THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0167-16
TARA BLUNT	
Employee	Date of Issuance: September 30, 2019
v	
	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION	Administrative Judge
Agency	

Kemi Morten, Esq., Employee Representative
Jhumur Razzaque, Esq., Agency Representative[1]

INITIAL DECISION

PROCEDURAL BACKGROUND[2]

Tara Blunt ("Employee") filed a petition with the Office of Employee Appeals ("OEA," "Office") on July 27, 2016, appealing the final decision of the District of Columbia Department of Parks and Recreation ("Agency") to terminate her employment, effective June 29, 2016. On August 29, 2016, Agency filed a motion for dismissal or summary judgment. The matter was assigned to this Administrative Judge ("AJ") on September 9, 2016.

[1] Ms. Razzaque entered her appearance on February 24, 2017. She was preceded by Jamarj Johnson, Esq., and Andrea Comentale, Esq..

[2] The AJ was called upon to use the considerable experience and expertise obtained during her 30 years of conducting administrative proceedings, in order to resolve the extraordinary number of difficulties, conflicts and challenges presented in this matter, while maintaining order and minimizing delay. Due to the plethora of pleadings, and other events, the procedural background is extensive. The AJ reduced the number of pages by eliminating some information, such as stated deadlines, and by summarizing captions and contents of documents. In addition, although some delay was necessitated because Ms. Morten stated that she was required to be in Africa on family matters for extended time periods, considerable delay resulted because the parties were unable to work together amicably and productively to resolve discovery and other matters. More delay was caused by the failure of the parties, despite numerous warnings, to consistently comply with OEA Rules and AJ directives. The AJ treated the parties with respect and complied with applicable OEA Rules, although she allowed parties to deviate from requirements in order to reduce delay and move to resolution, provided the other party was not prejudiced. She avoided imposing sanctions so that Employee could present her case fully. The difficulties during this long and arduous process did not impact on the AJ's ability to render an impartial decision based on the facts, law and precedent.

The AJ issued an Order on September 20, 2016, stating that this Office's jurisdiction was at issue based on the allegations and relief sought in the petition, and directed Employee to respond to the

Order and Agency's motion. On October 14, Employee filed an opposition to the motion, sought summary disposition, and asked to amend her petition, attaching a document entitled "amended statement of facts" to the submission. In her October 24 Order, the AJ denied all outstanding motions; and ruled that consistent with OEA Rule 608.6, Employee could amend her petition unless Agency filed an opposition, alleging resulting prejudice or delay. Agency responded on November 9, again seeking dismissal of the appeal, based on the "amended statement of facts" which Agency argued was essentially the same as the initial appeal. Employee moved for summary disposition on November 21. On December 5, Agency requested additional time to respond to the motion.

On December 8, 2017, the AJ conducted a telephone conference ("TC") with the parties, denying all outstanding motions, allowing Employee to file an amended petition by December 15 since the October 14 attachment was not an amended petition, and directing Agency to file its response by January 21, 2017. Employee filed the amended petition on December 21. Agency filed it response on January 23, 2017, again seeking dismissal of the appeal.

By Order dated March 1, 2017, the AJ scheduled oral argument for April 25 on Agency's motion, and stated that prehearing matters would also be addressed. She expressed concern and disapproval of the quantity and content of emails sent by Employee, and again directed that emails and telephone calls to the AJ be "limited to matters requiring immediate attention." She reiterated that strict compliance with OEA Rules and AJ directives was required. However, she allowed Employee until March 22 to file a motion, and set a deadline for Agency's response. The AJ stated that if Employee met the filing deadline, oral argument would include her submission. In her "Petitioner's Motion for Default Judgment, or in the Alternative, for Summary Judgment and Petitioner's Motion to Compel Production of Chief Tyrell Lashley's Personnel and Other Records," Employee argued, in part, that she was entitled to a default judgment because Agency "disobeyed" the AJ by filing a motion to dismiss instead of an answer to the amended petition. Agency moved to stay discovery until the jurisdictional issue was resolved. On March 30, it filed its opposition to Employee's motion. On April 12, the AJ issued an Order granting Employee's unopposed request to continue argument until after June 5 due to Ms. Morten's absence from the country until May 30, and rescheduled oral argument for June 8.

At the June 8, 2017 proceeding, attended by Employee, Ms. Morten, and Ms. Razzaque; the AJ denied all outstanding motions, discussing her rationale with the parties. The parties declined mediation. The issue of consolidation was raised after Ms. Blunt stated that she represented several other Agency employees with the same or similar issues. Discovery issues were discussed, and a tentative hearing date of November 8, 2017 was scheduled. By Order dated July 6, the AJ notified the parties that the matters would not be consolidated and that hearing would proceed as scheduled. She directed the parties to consult and address specific matters, reduce and agree on documentary and testimonial evidence, and to file summaries of these efforts by October 5, also the deadline for exchanging lists of proposed documentary and testimonial evidence and filing subpoena requests. On October 4, Employee filed a consent motion asking to extend the deadline by a week since discovery was still being produced and needed to be reviewed. On October 4 and 5, Employee submitted draft subpoenas for 15 witnesses and two *subpoenas duces tecum* requesting the production of extensive

amount of documents. Agency sought the issuance one subpoena. On October 12, Agency filed a Stipulation Summary regarding the results of the meetings ordered by the AJ; and its Witness and Document Lists.

In "Employee's Motion for Sanctions for Agency's Failure to File an Answer to Employee's Amended Petition and for Agency's Refusal to Timely and Completely Respond to Employee's Discovery Requests," filed on October 16, Employee sought the imposition of sanctions on Agency alleging that its January 23 submission failed to comply with OEA Rules, and that Agency's responses to discovery requests were late and incomplete, which placed an "onerous burden" on her, and left her with insufficient time to prepare for the hearing. She argued that she had "no alternative" but to seek reversal of the removal, consistent with Superior Court Rule 37, due to Agency's refusal to cooperate in the discovery process." After reviewing the pleading, the AJ held a telephone conference ("TC") with the parties, during which she rejected Employee's request to immediately impose sanctions, stating Agency was entitled to respond to the pleading. The AJ noted that Employee's delay in bringing her allegations to the AJ's attention, left insufficient time to allow Agency to respond, and for the AJ to address these matters before the scheduled hearing. Although Employee objected to the delay, she also stated that she was unprepared to go forward without the additional discovery. The AJ therefore cancelled the proceeding. On October 26, Agency filed its "Opposition to Petitioner's Motion for Sanctions and for Agency's Failure to File an Answer to Employee's Amended Petition and for Agency's Refusal to Timely and Completely Respond to Employee's Discovery Request," stating, in part, that it had met all filing deadlines and cooperated fully in discovery matters.

By Order dated December 18, 2017, the AJ directed the parties to file factual and legal arguments on the jurisdictional issue of whether Employee had at will status at the time of her removal, by January 15, 2018. On January 8, Employee emailed the AJ that she was filing a consent motion asking to extend the deadline until January 19. Based on Employee's representation, the AJ granted the request by email on January 11. Several days later, Employee emailed the AJ, that she was filing another consent motion, seeking an extension until February 28. Again, based on Employee's representation, the request was granted. The Order issued on January 18 memorialized these actions, and also stated that Employee failed to comply with OEA Rules and directives during this process. The AJ again ordered that unless permitted by the AJ, compliance with OEA Rules and AJ directives was mandatory.

After reviewing the pleadings filed by Agency on February 28 and by Employee on March 5, the AJ issued an Order on March 22, scheduling oral argument for April 18, and advising the parties of specific issues that they should be prepared to address and to be prepared to schedule the evidentiary hearing. On March 30, Agency filed a request to continue the hearing due to a scheduling conflict, stating that the parties agreed to July 16 as the rescheduled date. Since no reason was given for the extensive delay, the AJ emailed the parties that she would grant the request, but wanted the hearing rescheduled for the earliest possible date. Several discussions took place with the parties by email and telephone. Ms. Morten stated she would be away between April 19 and early May, and would leave for Africa some time thereafter, remaining there until July. The AJ directed the parties to agree on a date for oral argument before Ms. Morten left for Africa. They informed the AJ that they agreed to reschedule the proceeding until May 4. In her April 5 Order, the AJ rescheduled the matter until May 4, and commended the parties for their successful resolution.

Based on matters discussed during the May 4 proceeding, the AJ determined that an evidentiary hearing was needed to resolve both the jurisdictional and substantive issues. Despite their statements at the hearing that discovery was completed, Employee argued that Agency failed to provide her with requested documents and acted in bad faith. Agency denied the allegations, asserting that it actually provided Employee with documents that it was not required to provide. Responding to the AJ's question regarding the amount of time needed for the evidentiary hearing, Employee stated that she anticipated introducing at least ten witnesses and 70 documents. The AJ dismissed outstanding motions without prejudice, again telling the parties that the numerous motions was adding to the delay in completing the hearing process. The AJ stated that she would allow additional time for discovery, and that although the parties were entitled to fully present their cases, they needed to reduce unnecessary and duplicative evidence. She directed the parties to consult as often as needed to resolve discovery and evidence issues so that the hearing could proceed expeditiously and smoothly. The parties agreed to a June deadline, but the AJ extended the deadline to August 23, explaining that she expected the additional time would result in greater success in resolving all outstanding issues and addressing evidentiary matters. The parties agreed to do so. The Summary of Proceedings and Order memorializing these matters was issued on June 4.

