

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:
ROBIN Y. JACKSON,
Employee
v.
OFFICE OF CONTRACTING
AND PROCUREMENT,
Agency

OEA Matter No. 1601-0024-05
Date of Issuance: October 12, 2007
ERIC T. ROBINSON, Esq.
Administrative Judge

Stephen C. Leckar, Esq., Employee Representative
Thelma C. Brown, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On March 3, 2005, Robin Jackson (hereinafter "the Employee") timely filed a petition for appeal with the Office of Employee Appeals (hereinafter "OEA" or "the Office") contesting the Office of Contracting and Procurement (hereinafter "the Agency") summary removal action. A prehearing conference as well as various status conferences were held in this matter. During the course of these proceedings, I decided that an Evidentiary Hearing was required. Consequently, a Hearing was held on June 13 & 14, 2006. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

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

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.

“Preponderance of the evidence” shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

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

### STATEMENT OF THE CHARGES

By notice dated January 14, 2005, the Employee was notified of her summary removal from the Agency based on the charges of “incompetence, inefficiency and discourteous treatment of other employees, [and] conduct that threatens the integrity of government operations as provided in subsection 1617.1 of the DPM.” In pertinent part, the notice reads as follows:

You were instructed in advance to meet with the principal OCP managers for the purpose of gathering pertinent information necessary for the preparation of the Interim Chief Procurement Officer’s testimony for Wednesday, September 29, 2004. As you are aware testimonies held before the DC City Council require extensive research, fact finding and input from various sources and therefore, are time consuming. On Tuesday evening, September 28, 2004 the testimony was still in a draft form. Your failure in following oral instructions has caused the staff involved in the preparation of the testimony to work under stressful conditions and therefore is not able to assist in the preparation of high quality product.

Also while meeting with staff on Tuesday evening September 28, 2004, you were speaking to a co worker in a tone of voice that was considered discourteous.

On Tuesday, October 7, 2004 you were provided with documentation that indicated expectations of duties and responsibilities. Your expectations of duties and responsibilities included Council Relations/Hearing Preparation; Policies and Procedures; Green Committee; Ratification Panel; Interpersonal interactions and other related duties.

In addition to the above mentioned hearing, this type of behavior

was again displayed in preparation for Council hearings held on November 3 and December 20, 2004. You presented documents that were inaccurate and required critical changes resulting in the resubmission of a revised testimony to the Councilmember. Testimonies have been submitted for senior level review that were incomplete, did not flow in a clear, concise manner appropriate for Council hearings and had to be rewritten by another staff member. Overall, your quality of work is unacceptable and does not meet expectations as outlined in the document provided to you on October 7, 2004.

### SUMMARY OF THE TESTIMONY

#### Kahni Ward

*Kahni Ward (hereinafter "Ward") testified in relevant part that:* she has worked for the Agency since January 2005 and that her current position within the Agency is Chief of Staff. As part of her initial and current duties, Ward had supervisory responsibilities over several of the Agency's employees. At the time of the Employee's summary removal, Ward was her supervisor. Like the Employee, Ward has had extensive experience preparing testimony for District of Columbia Council hearings. According to Ward, the process for preparing testimony starts with information gathering. Depending on the subject matter, information gathering may involve soliciting significant input from persons who are knowledgeable of the particular subject matter. Once all of the relevant information is collected, it is then synthesized into draft testimony where it is then presented before key Agency leaders for further vetting and review. If necessary, changes to the draft testimony are then incorporated into the final product. Once that process has concluded, the testimony is then codified into its final form for presentation before the District of Columbia Council. In carrying out these duties it is the policy analysts' duty to write the testimony. The information that is contained within said testimony must be provided by the person(s) who possess the relevant subject matter expertise. Ward further testified that it is the primary responsibility of the policy analyst, in this matter the Employee, to carry out the above referenced process of preparing testimony.

One of the allegations made by the Agency in support of its summary removal of the Employee relates to an incident between the Employee and Bruce Witty (hereinafter "Witty"). Relative to her recollection of the incident Ward testified thusly:

Q: Do you recall a meeting, a staff meeting, regarding, involving testimony with [Witty] where [Witty] and the [Employee] were present and discussing upcoming testimony?

A: I do.

Q: Who was at the meeting? Do you recall?

A: ... I do not recall everyone at the meeting, but I do recall Nancy Hapeman being there, [the Employee], [Witty], and likely Mr. Walton, Ms. Lee, and Mr. Soderberg.

Q: Where did these meetings physically take place?

A: Normally they take place in the Director's conference room in 441 Suite 700.

Q: What is the proximity of this conference room to the office of Mr. Tillery?

A: It's next door. There is a door that connects the two rooms...

Q: During the meeting with Mr. Tillery are you aware of any difficulties or any obstacles that [the Employee] had in preparing the testimony at that meeting discussed at that meeting?

A: I recall there being a discussion about needing additional information to complete – because there were two things that were occurring. Mr. Tillery was testifying but he was not testifying to the details of [Witty's] action. [Witty] was providing his own separate testimony associated with that. So there was discussion at that meeting about needing additional information to complete those testimonies.

Q: Was [the Employee] responsible for drafting the testimony for [Witty] as well as Mr. Tillery?

A: Yes.

Q: In order to do that what would she have had to receive from [Witty]?

A: Any relevant pertinent points.

Q: So can you tell us what happened at the meeting relative to that testimony?

A: I don't recall specifically what was said. I know things went as normal initially in terms of having the conversation, discussion about the testimony, but I do recall specifically an outburst by [the Employee] towards [Witty]. She was visibly upset and loud about what she did or did not have to complete preparation....

Q: Do you recall specifically what was said?

A: I do not recall specifically what was said...

Q: How did the outburst, as you characterize it, how did it impact on the ability of [the Employee] to ultimately prepare the testimony or did it?

A: I don't know. I don't really remember specifically what happened after that. I mean she was responsible for gathering the information and pulling together the testimony so that it could be delivered. So I don't know what subsequent interaction she may have had with [Witty] after that. I mean, I imagine that there were some to get exactly what it was that she needed.

Transcript at 72- 76.

Ward was subsequently subjected to cross examination by Mr. Leckar relative to the aforementioned outburst between the Employee and Witty and testified as follows:

Q: ... In terms of that outburst. You never recommended that [the Employee] be disciplined for that. Isn't that right?

A: No.

Q: In fact you are unaware whether [Witty] ever went to Mr. Tillery and said: Please discipline her for what she said to me?

A: I am not aware of any.

Q: Prior to January of 2005 did you ever see or hear of a document from anybody to Mr. Tillery recommending that [the Employee] be disciplined for this extraordinary unprecedented outburst?

A: I never - - I am not aware of any document.

Q: Irrespective of what happened that day in the meeting between [the Employee] and [Witty], you never wrote anybody any memo complaining about her testimony. Isn't that right?

A: Complaining about what?

Q: The testimony that she drafted? Isn't that right?

A: No, I don't recall.

Q: ... Did you ever see any memo from anybody else complaining about the quality of her testimony that she wrote for the September 29<sup>th</sup> hearing other than this January 14<sup>th</sup> firing notice? That's Exhibit No. 2?

A: I don't recall ever seeing anything.

Transcript at 160 – 161.

Relative to testimony presented by Mr. Tillery to the District of Columbia Council (hereinafter "DC Council") on or about November 4, 2004, it was alleged that the Employee wrote an incorrect numerical figure that Mr. Tillery had to correct while providing testimony to the DC Council. This discrepancy resulted in revised written testimony having to be submitted to the DC Council after the hearing had concluded. This incident was cited by the Agency as one of the justifications as to why the Employee was summarily removed. When cross examined on this incident, it was intimated that the Employee would not create numerical figures, but that instead she would get that information from someone else to include in the testimony. It was also revealed that Ward was not aware of any notice (either verbal or written) being given to the Employee admonishing her about the errors that were in said testimony. Of relevance to this matter is the following excerpt from Ward's cross examination:

Q: ... Your deposition sworn under oath, you have that right hand up and you testified right? What you said then was all true, right?

A: Yes.

Q: Page 102, line two, you were asked the following question and gave the following answer: "Now, I want to focus on the November 4<sup>th</sup> testimony. Do you know in any way that testimony was inaccurate and required critical changes other than the submission of a revised testimony of a corrected number?"  
Answer: "I don't recall specifically at this time."

Were you asked that question and did you give that answer?

A: Yes.

Ward was also questioned regarding testimony that the Employee prepared in anticipation of a DC Council hearing that was scheduled for December 20, 2004. It was alleged by the Agency that this testimony contained errors requiring it to be re-written by Ward (with possible assistance by Nancy Hapeman) on the day the testimony was to be presented to the DC Council. It was also alleged that the draft testimony was late thereby resulting in a sub-par work product.

It was revealed during cross examination that the Employee prepared and sent the

draft testimony for further vetting to Ward, among others, the evening of Friday, December 17, 2004, via email. Ward could not recall whether or not she opened and reviewed this email before the morning of Monday, December 20, 2004 (the day of the aforementioned hearing). However, Ward did admit that it was unlikely that she did. It was further revealed that in the days after the testimony was submitted that Ward was not aware of any communication to the Employee (either verbally or in writing) that the testimony was late or exactly which alleged errors presented cause for concern with the sole exception of the January 14, 2005, letter summarily removing the Employee from service.

