**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| BARRY BRAXTON, | ) | |
| Employee | ) | OEA Matter No. 1601-0012-12 |
| | ) | |
| v. | ) | Date of Issuance: February 18, 2015 |
| | ) | |
| DEPARTMENT OF PUBLIC WORKS, | ) | |
| Agency | ) | Arien P. Cannon, Esq. |
| | ) | Administrative Judge |
| | ) | |

Daniel Katz, Esq., Employee Representative
Kevin Turner, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL BACKGROUND

On October 26, 2011, Barry Braxton ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") challenging the Department of Public Works' ("Agency" or "DPW") decision to terminate him. At the time of his termination, Employee worked as a Motor Vehicle Operator. The effective date of Employee's termination was October 7, 2011.

I was assigned this matter in July of 2013. A Status Conference was held on November 26, 2013. Subsequently a Post Prehearing Conference Order was issued which required the parties to address the issues in this matter. Based upon the submission of the parties, it was determined that there were material issues of fact and an Evidentiary Hearing was warranted. After requests by both parties to reschedule various pre-hearing proceedings, an Evidentiary Hearing was held on September 9, 2014. Both parties presented documentary and testimonial evidence. After being afforded the opportunity to review the transcript both parties filed written closing briefs. The record is now closed.

### JURISDICTION

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

## ISSUES

1. Whether Agency had cause to take adverse action against Employee.

2. If so, was the penalty of termination appropriate under the circumstances.

## BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

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

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

## SUMMARY OF TESTIMONY

On September 9, 2014, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr."), which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

### Agency's Case-in-Chief

***Patricia Roch ("Roch")*** *Tr. 18-41*

On or around May 11, 2011, Roch resided at 1040 Newton Street, Northeast in the District of Columbia. After driving home from work that night, she entered her apartment building around 2:30 a.m. where she observed a gentleman standing with his back towards her and his pants down to his ankles. She also observed Ms. Bushby, her neighbor, sitting on the stairs right in front of the gentleman. Roch described the proximity between the two individuals as "…if he was standing at the bottom step, she was on maybe the second or third step right in front of him."[1] Based on her observation, she believed that she was witnessing "a sexual act" and that the woman was giving the gentleman oral sex.

[1] Tr. at 21.

Roch described the dwelling as an apartment building with only three apartments. The main level of the building has a Mom and Pop convenience store and to the side of the store is a door that the building residents use to enter and exit into their apartments. The lighting in the area included a light when you open the door to the landing and then one on the second floor landing. Roch does not recall drinking that night, but she "might have had one [drink]" when she got off work. Normally, the establishment where Roch worked would close around 1:30 a.m. and by the time she cleaned up, she would get home around 2:30 a.m.

When Roch came in the stairwell to her building, she reacted and said "Are you kidding me right now?" to which the gentleman responded, "No, no, not kidding."[2] After pulling up his pants, Roch waited for him to come out of the stairwell and then she went into her apartment. While in the stairwell, Roch observed sodas and a pizza box sitting on the stairs next to the woman. Roch further testified that she knew the women because the woman lived in one of the apartments in the building.

At some point after the incident, Roch contacted the management company for the building who suggested that she call and report what she had observed. Subsequently, Roch called the District of Columbia government to report the incident because she was disgusted by what she had witnessed. When Roch observed the gentleman she noticed he had on a uniform, but did not notice an insignia on it. She was able to identify the man's employer by the number on the street sweeper that was parked outside. Roch had seen street sweepers driving along the streets in front of her building, but never parked in front of the building.

On cross-examination, Roch testified that she did not see Employee holding a cup in his hand. Roch has lived at the apartment complex for approximately eleven (11) years and had encountered several problems with Ms. Bushby while she was living there. Those problems included: Bushby throwing trash out of the window, creating bug problems, being loud and noisy, and the police regularly at her apartment.[3] Roch stated that she never complained directly to Bushby about her behavior, but she did complain to property management several times. Shortly after this incident in this case, Bushby moved from the building.

Roch called Agency the next day after witnessing the incident and left a message with a woman. A man later returned her phone call; however, Roch could not remember his name. After speaking with someone from Agency, they requested to meet with Roch in person. Roch indicated that she may have been apprehensive about giving a written statement, but she was more uncomfortable with the way Agency was handling its investigation of her complaint. She further testified that she never told a D.C. government employee that she had seen the same street sweeper parked in front of her building several times. She had, however, seen the street sweeper a number of times near her building, but never parked. Roch stated that she never told a D.C. government employee that she could recognize the individual she saw in the hallway if he had his pants down.