The parties failed to meet the August 23 deadline, jointly requesting, usually by email or telephone, several extensions to complete this process which the AJ granted, based on her assumption that the parties were using the additional time to successfully resolve outstanding issues. However, after granting several extensions, the AJ cautioned the parties that based on these additional extensive delays, it was unlikely future extensions would be granted. By Order issued October 22, the AJ imposed a filing deadline of November 10. Employee emailed the AJ an extensive narrative on November 2, asking for an immediate TC, and seeking relief based on alleged Agency misconduct during this extended time. The AJ denied her request on November 7, stating that the lengthy email did not constitute a pleading and would not be addressed, and that the filing deadline must be met. She expressed concerns about the apparent lack of resolution, the failure to notify her of problems until a few days before the final deadline, and her concerns about conducting a TC with the parties.

After reviewing the submissions filed in response to the November 10 Order, the AJ realized that the parties had achieved minimal, if any success, during the extensive time given to them. For example, Agency filed a list of "proposed stipulated documents" which stated on it that Employee had withdrawn her consent. The AJ determined that the parties had not engaged in sufficient and meaningful discussions and did not resolve any matter of substance. In order for the hearing to go forward, she conducted extensive TCs with the parties on November 26, 28 and 30; resolving matters that remained in dispute. In order to ensure that the resolution remained intact, she assigned herself the task of preparing the lists of evidence, testimonial and documentary, agreed upon by the parties, and attached them to the Summary and Order issued on December 18, 2018.[3] The Order also identified the hearing dates agreed upon by the parties, the issues to be addressed at the hearing, the procedures that would be utilized, and deadlines for subsequent submissions. On January 29, 2019, the AJ issued a Summary and Order, reviewing the submissions filed in response to the December 18

[3] The December 18 and January 29 Orders, particularly the former, offer examples of continuing problems due to the failure of cooperation and compliance by the parties, and efforts by the AJ to resolve these matters so the hearing could go forward.

Order. She discussed, in detail, the revisions to the lists of documentary and testimonial evidence, and ruled on subpoena requests.

The evidentiary hearing was held at the Office of Employee Appeals on February 6, February 7 and March 14, 2019. At the proceedings, the parties had full opportunity to, and did in fact, present testimonial and documentary evidence as well as arguments.[4] The following individuals were present on each hearing date: Tara Blunt, Employee; Kemi Morten, Esq., Employee counsel; Jhumur Razzaque, Esq., Agency counsel; Jamarj Johnson, Agency representative; and Erik Beck, Ms. Morten's assistant.[5]

On March 19, 2019, the AJ notified the parties of her decision to admit PE-A and PE-B, as sought by Employee, into the record. On March 27, Employee filed a "Motion for Summary Disposition or Written Order Modifying this Tribunal's Oral March 14, 2019 Order from the Bench," which contained new and old allegations of intentional Agency misconduct. On March 28, the AJ issued an Order which, in pertinent part, denied the motion, adding that the deadline for filing briefs was unchanged. However, due to the nature of the allegations, she gave Agency the opportunity to respond. On April 15, Agency submitted information as directed at the hearing, and on April 29, it responded to the Motion. By Order issued June 10, 2019, the AJ memorialized some matters discussed in this paragraph, including the admission of the documents on March 19, and ordered the parties to show good cause for failing to file closing briefs.[6] Although the AJ did not find that the

[4] Witnesses were sequestered, and testified under oath. The proceedings were transcribed, and the transcripts are cited as "Tr" followed by 1, 2 or 3 (volumes of February 6, February 7 or March 14 proceeding, respectively); followed by the page number. Documentary evidence is cited as "J" (Joint), "A" (Agency), or "E" (Employee), followed by the document number.

[5] The transcripts contain errors and omissions. For example, it erroneously states in Volume 2, that Employee was asked by the AJ to leave the hearing room at the start of the February 7 hearing while certain matters were discussed, when in fact, the AJ asked witnesses waiting to be sworn, to wait outside during the discussion. Employee was not asked to leave, and remained in the room. (Tr, 2-2-6, 20). In addition the transcripts omit or erroneously reference documentary evidence. Agency is referred to as offering evidence into the record on the second hearing date, when it was Employee who did so. (Tr, 2-3). Other documents are misidentified, *e.g.*, Ex E-12 was admitted into evidence as Ex E-1. (Tr, 2-243, 249). The transcripts include errors identifying the speaker. The AJ was very familiar with the proceedings, and easily identified errors. In order to resolve the omission in the transcripts to reflect the admission of all exhibits, the AJ reviewed all documents in the three binders marked by the Court Reporter which are the only binders entered into evidence and considered them as entered into evidence, since doing so did not determine relevance or reliability, did not prejudice either party, and permitted the matter to move to resolution. The errors in the transcripts did not impact on the AJ's ability to prepare this decision. The AJ also notes that neither party notified her of any problem with the transcripts; so she concludes the errors had not impact on their ability to prepare briefs and were not considered problematic by the parties. The parties submitted various binders of proposed documentary evidence, but only three were used at the proceeding and only documents in those binders were entered into evidence, with the exception of the documents listed in the June 10 Order. These are the only three binders, *i.e.*, Joint exhibits, Agency exhibits, and Employee exhibits, that are marked and dated by the Court Reporter.

[6] At the March 14 proceeding, the AJ ordered, and the parties agreed, that the filing deadline for closing briefs was 60 calendar days from the date the AJ notified them that the third volume of the transcript was available. The AJ notified the parties by email on April 4, which established a June 4 deadline.

responses of either party established good cause, by Order dated July 3, 2019, she extended the filing deadline to August 6. Closing briefs were submitted and the record was then closed.[7]

JURISDICTION

The jurisdiction of this Office was at issue in this matter.

ISSUES[8]

Does this Office have jurisdiction to hear this appeal? Assuming, *arguendo*, that it does have jurisdiction, did Agency meet the requisite burden regarding its decision to terminate her employment?

POSITIONS OF THE PARTIES, SUMMARY OF EVIDENCE, ANALYSIS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Undisputed Findings of Fact (UFF)[9]

1. Agency is the District of Columbia Governmental entity that provides recreational services and facilities in the District of Columbia. Agency's Aquatics Division ("AD"), where Employee worked, is responsible for ensuring that health and safety standards are maintained at the District's public swimming pools and the aquatic programs at those pools. (Tr, 1-145).

2. Employee began working in Agency's AD on a part-time or seasonal basis in 1991, working primarily as a lifeguard. She started her career as a firefighter with the Alexandria Fire Department in 2006, but continued to work 20 hours a week with Agency. In 2014, she became a permanent Agency employee with career status. (Amended Petition, pp. 1-3). At the time of her removal, she was a Grade 7, Recreation Specialist ("RS") and assigned to perform duties as an Assistant Pool Manager. (Ex J-33-#24). Employee's position description ("PD") during the relevant time period was for a RS. The PD stated the incumbent had to "possess a current CPR[10] and Lifeguard Certification gained through a full certified Red Cross

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[7] The AJ advised the parties not to erase emails since she might request copies after briefs were filed. She issued an Order on September 11, asking the parties to file all emails between the AJ and parties from 2016-2019, and emailed the parties copies of the Order. The following day, Employee emailed the AJ that she could not meet the deadline or even a brief extended deadline. Since the AJ determined that she not need the additional emails, she immediately notified the parties by email that the September 11 Order was withdrawn, that no emails should be submitted, and that the record remained closed. Nevertheless on September 20, Employee sent two *ex parte* emails to the AJ, with attachments identified as emails exchanged in 2018 and 2019. The AJ sent copies of the emails to Agency counsel, and notified the parties that Employee's submissions were not reviewed or accepted. This footnote memorializes that the September 11 Order was withdrawn.

[8] These are the primary issues, and although this decision also addresses other issues and arguments raised by the parties; it may not address every item raised, particularly those that were baseless and irrelevant, the AJ carefully reviewed and considered the entire record in reaching her decision. *See, e.g., Antelope Coal Co. /Rio Tino Energy American v. Goodin*, 743 F3d 1331 (10 Cir. 2014).

[9] The UFFs are derived primarily from the Joint Exhibits, and the Stipulations of Proposed Facts. They are cited as "Ex J-33," followed by the number of the stipulation.

[10] Cardio Pulmonary Resuscitation

course and Instructor Certification." (Tr, 1-66; Exs J-24, J-33-#25). Employee had American Red Cross ("ARC") certification throughout her tenure with Agency.

3. The American Federation of Government Employees, Local 2741 ("Local," "Union") represents eligible AD employees. Employee was a bargaining unit member. Agency and Local 2741 are signatories to the Master Agreement ("MA") between certain Locals of the Union and the Government of the District of Columbia. (Ex J-30).

4. On October 16, 2015, Local President David Brooks filed two Unfair Labor Practice ("ULP") complaints with the D.C. Public Employee Relations Board ("PERB"), charging Agency with committing ULPs. (Exs J-33-#6).

5. On December 14, 2015, following mediation, Agency and the Union entered into a Settlement Agreement ("SA") resolving both ULPs. (Ex J-33, ##7-8). The SA stated, it pertinent part, that the Complaints would be dismissed with prejudice, that "all further remedies" were waived by the Local, and that Agency would hold labor management meetings (information sessions) over a period of six months to discuss time management and certifications. (Ex J-18).