Nancy Hapeman

*Nancy Hapemen (hereinafter "Hapeman") testified in relevant part that:* she is employed by the District of Columbia Office of Contracting and Procurement as its General Counsel. She has served in this position since November, 1997. Among other job-related duties, she has traditionally been involved with the drafting and reviewing of testimony on behalf of the Agency. She has performed this function to varying degrees for various Directors of the Agency. In a somewhat similar fashion as Ward, Hapeman describes the process of drafting testimony as being a collaborative process that involves information gathering from person(s) possessing the relevant experience or knowledge on the topic *du jour*. The information is then synthesized into draft form which is then vetted and reviewed by various co-workers, and once the group is satisfied with the work product it is then submitted to the Agency Director for further review before being codified into its final form. In participating in this process, Hapeman's role has varied throughout her tenure. However she has generally been called upon to provide a legal analysis relative to prospective draft testimony.

Concerning the incident between the Employee and Witty, Hapeman recalls being present and noted a tone of anger and frustration being expressed by both the Employee and Witty regarding Witty's alleged lack of involvement in providing information for the then upcoming DC Council hearing. The nature of this hearing involved, among other things, Witty's alleged personal involvement in questionable procurement contracts. The Employee privately indicated to Hapeman that Witty was not providing the information that was necessary for completion of the testimony and was frustrated by his inaction. During cross examination, Hapeman revealed that she believed the Employee when she indicated that Witty was not communicating with her so that she could timely finish drafting the testimony. After the incident Hapeman did not recommend to anyone that the Employee be disciplined for her part in this incident.

Relative to the November 4, 2004, hearing and by extension the testimony drafted by the Employee, Hapeman cannot recall the specific testimony provided by the Employee nor could she recall any alleged inaccuracies with said testimony. Similarly, relative to a DC Council hearing scheduled on or about December 20, 2004, she does not recall with any specificity what, if any, inaccuracies or issues that were raised regarding the Employee draft testimony submitted for review in anticipation of this hearing. Hapeman does not recall complaining to Mr. Tillery regarding the draft testimony

submitted by the Employee.

Lastly, Hapeman testified that she had no role in effectuating the Employee's summary removal nor has she recommended that the Employee be disciplined in any capacity for the alleged actions that are the subject of the instant matter.

Herbert R. Tillery

*Herbert R. Tillery (hereinafter "Tillery") testified in relevant part that:* at the time of this proceeding he was both the Deputy Mayor for Operations as well as the interim Chief Procurement Officer of the Agency. At the time of this proceeding, Tillery had served as interim Chief Procurement Officer of the Agency since September, 2004. Tillery was first acquainted with the Employee when he started his tenure with the Agency. Tillery describes the Employee's main job-related duty as being the drafting and preparation of testimony.

As it relates to the incident between Witty and the Employee, Tillery remembers that while in his office that he had heard an "outburst" emanating from an adjoining conference room. The following excerpt describes his initial response:

... So I just stuck my head in the door and said, you all need to knock it off, or words to that effect. Something to let them know that that was bothering me and that was not the way I expected that meeting to go.

Q: Did you ever find out or did you determine who she was speaking to or the context of the outburst?

A: Not that I can recall. I have been - - not that I can personally recall.

Q: Did you ever discuss with [the Employee] the outburst and what you overheard?

A: I think in a follow-up conversation - - and I'm just guessing - - in a follow-up conversation, and it might have been during that time that I gave her her outline of her duties and responsibilities, that that's not the kind of environment or atmosphere that I want.

But it wasn't just to her. I had made that known to the organization when I first got there, that in order for us to create the team environment that I'm so used to and just press, is that you got to work together, not, you know, with these kind of adverse activity toward each other.

Tr. at 318 – 319.

Tillery relates that he decided to summarily remove the Employee because her work product (testimony) was allegedly “not being done timely, factually ..., nor were facts being gathered in the congenial manner that I had requested in terms of, you know, folks working together...” Tr. at 353 – 354. Furthermore, Tillery goes on to relate that the Employee communicated to him the difficulties she was having with getting the required information from other employees so that she could promptly prepare the requested draft testimony. Tr. at 360.

During cross examination, Tillery could not specifically relate what was wrong with the December 20, 2004, draft testimony prepared by the Employee. Tillery also generally stated that some of the Employees’ past supervisors had made general complaints about her performance; however, when confronted with his deposition testimony, Tillery was not able to recall any supervisors who had any complaints regarding the Employee’s performance. Tr. at 408.

Regarding the Employee’s summary removal Tillery testified thusly on cross examination:

Q: True or false [Tillery]: In your deposition when you were asked the following question - -

A: What page are you on?

Q: Page 35, line 6. You were asked the following question --

A: Can I take a moment?

Q: ... “Is there a reason why [the Employee’s] removal letter, which came about a month later, didn’t say why you concluded that the summary removal process was necessary in her case?” What did you answer, [Tillery]?

A: “I don’t know. I don’t have any recollection or thoughts about comparing the two letters.”

Tr. at 449

Q: True or False, [Tillery]: Tell ... Judge Robinson, true or false, none of your leadership team recommended that [the Employee] be fired summarily? True or false?

A: I don’t recall whether that’s true or false.

Q: You don’t recall?

A: I don't recall.

Tr. at 450.

Relative to the allegation that the Employee threatened the integrity of government operations ultimately necessitating her summary removal, Tillery explained initially that the Employee was allegedly insubordinate and was unable to get along with her co-workers. During cross examination the following exchange occurred:

Q: Page 14 of your deposition, [Tillery], line 6, you were asked the following question: Sir - - and did you give the following answer: "Now, Mr. Tillery, please tell me on January 14, 2005, what led you to conclude that [the Employee] was threatening the integrity of government operations?" and you answered, "I don't recall what I was thinking on January 14,." Were you asked that question and did you give that answer?

A: Yes, I did.

Tr. at 473 – 474.

Tillery was generally dissatisfied with the quality and the timeliness of the Employee's work product; he also was dissatisfied with the perceived lack of rapport that she endeared from some of her work colleagues. When pressed, Tillery was unable to recall specific examples of his dissatisfaction, nor what he did to remedy his dissatisfaction before summarily removing the Employee. *See generally*, Tr. at 487 – 491, 524 – 525 and 532 (among others).

Tillery generally cited the length of time that has transpired between the Employee's removal and either the deposition or the evidentiary hearing in this matter in order to explain his lack of recall about certain salient events.

Robin Jackson

*The Employee testified in relevant part that:* she is an attorney licensed to practice law in the state of Ohio. After graduating from Case Western Reserve University School of Law, she held various positions primarily related to policy making and government relations. She started working for the Agency on or about December 3, 2001.

The Employee's rendition of how testimony is drafted (generally speaking) is not considerably different than what was previously described by Ward, Hapeman, or Tillery. While she has had several immediate supervisors since the beginning of Tillery's tenure, none of them criticized her. The only time that she received criticism during Tillery's tenure was the day that she was summarily removed from her position.

As it relates to the incident that she had with Witty, the Employee explained that Witty never responded to her requests to collaborate for an upcoming hearing. Since it was Witty's personal action(s) revolving around his prior approval of a number of contracts that did not get the requisite DC Council approval prior to their payment, Witty's involvement in crafting the testimony was critical to its completion. The Employee complained to a number of colleagues within the Agency about Witty's avoidance of completing the assignment. The Employee even went so far as to call Hapeman at home over the weekend in order to get some advice on how to resolve this situation. Hapeman informed her that there was nothing that could be done on the weekend and that this issue should be addressed on the next business day (Monday). On Monday, a staff meeting was called where the Employee, Witty, and others were present to discuss the matter of preparing the testimony. When questioned about his participation to date in helping to prepare the testimony, Witty allegedly said that he had been cooperating, at which point the Employee disagreed with Witty's response and accused him of lying. *See generally*, Tr. at 609. The Employee disputes Tillery's contention that he then belatedly showed up at this staff meeting. After this meeting, the Employee found Witty more cooperative and she was subsequently able to complete the testimony. Until she received her summary removal letter, the Employee contends that none of her supervisors had voiced any concern regarding her conduct in this meeting.

As it relates to the November 4, 2004, testimony that was allegedly inaccurate because it contained a figure of \$10,000 where in fact the figure should have read \$1,000,000, the Employee explained that the number was supplied to her by someone else, as she would not make a determination of putting a figure on her own, since she "didn't have the authority or knowledge to do that." Tr. at 613. Furthermore, before the inaccuracy was noticed by Tillery, the testimony had gone through a vetting process with other senior members of the Agency and no one else had picked up on the inaccuracy. Lastly, Tillery did not discuss his dissatisfaction over the quality of this (or any other) testimony prepared by the Employee.

As it relates to the December 20, 2004, testimony, the Employee contended that she prepared the testimony and then emailed a copy of it to Ward on Friday, December 17, 2004, at her request. The Employee then related that she did not hear from Ward over the weekend and when she reported to work on December 20, 2004, she went to Ward and asked her if she had had an opportunity to review the testimony. The Employee related that Ward indicated that she had not reviewed the testimony. To the Employee, "[Ward] didn't seem angry or upset. She didn't criticize me or complain about anything." Tr. at 619. The Employee also contended that if there were any issues with that (or by implication any other) testimony that needed resolving that she was ready, willing to make whatever corrections were necessary in a workmanlike and expeditious manner.

The Employee also testified about other incidents that have occurred during her tenure with the Agency. These incidents are not addressed or discussed in this initial decision because I deem said incidents irrelevant to a proper disposition of the instant

matter.

### FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

The January 14, 2005, letter addressed to the Employee (hereinafter "Removal Letter") served as final notice that she is being summarily removed from her position as a policy analyst on charges of "incompetence, inefficiency and discourteous treatment of other employees, [and] conduct that threatens the integrity of government operations as provided in subsection 1617.1 of the DPM." The Undersigned must take note that the provision of the DPM cited by the Agency in its Removal letter does not reference the summary removal process. DPM § 1617.1 states:

#### **1617 Disciplinary Grievances: General Discipline**

1617.1 An employee against whom a corrective action has been taken shall be entitled to contest the final decision as a disciplinary grievance under the procedure set forth in § 1636.

