THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBIN BROWN,	)	
Employee	)	OEA Matter No. 1601-0030-08
	)	
v.	)	Date of Issuance: July 6, 2009
	)	
DISTRICT OF COLUMBIA	)	
OFFICE OF UNIFIED COMMUNICATION	)	Rohulamin Quander, Esq.
Agency	)	Senior Administrative Judge
	)	

Ross Buchholz, Esq., Counsel for Agency
Edward Elder, Esq., Counsel for Employee

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Robin Brown ("Employee"), a Telecommunication Equipment Operator, CS-8/4 with Agency, (a "call taker") for the District of Columbia's Office of Unified Communications ("OUC" or the "Agency") was terminated effective December 18, 2007, for alleged, "Discourteous treatment of the public, a supervisor or other employee: (d) Use of abusive or offensive language or discourteous or disrespectful conduct toward the public or other employee," as referenced in the Notice of Proposed Termination letter, issued by Agency on November 14, 2007. On January 14, 2008, Employee timely appealed her termination to the Office of Employee Appeals ("OEA" or the "Office"). Evidentiary hearings were held on May 8, June 10, and June 24, 2008. The parties were required to submit closing briefs by August 25, 2008. This record closed on September 5, 2008, upon both parties' submission of their respective proposed final orders.

CHARGES AND SPECIFICATIONS

The details of the November 14, 2007, memorandum in support of the proposed action are stated below:

> Specifically, on November 7, 2007 at around 12:19 you received a call from a female caller who requested the police at the Simon Elementary School for her son who had allegedly been raped. You were rude and discourteous

> throughout the call. Additionally, you did not complete the call and had to pass the call to your supervisor on duty, Ms. Ribbon.

On December 18, 2007, Agency issued a Notice of Final Decision sustaining the removal of Employee, based on the evidence of record, written responses from Employee, the National Association of Government Employees ("NAGE"), and the recommendation report of Yvonne McManus, Agency's designated hearing officer.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

Whether the Agency's decision to terminate Employee was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

SUMMARY OF WITNESS TESTIMONY

A/ Agency's Case

Testimony of Janice Quintana

Janice Quintana ("Quintana"), Director of OUC and deciding official, testified that she listened to the November 7, 2007, phone conversation between Employee and the outside caller, and found that it was similar to other calls she had spoken to Employee

about in the past, only worse. *Tr. 30*[1]. Employee was rude, antagonistic, and basically refused service. Her action constituted a "virtual hang-up" when she threw her headset down and stated she was not going to take the call. *Tr. 30-33.* Employee merely had to obtain the address of the location, which should have taken no more than one minute to do. Schools are located in designated public safety areas, where typically police officers are patrolling in the area. Had Employee simply obtained the name of the school, an officer could have responded. *Tr. 31.* After the investigation was completed, Employee was issued a Notice of Final Decision on December 18, 2007, which terminated her on the same date. *A-9*[2]

Historically, Employee received a formal corrective action (a reprimand)[3] for the same offense with regard to a mishandled call on March 16, 2006. *(Tr. 34; A-2).* She was counseled (verbally) with regard to other similar calls which involved Employee being discourteous, i.e., 310 15th Street, NE. *Tr. 37-42; A-3,* but made no attempts to change her behavior. Employee had been disgruntled for about one year because she wanted to be promoted to a dispatcher. As a result, Employee's job and judgment were adversely affected. *Tr. 49.* Employee's tenure and a previous commendation were considered as mitigating factors in determining the appropriate penalty, but Employee's failure to change her behavior, after repeated warnings, overrode those considerations. *Tr. 54-60.*

Testimony of Kenneth Mallory

Kenneth Mallory ("Mallory") is the Agency's Operations Manager and the proposing official in Employee's removal action. According to his enumerated item testimony, with regard to the singular call of November 7, 2007, Employee:

1. failed to adhere to standards of performance for call takers, as delineated in her job description *Tr. 91, 110-112, 140-142, 167; A-12, A-12A;*
2. failure to obtain the required information regarding a rape complaint. *Tr. 99, 142-43; A-9;*
3. failed to adhere to Agency's standards for customer service by not obtaining basic required information from a caller, being discourteous, including arguing with a caller, and failed to terminate the call properly *Tr. 100-06, 136-38, 148-50, 179-80, 189-90, A-10, 12;*

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[1] References to the transcript are noted as "*Tr.*", followed by the page number(s).