6. Tyrell Lashley (Morris)[11] testified that shortly after he started as Aquatics Division Director in April 2014, he determined that ARC certification failed to meet newly issued national standards for the safe operation of swimming pools, and that the International Lifeguard Training Program ("ILTP") certification met those standards, ensuring Agency could provide the public with a safer environment. He recommended the change in certification provider from ARC to ILTP to Agency Director, who approved the change in August 2014. (Tr, 1-166).

7. On November 9, 2014, Agency notified all AD employees that they would be required to obtain ILTP certification, and that ARC certification was no longer accepted. Agency started training sessions for ILTP certification soon after. (Ex J-33-#22). Employees were paid during training, and sessions were scheduled during duty hours.

8. On May 6, 2015, Acting Director Keith Anderson notified employees that May 18, 2015 was the deadline for obtaining ILTP certification, and that those who did not meet the deadline risked disciplinary action. He expressed appreciation to the "99%" of the employees who had obtained ILTP certification. The email listed several ILTP courses that would be given before the deadline. (Exs J-2, Ex J-33-##4-5, 22-23).

9. On January 29, 2016, Agency issued Employee an "Advance Written Notice of a Proposed Five-Day (5-day) Suspension," charging her with violating District Personnel Manual (DPM) Chapter 16, Section 1603.3(f)(4):

[11] Mr. Lashley's surname became "Morris" following his marriage. The parties were advised that the witness would be identified as "Lashley" in this matter since this was his surname during his employment with Agency. (Tr, 1-336).

> Any On-Duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations: specifically
>
> insubordination: includes the refusal to comply with direct orders, accept an assignment or detail, and carry out assigned duties and responsibilities

The charge was based on the following specification:

> On…December 17, 2015, you were provided a notice to attend mandatory training at the Wilson Aquatic Center [from January 4- 6, 2016]. On the morning of the 4th you arrived at Wilson as scheduled and affirmatively refused to participate in the required training. .

Agency concluded that Employee's failure to acquire ILTP certification negatively impacted on its operations and its ability to serve the public. (Ex J-7). On February 9, 2016, Hearing Officer ("HO") Hillary Hoffman-Peak found that Agency provided "clear evidence" that Employee was notified of the ILTP certification requirement, the mandatory training and the risk of disciplinary action for failing to comply. She further found that Employee failed to attend training and was placed on restricted duties because without ILTP certification she could not perform her duties. The HO found Employee's arguments lacked merit and concluded that Agency met its burden that Employee was insubordinate and that the proposed five day suspension was an appropriate penalty for the first offense of insubordination. (Exs J-33-##-9, 10; J-8). On February 16, 2016, Agency issued its "Final Decision Notice on Proposed Suspension of Five (5) Days," notifying Employee that she would be suspended for five days, effective February 26, 2016. (Ex J-9).

10. On February 24, 2016,[12] Mr. Lashley issued a "Notice of Failure to Complete Certification Course," notifying Employee that since she failed to complete certification requirements, Agency enrolled her in ILTP training that started on March 19. The Notice stated that her "failure to report and successfully complete this… course may result in…adverse action." (Ex J-10). The Notice was attached to an email from Mr. Lashley, telling Employee to review "the attached notice to attend the next ILTP course that fits within your tour of duty." (Ex J-11). Mr. Lashley had previously issued similar notices to Employee regarding her failure to obtain certification and directing her to attend specific training sessions. (*See, e.g.*, Exs J-30, J-33-#18). Employee did not attend any training session she was directed to attend.

[12] This is the same date that Agency proposed to suspend Employee for 15 days based on her failure attend another ILTP training session as ordered. However, it is undisputed that after issuing the final notice on March 16, Agency rescinded the adverse action and no suspension was imposed. (Tr, 1-318-322; Tr 3-100; Exs J-12, 15, 22 and-33). It is undisputed, and confirmed by Employee in her testimony, testified that she received one five day suspension and one 15 day suspension prior to her removal. (Tr, 3-100).

11. On March 21, 2016, Agency issued the "Advance Written Notice of a Proposed Fifteen-Day (15-day) Suspension," charging Employee with violating DPM Chapter 16 Section 1603.3(f)(4):

> Any On-Duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations: specifically insubordination: includes the refusal to comply with direct orders, accept an assignment or detail, and carry out assigned duties and responsibilities.

The charge was based on the following specification:

> On…January 14, 2016, you were provided a notice to attend mandatory training at the H.D. Woodson Aquatic Center [January 23-February 6, 2016]…You failed to show up for class and complete the required training. Also you were not on approved leave of any type.

Agency concluded that Employee's failure to obtain ILTP certification negatively impacted on its operations and ability to serve the public. (Exs J-15; J-33-#14). The HO concurred with the recommendation. Agency issued its "Final Decision Notice on Proposed Suspension of Fifteen (15) Days," notifying Employee that the proposal was upheld, and that the 15 day suspension begin on May 14, 2016. (Exs J-19; J-33-## 15-16).

12. On June 1, 2016, Agency issued Employee an Advance Written Notice of Proposed Removal, advising her that it was proposing her removal based on her violation of DPM Chapter 16 Section 1603.3(f)(4):

> Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: specifically insubordination: includes the refusal to comply with direct orders, accept an assignment or detail, and carry out assigned tasks.

The charge was based on the following specification:

> On…February 24, 2016, you were provided notice to attend mandatory training session on March 19th, 26th, and April 2nd. You did not attend as instructed and this is your third offense [of] insubordination. (Exs J-20; J-33- #18).

HO Nakeasha Sanders-Small conducted the administrative review and concluded that the proposed removal and should be sustained." (Exs J-22, J-33-#20).

On June 29, 2016, Agency issued its "Notice of Final Decision on Proposed Removal," notifying Employee of its final decision to terminate her employment, effective close of

business on June 29, 2016. (Exs J-23, J-33-#21).

Positions of the Parties and Summary of Evidence Presented at Proceeding[13]

Positions of the Parties

Agency's position is that it properly removed Employee for insubordination based on her refusal to obtain the required ILTP certification, despite numerous directives and opportunities to do so. It argues that Agency had the "management right" to implement this new certification requirement and did so in accordance with the MA. (Tr, 1-42-48). It maintains that it followed all contractual requirements in this matter. In the alternative, Agency argues that this Office lacks jurisdiction of the appeal because Employee's failure to obtain ILTP certification rendered her an at will employee at the time of her removal, which deprived this Office of jurisdiction. It maintains that Employee's argument that she was the victim of disparate treatment, lacks merit since none of the employees identified by Employee was similarly situated to her.

Employee's position is that she was not insubordinate since she was not required to follow the directives to complete ILTP training, which she characterized as "illegal," due to Agency's failure to "review and consult" with the Union before implementation, as required by the MA. She also argues that since Agency removed her "for cause," it cannot now contend she was at will. She asserts that she maintained ARC certification as listed in her PD, and was able to perform her job duties. (Tr, 2-151). She further argues that Agency failed to provide timely notice of the proposed removal to the Union as required by the MA so the removal is invalid. (Tr, 2-164). Finally, Employee raised the affirmative defense of disparate treatment, claiming that Agency did not terminate "five other similarly situated Aquatics Division Recreation Specialists with lifeguarding duties: Angel Gooden, George Maxie, Jarrell Allen, Roger McCoy and Robert Green." (Tr, 2-164-165).

Summary of Evidence Presented at Proceeding

James Washington, Director of Aquatics Division since March 27, 2017, testified that he worked for Agency for eight years, and was an RS from 2015 until June 2016. (Tr, 1-55-56). He said that he obtained ILTP certification in 2014. (Tr, 1-59-60). Mr. Washington stated that Employee and Devlin Hillman were the only employees who failed to obtain ILTP certification and both were terminated. (Tr, 1-80-81). He testified that an employee assigned to a position without lifeguard duties, such as swim coach or customer service representatives ("CSR") did not need to obtain certification. (Tr, 1-83-90). He identified George Maxie, Roger McCoy, Jarrell Allen and Angel Gooden as employees who did not need to be certified because they held positions that did not include lifeguard duties. (Tr, 1-102-126).

[13] This *Initial Decision* does not follow the usual format of presenting the evidence offered by each party separately, since both parties named many of the same witnesses, such as, Tyrell Lashley, Robert Green, James Washington, Jason Yuckenberg, David Brooks and Angel Gooden. *See, December 18, 2018 Order*. Therefore, the summaries of testimony are presented in chronological order.

Tyrell Lashley testified that as Director of the Aquatics Division, he was required to "ensure that…standards of the industry and… applicable laws that govern pool operations" were met. (Tr, 1-147). He stated that the Model Aquatic Health Code issued by the Centers for Disease Control in May 2014 "established new national standards" for the safe operations of swimming pools; and that when he started with Agency, he observed that lifeguards lacked skills needed to ensure public safety, and determined that ARC certification failed to meet the new standards. He stated that as a certified ILTP instructor, he was familiar with ILTP curriculum and standards, and determined that ILTP certification met national standards, and would increase lifeguard skills and public safety. (Tr, 1-59-60). He noted, for example, that ARC lacks in-service and auditing requirements, as well as "defined patient care standards," all of which are required by ILTP. (Tr, 1-166). He testified that the transition to ILTP certification began immediately after the Agency Director approved the change in August 2014 with the establishment of a transition team who obtained ILTP instructor certification, and then began conducting ILTP training sessions for other AD staff in January 2015, with sessions held at least monthly and schedules arranged so employees would be paid for their training. (Tr, 1-59-60). He added that two transition team members also attended the International Aquatics Safety School "to get a higher level of training to lead this transition." (Tr, 1-171).