[2] Tr. at 22.
[3] Tr. at 29.

***James Carter ("Carter")*** Tr. 41- 79

Carter is the General Foreman of the Agency's night operations. Carter has been with Agency for twenty-eight (28) years. As the General Foreman of night operations, Carter manages the delivery of trashcans and sweeping operations. Carter noted that Agency sweeps only commercial areas, and not residential areas. Carter came to know Employee through his time at Agency with the sweeping operations division. Employee was a Motor Vehicle Operator and operated a Tymco sweeper—one of Agency's smaller sweeping trucks. Employee had a different route every day that consisted mostly of commercial areas at the times he was driving the sweeper. Generally, Employee's hours were from 11:00 p.m. to 7:30 a.m. and sweepers did not go into residential areas at that time of night because of the amount of noise from the trucks.

There came a time in May of 2011, where Carter was made aware by his Chief of Staff, Tony Duckett, about an investigation of a complaint regarding one of Agency's employees with the tag number 6072. Carter was made aware of this complaint in-person by Mr. Duckett. Carter was told that an Agency sweeper was observed, parked at 12th and Newton Street the night of the incident and that a citizen explained what she witnessed. After identifying who was operating the vehicle with that tag number, Carter had to further investigate exactly what happened. Prior to learning of Employee's involvement with the complaint, Carter was told by Employee that he was in the area of 12th Street and Newton, and that he was sweeping the area and he had to go down a stairwell in an apartment building to urinate. Employee further told Carter that while using the bathroom, someone walked up and startled him, causing his pants to fall down. At some point, Carter was told by Duckett that Employee was seen in an apartment building with a young lady receiving a "blow job."[4]

Carter further testified regarding the policies for when Street Sweepers need to use the restroom facilities. The policy is that street sweepers should go to the nearest fire or police department, or go back to their respective headquarters. Employees were not permitted to go to private residences to use the restroom while on duty. Carter further described the 1000 block of Newton Street, Northeast as a residential area. Carter provided two written statements, at the request of Safety Officer Daniel Harrison, which were introduced as Agency's Exhibit 1 and as an attachment to Agency's Exhibit 2. Carter was never made aware that Employee needed any type of accommodation for health reasons. Carter stated that Employee's overall performance was very good.

After a photograph was introduced as Employee's Exhibit 1, with the approximate address of 1040 Newton Street, the location of the incident, Carter stated that he recognized the CVS in the photo. Carter further acknowledged that the area where the street sweeper was parked was in a mixed use area of residential and commercial buildings.

***Daniel Harrison ("Harrison")*** Tr. 79-115

Harrison is the Safety Officer Risk Manager for Agency. In this capacity, Harrison works on policies and procedures for the safe operations of equipment, conducts accident

[4] Tr. at 54.

investigations, and does special investigations concerning employee matters. He stated that while on duty, employees are not supposed to go into private residences, and if they needed, they should call a supervisor and get permission.

In May and June of 2011, Harrison initiated an investigation involving Employee. Harrison stated that he was asked to investigate a complaint by a resident who sent an e-mail and complained that Employee was in the stairwell of her apartment building, with another tenant in the building, receiving oral sex. During the course of the investigation, Harrison spoke with Employee and Ms. Roch, the complaining witness. Employee told Harrison that he had to go to the restroom and asked a young lady if he could use her restroom, to which she replied "yes."[5] Employee also told Harrison that on the way into the building, he realized he could not make it up the stairs and he relieved himself in the hallway into a cup. Employee stated that he did not know the lady whose restroom he asked to use, and that he did not know the lady who spotted him in the stairway. Employee further told Harrison that a lot of police were in the area and that he did not want to use the restroom in an alley, so he asked the women if he could go into her house to use the restroom.

Harrison prepared a Sexual Misconduct report from the incident that occurred on May 11, 2011. Harrison relied on an initial e-mail about the incident, and statements from Roch and Employee.[6] This report was introduced as Agency's Exhibit 2. During the investigation, Employee told Harrison that his pant fell down in the process of him relieving himself.