[2] References to exhibits are designated as "A" for Agency and "E" for Employee followed by the exhibit number(s), p.e., *"A-9."*

[3] Although Agency, through its respective witness testimonies would refer to Employee's having received a formal reprimand in 2006, the record submitted by Agency does not support such a claim. Employee was served an Advanced Written Notice of Proposed Official Reprimand, which contained a statement that, " . . . Mr. Jose Gutierrez, Deputy Director, deciding official, who will review this written notice and your response, if there is one, and issue a notice of final decision." No such Final Decision document was ever presented for this AJ's consideration, which will later result in a negative inference against Agency's imposition of discipline against this Employee. Therefore, there is no indication that the proposal ever resulted in the imposition of any disciplinary action for an alleged March 2006 job related incident.

4. failed to adhere to Agency standards in creating an event record by not attempting to use the available computer system to provide a location for the caller *Tr. 108-09, 135; A-11;* and
5. failed to properly identify herself by her name. *Tr. 145-47.*

Mallory formally reprimanded Employee for the March 16, 2006,[4] 9-1-1 call for failing to properly process the call for a threat, and issued a document to verify the reprimand. *Tr. 159, A-9; A-2.* With regard to the incident at hand, after the caller informed Employee that she was at Simon Elementary School ("Simon"), Employee could have simply input "@ school" and her computer terminal would have provided her with the correct address for Simon. *Tr. 181*.

Testimony of Robert Sutton

Robert Sutton ("Sutton") is the Assistant Operations Manager at Agency and served as Employee's supervisor. He and Quintana counseled Employee on or about October 2007 on two occasions, addressing two different incidents. One occasion concerned a call about a medical emergency wherein a man was having a seizure. *Tr. 197-200, A-3.* He admonished Employee about her demeanor, which he determined was discourteous and rude, and advised her to rectify her interviewing techniques in the future. *(Tr. 201-202, 205).* The second counseling session involved a caller who had a car parked in her driveway. *A-3.* He again counseled Employee about her tone and demeanor and advised her to avoid confrontations with callers. The two counseling sessions took place within a two to three week period. *Tr. 212.*

Employee subsequently mishandled the November 7, 2007, call regarding the child rape suspect. The caller was in obvious distress due to the extreme circumstances. Employee had a substandard demeanor, attitude, and disposition, and failed to meet the Agency's standards in handling these three calls. *Tr. 215.* The counseling sessions arose as a result of Agency's quality assurance system in reviewing calls, although the actual calls may have taken place three or four weeks before the Employee was counseled. *Tr. 220.*

B/ Employee's Case

Testimony of Robin Brown, Employee

Robin Brown, Employee ("Employee"), testified that she never received the training outlined in the *D.C. Official Code,* Telephone and Interview Techniques/ Customer Service or Event Records. *Tr. 251-252.* Although she was a "UCT," she was unsure what the acronym meant. *Tr. 247*. She admitted to receiving training in "Pro-Q-A," but was similarly uncertain what that acronym stood for as well. *Tr. 252*. She denied that she ever received any October 2007, verbal counseling or any written confirmation that a verbal counseling session had occurred, directly contradicting the testimony of Agency witnesses Quintana and Sutton. *Tr. 289.*

[4] Again, this is an erroneous reference to Employee having been "formally reprimanded." See comments at Footnote #3, above.

Although Employee's witness, Yolanda Jeeter, testified that their co-workers were outraged at Agency's failure to pay Employee her correct wages over a sustained period of several months, *Tr. 369*, Employee testified that Mallory and some fellow employees laughed at her and her child's prospect and dilemma of facing homelessness, following the forced sale of her home, due to Agency's own admitted mistake of erroneous and sustained withholding of about $10,000 out of Employee's $45,000 annual salary, despite all efforts to correct the alleged "computer problem." The effect of this severely reduced paycheck rendered Employee unable to pay her mortgage, facing foreclosure. *Tr. 265*.