The witness testified that Agency complied with the MA in its transition from ARC to ILTP certification, communicating with Local leadership both before and at the November 2014 labor-management meeting, during which he discussed the transition to ILTP certification and addressed questions raised by Union members. (Tr, 1-188). He testified that "once [Agency] demonstrated that there was not really a change in working conditions or hardship," the participants agreed that the change was a management right and that there was no contractual violation. (Tr, 1-169). He said the Local never sought bargaining or raised the issue with Agency again, until October 2015, when it filed two ULPs with PERB related to the transition to ILTP certification, but that both were soon settled. (Tr, 1-177).

Mr. Lashley testified that the notices regarding ILTP training sessions which included warnings of disciplinary actions for failure to comply, were issued to all AD employees, not just those with lifeguard duties; but only employees, both seasonal and permanent, with lifeguard duties were required to take the ILTP training and obtain ILTP certification. (Tr, 1-179-181; Ex J-2). He testified that Employee's position included lifeguard duties, so she was required to obtain ILTP certification. He noted that the RS PDs contained a wide range of duties, but that an RS might not be required to perform all of them. He pointed out that maintenance technicians, swim coaches and CSRs all had RS PDs, which listed lifeguard duties, but if they were not assigned lifeguard duties then they did not have to have ILTP certification.

With regard to the co-workers alleged by Employee be similarly situated, Mr. Lashley testified that George Maxie was a seasonal employee who performed maintenance duties and had no lifeguard duties so did not require certification. (Tr, 1-159-160). He distinguished Sirah Turner from Mr. Maxie, explaining that although both did maintenance work, Mr. Turner also had lifeguard duties so was required to have ILTP certification. He stated that in 2014, Agency excused Angel Gooden from lifeguard duties as a reasonable accommodation based on a substantiated disability claim, and therefore she did not need to be certified. (Tr, 1-185). He said that an RS could work at a pool without having any lifeguard duties, and Ms. Gooden was in that status. (Tr, 1-228-229). The witness said that Jarrell Allen did not require ILTP certification because he was a CSR and had no

lifeguard duties. (Tr, 1-185). Mr. Lashley testified that both Parish Green and Solomon Robinson performed lifeguard duties and held ILTP certification. (Tr, 1-187). He stated that a swim coach does not need ILTP certification because a lifeguard must be present during coaching sessions. (Tr, 1-213-214). The witness also explained that the reason that Employee and Mr. Hillman were the only individuals disciplined for failing to attend the training session that began January 4, 2016, although the roster listed three other individuals who failed to attend, was that Employee and Mr. Hillman were the only two individuals who were Agency employees. The other three were not employed by Agency. (Tr, 1-289-292; Ex A-2).

Mr. Lashley testified that the various iterations of the RS PDs may have included different titles, *i.e.*, assistant pool manager, and lifeguard; but the titles lacked meaning. He testified that RS PDs were outdated, overly broad and inaccurate; but that Agency was barred from updating them, including the change from ARC to ILTP certification, because the District Government was conducting a comprehensive review of its compensation and classification systems, and imposed a "moratorium" on revisions to PDs. He testified, however, that Agency still had the authority to implement the change to ILTP certification without revising the PD. (Tr, 1-187-188).

Mr. Lashley stated that his policy was to discipline any employee who failed to comply with the directive to attend ITLP training. He testified that Employee and Mr. Hillman were the only employees who failed to comply, and as a result, both were disciplined and eventually terminated. (Tr, 1-152). He stated that Employee was first placed on paid administrative leave, with no discipline imposed; and that when she returned to work in November 2015, she was not allowed to perform lifeguard duties. (Tr, 1-250-254). He said that before proposing discipline, he spoke with her in person about three or four times about the need to obtain ILTP certification, because she was considered a "phenomenal instructor" and he wanted to know "what her apprehension was" and resolve the problem, but that his efforts were "unsuccessful." He added that during their talks, he told Employee that her failure to comply with the instructions to attend training and obtain certification could result in disciplinary action. (Tr, 1-328-330). He referenced emails that he sent her on January 10, January 15, and January 28, 2016 regarding her failure to attend training sessions and obtain certification, notifying her of scheduled training sessions, and warning her that discipline could be imposed if she did not comply. (Tr, 1-189-191; Exs J-3-5). He said that he proposed Employee's suspensions and removal, because she continued to refuse to follow directives to attend training and obtain certification, and her conduct constituted insubordination.

The witness reviewed the advance notices, HO reports and final decisions related to Employee's suspensions and removal. (Tr, 1-193-198, 207-208; Exs J-7-8, 12, 14). He testified that the decision to remove Employee was made after lesser discipline was imposed. He stated that in reaching the decision to terminate Employee, Agency considered "the amount of times and the opportunities" it had given Employee to obtain certification. He testified that Agency complied with all requirements, including those in the MA, during the disciplinary processes which culminated in Employee's removal. Mr. Lashley testified that Agency always provided the Local with required written notifications of disciplinary action, sending them to the Shop Steward or Local President. (Tr, 1-209). He testified that the June 1 advance notice of Employee's proposed removal was provided to Mr. Brooks, and confirmed that Mr. Brooks was included on the list of individuals receiving the June 2, 2016 email sent by Kwelli Sneed which had the June 1 notice attached. (Tr, 1-306; Ex J-21).[14]

[14] Employee sought to impeach Mr. Lashley based on inconsistencies between his testimony and his affidavit.

Jason Yuckenberg stated he started with Agency on May 24, 2015[15] and was Chief of Staff during the relevant time period. He stated that as deciding official, he ensured that Agency fully complied with all requirements, including consideration of the *Douglas Factors*.[16] (Tr, 1-343, Exs J-22-23). He testified that in reaching his decision, he reviewed the supporting documents and considered the "insubordination component," *i.e.*, the "multiple opportunities" Agency gave Employee to comply; the progressive discipline imposed; and alternative penalties. (Tr, 1-346, 357-360, 385). The witness stated that a lesser penalty would not have been appropriate since Employee still refused to comply with directives after two suspensions. He stated that he agreed with the HO that Employee's insubordination was "deliberative," based on her multiple failures to comply with "straight directive[s] from her supervisor to attend mandated training. (Tr, 1-363, 398).

Kwelli Sneed was employed at Agency between August 2015 and November 2018. In February 2016, she became Interim Director of the Human Resources Department ("HR"), and therefore was HR Director during the relevant time period. (Tr, 1-406-407). She testified that during her tenure, Agency complied with Article 24 of the MA, providing timely notice to the Local. (Tr, 1-482-483). She noted that MA does not specify the method to be used, and that Agency usually used email to send notices to the Union. (Tr, 1-415). She testified that she was certain that David Brooks, Local President at the time, was copied on the June 2 email to which the advance notice was attached. (Tr, 1-408-409, 485, 493; Ex J-21). With regard to the email address used for Mr. Brooks, the witness testified that it was the same email address that she always used for Mr. Brooks and the one he used to send her ema1ls. (Tr, 1-410-414). She stated that Agency was not barred from imposing discipline during that period of time. (Tr, 1-436). Ms. Sneed testified, even after reviewing documents shown to her by Employee to refresh her recollection, that she did not recall that on or about September 30, 2016, the D.C. Department of Human Resources ("DCHR") required Agency to rescind a disciplinary action involving Mr. Brooks because it failed timely meet the notice requirement. (Tr, 1-469-483).

Eboni Gatewood-Crenshaw was employed by Agency between July and December 2015, holding the position she described as Director of HR. (Tr, 2-26). She stated that she was familiar with both Chapter 16 of the DPM and with the MA, and that Agency complied with Article 24 of the MA in providing the Local with notice. (Tr, 2-36; Exs J-20, 31). The witness[17] testified that Agency acted

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The witness testified that Ms. Morten prepared the affidavit after interviewing him by telephone, and that when he reviewed the 24 page document she sent him, he found she had "severely misrepresented" what he told her. He said that although he made "significant edits," he did not notice other errors at the time and had not realized seen a number of errors until he testified at this proceeding. (Tr, 1-265-274).

[15] Although he subsequently agreed with Agency counsel that he started in 2014, his testimony that he had been at Agency for about a year when Employee was terminated, and that the May 6, 2015 memorandum was issued before he started with Agency, indicates that he started with Agency in 2015. However, it is not necessary to delve further, since he was present during the relevant time period. (Tr, 1-338-340 355).

[16] *Douglas v. Veterans Administration*, 5 M.S.P.B. 323 (1981).

[17] Employee objected to the witness's testimony, arguing that no foundation had been laid to establish she was qualified to testify on these matters and to provide a "legal analysis." The witness, at the direction of the AJ, testified about her experience and expertise in labor-management in the District of Columbia Government. She stated that she was the labor liaison and/or in labor-management positions for six District of Columbia

appropriately and did not violate any contractual or legal requirement in changing from ARC to ILTP certification, because the change was not a "substantial" change in working conditions. According to the witness, the procedures were required only if the change was substantial, which meant that it had to involve "major duties" of the position. She said that in this matter, the duties remained the same because certification was always required; it was only the certifying authority or vendor that changed. The witness testified that Agency had a "management right" to make the change, describing a "management right," as a right reserved by Agency in order to "ensure efficiency and safety in operations." (Tr, 2-48-54; Ex J-31).