I am left to assume that in its Removal letter the Agency intended to reference DPM § 1616.1 which states:

#### **1616 Summary Removal: General Discipline**

1616.1 An agency head may remove an employee summarily when the employee's conduct:

- (a) Threatens the integrity of government operations;
- (b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or
- (c) Is detrimental to public health, safety, or welfare.

In the Removal letter, the Agency contends that summary removal was necessary and cites instances that ostensibly buttress that contention. Said instances date over a period of time three months prior to the date of the Removal letter. Nothing in the Removal letter cites any activity that occurred during calendar year 2005 (when the Removal letter was presented to the Employee). While Agency's error may be typographical in nature and as such *de minimis* in result, it is evident to the Undersigned that the Agency failed in other regards to follow the proper procedures in effectuating the Employee's removal. Such failures on the Agency's part shall be discussed in more detail *infra*.

The Summary Removal process (DPM § 1616) is not a tool that should be used lightly in managing the District of Columbia workforce. Furthermore, it is not a tool that should be used by an Agency in an attempt to circumvent an employee's career service rights. Summary removal has not been litigated to a final decision in recent memory within the OEA. However, it stands to reason that it is a tool that should only be used in circumstances most dire and should be done almost immediately after the Employee has committed said action. For example, if a career service employee were caught using illicit drugs during their regularly scheduled tour of duty and at their place of work, then the summary removal process may be the best option for addressing said behavior. It allows the Agency to address employee conduct that, because of its mere occurrence, causes an unsafe environment for others or otherwise threatens the integrity of District of Columbia government operations.

While I cannot accurately gauge how soon an Agency should use summary removal to address said issue, I find that it should be done within a close proximity of time to the Agency conclusively learning of this event. I would not measure the time in months or weeks but in days within when the Agency knew or should have known of the employee's poor choice in judgment. In the instant matter, the Agency elected to summarily remove the Employee from service effective January 14, 2005. The Removal letter cited allegedly unsatisfactory Employee conduct dating from late September 2004, to late December 2004. This constituted a period of time of almost four months where the Agency cataloged instances in which it felt that the Employee's conduct and work product were unsatisfactory. Given the instant facts, I find that the time frame listed in the removal letter to be too long to otherwise justify a summary removal action. Also, after considering the documents of record as well as the testimonial evidence presented by the parties, I also find that the circumstances listed by the Agency to buttress its summary removal action do not fit within the acceptable grounds for initiating the summary removal process as defined by DPM § 1616.1.

As a part of the Employee's appeal process within this Office, I held an evidentiary hearing on the issue of whether Agency's action of terminating the Employee was in accordance with applicable law, rule, or regulation. In doing so, I heard testimony from Ward, Hapeman, Tillery, and the Employee. Ward and Tillery, working either singularly or in conjunction with one another, were involved in the process of either recommending and/or effectuating the Employee's removal. As such, Ward and/or Tillery either singularly or in conjunction with others would have been privy to all relevant circumstances and information that the Agency used to buttress the Agency's adverse action in the instant matter. During the evidentiary hearing, I had the opportunity to observe the poise, demeanor and credibility of the Agency's witnesses as well as the Employee in this matter. In a nutshell, when it came to salient instances regarding the Employee's conduct that were cited as a predicate to Agency's action, Ward and Tillery generally used a variation of the refrain "I do not recall". This refrain was used when asked about the incident that the Employee had with Witty and what action was taken immediately afterwards. It was also consistently stated by Ward, Hapeman, and Tillery that they collectively did not recall the particular circumstances

that led them to collectively believe that the Employee's work product was deficient, if in fact her work product truly was. Or in that same vein, what if any admonishment was given to the Employee immediately after these alleged incidents that caused concern for the Agency's hierarchy. Lastly, Tillery failed to recall any action of the Employee that he felt threatened the integrity of government operations<sup>1</sup>.

As was stated previously, the Agency has the burden of proof by a preponderance of the evidence standard<sup>2</sup> to prove that its action was legally justified. I find that the documents of record that were presented by the Agency during the course of the Employee's appeal process do not provide an adequate "paper trail" for the Undersigned to make a determination that summary removal was a proper recourse for the Agency in this matter. The Agency's witnesses, while under oath both during the depositions as well as during the evidentiary hearing, failed to recall any and all relevant facts or circumstances that would potentially buttress the Agency's general contention that its adverse action should be upheld. Considering as such, I find that the Agency utterly *failed* to meet its burden in this matter. Further, I conclude that given the aforementioned findings, the Agency's action of removing the Employee from service should be reversed.

#### ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing the Employee from service is REVERSED; and
2. The Agency shall reinstate the Employee and reimburse her all back-pay and benefits lost as a result of her removal; and
3. The Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Eric T. Robinson, Esq.  
Administrative Judge

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<sup>1</sup> See generally, DPM § 1616.1 (a).

<sup>2</sup> See the Burden of Proof Section *supra* of this initial decision for a recitation of this Office's rules regarding burden of proof, preponderance of the evidence standard, and under what circumstances does either party possess said burden.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

\_\_\_\_\_ )  
 In the Matter of: )  
 )  
 ANNE McHUGH, )  
 Employee )  
 )  
 v. )  
 )  
 DISTRICT OF COLUMBIA )  
 PUBLIC SCHOOLS, )  
 Agency )  
 \_\_\_\_\_ )

OEA Matter No. 1601-0013-06

Date of Issuance: January 11, 2008

ERIC T. ROBINSON, Esq.  
Administrative Judge

Frazer Walton, Esq., Employee Representative  
Harriet Segar, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 11, 2005, Anne McHugh (“the Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools (“the Agency”) adverse action of removing her from service. After convening a prehearing conference, as well as multiple status conferences, I determined that an evidentiary hearing was warranted in this matter. Accordingly, an evidentiary hearing was held on June 8, 2006. I have since received both parties’ respective closing arguments. The record is closed.

JURISDICTION

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

BURDEN OF PROOF

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

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

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

### ISSUE

Whether Agency's action of removing the Employee from service was done in accordance with applicable law, rule, or regulation.

### SUMMARY OF THE TESTIMONY

*Nathan Saunders ("Saunders") testified in relevant part that:* he is the General Vice President of the Washington Teachers Union. He assisted the Employee in attempting to resolve her problems with reporting for duty and for requesting sick leave. Saunders indicated that he made telephone inquiries to the two schools that the Employee was assigned to regarding her leave issues. According to Saunders, he was informed by one of the principals that he contacted that they followed the rules with regards to granting sick leave.

Saunders also indicated that the Employee provided him with two documents that ostensibly buttressed her need for sick leave. According to Saunders, the Employee created one of these letters. The second note was a detailed explanation authored by an unnamed doctor. Saunders is aware of the established procedures that a teacher should undertake in order to properly request sick leave as enunciated interchangeably in the Collective Bargaining Agreement ("CBA") and the District Personnel Manual ("DPM"). Employee's Exhibit No. 1 was an excerpt from the CBA that detailed, in relevant part, what steps an employee of the Agency shall undertake in order to request sick leave. Of note, the CBA indicates that a doctor's note is required for an employee that wants to utilize three or more consecutive days of sick leave.

*Valarie Sheppard ("Sheppard") testified in relevant part that:* she is the current Director of Staffing and Human Resources for the Agency. Further, at the time of this hearing, she has held said position for approximately two and a half years. The Employee was given an assignment letter, which, *inter alia*, directed the Employee to the new schools to which she was assigned to for school year 2005/2006, as well as her start date. Sheppard indicated that the assignment letter was signed by the Employee (as per standard Agency procedure) in the presence of Sheppard's colleague Tiffany Tenbrook.

Sheppard indicated that if a teacher needed to request extended sick leave, that teacher would have to fill out and sign a leave application form and submit it to his/her principal for approval. If the principal approves, s/he then signs and submits it to the assistant superintendent who, if s/he approve, would sign and forward the form to the Department of Human Resources, where Sheppard signs the form and processes the teachers' extended sick leave. *See generally*, Tr. at 88-89. This process did not occur in the instant matter. Approximately during the first week of the school year, Sheppard contacted M.M. Washington and was informed that the Employee had not reported for duty.

*Tiffany Tenbrook ("Tenbrook") testified in relevant part that:* she is a Human Resources Specialist working at the Agency. A portion of her job related duties include, *inter alia*, preparing personnel budgets. Tenbrook testified that she was familiar with Agency Exhibit No. 6 which was the aforementioned assignment letter. Tenbrook indicated that on August 22, 2005, pursuant to an order from Sheppard, she provided the assignment letter to the Employee and watched her sign it. Furthermore, she remembers certain salient details of her interaction with the Employee. Most notably, Tenbrook remembers the Employee asking her if she had to report for duty to the locations as stated in the assignment letter. Tenbrook indicated that she answered affirmatively. The Employee also asked what the signing of the assignment letter meant. Tenbrook responded as follows: "I replied in saying that in signing that you know what your assignment is, you know when you're to report and the expectation is that you arrive at the schools that were initialed in the letter at the date and time the letter speaks to." Tr. at 136-137.