Employee testified that she did not need to separate her personal problems from her job performance, but call takers cannot take their frustrations out against the callers. She was under tremendous stress on the November 7, 2007, date in question, "holding on to a bunch of emotional baggage, when everything is overwhelming you, . . ." She went on to note the extreme personal problems that overwhelmed her at the time, including lessened, incorrect wages, her worries about the pending foreclosure on her home, and how she was going to raise her son. Yet, she sought to do her job-related duties. She admitted that the magnitude of events affected and compromised her job performance. *Tr. 556-559.* Under the circumstances, it was inappropriate for her to state to the caller, "I have no clue." *Tr. 566*. Further, she did not try to calm the caller or obtain the location of the call. *Tr. 571.* She admitted that she did not give the caller her name and badge number, when asked, as required by Agency policy and training, because she was concentrating on the caller, who was telling her that her child was raped. *Tr. 592.*

On November 6, 2007, Employee wrote an unaddressed blind letter, titled, "Regarding Dispatching," which she testified was forwarded to NAGE, her union. In the letter, she decried that she had not been selected for a promotion to become a dispatcher. She bared her soul, revealing a level of devastation and cited Mallory for what Employee believed were "untruths about my character and what actually took place during the interview process." She further concluded that she had been treated unfairly, especially by Mallory, who created a hostile work environment for her.[5] *A-19.* Despite having written the letter to NAGE for inclusion in a potential union grievance against Agency, she was not devastated or "blown away" by what happened, and not getting the dispatcher position that she wanted, to the point where she could not do her job properly. She insisted that she had not carried her feelings of disappointment to her job on the following day. *Tr. 596-602.*

Employee admitted that she had been counseled on her monotone voice and her tendency to make callers think she might not be interested in their problem, which caused citizens to become argumentative. Still, her annual Performance Evaluation Rating for April 1, 2006, to March 31, 2007, was "Satisfactory." As well, any reference that Agency

[5] A hostile work environment is one that is created by work place harassment based upon race, color, religion, national origin, disability, age or sex. Employee has not claimed discrimination on any of these grounds. Thus, the phrase, "hostile work environment" does not pertain to this situation. See. *Payton v. Department of Motor Vehicles,* OEA Matter No. 1601-0092-08, June 22, 2009, __ DC Reg. __.

might make with regard to Employee's alleged prior "counseling" by Agency, was tied to this annual evaluation, and addressed the issue of Employee's monotone voice and telephone etiquette *Tr. 606-608; E-1.* Employee admitted that although she sought assistance through the COPE program for emotional support during this time of great personal stress, she attended only one session and neglected to follow through and participate in the offered COPE-coordinated sessions for counseling. *Tr. 606-608; A-20.*

Testimony of Yolanda Jeeter

Yolanda Jeeter ("Jeeter") is a telephone equipment operator and Employee's co-worker. Jeeter's testimony outlined the duties of call takers within OUC, to include: 1) knowing the difference among types of crimes, including the crime of rape; 2) knowing the questions to ask a caller reporting a rape; 3) knowing how to take control of a call with an emotional caller; 4) knowing how to take charge of a conversation by remaining calm and courteous; 5) showing empathy for the caller; 6) not arguing with a caller even if you are personally having a bad day; 7) apologizing to the caller if the caller comments that the call taker is argumentative, even if the call taker is not wrong or argumentative; 8) not hanging up abruptly or ending the call in a rude manner without advising the caller that he/she is terminating the call; 9) exhausting all means of obtaining the necessary information from the caller before transferring the call to a supervisor; and 10) asking the caller why she wants to be transferred to a supervisor before doing so. *Tr. 369-423.*

While it is possible that employees who were not able to perform their jobs because they were emotionally or physically unable should request leave, rather than come to work, the peculiar nature of the call taker's job is something that the hired person accepted from the outset, fully knowing what they were getting into. She and Employee had approximately eight years and seven years, respectively, in this position, and were able to do the job. As such, Jeeter disagreed with Agency's document, "Telephone and Interview Techniques/Customer Service," and its generic statement about the call taker's need to be "psychologically prepared to work each day, and in receiving each call, or else the call taker will be psychologically unprepared to work." *Tr. 409-411; A-10, p. 7, "Preparation"*. Jeeter admitted that call takers are required to modulate the tone of their voice and to always control the call, but did not make any statement to the effect that Employee was deficient in those respects when she served as a call taker. *Tr. 411-413.*

Jeeter testified that her intake calls were regularly monitored by OUC personnel and that on occasion she was required to discuss her responses. (Tr. 459). She was aware of instances where OUC call takers were called into a manager's office and counseled about how they handled particular calls, stating that OUC imposed penalties in some, but not all of the instances. *Tr. 464.*