Ms. Gatewood-Crenshaw testified that Agency was not required to revise the PD to reflect the change to ILTP certification before implementing the change because Agency had the right to make "immediate" changes needed to ensure efficiency and safety. She added that, in any event, Agency was barred from revising PDs between 2010 and 2018 because the District of Columbia Government had imposed a moratorium on all changes to PDs while it completed the Classification and Compensation Reform Project. The witness stated that she was knowledgeable about the Project and had participated in it. (Tr, 2-56-60). Asked by Employee how a PD could be signed in 2012 since moratorium was in place, the witness explained that this was permitted since a PD must be renewed and recertified every three years or it will lapse, so that even during the moratorium, recertifications and renewals continued although the PDs remained unchanged. (Tr, 2-80-81; Ex J-24).

Robert Green testified that he was a bargaining unit member and an RS, who began with Agency as an assistant swim coach in 2006, and moved to his current position as head swim coach in 2011. He testified that neither he nor any other Agency swim coach perform lifeguard duties, and that unless a lifeguard is on duty during swim practice, the team cannot practice. (Tr, 2-137-138, 148). Mr. Green stated that Roger McCoy had been a head coach, and he did not think he ever had lifeguard duties. (Tr, 2-139). He testified that he knew that Employee worked as a lifeguard and pool operator, and that both positions required lifeguard certification. (Tr, 2-140-141). He noted that swim coaches must take training, but are not required to be certified. (Tr, 2-145). He stated that when he started working he had ARC certification, but that he let it expire. (Tr, 2-147).

Jarrell Allen, stated that he is an RS, and previously had ARC certification. He stated that in May 2015, he received a directive to take ILTP training. He said that he did not comply, because that since 2013 he has been a CSR, and since a CSR has no lifeguard duties, Agency did not require him to obtain ILTP certification. (Tr, 2-189-193).

Solomon Robinson testified that he worked for Agency between 1979 and 2016, although not continuously. (Tr, 204, 215, 231). He stated that he initially had ARC certification, but became ILTP certified in 2015 because it was required for a summer position that he sought at Agency. (Tr, 2-210. 217) He stated that he was a swim coach between 2000 and 2014, and that coaches assumed lifeguard duties when no lifeguard was present during coaching sessions. (Tr, 2-219-224). Mr.

Government agencies, including DCHR; earned two Master's level degrees, one focusing on human resource management including labor relations, and collective bargaining agreements; and had taken additional courses in these areas (Tr, 2-38, 43-44). Based on the witness's experience and expertise, the AJ stated that she was qualified to offer testimony on these issues, since she was not offering a legal analysis, but testifying based on her experience and expertise in labor-management issues, particularly in the District of Columbia. (Tr, 2-45).

Robinson initially testified that he supervised Angel Gooden between 2006 and 2010, and again from 2015 until he left in 2016; and that she had lifeguard duties but lacked required certification and could not swim. He testified that he knew that she could not swim because she never got in the water and "did not possess the ability to pass a lifeguard class as [a] swimmer." He said that he thought he saw Ms. Gooden sitting in a lifeguard chair during the latter part of 2004. However, Mr. Robinson later testified that that he was never Ms. Gooden's direct supervisor, but in his view, he had the right to supervise any employee who was at a lower grade level at any AD facility. (Tr, 2- 225-231).

David Brooks stated that he began working at Agency in about 1979, and after briefly serving as a locker attendant, became a lifeguard. He said that he is now is a pool manager and that he is ILTP certified. (Tr, 2-233-235, 276). The witness testified that he was Local President between July 2015 and September 2017. (Tr, 2-255). He stated that he was not familiar with or certain about receiving a number of emails. (Tr, 2-237-240, 245-247, Exs E-1, 12, 15). He testified that the email address used by Agency, *i.e.*, "dlbII" is his private email address, and that this address appears on both the June 2 email from Ms. Sneed related to Employee's proposed removal and the December 2, 2015 email sent under this email address, which accused Agency of bullying Union members to obtain ILTP certification; although different fonts were used. The witness testified, however, that he did not use his private email address for Union business, and contended that he did not send the December 2 email, although he agreed it was issued from his personal email address. (Tr, 2-247-248, 290-293; Exs E-15. E-19). He reviewed the June 2 email and agreed that his private email "signature" was listed as being sent a copy, but stated that he did not receive it. (Tr, 2-293-294, Ex E-12).

When asked if the MA included procedures for providing the Union with copies of proposed discipline of its members, he initially testified:

> It's really unclear in the – it's not that it's actually written, but when you come on, you give—you preside— (Tr, 2-254)

Responding to the question after it was reworded to make it clearer, Mr. Brooks stated:

> Word from word, I will say there is a process, but it wasn't like certified letter, or I don't know exactly what… (*Id*).

Mr. Brooks added that "[for] past practice, [notices were provided to the Union] either at the labor management meeting or by email." (Tr, 2-255). He said that he did not receive "that many" notices of proposed disciplinary actions until after he filed the ULPs, but was unsure when the ULPs were filed. (Tr, 2-256-257). Asked about the two ULPs, he stated:

> I recall filing two, but I don't remember which two they were. (Tr, 2-258).

After being provided with some information about the ULPs, he stated that only one was resolved

during mediation. (Tr, 2-259). When shown that the SA referenced both ULPs, he stated:

> I can't remember whether it refers to both exactly, but I don't have my notes in front of me. (Tr, 2-260).

Asked if the MA required Agency to withdraw a proposed disciplinary notice if it did not meet the 45 day requirement, he responded:

> I haven't had that experience, but through a filing, maybe. (Tr, 2-271).

Mr. Brooks disagreed with Employee's contention that during the same time period, DC]][HR required Agency to withdraw a disciplinary action against him in which he was charged "with a very serious offense" because Agency had not complied with the 45 day requirement, stating "[f]rom my understanding, not for that rule. (Tr, 2-273).

Brian Vahey stated that he has been Operations Manager for Aquatics since May 2016; and is in charge of training programs. (Tr, 2-298). He testified that ILTP certification is required for employees who have lifeguard duties; and that to his knowledge, all such employees are ILTP certified. (Tr, 2-299-301, 318). He testified that Angel Gooden was a pool manager, and was not required to have ILTP certification. He stated that he did not recall issuing Ms. Gooden an admonition or a notice to complete ILTP training in 2017. (Tr, 2-306). He said that Jarrell Allen was a CSR, a position that does not require ILTP certification. (Tr, 2-307). The witness testified that he has ILTP certification, and has assisted with lifeguard duties when needed. (Tr, 2-321).[18]

Angel Gooden testified she has worked at Agency since 2009, and that until October 2014, she had lifeguard duties and maintained ARC certification. She testified that she knew how to swim. The witness stated that in October 2014, based on a documented medical disability, which she had to certify yearly, Agency eliminated her lifeguard duties so that she did not need certification; although ARC certification was not removed from her PD. (Tr, 3-12-14, 19, 28). Ms. Gooden testified that she received written notices directing her to take the ILTP certification courses both before and after October 2014, but did not recall being admonished by Mr. Vahey as a result, as alleged by Employee. She testified that although she may have received emails to attend certification courses, she did not attend any since she was not required to do so. (Tr, 3-22-26).

Sirah Turner testified that he was a Supervisory RS between 2014 and 2018, and that as a supervisory manager, he was required to have lifeguard certification. He stated that although his primary duty was to supervise maintenance staff, he had lifeguard duties because he had to "step in when needed to lifeguard." (Tr, 3-30, 71-73). He said that he supervised George Maxi, who was a DS-5 Recreation Specialist. He could not recall if Mr. Maxie had lifeguard duties (Tr, 3-31). He said

[18] The February 7 hearing ended after this witness testified since the AJ agreed that Employee could subpoena witnesses for whom she had failed to timely file subpoena requests. Employee stated that she had decided not to call Mr. Hillman, Darrell Fogan and Paris Green as witnesses; and sought subpoenas only for Sirah Turner and Jarrell Adams. Since there would be insufficient time to comply with OEA requirements by serving the subpoena within a week of the next scheduled hearing date, the hearing was rescheduled. In addition, the parties confirmed that they were not calling any rebuttal witnesses.

that he was not sure which employees he supervised, explaining that "some of them reported to me…professionally and some…just worked with me." Asked about other employees, he stated that David Lewis was a pool operator who did not have certification, and that Marvin Flores, also a pool operator, did have lifeguard certification. (Tr, 3-34). Mr. Turner testified that he previously had ARC certification, and now has ILTP certification. (Tr, 3-36). The witness testified that he did not know if swim coaches must have lifeguard certification. (Tr, 3-37). The witness testified that when he started working at Agency, he had ARC certification, but later obtained ILTP certification, as required, in

December 2014 or January 2015. (Tr, 3-74).

Employee testified that she began receiving notices from Mr. Lashley instructing her to take the ILTP training shortly after December 2014, when Agency notified employees of the transition to ILTP certification. She said that by May 2015, while still receiving notices to attend required ILTP training, she was an "avid" Union member, attending "a lot of Union meetings," and "working closely" with Mr. Hillman, who was then Chief Shop Steward. (Tr, 3-79, 82). She testified that Mr. Hillman told her that the Local President had stated that since ARC and not ILTP certification remained in their job descriptions, they did not need to follow the directives. She testified that she continued to perform lifeguarding duties with ARC certification. (Tr, 3-81) She said that in June 2015, she was placed on administrative leave with pay while Agency was "investigating" the matter; and that when she returned to work in November 2015, she continued to perform lifeguard duties with her ARC certification. (Tr, 3-85-86, 99). Employee testified that Mr. Lashley told her in December 2015, that the SA had been signed and he was permitted to direct her to obtain ILTP certification requirements, but that she then reviewed the SA and did not find it said anything about certification. (Tr, 3-91, 94-96). She said that she and Mr. Hillman then spoke with Mr. Brooks about the matter, and he said he would "get back" with them, he never did. (Tr, 3-97).