On cross-examination, Harrison acknowledged that Roch actually called, not e-mailed about the incident, and that he received an e-mail from Duckett regarding the incident. Harrison further acknowledged that he did not interview Bushby, the lady whom Employee was seen in the stairwell with, during the course of his investigation. The first e-mail regarding this incident was sent from Duckett to Christine Davis, Agency's General Counsel, with the subject line, "The blow job."[7] Ms. Davis then forwarded the e-mail to Harrison with the same subject line.

Harrison spoke with Roch via phone on May 16, 2011. During that conversation, Roch told Harrison that she could identify the individual receiving oral sex "if his pants were down."[8] Harrison did not speak with Bushby during his investigation because "[he] didn't know Ms. Bushby and no one knew her."[9] Without interviewing Bushby, Harrison still reached the conclusion that Employee was receiving oral sex in the stairwell of an apartment building. Based on this conclusion, Harrison recommended that Employee be disciplined and referred to Agency's COPE program.

On cross examination, Harrison was further questioned about labeling Employee as a "Direct Repair Manager" in his report and explained that the title listed under Employee's name was a misprint and that was not in fact Employee's position.[10]

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[5] Tr. at 82-83.
[6] Tr. at 87.
[7] *See* Agency's Exhibit 2; Tr. at 93.
[8] Tr. at 101.
[9] Tr. at 105.
[10] Tr. at 109.

***William Howland ("Howland")*** Tr. 115-156

Howland is the Director for Agency where he oversees the operations of Agency, sets policy, and manages the operations of Agency. DPW has three (3) major business areas: (1) Solid Waste Management, which includes trash and recycling, sweeping the streets, and snow removal; (2) Parking enforcement which includes towing, ticketing, and booting; and (3) Fleet Management.

Howland had the opportunity to review the adverse action that was proposed against Employee. After review of the proposed action, Howland issued a Notice of Final Decision on Proposed Removal, sustaining Employee's removal from Agency. This notice was introduced as Agency's Exhibit 3. Howland's understanding of the allegations against Employee was that he (Employee) was receiving oral sex in the stairwell of a building while on duty.

Howland explained why he believed Employee's actions were an on-duty or employment related act or omission that interfered with the government's operations. Howland felt that whether Employee was engaging in oral sex or urinating in a stairwell, as Employee proclaims, that both scenarios go "well beyond what you would expect a government employee to be doing [while on duty]" and in uniform.[11] Howland did not believe there was a reasonable explanation for an employee to go into a private residence while on duty. He further described the protocols Agency has in place for when employees need to use public restrooms, which include going to a public restroom either in a restaurant, fast-food place, gas station, or hotel. The police and fire stations also accommodate government employees who need to use the restroom while on duty. Howland testified that if Agency were made aware that Employee had a health issue that caused him to have to relieve himself on short notice, Agency would have changed his route or reassigned his duties.

Employee was a 15-year employee who did not have any prior disciplinary issues but Howland stated that some offenses are so egregious that termination is an appropriate disciplinary action on the first offense. In this instance, he believed that the seriousness of the offense outweighed the mitigating factors of Employee's disciplinary record and employment history.

On cross examination, Howland stated that he spoke with several people who were involved in investigating the incident, including Harrison. He believed that Harrison told him that he (Harrison) spoke with Ms. Bushby. In making his decision to sustain Employee's removal, Howland relied on the Hearing Officer's report, the investigation report, and conversations with Agency's attorney.

Agency was aware of Employee's medical history; however, Employee never made a request for an accommodation or requested an assignment change. Howland further testified that there was a fire station and gas station in close proximity to the private residence where the incident occurred. Furthermore, given that this occurrence took place at 2:30 a.m., not much traffic would be on the roadways.

[11] Tr. at 121.

***Connie Braxton ("Braxton")*** Tr. 159-163

Braxton is Employee's sister. Braxton testified about the known medical conditions of her brother and described the accommodations at his home, such as living on the first floor. Braxton testified that because of Employee's knee replacement surgery, he has trouble walking up and down a lot of stairs. Employee is also diabetic and suffers from symptoms of frequent urination. Braxton described her brother (Employee) and Bushby's relationship as platonic.

***Dawn Bushby ("Bushby")*** Tr. 163-188

Bushby testified in relevant part that she is a platonic friend of Employee and they have never had sex. Bushby and Employee know each other through their daughters, who are friends and go to school together. On or around May 11, 2011, Bushby was in front of her apartment building smoking a cigarette around 2:30 a.m. While outside, she saw Employee who told her that he had to use the bathroom and that he could not hold it, so she allowed him to use her restroom. Prior to making it to the restroom in Bushby's apartment, Employee almost urinated on himself and began reliving himself in a cup while in the stairway. When Roch walked in the door, Bushby told her to, "Hold up…he is urinating."