Testimony of Vincent D. Fong

Vincent D. Fong ("Fong") testified that he was the president of Employee's union, serving is such capacity on behalf of the Communication Workers of America ("CWA"), and later on behalf of the National Association of Government Employees ("NAGE"). Noting familiarity with Agency's disciplinary practices, he has sat in on several occasions where an employee was counseled as a possible preliminary

consideration to a corrective action or adverse action. *Tr. 487.* Counseling sessions were the standard operating procedure for job performance warnings, and were generally given by the front line supervisor. *Tr. 489-491; 521-522.* He has never known of someone at the rank of Agency Director (Quintana at the time of Employee's termination) being involved in an employee counseling session, although it would not be illegal for such a high level to be present. *Tr. 537-538.*

Unless it was a minor, informal verbal counseling, all counseling sessions were memorialized in writing, so that Agency could create a paper trail, in the event that further disciplinary action was later taken. *Tr. 490.* Still, it is up to an employee whether or not to request that a union representative be present at any session, and if such a representative attends, both the affected employee and the union representative would be given a copy of the document memorializing that a counseling session had occurred. *Tr. 520.* While there are, on occasion, informal verbal counseling sessions that are not reduced to writing, these types of relaxed sessions are utilized only for minor issues. *Tr. 545.*

In his opinion, Employee was experienced and professional. Based upon his limited observations of her job performance, he did not believe that her job performance had been affected by the ongoing issue of her pay shortage or her non selection for a promotion. He agreed that management was entitled to professional behavior, notwithstanding Employee's personal issues, and had the right to counsel, discipline and ultimately fire an employee, when necessity and circumstances dictate. *Tr. 522-525.*

FINDINGS OF FACT, LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Agency's basic position

The District Personnel Manual, Chapter 16, Part I, Section 1603, Definition of Cause; General Discipline includes, among the actionable behavior the following: (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: (3) Neglect of duty; (6) Misfeasance; (7) Malfeasance; and (9) Unreasonable failure to give assistance to the public; and (g) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.

Agency urges the AJ to find that Employee knew or should have known that she was required to treat 9-1-1 callers in a courteous manner, including providing her name when asked, and to terminate calls only after advising the caller for the reason for doing so. Agency argued that Employee acknowledged that she knew how to enter the appropriate entry into the CAD system, but admittedly failed to do so on November 7, 2007, offering the explanation that she had been given a verbal directive not to use the CAD system for obtaining the addresses of schools, because the resultant address might not be accurate. Agency placed much reliance upon Employee's alleged performance on November 7, 2007, and the credibility of Employee's testimony during the evidentiary hearing about how she conducted herself during the 9-1-1 call that came to her on that date.

Agency then cited Employee for alleged failure to use reasonable care in exercising her duty as a call taker by: 1) being discourteous; i.e., arguing and yelling, when answering the call; 2) failing to enter the "@ school" prompt into the CAD system; 3) failing to empathize with the caller; 4) failing to identify herself by name when requested to do so; and 5) terminating the call (virtually hanging-up) without explaining to the caller why she was doing so. The AJ listened to three 9-1-1 telephone conversations that Employee had with members of the public, including the November 7, 2007 call. These three calls were extracted from among several hundred calls that she conducted since March 16, 2006, the particular date on which Employee engaged in a hostile call with a member of the general public, the aftermath of which resulted in the issuance of an Advanced Notice of Proposed Official Reprimand. *A-2, internal document.*

Employee's basic position

The essence of Employee's case is that Agency did not carry this burden, as Agency failed to: a) show a history of prior discipline; b) consider proper factors before electing termination; c) consider that Employee's training history is not relevant to the elected outcome in this matter; d) adequately consider mitigating circumstances; and e) realize that termination was too harsh a penalty.

I now address each item:

a. Agency Cannot Show a History of Prior Discipline

I find that OUC failed to provide credible proof that Employee's disciplinary record supports termination. Although the Notice of Proposed Termination cited four "previous infractions" to support Employee's termination, including a suspension, a reprimand, and two incidents of verbal counseling, everything faded as Agency's case was presented on the record. The suspension was dropped from consideration in the Notice of Final Decision, as it occurred more than three years before the November 7, 2007, incident.[6] I find that the viability of the remaining three alleged incidents is highly questionable.