Employee stated that Agency continued to send her notices directing her to take the ILTP courses; and that she continued to respond that she was ARC certified, as listed on her PD. She testified that in January 2016, Mr. Lashley notified her that she could no longer perform lifeguard duties, but she continued with her other responsibilities. (Tr, 3-98). She said at some point, Agency stated she was a full time employee and would be charged with AWOL[19] if she did not work full-time. She said that although she explained that she was not full-time because she was a full-time firefighter, Agency charged her with AWOL, but it had no impact on her pay since she continued being paid for the 20 hours a week that she worked. Asked if she had a set schedule at Agency, Employee responded that she did not, explaining that Agency scheduled her hours around her availability based on her schedule as a firefighter. (Tr, 3-99).

Employee testified that she received a five day suspension in March 2016, a 15 day suspension in April 2016, and was terminated in June 2016, all based on the charge of insubordination for failing to take the ILTP courses as directed and failing to obtain the required ILTP certification. (Tr, 3-106-108). She stated until then, she had never been the subject of any disciplinary action throughout her tenure with Agency. (Tr, 3-147). She added that she never refused an Agency instruction, until she refused to comply with Agency orders to take the scheduled training sessions. (Tr, 3-150).

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[19] "Absent Without Official Leave"

Employee said that she did not supervise any of the employees who she claimed were similarly situated but were not removed for failing to complete ILTP certification requirements. (Tr, 3-121). She claimed Mr. Maxi and Ms. Gooden had PDs that listed lifeguard duties, but that Mr. Maxi performed maintenance work, and she had never seen Ms. Gooden swim. (Tr, 3-133-134, 188-189). She said that she thought a swim coach required certification; asserting that Mr. McCoy, a swim coach, failed the certification exam. (Tr, 3-135-136; 141-142). She said that no employee was limited to maintenance duties, and cited David Lewis, Marvin Flores and David Ransom as maintenance technicians and lifeguards. (Tr, 3-145). She stated that assistant pool managers had lifeguard duties. (Tr, 3-146).

Employee testified that each time Mr. Lashley directed her to take a scheduled ILTP training session, she told him that she was "certified to do [her] job, based on [her] job description." (Tr, 3-166). She reasoned that her failure to follow his directives were not refusals, but rather based on her belief that she "didn't need" to comply since she had the ARC certification listed in her PD. (Tr, 3-187-188). Employee agreed that Agency gave her multiple opportunities to complete training, and that she would have been paid while training. She testified that she had no physical or health condition that prevented her from taking ILTP training. (Tr, 3-169). Employee stated that she based her decision that she did not have to comply with orders to take required training for ILTP certification, on her conversations with Mr. Hillman, on "hearsay" that the Local President had rejected the change, and on her disagreement with Mr. Lashley that the SA allowed him to direct her to take the certification training. (Tr, 3-191-194).

ANALYSIS, FINDINGS OF FACTS, AND CONCLUSIONS OF LAW

The AJ will first discuss the framework used in her analysis. In reviewing and evaluating the evidence in order to make findings and conclusions, and ultimately reaching a decision on each issue, the AJ assessed and determined the value or weight accorded to the documentary and testimonial evidence entered into the record based on relevancy,[20] consistency, and credibility.

Credibility assessments were essential in this matter. There is a presumption that a witness will testify truthfully, but an AJ is required to determine credibility and her decisions will affirm or rebut that presumption. To do so, this AJ carefully observed the demeanor of each witness, including tone and body language, items not reflected in a transcript. *Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474* (1951). The AJ can credit some testimony and reject other testimony offered by the same witness. *DeSarno, et al., v. Department of Commerce,* 761 F.2d 657 (Fed. Cir.1985). Credibility assessments also require the AJ to factor in other considerations, including the interest the witness may have in the outcome, although this factor did not impact on her decision in this matter. The AJ must also assess the consistency of evidence, both internally, and compared with other evidence.

[20] As noted earlier in this decision, the AJ accepted evidence, both testimonial and documentary, into the record to reduce arguments by the parties and move the matter to resolution, the AJ, as noted above, determined the relevancy and weight of all evidence entered into the record.

Employee challenged the credibility of Mr. Lashley, based on inconsistencies between his testimony and his affidavit. Since Mr. Lashley offered evidence on almost every issue, the AJ will address this issue at this juncture. In response to Employee's challenge, Mr. Lashley testified that the affidavit prepared by Ms. Morten was based on a telephone interview, and that when he reviewed the 24 page draft, he found it "severely misrepresented" what he had told Ms. Morten. He said that he made numerous changes but some items he did not see and others he did not realize were inaccurate or incorrect until he testified at this proceeding. The AJ observed him carefully while he testified, realizing the importance of his testimony, and that there were inconsistences between the affidavit and the testimony. The AJ concluded that his testimonial evidence was more reliable than his affidavit, and that his explanations regarding the inconsistencies were reasonable.

The AJ, in analyzing this matter, also adhered to the requirements of the MA, the negotiated agreement between Agency and the Local of which Employee was a member. *See, e.g., Brown v. Watts*, 933 A.2d 529 (2010). D.C. Code § 1-616 states that OEA is authorized to hear and decide adverse actions, providing in pertinent part:

> Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures in this Subchapter.

The AJ also adhered to legal requirements, including OEA Rules. She was guided by OEA Rule 628.1, 59 D.C.R. 2129 (March 16, 2012), which places the burden of proof on agencies on all matter except issues of jurisdiction, which are placed on employees. The party assigned the burden must meet it by a "preponderance of the evidence," which is defined in OEA Rule 628.2 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."

Jurisdiction:

This Office's jurisdiction is established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA") (2001) as amended by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124. The jurisdiction of this Office must be established as a threshold issue. Agency argued that the appeal should be dismissed because this Office lacked jurisdiction based on Employee's at will status. In support, it contended that at the time of her removal, she lacked ILTP certification, a requirement of her position. Employee, on the other hand, maintained that her status was unchanged since she retained ARC certification, as listed in her PD.[21] She further argued that Agency should not be allowed to raise this argument since it removed Employee "for cause," a prerequisite for disciplining permanent employees. (Employee's Closing Brief, pp. 1-3). However, that argument must fail since jurisdiction can be challenged at any point. Agency could

[21] The parties presented written and oral argument on this issue prior to the evidentiary hearing, but there were relevant facts in dispute, and the AJ determined that the proceeding would go forward and the parties could present evidence in support of their positions on this issue.

remove Employee for cause and provide her with appeal rights to this Office, and would still be permitted to challenge this Office's jurisdiction. Even if parties agreed to this Office's jurisdiction, the AJ must raise the issue if she determines it is a question. Therefore, the challenge to this Office's jurisdiction must be resolved.[22]

The District of Columbia is one of many jurisdictions that allows at-will employment. The D.C. Official Code § 1-606.03 describes the at-will employee as one who serves "at the pleasure of the appointment authority and may be terminated at any time and with or without cause." This employee can be removed at any time and for no reason. *Adams v. George W. Cochran & Co*., 597 A.2d 28 (D.C. 1991). *See also, Bowie v. Gonzalez*, 433 F.Supp.2d 24 (D.C.D.C. 2006). This Office has consistently determined that an at-will employee lacks protections guaranteed by the CMPA, including the right to appeal a termination to this Office. *See, e.g., Leonard, et al v. Office of Chief Financial Officer*, OEA Matter Nos. 1601-0241-96 *et al*. (February 5, 1997). The Board's position that this Office lacks jurisdiction to hear appeals of at -ill employees has been consistently affirmed reviewing courts. *See, e.g., Grant v. District of Columbia*, 908 A.2d 1173 (D.C. 2006).

At-will status is generally achieved in one or two ways. First, it can be a condition of employment. For example, the District Personnel Manual ("DPM") states in Chapter 38, §2819.1 that employees in the Management Supervisory Service ("MSS") serve "at-will…[do] not acquire Career Service status, …serve at the pleasure of the appointing personnel authority, and may be terminated at any time." Alternatively, an employee who lacks an essential requirement of his or her position, loses the guarantee of continued employment and protection from termination. Agency contends that by the time she was terminated, Employee was at-will because she lacked ILTP certification, an essential requirement of her position.

This Office has consistently held, and been supported on appeal, that an employee who fails to meet essential requirements of a position, becomes at will, and loses the right to appeal a removal to this Office. These cases often involved teachers who failed to obtain permanent licenses, a requirement of the job, although they are allowed to continue teaching with provisional licenses while trying to obtain permanent license, after the expiration of their probationary periods. As in the instant matter, these cases do not involve charges that the teachers are incompetent or unskilled. Indeed, the opposite was often true. However, this Office concluded in each matter, that the failure to meet licensure requirement created at-will employment, depriving the employee of the right to appeal the removal to this Office. *See, e.g. Gizachew Wubishet v. D.C. Public Schools*, OEA Matter No. 1601-0106-06 (March 23, 2007), *Opinion and Order on Petition for Review* (June 23, 2009). *See also, Robin Suber v. D.C. Public Schools*, OEA Matter No. 1601-0107-07R10 (January 22, 2010), and *Tricia Bowling-Bryant v. D.C. Public Schools*, OEA Matter No. 1601-0090-16 (May 30, 2017).