Bushby was not looking at Employee as he was urinating, but proceeding up the steps with her back turned towards him.

Bushy testified that Employee had never been to her apartment before while he was on duty. She further stated that she has never prepared or warmed up his food for him. Bushby signed a written (typed) statement that was prepared by Employee's sister, Braxton. Bushby told Braxton what happened and then Braxton typed the statement on Bushby's behalf. Bushby briefly spoke with Employee's sister before the statement was prepared.

***Barry Braxton ("Employee")*** Tr. 189-213

Employee testified that he has never had sex with Bushby. He further testified that he has arthritis in both of his knees, is diabetic, and has to frequently urinate. His frequent urination has affected him for about fifteen (15) years.

In May of 2011, Employee worked for Agency as a Motor Vehicle Operator on the 11:00 p.m. to 7:30 a.m. shift. He was assigned to the 12th Street, Northeast area to operate his street sweeping truck.

Employee knows Bushby because their daughters are friends. Employee further discussed the incident that occurred on or around May 11, 2011, when he went to Bushby's home while on duty because he had to use her bathroom. When Employee got out of his truck, he also had a cup with him because he "always keep[s] a… cup with [him] because [he] drink[s] a lot of fluids..."[12] After Bushby agreed to let Employee use her bathroom, and Employee got inside of the building, he realized he could not make it up 10 flights of steps. Because he already

[12] Tr. at 193.

had a cup in his hand, he relieved himself in the cup after making it up one step. When the young lady opened the door to come inside of the apartment building, Employee apologized for urinating in a cup while in the stairwell.

About a week later, Employee recalls talking to Carter about the incident. He could not remember exactly what he said to Carter, but he does recall telling him that he urinated in a cup in the hallway of the apartment building. Employee also told Carter that there was no sex involved in the incident. Employee further acknowledged that when he spoke to Harrison that he denied knowing Bushby, although that was untrue. Employee explained that he made this untrue statement to Harrison because Harrison was "trying to take [his] job, trying to get [him] fired."[13] However, when Employee went before the Hearing Officer who conducted the administrative review of this matter, Employee acknowledged that he did in fact know Bushby. Employee further explained that he did not urinate outside of the building because he saw police in the area and they had an individual apprehended at the CVS across from Bushby's building and he "didn't want to take a chance."[14]

Employee prepared a written statement for the Hearing Officer. On cross-examination, Employee testified that he was not aware that his sister, Braxton, was assisting Bushby prepare a statement on his behalf.

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

***Whether Agency's adverse action was taken for cause***

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1603.3 of the District Personnel Manual ("DPM") sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Employee's termination was based on Section 1603.3: (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty; and (g) Any on-duty or

[13] Tr. at 197.
[14] Tr. at 198.

employment-related reason for corrective or adverse action that is not arbitrary or capricious.

**Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; specifically, neglect of duty: failure to carry out assigned tasks and careless or negligent work habits.**

***Neglect of Duty: failure to carry out assigned tasks and careless or negligent work habits***

The District's personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.[15] Here, Employee was a Motor Vehicle Operator for Agency, who was tasked with operating a street sweeper during the 11:00 p.m. to 7:30 a.m. shift. Based upon the documentary and testimonial evidence presented, it is clear that Employee's actions while on duty were careless and negligent.

On or around May 11, 2011, Employee was observed in a private apartment building around 2:30 a.m. by Roch, a tenant in the building, with his pants down to his ankles in the stairwell of the building. As Roch entered the building, she described with conviction that she observed Employee facing Bushby, who was sitting on the steps facing Employee. These observations left Roch with no doubt that Employee was receiving oral sex. Roch also observed sodas and a pizza box sitting on the stairs next to Bushby. Roch noticed that Employee had on a uniform but did not notice any insignia. Roch was able to identify Employee's employer as Agency by the information on the street sweeper parked outside of her building. Prior to this incident, Roch had never seen a street sweeper parked in front of her building. Despite Roch's testimony, Employee maintained that he was urinating in a cup and not engaging in sexual activity. It is not disputed that Employee was found in a precarious situation in the stairwell of a private residential apartment building. I find that whether Employee was urinating in a cup or engaging in sexual activities, his conduct was unacceptable and provided sufficient cause for Agency to take adverse action for neglect of duty by being careless and negligent while performing his duties.