*Wilma Gaines ("Gaines") testified in relevant part that:* at the time of the hearing, she was the principal at M.M. Washington Center. She has held this position since July 2005. This is one of the schools that the Employee was instructed to report for duty as outlined in the assignment letter. On August 23, 2005, Gaines held a teacher orientation at the M.M. Washington Center. According to Gaines, the Employee did not appear for this orientation meeting. Gaines telephoned all of the teachers that did not appear for the orientation meeting to "specifically make sure that they were aware that the school year had started." Tr. at 158. Gaines testified that she had a telephonic conversation with the Employee on or about August 23, 2005, wherein the Employee indicated that she would be reporting for duty. The Employee did not report for duty on the next business day. At some point thereafter, Gaines telephoned the Employee again and asked her if and when she was going to report for duty. Gaines indicated that the Employee instructed her to contact her Washington Teachers Union Representative or her attorney and gave her "no indication at that time whether she was coming she was not coming. Nothing to that extent." Tr. at 162. Gaines placed the Employee on absence without official leave from August 23, 2005, through September 2, 2005. *See generally*, Tr. at 162. At some point, Gaines contacted the principal at Turner Elementary School. This was the other school the Employee was assigned to according to the assignment letter. The principal at Turner indicated to her that the Employee had failed to report for duty there as well.

Agency's Exhibit No. 12 is a return to duty notice dated September 1, 2005. It was prepared and sent by Gaines to the Employee. It instructs the Employee to, *inter alia*, return to duty on or before September 12, 2005. Further, the return to duty letter instructs the Employee to provide medical documentation that would presumably justify her absence to that date. In the alternative, if the Employee was absent due to other circumstances, such as a death in the family, the return to duty notice instructed her to submit appropriate documentation to that effect. Gaines testified that the Employee did not submit any documentation after having been sent the return to duty letter, nor did she physically report for duty by the September 12, 2005, deadline.

Since the Employee did not respond to the return to duty notice, Gaines prepared and submitted Agency Exhibit No. 13, a memorandum dated September 12, 2005, to Assistant Superintendent Michael Snipes ("Snipes"), recommending that the Employee be terminated for abandonment of her position. On October 12, 2005, Snipes signed the aforementioned memorandum approving the Employee's termination. Gaines testified that one of the reasons that she had to go through the process of removing the Employee is that she was unable to fill the Employee's position with replacement personnel until her removal was processed. Furthermore, she was unable to offer the services of an art teacher at her school during the Fall 2005 school year, because of the Employee's failure to report for duty.

*Donald Tatum ("Tatum") testified in relevant part that:* he is a labor relations specialist for the Agency's Department of Human Resources. He has held this position since February 2003. Tatum testified that he had no personal involvement in reviewing or processing the Employee's adverse action in this matter. Tatum was admitted as an expert witness regarding the policies and procedures of the labor relations section of the Agency's Department of Human Resources.

A portion of his job related duties include reviewing proposed adverse actions and processing same if it is ultimately approved. Notices of termination are generated by the Agency's Department of Human Resources. Tatum characterized job abandonment as "when the employee just does not come to work and they don't call in to explain their absence. They're not communicating." Tr. at 211-212. For further clarification on job abandonment, Tatum read from the District of Columbia Municipal Regulations Title 5 § 1020.6 which states that: "[f]ailure to report to work after notice shall be deemed a voluntary resignation due to abandonment of position. This voluntary action shall not be construed as an adverse action."

*The Employee testified in relevant part that:* she was re-hired by the Agency after she prevailed in her prior matter in this Office<sup>1</sup> wherein her position was abolished through a reduction in force. As a part of his decision, the late Senior Administrative Judge Daryl Hollis reversed the Agency's action of abolishing the Employee's position. While that matter was still pending before Judge Hollis, the Employee attempted,

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<sup>1</sup> This matter was docketed as Anne McHugh v. D.C. Public Schools, OEA Matter No. 2401-0075-04, October 15, 2004 ("RIF matter").

unsuccessfully, to process an early-out retirement. According to the Employee, her early-out retirement was rejected because the Agency miscalculated the number of years of service she had, neglecting to include the time she had served with the federal government prior to her taking a position with the Agency. However, since the Employee prevailed in her RIF matter before Judge Hollis, she was seemingly foreclosed from utilizing the Agency's early-out retirement. That option is only available to employee's who both have the requisite years of service and where the Agency was successful in abolishing their position.

Undeterred, the Employee still sought to process her early-out retirement even though she had prevailed in her RIF matter. To that end, she made several inquiries at the Agency regarding her early-out retirement. The Employee contacted both Harriet Segar and Valerie Sheppard, among others, regarding her retirement dilemma. The Employee recalls her interaction with Tenbrook during which she signed the assignment letter. Tenbrook advised her that she should sign the assignment letter and go to the orientation but that it did not seem as if she was, at that time, eligible to retire via the early-out option. *See generally*, Tr. at 258-259. Tenbrook also advised her to contact the Washington Teachers Union ("WTU") regarding her retirement quandary. *See generally*, Tr. at 259.

The Employee testified that she did not report for duty on August 23, 2005, because she thought that her dad had just suffered a heart attack. She related that she called the WTU and spoke to Saunders who instructed her to fax a letter describing her predicament to the WTU and to call the schools she was assigned to in order to inform them of the situation and to verbally request sick leave. The letter that was sent to the WTU was also sent to Turner Elementary via facsimile. It was entered into evidence as Agency's Exhibit No. 11. The Employee recalls telling someone, possibly Gaines, via a telephone call, that she was on sick leave and that the WTU would assist in handling her sick leave situation. The Employee also made her request for sick leave both to Harriet Segar and to the OEA.

After having her position abolished as a part of the RIF matter, the Employee took a position with the Prince Georges County Public Schools ("PGCPS"). The Employee admits that she did not report for duty with the Agency. She further admits that she reported for duty at PGCPS for most of the work days in which she was allegedly AWOL from the Agency. *See generally* Tr. at 313-316. The following excerpt from the Employee's testimony is particularly relevant to the instant matter:

Q: Let me ask you a question. When you're asking for the extended sick leave here and you're not asking for extended sick leave [at PGCPS], don't you think that is sort of a problem?

A: No, because I was entitled to that early-out retirement. And because of the error that the agency committed, and I found that out through [Sheppard], through the DC government retirement board, that longevity forms should have been in that folder.

Q: So when you made the request for sick leave [with the Agency] you didn't make a corresponding request for sick leave with [PGCPS], did you?

A: I didn't need to because as my, as my doctor states in some of the correspondence here that because of what has happened with DCPS, I suffered from post-traumatic stress, depression...

Q: Had you been going in to work, if I checked the records with [PGCPS], have you been going to work?

A: Yes, because they don't do things like this to their employees.

Tr. at 315-316.

#### FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the documentary and testimonial evidence as presented by the parties during the course of the Employee's appeal process with this Office.

As was stated previously, the Employee was removed from service for the stated cause of being AWOL from August 22, 2005, until the time of her dismissal, which occurred on or about October 28, 2005. The Employee admits that she did not report for duty at the Agency for the dates and times alleged by the Agency in this matter. The Employee offered three explanations, that when considered conjunctively, would ostensibly explain her failure to report for duty. First, her father suffered a heart attack and required her hands-on assistance in order to ameliorate his situation. Second, she was emotionally unable to work with the Agency because she was suffering from depression. Lastly, her woeful situation was exacerbated by her inability to exercise an early-out retirement option while her RIF matter was pending, which was due to an alleged miscalculation of her creditable years of service.

While the Employee presents a lamentable tale that, on its face, would merit sympathy, there remains one telling admission that completely undermines the Employee's sincerity in this matter. The Employee reported for work as normal with the PGCPS even though she was attempting to utilize her accrued sick leave with the Agency. Generally speaking, the usage of sick leave by employees of the Agency is explicitly reserved for situations arising from that employee either being too ill to perform the functions of their assigned job; being contagious to others; caring for a sick or injured relative; attending scheduled medical and/or dental appointments; or bereavement. Ironically, the Employee attempted to utilize her accrued sick leave because of alleged ailments to both herself and her father. However, she was still able to report for duty as normal to the PGCPS. *See generally* Tr. at 313-316.

Given the aforementioned findings of fact, corroborated by the Employee's own admission, it is readily evident to the undersigned that the Employee was not in fact sick since she was able to report for duty with the PGCPs. Considering as much, I find that the Employee attempted to "cheat" the Agency when she requested extended sick leave, while still reporting for duty at the PGCPs. This miscarriage is even more despicable given the Agency's unique mission of educating the children of the District of Columbia. The Employee's selfish actions served to severely disrupt the access to a quality education that the children attending M.M. Washington elementary and Turner elementary most rightfully need and deserve. The children of the PGCPs had unfettered access to Employee as a teacher. The children of the District of Columbia Public Schools deserve no less given the instant circumstances. Accordingly, I find that the Agency has met its burden of proof in the instant matter.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), \_\_ D.C. Reg. \_\_ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), \_\_ D.C. Reg. \_\_ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes, supra; Hutchinson, supra; Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), \_\_ D.C. Reg. \_\_ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), \_\_ D.C. Reg. \_\_ ( ).

In accordance with *Stokes* and its progeny, I find that the Agency legitimately invoked and exercised its discretion in this matter when it removed the Employee from service. Neither the Employee's argument nor my own investigation into this matter reveal the sort of managerial indiscretion that would require me to either reverse or modify Agency's action. Accordingly, I find that I must uphold Agency's action in the instant matter.