Agency lacked documentary evidence to prove that Employee had a prior reprimand. The record contained only a Notice of Proposed Reprimand, dated May 2, 2006, but no evidence that the proposed reprimand was ever put into effect. Further, Employee credibly testified that she was never reprimanded. *Tr. 318-319.* Nor was any reprimand reflected in her April 1, 2006, to March 31, 2007, annual performance evaluation. I consider this factor to be a critically significant component of how the Agency either failed to follow though, or determined that the initial proposal to reprimand Employee was not to be implemented. *E-1.* Without proof of a final action,

[6] District Personnel Manual (DPM), Chapter 16, §1606.2. states that, "[I] n determining the penalty for a disciplinary action under this chapter, documentation appropriately placed in the O[fficial] P[ersonnel] F[older] regarding prior corrective or adverse actions, . . . may be considered for not longer than three (3) years from the effective date of the action, unless sooner ordered withdrawn in accordance with section 1601.7 of this chapter."

Agency simply cannot use an alleged proposed reprimand to support Employee's termination, nor as a component of a claim that Employee received a formal reprimand as an element in her progressive disciplinary history..

Agency was also unable to produce documentary evidence sufficient to show that Employee had been verbally counseled. Agency witnesses testified to having given such counseling to Employee, but the details of the alleged counseling were vague, and apparently deemed to not be significant enough to be documented for the record. As well, no documentation was presented for consideration of whether any supposed counseling had occurred with a paper trail available for management to cite and include in Employee's personnel file, should there be any future disciplinary action which might call into question what prior indications there were of alleged deficient behavior.

Fong testified that managers normally provide written confirmation of counseling sessions as the regular practice at OUC. *Tr. 490-491; 543–544.* Their actions would document that counseling took occurred, the date of counseling, and the topic of discussion. This procedure allows managers to use verbal counseling sessions, supported by written documentation, to buttress subsequent discipline. I find that OUC's managers' respective testimony was not credible, in that they failed to document any alleged disciplinary matter(s) which they belatedly claim was important enough to later form the basis for a removal action.

b. The Agency Considered Improper Factors Before Electing Termination

Director Quintana admitted that she considered how the news media might report on 9-1-1 calls taken by Employee *Tr 82–84.* This statement reflects that Quintana over reacted to the situation, which supports Employee's argument that OUC managers imposed too severe a penalty. Employee is correct in asserting that, "Must not embarrass Agency managers!," is not a proper disciplinary consideration, nor should, "How calls play in the media!," be a part of any performance standard for the call taker job description.

c. Employee's training history is not relevant to the elected outcome in this matter

Agency devoted much of its case to documenting formal training provided to OUC call takers. The record shows that Employee was trained several years before the training manuals were written, and although she did not receive or use any of the training materials cited by Agency, she was still expected to comport herself in a knowledgeable, courteous, and professional manner, consistent with both the directives of her initial training, and in compliance with the general contents of what was contained in the later created training manual, which essentially reduced to writing what Employee and her fellow call takers were supposed to already be doing in the discharge of their job-related duties. *Tr. 248-253, 325-326.*

d. Agency Failed to Consider Mitigating Circumstances

In determining the appropriateness of Agency's penalty, OEA has consistently relied upon *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). See *Page v. DC*

Fire and EMS, OEA Matter No. 1601-0015-01 (2008). Under *Douglas* OEA may consider the clarity of Agency warnings regarding the alleged offense, mitigating circumstances, and how consistent the Agency's action is with the Agency's table of penalties. While recognizing that Agency is vested with the managerial authority to oversee the disciplinary policies and enforcements with regard to its employees, if the OEA finds that an agency's penalty is not reasonably arrived at, perhaps cannot be supported by the evidence presented during an administrate dismissal process, the OEA may overturn the penalty. *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. App. 1985). It is against this legal backdrop that Employee has positioned her case.

The Merit Systems Protection Board, OEA's federal counterpart, has held that it would "take a more active role" in determining the reasonableness of a penalty imposed in cases where the Agency fails to support all aspects of a charge against an employee. See, *Vigil v. Dept. of Veterans Affairs*, 46 M.S.P.R. 57, 59 (1990). OEA has seen fit to follow this same guideline on occasion. See, *Employee v. Agency*, OEA Matter No. 1601-0052-82 (1987) (Mitigating a penalty from 14 to 10 days), and *Palmer v. D.C. Metropolitan Police Department*, OEA Matter No. 0048-05, March 6, 2007, ___ D.C. Reg. ___ (reducing a 35-day suspension to 13 days).