After Roch's encounter with Employee and Bushby, she contacted the property management company who suggested that she contact the District of Columbia government and report what she witnessed. When Roch contacted the Agency, she left a voicemail message. Sometime thereafter, she received a call back from a gentleman; however, she could not remember his name. At some point during its investigation, Agency requested to meet with Roch in person. Roch expressed that she had some apprehension about giving a written statement. Additionally, Roch was uncomfortable with the way Agency was handling its investigation of her complaint. The exact reason of Roch's discomfort is unclear. However, there were statements in the investigator's report conducted by Harrison ("Sexual Misconduct" Report)[16] that were attributed to Roch, which she adamantly denied saying during her testimony. Specifically, the Sexual Misconduct Report cites Roch, stating that she had seen Employee's street sweeper parked in front of her building five or six times over the last few months prior to

[15] *See* D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.
[16] Agency's Exhibit 2.

the incident. Roch denied ever saying that she had seen the street sweeper parked outside of her building although she had seen it in the area a number of times.[17] The Sexual Misconduct Report also attributes Roch stating that, "she could identify [Employee] if she saw him again especially if his pants were down." Again, Roch adamantly denied making this statement. Although Harrison's Sexual Misconduct Report may have embellished the statements given by Roch, it did not take away from the credibility of Roch's testimony. Roch's testimony was very forthright and she made no hesitation of the fact that she experienced several problems with Bushby throughout the course of being neighbors. Roch further expressed that she was "glad" when Bushby moved out of the building. Although Roch had an apparent dislike towards Bushby, I still found her testimony regarding Employee's actions to be very credible.

Carter, who was a superior in Employee's chain of command, testified about a conversation he had with Employee surrounding the incident, to wit, he stated that Employee told him that he (Employee) had to take a "leak" while on duty and that he ended up going in the stairwell of an apartment building. [18] Employee further told Carter that while relieving himself, someone walked up and startled him, causing his pants to fall down. Carter provided two written statements regarding the incident: one on May 26, 2011[19], before he was aware that Employee was involved in the incident, and another statement that became a part of Harrison's Sexual Misconduct Report.[20] Carter testified in a very forthright and credible manner.

After the his initial conversation with Employee, Carter was later asked by the Chief of Staff, Tony Duckett, to investigate a complaint of an employee operating a vehicle with the tag number "6072." At the time of this request, Carter was unaware that the complaint involved Employee. During the course of the investigation of Employee, Carter provided a written statement, wherein, he stated that Employee acknowledged that he had "made a big mistake" during their initial conversation.[21] Carter was later told by Duckett that Employee was involved in the incident and that he was seen in an apartment building with a young lady receiving a "blow job."[22]

Both, Howland and Carter described the policy for when street sweepers need to use the restroom while on duty. The policy required that employees go to the nearest fire or police station, but they were not permitted to go into private residences while on duty. Howland further stated that employees were permitted to go into a fast-food place, gas station, or hotel. Despite this policy, Employee proclaims that it was necessary for him to go into Bushby's apartment building because it was an emergency and he could not hold his bladder any longer. Employee testified that his medical issue which caused him to frequently urinate has persisted for fifteen (15) years.[23] Even with this knowledge, Employee made no request to Agency to change his route or reassign his duties during his tenure with Agency.

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[17] Tr. at 38.
[18] Agency's Exhibit 2, Attachment 2.
[19] Agency's Exhibit 1.
[20] Agency's Exhibit 2, Attachment 2.
[21] *Id.*
[22] Tr. at 54.
[23] Tr. at 190.

Bushby, who was seen with Employee in the stairwell, provided testimony that Employee could not make it up the stairs and had to urinate in a cup. A written statement was provided bearing Bushby's name; however, testimony demonstrated that Braxton, Employee's sister, actually wrote the statement and Bushby signed it.[24] Employee testified that he was not aware that his sister assisted Bushby in preparing a statement. This statement was not given much weight by the undersigned. Although Bushby claimed that Employee was urinating in the stairwell rather than engaging in sexual activities, I find Roch's testimony to be more credible.