#### ORDER

It is hereby ORDERED that Agency's action of removing the Employee from service is UPHeld.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.  
Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SONYA OWENS,	)	
Employee	)	OEA Matter No. 1601-0015-06
	)	
v.	)	Date of Issuance: November 21, 2007
	)	
D.C. METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Sonya Owens, Employee *Pro-Se*  
 Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 28, 2005, Sonya Owens (hereinafter “the Employee”) filed a Petition for Appeal with the Office of Employee Appeals (hereinafter “OEA” or “the Office”) contesting her removal from employment with the Metropolitan Police Department (hereinafter “the Agency” or “MPD”). I was assigned this matter on January 13, 2006. On that same day, I scheduled a Status Conference for February 23, 2006. Pursuant to a joint request by the parties, I rescheduled the Status Conference to March 14, 2006.

During the Status Conference, I informed the parties that my review of this matter is limited to a determination of whether the Adverse Action Panel’s (hereinafter “the Panel”) prior decision in this matter was supported by substantial evidence, whether there was harmful procedural error, or whether Agency’s action was done in accordance with applicable laws, rules, or regulations. Furthermore, I informed the parties that according to the District of Columbia Court of Appeals holding in *Elton Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Pursuant to the guidelines as set forth by Pinkard, I initially determined that I was unable to hold a *de novo* Evidentiary Hearing in this matter. Also, I verbally denied Employee’s February 23, 2006, Motion requesting further discovery in this matter. Consequently, I ordered both parties to submit their final legal briefs in this matter. I issued an Order dated April 24, 2006, denying Employee’s request for sanctions. The parties then submitted their respective final legal briefs as

ordered. After considering the sum and substance of the parties' respective arguments, I determined that *Pinkard* was inapplicable to the instant matter and that an evidentiary hearing was warranted<sup>1</sup>. Consequently, a hearing was held on October 26, and November 17, 2006. The record is now closed.

### JURISDICTION

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

### BURDEN OF PROOF

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

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

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

### ISSUE

Whether the Agency's adverse action of terminating the Employee from service was done in accordance with applicable law, rule, or regulation.

### STATEMENT OF THE CHARGES

According to the Panel, which was convened in order to make findings of fact and conclusions of law in the instant matter and whose transcript is part of the documents of record, the Employee was charged with the following violations:

Charge No. 1: Violation of General Order 1202.1, Part I-B-17, which reads: "Fraud in securing appointment or falsification of official records or reports". This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

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<sup>1</sup> It was unknown to the undersigned, at the time of the Employee's initial submission of her petition for appeal, that she was not included in a collective bargaining agreement. This is one of the salient requirements necessary to invoke the administrative review procedures outlined in the *Pinkard* case.

Specification No.1: In that, on or around November 5, 2004, while off duty, you presented a PD Form 251 report of a Theft One/Burglary One to the Director of the Animal Welfare League of Arlington. You presented the report as a legitimate and genuinely documented report of the MPD, knowing that it was fictitious.

Charge No. 2: Violation of General Order 1202.1, Part I-B-6, which reads: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing". This misconduct is defined as cause in Section 1603 in the D.C. personnel manual.

Specification No. 1: In that, on March 3, 2005, during an interview with the Office of Internal Affairs you stated that a MPD Officer responded to your residence on June 4, 2004 and prepared a PD 251 report of Theft One/ Burglary One. You made this statement knowing this to be untrue.

Specification No. 2: In that on March 3, 2005, during an interview with the Office of Internal Affairs you denied surrendering your dog to the Animal Welfare League of Arlington on June 17, 2004, or filling out and affixing your signature on the necessary forms to surrender your dog. You made this statement knowing this to be untrue.

Specification No. 3: In that on March 3, 2005, during an interview with the Office Internal Affairs you [stated] (sic) that you received a call from your next door neighbor saying that he did not hear dogs inside of your house. Mr. Salvatore Anastasi refutes this statement and denies calling you on your cell phone about your dogs. You made this statement knowing it to be untrue.

Charge No. 3: Violation of General Order Series 1202, Number 1, Part I-B-5, which states: "Willfully disobeying orders or insubordination". This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on March 11, 2005, you were given a direct order by Commander Jennifer Greene to respond to the Office of Internal Affairs and provide information. You responded to the Office of Internal Affairs but did not stay to be interviewed.

Instead, you handed an envelope to the receptionist, which contained a letter addressed to Commander Greene stating your refusal to submit to an interview or provide the requested information.

Specification No. 2: In that on March 29, 2005, you were given a direct order to provide the name and contact information of the police agency which you alleged, helped to locate and recover your dogs, however, you refused to answer.

Specification No. 3: In that on March 29, 2005, you were given a direct order to provide the name and contact information for the person who arranged the confidential agreement to locate and recover your dogs, however, you refused to answer.

Specification No. 4: In that on March 29, 2005, you were given a direct order to provide the name and contact information for the pet sitter or pet sitting agency that you used who allegedly stole your dogs, however, you refused to answer.

Charge No. 4: Violation of General Order 1202.1, Part I-B-12, which states, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law municipal ordinance, or regulation of the District of Columbia."

Specification No. 1: In that you presented a fictitious PD 251 report to the Animal Welfare League of Arlington, Virginia, which you purported to be authentic.

Specification No. 2: In that on June 17, 2004, you voluntarily surrendered your German Shorthair Pointer named "Kona" to the Animal Welfare League of Arlington, Virginia for adoption. You submitted a letter, addressed to "Prospective Owner" which gave specific details about your dog. The letter was signed "Sonya." In October 2004, you returned to the Animal Welfare League of Arlington and informed them that your pet sitter had stolen your dog along with other valuables from your home while you were out of town and requested "Kona" be returned to you. The Animal Welfare League informed you that your dog had been adopted two weeks after you surrendered him. As a Captain of the Metropolitan Police Department, you persisted in deceitful behavior, which has proven to be an embarrassment to the Department.

Charge No. 5: Violation of General Order 1202.1, Part I-B-7, which states: Conviction of any member of the force in any court of competent jurisdiction of any quasi-criminal offense or of any offense in which the member pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere or is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement.

Specification No. 1: In that on January 27, 2005, the United States Attorney's Office issued a declination wherein they declined to pursue a criminal investigation into the matter.

Charge No. 1: Violation of General Order 1202., Part I-B-10; which states: "A.W.O.L., i.e., reporting late for duty more than six (6) days within a one-year period or absence from duty without official leave for more than eight (8) consecutive hours." This misconduct is defined in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on March 11, 2005, you were absent from duty without supervisory approval.

Specification No. 2: In that on March 13<sup>th</sup> through March 26<sup>th</sup>, 2005 you were absent from duty without supervisory approval.

The Panel Transcript at pp. 2-4.

#### SUMMARY OF THE TESTIMONY

##### Commander Jennifer Greene

*Commander Jennifer Greene (hereinafter "Greene") testified in relevant part that:* she has been with the Agency for approximately 24 years and that currently she serves as the Commander of the Fifth District (hereinafter "5D"). Prior to the Employee's removal from service, she was formerly a Captain under Greene's command. Greene relates that in November 2004 she received a message from a Kay Speerstra (hereinafter "Speerstra") of the Animal Welfare League of Arlington, Virginia (hereinafter "AWLA") in reference to the Employee. After calling Speerstra and hearing her initial rendition of events, Greene asked Speerstra for copies of all of the documents associated with the Employee attempts to donate and retrieve her dog, Kona. Speerstra complied with her request. Greene testified that she had some concerns regarding the documents that were forwarded as well as the circumstances as described by Speerstra. Most notably, Greene was concerned with the authenticity of the police report also

known as a PD-251 that was allegedly provided to AWLA by the Employee. While she is not a handwriting expert, Greene testified that the PD-251 appeared to be in the Employee's handwriting. Also cause for concern was that the PD-251 listed the Employee's employer as Microsoft, not the Agency. After hearing Speerstra's account of the situation and reviewing the documents provided by AWLA, Greene notified Internal Affairs of the situation. Internal Affairs instructed Greene to forward all of the materials received to its office and to put the Employee on non-contact duty status. This duty status allowed the Employee to continue working for the Agency. However, her police powers were temporarily revoked.

Greene testified that she did not conduct any further investigation into the Employee's actions relative to her dismissal. She further testified that the Internal Affairs Unit (hereinafter "IA") oversaw the investigation into the Employee's activities that are the crux of the instant matter. Greene later learned that the Employee was uncooperative in the IA investigation and that the Employee was eventually served with a proposed notice of adverse action which eventually blossomed into the instant matter.

Arthur Schwartz

*Arthur Schwartz (hereinafter "Schwartz") testified in relevant part that:* he is an adoption counselor working for AWLA. He remembered meeting the Employee for the first time in or around June 2004 when she came to AWLA inquiring about giving up one of her dogs for adoption because they were not getting along together. He further related that he was not present when the Employee actually surrendered her dog to AWLA for adoption, he was present for the Employee's subsequent appointment with the Executive Director of AWLA regarding her dog, Kona. As part of the IA investigation into this matter, Schwartz was able to accurately identify the Employee in a photo array provided by IA Agent Ostazeski. He also remembers giving a statement to Agent Ostazeski in relation to the Employee's visit. Schwartz then remembers being provided a transcribed statement of his meeting with Agent Ostazeski, which he signed because the statement comported with his recollection of the interview.

Susan Sherman

*Susan Sherman (hereinafter "Sherman") testified in relevant part that:* she has been employed for approximately ten years with AWLA as manager of training and support. Sherman testified that she is familiar with the Employee because the Employee surrendered her dog, Kona, to her in the summer of 2004. Sherman recalls talking to the Employee, for approximately 20 minutes. The Employee then completed the surrendering of her dog Kona by signing a release form authorizing the surrender. *See*, Agency Exhibit No. 5 attachment No. 2. This is standard operating procedure for AWLA. Notably, during Kona's surrender, the Employee gave Sherman a signed letter detailing Kona's behavior so that it could be provided to Kona's eventual new owner. *See*, Agency No. 5 attachment No. 3. Like Schwartz, Sherman was able to accurately identify the Employee in a photo array orchestrated by Agent Ostazeski, and she also remembers being provided a transcribed statement of her meeting with Agent Ostazeski,

which she signed because the statement comported with her recollection of the interview.