Agency was mandated to consider mitigating circumstances as a component of imposing discipline. This AJ may then judge whether Agency properly considered mitigating factors. *Stokes, supra,* at 1010. Other than Quintana's basic assertion that she considered mitigating circumstances and decided that the adverse case outweighed mitigation, the record lacks proof of the weight given, if any, to mitigation. The testimony reveals several factors which this AJ believes were given short shrift in Agency's deliberations before deciding to terminate Employee.

Not sufficiently considered were: a) personal issues related to Employee's work disposition, which increased her levels of stress; b) Throughout much of 2006 and 2007, Employee suffered chronic problems with being shorted in her pay, for which anomaly Agency has accepted responsibility, with devastating effect, including trouble in taking care of her son and herself, and the loss of her house and her credit rating; c) the psychological implications of allegedly being the butt of certain co-workers' jokes, laughter, and behind-the-back conversations about her mountain of personal problems related to what accumulated to about $10,000.00 pay shortage (about 25% of her annual salary); d) unexpectedly being called back to work on short notice, after having completed her own complete shift, and the impact this salutation may have imposed upon her ability to successfully perform her job; e) possible equipment failures; and f) possible declination of supervisor Carl Millard or the availability of a fellow call taker to accept the call, when the caller refused to continue the conversation with Employee; and *Tr 264.*

I find that all of these accumulated factors culminated at one moment in Employee's life, making both the caller and the caller's interactions with Employee volatile. I conclude that, under the circumstances outlined above, Employee suffered a temporary emotional breakdown, which briefly interfered with her good judgment, and rendered her unable to discharge her job-related duties for a brief period.

For example, all of the OUC managers, Employee's co-workers, and even the payroll staff who were in charge of handling pay issues were aware of Employee's short paycheck problems. *Tr 503.* Despite their awareness, it still took the better part of a year to resolve the pay issue, which accumulated to about a $10,000 wage shortage, i.e., approximately 25% of Employee's earned annual income. Employee believed that the length of time that it took to resolve these problems suggested that her OUC managers never took seriously enough her pay shortage problems, and the devastating impact that it imposed upon her and her family. I find that Employee is correct in this assertion, and conclude that Agency, the OUC managers, and/or the payroll staff of Agency and the DC Government did not take more forceful, immediate, and sustained steps to resolve this matter much sooner. Agency's failure to act in this regard to resolve the problem on behalf of one of its most dedicated employees supports Employee's argument that this and other mitigating factors were not fully considered prior to the decision to impose termination.

e. Termination is Too Harsh a Penalty

With regard to the penalty of removal, this Office has long recognized that an agency has the primary responsibility for managing its employees, and that part of that responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department,* OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __D.C. Reg. __. In this matter, the AJ cannot substitute his judgment for that of Agency when determining if the penalty should be sustained. Rather the review is limited to determining that "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty should not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review, 32* D.C. Reg. 2915 (1985). Although Agency argues that it presented sufficient evidence to establish that its action was not arbitrary or capricious, and likewise, no error of judgment, the AJ concludes otherwise. He cannot sustain the arbitrariness of Agency's decision in this matter, as the record lacks a sufficient evidentiary basis for the ultimate penalty of termination.

The Office has on occasion determined that an Agency-imposed penalty should be reversed, and reduced to something less severe.[7] See *Palmer v. D.C. Metropolitan Police*

[7] In an earlier appeal, the Board of this Office issued an *Opinion and Order on Petition for Review* on January 26, 2007, upholding the determination of the Office to reduce the removal of an employee to a suspension. In the matter of *Robert Aronson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter 1601-0128-99, the Board found that the employee's ten (10) year history with no previous adverse actions and his strong potential for rehabilitation supported that decision. Agency sought review of the *Opinion and Order on Petition for Review* before the Superior Court of the District of Columbia (*District of Columbia Fire and Emergency Medical Services Department v. Office of Employee Appeals*, Civil Action No. 2007 CA 001923 P(MPA). On April 22, 2008, the Honorable Judith E. Retchin, Associate Judge of the Superior Court of the

Department, OEA Matter No. 0048-05, March 6, 2007, ___ D.C. Reg. ___ (reducing a 35-day suspension to 13 days). That situation is applicable if the AJ finds Agency's initial disciplinary action to be arbitrary, excessive, or otherwise outside of the realm of managerial discretion, in terms of the character of the offense and the nature of the discipline imposed. Generally what happens is that an Agency-implemented termination or extended suspension may be reduced, with Employee reinstatement or the number of days of the extended suspension lessened, provided the AJ first determined that "cause" for disciplinary action still does exist, which would serve an any underlying basis for the imposition of some disciplinary action.

