobbs on November 14, 2017. Employee stated that ALJ Cobbs yelled at Ms. Sinclair, he was rude, unprofessional, demeaning and aggressive towards Ms. Sinclair. Employee maintained that Ms. Sinclair reported the incident to management, however, ALJ Cobbs was never disciplined for his actions. Agency however contended that Employee cannot allege disparate treatment because ALJ Cobbs and Employee are not similarly situated. Agency explained that ALJ Cobbs, as an ALJ, is in a different work unit than Employee, he has a different supervisor, and is subject to different standards governing discipline.

OEA has held that, to establish disparate treatment, an employee *must* show that she worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (emphasis added).[6] Further, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty."[7] (Emphasis added). An employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently."[8] If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[9]

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[6] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[7] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).
[8] *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30 ,2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).
[9] *Id*.

After a careful review of the record, I agree with Agency's assertion that Employee and ALJ Cobbs are not similarly situated. ALJ Cobbs, as an ALJ, is in a different work unit than Employee, he has a different supervisor, and is subject to different standards governing discipline. Moreover, unlike Employee, no adverse action was taken against ALJ Cobbs for Conduct Prejudicial to District Government, to wit – Use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language; quarreling; creating a disturbance or disruption. Consequently, I conclude that Employee has not provided sufficient evidence to establish a *prima facie* claim of disparate treatment, and therefore, she has not met her burden of proof.

Procedural Due Process

Employee averred that her due process rights were violated. She explained that she requested to make an oral response to the proposed removal, but the Deciding Official did not permit her to do so. She noted that the Deciding Official appeared to be unaware of her request for oral presentation. Employee also argued that the Deciding Official did not review the entire Hearing Officer's file before issuing the final decision hours after the recommendation.

DPM §1621.1 provides that, "[w]henever an employee is served a notice of proposed or summary action, he or she may *submit a written response* to the appropriate official identified in the notice. In the case of removals, the appropriate official shall be a hearing officer appointed pursuant to § 1622. Otherwise, the appropriate official shall be the *deciding official* (emphasis added)." Employee argues that she was not allowed to provide an oral response. Chief ALJ Adams testified that requests for oral response typically go to the Hearing Officer. While Chief ALJ Adams stated that Employee would have been afforded an opportunity to present an oral response before the Hearing Officer, pursuant to DPM §1621.1, the Hearing Officer/Deciding Official is not mandated to receive oral responses. The above provision only calls for a written response. Employee had the discretion to submit a written response to the Hearing Officer or the Deciding Official. Employee does not contend that the Hearing Officer/Deciding Official refused to receive her written response. Nor does she assert that Agency did not provide her with sufficient time to file her written response.[10] Moreover, Agency's failure to provide Employee the opportunity to make an oral response is harmless error, as Employee was provided such opportunity during the Evidentiary Hearing held before this Office.[11]

Additionally, Employee noted that the Deciding Official appeared to be unaware of her request for oral presentation. Because there was a Hearing Officer assigned to this matter, the Deciding Official was not required to manage or be notified of Employee's requests. Thus, I find that Employee's procedural due process with regards to her request for oral response was not violated in the current matter.

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[10] DPM § 1621.3 provides in pertinent parts that "[w]ritten responses must be received by the appropriate official according to the following schedule: … (c) For adverse actions, within ten (10) days of service."

[11] OEA Rule 631.3 provides that: "Notwithstanding any other provisions of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take action."

Employee also argued that the Deciding Official did not review the entire Hearing Officer's file before issuing the final decision hours after the recommendation. DPM § 1623.2 provides in pertinent parts that, "[i]n making the final decision, the deciding official shall: (a) *Consider* the notice of proposed…and supporting materials, the employee's response (if any), and any report and recommendation of a hearing officer… (emphasis added)." Chief ALJ Adams testified that he received the notice of proposed separation, and he discussed it with the proposing official and his legal team. He also received the recommendations from the Hearing Officer and he reviewed the documents that he thought were important to Employee's issue prior to making the final decision to terminate Employee. He further testified that he reviewed all the documents relevant in making his decision in three (3) to four (4) hours. He reiterated that he reviewed the documents before making the decision to accept the Hearing Officer's recommendation and findings. Tr. pgs. 209-211.

In addition, Employee stated that the Deciding Official improperly relied on the discipline imposed on Employee on December 21, 2017 which was after the December 14, 2017 incident. Chief ALJ Adams also stated that he considered, and adopted the evidence, rationale and the conclusion of the proposing official. Tr. pgs. 213-214. Chief ALJ Adams explained that he read/reviewed the proposing official's rationale worksheet, the findings and recommendation of the Hearing Officer, as well as his own knowledge of the incident, in making his final decision to terminate. Tr. pgs. 215, 220-221. Chief ALJ Adams stated that he did not rely on the incident of December 15, 2017, that led to the imposition of the December 21, 2017, discipline imposed on Employee. He explained that those charges were irrelevant and not connected to the December 14, 2017, incident and as such, he did not have any reason to rely on them. Tr. pg. 216. Based on the above testimonies, I conclude that Chief ALJ Adams, the Deciding Official, complied with DPM § 1623.2 before making the final decision in this matter. Accordingly, I find that Agency did not violate Employee's procedural due process rights in this instance.

2) ***Whether the penalty of removal is within the range allowed by law, rules, or regulations.***

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).[12] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "conduct prejudicial to District Government, to include – Use of abusive, offensive, unprofessional, distracting or

[12] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *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).

otherwise unacceptable language; quarreling; creating a disturbance or disruption" and as such, Agency can rely on this charge in disciplining Employee.

Employee asserted that the penalty of removal is unwarranted and excessive. She stated that she was already disciplined for the December 14, 2017, incident with ALJ Bruch through a reprimand, and was disciplined for the exact same incident days later when she was terminated, without the opportunity to remedy the purported deficiency.[13] In reviewing Agency's decision to terminate Employee, OEA may look to the Table of Illustrative Actions. Chapter 16 of the DPM outlines the Table of Illustrative Actions for various causes of adverse actions taken against District government employees. The penalty for "conduct prejudicial to District Government, to include – Use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language; quarreling; creating a disturbance or disruption" is found in § 1607.2(a) (16) of the DPM. The penalty for a first offense for this cause of action is Counseling to 15-Day suspension and the penalty for a second offense for this cause of action is 5-Day suspension to removal. The record shows that this was the second time Employee violated DPM §1607.2(a) (16).1(7).[14] Therefore I find that, by separating Employee, Agency did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[15] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of termination was within the range allowed by law. Accordingly, Agency was within its authority to terminate Employee.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[16] The evidence does not establish that the penalty of removal constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313

[13] The reprimand issued was discipline for the December 15, 2017, incident, and not for the December 14, 2017, incident. Employee herself testified that the reprimand was for her failure to meet with her supervisor. Therefore, I find that Employee's argument with regard to this issue is misguided.

[14] Employee served a three (3) days suspension for this cause of action from March 22, 2017 to March 24, 2017.

[15] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." Citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

[16] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

(1981), in reaching the decision to terminate Employee.[17] In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to terminate Employee. Agency has properly exercised its managerial discretion and its chosen penalty of termination is reasonable and is not clearly an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Senior Administrative Judge

[17] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.