Kay Speerstra

*Kay Speerstra testified in relevant part that:* she has been employed by AWLA since 2002. Currently she serves as AWLA's Executive Director. Speerstra remembers meeting the Employee in or around autumn of 2004, when the Employee scheduled an appointment with Speerstra about finding and reclaiming Kona. It was during this meeting that the Employee presented Speerstra with a police report indicating, among other things, that the Employee's two dogs were stolen from her residence and that the Employee was employed by Microsoft and not the MPD. Speerstra also testified that during the Employee's autumn 2004 visit to AWLA, Sherman indicated to Speerstra that the Employee had been to AWLA before to donate Kona. After her meeting with the Employee, Speerstra decided to investigate the Employee's claim that Kona was stolen and that AWLA should therefore assist her in reclaiming Kona. Her inquiry eventually led her to Greene, who asked for a copy of all documents relating to the Employee's visit(s) to AWLA. Speerstra complied with this request.

Theresa Ostazeski

*Theresa Ostazeski (hereinafter "Ostazeski") testified in relevant part that:* she has been employed with the MPD for approximately 27 years. For the past 12 years she has been working with the MPD Office of Internal Affairs unit. Ostazeski was assigned to investigate the instant matter concerning alleged inconsistencies that were contained in a police report that was presented to AWLA when the Employee tried to inquire about the subsequent adoption of her dog, Kona. Ostazeski's investigation indicated that Speerstra informed the Employee that prior to her releasing any information about the person(s) adopting Kona, that the Employee would have to produce a police report to substantiate her claim that Kona was stolen from her. Ostazeski presented a photo spread to Schwartz, Sherman, and Speerstra. Ostazeski indicated that Schwartz and Sherman were able to positively identify the Employee in the photo spread "... as being the same woman that surrendered the dog in the summer of that year and as being the one that came back with the [PD] 251 report of a burglary." Tr. at 183.

Relative to the PD 251<sup>2</sup> police report that was allegedly presented to AWLA by the Employee, Ostazeski's investigation indicated that the CCN numbers that are on the report do not correspond to a burglary at the Employee's residence, but rather to an attempt to locate. Ostazeski also cross checked the information in the PD 251 to the fourth district log book (wherein all police reports have to be logged) and at that time there was no report of a burglary at the Employee's residence for that year.

Ostazeski also investigated the MPD personnel listed on the PD 251 by cross checking against their time and attendance records. All of the MPD personnel listed on the document either did not exist or if the name and/or badge number corresponded to a person, that person did not participate in any way, whatsoever, in responding to or

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<sup>2</sup> A PD 251 is the MPD's official term for a police report.

investigating a burglary at the Employee's residence. Furthermore, all of the other MPD employees referenced in the PD 251 were either off duty or were working in another part of town at the time of alleged burglary at the Employee's residence. In making this determination, Ostazeski, *inter alia*, checked the PD 251 against the CCN numbers, the WALES<sup>3</sup> computer system, and the Communications unit. In every instance, the PD 251 that was presented to AWLA did not correspond to any legitimate response or investigation conducted by the Agency. When asked about how difficult it would be to obtain an official PD 251 Ostazeski opined thusly:

Witness: Anybody can pick up a piece of paper and fill in the blanks, but the CCN numbers - - this has to be turned in, it has to go through a sequence of events through the [MPD]. So if it's a legitimate, it has to go through a series of signing officials and then it has to go down ... to a report unit downtown that logs and tracks all of these things and files them away.

So filling it out isn't the problem; it's getting the CCN numbers and then sending it through the channels that could be the hard part, I guess.

Administrative Judge Robinson: So from the standpoint of - - an officer could just take one of these forms, fill it out, and as long as it wasn't submitted to anyone else... it would otherwise look - -

Witness: Oh yeah, especially - -

Administrative Judge Robinson: - - official.

Witness: - - if you're not familiar, yes... So any officer can pick this up and fill it out and as long as it's not actually really submitted, it looks like a real report.

Tr. at 188 - 190.

According to Ostazeski, when she questioned the Employee about the aforementioned events, the Employee "... denied that she prepared the report that is Attachment 4. She denied that she ever surrendered a dog to [AWLA], she denied that she ever gave [AWLA] the letter to the prospective adopters. She just denied the whole thing." Tr. at 198.

Ostazeski also found the Employee to be generally uncooperative in her investigation. She had to go through several attempts at conducting an interview in order

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<sup>3</sup> WALES stands for the Washington Area Law Enforcement System. According to Ostazeski's testimony, WALES is a "... computer system with all the data in it relevant to the [MPD], its actions, reports, runs generated, addresses, complainants, incidents, everything relating to what the [MPD] - - it's all the data that the [MPD] functions on." Tr. at 190.

to get in contact with the Employee, who claimed that she was on vacation from May 31, to June 4, 2005, and that she had hired a pet sitter to watch over her dogs while she was gone. When she returned from her vacation, the Employee found her home burglarized and her dogs, along with assorted papers and jewelry, were missing. The Employee further explained that she was working with a Maryland law enforcement agency to retrieve her dogs and because of the confidentiality agreement that she had entered into with this unnamed Maryland law enforcement agency, she could not reveal the name of the Agency assisting her or the name of the pet sitter service that allegedly burglarized her home. *See generally*, Tr. at 199 – 200.

Agency's Exhibit Number 5 Attachment Number 10, which was first introduced into testimony through Ostazeski, is an application to adopt an animal from the District of Columbia pound. This application indicates that the Employee attempted to adopt a dog but had indicated on the form that she had previously given up a dog for adoption to AWLA.

As a result of her investigation, Ostazeski concluded that the Employee had prepared a false PD 251 report and had presented it as a bona fide document in a failed attempt to retrieve her dog Kona from AWLA. In Ostazeski's opinion, while the Employee was not prosecuted for a criminal offense, she did commit an act that would constitute a crime. *See generally*, Tr. at 211.

While being cross examined, Ostazeski was questioned regarding unfounded reports<sup>4</sup>, of two reports (PD 251) having the same CCN number, and bumped reports<sup>5</sup>. As part of her investigation, Ostazeski did not contact law enforcement agencies in Arlington regarding the Employee's alleged illicit acts at AWLA. Ostazeski was under the impression that Speerstra had contacted the local authorities regarding this matter. Further, after the United States Attorney for the District of Columbia issued a declination in this matter, Ostazeski proceeded on a purely administrative track in her investigation of the Employee. According to Ostazeski, under this track, the Employee would not be subject to criminal prosecution but rather would only face administrative penalties. Consequently, Ostazeski described the interview sessions that she conducted with the Employee to be purely administrative and non-custodial in nature, thereby obviating a need to give the Employee a Miranda warning during these sessions. Ostazeski did however give the Employee a Reverse Garrity warning<sup>6</sup> which she describes as "... in this case, a Letter of Declination was issued, so now you have to answer questions about it... It's administrative now, it's no longer criminal in nature, and the Reverse Garrity advises you that [you] can't be prosecuted criminally for anything you say now about this particular matter." Tr. at 243 – 244.

<sup>4</sup> According to Ostazeski's testimony this is a report that for whatever reason has no basis and is consequently dismissed.

<sup>5</sup> While she was questioned on this term, Ostazeski could not recall having ever heard of it. *See generally*, Tr. at 221 – 222.

<sup>6</sup> "The protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office..." *Garrity v. New Jersey*, 385 U.S. 493, 500 (U.S. 1967).

After concluding her investigation, Ostazeski ultimately felt that the charges levied against the Employee were substantiated and she recommended to the Agency that the Employee be removed from service.

Wayne Rimel

*Wayne Rimel (hereinafter "Rimel") testified in relevant part that:* he is an employee of the Agency and currently holds the rank of Sergeant. He is currently assigned to the MPD's Forensic Science Division, Crime Scene Investigation Branch. His name and badge number appear on the PD 251 that is the subject of the instant matter. While Rimel acknowledges that his badge number appears on the form, he denies that the signature that appears on said PD 251 is his. He has no knowledge of ever signing said PD 251.

Andre Ivey

*Andre Ivey (hereinafter "Ivey") testified in relevant part that:* he is an employee of the Agency and currently holds the rank of Officer. He has worked for the MPD for approximately 16 years and is currently assigned to the Fifth District. The PD 251 in question lists the name of a Detective Ivey. Ivey has never held the rank of Detective. Also, Ivey has no prior knowledge of said PD 251.

Kimberli Ivey

*Kimberli Ivey (hereinafter "K. Ivey") testified in relevant part that:* she is an employee of the Agency and currently holds the rank of Officer. She has worked for the MOD for approximately 13 years and is currently assigned to the Harbor Patrol. The PD 251 lists that date of June 4, 2004, as the date on which the burglary at the Employee's residence allegedly occurred. On this date as well, K. Ivey was working at the Harbor. On June 5, 2004, K. Ivey was on annual leave. On June 4, 2004, K. Ivey testified that she was not a Detective working in the Fourth District. Furthermore, K. Ivey testified that she had no prior knowledge of the subject PD 251.