In *Michael E. Brown et al v. D.C. Department of Consumer and Regulatory Affai*rs ("DCRA"), OEA Matter Nos. 1601-0012-09-1601-0027-09 & 1601-0052-09-1601-0054-09 (June 26, 2009), new positions were established by DCRA for its inspectors, similar to their former positions, but adding a certification requirement. The employees were given an extended period of time to obtain certification, but eventually those lacking certification were removed, based on charges of insubordination and inexcusable neglect of duty. In their appeals, the removed employees argued,

without contradiction, that they were well qualified to perform their duties, and had done so for years without certification. However, the appeals were dismissed based on lack of jurisdiction the AJ having determined that the lack of certification changed the status of the employees to at-will. The Board upheld the decision, articulating its position which was supported on appeal:

> OEA has held that if an employee neglects to obtain proper licensure or certification by the effective date of their removal, then they are deemed at-will employees. Accordingly, they are subject to Agency's discretion regarding their qualifications to continue employment. *Michael E. Brown et al v. D.C. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09-1601-0027-09 & 1601-0052-09-1601-0054-09, *Opinion and Order on Petition for Review*. (January 26, 2011).[23]

Each case must be determined based on its own facts and merits. In this matter, Employee did not dispute that she was given extensive time to obtain ILTP certification, but contended that her status did not change because, unlike the employees in *Brown*, she already had the certification listed on her PD. Agency did not dispute that the PD was not revised to reflect the new requirement, but rather maintained that the fact that the ARC certification remained on the PD was not relevant. It argued that it merely changed the certifying authority or vendor, and that it had the right of management to do so in order to ensure efficiency and safety. Mr. Lashley testified convincingly and without challenge, that ARC certification failed to meet national standards for pool safety, and that ILTP certification met those standards. Agency determined it was necessary to require ILTP certification to ensure the safety of those using the pools.

Employee argued that Agency failed to meet contractual requirements, but offered little support for her position. Agency, however, presented witnesses with expertise and experience in labor-management in the District of Columbia. The AJ found both Ms. Sneed and Ms. Gatewood-Crenshaw provided credible and consistent evidence in their testimony, offering substantial evidence to conclude that Agency had the management right to implement the change from ARC to ILTP certification, that it could do so without revising the PD since the change did not alter working conditions and because it was barred from doing so due to the moratorium, and that it complied with the MA both in implementing the change and in imposing discipline.[24]

The rights of management are provided in Article 31 of the MA which states, in pertinent part:

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[23] Associate Superior Court Judge Gregory Jackson affirmed, finding both the *Initial Decision* and *Opinion and Order* to be "persuasive and supported by substantial evidence," and concluded the employees were at will at termination because they lacked required certification. *Linda Ellis, et al v. D.C. Department of Consumer and Regulatory Affairs*, 2011 CA 001529 P(MPA), 2011 CA 001533 P(MPA), 2011 CA 001534 P(MPA), 2011 CA 001557 P(MPA), 2011 CA 001560 P(MPA), 2011 CA 001561 P(MPA), 2011 CA 001562 P(MPA), and 2011 CA 001567 P(MPA) (November 28 2011).

[24] Employee accused Ms. Sneed of testifying falsely that Agency had complied with the 45 day requirement in this matter based on the witness's inability to recall a matter involving Mr. Brooks. The AJ disagrees, since she found Ms. Sneed's testimony that she did not recall this matter to be an honest response that did not taint the veracity of her testimony.

> The Department shall retain the sole right, authority and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the District in all aspects, including but not limited to, all rights and authority held by the Employer prior to the signing of this Agreement.
>
> Such management rights shall not be subject to the negotiated grievance procedure or arbitration, unless specifically abridged and abrogated in a separate distinctive Article of this Agreement. The Employer retains the following rights, which in no way are wholly inclusive:
> 1. To direct employees of the Department…
> 4. To maintain the efficiency of the District government operations entrusted to them;

In sum, the AJ credited Agency's position that it had the "management right" to change the certification requirement because it was not a significant change since certification was always required; that the change from ARC to ILTP certification was necessary since ILTP certification, but not ARC certification, met national guidelines which would increase lifeguard skills and thereby the safety of the public. She also found Agency's position that it could not alter the PDs to reflect the change at the time, because it was prohibited from doing so by the moratorium, but that the moratorium did not bar them from implementing the requirement to be convincing, noting it was unrefuted by Employee. In addition, the AJ credited Mr. Lashley's testimony that he met with Union leadership and discussed the certification change in November 2014, and the Union did not seek bargaining, although a year later it filed two ULPs related to the change. The ULPs, however, were settled, and the SA did not reference the certification changes. The AJ recognized Employee's considerable skills and long tenure with Agency, but neither was at issue. She considered that Employee did not argue that ILTP training or certification was unattainable or burdensome, and did not dispute that she was refused to comply with directives from Mr. Lashley to attend ILTP training sessions. The AJ also considered Employee's position that she believed that she did not have to comply based on talks with Mr. Hillman, her review of pertinent documents, her belief that the Local President said members did not have to comply because had violated MA requirements, and because that she had ARC certification as listed in her PD. The AJ found these reasons unconvincing.

Based on this analysis of the evidence and arguments presented by the parties, the AJ concludes that sufficient credible and convincing evidence was presented to support the following findings and conclusions: (1) Agency made a reasoned and necessary decision to change from ARC certification to ILTP certification based on its determination that ARC certification failed to meet national standards for pool safety issued in 2014, but that ILTP certification met those standards and would improve lifeguard skills and the safety of the public; (2) Agency had authority to implement the change to ILTP certification and did not violate the MA by doing so; (3) Agency had the authority to require employees to obtain ILTP certification even though their PDs did not reflect the change; both because it was a management right since there was no significant change in the terms and conditions of employment and also because of the ban on changing PDs in effect at the time; (4) Employee had lifeguard duties and was therefore required to obtain ILTP certification; (5) Agency notified employees that May 18, 2015 was the deadline for meeting the certification requirement; (6) Agency provided Employee with numerous notifications of the requirement, of training sessions and of consequences for failing to comply; (7) Agency gave Employee ample time and opportunities to comply extending the compliance deadlines over an extended period of time; (8) Although Agency

allowed Employee to continue working during these extensions, it eliminated her lifeguard duties because she lacked ILTP certification; and (9) Employee had no impediment that prohibited or delayed her from complying, rather she refused to do so based on her decision that Agency was not permitted to implement the requirement. Agency had no reasonable basis to believe that additional time would result in Employee compliance since she had failed to comply despite several suspensions. However, before a decision can be reached on this issue, the AJ must address the affirmative defense raised by Employee.

Disparate Treatment

Employee raised the affirmative defense of disparate treatment, claiming that other employees who were similarly situated, failed to obtain ILTP certification but were not terminated. The claim, if established, would undermine Agency's position that it imposed the requirement fairly. Courts have identified factors used to determine if employees are similarly situated. Although Employee did not meet each of the requirements established, *e.g.,* in *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), the AJ allowed her to proceed with this argument, since the AJ realized that although the employees she identified might have different grade levels, different supervisors and/or perform different tasks, they all had the same or similar PDs which included ARC certification, and that Mr. Lashley was at the head of the chain-of-command for employees in the Aquatics Division during the relevant time.

Agency denied the charge of disparate treatment, asserting that it terminated Employee and Devlin Hillman, the only two employees who were required to obtain ILTP certification but failed to do so. It maintained that the RS PDs during the relevant time period contained a myriad of duties, but not all duties were required of all employees. It offered credible evidence that the employees claimed by Employee to be similarly situated, did not qualify for that designation. Credible testimony was offered that Mr. Maxie did not need ILTP certification because he had no lifeguard duties while Mr. Turner had lifeguard duties and therefore required certification even though both served as maintenance technicians. Agency offered credible evidence that Angel Gooden was excused from lifeguard duties beginning in 2014 and continuing to the present, as a reasonable accommodation based on a substantiated ADA condition. With regard to the assertion that Ms. Gooden may have received notices to take certification classes, the AJ credits Agency's uncontradicted evidence that notices were issued to all AD employees, even those not required to attend training or obtain certification. Neither Ms. Gooden nor Mr. Vahey was certain, if he issued an admonition to her based on her failure to obtain certification; but if one was issued, as Employee alleged, it is reasonable to assume it was done in error since Mr. Vahey testified that he was aware that Ms. Gooden had no lifeguard duties and did not require certification. Agency also presented credible evidence that Ms. Gooden could work as an RS at a pool without being certified since she had no lifeguard duties; that as a CSR without lifeguard duties, Mr. Allen did not need certification, and that both Mr. Green and Mr. Robinson performed lifeguard duties and had required ILTP certification.

Based on this analysis, the AJ determines that the evidence did not support Employee's claim of disparate treatment. Although there were some inconsistencies in the evidence, particularly regarding requirements for swim coaches; the essential evidence offered by Agency in the preceding paragraph was largely unrefuted. Employee presented insufficient evidence that she was treated differently from similarly situated individuals, and offered little if any evidence that detracted from the credible and

substantial evidence offered by Agency that support the following findings of fact and conclusions: that during the relevant time period, the PDs of AD staff were generic and outdated; that Agency had the authority and discretion to waive the ILTP certification requirement for employees who did not have lifeguard duties even if their PDs listed lifeguard duties and ARC certification; that Agency offered reasonable explanations for decisions reached regarding the individuals alleged by Employee to be similarly situated. Agency, is not required to demonstrate "perfect consistency regardless of variations," rather it must apply "practical realism to each situation" to assure equitable treatment is applied where "genuinely similar cases are presented." *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981*). See also, Bess v. Department of the Navy*, 546 M.S.P.R. 583 (1991).