Employee gave testimony describing his medical condition and maintained that he had to relieve himself in a cup in the stairwell of the apartment building. When questioned by his attorney on direct examination, Employee acknowledged that he made an untrue statement to Harrison during the investigation when he denied knowing Bushby. Employee did in fact know Bushby because their daughters were friends. Employee proclaimed that he made this untrue statement because Harrison was "trying to take [his] job." [25] When questioned further about the untrue statement on cross-examination, Employee became combative about his untrue statement before acknowledging that he initially told Harrison that he did not know Bushby.

Employee was also asked about a written statement bearing his signature that was submitted to the Hearing Officer during the administrative review of this matter.[26] Despite a signature purporting to be Employee's on the document, Employee did not recognize the document and denied that it was his signature. It is noted that the format for Agency's Exhibits 5 ("Bushby's statement") and 6 ("Employee's statement") are very similar. I found there to be many inconsistencies with Employee's testimony and also issues with his credibility. In determining credibility issues between the eyewitnesses of this incident, I find Roch's testimony to be most credible. Accordingly, I find that Employee was engaged in oral sex while on duty which demonstrated careless and negligent work habits of a District employee.

**Any on-duty or employment-related reason for corrective or adverse action; to include activities for which the investigation can sustain that it is not "de minimis" (i.e., very small or trifling matters).**

I find that Agency had cause to take adverse action against Employee for an on-duty and employment-related reason for adverse action that is not "de minimis." This charge is a "catchall" phrase which includes activities for which an investigation can sustain is not "de minimis."

Here, by Employee's own admission, he was found in the stairwell of an apartment building urinating in a cup. Despite the Undersigned's findings that Employee was engaged in sexual activity while on duty, Employee's admission alone is enough to sustain an adverse action finding by Agency that Employee's actions were not "de minimis." Given that Employee's medical condition of having to frequently urinate has persisted for fifteen (15) years, Employee failed to take reasonable steps, such as making a request with Agency, to accommodate his conditions so that he would not have to relieve himself in inappropriate places at any given time.

[24] *See* Agency's Exhibit 5.
[25] Tr. at 197.
[26] *See* Agency's Exhibit 6.

Thus, I must find that Agency has met its burden that it had cause to take adverse action against Employee for an on-duty and employment-related reason that was not "de minimis."

**Appropriateness of penalty**

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Here, I find that Agency has met its burden of proof with both causes: (1) any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty; and (2) any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; may include any activities for which an investigation can sustain that is not "de minimis."

DCMR § 1619.1(6)(c) (Table of Appropriate Penalties) provides the range of penalties for the charge of neglect of duty. The penalty for the first offense of neglect of duty ranges from reprimand to removal. Although there was testimony that other than this incident Employee had a clean record, Agency elected to remove Employee from his position. This decision was made by Agency's Director, Howland. Howland testified regarding the process in which Agency underwent in deciding to remove Employee from his position. Howland felt that whether Employee was engaging in oral sex or urinating in a stairwell, that both scenarios go "well beyond what you would expect a government employee to be doing [while on duty]" and in uniform.[27] Howland further stated that although Employee had been with Agency for 15 years, and did not have any prior disciplinary issues, Howland felt that this offense was so egregious that termination was an appropriate disciplinary action on the first offense. In this instance, he believed that the seriousness of the offense outweighed the mitigating factors of Employee's disciplinary record and employment history.

In making his decision to sustain Employee's removal, Howland relied on the Hearing Officer's report, the Sexual Misconduct Report, and conversations with Agency's attorney. It is noted that the Hearing Officer's Report recommended a 15-day suspension penalty at the administrative review level by Agency; however, Howland did not agree with that recommendation. The Hearing Officer did not have the benefit of a written statement from Roch, nor was she able to make any credibility determinations of Roch's complaint. Here, the Undersigned had the benefit of observing sworn testimony given be all three eyewitnesses to the incident: Employee, Bushby, and Roch.

Based on the aforementioned, I find that Agency did not exceed the limits of reasonableness with the penalty imposed against Employee. In light of the testimonial and documentary evidence presented in this case, I find that Agency's penalty of removal was appropriate based on the two charges: neglect of duty and on-duty or employment-related reason for which an investigation can sustain that is not "de minimis."

[27] Tr. at 121.

## ORDER

Accordingly, it is hereby **ORDERED** that Agency's removal of Employee is **UPHELD**.

FOR THE OFFICE:

_____
Arien P. Cannon, Esq.
Administrative Judge