Larry Toye

*Larry Toye (hereinafter "Toye") testified in relevant part that:* he is a neighbor of the employee. He has given his address, however, due to confidentiality concerns, Toye's address shall not be reproduced in this initial decision. Toye has lived in the neighborhood for 13 – 15 years. Sometime during the day at some point in 2004, Toye noticed MPD officers coming through his back yard. When he briefly questioned the officers about their appearance, one officer stated that they were responding to a silent alarm at the Employee's home. He then warned the officer that the Employee has two large dogs living in the home. Toye did not get the name of the officers nor did the officers question him any further. In all, Toye conversed with the officers for approximately two to three minutes. Toye could not recall any further information

regarding what happened at the Employee's residence when the officers responded.

Carmen Sweeney

*Carmen Sweeney (hereinafter "Sweeney") testified in relevant part that:* she is currently employed by the MPD and holds the rank of Sergeant. She has been with the Agency for approximately 15 years and is currently assigned to Youth Investigations. At one point in her career with the MPD she worked in the Fourth District. She remembers the Employee as a colleague that she worked alongside with while she was in the Fourth District. At some point, the Employee, Sweeney, and Sweeney's mother entered into preliminary discussions about Sweeney's mother possibly adopting one of the Employee's dogs. However, those discussions never resulted in an adoption. Sweeney also notes that the Employee was very fond of her dogs.

Paul Charity

*Paul Charity (hereinafter "Charity") testified in relevant part that:* he is currently employed by the MPD and holds the rank of Lieutenant. Charity is a 19 ½ year veteran of the MPD and is currently assigned to the Office of Professional Responsibility, Internal Affairs Division. He is somewhat familiar with this matter as it relates to the Internal Affairs division investigation into the Employee. Charity did not carry out the investigation into this matter. He is aware that the United States Attorney for the District of Columbia declined to prosecute the Employee relative to the alleged acts that gave rise to the instant matter.

Sonya Owens

*The Employee testified in relevant part that:* prior to her removal, she was a veteran of the MPD for approximately 21 years. She believes in the existence of bumped reports within the Agency as a constant necessity on the part of the Agency to correct CCN numbers attached to various reports. She cites as evidence of this miscues Employee's exhibit 7B attachment 24. However, she proffered no tangible evidence that the PD 251 that was presented to AWLA, allegedly by her, is in fact a bumped report. *See generally*, Tr. at 441.

The Employee explains her uncooperative demeanor and general unwillingness to be interviewed by Ostazeski as her asserting her Fifth Amendment rights. She was generally hesitant to meet with Ostazeski without her attorney present. The Employee notes that she was never given a Miranda warning. She also notes a critical point during an interview conducted by Ostazeski where she felt she was not free to leave. In her opinion, Ostazeski was required to give her a Miranda Warning as well as be afforded all other applicable due process rights afforded to persons subjected to custodial interrogation relative to an alleged criminal act. Part of her understanding of the alleged criminal implications of her alleged acts revolve around the United States Attorney for the District of Columbia declining to prosecute as well as the Commonwealth of Virginia's Attorney declining to prosecute this matter.

The Employee asserts that she never willingly gave up either of her dogs for adoption. She calls into question the veracity of Sherman's recollection of the Employee coming to AWLA several years earlier. She is also a member of the American Rare Breed Association. She asserts that her dogs were very valuable, worth well into the thousands of dollars for a dog with Kona's pedigree. This ostensibly buttresses her contention that she did not give Kona up for adoption. In trying to locate Kona after the alleged burglary at her home, the Employee attempted to contact AWLA several times via telephone in order to inquire if Kona was there, all to no avail. After getting no tangible response, she threatened to file a lawsuit against AWLA. At this point, Speerstra contacted her.

The Employee testified that she discovered she was burglarized on May 30 or 31, 2004, when one of her neighbors called her and informed her that he did not hear her dogs. At the time of this telephone call, the Employee was out of town, but after receiving said call, she returned home that same day to discover that her dogs, among other things, were missing. The Employee contends that she called the MPD's Synchronized Operations Command Center (hereinafter "SOCC") on June 5, 2004, in order to report the alleged burglary at her residence. When asked to explain why she waited several days to report the burglary at her home, the Employee stated that she "... wanted to find out what was going on. The dogs were left in the care of a pet sitting service that I had never used before and I wanted to find out what was going on. I wanted to get set as to what may have occurred or what happened, I didn't know." Tr. at 472. At the time of the evidentiary hearing, the Employee could not recall the name of the pet sitting service she hired to watch her dogs while she was out of town. She also does not recall filling out a contract with the pet sitting service, although she remembers receiving a receipt for services rendered. However, she was unable to reproduce a copy of the receipt during the evidentiary hearing<sup>7</sup> in this matter. On her own volition, the Employee held several talks with the unnamed pet sitting service inquiring about the whereabouts of her dogs. The result of these talks were the eventual discovery and retrieval of her other dog, Swiss, at an unknown location, possibly a vacant lot, somewhere in the state of Maryland. *See generally*, Tr. at 476 – 481. After all of this, the Employee had decided not to report this unnamed pet service to the authorities.

Regarding the June 5, 2004, burglary call to the SOCC and the PD 251 associated with it, the Employee explains that the officers came to her residence and questioned her about the burglary. After the Officers had taken all of the requested information, the Employee asked the officers for a police report. Since the officers did not complete the report on the scene, she asked for them to drop it off in her mailbox. Within the next day or so, the Employee had received a PD 251 police report in her home mailbox. It is the same PD 251 that was subsequently presented to AWLA. In explaining why she listed her business/school as Microsoft as opposed to the MPD, the Employee explained that she had done extensive training with the Microsoft corporation and that "... it didn't make

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<sup>7</sup> Nor has the Employee produced a copy of the alleged receipt during the pendency of her appeal process in this matter.

a difference to her<sup>8</sup>,” because having worked for the MPD, that that particular piece of information was not that important and that since her contact information was correct, anyone from the Agency could contact her regarding any necessary corrections or clarifications needed on the PD 251.

### FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of the Employee’s appeal process with this Office.

According to the documents of record, the Employee’s removal from service initially arose from a set of alleged circumstances regarding her surrender and eventual attempt to find and reclaim her dog, Kona from AWLA. Ultimately, the Employee was charged as outlined above. By a preponderance of the evidence standard, the Panel unanimously found the Employee guilty of all of the charges and specifications as outlined above. These charges were sustained by then Chief of Police Charles Ramsey and the Employee was subsequently removed from service.

The Employee has raised a number of contentions in this matter relating to a perceived abuse of her Fifth Amendment and criminal due process rights by the Agency. This Office is not a judicial forum of general jurisdiction. Further, this Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), \_\_ D.C. Reg. \_\_ ( ). 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 (“Appeal procedures”) reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]...

Based on the preceding statute I may only adjudicate matters that squarely fall within the purview of D.C. Official Code § 1-606.03. The jurisdiction of this Office is limited to performance ratings that result in removals; final agency decisions that result in removals, reductions in grade or suspensions of ten days or more; or reductions in force. OEA Rule 604.1, 46 D.C. Reg. 9299 (1999). I find that issues relative to an aggrieved Employee’s Fifth Amendment and criminal due process rights are not within the jurisdiction of this Office. Accordingly, they shall not be discussed any further or in any way ruled upon in this initial decision. The remainder of this initial decision shall focus on issues relative to the Employee’s removal from service that are within this Office’s authority to adjudicate.

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<sup>8</sup> Tr. at 485.

In the instant matter, as has been stated previously, the Employee has been charged with: fraud in securing appointment or falsification of official records or reports; willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing; willfully disobeying orders or insubordination; and conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia; conviction of any member of the force in any court of competent jurisdiction of any quasi-criminal offense or of any offense in which the member pleads guilty, receives a verdict of guilty or a conviction following a plea of *nolo contendere* or is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement. The set of circumstances that gave rise to the aforementioned charges being levied against the Employee arose from the Employee's action relative to her attempting to reclaim her dog Kona. In order to properly assess the evidence that the parties have presented I shall address each charge individually *infra*.

The charge of fraud in securing appointment or falsification of official records or reports arose from an allegation that the Employee presented a fictitious PD 251 to AWLA in an unsuccessful effort to procure that organization's assistance in reclaiming Kona. During the evidentiary hearing in the instant matter, I had the opportunity to hear testimony relative to the subject PD 251 and its authenticity as a valid police report from both Ostazeski and the Employee. In assessing the validity of this document, Ostazeski performed an exhaustive investigation taking into account the normal procedure established by the Agency for logging a police report. This review included:

1. Checking the PD 251 against the registered CCN numbers and the WALES computer system.
2. Checking the veracity of the PD 251 with the MPD Communications unit as well as physically checking the Fourth District log book.
3. Cross checking the name and badge numbers of all of the MPD personnel allegedly listed on the PD 251 with their time and attendance records. This layer of review was further buttressed by the credible testimony of Rimel, Ivey, and K. Ivey who all credibly and consistently testified that they had no prior knowledge of the PD 251 in question.

In each instance, Ostazeski's investigation led her to believe that the PD 251 presented by the Employee to AWLA was a fictitious document. The Employee

countered with the suggestion that the PD 251 in question was possibly a “bumped report” or that it was inadvertently assigned a different CCN number than what was listed. During the evidentiary hearing, I had the opportunity to observe the demeanor, poise, and credibility of Ostazeski. I find that her testimony in this matter to be both credible and persuasive. I find that the Employee presented the PD 251 to AWLA and I further find that the PD 251 presented by the Employee to AWLA to be a false official record. Consequently, I further find that the Agency has met its burden relative to this charge and its attending specifications.