In the matter before me, I elect not to reduce the penalty imposed, but rather to vacate it entirely. DPM 1603.2, states, " ... disciplinary action may only be taken for cause." I find that Agency has not documented that it engaged in progressive discipline over time as a component of established cause for the implementation of this disciplinary action. Lacking that documentation, I likewise find that "cause," as defined by DPM 1603.3, has not been established, despite everyone's agreement, including this Employee, that there was substantial room for her to improve her telephone etiquette. However, without cause, the imposition of any discipline must fail.

Employee admitted that she handled the call poorly, resulting in the caller getting upset, belligerent, and asking to speak to another 9-1-1 intake staff. For this incident and Employee's behavior, a formal reprimand, or even a suspension of several days might well have been in order. This AJ believes that Employee needs to work on her telephone etiquette, as her monotone voice and gruffness are an invitation for future difficulties in interacting with the general public. Still, given the lack of a history of progressive discipline, the penalty selected, i.e., termination on the possible first offense, was excessive, inappropriate, and did not fit the "crime."

The AJ also considered that Employee had other emotional challenges during the period of time that immediately preceded the November 7, 2007 call. Employee was afforded the opportunity to address those problems through the COPE program, and failed to adequately pursue that option or other options privately. However, those problems are irrelevant to the outcome of this decision.

Witness credibility

Agency underscored that it is within the province of the AJ to assess the credibility of witnesses. *Dell v. Department of Employment Services,* 499 A.2d 102 (D.C. 1985). Agency then attacked Employee's credibility in her assertions that she had not received certain formal training, or been formally introduced to specific protocols and procedures for handling specific situations, despite her longevity on the job, and had likewise not been counseled about her job performance shortly before the time of termination.

District of Columbia, issued an Order affirming the *Opinion and Order* of the Board of the Office of Employee Appeals.

As the deciding AJ, I find that the credibility of Employee on the issue of her formal training and whether there was counseling in October 2007, to be less of an issue of credibility than testimony given by Agency's witnesses on the issue of the supposed implementation of progressive discipline. I find that the lack of a documentary evidentiary trail should be resolved as a component of successfully bringing the matter at hand to conclusion. To address this documentary deficiency, the AJ considered the demeanor of each testifying witness, the witness's character as known, the inherent probability or improbability of the witness's version of the facts, any inconsistent statements of the witness, and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army,* 35 M.S.P.R. 453 (1987).

The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand". *Stevens Chevrolet Inc. v. Commission on Human Rights,* 498 A.2d 440 (D.C. 1985). I am particularly concerned that first hand observations are critical in cases that involve termination and removal of an employee from a job and career.

My experience as an AJ includes years of observing and assessing witnesses. I am also mindful that even if some parts of a witness's testimony are discredited, other parts can still be accepted as true. *DeSarno, et at., v. Department of Commerce,* 761 F.2d 657, 661 (Fed. Cir.1985). I find much of the testimony of Agency's witnesses to be credible, factual, and objective. However, some of Agency's witnesses' testimony regarding whether Employee was given the benefit of formal training with respect to the focus and purpose of Agency Exhibits 9, 10, and 11, is immaterial. She was still required to know, understand, and utilize the information contained therein, based upon her initial six month training course, periodic updates (written or orally); and experience gained during seven and one-half years as a call taker. And to the extent that, on more than one occasion, Employee allegedly failed to rise to the level of expectations in the professional discharge of her job-related duties, she should be held accountable and dealt with accordingly. And therein lies Agency's dilemma.

Agency has attacked Employee's credibility by claiming that she said that the Nov. 7, 2007, caller asked to be transferred to a supervisor, when in reality the caller merely asked to speak to another operator due to Employee's discourtesy. To this AJ, this was misspeak, not a subject around which the issue of credibility, or lack there of, can be built and sustained. Instead, the real issue of credibility is Agency's burden to overcome. Three Agency managers/supervisors testified under oath about allegedly having warned Employee about her behavior and demeanor, buttressed by a formal reprimand, an official disciplinary action imposed for cause. While perhaps Employee's performance was lacking in certain respects, there is nothing in the record that would sustain a pattern of prior inadequate job-related behavior, to justify and support an action to terminate her.