Insubordination

Assuming *arguendo*, that Employee did not have at-will status when removed, then this Office would have jurisdiction to hear this appeal, pursuant to D.C. Official Code §1-606.3 (2001).[25] D.C. Official Code § 2-616.51 (2001) requires that disciplinary actions of most permanent employees must be taken for cause. DPM § 1603.3 defines "cause" as employment related conduct that interferes with the efficiency and integrity of the governmental operations. Insubordination is included as cause for which an employee may be disciplined. Employee does not dispute that at the time of her removal, insubordination remained a cause for which disciplinary action could be taken since it was still included in the MA. The D.C. Code does not provide a definition of insubordination, and therefore the common meaning of insubordination controls. *See, e.g. Davis v. District of Columbia Fire Department*, MPA 94-0015 (D.C. Super. Ct. 1995). Insubordination has been defined as the knowing and intentional refusal by an employee to comply a directive given by a supervisor or manager who is authorized to issue the directive and to have the employee comply. *Phillips v. General Services Administration*, 878 F.2d 370 (Fed.Cir. 1989). *See also, Raphael v. Okyiri*, 740 A.2d 935 (D.C. 1999) and *Mazares v. Department of Navy*, 302 F.3d 1382 (2002).

Employee does not deny that she knowingly and deliberately refused to comply with directives from Mr. Lashley to attend ILTP training in order to obtain required ILTP certification. She does not deny that Mr. Lashley was a superior official who was authorized to issue directives to her. However, she asserts that she was not insubordinate because the directives to take ILTP training were "illegal" contending Agency did not comply with requirements in the MA before instituting the requirement; and that she was not required to comply with an illegal directive. She also maintains that she was not insubordinate when she refused to follow directives to complete ILTP training because they violated the MA and because her PD listed ARC certification, having based her decision on her review of the MA and SA, discussions with Mr. Hillman, and information about the Local President's statements on the issue. She further contends that she was not insubordinate because she complied with requirements by maintaining ARC certification as listed on her PD.

[25] Although it may appear unnecessary and counterintuitive to address the substantive issue of insubordination after reaching the decision that this Office lacks jurisdiction, the AJ is doing so since it was fully addressed by the parties. If the jurisdiction issue is successfully challenged, it would be a waste of the time and resources of the parties and this Office to have to reopen the record to resolve this issue

The reasons given by Employee for refusing to comply are often given by employees charged with insubordination. However, courts and administrative bodies have, with rare exceptions, sustained the insubordination charges based on those reasons, requiring that employees comply first and challenge later. This rule is popularly known as "work now, grieve later" or "obey now, grieve later." The rationale is that compliance is "essential" for an agency to effectively manage its employees, and permitting an employee to refuse would be "inherently harmful to the orderly accomplishment of work." *Pedeleose v. Department of Defense, et al.* 2009 M.S.P.B. 16 (February 12, 2009). The rule has been applied in matters, similar to this one, where an employee alleges that a directive or its implementation, violates a negotiated agreement. *See, e.g., Bigelow v. Department of Health and Human Services*, 750 F.2d 962 (F.2d. Cir. 1984); and *Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, a*ff'd.*, 73 F.3d 380 (Fed. Cir. 1995). However, as with every rule, there are exceptions; but the exceptions are few and place a heavy burden on the employee to establish. As stated by the U.S. Supreme Court, the rule can only be waived if an employee presents "ascertainable, objective evidence that an abnormally dangerous work condition will be created if the directive is followed." *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). There is no corresponding requirement placed on an employer to prove that harm will result if the directive is not obeyed. The burden is solely on the employee to establish "extreme or unusual circumstances," such as irreparable harm and immediate danger that would ensue if the compliance is required. *See, e.g., Fleckenstein v. Department of the Army*, 63 M.S.P.R. 470 (1994).

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For these reasons, the AJ concludes that Employee's arguments lack merit. Although in the preceding section, the AJ concluded that Agency presented sufficient evidence to establish that it complied with the MA; in analyzing this argument to resolve the insubordination charge, it is not necessary to reach a decision on that issue. It is also irrelevant if Employee believed she was making the right decision based on her own research or advice from a colleague. Agency established, without contradiction, that Employee knowingly and deliberately refused to comply with directives from an Agency official authorized to issue the directive and to expect compliance with it. Employee offered no evidence or argument that she was incapable of complying with the directive, or that compliance would have caused irreparable harm or immediate danger.

Employee's remaining argument is that reversal of the removal is required by the MA based on Agency's failure to comply with the notice requirement pursuant to Article 24 of the MA which states in Section 2:

> An employee and the Union shall be notified in writing of any proposed disciplinary or adverse action within forty-five (45) days, not including Saturdays, Sundays, or legal holidays after the date that the Employee knew or should have known of the act or occurrence. The failure of the Employer to issue such notice shall preclude the discipline pursuant to the law.

Employee argued that Mr. Brooks, Local President at the time, did not receive the June 2 email that attached the proposed notice of her removal; and asserted in support, that the email address used by Agency for Mr. Brooks was incorrect. Agency offered testimony of witnesses that the AJ previously found credible, that it complied with the notice requirement in this and all other matters. Mr. Brooks, the only individual who could offer first-hand information regarding what he received, testified that he did not receive the June 2 email, and that the email address that Agency used for him

on the email was his personal email address which he never used for Union business. The AJ considered this testimony crucial, and therefore carefully observed the witness's demeanor and listened to his responses. Although the AJ did not find that Mr. Brooks deliberately offered misleading or untrue testimony, the AJ determined that it was not reliable. The AJ found Mr. Brooks was often hesitant and uncertain. The AJ realized that some confusion or hesitancy was understandable since time had passed since the events took place, but she found the degree of the witness's confusion and uncertainty exceeded what would be normal. It also raised a question to her as to why the witness could remember clearly that he did not receive the email of June 2, but could not remember events regarding the ULPs and the SA, which took place at the same time and with which he was involved. In addition, although Mr. Brooks was called by Employee as a witness, his testimony often conflicted with her representations and undermined her position to the point that she sought to impeach him. For example, she maintained that as Local President, he sent the email complaining that bargaining unit members were being bullied about the ILTP certification. The email was sent from the email address that Mr. Brooks claimed was his personal email address and not used for Union business. Mr. Brooks testified that he did not send that email. Employee later argued that the June 2 email, sent to Mr. Brooks at the same email address from which Employee asserted he sent the December email, was sent to the incorrect address. Mr. Brooks denied receiving that email.

After considerable review and consideration, the AJ found the evidence offered by Mr. Brooks was too tentative and confusing to be credible. *Belcon v. D.C. Water and Sewer Authority*, 826 A.2d 380 (D.C. 2003). As stated in *Ruggin v. United States,* 524 A2d 685 (D.C. 1987), *cert. den*., 846 U.S. 1057 (1988), the finder of fact can discredit even "uncontradicted, uncontroverted [and] undisputed evidence" upon a determination that it is the result of an "unreliable memory." For the reasons already discussed, the AJ determined that the evidence offered by Mr. Brooks resulted from an "unreliable memory" and could not be relied upon to reach a decision. Further, his testimony did not support Employee's position on factors related to the 45 day notice and emails. Agency, on the other hand, offered credible and consistent testimonial and documentary evidence to support its position that it complied with the notice requirement. In sum, for the reasons already discussed herein, the AJ concludes that Agency met its burden of proof regarding the charge of insubordination.

Penalty

It is the responsibility of the employing agency to determine the penalty; and the AJ is limited to ensuring that the penalty reflects a responsible balancing of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). This Office must determine whether the penalty comes 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. A penalty will not be reversed unless it violates the law or applicable regulation, or unless it is arbitrary or an abuse of discretion. *See, e.g., Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

Upon careful review, the AJ determines that there is no basis to disturb the penalty. Agency met it burden of proof that disciplinary action was taken for cause, and that the specifications come within the definition of cause. Agency adhered to the proper procedures in imposing disciplined and utilizing progressive discipline. Agency met its burden of proof that Employee engaged in the charged misconduct that resulted in her termination. There was insufficient evidence of disparate

treatment and sufficient evidence that there was no disparate treatment. The AJ reviewed the penalty and determined it was not arbitrary or an abuse of discretion. She further found that Agency considered relevant factors, including Employee's long tenure with Agency, the opportunities and extensions granted to her, and the lack of any basis for Agency to believe that Employee would comply with another directive to take training after her continuous refusal to do so.

Based on this analysis, the AJ concludes that Agency met its burden of proof regarding the appropriateness of the penalty. The record supports the conclusion that in determining the penalty, Agency did not abuse its discretion, did not act arbitrarily and did not fail to consider relevant factors. The record supports the conclusion that the penalty was reasonable and permitted by regulations.

In sum, the AJ concludes that based on the findings and conclusions reached herein, the petition for appeal[26] should be dismissed.

ORDER

Based on the findings and conclusions reached herein, it is hereby

Ordered: This petition for appeal is dismissed.

FOR THE OFFICE: _____
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[26] This includes both the original and amended petitions.

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