The charge of willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing, arose from Employee’s alleged conduct of knowingly lying during a March 3, 2005, interview with Ostazeski. These falsehood’s included:

1. The Employee allegedly lying to Ostazeski during a March 3, 2005, interview wherein the Employee related that MPD officer’s responded to her residence on June 4, 2004, and prepared a PD 251 report of a Theft One/ Burglary One. And;
2. The Employee again allegedly lying during the aforementioned interview in that she denied voluntarily surrendered Kona to AWLA on June 17, 2004, and further denied filling out and signing the necessary paper work in order to properly effectuate the surrender. And;
3. The Employee again telling another alleged lie regarding an alleged March 3, 2005, telephone conversation with Mr. Salvatore Anastasi, (hereinafter “Anastasi”). Anastasi indicated that he could not hear the Employee’s dogs. The Agency refutes that this conversation occurred and bases that determination on Mr. Anastasi’s own statement (to the Agency) that this conversation never took place.

Schwartz, Sherman, and Speerstra each testified in a collective capacity as employees of AWLA that they have encountered the Employee on at least three occasions. Their collective recollection of events follows three visits by the Employee to AWLA. The first occasion occurred when the Employee came to AWLA in order to review its policy and procedures regarding the surrender and eventual adoption of a dog. The second occasion was when the Employee came to AWLA to order to surrender Kona for eventual adoption. It was during the second visit that the Employee signed a release form as well as submitted a signed handwritten letter to Kona’s eventual new owner(s). Both of these forms were entered into evidence during the evidentiary hearing. The Employee came to AWLA a third time, after Kona had been surrendered in order to inquire about his whereabouts as part of her attempt to reclaim her dog. It was during

this last visit that Schwartz and Sherman confirmed with Speerstra (and later Ostazeski) that the Employee had been to AWLA in the past and that she had inquired about and eventually consented to Kona being surrendered.

During the evidentiary hearing, I had the opportunity to observe the demeanor, poise, and credibility of Schwartz, Sherman, and Speerstra. I find their testimony relative to this matter to be overwhelmingly more credible and persuasive than the Employee's rendition of events. As such, I adopt Schwartz's, Sherman's, and Speerstra's recollection of events as synopsisized in the previous paragraph in its entirety as a duly recognized finding of fact.

Ostazeski credibly testified that she interviewed Anastasi about the alleged telephone conversation between himself and the Employee wherein he allegedly warned the Employee that he did not hear her dogs. According to Ostazeski, Anastasi denied that this conversation took place. The Employee counters that the conversation did in fact occur. Anastasi did not testify in the instant matter. While Anastasi's response is textbook hearsay, it is nonetheless admissible in an administrative proceeding before the OEA<sup>9</sup>. Considering this determination, I find that the Employee did not have a telephonic conversation with Anastasi on March 3, 2005. I further find that the Employee was knowingly untruthful and deceptive when she told Ostazeski that this fictitious conversation with Anastasi occurred. I further find that the Agency has met its burden relative to this charge and its' attending specifications.

The institution of the charge of willfully disobeying orders or insubordination arose from the Employee's conduct during the Agency's IA investigation into the instant matter specifically relating to Employee' failure to follow direct orders including her refusal to:

1. Submit to an interview with Ostazeski after being ordered to do so by Greene. And;
2. To provide the name of the Maryland law enforcement agency that was allegedly helping her to reclaim her dogs. And;
3. To provide the name and contact information for the person who arranged the confidential agreement to locate and recover her dogs. And;

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<sup>9</sup> Regarding the admissibility of hearsay in an administrative proceeding, the District of Columbia Court of Appeals held in *Compton v. D.C. Board of Psychology*, 858 A.2d 470, 476 (D.C. 2004) "that duly admitted and reliable hearsay may constitute substantial evidence. See, e.g., *Coalition for the Homeless v. District of Columbia Dep't of Employment Services*, 653 A.2d 374, 377-78 (D.C. 1995) ("Hearsay found to be reliable and credible may constitute substantial evidence . . ."); *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987) (explaining that reliable hearsay standing alone may constitute substantial evidence); *Simmons v. Police & Firefighters' Ret. & Relief Bd.*, 478 A.2d 1093, 1095 (D.C. 1984); *Jadallah v. District of Columbia Dep't of Employment Servs.*, 476 A.2d 671, 676 (D.C. 1984); see also *Richardson*, 402 U.S. at 402; *Hoska v. United States Dep't of the Army*, 219 U.S. App. D.C. 280, 287, 677 F.2d 131, 138 (1982). Thus, nothing in the hearsay nature of evidence inherently excludes it from the concept of "substantial" proof in administrative proceedings."

4. To provide to Ostazeski the name and contact information of the pet sitting company that allegedly absconded with her dogs.

The Employee explains her conduct in not initially submitting to an interview with Ostazeski on a number of circumstances, including it being a violation of her constitutional rights (which relative to the instant matter I do not have to authority to adjudicate); as well as a skewed interpretation of the written order requiring her to present herself for questioning in this matter. A March 9, 2005, memorandum to the Employee from Greene instructed the Employee to have a meeting with Ostazeski on March 11, 2005. The memorandum further instructed the Employee to provide Ostazeski with the information listed in the previous numbered paragraph. In responding to this order, the Employee dropped off some written materials that she seemingly felt were responsive to the memorandum. The Employee contends that the written order requiring her to submit to Ostazeski for an interview only required her to drop off the requested paper work and nothing more. Of note, the paper work submitted by the Employee failed to effectively answer any of the questions posed in the memorandum. To date, the Employee has yet to proffer the name of the pet sitting agency she employed; the name of the Maryland law enforcement agency that has allegedly assisted her in finding her dogs; as well as the name of a contact person within the unnamed Maryland law enforcement agency. Considering everything mentioned so far, I find that the Employee failed to obey several direct orders by failing to timely submit to the aforementioned interview with Ostazeski; by failing to identify the pet sitting service, Maryland law enforcement agency, and the name and contact information of a contact person within the Maryland agency as referenced *supra*. I further find that the Agency has met its burden relative to this charge and its' attending specifications.

The charge of conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law municipal ordinance, or regulation of the District of Columbia, arose from the Employee's alleged act of presenting a fictitious PD 251 to AWLA as an official document, as well as the Employee's alleged conduct before AWLA in an attempt to reclaim Kona. I have previously found that the Employee presented the PD 251 in question to AWLA; and I further found that the PD 251 presented by the Employee to AWLA to be a false official record. I also find the Employee's rendition of events in this matter in its entirety as being self-serving, specious, and in some instances bordering on the ridiculous. The Employee's tale of trying to reclaim her dogs would almost assuredly bring a certain amount of notoriety that the Agency could ill afford to condone if it wanted to be taking seriously within the community as a whole. Consequently, I find that the Agency has met its burden relative to this charge and its' attending specifications.

The charge of conviction of any member of the force in any court of competent jurisdiction of any quasi-criminal offense or of any offense in which the member pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere or is deemed to have been involved in the commission of any act which would constitute a

crime whether or not a court record reflects a conviction, arose from the fact that the Employee, pursuant to District of Columbia law, could have been charged with the crime of forgery and uttering. Ostazeski testified that their seemingly existed two factors that potentially led to the declination issued by the United States Attorney for the District of Columbia. The fact that the presentation of the fictitious PD 251 occurred in the Commonwealth of Virginia (a bordering jurisdiction) and that the original PD 251 was not available for analysis. Ostazeski drew this conclusion from her own knowledge and experience regarding the laws of the District of Columbia. Considering the record as whole, I find that there was enough evidence that the Employee attempted an act that could possibly constitute a crime even though a declination was issued. Consequently, I find that the Agency has met its burden relative to this charge and its' attending specification.

The charge of Absence without official leave (hereinafter "AWOL") i.e., reporting late for duty more than six (6) days within a one-year period or absence from duty without official leave for more than eight (8) consecutive hours, arose from charges that the Employee was absent from duty without official leave on March 11 and from March 13 – 26, 2005.

On March 11, 2005, the Employee left a sealed envelop under Greene's office door. This envelope contained both the aforementioned ineffective written response to Greene's March 9, 2005, memorandum, as well as a written request for leave for that same day, which Greene denied. Greene credibly testified that the Employee should have made a verbal request for leave prior to leaving as was customary Agency procedure. The Employee opted to make her leave request in writing, and then left without receiving final verification of the acceptance of leave. Since Greene was the Employee's commanding officer, it was her managerial prerogative to accept or reject the Employee's leave request. Since the Employee's leave request was duly rejected and there exists no credible fault in Greene's judgment, I find that the Employee was AWOL on March 11, 2005. I find that the Agency has met its burden relative to this charge and its' attending specification.

As for the determination that the Employee was AWOL from March 13-26, 2005, Greene related that she had previously planned to suspend the Employee without pay during this time frame, however the Employee was not properly served with the notice of suspension. Greene contends that for a suspension to be properly effectuated the Employee would have been served with a form PD 77. The Employee however mistakenly received a memorandum from then Chief Ramsey stating that she would be suspended without pay during the dates in question. The Employee relying on that memorandum did not report for duty. I find that, given the reasonable amount of confusion that ensued from the memorandum issued by then Chief Ramsey, the Employee was not AWOL from March 13-26, 2005, but rather was attempting to serve a seemingly duly enacted suspension. I find that the Agency has not met its' burden relative to this attending specification.

The primary responsibility for managing and disciplining Agency's work force is

a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), \_\_ D.C. Reg. \_\_ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), \_\_ D.C. Reg. \_\_ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes, supra; Hutchinson, supra; Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), \_\_ D.C. Reg. \_\_ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), \_\_ D.C. Reg. \_\_ ( ).

I CONCLUDE that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing the Employee should be upheld.

#### ORDER

Based on the foregoing, it is ORDERED that Agency's action of removing the Employee from service is hereby UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.  
Administrative Judge