Beyond the proposed reprimand, there was no Notice of Final Decision, to indicate the implementation of a disciplinary action. Nor was there any reference to any reprimand in her annual performance evaluation for the period of March 31, 2006, to April 1, 2007. *E-1.* The lack of a formal reprimand gives rise to a negative inference against Agency, and a strong presumption that no reprimand was ever issued. For Agency to cite and rely upon a proposed reprimand as a significant component of the imposition

of claimed progressive discipline prior to termination is disingenuous, eradicating much of the credibility of Agency's witnesses.

Further, for Agency to then cite alleged discourteous treatment for which Employee counseling might have been in order closer to the time of occurrence, but which were not formally documented for the record, raises serious questions in this AJ's mind about whether the events, despite Employee's possible discourteousness, were ever viewed as seriously undermining the 9-1-1 Office's overall efficiency. Given the backdrop of considering the total number of 9-1-1 calls that Employee handled per shift, not all of which were emergency calls, and factoring in the testimony that some of the alleged discourteousness might not have been uncovered until several weeks later, when some of the tapes were monitored for quality control, I find Agency's witnesses' testimony to not be credible about how seriously non-compliant Employee's alleged job performance occasionally was, when coupled with management's glaring failure to take disciplinary action. I find that Agency's meeting(s) with Employee on prior occasions in October 2007, if at all, was only for the minor purpose of directing her to be less gruff, less monotone, and more gracious in dealing with the public. No written documentation was created. No cause was deemed to have existed. No disciplinary action was considered or imposed.

Having listened to the three tape-recorded 9-1-1 calls provided, I observe that there was room for significant improvement in Employee's manner, disposition, and professionalism. *A-3, A-13, and A-14.* Employee's tone and demeanor during her conversations bordered on the discourteous. Still, without more, and particularly some definitive Agency disciplinary action that was designed to address Employee's alleged deficiencies and unprofessional job-related behavior, I conclude that there is no evidence of discipline within the three years prior to Employee's termination. I further conclude that management's effort to "grow" a termination case against Employee must fail. The plethora of discipline-related documents that Agency submitted as its exhibits virtually all relate to developing a termination case against Employee as a result of the one November 7, 2007, call.

Pursuant to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), Agency has the burden of proof in adverse action appeals. OEA Rule 629.1 requires that the burden be met by "a preponderance of the evidence," which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." In sum, after carefully considering all of the evidence, documentary and testimonial, and all of the arguments presented by the parties, the AJ concludes that Agency did not meet its burden of proof by a preponderance of the evidence. Agency lacked sufficient cause for removal, and the penalty of termination must be vacated.

Agency admitted that its managers did not consult any table of penalties when they chose to terminate Employee, as there was no official table of penalties yet in effect on the date of Employee's termination on December 18, 2007. Drafts of the proposed document, formally implemented in April 2008, were in circulation and used by some D.C. Government managers as a disciplinary penalty guide. The Table of Penalties, once adopted, found at DCPM, Chapter 16, §1619 (Table of Penalties), reserves termination

for the most serious and repeated offenses.[8] The Table of Penalties supports Employee's argument that termination was too severe a penalty in this case. The part of the Table of Penalties applicable to Employee's case is Cause 6(i), "Unreasonable Failure to Give Assistance to the Public." Examples of matters considered under this cause include "discourteous treatment of the public; violation of department customer services standards; … failure to offer assistance when requested, etc." These examples describe the charges against Employee, as her managers specifically cited "discourteous treatment" in the Notice of Proposed Termination. OUC managers likewise accused Employee of violating customer service standards to support her termination, which is assuredly a component of the "discourteous treatment to the public" allegation. *Tr 34, 136, 205.*

Cause 6(i) only allows termination if the affected employee has three or more similar prior incidents. The penalty for two or fewer prior incidents is suspension or reprimand. I conclude that, without prior documentation of discipline to support it, the termination of this Employee on the first documented offense cannot be sustained. Agency's action of terminating Employee must be reversed.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's disciplinary actions taken against Employee are vacated, and Agency's action of terminating Employee as an OUC call taker is REVERSED; and

2. Agency shall immediately reinstate Employee to her last position of record; and

3. Agency shall reimburse to Employee all back-pay and benefits lost as a result of her removal, and adjust her official personnel file, to reflect no break in service, and to remove any adverse information indicative of her having been terminated; and

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

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

[8] Although there was no table of penalties in effect at the time Employee was terminated, Agency indicated that the table, once adopted, has retroactive application, which assists in evaluating what the appropriate penalty should be for any given offense. *Tr 19.*